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# RAISE OR LOSE: APPELLATE DISCRETION AND PRINCIPLED DECISION-MAKING

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## I. INTRODUCTION

Appellate waiver or forfeiture of issues or contentions not raised in lower court proceedings or sufficiently on appeal has been long deemed to require “zealous fidelity” and a rule which can neither be ignored nor brushed aside as a “pettifogging technicality or a trap for the indolent.”<sup>2</sup> Equally entrenched is the recognition that the raise or lose rule remains one of “discretion” and that there can be no general rule as the “[o]rderly rules of procedure do not require sacrifice of the rules of fundamental justice.”<sup>3</sup>

The discretionary approach to new or unpreserved issues on appeal is the result of the collision between the principle of party presentation underlying the adversarial process and the role of the appellate court as both the guardian of a fair proceeding and final arbiter of applicable law. Yet, when the governing rule is declared to be both firm but discretionary, the hairs on the back of the neck tend to bristle<sup>4</sup> particularly as, unlike a trial court’s discretion, appellate discretion is not likely subject to any other or further review.

The discretionary nature of the raise or lose rule strikes at the heart

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<sup>2</sup> Nat’l Ass’n. of Soc. Workers v. Harwood, 69 F.3d 622, 627 (1st Cir. 1995). The principle is long standing and even recognized in Blackstone. WILLIAM BLACKSTONE, COMMENTARIES \*455 (“It is practice unknown to our law . . . when a superior court is reviewing the sentence of an inferior, to examine the justice of the former decree by evidence that was never produced below.”); see also Clements v. Macheboeuf, 92 U.S. 418, 425 (1875) (stating “[m]atters not assigned for error will not be examined”); Robert J. Martineau, *Considering New Issues on Appeal: The General Rule and the Gorilla Rule*, 40 VAND. L. REV. 1023, 1061 (1987) (“The rule preventing an appellate court from considering an issue not raised in the trial court is as old as the common-law system of appellate review.”); Derrick Carter, *A Restatement of Exceptions to the Preservation of Error Requirement in Criminal Cases*, 46 U. KAN. L. REV. 947 (1998) (describing reasons for error requirement during appellate review); Rhett R. Dennerline, Note, *Pushing Aside the General Rule in Order to Raise New Issues on Appeal*, 64 IND. L.J. 985, 985-86 (1989) (“The rule against considering new issues on appeal developed from the writ of error model of appellate review as it was handed down from eighteenth century English common law.”); Comment, *Raising New Issues on Appeal*, 64 HARV. L. REV. 652, 654-55 (1951) (generally discussing exceptions to raise or lose rule).

<sup>3</sup> Hormel v. Helvering, 312 U.S. 552, 557 (1941); see Martineau, *supra* note 2, at 1028; Dennerline, *Pushing Aside supra* note 2, at 985 (“a difficult problem to which legal scholars have paid little attention . . . is where a litigant attempts to raise an issue in a reviewing appellate court that it did not present in the trial court.”); *Raising New Issues, supra* note 2, at 652-53 (“[o]ne of the central problems of appellate procedure is whether in civil cases one can raise in a reviewing court issues which might have been raised in the trial court but were not”); Barry A. Miller, *Sua Sponte Appellate Rulings: When Courts Deprive Litigants of an Opportunity to Be Heard*, 39 SAN DIEGO L. REV. 1253, 1257 (2002) (“The rule that points not argued will not be considered is more than just a prudential rule of convenience; its observance, at least in the vast majority of cases, distinguishes our adversary system from the inquisitorial one.”) (quoting *United States v. Burke*, 504 U.S. 229, 246 (1992) (Scalia, J., concurring))).

<sup>4</sup> See *In re Pet Food Products Liab. Litig.*, 629 F.3d 333, 360 n.2 (3d Cir. 2010) (noting appellate review of unpreserved error or new issues “subject of spirited academic discussion”).

of the integrity of the adversarial process and the appellate function. It provides substantial flexibility to address the particular circumstances of any case, yet can be marked by uncertainty and unevenness in application, leaving it subject to the harsh criticism that a “new issue is decided solely on the basis of whether a majority of the court considers the new issue necessary to decide the case in accordance with their view of the relative equities of the parties.”<sup>5</sup>

The discretionary exception to the raise or lose rule is embodied in the rubric of “exceptional circumstances.” This “exception” has developed into either or both of an array of discrete factors or interests, as well as the plain error/substantial risk of miscarriage of justice review as to procedural default. The coterminous relationship between these two strands of the discretion can be uneasy and potentially provide disparate treatment, as well as add a measure of uncertainty and imprecision. This loss of clarity and consistency is only amplified by the lack of uniform criteria or identifiable scale as to individual or cumulative weight to be given to the multi-factor strain of the discretionary exception.

Not only is there a measure of inconsistency and lack of clarity, but many appellate court decisions provide no or little explanation of why exception to forfeiture is being exercised; down play or ignore the right of the advocate to address waiver claims; and otherwise, at times, loosely reference and/or weigh the recited discretionary governing criteria. The resulting wound to principled decision-making serves to dilute societal and litigant respect and acceptance of the appellate decision.

This article examines the discretion underlying application and exception to the raise or lose principle. Part I defines and overviews appellate forfeiture and the justifications for the raise or lose rule. Part II examines the origin and establishment of both plain error and the various other “exceptional circumstances” that have been found to justify departure from the raise or lose principle. It provides an overview of the discretion as it has developed and been articulated in both the First Circuit and Massachusetts as well as other states and federal circuits.

Part IV attempts to take a critical look at the discretion and,

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<sup>5</sup> See Martineau, *supra* note 2, at 1061, 1034-61 (1987) (critiquing inconsistent and unprincipled way courts decide issues raised for first time on appeal); Jonathan Erving Marsh, *State v. Shumacher: Dual Standards of Review for Waived Claims or Error in Wisconsin Supreme Court and Court of Appeals*, 1989 WIS. L. REV. 773, 774-75 (1989) (“[N]either court has consistent criteria for choosing whether to apply the statutory exception or a given common law exception to the presumptive rule barring review of waived errors.”); see generally *Turner v. Memphis*, 369 U.S. 350, 353-54 (1962); Amanda Frost, *The Limits of Advocacy*, 59 DUKE L.J. 447, 463 (2009) (“[Federal courts act] with little rhyme or reason” regarding exceptions to raise or lose rule).

particularly, the various factors or circumstances that have come to comprise “exceptional circumstances” discretion outside of plain error. It advocates for stringent protection of litigant input and proposes a construct that combines both lines of discretion into a singular inquiry applicable to all cases. The construct attempts to unify the language and contours of the discretion with the fundamental aim to promote equal treatment and to enhance the discussion and evolution as to coherency and principled decision-making. In the end, the discretionary “exception” to the principle of raise or lose may well represent to some a shining example of the genius of the common law, while to others it will remain an “unruly concept in a judicial system dedicated to the rule of law.”<sup>6</sup>

## II. RAISE OR LOSE: DEFINITION, JUSTIFICATION AND RIGOR

Appellate “waiver” presents in two primary forms: where an issue or contention is made on appeal that was not raised or sufficiently raised in the lower proceedings and where, regardless of whether or not raised below, there is a failure to raise or sufficiently raise the issue or contention on appeal.

Waiver has been used interchangeably with forfeiture, but the two are distinguishable. Waiver is the “intentional relinquishment of a known right.”<sup>7</sup> Since the failure to raise or properly preserve an issue is many, if not most times, inadvertent or the result of ignorance, omission, or silence,<sup>8</sup> it is more precisely understood as “forfeiture.”<sup>9</sup> As such, “waiver is

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<sup>6</sup> Maurice Rosenberg, Professor of Law, Columbia University, Presentation at a Seminar for Federal Appellate Judges (May 13-15, 1975) (transcript at 28, *available at* [http://www.fjc.gov/public/pdf.nsf/lookup/review.pdf/\\$file/review.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/review.pdf/$file/review.pdf)).

<sup>7</sup> See *United States v. Zubia-Torres*, 550 F.3d 1202, 1205 (10th Cir. 2008) (“[W]aiver is accomplished by intent, [but] forfeiture comes about through neglect.”) (quoting *United States v. Carrasco-Salazar*, 494 F.3d 1270, 1272 (10th Cir. 2007)); *United States v. Torres-Rosario*, 658 F.3d 110, 115 (1st Cir. 2011) (noting that concession can constitute waiver); see also *Wood v. Milyard*, 132 S. Ct. 1826, 1832 n.4 (2012) (noting distinction between waiver and forfeiture).

<sup>8</sup> See *Chestnut v. Lowell*, 305 F.3d 18, 21 (1st Cir. 2006) (holding city’s failure to raise municipal immunity defense result of omission).

<sup>9</sup> *United States v. Olano*, 507 U.S. 725, 733 (1993); *United States v. Chaney*, 647 F.3d 401, 406 n.6 (1st Cir. 2011); *United States v. Rodriguez*, 311 F.3d 435, 437 (1st Cir. 2002); see also *Crispin-Taveras v. Municipality of Carolina*, 647 F.3d 1, 7 (1st Cir. 2011) (“A party’s failure, on account of ignorance or neglect, to timely oppose a motion . . . constitutes forfeiture.”); *United States v. Torres-Rosario*, 658 F.3d 110, 115 (1st Cir. 2011) (stating waiver intentional and therefore a permanent abandonment of a right); *United States v. Walker*, 538 F.3d 21, 22 (1st Cir. 2008) (stating same); *Rivera-Torres v. Ortiz-Velez*, 341 F.3d 86, 102 (1st Cir. 2003) (stating same); *Iqartua v. United States*, 626 F.3d 592, 603 (1st Cir. 2010) (explaining consequences of waiver and forfeiture); *Patterson v. Balsamico*, 440 F.3d 104, 112 (2d Cir. 2006) (discussing difference between forfeiture and waiver).

accomplished by intent,” while forfeiture results through neglect.<sup>10</sup>

The underlying justifications for the raise or lose rule are the adversarial process, judicial efficiency and finality, and respect for the differing roles of the trial and appellate courts.<sup>11</sup> The rule seeks to encourage full presentation as well as correction in the lower court; fairness to both the adversary and the trial court; and prevention of prejudice.<sup>12</sup>

Primary to the raise or waive rule is the understanding that our adversarial system is based on the “principle of party presentation.”<sup>13</sup> As stated by the United States Supreme Court:

In our adversary system, in both civil and criminal cases, in the first instance and on appeal, we follow the principle of party presentation. That is, we rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present.<sup>14</sup>

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<sup>10</sup> *Zubia-Torres*, 550 F.3d at 1205 (quoting *United States v. Carrasco-Salazar*, 494 F.3d 1270, 1273 (10th Cir. 2007)); *see also* *United States v. Rodriguez-Berrios*, 573 F.3d 55, 63 (1st Cir. 2009) (noting failure to object is forfeiture while “conscious relinquishment of objection” constitutes waiver”); *Microfinancial, Inc. v. Premier Holidays Int’l, Inc.*, 385 F.3d 72, 80 n.5 (1st Cir. 2004) (noting failure to object at trial and pursuant to pre-trial constitutes waiver, not forfeiture); *but see Torres-Rosario*, 658 F.3d at 115 (“Forgiving waiver however, merely remits . . . argument to the test of plain error”). Further, because forfeiture arises in many varied contexts, “the nature of the issue on review influences the outcome of the forfeiture analysis,” and thus, “what constitutes forfeiture is more one of degree and judgment by the appellate court.” *United States v. Gallant*, 306 F.3d 1181, 1187 (1st Cir. 2002) (noting rigorous requirement for precise jury instruction objection, but forfeiture regarding sentencing claim less rigid); *see also* *Yee v. Escondido*, 503 U.S. 519, 534 (1995) (holding appellate review of new argument proper because “parties . . . not limited to precise arguments below”).

<sup>11</sup> *See generally* *Carter*, *supra* note 2, at 950; *In re Net-Velázquez*, 625 F.3d 34, 40 (1st Cir. 2010) (stating raise or lose founded upon important considerations of fairness, judicial economy and practical wisdom”) (Nat’l Ass’n of Soc. Workers v. Harwood, 69 F.3d 622, 627 (1st Cir. 1995)); *Tri-M Grp., LLC v. Sharp*, 638 F.3d 406, 416 (3d Cir. 2011) (explaining general rule serves important judicial interests); *HTC Corp. v. IPCom GmbH & Co., KG*, 667 F.3d 1270, 1281-82 (Fed. Cir. 2012) (listing policies and citing cases supporting policies). The interests consist of “protect[ing] litigants from unfair surprise; promot[ing] the finality of judgments and conserv[ing] judicial resources.” *Webb v. Philadelphia*, 562 F.3d 256, 263 (3d Cir. 2009) (alterations in original).

<sup>12</sup> *Sharp*, 638 F.3d at 417-18; *see* *Bergeron v. Mansour*, 152 F.2d 27, 32 (1st Cir. 1945) (“Had the defendant interposed this defense seasonably, the plaintiff would have had an opportunity to explain her delay in instituting this action after learning of the defense of the statute of limitations.”); *Kimes v. Stone*, 84 F.3d 1121, 1126 (9th Cir. 1996) (“The decision to consider an issue not raised below is discretionary, and such an issue should not be decided if it would prejudice the other party.”); *Martineau*, *supra* note 2, at 1028-35; *Dennerline*, *supra* note 2, at 986-988; *Carter*, *supra* note 2, at 950.

<sup>13</sup> *Greenlaw v. United States*, 554 U.S. 237, 243 (2008).

<sup>14</sup> *Id.* at 243-44; *see also* *Pfeifer v. Jones & Laughlin Steel Corp.*, 678 F.2d 453, 457 n.1 (3d Cir. 1982) (noting contemporaneous objection requirement “go[es] to . . . heart of . . . common law tradition and the adversary process”), *vacated*, 462 U.S. 523 (1983).

It is for the advocates to frame the issues and bear the burden to properly and sufficiently present appellate contentions to the appeals court.<sup>15</sup> All issues and claims are then tested by the adversarial process further refining and defining the facts and law in dispute.<sup>16</sup> This trait of the adversarial system renders the raise or waive rule “more than just a prudential rule of convenience; . . . distinguish[ing] our adversary system of justice from the inquisitorial one.”<sup>17</sup>

The interests of fairness and finality<sup>18</sup> also underlie the raise or lose rule and follow from the principle that an “appeal must be based on what took place at the trial, not on anything which is presented for the first time before an appellate court.”<sup>19</sup> If errors not raised below in the lower court could be raised on appeal, unsuccessful litigants would be free to second guess tactical or deliberate decisions made in the lower court or otherwise seek to re-try or re-adjudicate the matter on appeal when the desired result is not reached below.<sup>20</sup> The rule thus serves predictability and “[w]ithout

<sup>15</sup> *New Jersey v. T.L.O.*, 468 U.S. 1214, 1216 (1984) (“the adversary process functions most effectively when we rely on the initiative of lawyers, rather than the activism of judges, to fashion the questions for review”); *see also* *Terminiello v. Chicago*, 337 U.S. 1, 11 (1949) (Frankfurter, J., dissenting) (“This is a court of review, not a tribunal unbounded by rules. We do not sit like a kadi under a tree dispensing justice according to considerations of individual expediency.”); *U.S. v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991) (“Judges are not pigs, hunting for truffles buried in briefs.”); *Linrud v. Linrud*, 552 N.W.2d 342, 345 (N.D. 1996) (“Judges are not ferrets.”).

<sup>16</sup> *Endres v. Ind. State Police*, 809 N.E.2d 320, 322 (Ind. 2004) (explaining raise or waive rule assures a claim is tested by adversarial process).

<sup>17</sup> *See U.S. v. Burke*, 504 U.S. 229, 246 (1992) (Scalia, J., concurring); *Eriline Co. S.A. v. Johnson*, 440 F.3d 648, 654 (4th Cir. 2006) (“As a defense waivable by the inaction of a party, the statute of limitations bears the hallmarks of our adversarial system . . . in which the parties are obliged to present facts and legal arguments before a neutral and relatively passive decision-maker.”).

<sup>18</sup> *Commonwealth v. Randolph*, 780 N.E.2d 58, 64 (Mass. 2002) (stating waiver requirement dual purpose protecting society’s interests in finality of judicial proceedings and efficiency); *Commonwealth v. Bly*, 830 N.E.2d 1048, 1055 (Mass. 2005). An early Massachusetts case, *Cady v. Norton*, explained the finality rule as follows:

[The finality rule] proceeds upon two grounds; one, that if the exception is intended to be relied on, and is seasonably taken, the omission may be supplied, or the error corrected, and the rights of all parties saved. The other is, that it is not consistent with the purposes of justice, for a party knowing of a secret defect, to proceed and take his chance for a favorable verdict, with the power and intent to annul it, as erroneous and void, if it should be against him.

31 Mass. 236, 237 (1833).

<sup>19</sup> *Commonwealth v. Olson*, 510 N.E.2d 787, 790 (Mass. App. Ct. 1987).

<sup>20</sup> *See Vassallo v. Baxter Healthcare Corp.*, 696 N.E.2d 909, 917 (Mass. 1998) (stating principle governing appellate review) (quoting *Olson*, 510 N.E.2d at 790); *Iverson v. Boston*, 452 F.3d 94, 103 (1st Cir. 2006) (“raise-or-waive rule serves the salutary purpose of preventing litigants from gaming the system by seeding complaints with Delphic references in the hope of

predictability the appellate process becomes little more than an exercise by which the appellant attempts to persuade the appellate court that the result reached by trial court was not the ‘right result.’”<sup>21</sup> The raise or waive rule is thus the litigation “winnowing process” and “part of the machinery by which courts narrow what remains to be decided.”<sup>22</sup> Absent a raise or lose rule, both the parties and the public are put to increased expense, especially where if a timely objection or raising of the issue or error had been made, the lower court could have corrected or ameliorated the error perhaps obviating the need for any appeal.<sup>23</sup> The loss of a chance for cure impacts the substantial policy behind finality and orderly procedure. Similarly, the raise or lose rule not only seeks to insure an opportunity for the opposing party to present a response, but allows the lower court, in the first instance, to fully address the issue.<sup>24</sup> The absence of any considered decision of the trial court for the appellate court to consider and evaluate is not insubstantial.<sup>25</sup> Some courts view it as impossible to determine if there was

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facilitating an escape should the district court’s ruling on their advertised claims fail to suit”); *Bergeron v. Mansour*, 152 F.2d 27, 32 (1st Cir. 1945) (“To allow a party to put forth new defenses on appeal would give him an incentive to postpone such defenses until after he has had his day in court.”); *People v. Hoover*, 377 Fed. Apex. 461, 463 (6th Cir. 2010) (stating forfeiture rule prevents “sandbagging”) (citation omitted); *see also* *TECO Mech. Contractor, Inc. v. Commonwealth*, No. 2009-SC-000821-DG, 2012 WL 975732, at \*7 n.15 (Ky. Mar. 22, 2012) (“An appellant is not ‘permitted to feed one can of worms to the trial judge and another to the appellate court.’”) (citation omitted).

<sup>21</sup> *Martineau*, *supra* note 2, at 1034.

<sup>22</sup> *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 487 n.6 (2008) (“The reason for the rules is not that litigation is a game, like golf, with arbitrary rules to test the skill of the players. Rather, litigation is a ‘winnowing process,’ and the procedures for preserving or waiving issues are part of the machinery by which courts narrow what remains to be decided.”) (quoting *Poliquin v. Garden Way, Inc.*, 989 F.2d 527, 531 (1st Cir. 1993)).

<sup>23</sup> *See Puckett v. United States*, 556 U.S. 129, 134 (2009) (“In the case of actual or invited error, the district court can often correct or avoid the mistake so that it cannot possibly affect the outcome.”); *Anderson v. Beacon Oil Co.*, 183 N.E. 152, 153 (Mass. 1932) (“[The purpose of raise or lose rule is] to warn the trial judge of his alleged error, so that he may correct it at the time and thus terminate the litigation”); *United States v. Taylor*, 54 F.3d 967, 977 (1st Cir. 1995) (noting contemporaneous objection rule to alert trial judge so immediate curative measure can be taken).

<sup>24</sup> *See Puckett*, 556 U.S. at 134; *United States v. Vonn*, 535 U.S. 55, 72 (2002) (noting importance of raising issues at lower court); *United States v. Kinsella*, 622 F.3d 75, 83 (1st Cir. 2010) (stating rule’s purpose to avoid needless reversals and remands); *see also* *Commonwealth v. Foley*, 263 N.E.2d 451, 453 (Mass. 1970) (“For us to consider alleged claims of error in cases where no exceptions were taken would deprive the trial judge of the opportunity to reconsider his ruling. It would make a shambles of our trial procedure to consider such assignments of error except in rare and unusual circumstances.”).

<sup>25</sup> *Commonwealth v. Bly*, 830 N.E.2d 1048, 1059 (Mass. 2005) (noting failing to raise or object at trial means no review consideration of trial opinion); *Hormel v. Helvering*, 312 U.S. 552, 556 n.5 (1941) (“The Board’s rulings on questions of law, while not as conclusive as its findings of fact, are nevertheless persuasive, and it is desirable that a reviewing court have the benefit of such rulings.”); *United States v. Argentine*, 814 F.2d 783, 791 (1st Cir. 1987) (“It is not our role to use second sight when parties have maneuvered to deprive the district judge of an



error if not addressed by the trial court.<sup>26</sup> More generally, “there is something unseemly about telling a lower court it was wrong when it never was presented with the opportunity to be right.”<sup>27</sup> Requiring presentation to the lower court gives the lower court a meaningful opportunity to address the matter and reach a proper result, contribute valuable input into the process, and more fully develops the record.<sup>28</sup>

Both prejudice and fairness are also fundamental to the raise or lose rule. Mandating that all issues be raised in the lower court prevents the adverse party from being prejudiced by the other party’s failure to object or raise the issue. To force the adverse party to defend an issue on appeal where he had no opportunity to present factual arguments or evidence would be unfair and prejudicial.<sup>29</sup> Similarly, where an issue or error is not raised below, there is many times a lack of a complete or developed record upon which the appellate court can fairly and properly perform its review function. A complete record where evidence and argument has been presented is fundamental to the appellate proceeding and meaningful review.<sup>30</sup>

The rigor with which the rule of forfeiture/waiver is applied is

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initial glimpse of the putative problem.”); *see also* *Waco v. Bridges*, 710 F.2d 220, 228 (5<sup>th</sup> Cir. 1983) (“facilitation accorded appellate review by a lower court’s consideration of the legal issues and judicial resolution of factual disputes commands that [the general rule] not be disregarded lightly”).

<sup>26</sup> *Doe v. Doe*, 634 S.E.2d 51, 54 (S.C. Ct. App. 2006) (“Without an initial ruling by the trial court, a reviewing court simply is not able to evaluate whether the trial court committed error.”); *see Herron v. Century BMW*, 719 S.E.2d 640, 642 (S.C. 2011) (“Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues and [provide] platform for meaningful appellate review.”).

<sup>27</sup> *Commonwealth v. Alphas*, 712 N.E.2d 575, 585 (Mass. 1993) (Greaney, J., concurring) (quoting *State v. Applegate*, 591 P.2d 371, 373 (Or. Ct. App. 1979)); *see also Khatchatourian v. Encompass Ins. Co.*, 935 N.E.2d 777, 783 (Mass. App. Ct. 2010) (noting that prudence dictates that judge should have first chance to address issue); *Hardley v. State*, 905 N.E.2d 399, 405 (Ind. 2009) (stating raise or waive rule rationale is desire to obtain trial court’s view on issue). The Massachusetts Supreme Judicial Court has remarked that reviewing unpreserved errors which the trial court never had a chance to consider “would make a shambles of our trial procedure.” *Foley*, 263 N.E.2d at 453; *Tosciano v. Chandris*, 934 F.2d 383, 385(1st Cir. 1991) (“Rules serve a valuable purpose. Without them, the judicial system would be in shambles.”); *Trach v. Fellin*, 817 A.2d 1102, 1119 (Pa. Super. Ct. 2003) (“[T]he Superior Court, as an error-correcting court, may not purport to reverse a trial court’s order where the only basis for a finding of error is a claim that the responsible party never gave the trial court an opportunity to consider.”) (quoting *Harber Phil. Center City Office Ltd. V. LPCI*, 764 A.2d 1100, 1105 (Pa. Super. Ct. 2000)).

<sup>28</sup> *See Spratt v. MDU Res. Grp., Inc.*, 797 N.W.2d 328, 333 (N.D. 2011); *Beeter v. Sawyer Disposal LLC*, 771 N.W.2d 282, 288 (N.D. 2009).

<sup>29</sup> *Dennerline*, *supra* note 2, at 988 (describing fairness justification for rule against considering new issues on appeal).

<sup>30</sup> *See Tri-M Grp., LLC v. Sharp*, 638 F.3d 406, 417-18 (3d Cir. 2011) (highlighting waiver rule provides greatest force where timely objection permits parties to develop factual record) (citing *Barefoot Architect, Inc. v. Bunge*, 632 F.3d 822, 835 (3d Cir. 2011)).

reflected in the stern manner to which it is referred by both the Massachusetts Supreme Judicial Court and the First Circuit; i.e., the rule of waiver is to be invoked “with near religious fervor” (First Circuit);<sup>31</sup> is not to be “ignored nor brushed aside as a pettifogging technicality or a trap for the indolent” (First Circuit);<sup>32</sup> that “objections, issues or claims—however meritorious that have not been raised in the trial court are deemed waived” (Supreme Judicial Court);<sup>33</sup> and that the rule is “ironclad,”<sup>34</sup> “crystalline” (First Circuit)<sup>35</sup> or “bedrock”<sup>36</sup> (First Circuit and Supreme Judicial Court); with any exception “narrowly configured and sparingly dispensed”<sup>37</sup> (First Circuit).

### III. EXCEPTIONAL CIRCUMSTANCES: PLAIN ERROR AND BEYOND

#### A. Singleton and Hormel: *Confirmation of Discretion*

Over 80 years ago Justice Black declared that “[t]here may always be exceptional cases or particular circumstances which will prompt a reviewing or appellate court, where injustice might otherwise result, to consider questions of law which were neither pressed nor passed upon by the court or administrative agency below.”<sup>38</sup> In the oft-quoted passage, Justice Black continued:

Rules of practice and procedure are devised to promote the ends of justice, not to defeat them. A rigid and undeviating

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<sup>31</sup> Nat’l Ass’n of Soc. Workers v. Harwood, 69 F.3d 622, 627 (1st Cir. 1995).

<sup>32</sup> *Id.*

<sup>33</sup> Wynn & Wynn P.C., v. Mass. Comm’n Against Discrimination, 729 N.E.2d 1068, 1083 (Mass. 2000), *overruled on other grounds by* Stonehill Coll. V. Mass. Comm’n Against Discrimination, 808 N.E.2d 205 (Mass. 2004).

<sup>34</sup> *In re Carp*, 340 F.3d 15, 26 (1st Cir. 2003).

<sup>35</sup> Bos. Beer Co. Ltd. P’ship. v. Slesar Bros. Brewing Co., 9 F.3d 175, 180 (1st Cir. 1993) (“The law in this circuit is crystalline: a litigant’s failure to explicitly raise an issue before the district court forecloses that party from raising the issue for the first time on appeal.”); *see also* Teamsters, Chauffeurs, Warehousemen & Helpers Union, Local No. 59 v. Superline Transp. Co., 953 F.2d 17, 21 (1st Cir. 1992) (“If any principle is settled in this circuit, it is that, absent the most extraordinary circumstances, legal theories not raised squarely in the lower court cannot be broached for the first time on appeal.”).

<sup>36</sup> United States v. Slade, 980 F.2d 27, 30 (1st Cir. 1992).

<sup>37</sup> *Wynn*, 729 N.E.2d at 1083-84; *see also* Daigle v. Maine Med. Ctr., 14 F.3d 684, 688 (1st Cir. 1994) (stating the same and “raise-or-waive rule applies with full force to constitutional challenges”); Iverson v. Boston, 452 F.3d 94, 103 (1st Cir. 2006) (discretion “is to be used sparingly and only in exceptional cases”).

<sup>38</sup> Hormel v. Helvering, 312 U.S. 552, 557 (1941); *see also* Youakim v. Miller, 425 U.S. 231, 234 (1976).

judicially declared practice under which courts of review would invariably and under all circumstances decline to consider all questions which had not previously been specifically urged would be out of harmony with this policy. Orderly rules of procedure do not require sacrifice of the rules of fundamental justice.<sup>39</sup>

This broad declaration pales considerably to the narrow tax appeal before the Court.<sup>40</sup> The Court could have simply relied on the applicable statute governing appellate review of tax board decisions to affirm the circuit court's determination to decide the tax question on a section of the tax code not raised or relied upon by the taxing authorities before the Tax Board.<sup>41</sup> Moreover, the interpretation of the code section first relied upon before the circuit court, and not in the earlier proceedings before the Tax Board, was based on a decision by the Supreme Court *after* the hearing before the Tax Board.<sup>42</sup> Nonetheless, the Court declared and reiterated the broad general discretion<sup>43</sup> making clear that the raise or lose rule was not

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<sup>39</sup> *Hormel*, 312 U.S. at 557; *see also* *Cruz v. Comm'r of Pub. Welfare*, 478 N.E.2d 1262, 1264 (Mass. 1985) (quoting *Hormel*); *cf.* *Beaupre v. Cliff Smith & Assocs.*, 738 N.E.2d 753, 760 n.8 (Mass. App. Ct. 2000) ("the mandate that the [Massachusetts Rules of Civil Procedure] are instruments for the promotion of justice, not the exaltation of mere technicalities"); *United States v. Seigel*, 168 F.2d 143, 146 (1948) (stating importance of adhering to rules of procedure). The court in *Seigel* stated:

[R]easonable adherence to clear, reasonable and known rules of procedure is essential to the administration of justice . . . [i]f the courts must stop to inquire where substantial justice on the merits lies ever time a litigant refuses or fails to abide [by] the reasonable and known rules of procedure, there will be no administration of justice . . . Just as soon as rules of procedure are ignored in order to do substantial justice on the merits in a particular case, there are no rules. What is done in one case must be done in all.

*Id.*

<sup>40</sup> *See Hormel*, 312 U.S. at 557 (stating issue before court). At issue was a tax delinquency assessed against the appellant, *Hormel*. *Id.* The Board of Tax Appeals rejected the Tax Commissioner's position that income from a certain trust at issue was taxable. *Id.* The arguments presented by the Commissioner before the Tax Board centered on sections 167 and 166 of the then Tax Code. *Id.* at 554. On appeal, the Commissioner relied on another section of the code, section 22(a), in asserting that the income was taxable. *Id.* at 554-55. The Circuit Court agreed. *Id.* at 555. On appeal to the Supreme Court, *Hormel* argued that this new ground could not be relied upon as it was never referenced before the Tax Board. *Id.* at 557-58.

<sup>41</sup> *Id.* at 552. The statute provided that the appellate courts could modify, reverse or remand decisions not in accordance with law "as justice may require." *Id.* at 552.

<sup>42</sup> *Id.* at 557-58 (discussing Court's reasoning in *Helvering v. Wood*, 309 U.S. 344 (1940)).

<sup>43</sup> *Id.* at 557. The rule of discretion as to appellate waiver has its roots in the merger of law and equity. *See Sunderland, Improvement of Appellate Procedure*, 26 IOWA L. REV. 3, 7 (1940).

an “inflexible practice”<sup>44</sup> and that “appellate courts . . . [should not] lose sight of the fact that such appellate practice should not be applied where the obvious result would be a plain miscarriage of justice.”<sup>45</sup> As the tax provision and interpretation at issue was outcome determinative, in that failing to address the omitted legal argument would have resulted in the petitioner escaping the otherwise owing tax payment, “this is exactly the type of case where application of the general practice would defeat rather than promote the ends of justice, and the court below was right in so holding.”<sup>46</sup>

Later, in *Singleton v. Wulff*,<sup>47</sup> the Supreme Court proclaimed that the raise or waive rule was one of “discretion.”<sup>48</sup> Justice Blackmun made clear there can be no “general rule” as to the potential exceptions to the raise or waive rule:

The matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the courts of appeals, to be exercised on the facts of individual cases. We announce no general rule. Certainly there are circumstances in which a federal appellate court is justified in resolving an issue not passed on below, as where the proper resolution is beyond any doubt or where ‘injustice might otherwise result.’<sup>49</sup>

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The rule against considering new issues on appeal originated from the common law writ of error and the “attaint.” See *id.*; Dennerline, *supra* note 2, at 985. Whether a review of a jury for a “false verdict” or of a judge for a “false judgment,” it was considered unfair to allow consideration of issues not part of the initial proceedings and only errors brought up in the initial proceeding could be considered. Sunderland, *supra*, at 7.

<sup>44</sup> *Hormel*, 312 U.S. at 556.

<sup>45</sup> *Id.* at 558.

<sup>46</sup> *Id.* at 560.

<sup>47</sup> 428 U.S. 106 (1976).

<sup>48</sup> *Id.* at 121.

<sup>49</sup> *Id.* (citations omitted). In *Singleton*, the Court was faced with an issue of the standing of a group of physicians challenging a state statute limiting abortion funding. *Id.* at 108. The Court upheld the Appeals Court’s determination as to standing but reversed the determination to address the merits. *Id.* at 118-119. Only the standing issue had been litigated below and the Supreme Court held that the state’s health department (appellant) had the right to introduce evidence in defense of the challenge to the statute as well as proffer applicable legal arguments. *Id.* at 120. In so finding, the Supreme Court held that “injustice was more likely to be caused than avoided by deciding the issue without petitioner having an opportunity to be heard.” *Id.* at 121; see also *Bird v. United States*, 241 F.2d 516, 521 (1st Cir. 1957) (confirming exception to forfeiture in “exceptional cases or particular circumstances where injustice might otherwise result”) (citing *Hormel v. Helvering*, 312 U.S. 552, 557 (1941))). By at once stating the general rule and then declaring the matter one of discretion, the result is what one commentator has referred to as the “gorilla rule” based on the famous riddle that asks where an 800 pound gorilla sleeps—anywhere it wants. Martineau, *supra* note 2, at 1023. That is, the decision not to announce a “general rule”

More recently, the Supreme Court has re-affirmed this approach, stating that whether to deviate from the waiver rule is one of discretion “to be exercised on the facts of individual cases” and that “we have previously stopped short of stating a general principle to contain appellate courts’ discretion and we exercise that same restraint today.”<sup>50</sup>

The fundamental justification for rendering the raise or lose rule one of discretion is that the appellate court is responsible for saying what the law is in any particular dispute, that its fundamental function is to ensure a fair trial, and that it cannot have its hands tied by the parties’ presentation. Reduced to essentials, the position is that the appellate court cannot be restrained from considering legal rules, claims, or issues omitted by the parties.<sup>51</sup> To some, the right of a federal court to frame and decide cases on its own terms regardless of whether raised or not is “a necessary dimension” of Article III of the Constitution.<sup>52</sup> As one commentator has noted:

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is the “Gorilla rule” in which the matter remains one of discretion. Case Note, Clark A. Donat, *Every Attorney Deserves a Second Chance: Consideration of Issues Not Raised at the Trial Court Level in Jones v. Flowers*, 62 ARK. L. REV. 831, 843 (2009) (discussing Martineau, *supra* note 2). Justice Selya of the First Circuit, borrowing from Ralph Waldo Emerson, has expressed a similar sentiment declaring that as to the general waive or lose rule “foolish consistency is the hobgoblin of little minds.” *Nat’l Ass’n of Soc. Workers v. Harwood*, 69 F. 3d 622, 627 (1st Cir. 1995) (citations omitted); *see also* *State v. Greene*, 473 S.E.2d 921, 926 (W. Va. 1996) (Cleckley, J., concurring) (“However, foolish consistency is the hobgoblin of little minds, and, in the last analysis, all these principles discussed above are procedural rules of discretion. Thus, although the rule requiring all appellate issues be raised first in the circuit court is important, it is not immutable”) (citation omitted). To escape the hobgoblins, the Court must be able to free itself of rigid application of the raise or waive rule in order to do justice. *Id.*

<sup>50</sup> *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 487 (2008). In *Baker*, the Ninth Circuit ruled on a preemption argument that the trial court had determined had been waived. *Id.* at 487-88. The Court reiterated the general discretion of the Appeals Court to reach such issues but went on to state in a footnote that there was insufficient “unusual circumstances” justifying departure from the general rule. *Id.* at 487 n.6. The Court noted:

[I]f the case turned on the propriety of the Circuit’s decision to reach the preemption issue we would take up the claim that it exceeded its discretion. Instead, we will only say that to the extent the Ninth Circuit implied that the unusual circumstances of this case called for an exception to regular practice, we think the record points the other way.

*Id.* It proceeded to note that “the complexity of a case does not eliminate the value of waiver and forfeiture rules, which ensure that parties can determine when an issue is out of the case. *Id.*”

<sup>51</sup> *See Bergeron v. Mansour*, 152 F.2d 27, 32 (1st Cir. 1945) (stating *Hormel* exception to forfeiture is in order to “prevent miscarriage of justice”). The exception “is confined to situations where evidence has been newly discovered or where counsel and the trial court has overlooked a governing case or a crucial statute.” *Id.*

<sup>52</sup> Joseph R. Pope, *Snyder v. Phelps: Issue Waiver and the Scope of Appellate Discretion*, THE APPEAL, Summer 2010, at 4.

In those cases where the parties fail to accurately and completely describe applicable legal doctrine or abandon a viable argument presented before the trial court, the court's duty to follow the party presentation principle collides with its duty to announce an accurate uncolored rule of law. Indeed, as judicial decisions are objective statements describing the meaning of law, and not statements concerning the subjective view of the law taken by litigants, courts must be able to *sua sponte* take notice of issues and legal principles either mistakenly or intentionally omitted by the parties.<sup>53</sup>

This view is not confined to the limited jurisdictional courts of the federal system, but is applicable to state courts of general jurisdiction as well with one such court remarking:

Appellate review does not consist of supine submission to erroneous legal concepts even though none of the parties declaimed the applicable law. Our duty is to enunciate the law on the record facts. Neither the parties nor the trial judge, by agreement or passivity, can force us to abdicate our appellate responsibility.<sup>54</sup>

Under this view, the appellate court has a duty to dispense, administer, and promote justice regardless of any lack of preservation by counsel.<sup>55</sup> According to the First Circuit, “[w]e may ourselves choose to consider newly minted arguments from the parties or devise them

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<sup>53</sup> Pope, *supra* note 52, at 4; *see also* Frost, *supra* note 5, at 472 (defending judicial issue creation as constitutional obligation corollary to articulate meaning of contested legal issues).

<sup>54</sup> Ochoa v. State, 794 P.2d 1127, 1136 (Idaho 1990) (citations omitted) (quoting Empire Life Ins. Co. of Am. v. Valdak Corp., 468 F.2d 330, 334 (5th Cir. 1972)). It is thus contended that “[d]espite much pretense to the contrary by judges and lawyers, it is one of the marks of a great judge to recast the issues in cases in his own image rather than to assume a passive, ‘umpireal stance.’” Pope, *supra* note 52, at 3 (quoting Richard A. Posner, *Cardozo: A Study in Reputation* 144 (1990)).

<sup>55</sup> United States v. One Urban Lot Located at 1 St. A-1, Valparaiso, 885 F.2d 994, 1007 (1st Cir. 1989) (“In our roles as arbiters of cases and administrators of justice, we are entrusted with protecting rights of those who seek resolution of their rights within the judicial process . . . [f]ailure to vacate the default judgment against Bruno would be a gross miscarriage of justice and offend our philosophy that cases should be resolved on the merits.”); Frost, *supra* note 5, at 472 (“Because judicial decisions are objective statements about the meaning of law, not statements about how the parties subjectively interpret the law, courts must be able to take notice of legal arguments that the parties fail to see.”).

ourselves, but this is not an entitlement of the parties.”<sup>56</sup>

Other justifications for exception to the raise or lose rule through discretion are that the court can review the entire proceeding and preserved or unpreserved errors can be effectively addressed based on such a posture, and that significant legal issues deserve and demand appellate attention, particularly in criminal cases where life or liberty is at stake. By leaving it to discretion, the court is free to assess the facts and circumstances of the particular case un-tied to any confining or general per se rule.<sup>57</sup>

Either or both of *Hormel* and *Singleton* have, at some point, been cited by virtually every federal circuit as well as a substantial number of state courts including Massachusetts.<sup>58</sup> The *Singleton* Court’s reference to exceptional circumstances including “where the proper resolution is beyond any doubt . . . or where ‘injustice might otherwise result’” is found repeatedly in the case law.<sup>59</sup>

#### *B. Plain Error and Discretion: The Supreme Court*

The federal “plain error” doctrine was developed at common law and is embodied in Rule 52 of the Federal Rules of Criminal Procedure,<sup>60</sup> Rule 51 of the Federal Rules of Civil Procedure,<sup>61</sup> the Supreme Court

<sup>56</sup> *Sierra Club v. Wagner*, 555 F.3d 21, 26 (1st Cir. 2009) (citing *United States v. La Guardia*, 902 F.2d 1010, 1013 (1st Cir. 1990)).

<sup>57</sup> *Id.*

<sup>58</sup> See *infra* note 357 and accompanying text.

<sup>59</sup> *Singleton*, 428 U.S. at 121 (citing *Hormel*, 312 U.S. at 557).

<sup>60</sup> FED. R. CRIM. P. 52 of the Criminal Rules of Procedure provides:

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

(b) Plain Error. A plain error that affects substantial rights may be considered even though it was not brought to the court’s attention.

FED. R. CRIM. P. 52.

<sup>61</sup> FED. R. CIV. P. 51 (“Instructions to the Jury; Objections; Preserving a Claim of Error”). Rule 51 was amended in 2003 to add subsection (d)(2), which permits plain error review even when a party failed to properly object before the district court if the error affects substantial rights. FED. R. CIV. P. 51(d)(2) (“*Plain Error*. A court may consider a plain error in the instructions that has not been preserved as required by Rule 51(d)(1) if the error affects substantial rights”); see 9C CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2558 (3d ed. 2008) (“The 2003 amendment . . . of Rule 51 codified the previous practice followed by most circuits that said that the appellate court may reverse for plain error in an instruction to the jury even if there had been no objection to it.”); see also *Ji v. Bose, Corp.*, 626 F.3d 116, 125 (1st Cir. 2010) (concluding plain error applies to failure to object or preserve claim pertaining to instruction). The accompanying advisory committee notes to Rule 51 state:

Preserving a claim of error and plain error . . . . Many circuits have recognized that an error not preserved under Rule 51 may be reviewed in

Rules,<sup>62</sup> and the Federal Rules of Evidence.<sup>63</sup> Between 1896 and 2010, the Supreme Court has issued a handful of decisions demarcating the doctrine under Rule 52 with the principle otherwise being codified in the Rules of Procedure beginning in 1944.

In its 1896 decision in *Wiborg v. United States*,<sup>64</sup> the Court stated that “if a plain error was committed in a matter so absolutely vital to defendants, we feel ourselves at liberty to correct it” even though no exception was made to the error at trial.<sup>65</sup> This was express recognition of the existing acceptance in common law to “do justice” where there has been a fundamental error and in spite of the failure to object or preserve.<sup>66</sup> Under *Wiborg*, the miscarriage of justice standard that evolved equated to “the conviction of one who but for the error probably would have been acquitted.”<sup>67</sup>

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exceptional circumstances. The language adopted to capture these decisions in subdivision (d)(2) is borrowed from Criminal Rule 52. Although the language is the same, the context of civil litigation often differs from the context of criminal prosecution; actual application of the plain-error standard takes account of the differences . . . . The court’s duty to give correct jury instructions in a civil action is shaped by at least four factors. The factor most directly implied by a “plain” error rule is the obviousness of the mistake. The importance of the error is a second major factor. The costs of correcting an error reflect a third factor that is affected by a variety of circumstances. In a case that seems close to the fundamental error line, account also may be taken of the impact a verdict may have on nonparties.

FED. R. CIV. P. 51 advisory committee’s note on 2003 amendment.

<sup>62</sup> SUP. CT. R. 24(1)(a) (“the Court may consider a plain error not among the questions presented but evident from the record and otherwise within its jurisdiction to decide”).

<sup>63</sup> See FED. R. CIV. P. 103(a) (defining reversible error evidentiary rulings wherein “a substantial right of the party” is affected). Rule 103(e), in turn, provides that “[a] court may take notice of a plain error affecting a substantial right, even if the claim of error was not properly preserved.” FED. R. CIV. P. 103(e). Both part a and e of the rule utilize the term “substantial right” and if given the same meaning would result in no differentiation between preserved and unpreserved errors. FED. R. CIV. P. 103(a) & (d). As a result, courts have sought to define plain error more narrowly requiring that such error be more serious than simply reversible error.

<sup>64</sup> 163 U.S. 632 (1896).

<sup>65</sup> *Id.* at 658; see also *Clyatt v. United States*, 197 U.S. 207, 222 (1905) (invoking plain error review by requiring Government prove all claim elements to ensure public confidence).

<sup>66</sup> *Wiborg*, 163 U.S. at 658-59. In *Wiborg*, the Supreme Court reversed the convictions of two of the three defendants making clear that there was insufficient proof on the record. *Id.*

<sup>67</sup> *United States v. Martinez-Torres*, 912 F.2d 1552, 1558-59 (1st Cir. 1990) (citing *United States v. Silberstein*, 732 F.2d 1338, 1349 (7th Cir. 1984)), *vacated* 944 F.2d 51 (1st Cir. 1991); see also *O’Neil v. State of Vermont*, 144 U.S. 323, 364-65 (1892) (Field, J., dissenting). Justice Field stated:

I think . . . that this court . . . should take notice of the error of its own motion; for, if the denial by the court below of the immunity claimed against the cruel and unusual punishment imposed was an error, it was one of the gravest character, leaving the defendant to a life of misery,—one of perpetual



In 1936, in *United States v. Atkinson*,<sup>68</sup> a civil case, the Court defined the parameters of the modern day plain error doctrine by stating that “[i]n exceptional circumstances, especially in criminal cases, appellate courts . . . may, of their own motion, notice errors to which no exception has been taken, if the errors are obvious, or if they otherwise seriously affect the fairness, integrity or public reputation of judicial proceedings.”<sup>69</sup> Under this formulation, either an “obvious error” or an error affecting the fairness, integrity, or public reputation of judicial proceedings meets the required “exceptional circumstance.”<sup>70</sup> The focus expressly included an inquiry as to the impact of the error on the judicial process.<sup>71</sup>

Rule 52(b), enacted in 1944 and codifying plain error for criminal matters, does not explain or define the concepts of “plain error” or “affecting substantial rights,” although the advisory committee notes indicate that the Rule was meant to codify the doctrine articulated in *Wiborg* and that it was a “restatement of existing law.”<sup>72</sup> Somewhat conspicuously absent from the notes is any mention or discussion of *Atkinson*’s “exceptional circumstances” or public interest criteria for the exercise of appellate court discretion.

In 1946, the Court in *Kotteakos v. United States*<sup>73</sup> indicated that “affecting substantial rights” for both Rule 52(a) (harmless error for preserved issues) and Rule 52(b) (plain error for unpreserved issues) meant “the error had a substantial and injurious effect or influence in determining the jury’s verdict.”<sup>74</sup> This standard has evolved into “a reasonable

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imprisonment and hard labor.

*Id.*

<sup>68</sup> 297 U.S. 157 (1936).

<sup>69</sup> *Id.* at 160.

<sup>70</sup> *Id.* (citing *New York Cent. R.R. Co. v. Johnson*, 279 U.S. 310, 318 (1929)); *Brasfield v. United States*, 272 U.S. 448, 450 (1926) (outlining exceptional circumstances where appellate courts may notice errors where no exception taken). In *Johnson*, the Court stated that despite the lack of objection the public interest required “litigation be fairly and impartially conducted” including the need to correct verdicts influenced by passion or prejudice. 279 U.S. at 318. In *Brasfield*, the concern was with serious error “affect[ing] the proper relations of the court to the jury.” 272 U.S. at 450.

<sup>71</sup> See *United States v. Atkinson*, 297 U.S. 157, 160 (1936). *Atkinson* made clear that plain error was to be recognized only in “exceptional circumstances” and that such errors affect the “fairness, integrity, or public reputation of judicial proceedings” and thus, in the “public interest,” appellate courts “may” notice the errors. *Id.* It also noted that plain error would be more likely in criminal case where life or liberty is at stake and that a court had the authority to recognize such error on its own. *Id.* The Court summarily concluded that “no such case is presented here.” *Id.*

<sup>72</sup> FED. R. CRIM. P. R. 52 advisory committee’s notes.

<sup>73</sup> 328 U.S. 750 (1946).

<sup>74</sup> *Id.* at 757 n.9. According to the Court in *Kotteakos*:

probability that, but for the error claim, the result of the proceeding would have been different.”<sup>75</sup>

In 1983, the Supreme Court held that Rule 52(b) was not applicable to collateral attacks upon convictions and remarked that plain error was “to be used sparingly and only when miscarriage of justice would otherwise result.”<sup>76</sup> According to the Court, “the intention of [Rule 52(b)] is to serve the ends of justice therefore it is to be invoked in exceptional circumstances where necessary to avoid a miscarriage of justice.”<sup>77</sup> The rule was found to reflect “careful balancing” between the intention of “encourag[ing] all trial participants to seek a fair and accurate trial the first time around” and the “insistence that obvious injustice be promptly redressed.”<sup>78</sup>

Two years later, the Supreme Court re-stated that plain error was to be found sparingly and was not to be subjected to unwarranted extension; required examination of the entire record; and would require reversal only if the error “undermine[s] the fundamental fairness of the trial and contribute[s] to a miscarriage of justice.”<sup>79</sup> It made clear the miscarriage of justice standard referenced in *Frady* was synonymous with that set forth in *Atkinson*—i.e., “seriously affects the fairness, integrity or public reputation of judicial proceedings.”<sup>80</sup> The Court was concerned with making a distinction between harmless error and that “an error . . . must be more than obvious or readily apparent . . . to trigger appellate review [under plain

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If, when all is said and done, the [court’s] conviction is sure that the error did not influence the jury, or had but very slight effect, the verdict and the judgment should stand . . . . But if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand.

*Id.* at 764-65 (emphasis added).

<sup>75</sup> United States v. Dominguez Benitez, 542 U.S. 74, 81-82 (2004).

<sup>76</sup> United States v. Frady, 456 U.S. 152, 163 n.14 (1982). The Court in *Frady* held that Rule 52(b) “was intended for use on direct appeal” and was “out of place” as to collateral attacks post-judgment. *Id.* at 164.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at 163.

<sup>79</sup> United States v. Young, 470 U.S. 1, 16 (1985).

<sup>80</sup> *Id.* at 15 (quoting United States v. Atkinson, 297 U.S. 157, 160 (1936)). The use of “only” as a qualifier of the “seriously affects” prong first appeared in *Johnson v. United States*, 520 U.S. 461, 467 (1975).

error].”<sup>81</sup>

The most recent Supreme Court formulation of the rule came in *United States v. Olano*.<sup>82</sup> There, the Court held that the presence of alternative jurors among the deliberating jury was not plain error.<sup>83</sup> The Court stated that the appellate court must find the unpreserved matter raised on appeal to be an “error,” that is “plain,”<sup>84</sup> and that “affects substantial rights.”<sup>85</sup> Such errors are to be noticed if it “causes the conviction or sentencing of an actually innocent defendant [miscarriage of justice]”<sup>86</sup> or where, in the discretionary judgment of the court, the “error seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.”<sup>87</sup>

Post-*Olano*, the Court has emphasized that the existence of “plain error,” particularly as to prejudice/public interest, must be addressed “on a case specific and fact-intensive basis.”<sup>88</sup> It has also reiterated that even

<sup>81</sup> *Young*, 470 U.S. at 16, n.14.

<sup>82</sup> 507 U.S. 725 (1993).

<sup>83</sup> *Id.* at 741.

<sup>84</sup> *Id.* at 734. Error is considered “a deviation from a legal rule,” and “plain” is obvious or clear or not subject to reasonable dispute. *Id.*; *Johnson*, 520 U.S. at 467 (“the word plain error is synonymous with clear or, equivalently obvious”) (quotations omitted).

<sup>85</sup> *Olano*, 507 U.S. at 731-37. “Affects substantial rights,” in turn, means the party claiming error has been prejudiced in that there is a “reasonable probability the error affected the outcome of the trial.” *United States v. Marcus*, 130 S. Ct. 2159, 2194 (2010); *see, e.g.*, *United States v. Brandao*, 539 F.3d 44, 58 (1st Cir. 2008); *United States v. Borrero-Acevedo*, 533 F.3d 11, 15-16 (1st Cir. 2008); *United States v. Padilla*, 415 F.3d 211, 220-21 (1st Cir. 2005); *see also* *Acevedo-Garcia v. Monroig*, 351 F.3d 547, 570 (1st Cir. 2003) (“[P]rejudice [for] the plain error test, requires a strong causal link between the harm to the aggrieved party and the legal error.”); The court stated that the possibility of harm does not satisfy a finding of prejudice. *Id.*; *see, e.g.*, *Marcus*, 130 S. Ct. at 2194; *Puckett v. United States*, 556 U.S. 129, 135 (2009); *United States v. Casas*, 356 F.3d 104, 113 (1st Cir. 2004).

<sup>86</sup> *Olano*, 507 U.S. at 736 (citing *Wiborg v. United States*, 163 U.S. 632 (1896)).

<sup>87</sup> *Id.* (quotations omitted). Applying this four-part test, the Court in *Olano* found that there was unquestionably an error: Rule 24(c) requires the discharge of alternate jurors after the jury has begun its deliberations, and waiver could not apply because the Government conceded the plain error. 570 U.S. at 737-38. The key inquiry was whether the error affected the defendant’s substantial rights. *Id.* But there was no evidence of prejudice, and a violation of Rule 24(c) is not of such a magnitude that affects substantial rights “independent of its prejudicial impact.” *Id.* at 737. Because substantial rights were not affected, the Court declined to address whether, if the error was prejudicial, the Court of Appeals should have exercised its discretion under the fourth prong of the test to correct the error. *Compare id.* at 737-38, with *United States v. Cotton*, 535 U.S. 625, 634 (2002) (“The real threat then to fairness, integrity, and public reputation of judicial proceedings would be if [the defendant], despite the overwhelming an uncontroverted evidence [of guilt, had the conviction overturned on appeal.]”) (quotations omitted).

<sup>88</sup> *Puckett v. United States*, 556 U.S. at 142. In *Puckett*, the Court found that the Government’s breach of a plea agreement must satisfy all of the elements of plain error for reversal and that “[w]hen the Government reneges on a plea deal, the integrity of the system may be called into question, but there may well be countervailing factors in particular cases.” *Id.* at 142-43. Similarly, in *United States v. Marcus*, the Court rejected the contention that the failure of

“serious errors” are subject to the full plain error inquiry and that constitutional errors will not always affect the framework in which the trial proceeds and, as such, like any other unpreserved error, requires a showing of prejudice.<sup>89</sup>

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the trial court to instruct the jury that they could only convict the defendant on post-criminal statute conduct and not pre was automatic plain error. See 130 S. Ct. at 2166. Mere possibility that the non-criminal conduct was the basis of the conviction was not the proper standard. *Id.* According to the Court:

[W]e see no reason why this kind of error would automatically “affect substantial rights” without a showing of individual prejudice.

That is because errors similar to the one at issue in this case—i.e., errors that create a risk that a defendant will be convicted based exclusively on noncriminal conduct—come in various shapes and sizes. The kind and degree of harm that such errors create can consequently vary. Sometimes a proper jury instruction might well avoid harm; other times, preventing the harm might only require striking or limiting the testimony of a particular witness. And sometimes the error might infect an entire trial, such that a jury instruction would mean little. There is thus no reason to believe that *all or almost all* such errors always “affect[t] the framework within which the trial proceeds,” or “necessarily render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence.

*Id.* at 2165-66 (citations omitted).

<sup>89</sup> *Id.* at 2164; *Puckett*, 556 U.S. at 141 (noting that “the rule of contemporaneous objection is equally essential and desirable [to policy in establishing trust between prosecutors and defendants affected by government plea breach] and when the two collide we see no need to relieve the defendant of his usual burden of showing prejudice”). The *Olano* formulation has not gone without some disagreement within the Court. See *Marcus*, 130 S. Ct. at 2169. Justice Stevens, who dissented in *Olano*, stated as recently as 2010:

In our attempt to clarify Rule 52(b), we have, I fear, both muddled the waters and lost sight of the wisdom embodied in the Rule’s spare text . . . . This Court’s ever more intensive efforts to rationalize plain-error review may have been born of a worthy instinct. But they have trapped the appellate courts in an analytic maze that, I have increasingly come to believe, is more liable to frustrate than to facilitate sound decisionmaking.

*Id.* at 2169. There have been differences in the Court as to application as well. In *Puckett*, for instance, a majority held that the unpreserved claim on appeal of the government’s breach of a plea agreement was subject to plain error review, was not a structural error, and required a showing of both prejudice (affects substantial rights, i.e. affected sentencing) and that the error seriously affected the fairness, integrity or public reputation of judicial proceedings. 556 U.S. at 140-41. Justices Souter and Stevens dissented agreeing with the plain error test but disagreeing as to the relevant interest for purpose of determining prejudice. *Id.* at 143-47. They contended that the substantial rights implicated for purposes of determining prejudice was not the sentence (length of incarceration-where error likely had no effect) but “conviction in the absence of trial or compliance with the terms of the plea agreement dispensing with the Government’s obligation to prove its case.” *Id.* at 144. As to prejudice and particularly the “fairness, integrity or public reputation” prong it was stated:

The Supreme Court has otherwise not fully weighed in on or clarified whether the discretion set forth in *Singleton* and *Hormel* is limited to plain error or encompasses other circumstances.<sup>90</sup> In three post *Hormel/Singleton* cases, its reference to exception to waiver appeared to be as to plain error.<sup>91</sup> However, in one case, *Exxon Shipping Co. v. Baker*,<sup>92</sup> the High Court did note (without any reference to plain error) that neither the complexity nor the significance of the overall case was sufficient to invoke the discretionary exception to forfeiture or waiver under *Singleton*.<sup>93</sup>

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If . . . the protected interest is in the guarantee that no one is liable to spend a day behind bars as a convict without a trial or his own agreement, then the fairness and integrity of the Judicial Branch suffer when a court imprisons a defendant after he pleaded guilty in reliance on a plea agreement, only to have the Government repudiate the obligation it agreed upon.

*Id.* at 147. In *Johnson v. United States*, the Court also addressed the discretionary public interest prong under plain error. 520 U.S. at 467. There, the case involved an error by the trial court in deciding the materiality of asserted false statements to a grand jury comprising a perjury charge instead of giving the determination to the jury. *Id.* at 464-65. In denying discretionary relief under the public interest prong of the plain error inquiry, the Court found that the evidence of the defendant's guilt was overwhelming and that the question of materiality was "essentially uncontroverted at trial." *Id.* at 470. According to the Court:

On this record there is no basis for concluding that the error seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings. Indeed, it would be the reversal of a conviction such as this which would have that effect. Reversal for error, regardless of its effect on the judgment, encourages litigants to abuse the judicial process and bestirs the public to ridicule it.

*Id.* (citations and quotations omitted) (alterations in original).

<sup>90</sup> See *Unitherm Food Sys., Inc. v. Swift-Eckrich Inc.*, 546 U.S. 394, 408 (2006) ("Arguments raised for the first time on appeal may be entertained, for example, if their consideration would prevent manifest injustice.") (citing *Singleton v. Wulff*, 428 U.S. 106, 121 (1976)); *Newport v. Fact Concerts Inc.*, 453 U.S. 247, 274-75 (1981) ("Rule 51 is susceptible to flexible interpretation when strictly necessary to avoid a clear miscarriage of justice"); *Anderson v. United States*, 417 U.S. 211, 217 n.5 (1974) (noting plain error exception importance in criminal case where error affects proceeding's fairness or integrity).

<sup>91</sup> See *supra* note 90 (discussing review of claims when it affects integrity of judicial proceedings).

<sup>92</sup> 554 U.S. 471 (2008).

<sup>93</sup> See *id.* at 488 n.6; see also *Peretz v. United States*, 501 U.S. 923, 954 (1991) (Scalia, J., dissenting) ("Even when an error is not 'plain,' this Court has in extraordinary circumstances exercised discretion to consider claims forfeited below."). According to the Court:

It is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below," when to deviate from this rule being a matter "left primarily to the discretion of the courts of appeals, to be exercised on the facts of individual cases." . . . . We have previously stopped short of stating a general principle to contain appellate courts' discretion, and we exercise the same restraint today . . . .

In yet another case, *City of Newport v. Fact Concerts Inc.*,<sup>94</sup> the Court reviewed the merits of a challenge to a punitive damage award under 42 U.S.C. § 1983 even though timely objection was not made to the jury instruction below.<sup>95</sup> The Court summarily held that review was not limited to “plain error” as it would be “particularly in-ap” under the circumstances.<sup>96</sup> Review without regard to plain error was provided as the trial court had opted to address the merits despite the waiver and to resolve “uncertainty” as to the availability of punitive damages which novelty, importance, and likelihood of recurrence “counsel[ed] unconstricted review.”<sup>97</sup> There was a dissent by Justices Brennan, Marshall, and Stevens which responded that there was no basis not to apply plain error review and, that by not doing so, the majority was “carv[ing] out an expansive exception” to procedural default which was “unprecedented and unwarranted.”<sup>98</sup>

*C. First Circuit Discretion: Plain Error and the Krynicky-Harwood Factors*

First Circuit discretion as to addressing unpreserved claims of error

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We will only say that to the extent the Ninth Circuit implied that the unusual circumstances of this case called for an exception to regular practice, we think the record points the other way.

Of course the Court of Appeals was correct that the case was complex and significant, so much so, in fact, that the District Court was fairly required to divide it into four phases, to oversee a punitive-damages class of 32,000 people, and to manage a motions industry that threatened to halt progress completely. But the complexity of a case does not eliminate the value of waiver and forfeiture rules, which ensure that parties can determine when an issue is out of the case, and that litigation remains, to the extent possible, an orderly progression. “The reason for the rules is not that litigation is a game, like golf, with arbitrary rules to test the skill of the players. Rather, litigation is a ‘winnowing process,’ and the procedures for preserving or waiving issues are part of the machinery by which courts narrow what remains to be decided.”

*Exxon*, 554 U.S. at 488 & n.6 (citations omitted) (citing *Poliquin v. Garden Way, Inc.*, 989 F.2d 527, 531 (1st Cir. 1993)). The District Court’s sensible efforts to impose order upon the issues in play and the progress of the trial deserve our respect. *Id.*

<sup>94</sup> 453 U.S. 247 (1981).

<sup>95</sup> *Id.* at 255-56.

<sup>96</sup> *Id.* at 256 (“No ‘right’ to a specific standard of review exists in this setting, any more than a ‘right’ to review existed at all once petitioner failed to except to the charge at trial.”).

<sup>97</sup> *Id.* at 257.

<sup>98</sup> *Id.* at 271-72, 276 n.7 (Brennan, J., dissenting); see *Romano v. U-Haul Int’l*, 233 F.3d 655, 664 (1st Cir. 2000) (limiting *Newport* exception to plain error review to instances lower court addressed issue); *Elwood v. Pina*, 815 F.2d 173, 176 (1st Cir. 1987) (stating same).

or new issues on appeal presently encompasses both plain error and other “exceptional circumstances” based on certain factors or interests. The First Circuit applies and follows the Supreme Court precedent as to plain error in both civil and criminal proceedings and has otherwise delineated a list of factors informing the discretion as to other exceptional circumstances. There thus is a dual discretionary exception to waiver encompassing both a plain error as well as separate, but overlapping, multi-factor approach.

The First Circuit has long recognized the power to reach issues or errors not assigned, in both criminal and civil matters, so long as they constituted plain error.<sup>99</sup> This was held as a matter of both common law and local circuit rule prior to the adoption of the Civil Procedural Rules in 1944.<sup>100</sup> In these early cases, it was noted that the power was to be exercised “sparingly and cautiously, and only to prevent gross injustice.”<sup>101</sup> In one decision, the First Circuit stated that exception to address an issue not raised only would arise if refusal to hear it “would shock the judicial conscience.”<sup>102</sup> Interestingly, it went on to remark that such cases are “grouped with a somewhat careless expression to the effect that, whatever the rules of practice are, plain errors may well be considered.”<sup>103</sup>

This sentiment has carried over to the more recent and current decisions of the First Circuit. Similar to most other circuits, it is repeatedly admonished that the plain error exception or default standard is to be applied “stringently”<sup>104</sup> in civil cases. “The standard is high” and “it is rare indeed for a panel to find plain error in a civil case.”<sup>105</sup> The right to reach

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<sup>99</sup> See *Chapman v. Reynolds*, 77 F. 274, 275-76 (1st Cir. 1896).

<sup>100</sup> See *Chapman*, 77 F. at 275 (citing *Wiborg v. United States*, 163 U.S. 632, 658 (1896)); *Nat'l Cash Register Co. v. Leland*, 94 F. 502, 506 (1st Cir. 1899); see also *United States v. Brown, Durrell & Co.*, 127 F. 793, 795 (1st Cir. 1903) (stating court may notice plain error when “the disregarding of which would do substantial injustice”); *Jones v. Pettingill*, 245 F. 269, 274 (1st Cir. 1917) (noting First Circuit Rules 11 and 24 allow court to reach plain errors not assigned); *B.A. Carrol Stevedore Co. v. Makinda*, 20 F.2d 19, 23 (1st Cir. 1927) (Anderson, J., dissenting) (stating plain error reach to be exercised sparingly, cautiously, and to prevent gross injustice); *Ayers v. United States*, 58 F.2d 607, 609 (8th Cir. 1932) (noting plain error concept applicable to civil and criminal matters before adoption of civil rules).

<sup>101</sup> *Makinda*, 20 F.2d at 23.

<sup>102</sup> *Keliher v. United States*, 193 F. 8, 10 (1st Cir. Mass. 1912).

<sup>103</sup> *Id.*

<sup>104</sup> *Tuli v. Brigham & Women's Hosp.*, 656 F.3d 33, 46 (1st Cir. 2011) (citing *Trull v. Volkswagen of Am., Inc.*, 320 F.3d 1, 5-6 (1st Cir. 2002)); *Johnson v. Holiday Inns, Inc.*, 595 F.2d 890, 894 (1st Cir. 1979) (stating exception only applies “in horrendous cases where a gross miscarriage of justice would occur”); see also *Jackson v. Parker*, 627 F.3d 634, 640 (7th Cir. 2010) (stating plain error rarely applied in civil cases) (citing *Moore ex rel. Estate of Grady v. Tuleja*, 546 F.3d 423, 430 (7th Cir. 2008)).

<sup>105</sup> *Chestnut v. Lowell*, 305 F.3d 18, 20 (1st Cir. 2002); *Munoz v. Sociedad Espanola De Auxilio Mutuo y Beneficiencia*, 671 F.3d 49, 59 (1st Cir. 2012) (stating requirement for plain error was extremely demanding) (citing *Chestnut*, 305 F.3d at 20); *Tuli*, 656 F.3d at 46

such plain error includes doing so *sua sponte*.<sup>106</sup>

The Reporter's Notes to Rule 51 openly suggests that there is a distinction between civil and criminal proceedings for purposes of plain error.<sup>107</sup> To state the obvious, personal liberty and other constitutional rights (such as the protection against ineffective assistance of counsel) are rarely at stake (if not inapplicable) in civil proceedings.<sup>108</sup> Further, some suggest that the adversarial process is sufficient to protect substantial rights in civil cases without the need for plain error review.<sup>109</sup>

Since *Olano*, First Circuit decisions have repeated the mantra that only "blockbuster" errors are within plain error review<sup>110</sup> and that "[a] party's best safeguard against judicial error [remains] a contemporaneous objection [and that] plain error principles cannot be used as a surrogate for the foregone objection."<sup>111</sup> In relying upon and reciting the *Olano* elements, it has also repeatedly emphasized that there must be a clear

(explaining no plain error as sheer conjecture jury would have awarded more if instructed differently); *see also* Hicks v. Avery Drei, LLC., 654 F.3d 739, 744 (7th Cir. 2011) (maintaining plain error "rarely" applied in civil cases); Ayers v. United States, 58 F.2d 607, 609 ("In criminal cases, in order to prevent a miscarriage of justice, a wider discretion to review errors not properly saved or presented for review is recognized."); Crawford v. United States, 212 U.S. 183, 194 (1909) ("In criminal cases courts are not inclined to be as exacting with reference to the specific character of the objection made as in civil cases.").

<sup>106</sup> *See* Day v. McDonough, 547 U.S. 198, 209 (2006) (holding discretion to consider *sua sponte* statute of limitations defense in federal habeas proceeding); *Chestnut*, 305 F.3d at 21 (holding court's failure to recognize precedent and preclude punitive damages, clear and obvious plain error); *see also* Munoz, 671 F.3d at 59-60.

<sup>107</sup> *See* FED. R. CIV. P. 51 advisory committee's notes to 2003 amendments (stating "actual application [should] take[] account of the difference[]" between civil and criminal litigation); *see, e.g.,* Long v. Howard Univ., 550 F.3d 21, 26 n. (D.C. Cir. 2008) ("[W]e follow the notes of the Advisory Committee on Civil Rules in recognizing that Civil Rule 51 is borrowed from Criminal Rule 52 and should be interpreted accordingly while still, of course, taking account of the differences between civil and criminal litigation"); Muldrow v. Re-Direct, Inc., 493 F.3d 160, 168 n.5 (D.C. Cir. 2007) (noting plain error review under Rule 51 requires distinguishing civil from criminal cases); Higbee v. Sentry Ins. Co., 440 F.3d 408, 409 (7th Cir. 2006) (stating same).

<sup>108</sup> *See* Deppe v. Tripp, 863 F.2d 1356, 1361 (7th Cir. 1988); Wycoff v. Grace Cmty. Church Assemblies of God, 251 P.3d 1260, 1269 (Colo. App. 2010) (noting in civil cases "liberty is not at stake and there is no constitutional right to effective counsel"); *see also* Goldfuss v. Davidson, 679 N.E.2d 1099, 1103 (Ohio 1997) ("The plain error doctrine originated as a criminal law concept.").

<sup>109</sup> *See* Gracia v. Bittner, 900 P.2d 351, 357 (N.M. Ct. App. 1995) (discussing fundamental error's limited role in civil cases and counsel's role in presentation to jury).

<sup>110</sup> *United States v. Salley*, 651 F.3d 159, 164 (1st Cir. 2011); *see, e.g.,* *Munoz*, 671 F.3d at 59-60; *United States v. Alverio-Melendez*, 640 F.3d 412, 421 (1st Cir. 2011); *Bielunas v. F/V Misty Dawn*, 621 F.3d 72, 79 (1st Cir. 2010); *United States v. Moran*, 393 F.3d 1, 13 (1st Cir. 2004).

<sup>111</sup> *United States v. Padilla*, 415 F.3d 211, 221 (1st Cir. 2005) ("The plain error doctrine is premised on the assumption that parties must take responsibility for protecting their legal rights and, accordingly, that only the clearest and most serious of forfeited errors should be corrected on appellate review.").



miscarriage of justice, or the error seriously affects “the fairness, integrity or public reputation of judicial proceedings.”<sup>112</sup> “The ‘fairness, integrity, or reputation’ plain-error standard is a flexible one and depends significantly on the nature of the error, its context, and the facts of the case.”<sup>113</sup>

As to any discretion to address unpreserved errors or new issues on appeal outside of the plain error rubric, early First Circuit cases generally

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<sup>112</sup> *Johnson v. United States*, 520 U.S. 461, 467 (1997); see *United States v. DeSimone*, 488 F.3d 561, 570 (1st Cir. 2007) (explaining ruling must be wrong and go to fairness, integrity and public reputation of trial); *Aldogan v. Aldogan*, 89 Fed. App’x 285, 286 (1st Cir. 2004) (stating same); *United States v. Marder*, 48 F.3d 564, 574 (1st Cir. 1995) (applying plain error found small risk error caused miscarriage of justice); *United States v. Figueroa*, 818 F.2d 1020, 1026 (1st Cir. 1987) (finding trial judge’s failure to make formal findings before admitting testimony “marginal,” not plain error).

<sup>113</sup> *United States v. Gandia-Maysonet*, 227 F.3d 1, 6 (1st Cir. 2000) (citing *United States v. Young*, 470 U.S. 1, 16 (1985)). In *Gandia-Maysonet*, for instance, an un-objected to error as to the failure of the trial court to advise under Rule 11 guilty plea colloquy as to what government would have to prove as to intent element of carjacking charge met plain error test. *Id.* at 3. Error was likely enough to have influenced the plea and may have encouraged defendant to plead guilty. *Id.* at 4. Evidence as to intent was indirect and far from overwhelming and thus error prejudicial. *Id.* at 5. Fairness, integrity prong met as plea undercut by error in misstatement of intent element and evidence of intent “thin” as such “we think that the error was not merely ‘harmful’ but also ‘plain’ under *Olano* because it seriously affected the guilty plea’s fairness and integrity. *Id.* at 6; see also *United States v. Hoyle*, 237 F.3d 1, 5 (1st Cir. 2001) (reviewing defendant’s guilty plea for plain error); *Padilla*, 415 F.3d at 228 (Lipez, J., dissenting) (explaining plain error shown). In *Padilla*, the dissent, which agreed the error was not structural but that plain error had been shown, contended that it was meaningless to assess the error under the prejudice prong as no such test could be conducted given that the error was the wrongful delegation by the court to the probation officer as to blood testing. *Id.* at 226. As the prejudice test requires a determination of the probability of the same outcome even if the error had not occurred there was no outcome to consider. *Id.* The dissenters further contended that the public interest prong was met due to the ease of the correction in that appellant was not asking for new trial or sentence only modification of supervised release condition. *Id.* at 228. Also, it was argued that where the obligation of following Congress’ statutory command is minimal the obligation to make the correction is that much greater. *Id.* at 229-30. Congress specifically enacted statute saying it was the responsibility of judges, not probation officers, to set number of tests. *Id.* at 230. According to the dissenter “[t]he fourth step of plain-error review is designed to safeguard the reputation of the courts. Leaving this plain error uncorrected disserves that purpose.” *Id.* See *United States v. Kinsella*, 622 F.3d 75, 83-84 (1st Cir. 2010) (determining no error in prosecutor asking coconspirator on redirect if he remembered who sentenced him); *United States v. Carrasco*, 540 F.3d 43, 53 (1st Cir. 2008) (holding un-objected trial to ruling reversing earlier decision and admitting defendant’s confession plain error). In *Carrasco*, the First Circuit considered whether the district court erred by admitting prior inconsistent statement, despite the defendant’s failure to object at trial. *Id.* at 52-53. Nevertheless, the First Circuit considered the issue on plain error review because “the closeness of the case and the crucial importance of the question of the confession’s admissibility” resulted in substantial rights being affected. *Id.* at 53. It was held that the public interest prong was met because the error “hobbled” the defendant’s Sixth Amendment right to conduct his defense. *Id.* at 54. The First Circuit also stated as to the public interest prong: “Trial judges, like appellate judges, are fallible human beings. Errors are therefore to be expected. But allowing such an error to go uncorrected even though it may well have meant the difference between conviction and acquittal would certainly erode public confidence in the integrity of judicial proceedings.” *Id.*

stated the right with little explanation provided. The wording or formulation of the exception has varied. Some decisions state that the court could notice errors not assigned “whenever in their discretion the circumstances seem to warrant such action”<sup>114</sup> or whenever “failure to do so would defeat the ends of justice.”<sup>115</sup> Others articulated the exception more narrowly, such as where the new ground was “so compelling as [to] virtually insure appellant’s success,”<sup>116</sup> or “where evidence has been newly discovered or where counsel and the trial court has overlooked a governing case or a crucial statute.”<sup>117</sup> A frequently recurring formulation among First Circuit decisions is that the exception applies only “in horrendous cases where a gross miscarriage of justice would occur.”<sup>118</sup>

In 1982, in *United States v. Krynicki*,<sup>119</sup> the First Circuit expressly delineated certain factors or interests that directed the discretion to consider forfeited issues.<sup>120</sup> There, the United States appealed the dismissal of an indictment found by the court to have been untimely under the Speedy Trial Act.<sup>121</sup> On appeal, the government argued that the statute’s requirement that an indictment be returned within 30 days of arrest was inapplicable to the stolen firearms charge because no such charge was pending at time of indictment.<sup>122</sup>

The First Circuit found the case presented “exceptional” circumstances as: (a) the new issue was “purely legal” with the record fully developed, thus not depriving the appellee from an opportunity to introduce relevant evidence; (b) the legal argument presented was “highly persuasive . . . leaving no doubt as to the proper resolution;”<sup>123</sup> (c) the issue

<sup>114</sup> *Prensa Insula De P.R. v. People of P.R.*, 189 F.2d 1019, 1023 (1st Cir. 1951).

<sup>115</sup> *Palo Blanco Fruit Co. v. Palo Alto Orchards Co.*, 195 F.2d 90, 93 (1st Cir. 1952).

<sup>116</sup> *Dobb v. Baker*, 505 F.2d 1041, 1044 (1st Cir. 1974) (stating while new contention not frivolous it was likewise not “self-evident”); *Johnston v. Holiday Inns, Inc.*, 595 F. 2d 890, 894 (1st Cir. 1979) (finding failure to consider would not cause miscarriage of justice and appeal not insuring success); see also *Palo Blanco Fruit Co.*, 195 F.2d at 93 (1st Cir. 1952) (“It is an established practice for appellate courts to consider matters not raised below when failure to do so would defeat the ends of justice. Thus we would notice a statute, or a rule of decisional law, or perhaps some other matter clearly apparent in the record, calling for reversal, even though the statute, or legal rule, or other matter, were not presented to the court below, or even argued to us on appeal.”).

<sup>117</sup> *Bergeron v. Mansour*, 152 F. 2d 27, 32 (1st Cir.1945).

<sup>118</sup> *Johnston*, 595 F.2d at 894 (quoting *Newark Morning Ledger Co. v. United States*, 539 F.2d 929, 932 (3d Cir. 1976)).

<sup>119</sup> 689 F.2d 289 (1st Cir. 1982).

<sup>120</sup> See *id.* at 291.

<sup>121</sup> See *id.* (citing 18 U.S.C. 3161(b)).

<sup>122</sup> *Id.*

<sup>123</sup> *Id.* at 292 (“Given the compelling nature of the government’s argument, preliminary examination of this legal issue by the trial court would not benefit either the court or the parties appreciably.”).

“is almost certain to arise in other cases”; and (d) declining to reach the issue would result in a “miscarriage of justice.”<sup>124</sup> As to the “miscarriage of justice” factor, the First Circuit stated that “[b]oth the government and the public have a legitimate and significant interest in prosecuting suspected criminals” and that since the Act did not bar the government from prosecuting a defendant on a particular count, “justice requires that this court correct the lower court’s error” even though not properly preserved.<sup>125</sup>

The *Krynicky* factors were reiterated again in *United States v. LaGuardia*<sup>126</sup> with the First Circuit further suggesting that where the issue is of constitutional dimension, it may also further militate toward exercise of the discretion.<sup>127</sup> Subsequent decisions referenced the exception to exist where the omitted argument is highly persuasive and declining to reach the issue would result in “a miscarriage of justice.”<sup>128</sup>

In 1995, the First Circuit expanded upon the *Krynicky* factors in *National Association of Social Workers v. Harwood*,<sup>129</sup> which is the court’s most recent definitive statement of the criteria for “exceptional circumstances” discretion. There, the court listed six factors: (1) whether the failure to raise the issue deprived the lower court of “useful fact-finding”; (2) whether the new issue is of “constitutional magnitude”; (3) whether the omitted argument is “highly persuasive,” particularly where failing to address it “threatens a ‘miscarriage of justice’”; (4) whether there is any special prejudice or inequity to the opposing party if the issue is addressed; (5) whether the omission was inadvertent as opposed to deliberate; and (6) whether the omitted issue “implicates matters of great public moment.”<sup>130</sup> The public interest factor was stated to be “perhaps [the] most salient”<sup>131</sup> with it subsequently reiterating, as with plain error, that this “exceptional circumstances” discretion be exercised far and few between and only if “the equities heavily preponderate in favor of such a step.”<sup>132</sup>

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<sup>124</sup> *Id.* at 292.

<sup>125</sup> *Id.*

<sup>126</sup> 902 F.2d 1010 (1st Cir. 1990).

<sup>127</sup> *Id.* at 1013 (“[I]f the defendants’ constitutional claim has merit, it would be a rank miscarriage of justice to allow their sentences to stand”).

<sup>128</sup> *Correa v. Hosp. San Francisco*, 69 F.3d 1184, 1196 (1st Cir. 1995); *Am. Auto. Mfrs. Ass’n v. Comm’r of Mass. Dep’t of Envtl. Prot.*, 31 F.3d 18, 23-24 (1st Cir. 1994); *United States v. Slade*, 980 F.2d 27, 31 (1st Cir. 1992).

<sup>129</sup> 69 F.3d 622 (1st Cir. 1995).

<sup>130</sup> *Id.* at 627-28.

<sup>131</sup> *Id.* at 628 (“Sixth-and perhaps most salient-the omitted issue implicates matters of great public moment”).

<sup>132</sup> *Id.* at 627, 629; *In re Net-Velasquez*, 625 F.3d 34, 41 (1st Cir. 2010) (noting criteria

The list would not appear to be all-inclusive with the First Circuit, in certain other cases, noting such factors as whether or not failure to consider the issue would “prolong an already protracted litigation” or is an issue likely to arise in other cases.<sup>133</sup> In addition, the amount of resources expended by the parties,<sup>134</sup> and whether invoking the raise or lose rule would then force the court to address a preserved argument that is difficult with no clear answer, have been referenced as well.<sup>135</sup>

*D. Massachusetts Discretion: Substantial Risk of a Miscarriage of Justice and Manifest Injustice*

The power of Massachusetts appellate courts to address, in both civil and criminal matters, errors or issues not previously raised or preserved has long-standing roots. As early as 1833, for instance, Chief Justice Shaw of the Supreme Judicial Court referenced the court’s discretionary authority in terms of both “plain” and “manifest” error.<sup>136</sup> There, the appellant failed to make a request for improvements to real estate in a civil land recovery action, with the Supreme Judicial Court allowing the contention to be addressed on appeal based on the court’s “general authority, to prevent the injurious consequences proceeding from accident and misfortune . . . we know no limit to the power of the Court so to interpose, where the plain and manifest dictates of justice require it.”<sup>137</sup>

This sentiment was expressed somewhat differently in a 1863 decision where it was held that the general rule of raise or lose “can be departed from only when it appears there has been a mistake or misapprehension or misapplication of legal principles to such an extent as clearly to show that a case has resulted in a mistrial.”<sup>138</sup> The Supreme Judicial Court described the discretionary power more directly in

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aiding in identifying exceptional cases); *N.Y. State Dairy Foods Inc. v. Ne. Dairy Compact Comm’n*, 198 F.3d 1, 11 n. 9 (1st Cir. 1999) (stressing importance of extraordinary circumstances to justify departure from raise or waive rule).

<sup>133</sup> *In re Two Appeals Arising Out of San Juan Dupont Plaza Hotel Fire Litig.*, 994 F.2d 956, 961 (1st Cir. 1993).

<sup>134</sup> *Nat’l Org. for Marriage, Inc. v. McKee*, 669 F.3d 34, 43 (1st Cir. 2012).

<sup>135</sup> *Gencarelli v. UPS Capital Bus. Credit*, 501 F.3d 1, 8 (1st Cir. 2007).

<sup>136</sup> *Cutler v. Rice*, 31 Mass. 494, 454 (Mass. 1833); *see also* *Noyes v. Noyes* 112 N.E. 850, 853 (Mass. 1916) (“It is not necessary now to decide whether, in cases where it appears to be necessary to prevent a miscarriage of justice, a decisive or pertinent point not theretofore raised may be acted on by this court in order to accomplish a right result in accordance with the law.”); *Greene v. Cronin*, 50 N.E.2d 36, 37 (Mass. 1943) (stating same); *Livermore v. Boutelle*, 77 Mass. 217, 221 (Mass. 1858) (finding claim made after verdict too late, despite court’s discretion to grant new trial).

<sup>137</sup> *Cutler*, 31 Mass. at 495.

<sup>138</sup> *Bond v. Bond*, 89 Mass. 1, 6 (Mass. 1863).

*Carangias v. Market Men's Relief Ass'n*,<sup>139</sup> in stating that, "[i]t is a general principle that the court undertakes to prevent any miscarriage of justice so far as permissible under the law,"<sup>140</sup> while also noting the court "ought not to be burdened with the unnecessary investigation of questions of law."<sup>141</sup>

In 1923, in *Commonwealth v. Dascalakis*,<sup>142</sup> the Supreme Judicial Court reiterated the established power to correct unpreserved errors *in both* civil and criminal proceedings "in appropriate instances," and particularly, that "the court has and will exercise the power to set aside a verdict in order to prevent a miscarriage of justice when a decisive or pertinent point affecting substantial rights has not been raised by exception at the trial."<sup>143</sup>

Massachusetts does not utilize a "plain error" rule<sup>144</sup> but operates, in criminal cases, under either a "substantial risk of miscarriage of justice" standard for non-capital cases or "a substantial likelihood of a miscarriage of justice standard" in capital cases.<sup>145</sup> As to capital cases, the review is by statute.<sup>146</sup>

<sup>139</sup> 199 N.E. 924 (Mass. 1936).

<sup>140</sup> *Id.* at 925.

<sup>141</sup> *Id.*

<sup>142</sup> 140 N.E. 470 (1923), *abrogated by* *Commonwealth v. Bly*, 830 N.E.2d 1048 (Mass. 2005).

<sup>143</sup> *Id.* at 476; *see also* *Anderson v. Beacon Oil Co.*, 183 N.E. 152, 153 (Mass. 1932) (citing *Noyes v. Noyes*, 112 N.E. 850, 853 (Mass. 1916)); *O'Brien v. Shea*, 95 N.E. 99, 101 (Mass. 1911) (noting Court's "possible extraordinary power . . . to prevent miscarriage of justice as to points not formally taken"); *Herrick v. Waitt*, 113 N.E. 205, 205 (Mass. 1916) (noting failure to make exception to charge constituted waiver). The court stated that "[i]t may not be amiss to add that an examination of the record does not disclose any error prejudicial to the substantial rights of the defendant." *Id.*

<sup>144</sup> *Commonwealth v. Lemar*, 492 N.E.2d 105, 106 (Mass. App. Ct. 1986) ("Our criminal rules have no category of 'plain error.'"); *see* *Commonwealth v. Freeman*, 227 N.E.2d 3, 9 (Mass. 1967) (noting test for review is whether there is substantial miscarriage of justice); *Commonwealth v. Lombardo*, 313 N.E.2d 140, 143 (Mass. App. Ct. 1974) (refusing to adopt plain error rule and reiterating substantial risk of miscarriage of justice standard); *Flood v. Southland Corp.*, 616 N.E.2d 1068, 1073 n.5 (Mass. 1993) (noting there might be a plain error exception to Rule 51) (citing *Smith v. Mass. Inst. of Tech.*, 877 F.2d 1106, 1110 (1st Cir. 1989)). "Plain error" review does arise in other contexts in Massachusetts such as review of petitions under MASS. GEN. LAWS. ch. 211, §3 (2011). *See* *Care & Protection of Sophie*, 865 N.E.2d 789, 795 (Mass. 2007) ("Absent a clear abuse of discretion or plain error of law, [the Supreme Judicial Court] will not disturb the order of a single justice denying relief under G.L. c. 211, §3.") (quoting *Adoption of Iris*, 695 N.E.2d 645, 648 (Mass. 1998)); *Teele v. Boston*, 42 N.E. 506, 507 (Mass. 1896) (noting appellate court will not order new trial unless "plain error"), *disavowed on other grounds*, *Henry v. Brown*, 495 A.2d 324 (Me. 1985).

<sup>145</sup> *Commonwealth v. Bly*, 830 N.E.2d 1048, 1055 (Mass. 2005).

<sup>146</sup> *See* MASS. GEN. LAWS ch. 278, §33E (2010). This statute requires the Supreme Judicial Court to review all appeals of first degree murder convictions including all claimed errors whether preserved or unpreserved. *Id.* The statute applies to capital cases which is defined as a case in which the defendant was tried in an indictment for murder in the first degree and was convicted of murder in the first or second degree. *See* *Commonwealth v. Baker*, 190 N.E.2d 555, 556-57 (Mass. 1963). Section 33E review requires the Supreme Judicial Court to "broadly

For non-capital cases, review is under the *Freeman* standard.<sup>147</sup> This “substantial risk of miscarriage of justice” standard was initially equated to the substantial possibility that the defendant was innocent.<sup>148</sup> That is, in order to show “miscarriage of justice,” there had to be a “genuine question of guilt or innocence”; the error was sufficiently significant to have altered the result of the trial; and the failure to raise the issue before was not a tactical decision by counsel.<sup>149</sup> Under this view, “there is a substantial risk of a miscarriage of justice if the evidence and the case as a whole . . . [leaves] us with a serious doubt that the defendant[‘s] guilt had been fairly adjudicated.”<sup>150</sup> As such, it was deemed (and remains so), a “rarely used power”<sup>151</sup> applicable only to “extraordinary cases.”<sup>152</sup>

In 1999, in *Commonwealth v. Alphas*,<sup>153</sup> the Supreme Judicial Court backed off any suggestion that Massachusetts follows a guilt-based definition for miscarriage of justice, opting instead to looking at the effect of the error on the verdict, i.e., an error creates a substantial risk of a

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consider the whole case on the law and the facts and “[u]pon such consideration the court may, if satisfied that the verdict was against the law or the weight of the evidence, . . . or for any other reason that justice may require” a new trial or the direction of a lesser degree of guilt. *Commonwealth v. Cole*, 402 N.E.2d 55, 60 (Mass. 1980) (alterations in original) (citing MASS. GEN. LAWS ch. 278, §33E)). While reversible error under Section 33 for unpreserved errors turns on whether there is a showing of “grave prejudice or substantial likelihood that a miscarriage of justice has occurred,” the Supreme Judicial Court has noted that review is broader than review under the substantial risk of miscarriage of justice standard. *Id.* “The search . . . is a more general and an obligatory one for a result that may be ‘more consonant with justice.’” *Id.* (citations omitted); *Commonwealth v. Richmond*, 399 N.E.2d 1069, 1073 (Mass. 1980) (stating reversal only upon showing of grave prejudice or substantial likelihood miscarriage of justice occurred). Section 33E “operates as a type of ‘safety valve’ by ensuring review as to all aspects of cases regardless of the absence of claim of error.” *Commonwealth v. Brown*, 380 N.E.2d 113, 120 (Mass. 1978); see also William J. Meade, *The Death of Resurrection Rule*, 90 MASS. L. REV. 1, 41 (discussing 33E origins and Sacco cases).

<sup>147</sup> See *Freeman*, 227 N.E.2d at 8-9 (explaining review standard is substantial risk of miscarriage of justice); see also *Commonwealth v. Conroy*, 133 N.E.2d 246, 250 (Mass. 1956).

<sup>148</sup> See *Commonwealth v. Amirault*, 677 N.E. 2d 652, 671 (Mass. 1997); *Commonwealth v. Miranda*, 490 N.E.2d 1195, 1202 (Mass. App. Ct. 1986).

<sup>149</sup> *Miranda*, 490 N.E.2d at 1202; see also Jonathan P. Hunter, Note, *Miscarriage of Justice: Appellate Review of Unpreserved Constitutional Objections to the Admission of Evidence in Massachusetts*, 44 SUFFOLK U. L. REV. 525, 534-35 (2011) (discussing *Miranda* and *Amirault* version of miscarriage of justice standard).

<sup>150</sup> *Amirault*, 677 N.E. 2d at 671; see also *Commonwealth v. Eason*, 681 N.E.2d 863, 875 (Mass. App. Ct. 1997) (Armstrong, J., dissenting) (“[A]pplying miscarriage [of justice] analysis to a plainly guilty defendant . . . cut[s] the doctrine loose completely from its historical moorings”), *rev’d on other grounds*, 694 N.E.2d 1264 (Mass. 1998).

<sup>151</sup> *Amirault*, 677 N.E.2d at 670 (“Our power to upset a completely adjudicated conviction on this ground is an extraordinary one which should only be exercised in the most unusual circumstances.”).

<sup>152</sup> *Fogarty v. Commonwealth*, 546 N.E.2d 354, 357 (Mass. 1989) (quoting *Commonwealth v. Harrington*, 399 N.E.2d 475, 478 (Mass. 1980)).

<sup>153</sup> 712 N.E.2d 575 (Mass. 1999).

miscarriage of justice unless it did not “materially influence[ ]” the guilty verdict.”<sup>154</sup> This generated disagreement within the court with Justices Fried and Lynch dissenting, concerned that the standard did not mark any appreciable distinction from harmless error and undercut the rule requiring proper preservation.<sup>155</sup> In response, Justice Greaney, in a concurring opinion, stated that the guilt-based approach usurped the jury’s function and that the applicable burden of proof adequately differentiated harmless error from the substantial risk of miscarriage of justice standard, adding further that the two standards had different purposes within the criminal justice system.<sup>156</sup>

The present Massachusetts formulation for unpreserved errors thus

<sup>154</sup> *Id.* at 580; *Commonwealth v. Randolph*, 780 N.E.2d 58, 67 (Mass. 2002) (stating the same).

<sup>155</sup> *Alphas*, 712 N.E.2d at 586-590 (Friend, J., concurring). According to Justice Fried:

When there has been such a waiver, a miscarriage of justice has only one meaning: that there is a substantial risk that an innocent person has been convicted . . .

It literally makes no sense to proclaim a doctrine of waiver-to insist, as our rules of criminal procedure clearly do, that a defendant make his objections . . . at trial-and then to consider whether there should be a new trial [based] on a [unpreserved error]. The rule the court proclaims today . . . threatens finality and the orderly procedure that the rule of waiver is intended to enforce . . . . The court’s formulation makes the difference between the miscarriage of justice standard and the harmless error standard . . . one of such imperceptible degree as to provide no discipline at all. A rational system relies not on such un-communicable and therefore arbitrary distinctions of degree-distinctions that effectively leave trial judges and the courts that review them at sea on an ocean of discretion-but on distinctions of kind, distinctions capable of statement, review, and consistency . . . . Although the court says that, in affirming these convictions, it is asking what effect the error had on an actual jury, this is an after-the-fact speculation about the effect on a hypothetical jury. It is mere wordplay to suggest that such an inquiry respects the role of an actual jury while the guilt or innocence standard usurps that role. Except for ineffable distinctions of degree, the reviewing court’s process of judgment is the same-but the guilt or innocence standard describes that process more candidly. The court’s reference to the strength of the Commonwealth’s case confirms my view.

*Id.* at 586-87.

<sup>156</sup> *Id.* at 584-86. (Greaney, J., concurring). According to Justice Greaney:

Appellate courts do not sit as triers of fact. Any test concerning reversible error that requires an appellate court to determine whether a defendant is actually innocent is conceptually flawed because such a test converts the appellate function into the jury function in violation of their different purposes. I do not accept recent pronouncements of Federal law that may suggest the contrary . . . . [The harmless error test] is quantitatively more favorable to a defendant than the substantial risk of a miscarriage of justice test . . . . It is enough to state that the tests differ in their substance, and each serves a discrete function in the criminal justice process.

*Id.*; see also *Commonwealth v. Lewis*, 960 N.E.2d 324, 330 n.14 (Mass. App. Ct. 2012) (reiterating Justice Greaney’s argument in *Alphas*).

reduces to four questions: (1) Was there error; (2) Was the defendant prejudiced by the error; (3) Considering the error in the context of the entire trial, would it be reasonable to conclude that the error materially influenced the verdict; and (4) Can the appellate court infer from the record that the failure to object or raise a claim of error at an earlier time was not a reasonable tactical decision.<sup>157</sup> Some decisions have suggested that the error must be “serious and obvious.”<sup>158</sup> Further, in determining whether the error materially influenced the verdict, the strength of the case without the error and the nature of the error, including “whether sufficiently significant in the context of the trial to make plausible an inference that the jury’s result might have been otherwise but for the error,” are considered.<sup>159</sup>

Similar to plain error, this standard is considered a “default” standard with errors of this magnitude extraordinary events whereby relief is seldom granted. The appellate authority to rectify such error is discretionary and is a power of the court, not a right of the defendant.<sup>160</sup>

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<sup>157</sup> *Randolph*, 780 N.E.2d at 677 (citations omitted); see *Alphas*, 712 N.E.2d at 580; (1999); *Commonwealth v. Russell*, 787 N.E.2d 1039, 1043 (Mass. 2003); *Commonwealth v. Randolph*, 780 N.E.2d 58, 64-65 (Mass. 2002); see also *Commonwealth v. Harrington*, 399 N.E.2d 475, 478 (Mass. 1980) (stating when trial judge may use discretionary power to give waiver relief). The court in *Harrington* stated that the discretionary power should only be “exercised only in those extraordinary cases where, upon sober reflection, it appears that a miscarriage of justice might otherwise result.” *Id.*

<sup>158</sup> *Commonwealth v. Pares-Ramirez*, 511 N.E.2d 344, 348 (Mass. 1987) (requiring error under review to be “obvious” for the first time). The Court in *Freeman* did not mention anything about the “error” needing to be obvious with it directing the inquiry as to the “type and seriousness” of the error. *Commonwealth v. Freeman*, 227 N.E.2d 3, 9 (Mass. 1967).

<sup>159</sup> *Alphas*, 712 N.E.2d at 580 (quotations omitted) (quoting *Commonwealth v. Miranda*, 490 N.E.2d 1195, 1202 (Mass. 1986)). Justice John Greaney expounded on this standard in the criminal context noting that “[e]ach case on appeal will have its own peculiar characteristics, and no all-encompassing checklist can be developed.” *Alphas*, 712 N.E.2d at 585 (Greaney, J., concurring). Such reversible error is more likely to be found where there was good reason for the lack of objection or where the error would not have been remedied by the trial judge even if raised. *Id.* Counterweights include a determination that the error could have been readily corrected by a timely objection or where an objection may have led the government to introduce additional evidence on the issue. *Id.* According to Justice Greaney: “to create a substantial risk of a miscarriage of justice, the error must be serious when considered in terms of its injurious effect or influence on the jury’s verdict.” *Id.* The burden is on the defendant and there must be “substantial agreement by the appellate panel that a new trial is necessary to correct a conviction that leaves the feeling that an injustice has occurred and to assure that trials are fundamentally fair.” *Id.* at 585-86.

<sup>160</sup> *Commonwealth v. Eason*, 681 N.E.2d 863, 874 (Mass. App. Ct. 1997) (Armstrong, J., dissenting) (explaining historically discretion is right of court, not defendant), *rev’d on other grounds*, 694 N.E.2d 1264 (Mass. 1998); see *Randolph*, 780 N.E.2d at 66 (citing *Commonwealth v. Amirault*, 677 N.E.2d 652, 674 (Mass. 1997)). Prior to 2005, Massachusetts applied a “resurrection” rule as to unpreserved errors raised in pre-appeal post trial motion. See *Commonwealth v. Bly*, 830 N.E.2d 1048, 1056-57 (Mass. 2005); *Commonwealth v. Hallet*, 694 N.E.2d 845, 846 (Mass. 1998), *abrogated by Commonwealth v. Bly*, 830 N.E.2d 1048 (Mass. 2005). Under “resurrection,” a trial judge had the discretion when considering a pre-appeal



As to civil matters, Massachusetts does not operate, at least expressly, under the “plain error” default standard and has not otherwise expressly held that the same “substantial risk of a miscarriage of justice” standard for criminal appeals applies to civil cases for either unpreserved errors or new issues on appeal.<sup>161</sup> Massachusetts appellate cases have, nonetheless, proceeded to utilize different nomenclature as to the standard applicable to review of unpreserved error in civil cases including reference to there being “no plain error which would result in manifest injustice,”<sup>162</sup> loss of “fundamental justice,”<sup>163</sup> “inconsistent with substantial justice,”<sup>164</sup> or “where injustice might otherwise result.”<sup>165</sup>

“Manifest injustice” has largely been referenced as the default standard as to appellate challenges to unpreserved jury instruction claims.<sup>166</sup> Reference to reviewing an otherwise forfeited issue under the “inconsistent with substantial justice” language has arisen in appellate challenges to the sufficiency of the evidence and/or in failing to renew

motion for new trial to “resurrect” issues that were not properly preserved at trial. See *Commonwealth v. Dascalakis*, 140 N.E. 470, 476 (Mass. 1923), *abrogated by Commonwealth v. Bly*, 830 N.E.2d 1048 (Mass. 2005). The difficulty with the rule was that it ran counter to the contemporaneous objection obligation and initially arose when there was no established review standard for unpreserved errors. In 2005, in *Commonwealth v. Bly*, the Supreme Judicial Court discarded the resurrection rule holding that it was no longer necessary given the default standards of review for both capital and non-capital cases. *Bly*, 830 N.E.2d at 1056.

<sup>161</sup> See *In re Blake*, 917 N.E.2d 260, 2009 WL 4110803, at \*1 n.1 (Mass. App. Ct. 2009) (unpublished table decision) (leaving unresolved whether unpreserved objections in sexually dangerous proceedings always, sometimes or never waived). But see *Commonwealth v. Mohamed*, 929 N.E.2d 358, 2010 WL 2629870, at \*2 (Mass. App. Ct. 2010) (unpublished table decision) (“plain error may be addressed even when a claim would otherwise have been waived”) (citing *Squibb v. R.M. Bradley & Co.*, 661 N.E.2d 1352, 1353 (Mass. App. Ct. 1996)); *Commonwealth v. Johnson*, 918 N.E.2d 876, 879 (Mass. App. Ct. 2010) (stating the same), *rev’d on other grounds* 965 N.E.2d 176 (Mass. 2012).

<sup>162</sup> *Squibb*, 661 N.E.2d at 1353; *Michnik-Zilberman v. Gordon’s Liquor, Inc.*, 453 N.E.2d 430, 433 (Mass. 1983); see *Rotkiewicz v. Sadowsky*, 730 N.E.2d 282, 287 n.3 (Mass. 2000) (noting if claim of error about instruction not preserved, review limited to determining “manifest injustice”); *Hatton v. Meade*, 502 N.E.2d 552, 555 (Mass. App. Ct. 1987); *MCS Enters., Ltd. v. Henry*, 2006 Mass. App. Div. 47, 2006 WL 870733, at \*2 (2006) (refusing to consider legal arguments not raised at summary judgment). The arguments as argued would not require reversal, and therefore, no manifest injustice. See *Williams v. Birhle*, 810 N.E.2d 1291, 2004 WL 1516471, at \*5 (Mass. App. Ct. 2004) (unpublished table decision) (basing *inovo* appeal on new grounds for “plain error” which without notice would miscarry justice).

<sup>163</sup> *Normand v. Dir. Of Office of Medicaid*, 933 N.E.2d 658, 665 (Mass. App. Ct. 2010) (explaining court would address unpreserved issue due to “fundamental justice”).

<sup>164</sup> *Michnik-Zilberman*, 453 N.E.2d at 433; see also *Normand*, 933 N.E.2d at 665; *White v. White*, 662 N.E.2d 230, 233 (1986).

<sup>165</sup> *Cruz v. Comm’r of Pub. Welfare*, 478 N.E.2d 1262, 1264 (1985); *Castiglione v. Castiglione*, 866 N.E. 2d 438, 2007 WL 1437695, at \*1 n.2 (Mass. App. Ct. 2007) (unpublished table decision).

<sup>166</sup> *Rotkiewicz v. Sadowsky*, 730 N.E.2d 282, 287 n.3 (Mass. 2000).

motions for directed verdict.<sup>167</sup> In *Michnik-Zilberman*,<sup>168</sup> for example, the appellant failed to have properly preserved a challenge to the sufficiency of the evidence supporting the negligent verdict but had failed to renew the motion for directed verdict at the close of its case.<sup>169</sup> The Supreme Judicial Court proceeded to review the claim, addressing whether there was any error and, if so, if it was inconsistent with substantial justice.<sup>170</sup>

The same “inconsistent with substantial justice” language has also been referenced in other cases addressing unpreserved errors as well.<sup>171</sup> For instance, in *White v. White*,<sup>172</sup> the trial judge addressed the propriety of a private interview and session with a major witness in a custody and visitation proceeding. The trial judge conducted the private session without any counsel for either side present, arguably preventing any effective confrontation or cross-examination. The Massachusetts Appeals Court found that although the issue was not preserved, “justice weigh[ed] in favor of our considering the issue.”<sup>173</sup> The court reasoned that the raise or waive rule should not apply, as the ultimate decision below was based “in large part” on the testimony in the private un-objected to session.<sup>174</sup> The court applied the two prong inquiry associated with miscarriage of justice review; i.e., was there error, and if so, did the error require a finding that the decree was “inconsistent with substantial justice.”<sup>175</sup> The practice was found to be in error, and because the visitation and custody findings were based on testimony received in the private session, the appeals court

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<sup>167</sup> *Michnik-Zilberman*, 453 N.E.2d at 433; *Squibb*, 661 N.E.2d at 1353; see also *Szalla v. Locke*, 639 N.E.2d 1096, 1099 (1994), *vacated in part on other grounds* 657 N.E.2d 1267 (Mass. 1995); *Upper Cape Realty Corp. v. Nuovo*, 800 N.E.2d 347, 2003 WL 22956963, at \*1 (Mass. App. Ct. 2003) (noting power to order new trial notwithstanding failure to renew motion to prevent manifest injustice) (unpublished table decision) (citing *Hatton v. Meade*, 502 N.E.2d 552, 555 (Mass. App. Ct. 1987)); *Jamgochian v. Dierker*, 681 N.E.2d 1180, 1184 (1997) (noting appellant requesting review of evidence sufficiency despite no objection complained on appeal under *Michnik-Zilberman*).

<sup>168</sup> 453 N.E.2d 430 (1983).

<sup>169</sup> *Id.* at 432.

<sup>170</sup> *Id.*; *Michnik-Zilberman* is somewhat notable in that it cited Rule 61 harmless error in a case which the argument was not preserved suggesting to one commentator that Rule 61 “maybe, if not a license for working whatever might appear to be ‘substantial justice’ at least a nod in that direction.” J. Smith & H. Zobel, MASS PRACTICE SERIES: RULES PRACTICE, Vol. 7 §46.2, 97 (2007).

<sup>171</sup> See, e.g., *Springfield v. Dep’t of Telecomm. & Cable*, 931 N.E.2d 942, 950 (Mass. 2010); *Jamgochian*, 681 N.E.2d at 1184; *White v. White*, 662 N.E.2d 230, 232 (Mass. 1996); *Cruz v. Comm’r of Pub. Welfare*, 478 N.E.2d 1262, 1264 (Mass. 1985); *McLeod’s Case*, 450 N.E.2d 612, 614 (Mass. 1983); *Rafferty v. Franklin*, 826 N.E.2d 794, 2005 WL 1106690, at \*2 (Mass. 2005) (unpublished table decision).

<sup>172</sup> 662 N.E.2d 230 (Mass. App. Ct. 1996).

<sup>173</sup> *Id.* at 232.

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

reversed and remanded for a new trial.<sup>176</sup>

Similar to the First Circuit, although less refined, Massachusetts decisions have found exception to the general rule of forfeiture as to new issues on appeal to exist in certain circumstances that appear to be in addition to any miscarriage of justice default standard.<sup>177</sup> *Hormel's* statement that "rules of practice are designed to promote justice not defeat them" has been cited in holding that review of unpreserved errors or new issues or arguments is permissible in "exceptional cases or particular circumstances."<sup>178</sup> Both the Supreme Judicial Court and the Massachusetts Appeals Court have proceeded to allow review where the issue is one of law, where it has been fully briefed on appeal,<sup>179</sup> and where there is no prejudice to the opposing party as to the failure to present the issue below.<sup>180</sup> In certain decisions, the Massachusetts courts have attempted to provide a listing<sup>181</sup> which has included "where injustice might otherwise result because of a limited and imperfect opportunity to present [the issue below],"<sup>182</sup> "when it is necessary to reach such an issue in order to provide

<sup>176</sup> *Id.* MASSACHUSETTS PROPOSED RULE OF EVIDENCE 103(d) limits plain error review to criminal not civil cases. Proposed rule 103(d) Substantial Risk of a Miscarriage of Justice in Criminal Cases provides: "[n]othing in this section precludes taking notice of plain errors in criminal cases, although not brought to the attention of the trial judge, if such error constitutes a substantial risk of a miscarriage of justice."

<sup>177</sup> See *Springfield v. Dep't of Telecomm. & Cable*, 931 N.E.2d 942, 950 (Mass. 2010) (stating appellate court may consider legal question not raised in exceptional cases or for injustice). A number of Massachusetts decision have cited and referenced *Hormel*. See *Normand v. Dir. of Medicaid*, 933 N.E.2d 658, 665 (Mass. App. Ct. 2010).

<sup>178</sup> *White v. White*, 662 N.E.2d 230, 232 (Mass. App. Ct. 1996).

<sup>179</sup> *Police Dept. of Bos. v. Fedorchuk*, 723 N.E.2d 41, 44 (Mass. App. Ct. 2000); cf. *In re Dutil*, 768 N.E.2d 1055, 1066 (Mass. 2002) (explaining exercise of discretion not appropriate where party has not fully briefed the issue).

<sup>180</sup> See *Hoffer v. Comm'r of Correction*, 589 N.E.2d 1231, 1235 (Mass. 1992); *Cruz v. Comm'r of Pub. Welfare*, 478 N.E.2d 1262, 1264 (Mass. 1985); *Albert v. Mun. Court of City of Bos.*, 446 N.E.2d 1385, 1387 (Mass. 1983) (stating authority unfairly prejudiced on rehearing because necessity of locating witnesses years after events); *Fortier v. Town of Essex*, 752 N.E.2d 818, 822 (Mass. App. Ct. 2001), *overruled on other grounds*, *Morrissey v. New Eng. Deaconess Ass'n-Abundant Life Communities, Inc.*, 940 N.E.2d 391 (Mass. 2010); *Kelly v. Kelly*, 735 N.E.2d 1276, 2000 WL 1477107, at \*1 (Mass. App. Ct. 2000) (unpublished table decision). In *McLeod's Case*, the Supreme Judicial Court reviewed whether the beneficiary to workmen compensation benefits was entitled to a higher rate even though not raised below as it was determined that the issue was purely one of law, there would be no undue prejudice to the insurer, and as the failure to address this issue would allow the lower court determination to stand and thus deprive the claimant benefits to which she was entitled. *McLeod's Case*, 450 N.E.2d 612, 614 (Mass. 1983); see also *Fedorchuk*, 723 N.E.2d at 44 (finding although statutory based argument raised first on appeal, court would consider as fully briefed).

<sup>181</sup> See *Gaw v. Sappett*, 816 N.E.2d 1027, 1032 (Mass. App. Ct. 2004); *White*, 662 N.E.2d at 232.

<sup>182</sup> *Id.* at 1032; see also *Pryor v. Holidays Inns, Inc.*, 517 N.E.2d 472, 474 (Mass. 1988); *McLeod's Case*, 450 N.E.2d at 614 (stating court may consider question of law not raised below "where injustice might otherwise result"); *Krock v. Robinson*, 806 N.E.2d 127, 2004 WL 690979,

guidance to the lower courts,”<sup>183</sup> particularly where the result is unchanged;<sup>184</sup> when an issue important to the public interest has been raised,<sup>185</sup> or where the issue is novel.<sup>186</sup>

#### *E. Distinction Between Massachusetts and the First Circuit*

The fundamental difference between the First Circuit (plain error) and Massachusetts (substantial risk of miscarriage of justice) for unpreserved issues is that Massachusetts does not have the discretionary public interest prong and otherwise does not tie the default standard to actual innocence or guilt (i.e., miscarriage of justice). If the unpreserved error materially influenced the verdict, it constitutes reversible error (substantial risk of miscarriage of justice).<sup>187</sup> Under federal practice, not only must there be error that affected the outcome, but it must either result in the conviction of an actually innocent defendant or “seriously affect the fairness, integrity, or public reputation of judicial proceedings.”<sup>188</sup> Also, the First Circuit has held that plain error applies to civil cases (although

at \*1 n.4 (Mass. App. Ct. 2007) (unpublished table decision).

<sup>183</sup> *Gaw*, 816 N.E.2d at 1032 (citing *In re R.I. Grand Jury Subpoena*, 605 N.E.2d 840, 845 (Mass. 1993)); see *In re Adoption of Ernst*, 831 N.E.2d 406, 2005 WL 1773697, at \*2 (Mass. App. Ct. 2005) (unpublished table decision) (finding no exceptional circumstances because reviewing issue not needed to “provide assistance for other cases”); *Gurry v. Bd. of Pub. Accountancy*, 474 N.E.2d 1085, 1090 (Mass. 1985) (considering claim not raised in administrative proceeding to provide guidance to board and rule-making authorities); see also *Care & Protection of Georgette*, 768 N.E.2d 549, 553 n.6 (Mass. App. Ct. 2002) (“This is not such an exceptional case . . . that in our discretion it is worthy of review to avoid injustice or provide assistance for other cases.”);

<sup>184</sup> *Mullins v. Pine Tree Manor Coll.*, 449 N.E. 2d 331, 341 (Mass. 1983) (considering new issues that were “of some public importance” where result reached unchanged); *Royal Indem. Co. v. Blakely*, 360 N.E.2d 864, 866 (“the question presented has application to other persons in the Commonwealth and the result we reach is not changed by our consideration of the point . . .”).

<sup>185</sup> *Gaw*, 816 N.E.2d at 1032 (citing *McLeod’s Case*, 450 N.E.2d 612, 615 (Mass. 1983)); see also *Fillipone v. Mayor of Newton*, 467 N.E. 2d 182 (Mass. 1984) (considering validity of home rule ordinance, an issue only raised on appeal for public interest); *Wellesley Coll. v. Attorney Gen.*, 49 N.E. 2d 220, 226 (Mass. 1943) (considering issue because of public interest and uncertainty of laws for educational and charitable institutions); *Maslab Liquidation Trust v. Commonwealth*, 806 N.E.2d 947, 948 n.1 (Mass. App. Ct. 2004); *Palmer v. Murphy*, 677 N.E.2d 247, 251-52 (Mass. App. Ct. 1997) (noting general rule exceptions if issue jurisdictional, public interest, or injustice would result if not addressed).

<sup>186</sup> *McCallum v. Sherillo*, 806 N.E.2d 969, 2004 WL 895787, \*2 (Mass. App. Ct. 2004) (unpublished table decision).

<sup>187</sup> *Commonwealth v. Alphas*, 712 N.E. 2d 575, 580 (Mass. 1999) (citing *Commonwealth v. Freeman*, 227 N.E.2d 3, 9 (Mass. 1967)); see also *Commonwealth v. Miranda*, 490 N.E.2d 1195, 1202 (Mass. App. Ct. 1986) (requiring error “sufficiently significant” in trial “to make plausible” inference result otherwise but for error).

<sup>188</sup> *United States v. Gandia-Maysonet*, 227 F.3d 1, 5 (1st Cir. 2000) (citing *United States v. Olano*, 507 U.S. 725, 732 (1993)).

“sparingly” found), with Massachusetts so far silent as to expressly stating a default standard akin to substantial risk of miscarriage of justice applicable to all unpreserved claims of error in civil matters.<sup>189</sup>

As a result, the First Circuit or federal practice, at least as to the articulation of the respective standards of review, results in a greater distinction between preserved and unpreserved errors or claims. Federal harmless error<sup>190</sup> and plain error is distinguished by not only the burden of

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<sup>189</sup> See *Iverson v. Boston*, 452 F.3d 94, 103 (1st Cir. 2006); *Wynn & Wynn P.C. v. Mass. Comm’n Against Discrimination*, 729 N.E.2d 1068, 1083-84 (Mass. 2000), *overruled on other grounds by Stonehill Coll. V. Mass. Comm’n Against Discrimination*, 808 N.E.2d 205 (Mass. 2004).

<sup>190</sup> See 28 U.S.C. 2111 (2006); Roger A. Fairfax, Jr., *Harmless Constitutional Error and the Institutional Significance of the Jury*, 76 FORDHAM L. REV. 2027, 2033 (2008); The harmless error rule emanates from common law as well as statute and is found in the governing rules of both criminal and civil procedure. *Id.* As to federal practice, the harmless error first emerged by statute in 1919 in response to concerns that courts were too frequently and easily overturning verdicts for even the most trivial of errors. See Daniel J. Meltzer, *Harmless Error and Constitutional Remedies*, 61 U. CHI. L. REV. 1, 20 (1994); ROGER J. TRAYNOR, THE RIDDLE OF HARMLESS ERROR 13-14 (1970); see also *Kotteakos v. United States*, 328 U.S. 750, 759 (1946) (explaining statute “grew out of widespread and deep conviction” appellate courts “impregnable citadels of technicality”) (citation omitted); *Bruno v. United States*, 308 U.S. 287, 294 (1939) (“[The Act of 1919] was intended to prevent matters concerned with the mere etiquette of trials and with the formalities and minutiae of procedure from touching the merits of a verdict.”). The statute was implemented through the criminal rules of procedure, particularly Rule 52(a) in 1946 which provides that “[a]ny error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.” FED. R. CIV. P. 52(a). At its core, the harmless error rule is intended to prevent appellate courts from becoming “impregnable citadels of technicality” and thus enhance the public’s confidence in the fair and effective operation of the judicial system. *Kotteakos*, 328 U.S. at 759; *Neder v. United States*, 527 U.S. 1, 18 (1999). The federal harmless error statute makes no distinction between civil and criminal practice. See *O’Neal v. McAninch*, 513 U.S. 432, 441 (1995); *Greenlaw v. United States*, 554 U.S. 237, 248 (2008). On the civil side, the nearly identical rule is found in Rule 61 of the civil rules. See FED. R. CIV. P. 61. Moreover, as to federal evidentiary matters, the rule is found at Rule 103(a) of the Federal Rules of Evidence which provides that “[a] party may claim error in a ruling to admit or exclude evidence only if the error affects a substantial right of the party.” FED. R. EVID. 103(a). See *Chapman v. California*, 386 U.S. 18, 22-24 (1967) (providing a history of harmless error concept); Steven H. Goldberg, *Harmless Error: Constitutional Sneak Thief*, 72 J. CRIM. L. & CRIMINOLOGY 421, 422-25 (1980) (discussing origins of non-constitutional harmless error). Under First Circuit jurisprudence, the standard in criminal cases has been stated to reduce to whether or not it can be said “with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error.” *United States v. Walker*, 665 F.3d 212, 231 (1st Cir. 2011) (citing *Kotteakos*, 328 U.S. at 765)). The harmless error issue is to be determined based on the circumstances with no definite rule of law governing this finding but rather it requiring an examination of the materiality and prejudicial character of the specific error as revealed from its relationship to the entire case and its specific circumstances. See *United States v. Casas*, 356 F.3d 104, 121 (1st Cir. 2004) (quoting *United States v. Sepulveda*, 15 F.3d 1161, 1182 (1st Cir. 1993)); *Sepulveda*, 15 F.3d at 1182 (“There is no bright-line rule . . . a harmlessness determination demands a panoramic, case-specific inquiry”); *United States v. Rodriguez-Marrero*, 390 F.3d 1, 18 (1st Cir. 2004). The inquiry is not suppose to be whether a reasonable jury could have looked at the evidence and

proof but the need to show not only that the error was outcome determinative, but that it impacted the fairness, integrity, or public reputation of the judicial proceeding.

Under Massachusetts practice,<sup>191</sup> the burden of proof shifts as in federal practice,<sup>192</sup> but there is no such added public interest element. The

reasonably found guilty but rather whether it was highly probable that the error did not influence the verdict. *Sepulveda*, 15 F.3d at 1182. The First Circuit articulation in both criminal and civil cases is whether it is “highly probable that the error did not influence the verdict.” *Casas*, 356 F.3d at 121. *See, e.g.*, *United States v. Dancy*, 640 F.3d 455, 463 (1st Cir. 2011); *United States v. Flores-De-Jesus*, 569 F.3d 8, 27 (1st Cir. 2009); *Fortini v. Murphy*, 257 F.3d 39, 43 (1st Cir. 2001); *Ruiz-Troche v. Pepsi-Cola of P.R. Bottling Co.*, 161 F.3d 77, 87 (1st Cir. 1998). The government, in criminal cases, bears the burden of demonstrating harmlessness as well as the risk of doubt when any exists as to the error being non-prejudicial. *See generally* *United States v. Sanabria*, 645 F.3d 505, 516 (1st Cir. 2011); *United States v. Pridgen*, 518 F.3d 87, 91 (1st Cir. 2008); *Casas*, 356 F.3d at 121 (citing *United States v. Rose*, 104 F.3d 1408, 1414 (1st Cir. 1997)). Such review is to take into account “the centrality of the tainted material, its uniqueness, its prejudicial impact, the uses to which it was put during the trial, the relative strengths of the parties’ cases, and any telltales that furnish clues to the likelihood that the error affected the fact-finder’s resolution of a material issue.” *Sepulveda*, 15 F.3d at 1182. In civil cases, it is the party who “seeks to have a judgment set aside because of an erroneous ruling [that] carries the burden of showing that prejudice resulted.” *Palmer v. Hoffman*, 318 U.S. 109, 116 (1943).

<sup>191</sup> *See* MASS. R. CIV. P. 61. Under Massachusetts practice, there is no criminal rule of procedure as to harmless error but on the civil side the rule (Rule 61) is nearly identical to its federal counterpart and expressed in terms of errors “affect[ing] the substantial rights of the parties.” MASS. R. CIV. P. 61. It is, likewise, a matter of both common law and statute. *Runshaw v. Bernstein*, 198 N.E.2d 293, 295 (1964); Chapter 231, section 119 of the Massachusetts General Laws provides:

No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or anything done or omitted by the trial court or by any of the parties is ground for modifying or otherwise disturbing a judgment or order unless the appeals court or the supreme judicial court deems that the error complained of has injuriously affected the substantial rights of the parties. If either court finds that the error complained of affects only one or some of the issues or parties involved it may affirm the judgment as to those issues or parties unaffected and may modify or reverse the judgment as to those affected.

MASS. GEN. LAWS ch. 231, § 119 (2010); *see also* MASS. GEN. LAWS ch. 231, § 132 (2010) (refusing new trial because of improperly admitted or excluded evidence unless error affected substantial rights).

<sup>192</sup> *See* *Grant v. Lewis/Boyle, Inc.*, 557 N.E.2d 1136, 1139-40 (Mass. 1990). The cases speak of the proponent of the error being required to make a “plausible showing” of or their being a reasonable possibility that the error “might have” made a difference. *Carrell v. Nat’l Cord & Braid Corp.*, 852 N.E.2d 100, 115 (Mass. 2006); *Grant*, 557 N.E.2d at 1139-40; *DeJesus v. Yogel*, 533 N.E.2d 1318, 1321 (Mass. 1989); *see* *Commonwealth v. Aguiar*, 936 N.E.2d 16, 26 (Mass. App. Ct. 2010) (considering whether reasonable possibility error might have contributed to jury’s verdict); *see also* *In re Adoption of Sherry*, 757 N.E.2d 1097, 1102 (Mass. 2001) (explaining exclusion of expert opinion only prejudicial if it would have changed outcome); *Peterson v. Foley*, 931 N.E.2d 478, 484-85 (Mass. App. Ct. 2010) (stating the same); *Coady v. Wellfleet Marine Corp.*, 816 N.E.2d 124, 128-29 (Mass. App. Ct. 2004) (finding evidence

difference between appellate review for unpreserved (substantial risk of miscarriage of justice) versus preserved (harmless error) under Massachusetts is thus seemingly very subtle, at least in articulation. Reversal of unpreserved error turns on whether the error “materially influenced” the verdict (i.e., whether the error is sufficiently significant in the context of trial to make plausible an inference that the result might have been otherwise but for the error),<sup>193</sup> while reversal for preserved error turns on “whether the conviction is sure that the error did not influence the jury, or had but very slight effect.”<sup>194</sup>

As to the “exceptional circumstances” discretion, both First Circuit and Massachusetts practice is similar. Both have identified similar circumstances as justifying review of new or unpreserved issues apart from

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admitted injuriously affects substantial rights where jury might have concluded differently if excluded).

<sup>193</sup> See *Commonwealth v. Russell*, 787 N.E.2d 1039, 1043 (Mass. 2003). The defendant is entitled to relief only “if [appellate court] has a serious doubt whether the result of the trial might have been different had the error[s] not been made.” *Id.* at 1043 (quoting *Commonwealth v. LeFave*, 714 N.E.2d 805, 809 (Mass. 1999)). See *Commonwealth v. Randolph*, 780 N.E.2d 58 (Mass. 2002) (“Errors of this magnitude are extraordinary events and relief is seldom granted.”); see also *Carrel*, 852 N.E.2d at 115 (requiring sufficient prejudice to require new trial); *DeJesus*, 533 N.E.2d at 1322 (stating error not prejudicial if appellate court substantially confident no material difference with error); *Cohen v. Liberty Mut. Ins. Co.*, 673 N.E.2d 84, 87 (Mass. App. Ct. 1996) (deciding whether plausible showing trial judge might not find violation had he not excluded evidence). Informative, non-inclusive factors to be considered in the harmless calculus in criminal cases include the importance of the evidence to the prosecution’s case; the relationship of the evidence to the thrust of the defense; who introduced the issue at trial; the frequency of the reference; whether the erroneously admitted evidence was cumulative; the availability of or effect of cumulative instructions, and the weight or quantum of evidence as to guilt. *Commonwealth v. Dagraca*, 854 N.E.2d 1249, 1255 (Mass. 2006); *Commonwealth v. Galicia*, 857 N.E.2d 463, 471-72 (Mass. 2006) (finding error harmless beyond reasonable doubt where improperly admitted statements cumulative of properly admitted evidence); or was irrelevant to the contested issue, see, e.g., *Commonwealth v. Pena*, 913 N.E.2d 815, 827 (Mass. 2009) (stating error harmless beyond reasonable doubt where erroneously admitted evidence not relevant to issue); or, as that term is correctly understood, that the evidence of guilt was “overwhelming” in the sense that it was so powerful as to “nullify any effect [the illegally obtained evidence] might have had on the jury or the verdict . . . .” *Dagraca*, 854 N.E.2d at 1256; *Commonwealth v. DePace*, 742 N.E.2d 1054, 1060-61 (Mass. 2001) (explaining to overcome presumption of harm, Commonwealth’s admissible evidence must be “truly overwhelming”), *abrogated on other grounds*, *Commonwealth v. Carlino*, 865 N.E.2d 767 (Mass. 2007).

<sup>194</sup> See *Commonwealth v. Alphas*, 712 N.E.2d 575, 580 n.7 (Mass. 1999) (quoting *Commonwealth v. Flebotte*, 630 N.E.2d 265, 268 (Mass. 1994), *overruled on other grounds*, *Commonwealth v. King*, 834 N.E.2d 1175 (Mass. 2005)). In addition to the “only slight effect” formulation, the harmless error test in Massachusetts includes “[b]ut if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected.” *Flebotte*, 630 N.E. 2d at 268 (quoting *Commonwealth v. Peruzzi*, 446 N.E.2d 117, 122 (Mass. App. Ct. 1983)); see also *Commonwealth v. Linton*, 924 N.E.2d 722, 744 n.19 (Mass. 2010) (explaining prejudicial error employs more generous standard to defendant than substantial likelihood of miscarriage of justice).

their respective default standard. Both have also identified the public significance of the issue as significantly favoring review.

#### *F. Other Jurisdictions*

##### *i. Federal Practice*

The federal circuits all apply the *Olano* plain error rule in both criminal and civil cases,<sup>195</sup> with the caveat that noticing such error is exceedingly rare in civil cases.<sup>196</sup> *Hormel/Singleton*'s "exceptional circumstances" discretion is also followed in all circuits although varying in formulation. Certain circuits utilize the *Singleton* "resolution is beyond

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<sup>195</sup> *Stewart v. Hall*, 770 F.2d 1267, 1271 (4th Cir. 1985) (refusing to consider new issues on appeal unless error plain or refusal denies fundamental justice); see *In re Celotex Corp.*, 124 F.3d 619, 631 (4th Cir. 1997) (holding correction of forfeited error required showing error plain and affected substantial rights); *Muth v. United States*, 1 F.3d 246, 250 (4th Cir. 1993) (stating the same); Plain error is only available in civil cases if a party can demonstrate that: (1) exceptional circumstances exist; (2) substantial rights are affected; and (3) a miscarriage of justice will occur if plain error review is not applied. *Johnson v. Ashby*, 808 F.2d 676, 679 n.3 (8th Cir. 1987). See *Hunter v. Cnty. of Sacramento*, 652 F.3d 1225, 1230 n.5 (9th Cir. 2011) (explaining plain error applies to civil cases); *Bath Junkie Branson, L.L.C. v. Bath Junkie, Inc.*, 528 F.3d 556, 561 (8th Cir. 2008) (citing *Champagne v. United States*, 40 F.3d 946, 947 (8th Cir. 1994) (applying plain error in a civil case)); see also *S.E.C. v. DiBella*, 587 F.3d 553, 569 (2d Cir. 2009) (holding claims of instruction error review only appropriate for "fundamental error"). "Fundamental error" is more stringent than the "plain error" standard applicable to criminal appeals. *Id.* In order for charging error "to be fundamental, it must be so serious and flagrant that it goes to the very integrity of the trial." (internal quotation marks omitted).

<sup>196</sup> *Celotex*, 124 F.3d at 630; see *Brimer v. Life Ins. Co., of Am.*, No. 11-5032, 2012 WL 414386, at \* (10th Cir. 2012) (refusing to consider issue not passed upon in lower court except where plain error); *Hicks v. Avery Drei, LLC.*, 654 F.3d 739, 744 (7th Cir. 2011) (applying plain error "rarely" and only where "exceptional circumstances or . . . miscarriage of justice could occur"); *Ledford v. Peeples*, 657 F.3d 1222, 1257 (11th Cir. 2011) (announcing plain error in civil cases rarely found); *In re Lett*, 632 F.3d 1216, 1227 n.22 (11th Cir. 2011) (stating the same); *Richison v. Ernst Group, Inc.*, 634 F.3d 1123, 1130 (10th Cir. 2011) (explaining plain error in civil cases presents "extraordinary, nearly insurmountable burden") (citing *Emp'rs Reinsurance Corp. v. Mid-Continent Cas. Co.*, 358 F.3d 757, 770 (10th Cir. 2004)); *Russian Media Grp., LLC v. Cable Am., Inc.*, 598 F.3d 302, 308 (7th Cir. 2010) ("it will be a 'rare case in which failure to present a ground to the district court has caused no one—not the district judge, not us, not the appellee—any harm of which the law ought to take note.'") (quoting *Amcast Indus. Corp. v. Detrex Corp.*, 2 F.3d 746, 749-50 (7th Cir. 1993)); *Wilson v. Brinker Int'l, Inc.*, 382 F.3d 765, 771 (8th Cir. 2004) ("[S]tringently limited standard of review"); *Bath Junkie Branson, L.L.C.*, 528 F.3d at 561 (evaluating plain error through effects on substantial rights, fairness, integrity or judicial proceeding's public reputation); *Castellano v. Fragozo*, 311 F.3d 689, 705 n.50 (5th Cir. 2002) (noting plain error not "run of the mill remedy" and only occurs in exceptional circumstances), *vacated*, 321 F.3d 1203 (5th Cir. 2003); *Crawford v. Falcon Drilling Co.*, 131 F.3d 1120, 1133 (5th Cir. 1997) (stating the same); *Dean Witter Reynolds, Inc. v. Fernandez*, 741 F.2d 355, 360-61 (11th Cir. 1984) (explaining plain error does apply to civil matters but should be applied with extreme caution).



any doubt”<sup>197</sup> and/or “injustice might otherwise result”<sup>198</sup> language, with others utilizing “manifest injustice,”<sup>199</sup> “interests of justice,”<sup>200</sup> or “miscarriage of justice”<sup>201</sup> terminology. Full briefing and lack of prejudice is regularly referenced<sup>202</sup> with many, if not most, of the federal circuits also routinely referencing issue of law,<sup>203</sup> no additional fact-finding,<sup>204</sup> in the

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<sup>197</sup> *Walker v. Page*, 2003 WL 1120232, 59 F. App’x 896, 900 (7th Cir. 2003) (articulating discretion can be used where “proper resolution is beyond any doubt”); *AAR Int’l, Inc. v. Nimelias Enters. S.A.*, 250 F.3d 510, 523 (7th Cir. 2001) (stating same); *Tarsney v. O’Keefe*, 225 F.3d 929, 939 (8th Cir. 2000) (“[W]here the proper resolution is beyond any doubt . . . or when the argument involves a purely legal issue in which no additional evidence or argument would affect the outcome of the case.”) (internal citations and quotations omitted) (quoting *Universal Title Ins. Co. v. United States*, 942 F.2d 1311, 1314-15 (8th Cir. 1991)); *Sanders v. Clemco Indus.*, 823 F.2d 214, 217 (8th Cir. 1987) (stating the same); *United States v. Brown*, 739 F.2d 1136, 1145 (7th Cir. 1984) (finding discretion proper where parties briefed issue and court hearing minimal benefit with clear resolution).

<sup>198</sup> *Syverson v. U.S. Dept. of Agric.*, 601 F.3d 793, 803 (8th Cir. 2010) (considering review of new issue if one of law and injustice might otherwise result).

<sup>199</sup> *New York v. Mickalis Pawn Shop, LLC*, 645 F.3d 114, 140 (2d Cir. 2011) (quoting *Patterson v. Balsamico*, 440 F.3d 104, 112 (2d Cir. 2006)). The court has discretion to consider unpreserved issue “where the issue is purely legal and there is no need for additional fact-finding or where consideration of the issue is necessary to avoid manifest injustice.” *Id.* at 140 (quoting *Patterson*, 440 F.3d at 112)); *Ridinger v. Dow Jones & Co. Inc.*, 651 F.3d 309, 316 (2d Cir. 2011) (explaining court may consider unpreserved issue to prevent manifest injustice); *Readco, Inc. v. Marine Midland Bank*, 81 F.3d 295, 302 (2d Cir.1996); *see also Homeless Patrol v. Joseph Volpe Family*, 2011 WL 2580329, 425 F. App’x 60, 61 (2d Cir. 2011) (“[T]he Court may, in its discretion, disregard the general rule when necessary to remedy manifest or obvious injustice.”); *Greene v. United States*, 13 F.3d 577, 586 (2d Cir. 1994) (stating the same).

<sup>200</sup> *Duffield v. Jackson*, 545 F.3d 1234, 1237-38 (10th Cir. 2008) (noting “interests of justice exception” to waiver is “elusive concept”).

<sup>201</sup> *Ruiz v. Affinity Logistics Corp.*, 667 F.3d 1318, 1322 (9th Cir. 2012) (exercising discretion where “exceptional” case and review necessary to prevent a miscarriage of justice); *Mentor v. Hillside Bd. of Educ.*, 2011 WL 1957698, 428 F. App’x. 221, 224 n.5 (3d Cir. 2011) (noting appellate review permissible for new or unpreserved issues to prevent “gross miscarriage of justice”); *Snapt Inc. v. Ellipse Commc’ns, Inc.*, 2011 WL 2496686, 430 F. App’x. 346, 351 (5th Cir. 2011) (stating exception to waiver/forfeiture where exception circumstances would result in miscarriage of justice); *Romain v. Shear*, 799 F.2d 1416, 1419 (9th Cir. 1996) (stating the same) (citing *Bolker v. Comm’r*, 760 F.2d 1039, 1042 (9th Cir.1985)); *Pinney Dock & Transp. Co. v. Penn Cent. Corp.*, 838 F.2d 1445, 1461 (6th Cir. 1988) (finding exceptional circumstances or “plain miscarriage of justice” permit deviations from raise or lose rule).

<sup>202</sup> *See Barefoot Architect, Inc., v. Bunge*, 632 F.3d 822, 834-35 (3d Cir. 2011) (“The waiver rule serves two purposes: ensuring that the necessary evidentiary development occurs in the trial court, and preventing surprise to the parties when a case is decided on some basis on which they have not presented argument.”); *Weitzenkamp v. Unum Life Ins. Co. of Am.*, 661 F.3d 323, 331 (7th Cir. 2011) (finding where full appellate briefing provided and resolution clear discretionary exception applies).

<sup>203</sup> *See Barefoot Architect, Inc.*, 632 F.3d at 834-35 (explaining court may consider whether a question of law); *Baker v. Dorfman*, 239 F.3d 415, 421 (2d Cir. 2000) (addressing allegedly forfeited claim where it raises “a pure question of law”); *Krumme v. Westpoint Stevens Inc.*, 238 F.3d 133, 141 (2d Cir. 2000) (stating the same); *Aguirre v. Armstrong World Indus., Inc.*, 901 F.2d 1256, 1258 (5th Cir. 1990) (reviewing new issues on appeal purely of law and resulting in miscarriage of justice); HENRY D. GABRIEL & SIDNEY POWELL, FED. APP. PRAC. GUIDE -- FIFTH

“public interest,”<sup>205</sup> as well as to “materially advance” the purposes of litigation factors or considerations.<sup>206</sup>

Additional factors noted by federal courts include an exception for arguments as to the illegality of contracts based on public policy;<sup>207</sup> intervening change in the law;<sup>208</sup> whether reaching the issue is necessary to the resolution of other issues before the court;<sup>209</sup> novelty;<sup>210</sup> whether or not

Cir. § 1:2 (1999) (collecting cases); *see also* *Creel v. Johnson*, 162 F.3d 385, 390 n.3 (5th Cir. 1998) (citing *Dennerline*, *supra* note 2, at 999) (noting pure legal issue is distinct from plain error inquiry); *Dennerline*, *supra* note 2, at 999 (explaining how characterizing issue as one of “pure law,” differs from characterizing as “plain error.”). Characterizing an issue as “plain error,” alleges trial error to which there was no objection, but could be clearly resolved. *Id.* *See In re Lett*, 632 F.3d 1216, 1227 n.22 (11th Cir. 2011) (noting Eleventh circuit “embraced” civil plain error rule to review questions of law); *Syversen*, 601 F.3d at 809 (8th Cir. 2010) (narrowing exception for questions of law to must be addressed if injustice might result); *Roofing & Sheet Metal Servs., Inc. v. La Quinta Motor Inns, Inc.*, 689 F.2d 982, 990 (11th Cir.1982) (“Specifically, we will consider an issue not raised in the district court if it involves a pure question of law, and if refusal to consider it would result in a miscarriage of justice.”) (citing *Martinez v. Mathews*, 544 F.2d 1233, 1237 (5th Cir. 1976))).

<sup>204</sup> *Diesel v. Town of Lewisboro*, 232 F.3d 92, 108 (2d Cir. 2000) (refusing to exercise discretion “where the argument requires new evidence or factual findings”) (internal quotation marks and citation omitted); *see Jackson v. Parker*, 627 F.3d 634, 640 (7th Cir. 2010) (finding no exceptional circumstances in undeveloped record and no effort to brief plain error applicability) (citing *Moore ex rel. Estate of Grady v. Tuleja*, 546 F.3d 423, 430 (7th Cir. 2008)); *Universal Title Ins. Co. v. United States*, 942 F.2d 1311, 1315 (8th Cir. 1991) (“[N]o additional evidence or argument would affect the outcome of the case”); *Sanders v. Clemco Indus.*, 823 F.2d 214, 217 (8th Cir. 1987) (stating the same); *see also* ); *Ruiz v. Affinity Logistics Corp.*, 667 F.3d 1318, 1322 (9th Cir. 2012) (exercising discretion where “the issue is purely one of law” and necessary facts fully developed); *Mayer v. Countrywide Home Loans*, 647 F.3d 789, 794 (8th Cir. 2011) (restating same discretionary standard); *Romain v. Shear*, 799 F.2d 1416, 1419 (9th Cir. 1996) (stating same) (citing *Bolker v. Comm’r*, 760 F.2d 1039, 1042 (9th Cir. 1985))).

<sup>205</sup> *Ninestar Tech. Co. v. Int’l Trade Comm’n*, 667 F.3d 1373, 1382 (Fed. Cir. 2012) (explaining forfeiture rule inapplicable to significant questions of general import or of great public concern); *United States v. Anthony Dell’Aquila, Enters.*, 150 F.3d 329, 335 (3rd Cir. 1998) (stating review of forfeited issue permitted when “public interest requires” or “manifest injustice” would result); *see also Lomando v. United States*, 667 F.3d 363, 381 n.19 (3rd Cir. 2011) (explaining waiver rule one of discretion and can be relaxed whenever in the public interest).

<sup>206</sup> *Amos v. Md. Dep’t of Pub. Safety & Corr. Servs.*, 178 F.3d 212, 215 n.2 (4th Cir. 1999) (considering new issue presenting purely legal question, parties briefed issue and resolution advances litigation’s progress), *vacated*, (Dec. 28, 1999).

<sup>207</sup> *See Seymour v. Blue Cross/Blue Shield*, 988 F.2d 1020, 1023 (10th Cir. 1993).

<sup>208</sup> *Ruiz*, 667 F.3d at 1322 (explaining discretion exercised where new issue arises while appeal pending because of change in law); *Baccei v. United States*, 632 F.3d 1140, 1149 (9th Cir. 2011) (stating the same); *Romain*, 799 F.2d at 1419 (stating the same) (citing *Bolker*, 760 F.2d at 1042); *see also United States v. Petersen*, 622 F.3d 196, 202 n.4 (3rd Cir. 2010) (“Since [the court has] not yet addressed issue . . . there is an institutional consideration that can be viewed as an exceptional circumstances.”) (internal quotations omitted).

<sup>209</sup> *Cordis Corp. v. Bos. Scientific Corp.*, 658 F.3d 1347, 1359 (Fed. Cir. 2011); *Kolstad v. Am. Dental Ass’n*, 527 U.S. 526, 540 (1999) (noting practice to consider waived issues “integral” to decision and “fairly subsumed” by question presented) (internal quotations omitted).

<sup>210</sup> *Bowie v. Maddox*, 642 F.3d 1122, 1131 (D.C. Cir. 2011) (stating novel legal question can

“the matter upon which relief is sought was not known and could not reasonably . . . be raised at trial”;<sup>211</sup> whether the parties right to have issues in their suit considered by both the district court judge and appellate court;<sup>212</sup> whether addressing the issue will “materially advance” the progress of already protracted litigation;<sup>213</sup> and whether, if full briefing is present, the benefit of the district court hearing is “minimal because proper resolution of the issue is clear.”<sup>214</sup>

The identified factors or considerations are not uniform with the Fifth Circuit frankly stating that “when an appellate court should consider an issue not properly presented is a question with no certain answer.”<sup>215</sup> The Tenth Circuit has rejected the assertion that pure legal issues may be reviewed on appeal or that public policy arguments merit exception.<sup>216</sup> At least two circuits have suggested that the discretion should not be exercised simply to correct a wrong result,<sup>217</sup> with at least one decision stating either that review of unpreserved error or new argument is appropriate where the standard of review is de novo and not requiring any deference to the trial court,<sup>218</sup> or where the issue is a “threshold” one.<sup>219</sup>

The Sixth, Eleventh, and District of Columbia Circuits, in turn, similar to the First Circuit and the *Krynicky-Harwood* decisions, have set forth a master list of the governing considerations. According to the Sixth Circuit, the discretionary criteria includes whether new issue is a question of law or there is a need for determination of facts; where proper resolution is beyond any doubt; whether failure to take up the issue will result in a miscarriage of justice or denial of substantial justice; and “the parties’

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be reached despite lack of preservation).

<sup>211</sup> *Essinger v. Liberty Mut. Fire Ins. Co.*, 534 F.3d 450, 453 (5th Cir. 2008) (citing and discussing *Martineau*, *supra* note 2, at 1060). Professor Martineau suggested that a rule akin to Federal Rule of Civil Procedure 60(b) be applied on appeal—if the error is the kind for which relief from a final judgment could be obtained in the trial court, that would be a good reason for allowing it on appeal. *Essinger*, 534 F.3d at 453.

<sup>212</sup> *AAR Int’l Inc. v. Nimelias Enters. S.A.*, 250 F.3d 510, 523 (7th Cir. 2001) (quoting *Otto v. Variable Annuity Life Ins. Co.*, 814 F.2d 1127, 1137-38 (7th Cir. 1986)).

<sup>213</sup> *Carrier Corp. v. Outokumpu Oyj*, 673 F.3d 430, 446 (6th Cir. 2012).

<sup>214</sup> *United States v. Brown*, 739 F.2d 1136, 1145 (7th Cir. 1984).

<sup>215</sup> *Essinger*, 534 F.3d at 453 (“General rules and occasional exceptions should not be haphazardly applied.”).

<sup>216</sup> *Richison v. Ernest Grp., Inc.*, 634 F.3d 1123, 1128-29 (10th Cir. 2011).

<sup>217</sup> *Fairlane Car Wash, Inc. v. Knight Enters. Inc.*, 2010 WL 3724604, 396 F. App’x. 281, 286 (6th Cir. 2010) (stating discretion to address issue exercised where “it would serve an overriding purpose”).

<sup>218</sup> *Sellers v. Zurich Am. Ins. Co.*, 627 F.3d 627, 632 n.1 (7th Cir. 2010) (noting reason to address new argument where review de novo because no lower court deference).

<sup>219</sup> *Greenberg v. Nat. Geographic Soc’y.*, 533 F.3d 1244, 1272 n.28 (11th Cir. 2008) (“Courts have generally been amenable to exercising their inherent power to consider un-briefed *threshold* issues when they arise.”).

right[s] under our judicial system to have the issues in their suit considered by both district court and appellate court.”<sup>220</sup> The Eleventh Circuit’s list is similar, i.e., the issue must be one of law and refusal to consider it would result in a miscarriage of justice; appellant had no opportunity to raise objection below; the issue involves an “interest of substantial justice; the issue is one where the proper resolution is beyond any doubt; or the issue presents a significant question of “general impact or of great public concern.”<sup>221</sup> Also notable, and discussed in more detail below, certain courts, particularly the Tenth Circuit, have limited discretion as to new arguments on appeal to plain error review.<sup>222</sup>

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<sup>220</sup> *Scotsdale Ins. Co. v. Flowers*, 513 F.3d 546, 552 (6th Cir. 2008) (citing *Friendly Farms v. Reliance Ins. Co.*, 79 F.3d 541, 545 (6th Cir. 1996)).

<sup>221</sup> *Dean Witter Reynolds, Inc. v. Fernandez*, 741 F.2d 355, 360-61 (11th Cir. 1984); see *Princeton Homes, Inc. v. Virone*, 612 F.3d 1324, 1329 n.2 (11th Cir. 2010) (applying Dean factors and exercising discretion given question of law and resolution beyond any doubt); *Belize Telecomm, Ltd. v. Gov’t of Belize*, 528 F.3d 1298, 1304 n.7 (11th Cir. 2008) (“Because the existence of a foreign judgment and the potential for conflicting judgments implicate concerns beyond those of the parties to this dispute, we choose to exercise our discretion in this case to consider whether comity should be extended to the Belizean judgment.”). Another relatively similar list has also been declared by the Federal Circuit Court of Appeals. See *HTC Corp. v. ICom GmbH & Co., KG.*, 667 F.3d 1270, 1282 (Fed. Cir. 2012) (explaining exceptional circumstances when appellate court has discretion to consider issue for first time). Exceptional circumstances include where the issue involves a pure question of law and refusal to consider it would amount to a miscarriage of justice, the proper resolution is beyond any doubt; appellant no opportunity to raise objection; the issue presents significant questions of general impact or of great public concern or the interests of justice are at stake. *Id.*; see also *Doe v. Exxon Mobil Corp.*, 654 F.3d 11, 40 (D.C. Cir. 2011) (“[Appellate courts] have a fair measure of discretion to determine what questions to consider and resolve for the first time on appeal.”) (citing *Roosevelt v. E.I. Du Pont de Nemours & Co.*, 958 F.2d 416, 419 n. 5 (D.C. Cir. 1992))).

<sup>222</sup> *Richison v. Ernest Grp., Inc.*, 634 F.3d 1123, 1128-29 (10th Cir. 2011) (“Linguistic packaging aside, the substantive analysis under either articulation of the standard is similar, and the litigant’s burden is the same: establishing a clear legal error that implicates a miscarriage of justice.”) (internal citations omitted). According to the court in *Richison*:

Neither, as it turns out, have they always been so precise about applying the plain error/manifest injustice standard to newly raised legal theories. But, despite this imprecision, no case in this circuit has held that we may reverse based on “purely legal” arguments in the absence of plain error. And the fact that this court has sometimes reversed on the basis of a new legal argument without indicating the burden the appellant must carry to obtain reversal cannot ensconce binding precedent requiring or allowing us to ignore the longstanding requirement that new legal arguments overcome plain error. What’s more, even if the silence of *Haugen*, *Geddes*, and *Jarvis* could be understood as a deliberate relaxing of the miscarriage of justice/plain error requirement, our older and so controlling cases (*Petrini*, *Bartlett-Collins*, *Stahmann*, *Hicks*, and *Titan Court*) all discuss appellate intervention only in the presence of legal error *and* manifest injustice, as the plain error standard requires. So it is that our precedent does nothing to preclude—and instead does a great deal more to affirm—our conclusion that plain error review should pertain in these circumstances.

## ii. State Practice

Virtually all of the states have adopted a plain error type default standard for unpreserved contentions at least in criminal cases with only about eight (8) states refusing to adopt such an exception or otherwise limiting any plain error review to death penalty cases or erroneous jury instruction claims.<sup>223</sup> The majority of the states adopting a plain error type of default standard utilize the terms “plain error,”<sup>224</sup> while others refer to

*Id.* at 1128-29 (internal citations omitted); *see also* *Wiser v. Wayne Farms*, 411 F.3d 923, 926-27 (8th Cir. 2005) (noting *Olano*’s stringent plain error formulation for correction of unpreserved errors in civil context).

<sup>223</sup> **Alabama** (ALA. R. APP. P. 45A; *Rice v. English*, 835 So.2d 157, 166 (Ala. 2002); *see* *Whatley v. State*, CR-08-0696, 2011 WL 6278296, at \*3 (Ala. Crim. App. December 16, 2011) (holding failure to object will weigh heavily against any claim of plain error); *Phillips v. State*, 65 So.3d 971, 986 (Ala. Crim. App. 2010); *Williams v. State*, 601 So.2d 1062, 1066 (Ala. Crim. App. 1991)). **Arkansas** (ARK. R. CRIM. P. 10; Morton Gitelman, *The Plain Error Rule in Arkansas—Plainly Time for a Change*, 53 ARK. L. REV. 205, 216 (2006)). **California** (*People v. McKinnon*, 259 P.3d 1186, 1211 (Cal. 2011); *People v. Benavides*, 35 Cal. 4th 69, 115 (Cal. 2005); *People v. Redd*, 229 P.3d 101, 135 (Cal. 2010); *In re Marriage of Stonier*, No. D055547, 2010 WL 3212734, \*2 (Cal. Ct. App. August 16, 2010)). **Georgia** (GA. CODE ANN. § 17-8-58 (2008); *State v. Kelley*, 718 S.E.2d 232, 235 (Ga. 2011) (resolving issue and definitively holding plain error applies to any jury instruction claim); *Brook v. State*, 640 S.E.2d 280, 284 (Ga. 2007) (stating plain error rule limited to death penalty cases and instruction errors in criminal cases)). **Iowa** (*Steele v. State*, 808 N.W.2d 756, 2011 WL 5877029, \*2 n.2 (Iowa Ct. App. 2011) (unpublished table decision) (citing *State v. McCright*, 569 N.W.2d 605, 607 (Iowa 1997))); *State v. Escobedo*, 573 N.W.2d 271, 277 (Iowa Ct. App. 1997)). **North Carolina** (*State v. Lawrence*, 723 S.E.2d 326, 333 (N.C. 2012) (stating plain error review normally limited to instructional and evidentiary error)). **Pennsylvania** (*Schmidt v. Boardman Co.*, 11 A.3d 924, 942 (Pa. 2011) (confirming Pennsylvania does not follow plain error rule); *Commonwealth v. Freeman*, 827 A.2d 385, 392 (Pa. 2003) (abandoning relaxed waiver rule for capital cases); *Dilliplaine v. Lehigh Valley Trust Co.*, 322 A.2d 114, 116-17 (Pa. 1974)). **Rhode Island** (*State v. Hallenbeck*, 878 A.2d 992, 1018 (R.I. 2005) (reiterating no plain error in civil or criminal proceedings)). **South Carolina** (*State v. Sheppard*, 706 S.E.2d 16, 19 (S.C. 2011) (recognizing South Carolina appellate courts have consistently refused to apply the plain error rule); *Jackson v. Speed*, 486 S.E.2d 750, 759 (S.C. 1997)).

<sup>224</sup> *See* **Alaska** (*Adams v. State*, 261 P.3d 758, 764 (Alaska 2011)). **Connecticut** (CONN. PRACTICE BOOK ch. 60, § 60-5 (stating court may notice plain error in interest of justice)). **Colorado** (*People v. Greer*, 262 P.3d 920, 924 (Colo. App. 2011) (We recognize as plain error those obvious and substantial errors that ‘so undermined the fundamental fairness of the trial itself ... as to cast serious doubt on the reliability of the judgment.’)) (quoting in part *People v. Miller*, 113 P.3d 743, 749-50 (Colo. 2005))). **Delaware** (*Wright v. State*, 980 A.2d 1020, 1023 (Del. 2009) (“Generally, the failure to raise a contemporaneous objection to allegedly inadmissible evidence constitutes a waiver of a defendant’s right to raise that issue on appeal, unless the error is plain”); (*Stansbury v. State*, 591 A.2d 188, 191 (Del. 1991), *superseded by statute*, *Mills v. State*, 732 A.2d 845 (Del. 1999); *Jenkins v. State*, 305 A.2d 610, 613 (Del. 1973)). **Georgia** (*Puckett v. State*, 712 S.E.2d 579, 582 (Ga. Ct. App. 2011) (citing *Putnam v. State*, 498 S.E.2d 340 (Ga. Ct. App. 1998)); *Sanchez v. State*, 508 S.E.2d 185, 187 (Ga. Ct. App. 1998) (“This court has also applied the plain error rule in cases presenting ‘exceptional circumstances’ (quoting *Putnam*, 498 S.E.2d at 343))). **Hawaii** (*State v. Miller*, 223 P.3d 157,

the doctrine as either “palpable,”<sup>225</sup> “clear,”<sup>226</sup> “fundamental,”<sup>227</sup>

165 (Haw. 2010); *State v. Nichols*, 141 P.3d 974, 982 (Haw. 2006); *Kobashigawa v. Silva*, 266 P.3d 470, 473 (Haw. Ct. App. 2011) (stating plain error in civil cases)). **Illinois** (*Wilbourne v. Cavallenes*, 923 N.E.2d 937, 955 (Ill. App. Ct. 2010) (applying plain error in civil cases) (citing *Palanti v. Dillon Enters., Ltd.*, 707 N.E.2d 695, 701 (Ill. App. Ct. 1999))). **Maryland** (*Morris v. State*, 837 A.2d 248, 264 (Md. Ct. Spec. App. 2003) (stating error must be plain and it must be material); *Angulo-Gil v. State*, 16 A.3d 283, 297 (Md. Ct. Spec. App. 2011) (noting do not exercise plain error review where area of law fully explicated)). **Michigan** (*People v. Carines* 597 N.W.2d 130, 138 (Mich. 1999)). **Mississippi** (*Neal v. State*, 15 So.3d 388, 403 (Miss. 2009)). **Missouri** (Mo. Sup. Ct. R. 84.13(c); *Rouse v. Cuvelier*, No. WD 73653, 2012 WL 912755, at \* 8 (Mo. Ct. App. Mar. 20, 2012) (explaining plain error evident, obvious, clear error, resulting in manifest injustice or miscarriage of justice)). **Montana** (*State v. Norman*, 244 P.3d 737, 742 (Mont. 2010)); **Nebraska** (*Cesar C. v. Alicia L.*, 800 N.W.2d 249, 254 (Neb. 2011); *State v. Barfield*, 723 N.W.2d 303, 311 (Neb. 2006), *disapproved of on other grounds*, *State v. McCulloch*, 742 N.W.2d 727 (Neb. 2007)). **New Jersey** (N.J. Ct. R. 2:10-2; *State v. Perez*, Nos. A-5803008T3, A-6017-08T3, 2012 WL 570182 at \*1, \*5, \*8 (N.J. Super. Ct. App. Div. Feb. 23, 2012); *Baker v. Nat’l State Bank*, 736 A.2d 462, 465 (1999)). **Nevada** (NEV. SUP. CT. RULE 178.602; *Ochs v. State*, No. 55618, 2011 WL 5146036, at \*1-2 (Nev. Oct. 27, 2011)). **New Hampshire** (N.H. SUP. CT. RULE 16-A; *State v. Hebert*, 965 A.2d 1059, 1065 (N.H. 2009)). **Oklahoma** (*Barnett v. State*, 271 P.3d 80, 82 (Okla. Crim. App. 2012; *Simpson v. State*, 876 P.2d 690, 700-01 (Okla. Crim. App. 1994)). **South Dakota** (S.D. CODIFIED LAWS § 23A-44-15 (2004) (“Plain errors or defects affecting substantial rights may be notices although they were not brought to the attention of a court.”)). **Utah** (*Meadow Valley Contractors, Inc. v. State Dep’t of Transp.*, 266 P.3d 671, 677 (Utah 2011); *Seamons v. Brandley*, 268 P.3d 195, 197 (Utah 2011) (citing *State v. Holgate*, 10 P.3d 346, 350 (Utah 2000)); *Terry v. Bacon*, 269 P.3d 188, 195 (Utah Ct. App. 2011)). **West Virginia** (*Cartwright v. McComas*, 672 S.E.2d 297, 300-01 (W. Va. 2008); *State v. Miller*, 459 S.E.2d 114, 128-29 (W. Va. 1995); *Page v. Columbia Natural Res. Inc.*, 480 S.E.2d 817, 828 (W. Va. 1996)). **Wisconsin** (WIS. STAT. § 901.03 (2000); *State v. Lammers*, 773 N.W.2d 463, 467 (Wis. Ct. App. 2009)).

<sup>225</sup> **Kentucky** (KY. R. CIV. P. 61.02; *Kerr v. Com.*, No. 2011-CA-000351-MR, 2012 WL 246454, at \*1, \*3 (Ky. Ct. App. Jan. 27, 2012) (opinion not final)). **North Carolina** (*State v. Stokes*, 718 S.E.2d 174, 178-79 (N.C. Ct. App. 2011)). **North Dakota** (*State v. Hernandez*, 707 N.W.2d 449, 455 (N.D. 2005)). **Ohio** (*State v. Barnes*, 759 N.E.2d 1240, 1247 (Ohio 2002)). **Oklahoma** (*Barnett*, 271 P.3d at 82; *Simpson*, 876 P.2d at 700-701). **South Dakota** (*State v. Thomas*, 796 N.W. 2d 706, 711 n.3 (S.D. 2011); *First Premier Bank v. Kolcraft Enters., Inc.*, 686 N.W.2d 430, 442 (S.D. 2004), *superseded on other grounds*, *In re Estate of Duebendorfer*, 721 N.W.2d 438 (S.D. 2006)).

<sup>226</sup> See **Kansas** (KAN. STAT. ANN. § 22-3414(3) (2007) (concerning failure to object to instructions); *State v. Daniels*, 91 P.3d 1147, 1153 (Kan. 2004); *State v. Davis*, 61 P.3d 701, 707 (Kan. 2003) (“Instructions are clearly erroneous only if the reviewing court is firmly convinced there is a real possibility that the jury would have rendered a different verdict if the error had not occurred.”)). **Minnesota** (*State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998)). **New Hampshire** (*Progressive N. Ins. Co. v. Argonaut Ins. Co.*, 20 A.3d 977, 983 (N.H. 2011) (discussing N.H. SUP. CT. R. 16-A). “A plain error that affects substantial rights may be considered even though it was not brought to the attention of the trial court or the supreme court.” N.H. SUP. CT. R. 16-A).

<sup>227</sup> **Arizona** (*State v. Maldonado*, 223 P.3d 653, 657 (Ariz. 2010) (en banc); *State v. Bible*, 858 P.2d 1152, 1175 (Ariz. 1993) (in banc); *State v. King*, 763 P.2d 239, 244 n. 4 (Ariz. 1988) (“[A] harmless error is not fundamental.”); *State v. Hunter*, 688 P.2d 980, 982 (Ariz. 1984) (“[F]undamental error [is] error going to the foundation of the case, error that takes from the defendant a right essential to his defense, and error of such magnitude that the defendant could not possibly have received a fair trial.”)). **Florida** (*F.B. v. State*, 852 So.2d 226, 229 (Fla. 2003)

“obvious,”<sup>228</sup> or “patent”<sup>229</sup> error. Many states have adopted the default standard by rule or statute.<sup>230</sup>

(“The sole exception to the contemporaneous objection rule applies where the error is fundamental.”); *Grau v. Branham*, 761 So.2d 375, 378 (Fla. Dist. Ct. App. 2000); *State v. Hunton*, 699 So.2d 320, 321 (Fla. Dist. Ct. App. 1997) (“Except in cases of fundamental error, appellate courts will not consider an issue that has not been presented to the lower court in a manner that specifically addresses the contentions asserted”) (internal quotations omitted) (quoting *Nevels v. State*, 685 So.2d 856, 857 (Fla. Dist. Ct. App. 1995))). **Idaho** (*State v. Perry*, 245 P.3d 961, 980 (Idaho 2010); *Hoppe v. McDonald*, 644 P.2d 355, 357 (Idaho 1982) (applying fundamental error to civil case); *State v. Reid*, 253 P.3d 754, 757–58 (Idaho Ct. App. 2011)). **Indiana** (*Johnson v. Wait*, 947 N.E.2d 951, 958 (Ind. Ct. App. 2011); *S.M. v. Elkhart Cnty. Office of Family & Children*, 706 N.E.2d 596, 599 n.3 (Ind. Ct. App. 1999) (listing handful of case fundamental error applied to civil cases)). **New Mexico** (N.M. R. APP. P. 12-216 (reviewing unpreserved jurisdictional issues, or in discretion, general public interest, fundamental error or rights questions); *State v. Ortega*, 817 P.2d 1196, 1208 (N.M. 1991), *abrogation on other grounds recognized*, *Kersey v. Hatch*, 237 P.3d 683 (N.M. 2010)). **New York** (*Santos v. Nat’l Retail Transp., Inc.*, 87 A.D.3d 418, 418 (N.Y. App. Div. 2011) (stating since error “fundamental” discretion to review unpreserved issue in interests of justice)). **Texas** (*See McCauley v. Consol. Underwriters*, 304 S.W.2d 265, 266 (Tex. 1957); *Ramsey v. Dunlop*, 205 S.W.2d 979, 982 (Tex. 1947); *see also* McDONALD & CARLSON, TEXAS CIVIL PRACTICE § 47:4, at 1201-02 (2d ed. 1998) (recognizing fundamental error as exception to general rule of preservation); W. James Kronzer, *Laying the Foundation for Appellate Review*, APPELLATE PROCEDURE IN TEXAS (State Bar of Texas, 2d ed. 1979), § 9.2, at 204–06 (stating same); *see also* *Jones v. Black*, 1 Tex. 527, 529-30 (1846) (“[T]he record being silent as to any judicial action either sought or had upon the issues of law, they will be considered as waived and will not be made the subject of revision here [except that] “if the *foundation of the action has manifestly failed*, we cannot, without shocking the common sense of justice, allow a recovery to stand.”) (quoting in part *Palmer v. Lorillard*, 16 Johnson 343, 353-54 (N.Y. Ch. 1819))).

<sup>228</sup> *See Maine* (*State v. Pabon*, 28 A.3d 1147, 1151-52 (Me. 2011) (discussing ME. R. CRIM. P. 52(b) providing “[o]bvious errors or defects affecting substantial rights” addressed on appeal)).

<sup>229</sup> **Louisiana** (*State v. Gordon*, No. 11-898, 2012 WL 555146, at \*1 (La. Ct. App. Feb. 22, 2012) (explaining all errors reviewed under LA. CODE CRIM. PROC. ANN. art. 920 as whether “patent on their face”); *see* LA. CODE CRIM. PROC. ANN. art. 920 (2008) (“The following matters and no others shall be considered on appeal: (1) An error designated in the assignment of errors; and (2) An error that is discoverable by a mere inspection of the pleadings and proceedings and without inspection of the evidence.”); *see also* *State v. Rector*, No. 08-211, 2008 WL 5169837, at \*1, \*5 (La. Ct. App. 2008) (“new legal arguments cannot be made for the first time on appeal.”).

<sup>230</sup> **Alaska** (ALASKA R. CRIM. P. 47 (stating rules for harmless and plain error)). **Connecticut** (CONN. PRAC. BOOK ch. 60, § 60-5 (explaining court may notice plain error in the interest of justice)). **Delaware** (DEL. SUP. CT. R. 8 (reviewing issues not raised below only for plain error)); **Hawaii** (HAW. R. APP. P. 28(b)(4)(D) (“Points not presented in accordance with this section will be disregarded, except that the appellate court, at its option, may notice a plain error not presented.”); (HAW. R. PENAL P. 52 (stating plain and harmless error rule)). **Illinois** (ILL. SUP. CT. R. 615(a) (explaining plain error may be noticed on appeal even if not raised)). **Kentucky** (KY. R. CIV. P. 61.02 (“A palpable error which affects the substantial rights of a party may be considered by the court on motion for a new trial or by an appellate court on appeal, even though insufficiently raised or preserved for review, and appropriate relief may be granted upon a determination that manifest injustice has resulted from the error.”)). **Louisiana** (*Gordon*, 2012 WL 555146, at \*1 (reviewing all errors as whether “patent on their face” under LA. CODE CRIM. P. art. 920)). **Mississippi** (MISS. R. APP. P. 28(a)(3) (allowing appellate court to notice plain error not identified or specified); *Univ. of Miss. Med. Ctr. v. Peacock*, 972 So.2d 619, 637 (Miss. Ct. App. 2006) (defining plain error in civil cases)). **Missouri** (MO. R. CIV. P. 84.13 (“Plain

Approximately eight (8) states apply plain error to criminal cases but not civil matters,<sup>231</sup> while twenty (20) states utilize the *Olano* formulation, including the public interest prong discretionary element.<sup>232</sup>

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errors affecting substantial rights may be considered on appeal, in the discretion of the court, though not raised or preserved, when the court finds that manifest injustice or miscarriage of justice has resulted therefrom.”); (MO R. CRIM. P. 30.20 (stating rule for plain error in criminal cases); MO. SUP. CT. R. 30.20 (permitting appellate court to consider plain error even if not raised); MB Town Ctr., LP v. Clayton Forsyth Foods, Inc., No. ED 96551, 2012 WL 70574, at \*1, \*5-6 (Mo. Ct. App. 2012); Lyon Fin. Serv., Inc. v. Harris Cab Co., Inc., 303 S.W.3d 589, 590 (Mo. Ct. App. 2010); Carroll v. Kelsey, 234 S.W.3d 559, 565 (Mo. Ct. App. 2007)). **New Hampshire** (N.H. SUP. CT. R. 16-A; State v. Herbert, 965 A.2d 1059, 1065 (N.H. 2009)). **New Jersey** (N.J. CT. R. 2:10-c). **Nevada** (NEV. REV. STAT. §178.602 (2011) (“Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.”)). **Oregon** (OR. R. APP. P. 5.45(1) (referring to “plain error” in appellate rule governing power to review unpreserved issues). According to the rule, in order to qualify as plain, an error must be one “of law”; must be “apparent,” *i.e.*, the point must be obvious, not reasonably in dispute; and must appear on the face of the record, *i.e.*, the reviewing court must not need to go outside the record to identify the error or choose between competing inferences, and the facts constituting the error must be irrefutable. *See id.*). **South Dakota** (S.D. CODIFIED LAWS § 23A-44-15 (2004); (“Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of a court.”); §19-9-6 (2004); *Thomas*, 796 N.W. 2d at 711 n.3; *First Premier Bank*, 686 N.W.2d at 442).

<sup>231</sup> **Georgia** (*Puckett v. State*, 712 S.E.2d 579, 582 (Ga. Ct. App. 2011) (citing *Putnam v. State*, 498 S.E. 2d 340, 343-44 (Ga. Ct. App. 1998)); *Dasher v. Dasher*, 658 S.E.2d 571, 572 (Ga. 2008) (stating plain error does not apply to civil cases)). **Kansas** (KAN. STAT. ANN. § 60–261 (2005); *Gilley v. Kan. Gas Serv. Co.*, 169 P.3d 1064, 2067 (Kan. 2007) (“The failure to object to a jury instruction invokes a clearly erroneous review standard, whereby we must be able to declare a real possibility existed that the jury would have returned a different verdict if the trial error had not occurred.”)). **Louisiana** (*Setliff v. Slayter*, 38 So.3d 1230, 1232 n.4 (La. Ct. App. 2010) (applying patent error review to criminal cases, but not civil)). **Maryland** (*Gittin v. Haught-Bingham*, 716 A.2d 1063, 1065 (Md. 1998) (doubting plain error applied in civil cases beyond jury instructions as provided for by MD. R. CIV. P. CIR. CT. R. 4-325 (e)). **Michigan** (*Souden v. Souden*, Nos. 297676, 297677, 29678, 2011 WL 4375097, at \*1, \*5 (Mich. Ct. App. Sept. 20, 2011) (suggesting no plain error review in civil cases)). **Minnesota** (MINN. R. CIV. P. 51.04(b) (stating plain error applies in civil jury instructions); *see also Frazier v. Burlington N. Santa Fe Corp.*, 788 N.W.2d 770, 780 (Minn. Ct. App. 2010), *rev’d* Nos. A09–2212, A092213, A09–2214, A09–2215, 2012 WL 102175, at \*1 (Minn. March 28, 2012) (stating civil plain error rule “suited to correcting obvious instances of injustice or misapplied law”) (citing *Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 256 (1981))). **New Mexico** (*State v. Alingog*, 877 P.2d 562, 566-67 (N.M. 1994), *rev’d*, 877 P.2d 562 (N.M. 1994); N.M. State Bd. of Psychologist Exam’rs v. Land, 62 P.3d 1244, 1251 (N.M. Ct. App. 2002); *Gracia v. Bittner*, 900 P.2d 351, 354–58 (N.M. Ct. App. 1995) (discussing fundamental error’s limited civil case role and counsel’s role presenting jury facts and issues)). **North Carolina** (N.C. R. APP. P. 10(a)(4) (“In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context. It is also necessary for the complaining party to obtain a ruling upon the party’s request, objection, or motion.”); *Durham v. Quincy Mut. Fire Ins. Co.*, 317 S.E.2d 372, 377 (N.C. 1984) (“[T]he application of the plain error doctrine [is limited] to appeals in criminal cases and [does not apply to] appeals in civil cases.”); *see Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, 657 S.E.2d 361, 364 (N.C. 2008)).

<sup>232</sup> **Connecticut** (*State v. Fagan*, 905 A.2d 1101, 1113 (Conn. 2006) (explaining plain error



doctrine reserved for extraordinary situations). Extraordinary situations occur where the existence of the error is so obvious that it affects fairness, integrity, and public confidence in the judicial proceedings. *Id.*; Conn. Steel Co. v. Nat'l. Amusements, Inc., 348 A.2d 658, 663 (Conn. 1974) (stating same)). **Delaware** (Robertson v. State, 596 A.2d 1345, 1356 (Del. 1991) (applying plain error to civil and criminal appeals and requiring error to be prejudicial) (citing Dutton v. State, 452 A.2d 127, 146 (Del. 1982))). “The error complained of must be so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process. *Id.*; see Duphily v. Del. Elec. Coop., Inc., 662 A.2d 821, 827 (Del. 1995) (applying the “clearly prejudicial” requirement cited in *Robertson*); Riggins v. Mauriello, 603 A.2d 827, 830 (Del. 1992) (stating same)). **Georgia** (Guajardo v. State, 718 S.E.2d 292, 295 (Ga. 2011) (considering errors for criminal cases, death penalty and jury instructions); Puckett v. State, 712 S.E.2d 579, 581 (“In exceptional circumstances . . . appellate courts, in the public interest, may, of their own motion, notice errors to which no exception has been taken, if the errors are obvious, or if they otherwise seriously affect the fairness, integrity or public reputation of judicial proceedings.”)). **Illinois** (Wilbourne v. Cavalenes, 923 N.E.2d 937, 955 (Ill. App. Ct. 2010) (explaining plain error applies in civil cases where error egregiously deprives party of fair trial) (citing Palanti v. Dillon Enters., Ltd., 707 N.E.2d 695, 701 (Ill. App. Ct. 1999))); *In re Marriage of Saheb*, 880 N.E.2d 537, 546 (Ill. App. Ct. 2007) (stating limited application of plain error to civil cases); see Gillespie v. Chrysler Motors Corp., 553 N.E.2d 291, 297 (Ill. 1990) (applying plain error doctrine more often in criminal cases); Dowell v. Bitner, 652 N.E.2d 1372, 1380 (Ill. App. Ct. 1995) (stressing plain error in civil cases must amount to “an affront to the judicial process”). **Indiana** (Addison v. State, 962 N.E.2d 1202, 1213 (Ind. 2012) (applying fundamental error only when harm or harm potential substantial and denies defendant due process) (citing Clark v. State, 915 N.E.2d 126, 131 (Ind. 2009) & Mathews v. State, 849 N.E.2d 578, 587 (Ind. 2006))); *Clark*, 915 N.E.2d at 131 (“Fundamental error is an error that makes a fair trial impossible or constitutes clearly blatant violations of basic and elementary principles of due process presenting an undeniable and substantial potential for harm.”) (citing Benson v. State, 762 N.E.2d 748, 755 (Ind. 2002))). **Kentucky** (Commonwealth v. Jones, 283 S.W.3d 665, 668 (Ky. 2009) (“[Manifest injustice for palpable error is error that] so seriously affected the fairness, integrity, or public reputation of the proceeding as to be ‘shocking or jurisprudentially intolerable.’”) (quoting Martin v. Commonwealth, 207 S.W.3d 1, 4 (Ky. 2006))). **Maine** (*Pabon*, 28 A.3d at 1153-54; State v. Burdick, 782 A.2d 319, 324 n.9 (Me. 2001); Mason v. Torrey, 714 A.2d 790 (Me. 1998) (“[Obvious error can apply in civil cases ‘only if the error was of the exceptional kind that seriously affected the fairness, integrity, or public reputation of the proceedings.’”) (quoting Harris v. PT Petro Corp., 650 A.2d 1346, 1349 (Me. 1994))). **Maryland** (Yates v. State, 33 A.3d 1071, 1083 (Md. App. 2011) (citing State v. Rich, 3 A.2d 1201, 1216 (Md. 2010)), *cert. granted*, (Md. April 20, 2012). **Michigan** (See *People v. Brown*, No. 299459, 2012 WL 593135, at \*1, \*3-4 (Mich. Ct. App. Feb. 23, 2012) (citing *People v. Carines* 597 N.W.2d 130, 138-39 (Mich. 1999))). **Minnesota** (State v. Griller, 583 N.W.2d 736, 741 (Minn. 1998)); **Mississippi** (Neal v. State, 15 So.3d 388, 403 (Miss. 2009)). **Montana** (State v. Taylor, 231 P.3d 79, 83 (Mont. 2010) (holding plain error requires appellate court convinced no review result in manifest miscarriage of justice); see also State v. Finley, 915 P.2d 208, 215 (Mont. 1996), *abrogated*, State v. Gallagher, 19 P.3d 817 (Mont. 2001)). **Nebraska** (State v. Barfield, 723 N.W.2d 303, 311 (Neb. 2006), *disapproved of on other grounds*, State v. McCulloch, 742 N.W.2d 727 (Neb. 2007); Cesar C. v. Alicia L., 800 N.W.2d 249, 254 (Neb. 2011)). **New Hampshire** (Progressive N. Ins. Co. v. Argonaut Ins. Co., 20 A.3d 977, 983 (N.H. 2011); Clark & Lavey Benefits Solutions v. Educ. Dev. Ctr., 949 A.2d 133, 138 (N.H. 2008) (“For [plain error to apply]: (1) there must be an error; (2) the error must be plain; (3) the error must affect substantial rights; and (4) the error must seriously affect the fairness, integrity or public reputation of judicial proceedings.”) (quoting Cloutier v. Berlin, 907 A.2d 955, 966 (N.H. 2006))). **Ohio** (State v. Barnes, 759 N.E.2d 1240, 1247 (Ohio 2002)). **Oklahoma** (Barnett v. State, 271 P.3d 80, 82 (Okla. Crim. App. 2012); Simpson v. State, 876 P.2d 690, 700-01 (Okla. Crim. App. 1994)). **South Dakota** (S.D. CODIFIED LAWS § 23A-44-15 (2004) (“Plain error or defects affecting substantial rights may be

There are generally three groups of plain error type of review among the state courts: the *Olano*-public interest approach,<sup>233</sup> the outcome determinative only approach,<sup>234</sup> and hybrids of both or either.<sup>235</sup> In certain

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noticed although they were not brought to the attention of the trial court.”); *State v. Thomas*, 796 N.W.2d 706, 711 n.3 (S.D. 2011); *First Premier Bank v. Kolcraft Enters., Inc.*, 686 N.W.2d 430, 442 (S.D. 2004), *superseded on other grounds, In re Estate of Duebendorfer*, 721 N.W.2d 438 (S.D. 2006)). **Vermont** (*State v. Brochu*, 949 A.2d 1035, 1055 (Vt. 2008) (“Plain error exists only in exceptional circumstances where a failure to recognize an error would result in a miscarriage of justice, or where there is a glaring error so grave and serious that it strikes at the very heart of the defendant’s constitutional rights.”) (citing *State v. Carpenter*, 749 A.2d 1137, 1139-40 (Vt. 2000))); *State v. Yoh*, 910 A.2d 853, 872 (Vt. 2006) (using *Olano* standard as “a guide for applying our own plain-error standard”). **West Virginia** (*Cartwright v. McComas*, 672 S.E.2d 297, 300 (W. Va. 2008); *State v. Miller*, 459 S.E.2d 114, 129-30 (W. Va. 1995); *Page v. Columbia Natural Res., Inc.*, 480 S.E.2d 817, 828 (W. Va. 1996)).

<sup>233</sup> See *supra* note 232 (listing states utilizing public interest prong).

<sup>234</sup> **Hawaii** (*State v. Miller*, 223 P.3d 157, 193 (Haw. 2010) (expressly rejecting fourth prong under *Olano* test)). **Kansas** (*State v. Davis*, 61 P.3d 701, 707 (Kan. 2003) (“[Clear error occurs if] reviewing court is firmly convinced there is a real possibility that the jury would have rendered a different verdict if the error had not occurred.”)). **Ohio** (*State v. Schlosser*, No. 14-10-30, 2011 WL 3658382, at \*3 (Ohio Ct. App. Aug. 22, 2011) (requiring obvious error and but for error outcome would be different)).

<sup>235</sup> **Alaska** (*Adams v. State*, 261 P.3d 758, 773 (Alaska 2011) (interpreting criminal procedure rule for plain error requirements). Plain error requires that:

(1) there must be error, and the error must not have been the result of an intelligent waiver or a tactical decision not to object; (2) the error must be obvious, meaning that it should have been apparent to any competent judge or lawyer; (3) the error must affect substantial rights, meaning that it must pertain to the fundamental fairness of the proceeding; and (4) the error must be prejudicial. A constitutional violation will always affect substantial rights and will be prejudicial unless the State proves that it was harmless beyond a reasonable doubt. An error that is not constitutional in nature will be prejudicial if the defendant proves that there is a reasonable probability that it affected the outcome of the proceeding.

*Id.* *Harris v. Keys*, 948 P.2d 460, 465-66 (Alaska 1997) (evaluating error for Alaskan civil cases where obvious mistake made creates high likelihood injustice resulted); *Miller v. Sears*, 636 P.2d 1183, 1189 (Alaska 1981) (stating same); *Holiday Inns of Am., Inc. v. Peck*, 520 P.2d 87, 90 (Alaska 1974) (stating same)). **Arizona** (*State v. Hunter*, 688 P.2d 980, 982 (Ariz. 1984) (en banc) (“Fundamental error [is] error going to the foundation of the case, error that takes from the defendant a right essential to his defense, and error of such magnitude that the defendant could not possibly have received a fair trial.”)). **Colorado** (*People v. Greer*, 262 P.3d 920, 924 (Colo. App. 2011); see *People v. Sepulveda*, 65 P.3d 1002, 1006 (Colo. 2003) (en banc) (“Plain error is error that] so undermined the fundamental fairness of the proceeding as to cast serious doubt on the reliability of the judgment.”) (quoting *Walker v. People*, 932 P.2d 303, 311 (Colo. 1997) (en banc))). **Delaware** (*Stansbury v. State*, 591 A.2d 188, 191 (Del. 1991), *superseded by statute*, *Mills v. State*, 732 A.2d 845 (Del. 1999)). **Florida** (*Grau v. Branham*, 761 So.2d 375, 378 (Fla. Dist. Ct. App. 2000); *State v. Hunton*, 699 So.2d 320, 321 (Fla. Dist. Ct. App. 1997). Florida follows fundamental error rule which requires appellate review where the error is “extreme” and “so damaged the fairness of the trial that the public’s interest in our system of justice justifies a new trial. *Murphy v. Int’l Robotics Sys.*, 710 So.2d 587, 590 (Fla. Dist. Ct. App. 1998). See *J.B. v. State*, 705 So.2d 1376, 1378 (Fla. 1998) (“[Fundamental error] goes to the foundation of the

case or the merits of the cause of action and is equivalent to a denial of due process.”); *State v. Johnson*, 616 So.2d 1, 3 (Fla.1993) (“[F]or an error to be so fundamental that it can be raised for the first time on appeal, the error must be basic to the judicial decision under review and equivalent to a denial of due process.”)). **Hawaii** (*Miller*, 223 P.3d at 193 (rejecting four part *Olano* test for plain error) (citing *State v. Nichols*, 141 P.3d 974, 982 (Haw. 2006))). **Illinois** (*Wilbourne*, 923 N.E.2d at 955 (citing *Palanti*, 707 N.E.2d at 701)); *In re Marriage of Saheb*, 880 N.E.2d at 546; *see Gillespie*, 553 N.E.2d at 297; *Dowell*, 652 N.E.2d at 1380)). **Indiana** (*Addison*, 962 N.E.2d at 1213; *Clark*, 915 N.E.2d at 131)). **Idaho** (*State v. Perry*, 245 P.3d 961, 980 (Idaho 2010) (“Error that is fundamental must be such error as goes to the foundation or basis of a defendant’s rights or must go to the foundation of the case or take from the defendant a right which was essential to his defense and which no court could or ought to permit him to waive.”) (quoting *Smith v. State*, 491 P.2d 733, 739 n.13 (Idaho 1971), *abrogated, Perry*, 245 P.3d 961 (Idaho 2010))). **Louisiana** (*State v. Bland*, 558 So.2d 719, 727 (La. Ct. App. 1990) (“[I]f an error is so fundamental that it calls into question the reliability of the fact finding process, the contemporaneous objection rule has not been applied.”)). **Missouri** (*State v. Woods*, 357 S.W.3d 249, 254 (Mo. Ct. App. 2012)). **Montana** (*Emmerson v. Walker*, 236 P.3d 598, 605 (Mont. 2010) (requiring showing of possibility of manifest injustice or issue with fundamental fairness of trial)). **Nevada** (*Valdez v. State*, 196 P.3d 465, 477 (Nev. 2008) (requiring plain error and affects substantial rights by causing actual prejudice or miscarriage of justice)). **New Jersey** (*State v. Perez*, Nos. A-5803-08T3, A-6017-08T3, 2012 WL 570182, at \*1 (N.J. Super. Ct. App. Div. Feb. 23, 2012) (“[E]rror was ‘clearly capable of producing an unjust result,’ that is . . . ‘sufficient to raise a reasonable doubt as to whether the error led the jury to a result it otherwise might not have reached.’”) (quoting *State v. Taffaro*, 950 A.2d 860, 867 (N.J. 2008))). **New Mexico** (N.M. R. APP. P. 12-216; *State v. Ortega*, 817 P.2d 1196, 1208 (N.M. 1991) (defining fundamental error when guilt doubtful it shocks court’s conscience or to avoid miscarriage of justice), *abrogation on other grounds recognized, Kersey v. Hatch*, 237 P.3d 683 (N.M. 2010)). **New York** (*Peguero v. 601 Realty Corp.*, 873 N.Y.S.2d 17, 25 (N.Y. App. Div. 2009) (“[W]here [an] error is so fundamental as to preclude consideration of the central issue upon which the claim of liability is founded, the court may, in the interests of justice, proceed to review the issue even in the absence of objection or request [to charge].”) (quoting *Pivar v. Graduate Sch. of Figurative Art*, 735 N.Y.S.2d 522, 524 (N.Y. App. Div. 2002))). **North Carolina** (*State v. Stokes*, 718 S.E.2d 174, 178-79 (N.C. Ct. App. 2011) (explaining application of plain error rule) (citing *State v. Odom*, 300 S.E.2d 375, 378 (N.C. 1983))). The court in *Stokes* explained that:

The plain error rule is always to be applied cautiously and only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is a fundamental error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done, or where the error is grave error which amounts to a denial of a fundamental right of the accused, or the error has resulted in a miscarriage of justice or in the denial to appellant of a fair trial or where the error is such as to seriously affect the fairness, integrity or public reputation of judicial proceedings or where it can be fairly said the instructional mistake had a probable impact on the jury’s finding that the defendant was guilty.

718 S.E.2d 174, 178-79. **North Dakota** (*State v. Hernandez*, 707 N.W.2d 449, 455 (N.D. 2005)). **Oregon** (OR. R. APP. P. 5.45(1)). **Rhode Island** (*State v. Hallenbeck*, 878 A.2d 992, 1018 (R.I. 2005) (noting exception to raise or waive rule). The court in *Hallenbeck* explained that:

An exception to Rhode Island’s ‘raise or waive’ rule does exist. To qualify as an exception to the rule, the error complained of must be more than harmless error, the record must be sufficient to permit a determination of the issue, the issue must be of constitutional dimension, and counsel’s failure to

states, the “plain error” type exception for civil cases is framed differently than that applicable to criminal cases.<sup>236</sup>

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raise the issue must be attributed to a novel rule of law that counsel could not reasonably have known during trial.

*Id.* (quoting *State v. Rupert*, 649 A.2d 1013, 1016 (R.I. 1994)). **Utah** (*State v. Dunn*, 850 P.2d 1201, 1208-09 (Utah 1993)). The establishment of plain error requires that the appellant must show . . . (i) [a]n error exists; (ii) the error should have been obvious to the trial court; and (iii) the error is harmful, i.e., absent the error, there is a reasonable likelihood of a more favorable outcome for the appellant, or phrased differently, our confidence in the verdict is undermined. *Id.*). **Virginia** (VA. SUP. CT. R. 5A:18 (“No ruling of the trial court . . . will be considered as a basis for reversal unless the objection was stated with reasonable certainty at the time of ruling, except for good cause shown or to enable the Court of Appeals to attain the ends of justice.”); *Gheorghiu v. Commonwealth*, 701 S.E.2d 407, 413 (Va. 2010) (“Whether the ends of justice provision should be applied involves two questions: (1) whether there is error as contended by the appellant; and (2) whether the failure to apply the ends of justice provision would result in a grave injustice.”) (citing *Charles v. Commonwealth*, 613 S.E.2d 432, 433 (Va. 2005), *abrogated*, *Rawls v. Commonwealth*, 683 S.E.2d 544 (Va. 2009))); *Perry v. Commonwealth*, 712 S.E.2d 765, 771 (Va. Ct. App. 2011) (construing Rule 5A:18 to constitute two exceptions—“good cause” and “ends of justice”), *abrogated by*, *Rawls v. Commonwealth*, 683 S.E.2d 544 (Va. 2009); *Bazemore v. Commonwealth*, 590 S.E.2d 602, 609 (Va. Ct. App. 2004) (en banc); *Mounce v. Commonwealth*, 357 S.E.2d 742, 744 (Va. Ct. App. 1987) (“[T]he ‘ends of justice’ provision may be used when the record affirmatively shows that a miscarriage of justice has occurred, not when it merely shows that a miscarriage *might* have occurred.”)). **Washington** (*State v. Bertrand*, 267 P.3d 511, 521 (Wash. Ct. App. 2011)). The court adopted the “manifest error” terminology when promulgating RAP 2.5(a)(3), rather than the more common “plain error” standard, in an effort to limit appellate review of unpreserved error to instances where an appellant’s constitutional rights were in jeopardy, and deliberately chose the well-understood and long-standing “manifest error” language to avoid confusion with the more expansive “plain error” standard); *Bertrand*, 2011 WL 6097718 (“A plaintiff must establish that a “manifest error” occurred and, that the error affected a constitutional right); *State v. Harris*, 224 P.3d 830, 833 (Wash. Ct. App. 2010) (requiring “manifest” error have “practical and identifiable consequences in the trial of the case”); *State v. Speaks*, 829 P.2d 1096, (1992) (stating courts should determine whether burden of showing manifest error met before addressing constitutional claims)). **Wisconsin** (WIS. STAT. 901.03 (2000); *State v. Lammers*, 773 N.W.2d 463, 467 (Wis. Ct. App. 2009) (requiring clear or obvious error and one likely depriving defendant of basic constitutional rights)). **Wyoming** (*Walker v. State*, 267 P.3d 1107, 1110 (Wyo. 2012) (listing requirements for plain error). Plain error requires (1) record is clear about incident as to alleged error; 2) there is transgression of a clear and unequivocal rule of law; and (3) the party claiming error was denied a substantial right which resulted in material prejudice. *Id.*).

<sup>236</sup> See **Colorado** (*Compare Sepulveda*, 65 P.3d at 1006 (“[Plain error review] is required only when an error so undermined the fundamental fairness of the proceeding as to cast serious doubt on the reliability of the judgment.”), *with Harris Group Inc. v. Robinson*, 209 P.3d 1189, 1195 (Colo. App. 2009) (applying civil plain error in “unusual and special cases” and “to avert manifest injustice”)). **Hawaii** (*Compare Miller*, 223 P.3d at 193, *with Montalvo v. Lapez*, 884 P.2d 345, 353 (Haw. 1994) (considering three factors to find plain error in civil cases). “We [consider] three factors . . . to notice plain error in civil cases: (1) whether consideration of the issue not raised at trial requires additional facts; (2) whether its resolution will affect the integrity of the trial court’s findings of fact; and (3) whether the issue is of great public import.” *Id.*; *Kobashigawa v. Silva*, 266 P.3d 470, 473 (stating same)). **Michigan** (*Compare People v. Carines*, 597 N.W.2d 130, 139 (Mich. 1999) (following *Olano* plain error test in criminal cases), *with Smith v. Foerster-Bolser Const.*, 711 N.W.2d 421, 423 (Mich. Ct. App. 2006) (“Court may

Approximately seventeen (17) states have cited to or referenced either *Hormel* and/or *Singleton* as to “exceptional circumstance” discretion.<sup>237</sup> Some states have a rule or statute providing for exception to

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overlook preservation requirements if the failure to consider the issue would result in manifest injustice, if consideration is necessary for a proper determination of the case, or if the issues involve a question of law and the facts necessary for its resolution have been presented.”), and *Souden v. Souden*, No. 297676, 2011 WL 4375097, at \*5 (Mich. Ct. App. Sept. 20, 2011) (suggesting no plain error review in civil cases)). **New Mexico** (N.M. State Bd. of Psychologist Exam’rs v. Land, 62 P.3d 1244, 1251 (N.M. Ct. App. 2003) (“[T]he fundamental error doctrine does not apply to civil cases except in the most extraordinary circumstances.”); *Gracia v. Bittner*, 900 P.2d 351, 354-58 (N.M. Ct. App. 1995) (discussing the very limited role of fundamental error in civil cases); *Morfin v. Villalobos*, No. 30,782, 2011 WL 2040809, at \*4 (N.M. Ct. App. Apr. 26, 2011) (stating same)). **Ohio** (*Compare Schlosser*, 2011 WL 3658382, at \*3 (stating obvious error affecting substantial rights applicable in criminal case), and *Barnes*, 759 N.E.2d at 1247 (stating same), with *Goldfuss v. Davidson*, 679 N.E.2d 1099, 1104 (Ohio 1997) (“[I]n appeals of civil cases, the plain error doctrine . . . may be applied only . . . where error . . . seriously affects the basic fairness, integrity, or public reputation of the judicial process, thereby challenging the legitimacy of the underlying judicial process itself.”); *Huntington Nat’l Bank v. Lomaz*, No. 2008-P-0007, 2010 WL 702439, at \*6 (Ohio Ct. App. 2010) (stating same)). **South Dakota** (*First Premier Bank*, 686 N.W.2d at 442 (stating civil plain error only applicable “ludicrous result” ridicules entire judicial system) (*superseded on other grounds in In re Estate of Duebendorfer*, 721 N.W.2d 438 (S.D. 2006))). **Vermont** (*Compare Brochu*, 949 A.2d at 1055 (noting *Olano* plain error test for criminal cases in Vermont), with *Follo v. Florindo*, 970 A.2d 1230, 1237 (Vt. 2009) (“Court considers plain error in civil cases only . . . when an appellant raises a claim of deprivation of fundamental rights, or when a liberty interest is at stake in a quasi-criminal or hybrid civil-criminal probation hearing.”) (internal citations omitted))).

<sup>237</sup> **Alaska** (*Commercial Fisheries Entry Comm’n v. Byayuk*, 684 P.2d 114, 122-23 (Alaska 1984)). **Arizona** (*Bohonus v. Amerco*, 602 P.2d 469, 471 (Ariz. 1979) (in banc)). **California** (*Greenblatt v. Munro*, 326 P.2d 929,935 (Cal. Dist. Ct. App. 1958)). **Connecticut** (*Conn. Steel Co. v. Nat’l Amusements Inc.*, 348 A.2d 658, 663 (Conn. 1974); *State v. Evans*, 327 A.2d 576, 581 (Conn. 1973); *State v. Narvaez*, 485 A.2d 1351, 1353 (Conn. App. Ct. 1985)). **Florida** (*Miami-Dade Cnty. v. Omnipoint Holdings, Inc.*, 863 So.2d 195, 200 (Fla. 2003) (citing and discussing *Hormel* but concluding there was no “patent injustice” present); *In Interest of R.W.*, 481 So. 2d 548, 549 (Fla. Dist. Ct. App. 1986) (considering waived argument as the unconstitutionality of statute was patent)). **Hawaii** (*Fujioka v. Kam*, 514 P.2d 568, 570 (Haw. 1973) (stating general rule “not inflexible” and appellate court may hear new arguments as justice requires)). **Idaho** (*Ochoa v. State Indus. Special Indem. Fund*, 794 P.2d 1127, 1134 (Idaho 1990)). **Illinois** (*Wadlington v. Mindes*, 259 N.E. 2d 257, 261 (Ill. 1970)). **Iowa** (*Berhow v. Kroack*, 195 N.W.2d 379, 390 (Iowa 1972)). **Maine** (*Teel v. Colson*, 396 A.2d 529, 535 (Me. 1979), *disavowed on other grounds*, *Henry v. Brown*, 495 A.2d 324 (Me. 1985) (“We do concede that exceptional circumstances may exist where the application of the general rule of practice under which appellate courts will not entertain issues or theories raised for the first time on appeal would obviously result in a plain miscarriage of justice, and that under such circumstances the court will consider the belated issue or theory to promote the ends of justice.”); *see also Hixon v. Mathieu*, 377 A.2d 112, 115 (Me. 1977) (notwithstanding unobjected critical erroneous instructions justice demanded new trial; otherwise deprivation of fundamental trial right); *Smith v. Tonge*, 377 A.2d 109, 111 (Me. 1977) (finding no right to disturb judgment unless after examination, court convinced appellant substantially prejudiced)). **Missouri** (*Clark v. Bd. of Dirs. of Kansas City*, 915 S.W.2d 766, 772 (Mo. Ct. App. 1996)). **New Mexico** (*State v. Alingog*, 866 P.2d 378, 383 (N.M. Ct. App. 1993), *rev’d*, 877 P.2d 562 (N.M. 1994)). **North Dakota** (*Johnson v. Elkin*, 263 N.W.2d 123, 133 (N.D. 1978)). **Oregon** (*Lane Council of Gov’ts. v. Lane Counsel of Gov’t Emps.*, 552 P.2d 600, 602 (Or. Ct. App. 1976), *rev’d* 561 P.2d 1012

preservation or the usual bar to presenting new issues on appeal.<sup>238</sup> Other states have no separate exceptional circumstances discretion beyond plain error.<sup>239</sup>

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(Or. 1977)). **Rhode Island** (Harvey Realty v. Killingly Manor Condo. Ass'n, 787 A.2d 465, 467 (R.I. 2001) (Reiterating rule precedent only supports deviation from general forfeiture rule concerning basic constitutional)). **South Dakota** (State v. Gard, 742 N.W.2d 257, 261 (S.D. 2007); see *In re J.D.M.C.*, 739 N.W.2d 796, 805 (S.D. 2007)). **West Virginia** (State v. Greene, 473 S.E.2d 921, 927 (W. Va. 1996); State v. Crabtree, 482 S.E.2d 605, 613 (W.Va. 1996) (deviating from invited error doctrine permitted where rule's application would result in manifest injustice)).

<sup>238</sup> **Colorado** (COLO. APP. P. R. 1(d) (stating appellate court "may in its discretion notice any error appearing of record")). **Kansas** (KAN. SUP. CT. R. 6.02(e) (directing appellant to "explain why" issues not raised below on appeal); State v. Atteberry, 239 P.3d 857, 867 (Kan. Ct. App. 2010)). **Louisiana** (LA UNIFORM R. 1-3 ("The Courts of Appeal will review only issues which were submitted to the trial court and which are contained in specifications or assignments of error, unless the interest of justice clearly requires otherwise.")). **Maryland** (MD. R. 8-131 ("[T]he Court may decide [an unraised issue] if necessary or desirable to guide the trial court or to avoid the expense and delay of another appeal.")). **New Mexico** (N.M. R. APP. P.12-216 (stating scope of review for unpreserved issues)). **North Carolina** (N.C. R. APP. P. 2 (suspending rules when necessary to prevent manifest injustice or to expedite decision in public interest); J.T. Russell & Sons, Inc v. Silver Birch Pond L.L.C., 721 S.E.2d 699, 704 (N.C. Ct. App. 2011)). **Tennessee** (TENN. R. APP. P. 36(b) ("When necessary to do substantial justice, an appellate court may consider an error that has affected the substantial rights of a party at any time, even though the error was not raised in the motion for a new trial or assigned as error on appeal."); TENN. R. APP. P. 13(b) ("The appellate court . . . may in its discretion consider other issues in order, among other reasons: (1) to prevent needless litigation, (2) to prevent injury to the interests of the public, and (3) to prevent prejudice to the judicial process.")). According to the Advisory Commission Comment to subdivision (b) of Rule 13:

This subdivision deals with the very difficult question of when an appellate court should consider an issue not raised by the parties. Generally speaking, control over the issues should reside in the parties, not in the court. Accordingly, this subdivision provides that review will typically extend only to the issues set forth in the briefs. Only the absence of subject-matter jurisdiction, whether at the trial or appellate level, must be considered by the appellate court regardless of whether it is presented for review. Cases appealed to the wrong appellate court must be transferred pursuant to Rule 17 of these rules. In all the other situations described in this subdivision, the appellate court has discretion to decide whether it will consider a matter not raised by the parties. It is intended that this discretion be sparingly exercised.

TENN. R. APP. P. 13 advisory committee's comment; see also *Malco Theaters, Inc. v. Roberts*, No. W2010-004640-COA-R3-CV, 2011 WL 1598884, at \*8 (Tenn. Ct. App. Apr. 26, 2011) (noting it would review issue because issue had been briefed by both parties); *Waters v. Farr*, 291 S.W.3d 873, 919 n.22 (Tenn. 2009) (Koch, J., concurring in part and dissenting in part); *Weaver v. Deverell*, No. W2011-00563-COA-R3-CV, 2011 WL 5069418, at \*3-4 (Tenn. Ct. App. Oct. 26, 2011)). **Virginia** (VA. SUP. CT. R. 5A:8, 5A:18). **Washington** (WASH. R. APP. P. 2.5(a) (permitting exception where no jurisdiction; insufficient facts to grant relief and constitutional right manifest error)). **Wisconsin** (WIS. STAT. § 901.03 (2001)).

<sup>239</sup> **Delaware** (*Brown v. State*, 36 A.3d 321, 323 (Del. 2012) (appearing to equate plain error with "interest of justice" and citing DEL. SUP. CT. R. 8)). **Georgia** (*OVIP, Inc. v. Blockbuster*

The formulations as to “exceptional circumstances” separate from plain error review are variable and difficult to pigeon hole into categories. Some generically state the exception under the “interest of justice,”<sup>240</sup> “when justice so requires,”<sup>241</sup> “injustice might otherwise result,”<sup>242</sup> “miscarriage of justice,”<sup>243</sup> “manifest injustice,”<sup>244</sup> “substantial rights

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Textiles, LLC., 656 S.E.2d 907, 909 (Ga. Ct. App. 2008) (“Issues presented for the first time on appeal furnish nothing for [appellate court] to review[.]”) (internal citations omitted)). **Minnesota** (MINN. R. CIV. APP. P. 103.04 (“[A]ppellate courts may review any order affecting the order from which the appeal is taken and on appeal from a judgment may review any order involving the merits or affecting the judgment . . . [and] any other matter as the interest of justice may require.”)). **Montana** (Andersen v. Monforton, 125 P.3d 614, 620 (Mont. 2005) (“Since this argument is raised for the first time on appeal, we do not address it.”); *In re T.E.*, 54 P.3d 38, 42 (Mont. 2002) (holding consistently no consideration of issues raised for the first time on appeal); Spencer v. Robertson, 445 P.2d 48, 50 (Mont. 1968) (considering for review only those questions raised in trial court); *contra* Day v. Payne, 929 P.2d 864, 866 (Mont. 1996) (noting limited exception where an allege error affects substantial rights)). **Nebraska** (*In re Estate of Rosso*, 701 N.W.2d 355, 363 (Neb. 2005) (refusing review for unpreserved error unless plain error)). **Nevada** (Nutraceutical Dev. Corp. v. Summers, No. 53565, 2011 WL 2623749 at \*1 n.1 (Nev. July 1, 2011); Bradley v. Romeo, 716 P.2d 227, 228 (Nev. 1986); Emmons v. State, 807 P.2d 718, 722 (Nev. 1991) (considering plain error and constitutional issues only), *overruled on other grounds*, Harte v. State, 13 P.2d 718 (1991)). **New Hampshire** (Doyle v. Comm’r, N.H. Dep’t of Econ. Dev., 37 A.3d 343, 348 (N.H. 2012)). **Texas** (*In re D.T.M.*, 932 S.W.2d 647, 652 (Tex. App. 1996) (reviewing new issue on appeal where trial court lacked jurisdiction or public interest adversely affected)).

<sup>240</sup> MINN. R. CIV. APP. P. 103.04 (“[Appellate courts may review] any other matter as the interest of justice may require.”); Smith v. State, 521 So.2d 106, 108 (Fla. 1988) (“[T]he doctrine of fundamental error should be applied only in rare cases where a jurisdictional error appears or where the interests of justice present a compelling demand for its application.”); Joyner v. State, 41 So.3d 306, 307 (Fla. Dist. Ct. App. 2010) (“[O]nly in the rare cases where a jurisdictional error appears or the interest of justice present a compelling demand for its application.”) (quoting Nesbitt v. State, 889 So.2d 801, 803 (Fla. 2004)); People v. Foster, 927 N.Y.S.2d 92, 96 (N.Y. App. Div. 2011) (stating court has discretion to address unpreserved claim in the “interests of justice”).

<sup>241</sup> *Fujioka*, 514 P.2d at 570 (stating appellate court may hear new arguments when justice requires); Kobashigawa v. Silva, 266 P.3d 470, 473 (Haw. Ct. App. 2011) (“[A]n appellate court should invoke plain error doctrine in civil cases only when justice so requires.”); People v. Hermiz, 611 N.W.2d 783, 785 (Mich. 2000) (reviewing issue not raised by parties in limited circumstances where justice so requires); Paramount Pictures Corp. v. Miskinis, 344 N.W.2d 788, 799 (Mich. 1984) (stating appellate court has right to address where justice so requires).

<sup>242</sup> Wadlington v. Mindes, 259 N.E.2d 257, 261 (Ill. 1970) (“[T]he general rule that an appellate court should confine itself to issues raised in earlier proceedings is not a rigid or inflexible one, and, where injustice might otherwise result, a reviewing court may consider questions of law . . . .”); Sekerez v. Rush Univ. Med. Ctr., 954 N.E.2d 383, 397 (Ill. App. Ct. 2011) (“The doctrine of waiver . . . is a limitation on the parties and not on this court [and] [d]espite waiver, this court may address an issue in order to carry out its responsibility to reach a just result.”).

<sup>243</sup> **Maine** (Butler v. Killoran, 714 A.2d 129, 134 n.9 (Me. 1998) (noting exception as when general rule would obviously result in plain miscarriage of justice); Teel v. Colson, 396 A.2d 529, 534 (Me. 1979) (conceding exception to general review for appellate review of newly raised issues), *disavowed on other grounds*, Henry v. Brown, 495 A.2d 324 (Me. 1985). The court stated:

affected,<sup>245</sup> “ends of justice,”<sup>246</sup> or other<sup>247</sup> terminology. At least eleven

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We do concede that exceptional circumstances may exist where the application of the general rule of practice under which appellate courts will not entertain issues or theories raised for the first time on appeal would obviously result in a plain miscarriage of justice, and that under such circumstances the court will consider the belated issue or theory to promote the ends of justice.

*Id.* **Mississippi** (State Highway Comm’n v. McDonald’s Corp., 509 So.2d 856, 863 (Miss.1987) (en banc) (“[T]hough a party may in fact have waived its right to assert error, this Court has inherent power to notice it to prevent a manifest miscarriage of justice.”); see *Johnson v. Fargo*, 604 So.2d. 306, 311 (Miss. 1992); see also *Johnson v. State*, 452 So.2d 850, 853 (Miss. 1984)).

<sup>244</sup> **Colorado** (*Harris Group, Inc. v. Robinson*, 209 P.3d 1188, 1189 (Colo. App. 2009)). **Florida** (*Smith*, 521 So.2d at 108 (equating “interest of justice” discretion with fundamental error); *Miami-Dade Cnty. v. Omnipoint Holdings, Inc.*, 863 So.2d 195, 200 (Fla. Dist. Ct. App. 2003) (concluding no “patent injustice” present); *In re R.W.*, 481 So.2d 548, 549 (Fla. Dist. Ct. App. 1986)). **Michigan** (*General Motors Corp. v. Dep’t. of Treasury*, 803 N.W.2d 698, 717 (Mich. Ct. App. 2010) (utilizing manifest injustice terminology)). **North Carolina** (*Dogwood Dev. & Mgmt. Co. v. White Oak Transp. Co.*, 657 S.E.2d 361, 364 (N.C. 2008) (“[A]ppellate courts may review] when necessary to prevent manifest injustice to a party or to expedite decision in the public interest.”) (internal citations omitted)). **Utah** (*State v. Archambeau*, 820 P.2d 920, 923 (Utah Ct. App. 1991) (“[E]xception to [general] rule . . . is catch-all device requiring exceptional or unusual circumstances . . . [as] a safety device to make certain that manifest injustice does not result from the failure to consider an issue on appeal.”)).

<sup>245</sup> *InTown Lessee Assocs., LLC v. Howard*, 67 So.3d 711, 718 (Miss. 2011) (explaining unless substantial rights affected, issues not presented to trial judge procedurally barred from appeal); *Mathis v. ERA Franchise Sys., Inc.*, 25 So.3d 298, 303 (Miss. 2009) (stating absent extraordinary circumstances, Supreme Court will not consider issues raised first time on appeal).

<sup>246</sup> See VA. SUP. CT. R. 5A:18 (“No ruling of the trial court . . . will be considered as a basis for reversal unless the objection was stated with reasonable certainty at the time of the ruling, except for good cause shown or to enable the Court of Appeals to attain the ends of justice.”); *Bazemore v. Commonwealth*, 590 S.E.2d 602, 610 (Va. Ct. App. 2004) (invoking ends of justice requires showing no miscarriage of justice and miscarriage might have occurred).

<sup>247</sup> *Gittin v. Haught-Bingham*, 716 A.2d 1063, 1066 (Md. Ct. Spec. App. 1998) (“Whatever limited discretion an appellate court may have to consider unpreserved errors. . . such discretion should be exercised only in extraordinary circumstances and within the bounds of fairness to both parties and to the court, not just as to the party seeking the exercise of that discretion.”); *Schmidt v. Boardman Co.*, 11 A.3d 924, 942 (Pa. 2011) (confirming Pennsylvania does not recognize plain error but “extraordinary circumstances” may justify reaching unpreserved issue); see *Patterson v. Patterson*, 266 P.3d 828, 832 (Utah 2011) (“Our preservation requirement is self-imposed and is therefore one of prudence rather than jurisdiction. . . . we exercise wide discretion when deciding whether to entertain or reject matters that are first raised on appeal.”); *State v. Dunn*, 850 P.2d 1201, 1209 n. 3 (Utah 1993) (noting exception deemed “ill-defined” and applying “primarily to rare procedural anomalies”); see also *Elizabethton v. Carter Ctny.*, 321 S.W.2d 822, 827 (Tenn. 1958) (explaining discretionary powers of appellate courts). The court stated:

[W]hile it is true that the rules of this Court provide that all questions presented to this Court shall have been raised in the trial Court and relied on in the assignments of error, this limitation is not binding upon this Court, acting on its own motion, when the constitutionality of statutes are involved, or when this Court conceives that equitable considerations, apparent on the



(11) states have adopted either a separate constitutional issue exception to the raise or lose rule or have otherwise specifically identified it as a factor favoring discretionary exception.<sup>248</sup> Many states include exception for questions of law and where the appellate record (including appellate briefing) is adequate either as stand-alone exceptions<sup>249</sup> or in combination

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face of the record, forbid a complainant from maintaining a suit. In every such case the Court will assert, on its own motion, its obligation to deny the use of the Court. These principles are fundamental. Appellate Courts have broad discretionary powers in such matters of practice.

*Elizabethton*, 321 S.W.2d at 827 (quoting *Frazier v. Elmore*, 173 S.W.2d 563, 566 (Tenn. 1943)).

<sup>248</sup> **Arizona** (*Aldrich & Steinberger v. Martin*, 837 P.2d 1180, 1182 (Ariz. Ct. App. 1992)). **California** (*People v. Partida*, 122 P.3d 765, 770 (Cal. 2005) (holding exception includes where error has legal consequence of violating due process rights)). **Connecticut** (*State v. Golding*, 567 A.2d 823, 827 (Conn. 1989) (stating conditions for constitution error review)). The constitutional error exception requires that a defendant meet all of the following conditions:

(1) the record is adequate to review the alleged claim of error; (2) the claim is of constitutional magnitude alleging the violation of a fundamental right; (3) the alleged constitutional violation clearly exists and clearly deprived the defendant of a fair trial; and (4) if subject to harmless error analysis, the state has failed to demonstrate harmlessness of the alleged constitutional violation beyond a reasonable doubt.

*Id.* **Idaho** (*State v. Perry*, 245 P.3d 961, 980 (Idaho 2010); *State v. Carter*, No. 38038, 2012 WL 386591, at \*3 (Idaho Ct. App. Feb. 8, 2012)). **Iowa** (*State v. Heacock*, 521 N.W.2d 707, 710 (Iowa 1994); *State v. Clark*, 351 N.W.2d 532, 535 (Iowa 1984) (allowing review if failure to preserve error results from due process right to effective representation), *superseded by statute*, *State v. Spoonmore*, 598 N.W.2d 311 (Iowa 1999)). **Montana** (*Day v. Payne*, 929 P.2d 864, 866 (Mont. 1996) (noting limited exception error alleged affects substantial rights); *In re A.S.F.*, 199 P.3d 808, 809 (Mont. 2008) (considering unpreserved issues where constitutional or substantial rights concerned)). **Nevada** (*Grey v. State*, 178 P.3d 154, 161 (Nev. 2008) (“Failure to object below generally precludes review by this court; however, we may address plain error and constitutional error *sua sponte*.”); *Emmons v. State*, 807 P.2d 718, 722 (stating same), *overruled on other grounds*, *Harte v. State*, 13 P.2d 718 (1991)). **Ohio** (*Hyle v. Porter*, 868 N.E.2d 1047, 1050 (Ohio Ct. App. 2006) (declining to address new legal argument unless claimed denial of constitutional rights), *rev’d on other grounds*, 882 N.E.2d 899 (Ohio 2008)). **Rhode Island** (*R.I. Depositors Econ. Protection Corp. v. Rignanese*, 714 A.2d 1190, 1196-97 (R.I. 1998) (“It is well settled that this Court will not consider on appeal an issue that was not raised before the trial court. An exception to the raise-or-waive rule is that this Court will review allegations of violations of basic constitutional rights but even then only in very narrow circumstances.”)). **Utah** (*Pratt v. City Council of Riverton*, 639 P.2d 172, 173-74 (Utah 1981) (noting court has considered unpreserved constitutional arguments where a person’s liberty is at stake)). **Washington** (*State v. Garner*, No. 63664-2-I, 2011 WL 61849, at \*5 (Wash. Ct. App. Jan. 10, 2011) (To raise a new issue on appeal, a defendant bears the burden of identifying a manifest constitutional error and showing how it prejudiced his defense.”); *see State v. Walsh*, 17 P.3d 591, 594 (Wash. 2001) (en banc) (discussing constitutional magnitude of error); *State v. MacDonald*, 981 P.2d 443, 450 (Wash. 1999) (discussing error analysis in terms of “manifest error affecting constitutional right”)).

<sup>249</sup> **Arizona** (*S. Tucson v. Bd. Of Sup’s of Pima Cnty.*, 84 P.2d 581, 584 (Ariz. 1938); *Tempe v. Fleming*, 815 P.2d 1, 3 (Ariz. Ct. App. 1991)). **Idaho** (*Ochoa v. State, Indus. Special Idem.*

with other factors, such as constitutional or significant public interest issues.<sup>250</sup> State courts have generally identified either a limited or a mix of

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Fund, 794 P.2d 1127, 1134 (Idaho 1990) (recognizing discretion to consider issue raised first on appeal involving legal question and uncontroverted facts); *State v. Paz*, 798 P.2d 1, 10 (Idaho 1990) (stating same), *overruled on other grounds*, *State v. Card*, 825 P.2d 1081 (Idaho 1991)). **Kansas** (*Fisher v. DeCarvalho*, 260 P.3d 1218, 1224 (Kan. Ct. App. 2011) (applying exception as to question of law)). **Maine** (*Scott v. Lipman & Katz, P.A.*, 648 A.2d 969, 974 (Me. 1994) (reviewing unpreserved issue because no fact finding necessary and error apparent on face of record)). **Michigan** (*Smith v. Foerster-Bolser Constr., Inc.*, 711 N.W.2d 421, 423 (Mich. Ct. App. 2006); *see Charlevoix Golf & Country Club LLC, v. Troszak*, No. 300892, 2012 WL 205840, at \*4 (Mich. Ct. App. Jan. 24, 2012)). *Contra* **Montana** (*Unified Indust., Inc v. Easley*, 961 P.2d 100, 103 (Mont. 1998) (rejecting California cases stating the exception for review). The Court in *Easley* stated:

Adopting the California exception would effectively swallow our general rule against addressing new issues or changes in legal theory on appeal. Furthermore, it is our view that the California exception is not fair to trial courts who ruled on the legal issues presented to them and who could then find themselves held in error on an issue or theory they had no opportunity to address.

*Id.* **Nevada** (*Nev. Power Co. v. Haggerty*, 989 P.2d 870, 878 n.9 (Nev. 1999) (noting issue from amicus brief reviewable because legal question, judicial economy interests and uncontroverted facts)). **New York** (*Fish King Enters. v. Countrywide Ins. Co.*, 930 N.Y.2d 256, 259 (N.Y. App. Div. 2011) (reviewing issues of questions of law on adequate record)). **South Dakota** (*State v. Gard*, 742 N.W.2d 257, 261 (S.D. 2007) (applying exception where issue potentially arising again, affects public interest, and fully briefed by parties); *see In re J.D.M.C.*, 739 N.W.2d 796, 805 (S.D. 2007)). **Tennessee** (*Heatherly v. Merrimack Mut. Fire Ins. Co.*, 43 S.W.3d 911, 916 (Tenn. Ct. App. 2000) (explaining appellate courts may grant complete relief if parties given fair notice and hearing opportunity)).

<sup>250</sup> **Arizona** (*Rubens v. Costello*, 251 P.2d 306, 308 (Ariz. 1952); *Regan v. First Nat'l Bank*, 101 P.2d 214, 218 (Ariz. 1940); *Bd. of Supervisors of Pima Cnty.*, 84 P.2d at 584; *State v. Campos*, 250 P.3d 201, 205 n.5 (Ariz. Ct. App. 2011) (stating exception exists for issue of statewide importance); *Aldrich & Steinberger v. Martin*, 837 P.2d 1180, 1182 (Ariz. Ct. App. 1992)). **Colorado** (*Roberts v. Am. Family Mut. Ins. Co.*, 144 P.3d 546, 549 (Colo. 2006) (“Particularly with regard to matters having broad impact or directing affecting the validity of judgments, such as constitutionality of statutes and related issues, [the court has] at times found it appropriate to address even claims that were never presented to the trial courts.”); *Harris Grp., Inc. v. Robinson*, 209 P.3d 1188, 1195 (stating same)). **California** (*Avalos v. Perez*, 127 Cal.Rptr.3d 106, 108 (Cal. Ct. App. 2011) (“[I]t is within this court’s discretion to make an exception to [the general] rule when the issue on appeal relates to a question of law only, or where the public interest or public policy is involved.”); *Henderson v. Pac. Gas and Elec. Co.*, 113 Cal. Rptr.3d 692, 699 (Cal. Ct. App. 2010) (stating discretion to consider new issue involving question of law applied to undisputed facts); *Cevallos v. Rowley*, No. G044191, 2012 WL 137376, at \*5 (Cal. Ct. App. Jan. 13, 2012) (noting discretion to review issue); *In re A.B.*, No. H036810, 2011 WL 5080639, at \*3 (Cal. Ct. App. Oct. 26, 2011) (“[C]onstitutional challenges not presenting pure questions of law are subject to the traditional objection and forfeiture principles . . . .”); *Parmar v. Bd. of Equalization*, 126 Cal. Rptr.3d 405, 415 (Cal. Ct. App. 2011) (stating same)). **Maine** (*In re Christopher H.*, 12 A.3d 64, 68-69 (Me. 2011); (applying discretionary exception to legally significant unpreserved issue affecting fundamental liberty interest)). **New Jersey** (*Jacobson v. United States*, 29 A.3d 1103, 1107 (N.J. Super. Ct. App. Div. 2011); *see also* *State v. Daquino*, 152 A.2d 377, 379 (N.J. Super. Ct. App. Div. 1959)

certain discrete or general circumstances or factors governing the discretion.<sup>251</sup>

(“[P]resentation [of new issues on appeal] is repugnant to the spirit of our practice which contemplates that, except in extraordinary situations, as where public policy or jurisdiction are involved, a party shall make his points in the court of first instance before urging them as grounds on appeal.”)). **New Mexico** (*Morfin v. Villalobos*, No. 30,782, 2011 WL 2040809, at \*2 (N.M. Ct. App. 2011) (stating same); *State v. Pacheco*, 517 P.2d 1304, 1305 (N.M. Ct. App. 1973) (noting preservation exception for questions of “general public nature affecting the interest of the state.”)). **New York** (*Matarrese v. N.Y. City Health & Hosps. Corp.*, 668 N.Y.S.2d 686, 687 (N.Y. App. Div. 1998) (stating general rule exception applies only to legal issues appearing on face of record); *contra Will of Alpert*, 651 N.Y.S.2d 451, 452 (N.Y. App. Div. 1996) (stating issue first raised on appeal considered only to extent no question of fact raised)). **North Carolina** (*J.T. Russell & Sons, Inc. v. Silver Birch Pond L.L.C.*, 721 S.E.2d 699, 704 (N.C. Ct. App. 2011) (noting exceptional circumstances warranting review of unpreserved issue for preventing manifest injustice or public interest)). **Oklahoma** (*In re Estate of Hodges*, 247 P.3d 755, 758 n.5 (Okla. Civ. App. 2010) (recognizing limited preservation rule exception for “questions of public policy or widespread public interest”)). **Oregon** (*State ex rel. Columbia Cnty. Sch. Dist. No. 13 v. Columbia Cnty.*, 674 P.2d 608, 616 (Or. Ct. App. 1983) (considering unpreserved because of questions of public importance)). **Rhode Island** (*State v. Smith*, 766 A.2d 913, 919 (R.I. 2001) (listing circumstances requiring appellate review of novel issues not raised at trial); *Shoucair v. Brown Uni.*, 917 A.2d 418, 428 (R.I. 2007) (declining review because protected activity mixed legal/fact question and no application of novel legal rule)). **South Dakota** (*Gard*, 742 N.W.2d at 261 (stating general rule exception for issues potentially arising again, affect public interest and fully briefed); *In re J.D.M.C.*, 739 N.W.2d at 805 (stating same exception)). **Texas** (*In re J.F.C.*, 96 S.W.3d 256, 293 (Tex. 2002) (listing two guiding principles for determination of fundamental-error review). The Court listed the two guiding principles for determining whether fundamental-error review should apply to a matter of public interest: that “(1) the error complained of must implicate a significant public interest or policy of the state, articulated by our statutes, constitution, or case law; and (2) the nature of the error must be such that it impacts a truly general public interest, and not solely that of private litigants.” *Id.*

<sup>251</sup> **Alaska** (*Erkins v. Alaska Trustee, LLC.*, 265 P.3d 292, 298 n.5 (Alaska 2011); *Sea Lion Corp. v. Air Logistics of Alaska, Inc.*, 787 P.2d 109, 115 (Alaska 1990); *State v. Nw. Const., Inc.*, 741 P.2d 235, 239 (Alaska 1987)). In *Erkins*, the court notes that an appellate court may reach unpreserved or new issues “if the issue is 1) not dependent on any new or controverted facts; 2) closely related to the appellant’s trial court arguments; and 3) could have been gleaned from the pleadings, or if failure to address the issue would propagate plain error.” *Id.* (internal quotations omitted). **Arizona** (*Aldrich*, 837 P.2d at 1182 (limiting exception to constitutional issue; issue of statewide importance; or issue that will dispose case)). **Arkansas** (The Arkansas exception include issues as to jurisdiction; a trial court in death penalty case’s failure to bring to the jury’s attention a matter essential to its consideration of the death penalty itself; where a trial court errs at a time when defense counsel has no knowledge of the error and thus no opportunity to object; there is a “serious error” requiring the trial court to admonish the jury or order a dismissal; and the exclusion or admission of evidence affects a defendant’s substantial rights or the error is evidentiary permitting appellate court to review for an alleged error affecting substantial rights. ARK. R. EVID. 103(d) (“Nothing in this rule precludes taking notice of errors affecting substantial rights although they were not brought to the attention of the court.”); *Clarendon Am. Ins. Co. v. Hickok*, 257 S.W.3d 43, 45 (Ark. 2007) (explaining subject matter jurisdiction can be addressed *sua sponte*); *Thomas v. State*, 257 S.W.3d 92, 96 (Ark. 2007); *Springs v. State*, 244 S.W.3d 683, 686 (Ark. 2006) (confirming exception “is a mere possibility, for it has not yet occurred in any case”) (quoting *Wicks v. State*, 606 S.W.2d 366, 369 (Ark. 1980))); *Vanderpool v. Fid. & Cas. Ins. Co.*, 939 S.W.2d 280, 286 (Ark. 1997); *Donat*, *supra* note 50, at 843; *Gitelman*, *supra* note 223, at 228-29; *see Buckley v. State*, 76 S.W.3d 825, 836 (Ark. 2002) (noting 103(d) imposes no

New Mexico has expressly adopted the *Krynicky* factors and approach, with other states setting out similar or other factors informing the discretionary exception.<sup>252</sup> The factors generally identified by state courts, in addition to “public interest,” run the gambit, including whether the issue is closely related to preserved arguments or issues;<sup>253</sup> whether the issue is outcome determinative;<sup>254</sup> whether the issue affects the validity of the

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affirmative duty and applies at most to admitting or excluding evidence); *Alexander v. State*, 983 S.W.2d 110, 112 (Ark. 1998) (stating same); *Hunt v. State*, No. CA CR 02-1204, 2003 WL 21350739, at \*2-3 (Ark. Ct. App. 2003)). **Maryland** (*McMillan v. State*, 956 A.2d 716, 752 (Md. Ct. Spec. App. 2008) (“An appellate court’s discretion to notice plain error is properly invoked only when the circumstances are ‘compelling, extraordinary, exceptional or fundamental to assure the defendant a fair trial.’”) (quoting *State v. Hutchinson*, 411 A.2d 1035, 1038 (Md. 1980))). Informing factors include “the opportunity to use an unpreserved contention as vehicle for illuminating an area of law; the egregiousness of the trial court’s error; the impact of the error on the defendant; and the degree of lawyer dereliction. *McMillan*, 956 A.2d at 752.). **Minnesota** (*Kunza v. St. Mary’s Reg’l Health Ctr.*, 747 N.W.2d 586, 590 (Minn. Ct. App. 2008 (“Factors favoring review include: the issue is a novel legal issue of first impression; the issue was raised prominently in briefing; the issue was implicit in or closely akin to the arguments below; and the issue is not dependent on any new or controverted facts.”) (internal quotations omitted) (quoting *Watson v. United Servs. Auto Ass’n*, 566 N.W.2d 683, 687-88 (Minn. 1997)))). **New Mexico** (*State v. Alingog*, 866 P.2d 378, 383 (N.M. Ct. App. 1993), *rev’d*, 877 P.2d 562 (N.M. 1994)). **Oregon** (*State v. S.J.F.*, 269 P.3d 83, 86 (2011 Or. Ct. App. 2011) (listing Supreme Court factors for exercising discretion to unpreserved error) (quoting *Ailes v. Portland Meadows, Inc.*, 823 P.2d 956, 959 (Or. 1991) (en banc))). The court in *S.J.F.* stated that the factors to consider include:

the competing interests of the parties; the nature of the case; the gravity of the error; the ends of justice in the particular case; how the error came to the court’s attention; and whether the policies behind the general rule requiring preservation of error have been served in the case in another way, *i.e.*, whether the trial court was, in some manner, presented with both sides of the issue and given an opportunity to correct any error.

*Id.* **Rhode Island** (*Shoucair*, 917 A.2d at 428 (quoting *Smith*, 766 A.2d at 919). Rhode Island requires party seeking exception to demonstrate the following factors: (1) the error complained of must consist of more than harmless error; (2) the record must be sufficient to permit a determination of the issue; and (3) counsel’s failure to raise the issue at trial must be due to the fact that the issue is based upon a novel rule of law which counsel could not reasonably have known at the time of trial. *Id.*). **Tennessee** (TENN. R. APP. P. 36(b); 13(b); *Waters v. Farr*, 291 S.W.3d 873, 919 & n.22 (Tenn. 2009) (“TENN. R. APP. P. 13(b) [signals that appellate courts should limit their discretion to issues] (1) to prevent needless litigation, (2) to prevent injury to the interests of the public, and (3) to prevent prejudice to the judicial process.”)). **Utah** (*Provo City v. Ivie*, 191 P.3d 841, 843 (Utah Ct. App. 2008) (listing situations allowing application of exceptional circumstances doctrine). The exceptional circumstances doctrine should be applied sparingly, with rare procedural irregularities and truly exceptional situations, and in situations where a change in law or settled legal interpretation affects the failure to raise the issue at trial. *Id.*).

<sup>252</sup> *Alingog*, 866 P.2d at 383 (determining *Krynicky*’s fundamental error doctrine applicable).

<sup>253</sup> *Watson*, 566 N.W.2d at 687-88; *Perl v. St. Paul Fire & Marine Ins. Co.*, 345 N.W.2d 209, 215 n.6 (Minn. 1984); *McNulty Constr. Co. v. Deeplaven*, No. A09-1625, 2010 WL 2899142, at \*3 (Minn. Ct. App 2010).

<sup>254</sup> See *Watson*, 566 N.W.2d at 687-88 (allowing appellate review where issue plainly

judgment; whether the issue is novel;<sup>255</sup> whether guidance to trial courts<sup>256</sup> or the public is needed; whether the issue is jurisdictional;<sup>257</sup> whether the issue needs addressing to correct incorrect applications of the law;<sup>258</sup> whether the issue concerns a statute<sup>259</sup> or compliance with the procedural requirements of the statute;<sup>260</sup> whether the issue concerns compliance with

decisive of entire controversy); *Hart v. Bell*, 23 N.W.2d 375, 378-79 (Minn. 1946) (stating same); *Twyp. of Piscataway v. S. Wash. Ave., LLC*, 947 A.2d 663, 667-68 (N.J. Super. App. Div. 2008) (“It is quite appropriate for an appellate court to raise a new issue of law ‘where upon the total scene it is manifest that justice requires consideration of an issue central to a correct resolution of the controversy and the lateness of the hour is not itself a source of countervailing prejudice . . . .’”) (quoting *In re Appeal of Howard D. Johnson Co.*, 177 A.2d 756, 758 (N.J. 1962)); see also *Klooster v. Charlevoix*, 795 N.W.2d 578, 583-84 (Mich. 2011) (considering statutory interpretation *de novo* because outcome determinative).

<sup>255</sup> *Burch v. State*, 696 A.2d 443, 461 (Md. 1997) (considering issue because novel and important); *Frazier v. Burlington N. Santa Fe Corp.*, 788 N.W.2d 770, (Minn. Ct. App. 2010) (explaining review appropriate to correct misapplied law) (citing *Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 256 (1981)), *rev'd by Frazier*, No. A09-2212, A09-2213, A09-2214, A09-2215, 2012 WL 1020175 (Minn. Mar. 28, 2012).

<sup>256</sup> See *Burch*, 696 A.2d at 461 (considering sentencing issue despite unpreserved objection to provide guidance for trial courts); *contra Angulo-Gil v. State*, 16 A.3d 283, 297 (Md. Ct. Spec. App. 2011) (noting no exercise of plain error review where area of law has been fully explicated). See *Tierco Md., Inc. v. Williams*, 849 A.2d 504, 532 (Md. 2004) (noting guidance to trial court or avoidance of expense of delay reasons for appellate review); *Governor v. Wash. Post*, 759 A.2d 249, 256 n.5 (Md. 2000) (considering whether statute applicable to Governor’s office properly reviewable to guide trial courts); see, e.g., *Gindes v. Khan*, 695 A.2d 163, 167 (Md. 1997); *Burden v. Burden*, 945 A.2d 656, 661 (Md. Ct. Spec. App. 2008); *Morris v. State*, 837 A.2d 248, 263-64 (Md. Ct. Spec. App. 2003).

<sup>257</sup> See *Jacobson v. United States*, 29 A.3d 1103, 1107 (N.J. Super. Ct. App. Div. 2011) (stating exception for review of jurisdictional and public interest issues); *State v. Gentry*, 610 S.E.2d 494, 499 (S.C. 2005) (explaining defendant may raise issue of trial court’s jurisdiction for first time on appeal); *Waters v. Farr*, 291 S.W.3d 873, 919 (Tenn. 2009) (listing interest of public reason to review issue raised for first time on appeal); *Weaver v. Deverell*, No. W2011-00563-COA-R3-CV, 2011 WL 5069418, at \*4 n.8 (Tenn. Ct. App. Oct. 26, 2011) (noting consideration for jurisdiction); *Bruce v. Maurais*, 684 P.2d 1243, 1245 (Or. Ct. App. 1984) (explaining where issue one of trial court’s jurisdiction, appellate court must consider newly raised issue).

<sup>258</sup> See *D.G.L. Trading Corp. v. Reis*, 732 N.W.2d 393, 395 (N.D. 2007) (discussing proper application of law). The North Dakota Supreme Court would consider and apply the correct statutes in diamond supplier’s action against re-seller regarding shipment of diamond and cash back from re-seller to supplier which disappeared in transit, even if the statutes were not presented to the district court in the first instance, because the Supreme Court would not affirm erroneous or incomplete applications of law in favor of judicial expediency. *Id.*

<sup>259</sup> *State v. Burke*, 438 A.2d 93, 94 (Conn. 1980) (explaining under state rule failure to follow mandatory provisions of statute plain error reviewable court); *Campbell v. Rockefeller*, 59 A.2d 524, 526 (Conn. 1948) (identifying exception for appellate review of unpreserved issue when “pertinent statute” overlooked); *Bradley v. Romeo*, 716 P.2d 227, 228 (Nev. 1986) (stating *sua sponte* consideration of issues where statute clearly controlling not applied by trial court); see also *In re Adoption of E.N.R.*, 42 S.W.3d 26, 32-33 (Tenn. 2001) (refusing to review unpreserved questions including constitutionality of statute unless statute obviously unconstitutional).

<sup>260</sup> *In re Charles K.*, 943 N.E.2d 1, 10 (Ill. App. Ct. 2010) (stating review appropriate where alleged failure to comply with statutory procedural requirements).

appellate rules;<sup>261</sup> whether addressing the issue is necessary to “maintain a uniform body of precedent”<sup>262</sup> or to “foster an orderly development of the law”;<sup>263</sup> whether the issue’s importance goes beyond the parties;<sup>264</sup> whether the issue establishes that the lower court was right, but for the wrong reason;<sup>265</sup> whether the issue escapes appellate review because of its fleeting or indeterminate nature;<sup>266</sup> whether the issue is necessary to a proper determination of the case or plainly decisive;<sup>267</sup> whether the opposing party will suffer no prejudice;<sup>268</sup> whether the issue arose due to a

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<sup>261</sup> *In re Peirano*, 930 A.2d 1165, 1172 (N.H. 2007) (considering unpreserved issue on appeal if matter of compliance with rules regarding appeals).

<sup>262</sup> See *Daniels v. Indust. Comm’n*, 775 N.E.2d 936, 943 (Ill. 2002) (“It has long been recognized that the waiver rule may be relaxed in order to maintain a uniform body of precedent or may be relaxed where the interests of justice so require.”); see also *Gen. Motors Corp. v. Pappas*, 950 N.E.2d 1136, 1145-46 (Ill. 2011) (noting forfeit overlooked in order to provide uniform body of case law); *People v. Givens*, 934 N.E.2d 470, 479 (Ill. 2010) (“[W]e conclude that the appellate court stepped over the line from neutral jurist to that of an advocate for defendant to raise and rule on issues that were neither controlled by clear precedent nor dictated by an interest in a just result.”).

<sup>263</sup> *Messiha v. State*, 583 N.W.2d 385, 390 n.2 (N.D. 1998) (reviewing claims “to foster an orderly development of the law”); see *Berg v. Ullman ex rel. Ullman*, 576 N.W.2d 218, 223 n.3 (N.D. 1998) (“We should apply the right rule of law even if it was not properly presented to the trial court or to this court.”); see also *State v. Holecek*, 545 N.W.2d 800, 803 (N.D. 1996) (“[W]here a pertinent statute has been overlooked by both counsel and the court, resulting in plain error in a matter that is of public concern, this court will consider the error even though it is not brought to our attention by either of the parties.”) (quoting *Le Pire v. Workmen’s Comp. Bureau*, 111 N.W.2d 355, 359 (N.D. 1961)); *Freed v. Geisinger Med. Ctr.*, 5 A.3d 212, 215 (Pa. 2010) (“[I]t is this Court’s function and responsibility to consider the broader picture, including the impact of precedent beyond the facts of an individual case, and the interplay between established precedent in varying areas of the law.”).

<sup>264</sup> See *Evans v. State*, 349 A.2d 300, 309 (Md. Ct. Spec. App. 1975) (stating exercise of discretion prudent in view of importance of issue beyond confines of appeal).

<sup>265</sup> See *Nelson v. QHG of South Carolina Inc.*, 580 S.E.2d 171, 185-86 (S.C. Ct. App. 2003) (allowing review of issue where it established lower court right for wrong reason), *aff’d in part, rev’d in part*, 608 S.E.2d 855 (S.C. 2005); *Field v. Bowen*, 131 Cal. Rptr.3d 721, 728 n.3 (Cal. Ct. App. 2011) (“[W]e are obliged to consider points of law not raised by the parties if they would support the trial court’s decision.”).

<sup>266</sup> *In re Guardianship of Willa L.*, 808 N.W.2d 155, 161-62 (Wis. Ct. App. 2011) (holding issues forfeited because despite somewhat relating to issue raise below); see also *State v. Rogers*, 539 N.W.2d 897, 901 (Wis. Ct. App. 1995) (stating forfeiture rule “is based on a policy of judicial efficiency”).

<sup>267</sup> *Watson v. United Servs. Auto Ass’n*, 566 N.W.2d 683, 687 (Minn. 1997) (recognizing review of issue raised first time on appeal where plainly decisive of entire controversy); see also *Hart v. Bell*, 23 N.W.2d 375, 378-79 (Minn. 1946) (holding court has duty to consider issue of contract’s illegality if decisive of entire controversy).

<sup>268</sup> See *Smith v. Tonge*, 377 A.2d 109, 111 (Me. 1977) (“We have no right . . . to disturb this judgment unless after examination of the record in its entirety . . . appellant has been substantially prejudiced.”); *Woodhall v. State*, 738 N.W.2d 357, 363 n.6 (Minn. 2007) (stating issue properly reviewable because consideration does not prejudice party); *Watson*, 566 N.W. at 687 (noting necessary no possible advantage or disadvantage to either party before review of new issue).

intervening change in the law;<sup>269</sup> whether the issue involves a public policy challenge to contract;<sup>270</sup> whether the issue is needed to prevent needless litigation;<sup>271</sup> injury to the interests to the public, and/or prejudice to the judicial process;<sup>272</sup> whether the issue raises a “rare procedural anomaly”;<sup>273</sup> and whether the interests of minors are involved.<sup>274</sup>

Some states have seemingly merged plain error with exceptional circumstances.<sup>275</sup> Oregon, for instance, allows for appellate review of new issues or unpreserved errors under an appellate rule allowing for such review “where an error of law [is] apparent on the face of the record.”<sup>276</sup> This provision allows for consideration of “rare errors of law” which are “obvious” and “not reasonably in dispute.”<sup>277</sup> In deciding whether to

<sup>269</sup> *Holland v. Big River Minerals Corp.*, 181 F.3d 597, 605-06 (4th Cir. 1999) (concluding no “strong precedent” where precise issue case “remained an open question” in precedent) (quoting *Curtis Publ’g Co. v. Butts*, 388 U.S. 130, 143 (1967)); *Cleveland v. Johns-Manville Corp.*, 690 A.2d 1146, 1151 (Pa. 1997) (explaining fundamental intervening change in law merited exception from general rule), *disagreed with*, *Norfolk & W. Ry. Co. v. Ayers*, 538 U.S. 135 (2003); *Brundridge v. Fluor Fed. Servs., Inc.*, 191 P.3d 879, 886 (Wash. 2009) (en banc).

<sup>270</sup> *See Baugh v. Novak*, 340 S.W.3d 372, 381 (Tenn. 2011) (A challenge to the validity of a contract based on public policy grounds is one such exception [to raise or waive rule].”); *see Reaves Lumber Co. v. Cain-Hurley Lumber Co.*, 279 S.W. 257, 258 (Tenn. 1926) (“[T]he courts will deny any relief upon any illegal contract . . . whenever the illegality is made to appear.”) (quoting *Cary-Lombard Lumber Co. v. Thomas*, 22 S.W. 743, 745 (Tenn. 1893)); *see also Berge v. Berge*, 8 N.E.2d 623, 624 (Ill. 1937); *Curry v. Dahlberg*, 110 S.W.2d 742, 749 (Mo. 1937).

<sup>271</sup> *Waters v. Farr*, 291 S.W.3d 873, 919 (Tenn. 2009); *Weaver v. Deverell*, No. W2011-00563-COA-R3-CV, 2011 WL 5069418, at \*3-4 (Tenn. Ct. App. Oct. 26, 2011).

<sup>272</sup> *See Waters*, 291 S.W.3d at 881 n.10 (stating review proper to prevent prejudice to judicial process).

<sup>273</sup> *Hill v. Estate of Allred*, 216 P.3d 929, 936 (Utah 2009) (“Exceptional circumstances . . . is used infrequently and usually requires ‘rare procedural anomalies.’”) (quoting *State v. Dunn*, 850 P.2d 1201, 1209 n.3 (Utah 1993)).

<sup>274</sup> *See S.C. Dep’t of Soc. Servs. v. Roe*, 639 S.E.2d 165, 172 (S.C. Ct. App. 2006) (“An exception to the rule that an unpreserved issue will not be considered on appeal exists where the interests of minors or incompetents are involved.”); *In re J.E.G.*, 476 A.2d 130, 133 (Vt. 1984) (addressing unpreserved issue due to “protected nature of juvenile hearings”).

<sup>275</sup> **Hawaii** (*Alvarez Family Trust v. Ass’n of Apartment Owners of Kaanapali Ali*, 221 P.3d 452, 468 (Haw. 2009) (citing *Montalvo v. Lapez*, 884 P.2d 345, 353 (Haw. 1994))). **Maryland** (*McMillan v. State*, 956 A.2d 716, 752 (Md. Ct. Spec. App. 2008); *Danna v. State*, 605 A.2d 150, 154 (Md. Ct. Spec. App. 1992)). **Oregon** (*Ailes v. Portland Meadows, Inc.*, 823 P.2d 956, 959 n.6 (Or. 1991) (en banc)). **Texas** (*In re J.F.C.*, 96 S.W.3d 256, 293 (Tex. 2002)).

<sup>276</sup> OR. R. APP. P. 5.45(1).

<sup>277</sup> *Ailes*, 823 P.2d at 959 n.6. According to the Court in *Ailes*:

Even if the error meets that test, however, the appellate court must exercise its discretion to consider or not to consider the error, and **if the court chooses to consider the error, the court must articulate its reasons for doing so.** This is not a requirement of mere form. A court’s decision to recognize unpreserved or unraised error in this manner should be made with utmost caution. Such an action is contrary to the strong policies requiring preservation and raising of error. It also undercuts the established manner in

exercise its discretion to consider an unpreserved error of law apparent on the face of the record, an appellate court may consider, among other factors, the following: the competing interests of the parties; the nature of the case; the gravity of the error; the ends of justice in the particular case; how the error came to the court's attention; and whether the policies behind the general rule requiring preservation of error have been served in the case in another way, such as whether the trial court was, in some manner, presented with both sides of the issue and given an opportunity to correct any error.<sup>278</sup>

Both Hawaii and Texas similarly follow a merged standard. Under Hawaii's formulation, three factors inform the "discretionary power" to notice plain error in civil cases: "(1) whether consideration of the issue not raised at trial requires additional facts; (2) whether its resolution will affect the integrity of the trial court's findings of fact; and (3) whether the issue is of great public import."<sup>279</sup> Texas, in turn, follows fundamental error, which includes "public-interest-based fundamental error."<sup>280</sup> This has been defined to be "rare" and "implicated only when [the] most significant state public interests are at stake."<sup>281</sup>

Wisconsin has adopted a dual standard of discretionary exception depending if the unpreserved or new issue is presented to the intermediary or supreme court of the state. The Wisconsin Supreme Court has the sole discretionary power to review waived or forfeited issues for purposes of "integrity of fact finding process consonant with its law developing function."<sup>282</sup> By statute, the intermediary appellate courts of Wisconsin, in

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which an appellate court ordinarily considers an issue, *i.e.*, through competing arguments of adversary parties with an opportunity to submit both written and oral arguments to the court. Moreover, by *expressly* following the prescribed method of recognizing unpreserved or unraised error, much greater efficiency in the review process between appellate courts is facilitated by giving this court the benefit of the recognizing court's reasoning.

*Id.* at 959 (emphasis added) (citations omitted). *Cler v. Providence Health Sys.-Or.*, 245 P.3d 642, 654 (Or. 2010) (en banc) (noting plain error application to civil cases); *State v. Godines*, 236 P.3d 824, 827 (Or. Ct. App. 2010).

<sup>278</sup> See *In re S.J.F.*, 269 P.3d 83, 86 (Or. Ct. App. 2011) (finding plain error review in civil commitment hearing proper given serious consequences).

<sup>279</sup> *Alvarez Family Trust v. Ass'n of Apartment Owners of Kaanapali Ali*, 221 P.3d 452, 468 (Haw. 2009) (citing *Montalvo v. Lapez*, 884 P.2d 345, 353 (Haw. 1994)).

<sup>280</sup> *In re J.F.C.*, 96 S.W.3d at 292.

<sup>281</sup> *Id.* at 293.

<sup>282</sup> *Vollmer v. Luetz*, 456 N.W.2d 797, 800 n.2, 803 (Wis. 1990). According to the Court in *Vollmer*:

When we review waived error, as in *Schumacher*, we are not institutionally



turn, can address matters involving forfeited issue if “it appears from the record that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried.”<sup>283</sup> This dual discretionary review is deemed to fulfill the intermediate appellate court’s function of error correcting<sup>284</sup> and the state supreme court’s law declaring function.<sup>285</sup>

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concerned with achieving justice in the particular case. The court of appeals performs that function admirably and there is no reason to believe that this court can do better in that respect. When we review error we do so not merely to correct error or to examine alleged error; instead we do so because the alleged error in issue has some substantial significance in our institutional law-making responsibility as set forth in the statute and constitution and as reflected in our rules for accepting cases on petition for review. Institutionally, we are more concerned with developing and clarifying the law. This court has relied on the “integrity of the fact-finding” test on numerous occasions in order to review an un-objected-to error and reach the conclusion that there was no error. Under this common-law power we may in our discretion review an error that was technically waived and affirm.

*Id.* at 803; *see also* State v. Baldwin, 304 N.W.2d 742, 746 (Wis. 1981) (finding appellate claim implicated “integrity of the fact-finding process” as jury instructions implicated constitutional concerns”).

<sup>283</sup> WIS. STAT. § 752.35 (2001); Marsh, *supra* note 5, at 777 (explaining statutory exception to waiver rule).

<sup>284</sup> *See* Burns v. Detroit, 660 N.W.2d 85, 90 (Mich. Ct. App. 2002) (highlighting function of Michigan Court of Appeals to act as error correcting court); Mich. Up & Out of Poverty v. Michigan, 533 N.W.2d 339, 343 (Mich. Ct. App. 1995) (“We are also mindful that this Court functions as a court of review that is principally charged with the duty of correcting errors.”); St. Aubin v. Burke, 434 N.W.2d 282, 284 (Minn. Ct. App. 1989) (recognizing role of appeals court as primarily decisional and error correcting and no precedents). *See* Irving v. U.S., 162 F.3d 154, 161 (1st. Cir. 1998) (“The authority to overrule the decision of a prior panel in the same case flows logically from the error-correcting function of the full court.”); Beal v. Lowell & D. St. Ry. Co., 32 N.E. 653, 654 (Mass. 1892) (“General criticisms of a charge are always discountenanced by an appellate court. Its functions are limited to correcting errors of law.”); *see, e.g.*, Clay v. Equifax, Inc., 762 F.2d 952, 957 (11th Cir. 1985) (stressing importance of appellate function to perform error correcting function); Kentucky Farmers Bank v. Nutter, No. 85-CA-2279-MR, 1987 WL 194726, at \*6 (Ky. Ct. App. 1987) (explaining intermediary court specifically designed and functions as error correcting court); State v. Castillo, 57 So.3d 1012, 1017 (La. 2011) (noting error correcting function of appellate court); Sefkow v. Sefkow, 427 N.W.2d 203, 210 (Minn. 1988) (identifying error correcting appellate function); *In re* Civil Commitment of Travis, 767 N.W.2d 52, 67 (Minn. Ct. App. 2009) (noting error correcting function precludes review of unpreserved error).

<sup>285</sup> *See* Marsh, *supra* note 5, at 777.

## IV. PRINCIPLED APPLICATION OF INFORMED DISCRETION

*A. Judicial Discretion and Error Correction*

Judicial discretion has long been difficult to define and this remains so in the appellate preservation context. At its core, judicial discretion means choice.<sup>286</sup> Beyond this fundamental premise, “discretion” drifts along a scale depending on the issue, with the definition of an “abuse of discretion” ranging anywhere from an “arbitrary determination, capricious disposition, or whimsical thinking”<sup>287</sup> to simply legal error.<sup>288</sup>

The commentary and case law primarily address discretion at the trial and not appellate level. As to trial level discretion, there is no one standard for all issues.<sup>289</sup> For instance, those trial court decisions where direct observation and contact in the litigation are at issue, a high degree of deference is afforded (e.g., scheduling, jury note taking, special verdicts, admission of evidence, discovery)<sup>290</sup> while other issues (e.g., motions for

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<sup>286</sup> See *Davis v. Bos. Elevated Ry. Co.*, 126 N.E. 841, 843-45 (Mass. 1920) (discussing meaning of judicial discretion); *Loneragan-Gillen v. Gillen*, 785 N.E.2d 1285, 1288 (Mass. App. Ct. 2003) (“The proper exercise of judicial discretion involves making a circumstantially fair and reasonable choice within a range of permitted options.”); see also Patrick Brennan, *Standards of Appellate Review*, 33 DEF. L. J. 377, 412-14 (1984) (“[T]he meaning of discretion can be narrowed to a single word: Choice.”).

<sup>287</sup> *Davis*, 126 N.E. at 843-44. The Court in *Davis* continued:

An exhibition of ungoverned will, or a manifestation of unbridled power is not the use of discretion. The word imports the exercise of discriminating judgment within the bounds of reason. Discretion in this connection means a sound judicial discretion, enlightened by intelligence and learning, controlled by sound principles of law, of firm courage combined with the calmness of a cool mind, free from partiality, not swayed by sympathy nor warped by prejudice nor moved by any kind of influence save alone the overwhelming passion to do that which is just. It may be assumed that conduct manifesting abuse of judicial discretion will be reviewed and some relief afforded.

*Id.* at 844.

<sup>288</sup> See *Long v. Wickett*, 737 N.E.2d 885, 894 n.8 (Mass. App. Ct. 2000) (discussing differing definitions for “abuse of discretion”); see also *Cooler & Gell v. Hartmarx Corp.*, 496 U.S. 384, 385 (1990) (arguing abuse of discretion if ruling based on erroneous law view or assessment of evidence); *U.S. v. One Urban Lot*, 885 F.2d 994, 997 (1st Cir. 1989) (stating an abuse of discretion does not need to be glaring to justify reversal) (citing *Keegel v. Key W. & Caribbean Trading Co.*, 627 F.2d 372, 373-74 (D.C. Cir. 1980)).

<sup>289</sup> See Henry J. Friendly, *Indiscretion about Discretion*, 31 EMORY L. J. 747, 783-84 (1982).

<sup>290</sup> See *Osorio v. One World Techs., Inc.*, 659 F.3d 81, 91 n.6 (1st Cir. 2011) (noting special deference given trial judges for on the spot judgment calls regarding evidentiary rulings); *Commonwealth v. Gilcrest*, 303 N.E.2d 331, 333 (Mass. 1973) (stating trial judge’s discretion as to continuances not disturbed on appeal unless arbitrary).

preliminary injunction or to dismiss for forum non conveniens)<sup>291</sup> are subject to less leeway.

The abuse of discretion standard represents a compromise between providing authority and flexibility while at the same time seeking to minimize arbitrary decisions. The question upon review becomes not so much the ultimate outcome of the decision, but whether the court resorted and relied upon the proper considerations, whether generic or specific. Discretion is deemed “abused” when there has been no evidence of independent judgment; no record of the reasoning behind such discretion; no acknowledgment of the discretionary power; incorrect identification of the informing criteria; and the wrong application of the governing criteria to the facts.<sup>292</sup>

The fundamental advantage of the discretionary approach is that it allows for escape from generalizations toward the more direct tailoring of a ruling to the specific facts of the case. As to trial level discretion, it serves judicial economy, comity, and finality.<sup>293</sup> It becomes further justified due to the understanding that it is not unlimited and subject to judicial review.

As to appellate discretionary decision making, both appellate rules and practice afford broad discretion to an appellate court regarding various matters, such as argument, briefing, and appellate record. This broad based discretion, in turn, has spilled over to an appellate court’s determination of whether the appellate record and argument has been sufficiently presented to the appeals court for it to make an informed decision. After all, if the appellate record and argument is not sufficient, then the ability of the appellate court to perform its function is obstructed. Like those first hand and direct contact matters in which trial courts are afforded broad discretion, sufficiency of briefing or the adequacy of the record issues are the same for the appellate court justifying a broad discretionary power.

Exception to forfeiture, however, is manifestly different. The decision whether to reach the merits of a forfeited issue transcends these types of discretionary matters. It is a substantive determination of substantial ramifications. It dictates the specific issues to be addressed which, in turn, can make the difference between reversal, remand or affirmance, as well as the substance of the appellate court’s law declaring

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<sup>291</sup> See *Doe v. Superintendent of Schs. of Weston*, 959 N.E.2d 403, 407 (Mass. 2011) (finding abuse of discretion as to ruling on preliminary injunction).

<sup>292</sup> See *Long*, 737 N.E.2d at 894 n.8 (“[Abuse of discretion] signifies only that the decision making process was not completely conducted within the established framework of relevant standards and did not take into account all of the proper factors . . . necessary to inform the discretionary exercise.”); see *Doe*, 959 N.E.2d at 407 (stating abuse of discretion measured by legal standards and stating reasonable support for factual evaluation).

<sup>293</sup> See Brennan, *supra* note 286, at 412.

function. An appellate court must be sensitive to its limitations and function.

No matter how attractive judicial discretion may be, it has its drawbacks. There is certainly a loss of predictability and the ability of citizens and litigants to know what the law proscribes. It can be antithetical to the rule of law and accountability particularly in the absence of a higher review of the discretion. Even when an appellate court adopts and applies a discretionary approach informed by various factors or circumstances, it is not so much announcing a rule of law, but engaging in a form of fact finding. While there may be identified factors and considerations, there is lacking any meaningful guidance or discussion as to the weight being given to one consideration versus another. It remains very difficult to predict with any certainty when an issue will be deemed waived or not under the discretionary conferring approach as presently practiced by many appellate courts. Moreover, it is the presence of available review that patrols the edges and provides litigant and public legitimacy and acceptance of the discretionary decision. Unlike a trial court's discretionary powers, however, appellate discretion is not subject to meaningful review, as any such review is rarely afforded or is otherwise non-existent.

A necessary limiting principle to this appellate discretion is the fundamental error correcting function of appellate courts.<sup>294</sup> The very justification for permitting review of new issues or unpreserved claims of error is so that procedural failing does not deprive the appellate court of the ability to remedy a clearly unjust and unacceptable result.<sup>295</sup> The "review for correctness serves to reinforce the dignity, authority and acceptability of the trial."<sup>296</sup> The error correcting or dispute resolution function of appellate courts likewise not only seeks to ensure that the lower proceeding or result was not the result of power exercised arbitrarily, but also serves the value of finality and economy and enhances both the appearance and reality of fairness and accountability. It serves to inform the appellate discretion by centering upon the specific litigants and the resolution of the dispute before the court. It also is more consistent with the important value of equal treatment serving to enhance public legitimacy and acceptance. While the

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<sup>294</sup> See *supra* note 284 (discussing and identifying error correcting function of appellate courts); see also JUDITH A. MCKENNA, FED. JUDICIAL CTR., STRUCTURAL AND OTHER ALTERNATIVES FOR THE FEDERAL COURT OF APPEAL: REPORT TO THE U.S. CONGRESS AND THE JUDICIAL CONFERENCE OF THE UNITED STATES 7-10 (1994) (discussing both the error correcting and law declaring function).

<sup>295</sup> See *Hormel v. Helvering*, 312 U.S. 552, 557 (1941).

<sup>296</sup> See Patrick David Hansen, *Stacking Appellate Dissents: Due Process in the Appellate Arena*, 18 VAL. U. L. REV. 141, 143-45 (1983) (recognizing error correction is "vital part of appellate process"); PAUL D. CARRINGTON ET AL., JUSTICE ON APPEAL 7-12 (West 1976).

law declaring or clarifying appellate function is more visible and the appellate function to which judges may tend to gravitate,<sup>297</sup> it is removed from the justiciable premise of the adversary system only further blurring any meaningful and uniform confines of discretionary review of new or unpreserved issues on appeal.

At the very least, appellate courts must hold themselves to the obligation imposed on trial courts: express statement of the discretionary standard and clear articulation and application of the established criteria to the facts of the case. This is particularly necessary if it follows and is relying upon the discretion outside of plain error, including such criteria as significant public interest. Such articulation results in more open and principled decision-making, particularly as to its fundamental error correcting function.

### *B. Articulation of Discretionary Choice*

Failure to apply the raise or lose rule based on a poorly developed “discretionary” exception can reasonably be perceived by the litigants and the public as a vehicle to serve the personal and irrelevant predilections of a majority of the appellate court.<sup>298</sup>

This is exacerbated when little to no discussion is provided as to why the exception applied (or did not apply).<sup>299</sup> Many decisions provide no or little analysis either as to why an issue not raised below is being considered, or why the discretion to do so is not being exercised.<sup>300</sup> Many

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<sup>297</sup> See Chad M. Oldfather, *Error Correction*, 85 IND. L. J. 49, 49-50 (2010)

<sup>298</sup> See *Dilliplace v. Lehigh Valley Trust Co.*, 322 A.2d 114, 116 (Pa. 1974) (“[T]he theory [for an argued exception to the raise or waive rule] has never developed into a principled test, but has remained essentially a vehicle for reversal when the predilections of a majority of an appellate court are offended.”).

<sup>299</sup> See *Carrington*, *supra* note 296, at 10-11 (“[T]he obligation to give reasons is vital . . . [w]hen reasons are announced and can be weighed, the public can have assurance that the correcting process is working . . . [a]n unreasoned decision has very little claim to acceptance by the defeated party, and is difficult or impossible to accept as an act reflecting systematic application of legal principles.”).

<sup>300</sup> See, e.g., *Walker v. Holder*, 589 F.3d 12, 18 (1st Cir. 2009) (asserting discretion to relax the raise or waive rule and thus decide on the merits); *Keating v. Chater*, 187 F.3d 622, 1998 WL 1085760, at \*1 (1st Cir. 1998) (unpublished table decision) (recognizing appellant who fails to raise issue below ordinarily cannot raise issue on appeal); *Springfield v. Dep’t of Telecomm. & Cable*, 931 N.E.2d 942, 950 (Mass. 2010) (acknowledging exceptional cases where appellate court may consider issues not raised below); *Dart v. Browning-Ferris Indus., Inc.*, 691 N.E.2d 526, 536 n.29 (Mass. 1998) (noting exercising discretion to consider unpreserved new issue on appeal); *Attorney General v. Brown*, 511 N.E.2d 1103, 1105 n.5 (Mass. 1987) (stating exercise of discretion as issue could be dispositive and “one of significant public importance”), *superseded by statute as stated*, *DiLiddo v. Oxford St. Realty, Inc.*, 876 N.E.2d 412 (Mass. 2007); *Adoption of Ynez*, No. 09-P-559, 2009 WL 3644107, at \*2 (Mass. App. Ct. Nov. 5, 2009) (“Although

decisions remain mostly cursory, simply stating that the court has opted to address the issue, or conversely, that the issue was forfeited and that “exceptional circumstances” did not exist. Where the discretion has been exercised, some courts summarily state that it has the right to do so “when necessary,”<sup>301</sup> that it is taking “the opportunity to do so in this case,”<sup>302</sup> and that it is doing so “in the interests of justice.” Courts have, in fact, relegated one line “analysis” in a footnote,<sup>303</sup> yet, in other cases, admonished litigants that argument contained in a footnote does not rise to the level of acceptable appellate argument.<sup>304</sup> Other decisions have provided slightly more insight by stating that addressing the issue or contention was proper, as it was one of law and/or one on which it could take judicial notice,<sup>305</sup> or otherwise listing the purported factors informing the discretion.<sup>306</sup> Such cases include those in which a regulation or statute not raised was found controlling.<sup>307</sup> Other cases summarily note that

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[appellant’s] waiver constitutes a valid ground for dismissal of the appeal, we choose to assess the merits . . . .”); *Blessing v. Blessing*, No. 08-P-1102, 2009 WL 435630, at \*4 (Mass. App. Ct. Feb. 24, 2009) (stating summarily no “exceptional circumstances justifying departure from general rule apply”); *Commonwealth v. Torres*, 886 N.E.2d 732, 744 (Mass. App. Ct. 2008) (noting waiver but “given the circumstances, we prefer to address the issue on the merits”); *Mately v. Minkoff*, 859 N.E.2d 887, 890 n.8 (Mass. App. Ct. 2007) (noting appellate court has power to reach otherwise waived issues); *Rinaldi v. State Bldg. Code Appeals Bd.*, 779 N.E.2d 688, 689 n.2 (Mass. App. Ct. 2002) (“We take the opportunity to [address an issue not raised by parties] in this case.”); *Commerce Bank & Trust Co. v. Hayeck*, 709 N.E.2d 1122, 1130 n.2 (Mass. App. Ct. 1999) (stating simply appellate discretion to consider issue); *Vaughan v. Easter Edison Co.*, 719 N.E.2d 520, 524 (Mass. App. Ct. 1999) (“Although this issue appears not to have been raised below . . . we exercise our discretion to consider it.”); *see also Dwyer v. Young Mgmt. Grp., Inc.*, No. 09-P-751, 2010 WL 2998674, at \*1 (Mass. App. Ct. Aug. 3, 2010) (“[A]rguments are either unpreserved, insufficiently argued or unpersuasive. They have not been overlooked. We find nothing in them that requires discussion.”) (citing *Dept. of Rev. v. Ryan R.*, 816 N.E.2d 1020, 1027 (Mass. App. Ct. 2004))).

<sup>301</sup> *Commonwealth v. Elder*, 452 N.E.2d 1104, 1107 n.6 (Mass. 1983) (stating MASS. R. APP. P. 16(a)(4) does not prohibit reaching issues “when necessary”); *see Foley v. Lowell Sun Publ’g Co.*, 533 N.E.2d 196, 197 (Mass. 1989).

<sup>302</sup> *P.R. Tel. Co., Inc. v. T-Mobile P.R., LLC*, No. 11-1504, 2012 WL 1522008, at \*6 n.3 (1st Cir. May 2, 2012); *Rinaldi*, 779 N.E.2d at 689 n.2; *see Walker*, 589 F.3d at 18; *Torres*, 886 N.E.2d at 744.

<sup>303</sup> *See, e.g., Kennie v. Natural Res. Dep’t of Dennis*, 889 N.E.2d 936, 941 n.12 (Mass. 2008); *Sweenie v. A.L. Prime Energy Consultants*, 887 N.E.2d 238, 243 n.12 (Mass. 2008); *Mately*, 859 N.E.2d at 890 n.8.

<sup>304</sup> *Commonwealth v. Vick*, 910 N.E.2d 339, 353 n.15 (Mass. 2009) (noting arguments relegated to footnote do not raise argument to appellate level); *Commonwealth v. Benson*, 899 N.E.2d 820, 828 n.6 (Mass. 2008) (stating same); *Commonwealth v. Lydon*, 597 N.E.2d 36, 41-42 (Mass. 1992) (stating same); *Rate Setting Comm’n v. Faulkner Hosp.*, 584 N.E.2d 1133, 1137 (Mass. 1992) (stating same).

<sup>305</sup> *See AT&T v. Automatic Sprinkler Appeal Bd.*, 750 N.E.2d 505, 508 (Mass. App. Ct. 2001) (addressing regulation despite failure to raise because issue subject to judicial notice).

<sup>306</sup> *See United States v. La Guardia*, 902 F.2d 1010, 1013 (1st Cir. 1990).

<sup>307</sup> *Automatic Sprinklers*, 750 N.E.2d at 508 (considering regulation); *Pontremoli v.*

although not raised on appeal, the argument or issue was otherwise “squarely presented” by the record below and on appeal,<sup>308</sup> or raised an issue of significant public interest.<sup>309</sup>

The summary formulation or reference by an appellate court as to its “discretion” on the issue of forfeiture strongly cuts against the integrity of the decision. Why a court has opted to address or not address a forfeited issue is a fundamental component of the appeal and decision. It is necessary for acceptance and legitimacy. An appellate court should hold itself to the same standard it holds the lower court in its review of discretionary rulings: express acknowledgment of the discretion and disclosure of the application of the facts to the guiding legal principles.<sup>310</sup> This is especially so given the discretionary component of plain error (“integrity or fairness of the proceeding”), the various un-weighted factors or interests underlying “exceptional circumstances,” including “in the public interest,” and the likely unavailability of any review of the appellate discretion. As Professor Rosenberg stated well 37 years ago:

[D]iscretion is an unruly concept in a judicial system dedicated to the rule of law but it can be useful if it is domesticated, understood, and explained. To tame the concept requires no less than to force ourselves to say why it is accorded or withheld, and to say so in a manner that provides assurance for today’s case and some guidance for tomorrow’s.<sup>311</sup>

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Spaulding Rehab. Hosp., 747 N.E.2d 1261, 1265 n.4 (Mass. App. Ct. 2001) (considering statute); Ourfalian v. Aro Mfg. Co., 577 N.E.2d 6, 9 n.5 (Mass. App. Ct. 1991) (considering statute).

<sup>308</sup> Watros v. Greater Lynn Mental Health & Retardation Ass’n., 642 N.E.2d 599, 602 n. 6 (Mass. App. Ct. 1994).

<sup>309</sup> See Brown v. Guerrier, 457 N.E.2d 630, 632-33 (Mass. 1983) (detailing courts exercise of discretion).

<sup>310</sup> See Long v. Wickett, 737 N.E.2d 885, 904 (Mass. App. Ct. 2000) (noting need for trial court in discretionary decision-making to make “specific findings”). The trial court should enumerate all of the facts relied upon and ground a decision that “distinguish[es] between well-reasoned conclusions arrived at after a comprehensive consideration of all relevant factors, and mere boiler-plate . . . phrased in appropriate language but unsupported by evaluation of the facts or analysis of law.” *Id.* (internal quotations omitted) (quoting Protective Comm. v. Anderson, 390 U.S. 414, 434 (1968)).

<sup>311</sup> See Rosenberg, *supra* note 6, at 28. Judge Easterbrook of the Seventh Circuit expressed the sentiment similarly:

Legal rules committing decisions to judicial discretion suppose that the court will have, and give, sound reasons for proceeding one way rather than another. ‘We must not invite the exercise of judicial impressionism. Discretion there may be, but methodized by analogy, disciplined by system. Discretion without criterion for its exercise is authorization of arbitrariness.’

*C. Respect and Need for Advocate Input and Direct Response*

The integrity of appellate discretionary decision making is perhaps most undercut where the court eschews any input or presentation by the advocates.<sup>312</sup> Appellate courts continue, at times, to proceed to reach issues, including the issue of waiver, which were never addressed or briefed by the parties.<sup>313</sup>

While the courts espouse the importance of the party presentation principle behind waiver, they equally declare that the court is not bound to accept or address the issues presented by the parties and can consider and frame issues on their own. Yet, the failure to provide advocate input even on the issue of waiver is unjustified and undercuts the legitimacy of the appellate determination. For instance, in *Matley v. Minkoff*,<sup>314</sup> the trial court entered judgment notwithstanding the verdict in a malpractice trial on a legal ground that was raised late but was otherwise fully briefed post-trial.<sup>315</sup> Although not raised in the motion for directed verdict, the plaintiff never argued waiver either before the trial court or on appeal. The appeals court, nonetheless, found the matter waived, reiterating the adage that arguments not raised in a motion for directed verdict cannot be raised in the motion for judgment notwithstanding the verdict.<sup>316</sup> It did so, however, otherwise ignoring the well-established rule that the failure to raise “waiver” at the time of the motion for judgment notwithstanding the verdict, never mind on appeal, is itself a waiver.<sup>317</sup> Most offensive was that

York Ctr. Park Distrib. v. Krilich, 40 F.3d 205, 209 (7th Cir. 1994) (internal citations omitted).

<sup>312</sup> See DANIEL JOHN MEADOR ET AL., APPELLATE COURTS: STRUCTURES, FUNCTIONS, PROCESSES, AND PERSONNEL 28 (Lexis 2d ed. 2006) (“[A]dversarial presentation contributes significantly to the quality of the court’s performance of the institutional function and is essential to the correctness function.”) (citing Carrington, *supra* note 296, at 7). See *Golchin v. Liberty Mut. Ins. Co.*, 950 N.E.2d 853, 865 n.9 (Mass. 2011) (“We are loath to approach such a complicated and close question [*sua sponte*] without the benefit of briefing from the parties.”).

<sup>313</sup> See *Matley v. Minkoff*, 859 N.E.2d 887, 891 n.8 (Mass. App. Ct. 2007) (noting neither party addressed issue in brief); *In re Pet Food*, 629 F.3d 333, 361 (Weis, J., concurring and dissenting) (“I have no reservations about discussing the fee award even though the parties have not briefed the matter.”).

<sup>314</sup> 859 N.E.2d 887 (Mass. App. Ct. 2007).

<sup>315</sup> *Id.* at 888. The legal contention was that the plaintiff was an incompetent minor and therefore the defendant physician could not be liable for not obtaining her informed consent as such consent must be subject of judicial hearing and determination. *Id.*

<sup>316</sup> *Id.* at 890-91.

<sup>317</sup> *Fox v. F & J Gattozzi Corp.*, 672 N.E.2d 547, 549 (Mass. App. Ct. 1996) (“[I]f the nonmoving party fails to object to the [trial] judge’s consideration of new grounds in deciding whether to grant the [jnov] motion, then the non-moving party is said to have waived the right to object on appeal.”); *S. Mass. Broadcasters, Inc. v. Duchaine*, 529 N.E.2d 887, 889 (Mass. App. Ct. 1988) (stating same); see *Goldbaum v. Weiss*, 738 N.E.2d 1154, 1157 n.5 (Mass. App. Ct.



the court found waiver under this circumstance *sua sponte* and reversed the judgment without ever seeking appellate argument from the advocates on the issue.<sup>318</sup>

The concern is the loss of advocate presentation and the resulting loss of litigant and public acceptance. Due process concerns are, in fact, implicated where an appellate court decides an issue not raised or briefed, as the parties have been deprived of notice and an opportunity to be heard.<sup>319</sup> This includes not just the substantive underlying legal issue, but the decision to find or not find waiver. If the appealing party has not properly preserved the issue and has failed to make a proper and sufficient argument on appeal as to the applicability of any exceptions, a strong case exists for having the general rule control.<sup>320</sup>

Fundamental to our adversary system is the right of advocacy by the interested parties.<sup>321</sup> If an appellate court deems certain legal principles, a statute, a regulation, or another legal source controlling, but which was not raised, it should give the advocate the opportunity to address that contention. There is nothing more frustrating to an advocate and devastating to the appellate process for the interested litigants to not have

2000) (discussing effect of failure to object to directed verdict); *see also* Williams v. Runyon, 130 F.3d 568, 572 (3rd Cir. 1997) (“[W]here a party did not object to a movant’s Rule 50(b) motion specifically on the grounds that the issue was waived by an inadequate rule 50(a) motion, the party’s right to object on that basis is itself waived.”); Collins v. Illinois, 830 F.2d 692, 698 (7th Cir. 1987) (stating same); Cox v. Freeman, 321 F.2d 887, 891 (8th Cir. 1963) (stating plaintiff precluded from raising issue because failed to raise when trial court directed verdict).

<sup>318</sup> *Matley*, 859 N.E.2d at 890-91. It did so noting that the appellant never raised or briefed the issue and simply saying in a footnote that the court had the power to consider the issue. *Id.* at 890 n.8; *see also* Wood v. Milyard, 132 S. Ct. 1826, 1834 (2012) (“[R]estraint is all the more appropriate when the appellate court itself spots an issue the parties did not air below, and therefore would not have anticipated in developing their arguments on appeal.”).

<sup>319</sup> *See* Paul D. Carrington, *A Critical Assessment of the Cultural and Institutional Roles of Appellate Courts*, 1 J. APP. PRAC. & PROCESS 101, 106 (2008) (reviewing THOMAS E. BAKER & JOAN E. STEINMAN, *APPELLATE COURTS: STRUCTURES, FUNCTIONS, PROCESSES AND PERSONNEL* (2006) (“If American law is to play the traditional and expected role of holding together a vast, diverse, and conflicted population by assuring adequately shared trust in law and its institutions, litigants must perceive that they are getting the personal attention of judges that is the heart of the Due Process guaranteed by state and federal constitutions.”); Miller, *supra* note 3 at 1260 (“The fundamental core of due process is that a party should have notice and a meaningful opportunity to be heard before a claim is decided.”).

<sup>320</sup> *See* Bruno v. Bd. of Appeals of Wrentham, 818 N.E.2d 199, 203 (Mass. App. Ct. 2004) (applying general rule because party failed to raise circumstances justifying departure from fundamental principle).

<sup>321</sup> FRANK M. COFFIN, *THE WAY OF A JUDGE: REFLECTIONS FROM THE FEDERAL APPELLATE BENCH* 52 (Houghton-Mifflin 1980) (discussing how central to judicial system is reliance on structured advocacy by adversaries); KARL LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEAL* 29-30 (Little Brown & Co. 1960) (“[O]ut of the hammer-and-anvil confrontation of opposing advocates, each of who seeks only victory, both a true view of facts and informed view of the law will emerge.”).

an opportunity to present argument both as to the merits and as to whether the court should consider the forfeited issue. Such an advocate should not be left with only the petition for rehearing avenue to first address the legal contention or grounds. Equally offensive is the failure of the court to address the material contentions. Appellate courts must be directly responsive to the contentions made.<sup>322</sup> The symbiotic relationship between the court and the advocates and litigants dictates such a practice. It is fundamental to the integrity of the appellate process.<sup>323</sup>

*D. A Uniform Discretionary Standard*

Principled decision making as to the exercise of discretion not only requires advocate input and meaningful court disclosure but also demands clarity of the considerations informing the discretion. The myriad of criteria or factors that have crept into the discretionary exception to the general rule of raise or lose, together with the existence of two seemingly disparate lines of discretion, undercut the interests of equal treatment and principled decision-making.<sup>324</sup>

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<sup>322</sup> Paul D. Carrington, Justice on Appeal in Criminal Cases: A Twentieth-Century Perspective, 93 MARQ. L. REV. 459, 461 (2009). As Professor Carrington has stated:

Appellate justice should be a model for the government's dealings with citizens. Appellate courts are the most dignified and receptive authorities to which individuals can turn to express their legal dissatisfactions in a pointed way, with assurance of a direct response. If these courts do not deal directly with litigants, we cannot expect agencies or bureaucracies of lesser sensitivity to legal rights to do so. It is therefore important that justice on appeal be visible to all.

*Id.* (quoting JUSTICE ON APPEAL, *supra* note 296 at v).

<sup>323</sup> See Oldfather, *supra* note 297, at 82.

[Advocate] [p]articipation is . . . critical to legitimacy. In part, this legitimacy is tied to the instrumental value of participation . . . [t]he reason is simply that courts resolving cases without being sufficiently responsive to the parties are not resolving the parties' dispute, but instead some more or less rough facsimile of it. Relatedly, research has demonstrated that litigants are more satisfied with processes in which they feel their voices have been heard and their positions given meaningful consideration even if they end up losing.

*Id.*

<sup>324</sup> See JUSTICE ON APPEAL *supra* note 296, at 11 ("[U]niform and coherent enunciation and application of the law" is systematic imperative for appellate court).

## i. Exceptional Circumstances Discretion: Unruly

Beyond the *Hormel* statement that forfeiture will be excused “in exceptional cases in order to prevent a miscarriage of justice,” the glosses upon the wording of this standard can differ markedly among courts. The case law includes references to “manifest injustice,” “miscarriage of justice,” “substantial miscarriage of justice,” “gross miscarriage of justice,” “the public interest,” or “the interests of justice.” The First Circuit, for instance, has stated, in some cases, that the exception applies only “in horrendous cases where a gross miscarriage of justice would occur” and that the new ground must be “so compelling as virtually to insure appellant’s success.”<sup>325</sup> How, for instance, that the term “gross” adds anything to the analysis or understanding is hard to see with the “virtually assuring success” equally incomplete in meaning.<sup>326</sup> Such generality only fuels the perception of un-principled or ad hoc decision-making. Further, any formulation of the governing criteria must be consistent with the underlying purposes for both the general rule of forfeiture and the need for exception in particular circumstances.

Even where courts, like the First Circuit, have more fully and admirably explored and declared the contours of the discretion, there remains inconsistent application, including the development of seemingly contradictory considerations. For instance, it has been noted that constitutional issues, like any other issue, can be waived,<sup>327</sup> yet the constitutional status of an issue has been stated to also favor exception to the raise or waive rule.<sup>328</sup> Similarly, waiver has been found to be

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<sup>325</sup> *Johnston v. Holiday Inns, Inc.*, 595 F.2d 890, 894 (1st Cir. 1979); *see also Wartski v. Bedford*, 926 F.2d 11, 21 (1st Cir. 1991) (stating *Johnston* rule); *Hernandez-Hernandez v. United States*, 904 F.2d 758, 763 (1st Cir. 1990) (reiterating principle discussed in *Johnston*); *Langton v. Berman*, 667 F.2d 231, 233 (1st Cir. 1981) (stating same).

<sup>326</sup> *See Mentor v. Hillside Bd. of Educ.*, 2011 WL 1957698, 428 F. App’x. 221, 224 n.5 (3d Cir. 2011) (noting exception to waiver “where a gross miscarriage of justice would occur”) (citing *Newark Morning Ledger Co. v. United States*, 539 F.2d 929, 932 (3d Cir. 1976)).

<sup>327</sup> *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.”); *Daigle v. Me. Med. Ctr., Inc.*, 14 F.3d 684, 688 (1st Cir. 1994) (stating raise or lose rule applies with full force to constitutional challenges); *Curtis v. Sch. Comm. of Falmouth*, 652 N.E.2d 580, 582 n.4 (Mass. 1995) (denying to review unpreserved constitutional claim); *Seagram Distillers Co. v. Alcohol Beverages Control Comm’n*, 519 N.E.2d 276, 283 (Mass. 1988) (stating same); *N.Y. & Mass. Motor Serv. Inc. v. Mass. Comm’n Against Discrimination*, 517 N.E.2d 1270, 1278 (Mass. 1988) (stating same); *In re Adoption of Donald*, 750 N.E.2d 1025, 1026 (Mass. App. Ct. 2001) (stating court will not consider issue first time on appeal particularly if constitutional).

<sup>328</sup> *See Nat’l Org. for Marriage, Inc. v. McKee*, 669 F.3d 34, 43 (1st Cir. 2012) (citing *Nat’l Ass’n of Soc. Workers v. Harwood*); *Nat’l Ass’n of Soc. Workers v. Harwood*, 69 F.3d 622, 628

particularly appropriate where the party is seeking adoption of a new legal principle while, at the same time, the legal nature of an otherwise waived issue favors exercise of discretionary review. Additionally, if the issue that is waived is deemed to be strong or decisive, then exception to waiver is favored, leaving the waiver issue to whether or not the otherwise waived argument was a winner. This seems contradictory to the recurring statement that “objections, issues or claims—however meritorious that have not been raised in the trial court are deemed waived,”<sup>329</sup> or that “[c]ourts typically invoke [the raise or lose] rule to avoid resolving a case based on an unaired argument, even if the argument could change the outcome.”<sup>330</sup> Also, it is stated that a court need not sit idly by where the parties have not raised or addressed applicable law yet must also not ignore the theories upon which the underlying matter was tried.<sup>331</sup>

In addition to conflicting considerations, courts have, collectively, identified no less than thirty (30) factors, considerations, or separate singular exceptions to the raise or lose general rule. It is hard to find even two jurisdictions that consider the very same factors as controlling, although there are certainly similarities. The lack of consensus and multitude of factors creates fertile ground for unbridled discretion.

There is, likewise, difficulty in weighing the factors in any given case. The diversity of factors and the substantial removal of many from the error correcting function render it virtually impossible to devise any workable scale or means of measure as to value any one “factor” versus another. Equal treatment and principled decision-making is thus threatened.

In a recent Third Circuit case, for example, the court affirmed the trial court’s determination that a state’s Prevailing Wage Regulations improperly discriminated against out of state contractors in violation of the Commerce Clause.<sup>332</sup> In holding that exceptional circumstances existed

(1st Cir. 1995); *see also* *Ninestar Tech. Co., Ltd. v. Int’l Trade Comm’n*, 667 F.3d 1373, 1382 (Fed. Cir. 2012) (“Although we agree that these issues were tardily raised, constitutional challenges should not be deemed waived when they relate to the foundations of governmental process.”).

<sup>329</sup> *Wynn & Wynn P.C. v. Mass. Comm’n Against Discrimination*, 729 N.E.2d 1068, 1083 (Mass. 2000), *overruled on other grounds by* *Stonehill Coll. V. Mass. Comm’n Against Discrimination*, 808 N.E.2d 205 (Mass. 2004); *see also* *Green v. Brookline*, 757 N.E.2d 731, 738 (Mass. App. Ct. 2002) (stating same).

<sup>330</sup> *Greenlaw v. United States*, 554 U.S. 237, 262 (2008).

<sup>331</sup> *See Jones v. Wayland*, 373 N.E.2d 199, 203 n.3 (Mass. 1978) (“The theory of law on which by assent a case is tried cannot be disregarded when the case comes before an appellate court for review of the acts of the trial judge.”) (quoting *Kagan v. Levenson*, 134 N.E.2d 415, 418 (Mass. 1956)); *see also* *Budish v. Daniel*, 631 N.E.2d 1009, 1012 n.5 (Mass. 1994) (stating same).

<sup>332</sup> *Tri-M Grp., LLC v. Sharp*, 638 F.3d 406, 412 (3d Cir. 2011).

allowing for review, the majority relied upon the following: (1) the strong public interest in considering all arguments, particularly because the case involved “crucial and unresolved issues of state sovereignty and state procurement spending, and tests the limits of the dormant Commerce Clause in this field”; (2) the issue had not yet been addressed by the Third Circuit; (3) the issue was sufficiently “intertwined” with other contentions that had been preserved; (4) the issue was one of law; and (5) addressing the issue would “preserve judicial resources.”<sup>333</sup>

In a concurring opinion, however, Judge Hardiman disagreed. While he agreed that the argument on appeal implicated significant issues as to state sovereignty and was one of law, in his opinion this was not enough to constitute “exceptional circumstances.”<sup>334</sup> Judge Hardiman found that since the construction project at issue had been completed and that all that was at issue was “some \$10,000 in wages” that had been paid to some apprentices, there was no urgency to address this issue, as it could be presented in another case upon a full trial record.<sup>335</sup> Also significant was the belief that nothing in the record indicated that the failure to make the contention below was inadvertent.<sup>336</sup> The argument was a recognized exception and it was, according to Judge Hardiman, unlikely that counsel had missed it, as opposed to it having been a deliberate decision to focus on other arguments.<sup>337</sup>

This debate is no stranger to the First Circuit. Even in the leading decision in *Harwood*, where the court delineated the various factors informing the discretion as to review of forfeited issues under the “exceptional circumstances” exception, there was no unanimity in application. The majority found that there was no absence of necessary fact finding and that the issue was one of law; that the issue was one of “constitutional magnitude”; that it was “highly persuasive”; that there was no prejudice or inequity to the opposing party; that the issue had been fully briefed and presented; that the failure to preserve was inadvertent rather than deliberate; and that “perhaps most salient” the otherwise forfeited issue “implicates matters of great public import, and touches upon policies as basic as federalism, comity, and respect for the independence of democratic institutions.”<sup>338</sup>

Justice Lynch dissented, stating that there were no “exceptional

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<sup>333</sup> *Id.* at 416-18.

<sup>334</sup> *Id.* at 432-33 (Hardiman, J., concurring).

<sup>335</sup> *Id.* at 432.

<sup>336</sup> *Id.*

<sup>337</sup> *Id.* at 434.

<sup>338</sup> *Nat’l Ass’n of Soc. Workers v. Harwood*, 69 F.3d 622, 627-29 (1st Cir. 1995).

circumstances,” finding that the immunity argument was “hardly an obscure legal concept” and able counsel represented all parties in the lower court.<sup>339</sup> Justice Lynch likewise noted that inadvertence, question of law, and implication of constitutional concerns are always present and would, if controlling, require the appeals court to always have to consider the legislative immunity issue even though raised for the first time on appeal.<sup>340</sup> Justice Lynch also added that one of the rationales for legislative immunity is to prevent vexatious litigation, which is undermined by allowing the legislator to raise the immunity issue for the first time on appeal after trial.<sup>341</sup>

The First Circuit was likewise unable to reach consensus in *Chestnut v. City of Lowell*.<sup>342</sup> There, a municipality was subject to a punitive damages finding following trial as to claims under 42 U.S.C. § 1983.<sup>343</sup> Prior to the jury charge, the trial judge asked both counsel about the propriety of punitive damages, with the claimant’s attorney stating it was proper and the defense attorney making no response or taking issue with the claimant’s attorney’s statement.<sup>344</sup> The trial court proceeded to instruct the jury on punitive damages even though the Supreme Court had long held such damages were not available against a municipality under § 1983.<sup>345</sup> Following the verdict, the defense raised the issue of the impropriety of punitive damages, asserting “immunity,” which request was denied.<sup>346</sup>

In an *en banc* decision, the First Circuit upheld the ruling. It found that most of the *Harwood* factors were present except that the issue was not one of constitutional magnitude; although it proceeded to note that *Harwood* did not involve the “disregard [of] plainly applicable Supreme Court precedent.”<sup>347</sup> In a dissent by Justices Lipez and Cyr, it was noted that the First Circuit had never before found “exceptional circumstances” to have been met in a civil case claiming error in jury instructions.<sup>348</sup> They found that reliance on the fact that the error was “shared” between counsel is not a relevant consideration and had never before been considered in the exceptional circumstances analysis.<sup>349</sup> They likewise found that unlike in

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<sup>339</sup> *Id.* at 638-39 (Lynch, J., dissenting).

<sup>340</sup> *Id.*

<sup>341</sup> *Id.*

<sup>342</sup> 305 F.3d 18 (1st Cir. 2002).

<sup>343</sup> *Id.* at 19.

<sup>344</sup> *Id.*

<sup>345</sup> *Id.* at 19.

<sup>346</sup> *Id.* at 19-20.

<sup>347</sup> *Id.* at 21.

<sup>348</sup> *Chestnut*, 305 F.2d at 25-28.

<sup>349</sup> *Id.* at 27.

*Harwood*, the issue was not one of constitutional dimension, but rather “a purely common law defense and did not otherwise implicate a matter of great public import.”<sup>350</sup> According to the dissenters, “we are faced only with the sort of ‘individualized harm that occurs whenever the failure seasonably to raise a claim or defense alters the outcome of the case.’”<sup>351</sup>

## ii. Unification

Subjecting some cases to plain error review and others to exceptional circumstances raises the specter of unequal treatment and begs the question of whether the two strands are truly (or otherwise should be) discreet and separate. Indeed, the co-terminus and overlapping nature of both plain error and exceptional circumstance discretion is substantial.<sup>352</sup>

There can be little question that plain error and other “exceptional circumstances” discretion have suffered a substantial measure of intermingling in their common law sojourn.<sup>353</sup> Although neither *Hormel* nor *Singleton* expressly cited to, or otherwise referenced, the power to review unpreserved errors for “plain error,” the decisions implicitly encompassed the fundamental or plain error exception to procedural default, as it was certainly already present and part of common law practice at the time. The Supreme Court had, in fact, already decided at least two leading decisions, one criminal (*Wiborg v. United States*<sup>354</sup>) and one civil

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<sup>350</sup> *Id.* at 28.

<sup>351</sup> *Id.* The dissenters also noted considerations such as that the failure of counsel to raise the issue was particularly egregious given that punitive claim had always been present and the defendant never raised or asserted the well established defense at any time including at the charge conference or after closing argument. *Id.* at 28-29. Additionally, reaching the issue and vacating the award would be prejudicial as it may have influenced the compensatory award. *Id.* at 29. Even where there is no dissent, the weighing of the factors is elusive. See *In re Net- Velazquez*, 625 F.3d 34, 40 (1st Cir. 2010) (“Of those [*Krynicky-Harwood*] factors, a few seem to weigh slightly . . . in favor here.”); *Montalvo v. Gonzalez-Amparo*, 587 F.3d 43, 48-49 (1st Cir. 2009) (granting review despite issue’s lack of constitutionality or public importance, “most salient” factors in analysis); *Harvey v. Veneman*, 396 F.3d 28, 45 (1st Cir. 2005) (stating constitutional issue not sufficiently publicly important to favor considering question).

<sup>352</sup> See DANIEL JOHN MEADOR & JORDANA SIMONE BERNSTEIN, *APPELLATE COURTS IN THE UNITED STATES* 23 (West 1994) (“The judicial system at all levels should strive to speak with a consistent voice and treat litigants even handedly.”).

<sup>353</sup> See *Salazar ex. rel. Salazar v. District of Columbia*, 602 F.3d 431, 437 (D.C. Cir. 2010) (“We have yet to determine whether the two inquiries [plain error and exceptional circumstances] are coterminous.”).

<sup>354</sup> 163 U.S. 632 (1896). In *Wiborg*, a private vessel’s captain and mates were found guilty of launching a private military expedition against Cuba. *Id.* at 633. The Court affirmed the captain’s conviction. *Id.* at 660. However, it reversed the convictions of the mates, finding there was no evidence that they had knowledge of the military nature of their voyage when they left the United States. *Id.*

(*United States v. Atkinson*<sup>355</sup>), in which it reiterated the long embedded plain or fundamental error exception.

There is no express reference in either *Hormel* or *Singleton* to the “plain” or “fundamental” error default standard for unpreserved errors or new issues on appeal, yet the recited circumstances in *Singleton*—to where resolution of the case is “beyond any doubt”—and in *Hormel*—to where “the obvious result would be a plain miscarriage of justice”—certainly seem to encompass the established “plain” or “fundamental” principle.<sup>356</sup> Many courts, including the First Circuit, have, in fact, at times cited to either or both of *Hormel* and *Singleton* as standing for the plain error principle,<sup>357</sup> or otherwise only reference plain error as to any exception to the general rule.<sup>358</sup>

The co-mingling can be seen in many of the exceptional circumstances formulations. In terms of nomenclature alone, the phrase “exceptional circumstances” has been used by both state and federal courts to refer to either or both of plain error or other criteria for allowing review of unpreserved error.<sup>359</sup> Massachusetts is no exception with courts

<sup>355</sup> 297 U.S. 157 (1936).

<sup>356</sup> It could be argued that the court in *Singleton* was noting mutually exclusive circumstances when it stated “where the proper resolution is beyond any doubt or where injustice might otherwise result.” 428 U.S. 106, 121 (1976) (internal quotations omitted) (quoting *Hormel v. Helvering*, 312 U.S. 552, 557 (1941)).

<sup>357</sup> See, e.g., *United States v. Tutty*, 612 F.3d 128, 131 (2d Cir. 2010) (citing *Hormel* for review of unpreserved error for plain error); *Sokoloski v. MetLife Ins. Co.*, 2002 WL 359974, 30 F.App’x. 209, 213 (4th Cir. 2009) (stating same); *Nottingham v. Sherill*, 2005 WL 1155997, 131 F.App’x. 427, 427 (4th Cir. 2005) (holding claim not raised below not considered absent exceptional circumstances such as plain error); *United States v. Cunningham*, 113 F.3d 289, 292 (1st Cir. 1997) (citing *Singleton* for power to review unpreserved errors but stating plain error limits review); *United States v. Byers*, 740 F.2d 1104, 1133 n.60 (D.C. Cir. 1986) (citing *Hormel* and *Singleton*); *Warren v. Ill. Cent. Gulf R. Co.*, 768 F.2d 709, 711 (5th Cir. 1985) (citing *Singleton*); *Melendez v. Boschulte*, 950 F. Supp. 114, 116 (D. V. I. 1997) (citing *Singleton*); see also *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111, 114 n.5 (1st Cir. 2009) (exercising discretion where “error is plain” and “equities heavily preponderate in favor of correcting it”) (quoting *Rocafort v. IBM Corp.*, 334 F.3d 115, 122 (1st Cir. 2003)).

<sup>358</sup> See *Velazquez-Ortiz v. Vilsack*, 657 F.3d 64, 74 (1st Cir. 2011) (“Assuming that it is only forfeited, the test is plain error”).

<sup>359</sup> See *United States v. Atkinson*, 297 U.S. 157, 160 (1936) (referencing exceptional circumstances in defining plain error); *Kenney v. Head*, 670 F.3d 354, 359 (1st Cir. 2012) (noting exceptional circumstances equivalent to plain error); *Jackson v. Parker*, 627 F.3d 634, 640 (7th Cir. 2010) (“Plain error is only available in civil cases if a party can demonstrate that: (1) exceptional circumstances exist; (2) substantial rights are affected; and (3) a miscarriage of justice will occur if plain error review is not applied.”) (quoting *Moore ex rel. Estate of Grady v. Tuleja*, 546 F.3d 423, 430 (7th Cir. 2008)); *Johnson v. Ashby*, 808 F.2d 676, 679 n.3 (8th Cir. 1987) (stating plain error only found in exceptional circumstances and but not exceptional case); *Dream Palace v. Cnty. of Maricopa*, 384 F.3d 990, 1005 (9th Cir. 2004) (“Even when a case falls into one of the exceptions to the rule against considering new arguments on appeal, [the appellate court] must still decide whether the particular circumstances of the case overcome [the]



interchanging “exceptional circumstances where injustice might otherwise result” with “substantial risk of a miscarriage of justice.”<sup>360</sup> Not surprisingly, courts have not been uniform as to whether or not “exceptional circumstances” is separate and distinct from or otherwise represents a restatement of plain error. Some have suggested that the two are coterminous; others have indicated they are separate and with still a number of states not otherwise adopting any exception beyond plain error.<sup>361</sup> Most jurisdictions, including the federal courts and a significant number of states, have adopted both strains of exception although differing, sometimes markedly, in the formulation of the exceptional circumstance branch. Even then, some decisions, including in the First Circuit, have, at times, defined “plain error” in terms of both *Olano* and the *Krynicky* factors.<sup>362</sup>

This overlap and interchange between the two lines of discretion can also be found upon isolation and inspection of the individual factors or circumstances that have come to constitute the criteria for the exercise of

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presumption against hearing new arguments.”); *United States v. Real Property Located at 1189 Drycreek Rd.*, 174 F.3d 720, 725-26 (6th Cir. 1999) (exercising discretion where failure to review would cause “miscarriage of justice”); *see also Hung Viet Vu v. Kirkland*, 2010 WL 24215, 363 F. App’x. 439, 443 (9th Cir. 2010) (noting waiver exceptions: exceptional circumstances; law change while appeal pending; law question with no prejudice); *Whiteman v. Friel*, 2006 WL 2441542, 191 F. App’x. 820, 821 (10th Cir. 2006) (stating absent plain error or exceptional circumstances issue not raised below not considered); *Muth v. United States*, 1 F.3d 246, 250 (4th Cir. 1993) (reviewing forfeiture issue only when failure is plain error or results in miscarriage of justice); *State v. Andrasak*, 958 N.E.2d 594, 596 (Ohio Ct. App. 2011) (permitting plain error where “exceptional circumstances” and necessary to prevent miscarriage of justice).

<sup>360</sup> *See Rafferty v. Town of Franklin*, 826 N.E.2d 794, 2005 WL 1106690, at \*2 (Mass. App. Ct. 2005) (“Only in exceptional cases, where injustice might otherwise result, will we review issues not raised at trial.”) (internal quotations omitted) (citing *Cruz v. Comm’r of Pub. Welfare*, 478 N.E.2d 1262, 1264 (Mass. 1985)).

<sup>361</sup> *See cases cited, supra* note 327; *see also Crawford v. Falcon Drilling Co.*, 131 F.3d 1120, 1123 n.3 (5th Cir. 1997) (noting exception allows consideration of newly raised issues if refusal would work manifest injustice); *Douglass v. United Serv. Auto Ass’n.*, 79 F.3d 1415, 1416 (5th Cir. 1996) (rejecting manifest injustice as independent test), *superseded by statute*, *ACS Recovery Serv., Inc. v. Griffin*, No. 11-40446, 2012 WL 1071216, at \*1 (5th Cir. Apr. 2, 2012).

<sup>362</sup> *See Babcock v. Gen. Motors Corp.*, 299 F.3d 60, 65 (1st Cir. 2002). The Court in *Babcock* stated:

We might find plain error where the failure to raise the claim below deprived the reviewing court of helpful factfinding; . . . the issue is one of constitutional magnitude; . . . the omitted argument is highly persuasive; . . . the opponent would suffer prejudice and . . . the issue is of great public importance to the public.

*Id.* (quoting *Play-Time Inc. v. DDS Metromedia Commc’ns Inc.*, 123 F.3d 23, 30 n.8 (1st Cir. 1997)); *see also Kenney v. Head*, 670 F.3d 354, 359 (1st Cir. 2012) (explaining waived issue may be reviewed for plain error).

exceptional circumstance discretion. The primary or recurring factors or considerations comprising “exceptional circumstances” discretion can be grouped into four general categories: court authority and competency; application and classification; error correction; and issue stature/law declaration. An examination of these factors or considerations reveals that some simply demonstrate that the appellate court is competent to address the issue, providing no other basis for exception from the general rule. They thus offer nothing that is not otherwise encompassed within plain error other than a more lenient means to escape the general rule. Other factors or considerations do not respond at all to the concerns underlying the general rule. Certain additional factors, such as the emphasis on significant public interest, in turn, are removed from the fundamental appellate function of adjudicating a claim of error.

Many of the circumstances do not truly constitute exceptions but address whether the raise or lose rule is even applicable. These include the court authority circumstances such as subject matter jurisdiction, standing, ripeness, venue, and notices of appeal; the court capability factors such as questions of law, adequacy of factual record, appellate briefing and prejudice to the opposing party; and the applicability and classification factors such as intervening change in law, futility, preclusion as well strategic versus inadvertent. These are all already encompassed within the plain error default standard.

### 1. Court Authority and Competency

The court authority circumstances center on jurisdictional issues which all directly concern the fundamental power of the court even to entertain the issue.<sup>363</sup> A number of courts, including certain Massachusetts decisions, have stated the general rule of raise or lose as incorporating the notion of jurisdiction,<sup>364</sup> i.e., “[a] party is not entitled to appellate review of a non-jurisdictional issue or theory never presented to the trial court.”<sup>365</sup>

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<sup>363</sup> Subject matter jurisdictional issues are excepted from the raise or lose rule as they concern the court’s underlying authority to hear and adjudicate cases. *See* RESTATEMENT (SECOND) OF JUDGMENTS §1 (1982) (noting court’s judgment only valid if it had jurisdiction); Frost, *supra* note 5, at 462 (“The best-known exception to the party presentation rule permits courts to question their capacity or suitability to hear a case or a specific issue.”).

<sup>364</sup> Doe v. Sex Offender Registry Bd., 927 N.E.2d 455, 459 (Mass. 2010) (defining subject matter jurisdiction as jurisdiction over nature of case and type of relief sought).

<sup>365</sup> Gaw v. Sappett, 816 N.E.2d 1027, 1032 (Mass. App. Ct. 2004); *see* Royal Indem. Co. v. Blakely, 360 N.E.2d 864, 865 (Mass. 1977) (stating same); *see also* Louisville & Nashville R. Co. v. Mottley, 211 U.S. 149, 152 (1908) (holding duty to determine whether lower court had jurisdiction even though issue unaddressed by parties); Belden v. Lampert, 251 P.3d 325, 328 (Wyo. 2011) (stating waiver rule inapplicable to issues which are either jurisdictional or

As the First Circuit has noted, “parties cannot confer subject-matter jurisdiction on a district court by sloth or acquiescence,”<sup>366</sup> with a jurisdictional defect implicating the foundational question of a court’s power to decide a case or issue or decree.<sup>367</sup> The same principle is followed under Massachusetts practice with it long held that “[w]hen jurisdiction is lacking, it ‘cannot be conferred by consent, conduct or waiver.’”<sup>368</sup>

In addition to issues of ripeness,<sup>369</sup> standing,<sup>370</sup> venue, and notices of appeal,<sup>371</sup> the court authority grouping includes where an agency declines to review the issue or asserts lack of authority to hear the issue.<sup>372</sup> Such issues are immune from the raise or lose rule regardless of

fundamental in nature). Notably, at least on the federal level, the non-waiverability of subject matter jurisdiction was not always so absolute as it is today. See *Short v. Marinas USA Ltd.*, 942 N.E.2d 197, 203-04 (Mass. App. Ct. 2011); Michael G. Collins, *Jurisdictional Exceptionalism*, 93 VA. L. REV. 1829, 1835 (2007) (detailing various practices at common law illustrating that raising jurisdictional objections subject to procedure regulation).

<sup>366</sup> *Trenkler v. United States*, 536 F.3d 85, 96 (1st Cir. 2008); see *United States v. Cotton*, 535 U.S. 625, 630 (2002).

<sup>367</sup> *Ascroft v. Iqbal*, 556 U.S. 662, 671 (2009).

<sup>368</sup> *Jamgochian v. Dierker*, 681 N.E.2d 1180, 1182 (Mass. 1997) (quoting *Litton Bus. Sys., Inc. v. Comm’r of Revenue*, 420 N.E.2d 339, 342 (Mass. 1981)). Such jurisdictional issues have been held to allow a court to address the issue *sua sponte* even if not properly preserved or raised in the appeal. See *Prudential-Bache Sec., Inc. v. Comm’r of Revenue*, 588 N.E.2d 639, 642 (Mass. 1992); see also *Spooner v. EEN, Inc.*, 644 F.3d 62, 67 (1st Cir. 2011) (“A court is duty-bound to notice, and act upon, defects in its subject matter jurisdiction *sua sponte*.”); *McCulloch v. Velez*, 364 F.3d 1, 5 (1st Cir. 2004) (stating same).

<sup>369</sup> *Hidalgo Cnty. v. Dyer*, 358 S.W.3d 698, 710 (Tex. App. 2011) (“Ripeness cannot be waived and may be raised for the first time on appeal.”); see *Arambarri v. Armstrong*, No. 38351, 2012 WL 739486, at \*3 (Idaho Mar. 8, 2012) (explaining issues of standing and mootness are jurisdictional and can be raised at any time).

<sup>370</sup> *Warrington v. Zoning Bd. of Appeals*, 937 N.E.2d 980, 982 (Mass. App. Ct. 2010) (stating zoning standing is subject matter jurisdiction).

<sup>371</sup> *Tsagronis v. Bd. of Appeals of Wareham*, 613 N.E.2d 893, 896 (Mass. 1994) (Abrams, J., dissenting) (“Standing as an aggrieved party is jurisdictional, and cannot be conferred by stipulation or waiver of the parties.”) (Abrams, J., dissenting); *Commonwealth v. Mannos*, 40 N.E.2d 291, 297 (Mass. 1942) (equating “territorial jurisdiction” with “venue and not with jurisdiction”); *Warrington*, 937 N.E.2d at 982 (holding abutter’s standing under zoning statute raiseable at any time constitutes subject matter jurisdiction issue); *Commonwealth v. Hart*, 918 N.E.2d 96, 2009 WL 4403315, at \*1 (Mass. App. Ct. 2009) (unpublished table decision) (holding conduct occurring outside territory constitutes venue, not jurisdiction, and thus waiver applies); *Pavian, Inc. v. Hickey*, 874 N.E.2d 670, 673 n.3 (Mass. App. Ct. 2007) (stating notice of appeal timeliness implicates subject matter jurisdiction and challengeable at any state), *rev’d on other grounds*, 895 N.E.2d 480 (Mass. 2008); *Barvenik v. Bd. of Aldermen of Newton*, 597 N.E.2d 48, 50 (Mass. App. Ct. 1992) (stating “aggrieved person” status jurisdictional prerequisite for § 17 review), abrogated, *Marashlian v. Zoning Bd. Of Newburyport*, 660 N.E.2d 369 (Mass. 1986).

<sup>372</sup> See *M. H. Gordon & Son, Inc. v. Alcoholic Beverages Control Comm’n*, 434 N.E.2d 986, 989 (Mass. 1982). For instance, where an agency had found or stated in another analogous case that it would leave the question of whether state regulation violated Sherman act to the courts, it was proper for appellate court to address issue. *Id.*

hardship.<sup>373</sup> Jurisdictional forfeiture issues can take a myriad of other forms,<sup>374</sup> with courts sometimes expressly recognizing that the new argument on appeal couched as one of “subject matter jurisdiction” has a “strategic explanation” of an attempt to avoid waiver in having not raised the issue below.<sup>375</sup>

Since issues pertaining to subject matter jurisdiction<sup>376</sup> involve the court’s very authority, there is much less concern as to discretionary looseness or unequal treatment.<sup>377</sup> The underpinnings to the raise or lose

<sup>373</sup> See *E.R. Squibb & Sons, Inc. v. Accident & Cas. Ins. Co.*, 160 F.3d 925, 929, 940 (2d Cir. 1998) (vacating judgment after sixteen years of litigation); *United States v. Jacobo Castillo*, 496 F.3d 947, 952 (9th Cir. 2007) (“Defects in procedural rules may be waived or forfeited by parties who fail to object properly, whereas defects in our subject-matter jurisdiction go to the inherent power of the court and cannot be waived or forfeited.”).

<sup>374</sup> Both First Circuit and Massachusetts courts have addressed claims of jurisdiction both in the raise or lose context and otherwise. See *Maxwell v. AIG Domestic Claims, Inc.*, 950 N.E.2d 40, 48 (Mass. 2011) (“[T]he question of subject matter jurisdiction may be raised by the parties at any time or by the court on its own motion.”); *Miller v. Miller*, 861 N.E.2d 393, 398 (Mass. 2007) (“[W]e consider whether the judge was correct in determining that the court had subject matter jurisdiction over the case, would be a waste of judicial resources for that issue to remain unresolved.”); *ROPT Ltd. P’ship v. Katin*, 729 N.E.2d 282, 287 (Mass. 2000) (stating right of party to raise subject matter jurisdiction at any time); *Nature Church v. Bd. of Assessors of Belchertown*, 429 N.E.2d 329, 330 (Mass. 1981) (“Courts . . . have both the power and the obligation to resolve problems of subject matter jurisdiction whenever they become apparent, regardless whether the issue is raised by the parties.”); see, e.g., *Stevio v. Frasor*, 662 F.3d 880, 884 (7th Cir. 2011) (considering whether lack of consent to magistrate is issue of jurisdiction not subject to forfeiture); *Sperounes v. Farese*, 873 N.E.2d 239, 244 (Mass. 2007) (explaining \$25,000 filing limit “procedural,” not “jurisdictional,” and must be raised in answer or waived); *Middleborough v. Hous. Appeals Comm.*, 870 N.E.2d 67, 74 (Mass. 2007) (requiring project be “fundable” to challenge comprehensive permit decision “substantive,” not “jurisdictional”); *Jamgochian v. Dierker*, 681 N.E.2d 1180, 1183-84 (Mass. 1997) (finding statutory jury requirement not jurisdictional where verdict rendered by 11 of 14 jurors).

<sup>375</sup> See *Doe v. Sex Offender Registry Bd.*, 927 N.E.2d 455, 458 (Mass. 2010) (“Given the fact that the plaintiff neglected to raise this issue . . . there is a strategic explanation for why he has couched his argument in terms of subject matter jurisdiction. As we have said, questions of subject matter jurisdiction may be raised at any time . . . and are not waived even when not argued below.”) (internal quotations omitted) (quoting *Commonwealth v. DeJesus*, 795 N.E.2d 547, 551 (Mass. 2003)).

<sup>376</sup> See *United States v. Cotton*, 535 U.S. 625, 630 (2002); *Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982). Only subject matter jurisdiction is excepted from the no waiver rule. *Cotton*, 535 U.S. at 630; *Ins. Corp. of Ireland*, 456 U.S. at 702. Personal jurisdiction can be waived as it relates to the due process liberty restriction on judicial power as opposed to the statutory or constitutional authority of the court to hear a particular action. *Id.* at 703.

<sup>377</sup> The battleground as to the jurisdictional exception to the raise or lose rule is usually over whether an issue is jurisdictional or not. See Ryan Walters, Note, *Raise It or Waive It? Addressing the Federal and State Split in Authority on Whether a Conviction Under an Unconstitutional Statute is a Jurisdictional Defect*, 62 *Baylor L. Rev.* 909, 913-14 (2010) (“[T]he question of when a defect qualifies as jurisdictional has not proved to be a simple one and has caused courts a great deal of headache over the years.”). The term “jurisdiction” has been noted to be a “chameleon,” and otherwise notoriously broad with courts giving it a wide variety of

meanings. *Moore v. Olson*, 368 F.3d 757, 759 (7th Cir. 2004); *see* *Union Pac. R.R. Co. v. Bhd. of Locomotive Eng'gs & Trainmen Gen. Comm. of Adjustment Cent. Region*, 130 S. Ct. 584, 596 (2009); *Bennett v. Holyoke*, 362 F.3d 1, 8 (1st Cir. 2004); *see also* *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 510-11 (2006) (noting history of "profligate" and "less than meticulous" use of the term). In recent years, the Supreme Court has attempted to limit and more carefully define "jurisdiction" stating it is limited to either "subject matter jurisdiction" or "personal jurisdiction." *See* *Reed Elsevier, Inc. v. Muchnick*, 130 S. Ct. 1237, 1243 (2010) ("'[J]urisdiction' properly applies only to 'prescriptions delineating the classes of cases (subject-matter jurisdiction) and the persons (personal jurisdiction)' implicating [the court's adjudicatory] authority.") (quoting *Kontrick v. Ryan*, 540 U.S. 443, 455 (2004)). Additionally, the Supreme Court noted that courts should use the term jurisdiction "only when it is apposite," and should "curtail . . . 'drive-by jurisdictional rulings.'" *Id.* at 1243-44 (quoting *Kontrick*, 540 U.S. at 455; *Steel Co. v. Citizens for Better Env't*, 523 U.S. 83, 91 (1998)). *See, e.g.,* *Henderson ex rel. Henderson v. Shinseki*, 131 S. Ct. 1197, 1202-07 (2011) (holding veteran's failure to file notice of appeal within required period did not deprive jurisdiction); *Reed Elsevier*, 130 S. Ct. at 1249 (holding copyright-registration requirement not jurisdictional); *Union Pac. R.R.*, 130 S. Ct. at 598-99 (holding settlement-conference requirement not jurisdictional); *Arbaugh*, 546 U.S. at 514-15 (holding Title VII provision exempting employers with fewer than 15 employees jurisdictional); *Kontrick*, 540 U.S. at 452-56 (holding bankruptcy rule governing timely amendments not jurisdictional); *Cotton*, 535 U.S. at 630-31 (holding sentencing in excess of a statutory maximum did not deprive sentencing court of jurisdiction). *But see* *Bowles v. Russell*, 551 U.S. 205, 209-10 (2007) (holding statutory time for taking of appeal from district court decision jurisdictional). Further, distinguishing true jurisdictional issues from "merits" based issues or "procedural" issues is not always particularly apparent. *See* *Reed Elsevier*, 130 S. Ct. at 1243 (noting it can be confusing in practice); *see also* Howard M. Wassermann, *The Demise of "Drive by Jurisdictional Ruling"*, 105 NW. U. L. REV. 947, 955-58 (2011) (discussing several Supreme Court decisions decided in October 2009). Recent Supreme Court decisions concerning "jurisdiction" indicate that the Court has retreated from its admittedly "profligate" and "less than meticulous" use of the term jurisdiction and now rejects "drive-by jurisdictional rulings," in which a legal rule has been labeled as jurisdictional only through "unrefined" analysis, without rigorous consideration of the label's meaning or consequence. *Id.* The Supreme Court, for instance, has confessed that "[w]hile perhaps clear in theory, the distinction between jurisdictional conditions and claim-processing rules can be confusing in practice." *Reed Elsevier*, 130 S. Ct. at 1243. For example, it has been held that mandatory notice or presentment provisions are not jurisdictional and can be waived, yet exhaustion of administrative remedies have been found to be either jurisdictional or not turning on whether the legislature has designated the requirement as such. *See* *Global NAPs, Inc. v. Verizon New England Inc.*, 603 F.3d 71, 85 (1st Cir. 2010); *see also* *Payne v. Peninsula Sch. Distr.*, 653 F.3d 863, 871 (9th Cir. 2011) (holding Individual with Disabilities Education Act (IDEA)'s exhaustion requirements claim processing rule not jurisdictional limitation); *Mosely v. Bd. of Educ. of City of Chicago*, 434 F.3d 527, 533 (7th Cir. 2006) ("A failure to exhaust is normally considered to be an affirmative defense, and we see no reason to treat it differently here."); ("The exhaustion requirement . . . is not jurisdictional . . ."); *Blanchard v. Morton Sch. Dist.*, 420 F.3d 918, 920-21 (9th Cir. 2005) ("If a plaintiff is required to exhaust administrative remedies but fails to do so, the federal courts do not have jurisdiction to hear the plaintiff's claim."), *overruled*, *Payne v. Peninsula Sch. Distr.*, 653 F.3d 863, (9th Cir. 2011); *MM ex rel. DM v. Sch. Dist. of Greenville Cnty.*, 303 F.3d 523, 536 (4th Cir. 2002) ("The failure of the Parents to exhaust their administrative remedies . . . deprives us of subject matter jurisdiction over those claims . . ."); *N.B. ex rel. D.G. v. Alachua Cnty. Sch. Bd.*, 84 F.3d 1376, 1379 (11th Cir. 1996); *Urban by Urban v. Jefferson Cnty. Sch. Dist. R-1*, 89 F.3d 720, 725 (10th Cir. 1996) ("We conclude that the district court correctly dismissed the [unexhausted] claims for lack of jurisdiction."). Similarly, preemption claims under federal statutes or law can raise issues of subject matter jurisdiction that can be raised for first time on appeal. *See* *Cent. Transp. Inc. v. Package Printing Co.*, 706 N.E.2d 698, 699 (Mass. 1999) (considering issue of ERISA

rule are secondary given the focus on the court's constitutional or statutory power to adjudicate the case.<sup>378</sup> Indeed, "[a] court's responsibility to satisfy itself of its jurisdiction to proceed is rationalized as necessary to maintain the judiciary's limited role in the constitutional structure."<sup>379</sup> Further, jurisdictional issues provide no distinction for purposes of plain error or exceptional circumstances discretion. If there is no jurisdiction, there is no basis to exercise either line of discretion.

The court capability or competency factors or circumstances, namely the status of the issue as one of law,<sup>380</sup> the completeness of the factual record, the existence of applicable appellate briefing, and lack of prejudice to the opposing part also do not truly constitute "exceptions" to the general rule.<sup>381</sup> These factors go to the competency of the appellate court to provide meaningful review and, again, apply equally to plain error.

The Supreme Court in *Hormel* specifically referenced "questions

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preemption for first time on appeal); *Chestnut-Adams Ltd. P'ship v. Bricklayers & Masons Trust Funds of Bos.*, 612 N.E.2d 236, 237 (Mass. 1993) (considering same), *abrogated*, *Cent. Transp.*, 706 N.E.2d 698 (Mass. 1999); *Barry v. Dymo Graphic Sys., Inc.*, 478 N.E.2d 707, 711 (Mass. 1985) (considering same), *disapproved*, *Massachusetts v. Morash*, 490 U.S. 107 (1989). Federal statutes controlling substantive law rather than forum choice, render any such "preemption" a waivable non-jurisdictional defense. See *Int'l Longshoremen's Ass'n v. Davis*, 476 U.S. 380, 389-99 (1986); *Wolf v. Reliance Standard Life Ins. Co.*, 71 F.3d 444, 449 (1st Cir. 1997); *Central Transp.*, 706 N.E.2d at 700; *Violette v. Smith & Nephew Dyonics, Inc.* 62 F.3d 8, 11-12 (1st Cir. 1995).

<sup>378</sup> See generally *Cotton*, 535 U.S. at 630 (explaining defects in indictment do not deprive court of jurisdiction); *Steel Co.*, 523 U.S. at 89; Evan Tsen Lee, *The Dubious Concept of Jurisdiction*, 54 HASTINGS L.J. 1613, 1620 (2003) (discussing the adjudicatory competency and legitimate authority underpinnings to jurisdiction). Even with such arguably benign considerations, the current absolute rule allowing for objection to jurisdiction to be raised at anytime merits discussion about whether there can and/or should be a workable limitation. See *Belleville Catering Co. v. Champaign Mkt. Place, L.L.C.*, 350 F.3d 691, 692 (7th Cir. 2003) (chastising "litigants' insouciance" to federal jurisdiction requirements and listing cases reversed for unnoticed jurisdictional defects).

<sup>379</sup> *Frost*, *supra* note 5, at 462.

<sup>380</sup> See *Dennerline*, *supra* note 2, at 996-99 ("One of the most common exceptions to the general rule appellate courts use is the characterization of a new issue on appeal as one that is purely legal in nature."); see, e.g., *Montalvo v. Gonzalez-Amparo*, 587 F.3d 43, 48-49 (1st Cir. 2009); *United States v. La Guardia*, 902 F.2d 1010, 1013 (1st Cir. 1990) (reaching constitutional due process challenge to sentencing as it presented question of law); *United States v. Krynicki*, 689 F.2d 289, 291 (1st Cir. 1982) (discussing statutory construction-Speedy Trial Act-and no need to develop record further); *Stop & Shop Supermarket Co. v. Loomer*, 837 N.E.2d 712, 715 (Mass. 2005) (considering issue despite waiver because question of law); *Fortier v. Town of Essex*, 752 N.E.2d 818, 821 (Mass. App. Ct. 2005) (refusing to consider best evidence rule on appeal because waived), *overruled on other grounds*, *Morrissey v. New Eng. Deaconess Ass'n-Abundant Life Communities, Inc.*, 940 N.E.2d 391 (Mass. 2010).

<sup>381</sup> See *Dennerline*, *supra* note 2, at 999 ("[A]lthough termed an 'exception' to the general rule, it actually is not because the exception only partially addresses the commonly accepted rationales for the general rule.").

of law” in its discretionary pronouncement,<sup>382</sup> and both First Circuit and Massachusetts decisions have repeatedly referenced the legal nature of the unpreserved issue.<sup>383</sup> Even if the issue is not strictly a “question of law,” courts have opted to review a waived or forfeited issue where the record below provides a sufficient and adequate record and the parties have otherwise fully briefed the issue.<sup>384</sup> If the record is fully developed, there is no concern that the failure to raise the issue below has hampered or limited the appellate court’s ability to decide the issue.<sup>385</sup> Similarly, if the record or brief is inadequate, even as to what is considered a pure question of law, discretion to review an unpreserved argument or error is usually declined.<sup>386</sup> Courts have reviewed otherwise forfeited issues relying on the adequacy of briefing factor alone,<sup>387</sup> or when coupled with another factor,

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<sup>382</sup> *Hormel v. Helvering*, 312 U.S. 552, 557 (1941); *LaGuardia*, 902 F.2d at 1013; *Springfield v. Dep’t of Telecomm. & Cable*, 931 N.E.2d 942, 950 (Mass. 2010); *Albert v. Mun. Court of City of Bos.*, 446 N.E.2d 1385, 1386-87 (Mass. 1983).

<sup>383</sup> See *Krynicky*, 689 F.2d at 292 (stating issue whether an indictment must be returned within 30 days legal, thus favoring review); *Nuclear Metals, Inc. v. Low-Level Radioactive Waste Mgmt. Bd.*, 656 N.E.2d 563, 572 (Mass. 1995) (noting issue legal because interpretation of statutory and regulatory language and validity of agency’s interpretation); *Commonwealth v. Dyer*, 138 N.E. 296, 313 (Mass. 1923) (stating exceptions not argued waived but court retains power to correct genuine errors of law); *Vahey v. Bigelow*, 94 N.E. 249 (Mass. 1911) (stating question of law not presented to trial court cannot be raised on appeal).

<sup>384</sup> See *Nat’l Ass’n of Soc. Workers v. Harwood*, 69 F.3d 622, 627-28 (1st Cir. 1995); *Krynicky*, 689 F.2d at 291; see also *Golchin v. Liberty Mut. Ins. Co.*, 950 N.E.2d 853, 865 n.9 (Mass. 2011) (“We are loath to approach such a complicated question [*sua sponte*] without the benefit of briefing from the parties.”); *Slater v. Rawson*, 42 Mass. 450, 450 (Mass. 1840) (stating proper for court to consider argument not presented below because facts conceded); *Vaughan v. E. Edison Co.*, 719 N.E.2d 520, 524 (Mass. App. Ct. 1999) (exercising discretion to consider new issue where both parties briefed issues and neither had objected); *Altschuler v. Bos. Rent Bd.*, 425 N.E.2d 781, 786 (Mass. App. Ct. 1981) (finding issues presented question of law and briefed and argued by parties).

<sup>385</sup> See e.g., *United States v. Pakala*, 568 F.3d 47, 57 (1st Cir. 2009) (stating legal issue not raised below reviewable because record fully developed, and no special prejudice); *Nuclear Metals, Inc.*, 656 N.E.2d at 572 (noting waived issue addressed as question of law and as adequate record); *In re Redgate*, 633 N.E.2d 380, 383 (Mass. 1994) (“[I]t is within our discretion to consider issues not otherwise properly before us when presented with argument and a complete record on which to examine the issue.”); *Loomer*, 837 N.E.2d at 716.

<sup>386</sup> *Denny v. Westfield State Coll.*, 880 F.2d 1465, 1473 (1st Cir. 1989); see *Dobb v. Baker*, 505 F.2d 1041, 1044-45 (1st Cir. 1974) (noting reliance claim forfeited despite appellant presenting evidence, because not raised below); *Friedman v. Bd. of Registration in Med.*, 561 N.E.2d 859, 862 (Mass. 1990) (declining review of unpreserved issue where “factoral predicate of such arguments not in the record”); *Fedorchuk*, 723 N.E.2d at 44 (“[The] general rule will not be invoked where justice will be served by a consideration of the claim and the other party is not prejudiced by consideration of the issue.”). This has also been held to be applicable to plain error review. See *United States v. Brown*, 352 F.3d 654, 665 (2d Cir. 2003) (stating where record below is incomplete, review for plain error is to be more rigorous); *Cornell v. Michaud*, 947 N.E.2d 1138, 1143-44 (Mass. App. Ct. 2011) (noting “typically” failing to raise issue constitutes waiver where resolution requires adequate record and findings concerning claim).

<sup>387</sup> See *RYO Cigar Ass’n, Inc. v. Bos. Pub. Health Comm’n.*, 950 N.E.2d 889, 894 (Mass.

such as when the issue is in the “public interest”<sup>388</sup> or affects outcome.<sup>389</sup> For instance, it is not uncommon for courts to address the otherwise waived issue because it was briefed “and because the answer to the issue [was] reasonably clear.”<sup>390</sup>

The absence of prejudice has also been identified as a factor and interest militating toward discretionary review of an otherwise forfeited issue, and is tied closely to the adequacy of record factor.<sup>391</sup> The question asked is whether the party asserting forfeiture has been harmed or prejudiced in not having the chance to address the issue below. If the issue is one where the party could have presented helpful evidence, for instance, prejudice will exist militating against permitting appellate review.<sup>392</sup>

All of these factors address the capability/competency of the

App. Ct. 2011) (“[A]ll issues have been briefed by both sides and we therefore consider them all.”).

<sup>388</sup> *Maslab Liquidation Trust v. Commonwealth*, 806 N.E.2d 947, 948 n.1 (Mass. App. Ct. 2004); *Smith v. Sex Offender Registry Bd.*, 844 N.E.2d 680, 686 (Mass. App. Ct. 2006) (stating constitutional challenge to newly drafted sex-offender classification guidelines addressable because fully briefed).

<sup>389</sup> *See Police Dep’t of Bos. v. Fedorchuk*, 723 N.E.2d 41, 44 (Mass. 2000).

<sup>390</sup> *Woburn Bd. of Appeals v. Housing Appeals Comm.*, 847 N.E.2d 1140, 2006 WL 1493052, at \*1 (Mass. App. Ct. 2006) (unpublished table decision) (quoting *Brown v. Guerrier*, 457 N.E.2d 630, 631 (Mass. 1983)).

<sup>391</sup> *See Royal Indem. Co. v. Blakely*, 360 N.E.2d 864, 865 (Mass. 1977) (“[The general rule] has force where the other party may be prejudiced by the failure to raise the point below.”); *see also Nat’l Ass’n of Soc. Workers v. Harwood*, 69 F.3d 622, 627-28 (1st Cir. 1995); *United States v. Krynicki*, 689 F.2d 289, 291-92 (1st Cir. 1982); *Albert v. Mun. Court of Bos.*, 446 N.E.2d 1385, 1387 (Mass. 1983); *First Nat’l Bank of Bos. v. Haufler*, 385 N.E.2d 970, 972 (Mass. 1979) (stating will not consider new issue on appeal if other side would be prejudiced).

<sup>392</sup> *See e.g., Bird v. United States*, 241 F.2d 516, 521 (1st Cir. 1957) (“If the taxpayer had made this ‘recovery exclusion’ argument an issue in the district court, we assume the government could have introduced evidence tending to defeat its applicability by showing that the taxpayer received some tax benefit from claiming the original interest deduction in his return for 1942”); *Ingram v. Problem Pregnancy of Worcester, Inc.*, 488 N.E.2d 408, 409 n.4 (Mass. 1986); *Cruz v. Comm’r of Pub. Welfare*, 478 N.E.2d 1262, 1264-65 (Mass. 1985); *Albert*, 446 N.E.2d at 1387 (“[T]he rule that an issue need not be considered for the first time on appeal ‘has particular force when the other party may be prejudiced by the failure to raise the point below.’”) (quoting *Royal Indem. Co.*, 360 N.E.2d at 865)). For example, the Supreme Judicial Court relied on this factor in an action in which an appellant claimed to have been denied Medicaid benefits but had never raised her eligibility for such benefits under a federal regulation allowing such status where the alien is permanently residing in the United States “under color of law.” *Cruz*, 478 N.E.2d at 1264. It was found that “justice” weighed in favor of considering the issue as the appellant “has been denied benefits to which she may in fact be entitled under the applicable Federal regulations” and that it did not “appear that the department will have been prejudiced by the plaintiff’s failure to press this issue below.” *Id.* *See In re Dustin A.*, No. F060297, 2011 WL 2637499, at \*13 (Cal. Ct. App. July 6, 2011) (refusing to reach unpreserved constitutional claim as was not sufficiently briefed); *E.H.S. v. K.E.S.*, 676 N.E.2d 449, 450 (Mass. 1997); *In re Gagnon*, 625 N.E.2d 555, 558 (Mass. 1994). Conversely, where an appellant would suffer prejudice on rehearing due to difficulty of locating witnesses many years after events at issue, the unpreserved issue would not be heard. *Cruz*, 478 N.E.2d at 1264.



appellate court to provide meaningful review with the briefing and prejudice factors also representing the importance of the party presentation principle. Questions of law are “excepted” from forfeiture due to the fact that such questions do not depend on the factual record below.<sup>393</sup> This “exception” appears to derive as well from the principle that an appellate court reviews questions of law de novo without deference to the lower court evaluation.

These court capability or competency factors do not otherwise address any of the other underpinnings to the raise or lose rule such as judicial economy, finality and encouraging all issues to be raised at trial. Moreover, there remains great value to an appellate court to have the lower court address, in the first instance, any issue including questions of law and regardless whether or not the appellate court need not afford deference.

These capability/competency factors, if sufficient alone to merit not only review of unpreserved or new issues on appeal but reversal or remand, severely undercut the plain error/substantial risk of miscarriage of justice default standard. The unpreserved issue is reviewed de novo and without regard as to any plain or fundamental error. There is likewise nothing particularly “extraordinary” in an appellate issue involving a question of law with a complete record and full briefing of the parties.

The retort may be that the pure legal question “exception” fits into the understanding that it is the appellate court, in the end, that must properly declare the governing law to the dispute as well as future cases justifying exception.<sup>394</sup> Yet this is not truly an “exception” as opposed to a policy choice, and wary territory, particularly for intermediate appellate courts.<sup>395</sup> Many courts have admirably declined to review even pure legal questions if not raised below,<sup>396</sup> with others refusing absent at least a

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<sup>393</sup> *Hormel v. Helvering*, 312 U.S. 552, 556 (1941); *see also* *United States v. Miller*, 636 F.2d 850, 853 (1st Cir. 1980) (“[I]t would be unfair if litigants were ‘surprised on appeal by final decision there of issues upon which they had no opportunity [below] to introduce evidence.’”) (quoting *Hormel*, 312 U.S. at 556)); *Atlas Tack Corp. v. DiMasi*, 637 N.E.2d 230, 233 (Mass. App. Ct. 1994) (stating no opportunity to present issue below, issue was one of law and fully briefed).

<sup>394</sup> *See* Appellate Courts, *supra* note 352, at 60 (“Justification for de novo authority derives from one of the major reasons for the existence of the appellate courts: to maintain uniformity in the law throughout the jurisdiction and to keep the law evolving and developing[.]”); Frost, *supra* note 5, at 470-71 (“[F]ederal courts have the power ‘to say what the law is,’ and thus must be able to take notice of legal sources, arguments, and claims omitted by the parties to avoid issuing inaccurate statements of law.”); *see also* *Marbury v. Madison*, 5 U.S. 137, 177 (1807) (explaining Supreme Court has power “to say what the law is”).

<sup>395</sup> *See* James D. Hopkins, *The Role of the Intermediate Appellate Court*, 41 BROOK. L. REV. 459, 460-78 (1975) (“The intermediate court is usually cast in the error correcting mold rather than into a rule making model”).

<sup>396</sup> *Unified Indus., Inc. v. Easley*, 961 P.2d 100, 103 (Mont. 1998) (refusing except ion for

showing that the argument is “so compelling as virtually to insure appellant’s success.”<sup>397</sup> According to the Tenth Circuit:

[N]o case in this circuit has held that we may reverse based on “purely legal” arguments in the absence of plain error. And the fact that this court has sometimes reversed on the basis of a new legal argument without indicating the burden the appellant must carry to obtain reversal cannot ensconce binding precedent requiring or allowing us to ignore the longstanding requirement that new legal arguments overcome plain error.<sup>398</sup>

This is in keeping with the prudential concern behind prohibiting litigants from trying a case under one theory and then changing horses on appeal once unsuccessful, as well as the need to remain tied to the fundamental error correction appellate function.<sup>399</sup> This approach, in effect, eliminates the question of law as a separate basis for the “exceptional circumstances” exception to the raise or forfeit rule, leaving the issue to be addressed under the plain error/miscarriage of justice default standard.<sup>400</sup>

Although the capability criteria under “exceptional circumstances,” i.e., question of law, adequate record and no prejudice are seldom

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pure questions of law from general of raise or lose).

<sup>397</sup> *Denny v. Westfield State Coll.*, 880 F.2d 1465, 1473 (1st Cir. 1989) (quoting *Sanchez-Arroyo v. E. Airlines, Inc.*, 835 F.2d 407, 408-09 (1st Cir. 1987)); *see also Johnson v. Helmerich & Payne, Inc.*, 892 F.2d 422, 424 (5th Cir. 1990) (stating failure to object precludes review unless issue legal question because to ignore miscarries justice); *Fortier v. Town of Essex*, 752 N.E.2d 818, 822 (Mass. App. Ct. 2001) (“Where injustice might otherwise result, an appellate court properly may consider questions of law which were neither argued nor passed upon in a court or agency below.”) (quoting *Hoffer v. Comm’r of Corr.*, 589 N.E. 2d 1231, 1235 (Mass. 1992))), *overruled by Morrissey v. New Eng. Deaconess Ass’n*, 940 N.E.2d 391 (Mass. 2010).

<sup>398</sup> *Richison v. Ernest Grp., Inc.*, 634 F.3d 1123, 1128-29 (10th Cir. 2011).

<sup>399</sup> *Denny*, 880 F.2d at 1473 (*Johnson v. Allyn & Bacon, Inc.*, 731 F.2d 64, 73 (1st Cir. 1984); *see B & T Masonry Constr. Co. v. Pub. Serv. Mut. Ins. Co.*, 382 F.3d 36, 40 (1st Cir. 2004)).

<sup>400</sup> Another concern with the question of law factor is the sometimes knotty issue of whether the issue is truly one of law and whether the opposing party could have presented different arguments or new evidence had the “legal” contention been made at trial. Some courts have thus refused to invoke the exception finding the issue not one of law if there was a loss of opportunity to develop the record or argument below and/or the opposing party would have otherwise altered its position. *See Runnebaum v. NationsBank of Md., N.A.*, 123 F.3d 156, 177-78 (4th Cir. 1997) (Michael, J., dissenting) (disputing majority’s finding disability a question of law when court endorses an individualized inquiry), *overruled on other grounds, Bragdon v. Abbott*, 524 U.S. 624 (1998); *Payne v. McLemore’s Wholesale & Retail Stores*, 654 F.2d 1130, 1144 (5th Cir. 1981).

mentioned as to plain or fundamental error review, the criteria is implicit.<sup>401</sup> An appellate court cannot fairly find plain error, never mind plain error, resulting in either a miscarriage of justice or affecting the fairness or integrity of the proceeding unless there is an adequate record, briefing, and absence of prejudice.

## 2. Applicability and Classification

The applicability and classification criteria identified in “exceptional circumstance” discretion concerns the question of whether the general rule precluding addressing new issues or unpreserved claims even applies. They address those situations where (a) there has been no true waiver or forfeiture, and (b) otherwise distinguish between waiver and forfeiture. These are also not true “exceptions” and are otherwise equally applicable to plain error.

The governing circumstances as to whether the issue was ever truly waived or forfeited include where there is an intervening change of the law; where the claim or argument was not known; where the party was precluded from raising the issue; or where raising the issue was futile. Where the appellant had no opportunity to raise the question on appeal in the trial or lower court, or otherwise was precluded from doing so, establishes that there was never any true waiver of forfeiture eliminating the applicability of the general rule.<sup>402</sup> Related circumstances include where it has been found that the particular objection or claim was not known to be available at the time it could have first been made.<sup>403</sup> A party will be excused from raising a claim or defense if at the time it should have

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<sup>401</sup> See *United States v. Torres-Rosario*, 658 F.3d 110, 116 (1st Cir. 2011) (“How far *Olan* embraces concerns of prejudice to the other side might be debated . . .”).

<sup>402</sup> See *Mass. Ass’n of Older Ams., Inc. v. Comm’r of Ins.*, 471 N.E.2d 1281, 1287 (Mass. 1984). For example, in *Atlas Tack Corp. v. DiMasi*, an appeal was taken on the grant of summary judgment in favor of defendants on plaintiff’s partnership by estoppel claim. 637 N.E.2d 230, 237 (Mass. App. Ct. 1994). The defendants had also argued that the appeal should be dismissed because following summary judgment, the plaintiff settled the claim against one of the defendants and the terms of the release purported to prevent any further action. *Id.* at 231. The court agreed to address the issue even though it was not raised below on the grounds that the defendants did not have the opportunity to raise it below. *Id.* at 233. According to the court, under circumstances where the defendants “would not have had the opportunity to present the issue to the court below and where the issue is one of law which [had] been fully briefed and argued on appeal by the parties, [the court] believe[d] the interests of judicial economy warrant[ed] consideration of the issue.” *Id.*

<sup>403</sup> See *Bennett v. Holyoke*, 362 F.3d 1, 7 (1st Cir. 2004) (stating exception in civil case); *United States v. Lopez-Pena*, 912 F.2d 1542, 1549 (1st Cir. 1989) (stating same exception in criminal case); see also *Gurry v. Bd. of Pub. Accountancy*, 474 N.E.2d 1085, 1090 (Mass. 1985).

been raised it would have been futile under existing precedent.<sup>404</sup> Examples would include the overruling of a prior decision or legislative clarification as well as a change in decisional law after the lower court decision which may have materially altered the result.<sup>405</sup>

Further, where any objection, if made, would have been futile review has been permitted.<sup>406</sup> Where, for instance, it is clear that an agency would not have ruled on the argument based on its established position or

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<sup>404</sup> See *In re San Juan DuPont Plaza Hotel Fire Litig.*, 994 F.2d 956, 961 (1st Cir. 1993) (“The law does not require litigants to run a fools’ errand. Thus, a party who forgoes an obviously futile task will not ordinarily be held thereby to have waived substantial rights.”); *Franki Found. Co. v. Alger-Rau & Assocs., Inc.*, 513 F.2d 581, 587 (3d Cir. 1975) (noting waiver rejected where grounded in party’s dereliction of a futile task).

<sup>405</sup> *M.H. Gordon & Son, Inc. v. Alcohol Beverages Control Comm’n*, 434 N.E.2d 986, 989 (Mass. 1982) (“[W]here new interpretations of law may have materially altered the result of the commission’s decisions, we are inclined to allow a previously unadvanced issue to be raised before the court.”); *Commonwealth v. Williams*, 951 N.E.2d 55, 2011 WL 3299022, at \*3 (Mass. App. Ct. 2011) (unpublished table decision) (allowing defendant to raise new constitutional argument from law announced after lower court proceeding). On this point Judge Posner of the Seventh Circuit observed: “[a] party should be allowed to take advantage of a decision rendered during the pendency of his case, even if he did not reserve the point decided, if the decision could not have reasonably been anticipated. A contrary rule would induce the parties to drown the judge with reservations.” *McKnight v. Gen. Motors Corp.*, 908 F.2d 104, 108 (7th Cir. 1990), *superseded by statute as stated in* *Humphries v. CBOCS West, Inc.*, 474 F.3d 387 (7th Cir. 2007). This exception, in fact, has been held to allow a court to consider the issue *sua sponte*. *United States v. Garcia*, 77 F.3d 274, 276 (9th Cir. 1996); *State v. Harris*, 224 P.3d 830, 834 (Wash. Ct. App. 2010). Massachusetts follows a variant of this principle for constitutional issues referred to as the “clairvoyance exception.” See *Commonwealth v. Randolph*, 780 N.E.2d 58, 65 (Mass. 2002); *Commonwealth v. Rembiszewski*, 461 N.E.2d 201, 204 (Mass. 1984); see also *Commonwealth v. Vasquez*, 914 N.E.2d 944, 952 (Mass. App. Ct. 2009), *rev’d by* 923 N.E.2d 524 (Mass. 2010). “[W]hen the constitutional theory on which the defendant has relied was not sufficiently developed at the time of trial or direct appeal to afford the defendant a genuine opportunity to raise his claim at those junctures of the case” the raise or lose rule does not apply. *Rembiszewski*, 461 N.E.2d at 204. The waiver test is whether “the theory on which [the] argument is premised has been sufficiently developed to put [the defendant] on notice that the issue is a live issue. Counsel need not be clairvoyant.” *Commonwealth v. Amirault*, 677 N.E.2d 652, 667 (Mass. 1997) (quoting *Commonwealth v. Bowler*, 553 N.E.2d 534, 536 (Mass. 1990)). This clairvoyance exception has not developed principally in connection with direct appeals but rather been at play as to appeals collateral to a direct appeal, specifically under the purview of motions for new trial. *Vasquez*, 914 N.E.2d at 952. If the exception applies, the appellate court will review the claim as if it were preserved. *Commonwealth v. Woodworth*, 922 N.E.2d 862, 2010 WL 743506, at \*2 (Mass. App. Ct. 2010) (unpublished table decision). It has been suggested that the exception is limited to constitutional issues. *Commonwealth v. Peppicelli*, 872 N.E.2d 1142, 1152-53 (Mass. App. Ct. 2007) (questioning clairvoyance exception applicability outside constitutional issues or to new common law rule of evidence).

<sup>406</sup> *M.H. Gordon & Son*, 434 N.E.2d at 989 (stating justice served by considering claim not raised because Supreme Court decision arguably modified law); see also 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, 559 (2002) (examining futility exception to procedural default and exception). “The actual futility exception promotes fundamental fairness and serves other legitimate purposes. *Id.*

understanding of existing law, the raise or lose is inapplicable.<sup>407</sup>

The application and classification grouping also includes criteria seeking to differentiate between waived and forfeited issues. If waived, there has been an intentional relinquishment of a right which is not subject to any exception, discretionary or otherwise. If not intentional, but inadvertent, the issue is “only” forfeited, thus allowing for the application of discretionary exception if otherwise applicable.

Courts frequently look to whether the failure to preserve or timely raise the issue was “strategic.” Similarly, if the error claimed on appeal was “invited,” a party is deemed to have waived the claim and loses any right to invoke discretionary exception.

In examining whether strategic or inadvertent, courts have looked at the circumstances of the failure to object or preserve<sup>408</sup> as a relevant consideration in determining whether to afford review on the merits. If the failure to preserve is “inadvertent,” or where it was not due to a desire or intent for tactical advantage, is deemed a favorable, if not dispositive, circumstance to consider in whether to afford discretionary review.<sup>409</sup> Some courts have noted that the distinction can be one of degree. For instance, a repeated failure to preserve has been noted to militate against review,<sup>410</sup> plain error or otherwise, with some courts suggesting that a

<sup>407</sup> *M.H. Gordon & Son*, 434 N.E.2d at 989.

<sup>408</sup> See *United States v. Ortiz-Arrigoitia*, 996 F.2d 436, 442 (1st Cir. 1993) (finding reasons for failing to move for mistrial were not inadvertent but tactical); *Commonwealth v. Trappaga*, 924 N.E.2d 298, 308 n.6 (Mass. App. Ct. 2010) (reviewing record disclosed failure to request instruction was not deliberate litigation tactic).

<sup>409</sup> *Montalvo v. Gonzalez*, 587 F.3d 43, 49 (1st Cir. 2009); *Nat’l Ass’n of Soc. Workers v. Harwood*, 69 F.3d 622, 628 (1st Cir. 1995); see also *New York v. Mickalis Pawn Shop, LLC*, 645 F.3d 114, 140 (2d Cir. 2011) (“[W]e will not excuse the defendants’ forfeiture in this instance, where there is every indication defendant’s default was not the product of inadvertence, but a deliberate tactic instead.”); *LNC Invs., Inc. v. Nat’l Westminster Bank*, 308 F.3d 169, 176 n.8 (2d Cir. 2002) (“It would be particularly unusual [to address an argument despite its abandonment on appeal] . . . where the abandonment appears to be strategic choice rather than inadvertent error.”). This also has been applied to plain error review. See *United States v. Bayless*, 201 F.3d 116, 128 n.2 (2d Cir. 2000) (noting plain error finding more likely where there is no likelihood of strategic manipulation); *People v. Stewart*, 55 P.3d 107, 119 (Colo. 2009) (stating where omission is strategic, invited error should not be invoked).

<sup>410</sup> *United States v. Figueroa*, 818 F.2d 1020, 1026 (1st Cir. 1987). The court in *Figueroa* stated:

The record makes it excruciatingly plain that at no time before, during, or after the trial did the defendant object to the proffer of [testimony challenged on appeal] . . . . Notwithstanding what appellate counsel now urges, trial counsel-for what may well have been sound tactical reasons-appears deliberately to have bypassed such a defense stratagem.

*Id.* See, e.g., *Vaspourakan, Ltd. V. Alcoholic Beverages Control Comm’n*, 516 N.E.2d 1153,

repeated failure to object can move a forfeited error to a waived one.<sup>411</sup> The difficulty remains being able to fairly determine between inadvertence and strategic in any given case.<sup>412</sup>

Under invited or induced error, “a party may not complain on appeal of errors that he himself invited or provoked the court or the opposite party to make.”<sup>413</sup> It is a principle of estoppel. The focus is less on the failure to preserve and more on the perversion of the judicial proceeding stemming from the use or adoption of inconsistent positions.<sup>414</sup>

1158 (Mass. 1987) (noting number of opportunities to raise issue); *In re Adoption of Ernest*, No. 04-P-1731, 2005 WL 1773697, at \*4 (Mass. App. Ct. July 26, 2005) (noting matter not exceptional case given “opportunity to have preserved the issue below”); *In re Georgette*, 768 N.E.2d 549, 553 n.6 (Mass. App. Ct. 2002) (finding exception inapplicable because of appellant’s “untrammeled opportunity to have preserved the issue below”); *Waxman v. Amherst Hous. Review Bd.*, 1992 Mass. App. Div. 89, 1992 WL 102801, at \*2 (Mass. Dist. Ct. 1992) (noting “numerous occasions” party failed to raise issue).

<sup>411</sup> *In re Net-Velazquez*, 625 F.3d 34, 40 (1st Cir. 2010) (stating despite including defense in answer, subsequent inattention precludes exercise of discretionary power); *Chestnut v. Lowell*, 305 F.3d 18, 32-33 (1st Cir. 2006) (Lopez, J. and Lynch, J., dissenting) (noting immunity issue “particularly egregious” because not raised at multiple opportunities); *see also United States v. Patrick*, 359 F.3d 3, 8 (1st Cir. 2004) (allowing restitution issue on appeal despite “lack of emphasis” at disposition hearing); *Carter*, *supra* note 2 at 950. The notion of “inadvertence” is found in Rule 60(b)(1) of both the Federal and Massachusetts rules of civil procedure. *See* FED. R. CIV. P. 60(b)(1); MASS. R. CIV. P. 60(b)(1). The Rule authorizes relief from a judgment on the basis of “mistake, inadvertence, surprise or excusable neglect.” FED. R. CIV. P. 60(b)(1). It has been held, however, that neither “strategic miscalculation” nor “counsel’s misinterpretation of law” warrants relief from judgment. *FHC Equities, L.L.C. v. MBL Life Assurance Corp.*, 188 F.3d 678, 683-87 (6th Cir. 1999).

<sup>412</sup> *See Hines v. Enomoto*, 658 F.2d 667, 673 (9th Cir. 1981) (noting could not determine from record whether failure to object strategic or inadvertent), *abrogation recognized by Vansickel v. White*, 166 F.3d 953 (9th Cir. 1999); *O’Berry v. Wainwright*, 546 F.2d 1204, 1214-15 (5th Cir. 1977) (stating same); *In re Oleg*, 776 N.E.2d 1039, 2002 WL 31322751, at \*2 n.6 (Mass. App. Ct. 2002) (unpublished table decision) (“Given the record on appeal, we also cannot determine whether counsel’s actions were the result of deliberate tactical choices”).

<sup>413</sup> *United States v. Barrow*, 118 F.3d 482, 490 (6th Cir. 1997) (“[Invited error intended to deter] party from inducing erroneous ruling and later seeking to profit from the legal consequences by having the verdict vacated.”); *Harvis v. Roadway Express, Inc.*, 923 F.2d 59, 60 (6th Cir. 1991); *see also Ford v. Cnty. of Grand Traverse*, 535 F.3d 483, 490-91 (6th Cir. 2008) (explaining the invited-error doctrine). *See State v. Charles*, 39 A.3d 750, 754 (Conn. App. Ct. 2012) (“The term induced error, or invited error, has been defined as [a]n error that a party cannot complain of on appeal because the party, through conduct, encouraged or prompted the trial court to make the erroneous ruling.”) (alterations in original) (quoting *State v. Kitchens*, 10 A.3d 942, 945 (Conn. 2010)); *Tittizer v. Union Gas Corp.*, 171 S.W.3d 857, 862 (Tex. 2005) (“[A] party cannot complain on appeal that the trial court took a specific action that the complaining party requested, a doctrine commonly referred to as the invited error doctrine.”) (internal quotations omitted).

<sup>414</sup> *See Box Pond Ass’n v. Energy Facilities Sitting Bd.*, 758 N.E.2d 604, 615 n.14 (Mass. 2001) (“One who by his conduct induces the commission of some error by the trial court, or, in other words, who has invited error, is estopped from insisting that the action of the court is erroneous.”) (quoting *Deland v. Old Republic Life Ins. Co.*, 758 F.2d 1331, 1336 (9th Cir. 1985)); *see also Data Gen. Corp. v. Johnson*, 78 F.3d 1556, 1565 (Fed. Cir. 1996) (“The doctrine

As the First Circuit has stated, “a party may not appeal from an error to which he contributed, either by failing to object or by affirmatively presenting to the court the wrong law.”<sup>415</sup> The First Circuit has held that invited error precludes plain error review<sup>416</sup> and has otherwise applied the doctrine to such instances as complained of statements elicited on cross examination,<sup>417</sup> claims the court failed to conduct choice of law inquiry,<sup>418</sup> and jury instructions.<sup>419</sup> Massachusetts practice recognizes the doctrine but allows for review, in criminal cases, under the substantial risk of miscarriage default standard.<sup>420</sup> As to civil matters, the doctrine precludes

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of judicial estoppel is that where a party successfully urges a particular position in a legal proceeding, it is estopped from taking a contrary position in a subsequent proceeding where its interests have changed.”); *Freedman v. Freedman*, 557 N.E.2d 1386, 1387 (Mass. App. Ct. 1990) (“The case was presented and tried on the theory that the judgment of divorce was modifiable upon a showing of a material change in circumstances. The appeals, therefore, should proceed on the same theory.”); *State v. Richard*, 7 A.3d 1195, 1200 (N.H. 2010) (stating invited error is classified as waiver or estoppel).

<sup>415</sup> *Austin v. Unarco Indust., Inc.*, 705 F.2d 1, 15 (1st Cir. 1983).

<sup>416</sup> *McDonald v. Fed. Labs., Inc.*, 724 F.2d 243, 248 (1st Cir. 1984) (“It has been said that the ‘plain error’ doctrine has no application where the party claiming error invited or elicited the alleged error.”) (citing 11 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 2885 (1973)); see *United States v. Mitchell*, 85 F.3d 800, 807 (1st Cir. 1996) (stating invited error waives all claims of error including plain error); *Aetna Cas. & Sur. Co. v. Trayniecki*, 293 F.2d 289, 291 (5th Cir. 1961) (stating same).

<sup>417</sup> *United States v. Lizardo*, 445 F.3d 73, 84 (1st Cir. 2006); see also *Buggs v. State*, 640 So.2d 90, 91 (Fla. Dist. Ct. App. 1994) (holding objectionable comment during cross-examination invited error because comment in response to defense counsel’s question).

<sup>418</sup> *P.R. Hosp. Supply, Inc. v. Bos. Scientific Corp.*, 426 F.3d 503, 505-06 (1st Cir. 2005).

<sup>419</sup> See *Fraser v. Major League Soccer, L.L.C.*, 284 F.3d 47, 63 n.11 (1st Cir. 2002) (applying invited error because complaining party had requested instruction below); see *Harvis v. Roadway Express Inc.*, 923 F.2d 59, 61-62 (6th Cir. 1991); *Lively v. Elkhorn Coal Co.*, 206 F.2d 396, 399 (6th Cir. 1953) (declining claimed error where appellant failed to request or object to jury instructions); see also *People v. Flores*, No. G044509, 2012 WL 733900, at \*10 (Cal. App. Ct. Mar. 7, 2012) (barring defendant from raising issue on appeal when “conscious and deliberate tactical choice” made below); *State v. Wilson*, 270 P.3d 1230, 2012 WL 718916, at \*15 (Kan. Ct. App. 2012), (unpublished table decision) (refusing to apply invited error in sentence stipulation). In *Wilson*, the court noted that “no party can properly stipulate to an incorrect application of the law” and that the “invited error rationale is not applicable when the erroneous information at the heart of a stipulation is within the knowledge of the court, the prosecutor, and defense counsel, but not the defendant.” *Id.* (quoting *State v. Donaldson*, 133 P.3d 154, 157 (Kan. Ct. App. 2006)).

<sup>420</sup> *Commonwealth v. Roderiques*, 940 N.E.2d 1234, 1237-38 (Mass. App. Ct. 2011); see also *Commonwealth v. Knight*, 637 N.E.2d 240, 244 (Mass. App. Ct. 1994) (recognizing heavy burden of demonstrating substantial miscarriage of justice). The court in *Knight* stated:

As the challenged instruction was given upon the specific request of defense counsel at trial, to the extent that the issue is reviewable at all, the defendant on appeal bears a heavy burden in attempting to have his conviction overturned. He must demonstrate at least a substantial risk of a miscarriage of justice.

any review.<sup>421</sup>

These applicability and classification factors are not a basis for any separate non-plain error discretionary exception. Rather, they determine whether there has, in the first instance, been a waiver precluding any exception at all. If a party has waived the issue or is otherwise estopped from making such a claim due to induced or invited error, discretionary exception under plain error or exceptional circumstances has no applicability. Indeed, these considerations apply equally to plain error review and further exemplify why there is a substantial question of whether exception outside of plain error is truly justified.

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*Id.* (citations omitted); *Lannon v. Commonwealth*, 400 N.E.2d 862, 866 (Mass. 1980) (“The petitioner cannot now object to the judge’s use of wording which his own counsel proposed for inclusion in the instructions.”); *Commonwealth v. Gladney*, 607 N.E.2d 750, 754 n.3 (Mass. App. Ct. 1993) (“Ordinarily, we would not review an instruction requested by defense counsel. We do so here out of an abundance of caution and fairness and because the defendant claims that the incorrect instruction resulted from trial counsel’s ineffectiveness.”); *Commonwealth v. Simcock*, 575 N.E.2d 1137, 1144 (Mass. App. Ct. 1991) (“The consequences of trial tactics may not be converted after conviction into alleged errors by the judge. The less is this so if the tactics produce some measure of success, as they did here.”) (citations omitted); *Commonwealth v. Grant*, 727 N.E.2d 1207, 1209-10 (Mass. App. Ct. 2000) (“Where the error [in giving an instruction] was invited by the defendant, our review is limited to whether a substantial risk of a miscarriage of justice occurred.”); *see Commonwealth v. Vinnie*, 698 N.E.2d 896, 910-11 (Mass. 1998) (affirming first degree murder conviction because defendant asked instruction on second degree murder be omitted).

<sup>421</sup> *Box Pond Ass’n. v. Energy Facilities Sitting Bd.*, 758 N.E.2d 604, 615 n.14 (Mass. 2001); *Vescera v. Vescera*, 938 N.E.2d 906, 2010 WL 5071965, at \*2 n.5 (Mass. App. Ct. 2010) (unpublished table decision). There is some concern that applying invited error too broadly such as not differentiating between clear strategic choices and unwitting failures subverts substantial justice. *See* Sean Arthurs, Case Comment, *A Foolish Consistency: How Refusing to Review Ford v. Garcia’s Invited Error Demonstrates the Eleventh Circuit’s Prioritization of Procedure Over Justice*, 72 U. CINN. L. REV. 1707, 1721–22 (2004).

The primary purpose of the invited error doctrine is to deter defendants from making ‘an affirmative, apparently strategic decision at trial and then complain[ing] on appeal that the result of that decision constitutes reversible error.’ The widespread acceptance of the plain error exception to the preservation of error requirement has prompted some legal charlatans to devise trial strategies that ensure the presence of a plain error at the trial court level. . . . [T]he invited error doctrine assumes a complete familiarity with the relevant law and penalizes the ill-prepared or unwitting lawyer just as harshly as the malicious lawyer . . . . This complete prohibition on reviewing invited error disregards the dangers of establishing a flawed precedent and ignores any role played by the opposing counsel or the judge in contributing to the error.

*Id.* (quoting *United States v. Jernigan*, 341 F.3d 1273, 1290 (11th Cir.2003)).



## 3. Error Correction

The coterminous relationship between “exceptional circumstances” and plain error discretion is particularly apparent with the outcome determinative or compelling argument factor comprising many of the formulations of “exceptional circumstance” discretion including under *Krynicky*.<sup>422</sup> In *Singleton*, the Supreme Court agreed to address the merits of an argument not properly preserved as “proper resolution was beyond any doubt.”<sup>423</sup> The justification is that it remains with the appellate court to ultimately do justice and, to a lesser extent, that a preliminary or earlier examination of the “compelling argument” by the lower court would not likely benefit the appellate court or the parties.<sup>424</sup> This factor is focused, as plain error, on the error correcting function of the appellate court.

In the exceptional circumstance discretionary context, courts have stated the consideration in various ways, including “miscarriage of justice,” “manifest injustice,” as well as the First Circuit’s “virtually assuring success”<sup>425</sup> formulation. Regardless of terminology, the centerpiece remains the issue of “error.”

The compelling argument or “virtually assuring success” “exception” is akin to the notion of a “miscarriage of justice” and/or “injustice might otherwise result” at least where the ruling below is in error.<sup>426</sup> The First Circuit, in fact, suggested that the new issue not only

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<sup>422</sup> See 689 F.2d 289, 291-92 (1st Cir. 1982).

<sup>423</sup> 428 U.S. 106, 121 (1976); see *Krynicky*, 689 F.2d at (finding government’s statutory interpretation “highly persuasive . . . leaving no doubt as to . . . proper resolution of issue”) (citation omitted).

<sup>424</sup> *Id.* at 292 (“Given the compelling nature of the government’s argument, preliminary examination of this legal issue by the trial court would not benefit either the court or the parties appreciably.”).

<sup>425</sup> *Daigle v. Me. Med. Ctr.*, 14 F.3d 684, 688 (1st Cir. 1994) (“[W]e invoke . . . exception only when, at a bare minimum, the omitted ground is so compelling as virtually to ensure an appellant’s success.”); *Denny v. Westfield State Coll.*, 880 F.2d 1465, 1473 (1st Cir. 1989) (assuring success prong met because record lacking and latent legal issues resolution uncertain); *Johnston v. Holiday Inns Inc.*, 595 F.2d 890, 894 (1st Cir. 1979) (“[P]osing the issues raised by the appellant before us for the first time shows the wisdom of the rule requiring that appellate review be limited to what was raised and argued in the trial court.”); *Dobb v. Baker*, 505 F.2d 1041, 1044 (1st Cir. 1974) (noting contention was not “frivolous” but also not “self-evident”); *In re Redgate*, 633 N.E.2d 380, 382 (Mass. 1994) (“In the circumstances, we feel it appropriate to consider the issue [because it] would be a reproach to the justice system and would squander judicial and legal resources.”) (internal quotations and citations omitted); *Attorney General v. Brown*, 511 N.E.2d 1103, 1105 (Mass. 1987) (noting would exercise exceptional circumstance discretion because the issue of preemption could be dispositive), *superseded by statute as stated*, *DiLiddo v. Oxford Street Realty, Inc.*, 876 N.E.2d 421 (Mass. 2007); *Police Dep’t of Bos. v. Fedorchuk*, 723 N.E.2d 41, 44 (Mass. App. Ct. 2000) (allowing issue because fully briefed and “just result” required consideration).

<sup>426</sup> See *Krynicky*, 689 F.2d at 292 (“[D]eclining to reach the government’s . . . argument

must be so compelling as to virtually assure success, but it must also result in a miscarriage of justice.<sup>427</sup> In this context, miscarriage of justice has been defined to mean “more than the individualized harm that occurs whenever the failure seasonably to raise a claim or defense alters the outcome of a case.”<sup>428</sup> “Rather, courts ordinarily relax the raise or waive principle on this basis only if a failure to do so threatens the frustration of some broadly important right.”<sup>429</sup> “For this reason, courts often are more prone to make the infrequent exception in cases that involve a discernible public interest, and less prone to do so in disputes between private parties.”<sup>430</sup>

Some courts appear to conduct a review of the merits to determine if it is compelling. This has been noted to include examination of the overall evidence and whether it supports the verdict.<sup>431</sup> The court conducts a review of the merits of the unpreserved contention to determine whether it should be excepted from forfeiture, yet simultaneously addresses the merits. Other courts simply “determine” whether assuming the argument has merit, it would result in a miscarriage of justice not to address it.<sup>432</sup> The inquiry is “restricted” involving a “survey” of the record “always bearing in mind that we are not ruling on the merits of the claim but only searching for rank injustice or overwhelming evidence of error.”<sup>433</sup>

The overlap with plain error is readily apparent. Under the *Krynicky* terminology of “virtually assuring success” it might be that the argument need only be demonstrated as “compelling,” which when accompanied by other “exceptional circumstances” like significant public

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would result in a miscarriage of . . . [and] justice requires that this court correct the lower court’s error even though the government failed to apprise the court below of its error.”); *see also* Volkswagenwerk Aktiengesellschaft v. Wheeler, 814 F.2d 812, 820-21 (1st Cir. 1987) (holding refusal to fee award would constitute manifest injustice where lower court applied incorrect standard).

<sup>427</sup> *See* Nat’l Ass’n of Soc. Workers v. Harwood, 69 F.3d 622, 628 n.5 (1st Cir. 1995); *See also* Chambers v. Calais, 187 F.3d 621, 1998 WL 1085801, at \*4 (1st Cir. 1998) (unpublished table decision); Credit Francais Int’l, S.A. v. Bio-Vita, Ltd., 73 F.3d 698, 709 (1st Cir. 1996).

<sup>428</sup> *Harwood*, 69 F.3d at 628 n.5.

<sup>429</sup> *Id.*

<sup>430</sup> *Id.*; *contra* Miller, *supra* note 3, at 1307 (“[T]he miscarriage of justice standard is the most open and manipulative of all.”).

<sup>431</sup> *See In re Adoption of Ernest*, No. 04-P-1731, 2005 WL 1773697, at \*4 (Mass. App. Ct. July 26, 2005) (“This is not such an exceptional case (given the substantial evidence of the parties’ unfitness”); *In re Georgette*, 768 N.E.2d 549, 553 n.6 (Mass. App. Ct. 2002) (noting not exceptional case because of overwhelming evidence supporting finding).

<sup>432</sup> *See* United States v. La Guardia, 902 F.2d 1010, 1013 (1st Cir. 1990) (“[I]f the defendants’ constitutional claim has merit, it would be a rank miscarriage of justice to allow their sentences to stand.”); *see* Case of McLeod’s, 450 N.E.2d 612, 614 (Mass. 1983) (recognizing where injustice might otherwise result, an appellate court may consider questions of law).

<sup>433</sup> *Hernandez-Hernandez v. United States*, 904 F.2d 758, 763 (1st Cir. 1990).

interest, justifies further review. Yet this would not appear to be a meaningful distinction. If not tied to any need for error but simply a means justifying review for “institutional” reasons, it perpetuates unequal treatment and otherwise unnecessarily dilutes the plain error/substantial risk of miscarriage of justice default standard, particularly if reversal is permitted. If the issue must “virtually assure success,” why isn’t the plain error default standard enough in applying to all unpreserved issues or new arguments, particularly where any such error must be shown to effect “fairness, integrity or public reputation of the proceeding?”

#### 4. Issue Stature and Law Declaration

The co-terminus relationship between plain error and exceptional circumstances is not seamless. New issues or arguments, as opposed to unpreserved errors together with the “public interest” or issue stature component of exceptional circumstances discretion, are not readily subsumed into the plain error standard. For the same reasons, the differentiation between the two strands of discretion can be argued to be justified by the separate error correcting and law declaring appellate functions.

Plain error/substantial risk of miscarriage of justice review usually involves a lower court ruling to which the plain error default standard can be applied. The First Circuit has noted that plain error does not readily apply to those instances where there is no per se ruling at issue (admission of evidence, instruction, etc.) and a new claim or argument is being made on appeal. It, in fact, has repeatedly stated that “it is normally not error at all, let alone plain error, for a court to ignore a possible claim or defense that a party fails to proffer or pursue.”<sup>434</sup>

Nonetheless, plain error would seem applicable even to new issues or arguments.<sup>435</sup> The new issue or argument is addressed under plain error from the perspective of determining whether the court committed error in not raising the argument or issue on its own *sua sponte*. If the issue is truly that compelling and “plain,” then evaluating the trial court’s failure to raise it on its own is workable under plain error and furthers consistency and

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<sup>434</sup> Town of Norwood, Mass. v. New Eng. Power Co., 202 F.3d 408, 417 (1st Cir. 2000).

<sup>435</sup> See *Jordan v. U.S. Dep’t of Justice*, 668 F.3d 1188, 1199 (10th Cir. 2011) (stating new theories on appeal are subject only to review for plain error); *Demere Landing Condo. Owner Ass’n v. Matthews*, No. A11A2154, 2012 WL 562670, at \*3 (Ga. Ct. App. Feb. 22, 2012) (finding where no trial court ruling nothing to review of appeal); *Bassinger v. Neb. Heart Hosp.*, 806 N.W. 2d 395, 400 (Neb. 2011) (explaining lower court cannot commit error in resolving issue never presented).

equal treatment of cases.<sup>436</sup>

The public interest component that dominates many of the existing formulations of “exceptional circumstances” discretion, including those of the First Circuit and Massachusetts, is more problematic. This factor, by itself, is not able to be readily absorbed into plain error. Absent a direct tie to the issue of whether there was error, it does not fit into the plain error analysis, including the discretionary integrity, fairness, and public reputation prong.

The public interest factors or circumstances under “exceptional circumstance” discretion include where the issue is deemed of significant public interest or importance,<sup>437</sup> the issue is novel or one of first impression,<sup>438</sup> or an issue which the appellate court believes requires intervention to provide guidance to the lower court and/or the public.<sup>439</sup> Both Massachusetts and the First Circuit, together with a great many other jurisdictions, have identified significant public interest as to the unpreserved argument or issue as meriting the exercise of discretion to consider the otherwise forfeited matter.<sup>440</sup> The First Circuit has noted, with little elaboration, that this issue stature based factor or consideration is “the most salient.”<sup>441</sup>

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<sup>436</sup> See *Munoz v. Sociedad Espanola De Auxilio Mutuo Y Beneficiencia De P.R.*, 671 F.3d 49, 59 (1st Cir. 2012) (“We have held, on rare occasions, that a court’s failure to recognize and apply, sua sponte, well-established case law can be so clear and obvious as to constitute plain error.”) (quotations omitted).

<sup>437</sup> See cases at *supra* note 205; *contra* *Abbott v. Law Office of Patrick J. Mulligan*, 2011 WL 4375087, 440 Fed. App’x 612, 624 (10th Cir. 2011) (explaining public policy arguments not immune from waiver).

<sup>438</sup> See *Doe v. Exxon Mobil Corp.*, 654 F.3d 11, 40 (D.C. Cir. 2011).

<sup>439</sup> See cases at *supra* note 256.

<sup>440</sup> See *In re Gagnon*, 625 N.E.2d 555, 558 (Mass. 1994) (noting significant important public interest but declining to review due to inadequate record); *Filippone v. Mayor of Newton*, 452 N.E.2d 239, 243 (Mass. App. Ct. 1984) (“Because of the public interest involved and the uncertainty which would likely result if the question is left unresolved, and to avoid an unjust result . . . [the] issue first briefed and argued on appeal, and neither raised nor passed upon below, should be decided.”), *rev’d by* 467 N.E.2d 182 (Mass. 1984); see, e.g., *Harvey v. Veneman*, 396 F.3d 28, 45 (1st Cir. 2005) (considering whether issue of “great public moment”); *B & T Masonry Constr. Co. v. Pub. Serv. Mut. Ins. Co.*, 382 F.3d 36, 41 (1st Cir. 2004) (reaching issue because it is one of “paramount importance”).

<sup>441</sup> *Harwood*, 69 F.3d at 628; see *Harvey*, 396 F.3d at 45. Both the First Circuit and Massachusetts courts have gone on to find, again with little elaboration, that certain unpreserved issues or arguments merited exception due to their public interest stature. See *Harwood*, 69 F.3d at 27-28; (noting public importance of issue); *Sheridan v. Michels*, 362 F.3d 96, 104-05 (1st Cir. 2004) (stating same); *United States v. La Guardia*, 902 F.2d 1010, 1012-13 (1st Cir. 1990) (stating same); *Norfolk v. Dep’t of Env’t Quality Eng’g*, 552 N.E.2d 116, 119-20 (Mass. 1990) (stating same); *Attorney Gen. v. Brown*, 511 N.E.2d 1103, 1105 n.4 (Mass. 1987) (stating same). Relying on the public interest consideration, the First Circuit in *Harwood* held that the unpreserved issue of the applicability of legislative immunity would be reviewed under the exceptional circumstance principle because it involved a matter “of great public moment, and

Courts have also referenced novelty or an issue of “first impression” as a basis to review an otherwise unpreserved issue.<sup>442</sup> Unpreserved issues have been reviewed where it was determined that the appellate court needed to provide guidance to the lower courts or the issue concerned a matter “almost certain to arise in other cases.”<sup>443</sup> These circumstances are closely related if not subsumed within the “public

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touches upon policies as basic as federalism, comity, and respect for the independence of democratic institutions.” *Harwood*, 69 F.3d at 628. It was determined that the failure to address the issue would result in a federal court wrongly intruding into the internal operation of a state legislature. *Id.* at 629; *see also* *The Real Estate Bar Ass’n for Mass., Inc. v. Nat’l Real Estate Info. Servs.*, 608 F.3d 110, 125-26 (1st Cir. 2010) (stating whether injunctive relief request violated First Amendment was “issue of great public concern”). Additionally, the First Circuit noted that “[n]o party bringing suit should fear that its non-frivolous advocacy of a reasonable position in federal court will, on that basis alone, lead to an injunction and declaration against it based on the dormant Commerce Clause. Much less should a party be made, based on its conduct in bringing such a suit, to fear the imposition of attorney’s fees.” *Id.* at 126. As to Massachusetts practice, the public interest of the subject matter has also been noted as meriting exception from the general rule. *See Brown*, 511 N.E.2d at 1105 n.4 (noting federal preemption raised issue of “significant public importance”); *Altschuler v. Bos. Rent Bd.*, 425 N.E.2d 781, 786 (Mass. App. Ct. 1981) (agreeing to review new argument on appeal because fully briefed and had implications beyond case). For example, cases presenting issues such as the applicability of comparative negligence to legal malpractice claims, of whether, pursuant to a state statute, certain municipalities were free from laws of general applicability governing activities engaged in by private businesses where the municipality voluntarily engages in such activities; and arguments affecting the general duties of landlords and tenants have been found to merit discretionary exception. *See Clark v. Rowe*, 701 N.E.2d 624, 626 (Mass. 1998) (also noting issue was fully briefed and likely to arise in other cases); *Norfolk v. Dep’t of Env’t Quality Eng’g*, 552 N.E.2d 116, 119 n.4 (Mass. 1990) (exercising discretion because issue of great public importance and fully briefed); *Altschuler*, 425 N.E.2d at 786. It has also been noted where the court is asked to enforce or aid in the enforcement of a contract violative of public policy even though never raised below. *See McLaughlin v. Amirsaleh*, 844 N.E.2d 1105, 1114 (Mass. App. Ct. 2006) (stating appellate court’s discretion not to enforce contract against public policy despite not raised below). Some Massachusetts decisions have alluded to the need to address an otherwise unpreserved issue if it involves a “fundamental right.” *See McSweeney v. Cambridge*, 665 N.E.2d 11, 14 (Mass. 1996) (“[W]e make some comment on [claim not raised below] . . . because we deem it imprudent to leave an issue of such importance to the People of Cambridge under a greater cloud of uncertainty than is necessary.”); *Commonwealth v. Alvarez*, 596 N.E.2d 325, 330 (Mass. 1992) (“[Court] choose[s] to consider [issue] because it involves a fundamental right, has been fully briefed, and is certain to be raised in other cases.”).

<sup>442</sup> *See Doe*, 654 F.3d at 40; *Jamgochian v. Dierker*, 681 N.E.2d 1180, 1182 (Mass. 1997).

<sup>443</sup> *United States v. Krynicki*, 689 F.2d 289, 291 (1st Cir. 1982); *see United States v. Patrick*, 359 F.3d 3, 8 n.2 (1st Cir. 2004) (“[D]eclining to hear the issue will neither promote judicial economy nor aid in the administration of the . . . justice system”); *LaGuardia*, 902 F.2d at 1013 (finding due process sentencing challenge “almost certain to be presented in identical terms in other cases”); *United States v. Golon*, 511 F.2d 298, 301 (1st Cir. 1975) (noting legal issue “almost certain to be presented in identical terms in other cases”); *In re Dep’t of Soc. Servs. to Dispense with Consent to Adoption*, 467 N.E.2d 861, 863 (Mass. 1984) (addressing issue because of its importance in future cases of same kind); *In re Georgette*, 768 N.E.2d 549, 553 n.6 (Mass. App. Ct. 2002) (noting exceptional circumstances exception includes where issue review necessary to “provide assistance in other cases”).

interest” factor. The underlying interest is to serve or promote judicial economy or otherwise clarify and declare an area of law.<sup>444</sup> They are sometimes combined with the court capability factors of adequacy of record, question of law, and no prejudice.<sup>445</sup>

A subset of the public interest factors or criteria under “exceptional circumstances” discretion is the “constitutional” stature of the new or unpreserved issue. Case law is somewhat conflicting, at once stating that unpreserved constitutional issues are subject to forfeiture just as any other claim;<sup>446</sup> that a constitutional issue is usually of a greater magnitude than other claimed errors demanding consideration in the exceptional circumstances rubric; and that the general rule of waiver/forfeiture applies with particular force to constitutional issues raised for first time on appeal.<sup>447</sup> Nonetheless, a number of formulations of “exceptional

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<sup>444</sup> *Krynicky*, 689 F.2d at 291. Examples run the gambit; decisional law includes an issue of whether an indictment had to be returned within thirty days of arrest where the underlying charge has been dismissed prior to indictment, the issue as to the propriety of an out of state subpoena upon a Massachusetts accountant for financial records, and a constitutional challenge to an agency’s enabling regulations. See *Krynicky*, 689 F. 2d at 291; *Matter of a R.I. Grand Jury Subpoena*, 605 N.E.2d 840, 845 (Mass. 1993) (addressing issue where party lacked standing to bring appeal because necessary to provide court’s guidance); *Bruno v. Bd. of Appeals of Wrentham*, 818 N.E.2d 199, 203-04 (Mass. App. Ct. 2004); see also *Gurry v. Bd. Pub. Accountancy*, 474 N.E.2d 1085, 1090 (Mass. 1985) (noting challenge not *Hormel* exception but reviewed to give guidance to board and rulemaking agencies). Under one Massachusetts decision, the Court viewed the need for guidance to be independent from the exceptional circumstance rubric. *Id.* It held that while the constitutional argument at issue did not meet the exceptional circumstances exception to the forfeiture rule, because of the perceived need to provide guidance, the issue was addressed anyway. *Id.*; see also *In re Adoption of Ernest*, No. 04-P-1731, 2005 WL 1773697, at \*4 (Mass. App. Ct. July 26, 2005) (noting exceptional circumstances include whether the issue would “provide assistance for other cases”). Further, courts have noted the waived status of the issue and lack of briefing but due to further litigation have proceeded to review which may aid the parties in the future litigation. See *Commonwealth v. Clint C.*, 715 N.E.2d 1032, 1037-38 (Mass. 1999). This factor is usually not the sole factor present but is usually coupled with the question of law, constitutional issue and/or public interest consideration. See *La Guardia*, 902 F.2d at 1013; *Cottam v. CVS Pharmacy*, 764 N.E.2d 814, 819 (Mass. 2002) (considering tort issues not raised below because fully briefed and likely to arise in other cases).

<sup>445</sup> *Jamgochian*, 681 N.E.2d at 1182 (stating jurisdictional “gloss” and novelty justified review of unpreserved argument); *Geehan v. Trawler Arlington, Inc.*, 359 N.E.2d 1276, 1278 (Mass. 1977) (permitting review of issue of first impression where case “fully argued in adversary proceeding”).

<sup>446</sup> See *Yakus v. United States*, 321 U.S. 414, 444 (1944) (“[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.”); see also *Daigle v. Me. Med. Ctr., Inc.*, 14 F.3d 684, 687-88 (1st Cir. 1994); *Cohen v. President & Fellows of Harvard Coll.*, 729 F.2d 59, 60-61 (1st Cir. 1984). *Outdoor Adver. Bd. v. Sun Oil Co. of Pa.*, 391 N.E.2d 916, 918 (Mass. App. Ct. 1979).

<sup>447</sup> *5K Farms, Inc. v. Miss. Dep’t of Revenue*, No. 2009-CT-01787-SCT, 2012 WL 1624288, at \*3 (Miss. May 10, 2012) (refusing to address new issues on appeal, particularly constitutional questions); see *In re Adoption of Donald*, 750 N.E.2d 1025, 1026 (Mass. App. Ct. 2001) (stating

circumstances” discretion identify the constitutional status of the issue as either a stand-alone exception to the general rule or a factor or criteria favoring exception.<sup>448</sup>

Some courts have refused review under exceptional circumstances, stating in one case that the unpreserved constitutional claim did not present a question of law, was not of significant public importance, and would not result in a miscarriage of justice if not addressed.<sup>449</sup> Others have found unpreserved constitutional claims to meet or not meet “exceptional circumstances” based on the degree of public importance.<sup>450</sup> For instance, a constitutional due process challenge to sentencing was found to merit exception to forfeiture, as not only was the issue of constitutional magnitude, but it “could [also] substantially affect these, and future defendants.”<sup>451</sup>

It may be that the “public interest” component to exceptional circumstances discretion as with the “fairness, integrity and public reputation” discretionary prong to plain error can be viewed as providing a distinction from harmless error applicable to preserved error. However, if so, then the need for two separate strains of discretion becomes questionable. Regardless, too many formulations of exceptional circumstances discretion have un-moored public interest from adjudicatory review for actual error. In the end, the tension with the public interest component of exceptional circumstances discretion is that it is ill-defined

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general rule does not consider new issues, especially constitutional ones raised for first time). It has been held that when a party seeks protection under the constitution of a federal statute, the party may advance other theories based on the constitutional or federal statute claim (even if not addressed by lower court). See *Lebron v. Nat’l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995); *Romano v. U-Haul Int’l*, 233 F.3d 655, 663-64 (1st Cir. 2000) (stating *Lebron* principle inapplicable because no alternative argument based on claim of protection under constitution).

<sup>448</sup> See *Ninestar Tech. Co. v. Int’l Trade Comm’n*, 667 F.3d 1373, 1382 (Fed. Cir. 2012) (explaining constitutional challenges not waived if relate “to the foundations of governmental process”); *Whiteside v. Merch. Nat’l Bank of Bos.*, 187 N.E.2d 706, 707 (Mass. 1933) (explaining constitutionality of statute in equity may be raised for first time on appeal); *Nat’l Ass’n of Soc. Workers v. Harwood*, 69 F.3d 622, 627-29 (noting presence of constitutional issue is factor that favors review despite procedural default).

<sup>449</sup> *Webb v. Philadelphia*, 562 F.3d 256, 263 (3d Cir. 2008).

<sup>450</sup> See *West Virginia v. Greene*, 473 S.E.2d 921, 926-27 (Cleckley, J., concurring).

<sup>451</sup> *United States v. La Guardia*, 902 F.2d 1010, 1013 (1st Cir. 1990). Whether the “public interest,” novelty, court guidance or constitutional stature considerations require a determination that there be an adequate record or that there be no prejudice to the opposing party remains unclear. *Contra Dennerline*, *supra* note 2, at 1102 (“The public interest exception is blind to this concern because the appellate court will typically decide a new issue without explicitly considering the development of the factual record or whether the appellee may have presented new evidence to confront the issue were it raised in the trial court.”). Some cases have suggested the contrary. *United States v. Krynicki*, 689 F.2d at 289, 292 (1st Cir. 1982); *In re Gagnon*, 625 N.E.2d 555, 558 (Mass. 1994).

and removed from the prudential concerns underlying the general rule. Unleashed from the need for error adjudication, it constitutes a potentially smothering expanse of discretion and a perpetuating force for unequal treatment.<sup>452</sup>

First, there is little to no discussion as to when an issue becomes a matter of sufficient “public interest” to merit exception to the raise or lose rule.<sup>453</sup> Courts which have relied on this factor have, in fact, done so in rather cursory terms. While the First Circuit has indicated that the “public interest” nature of the new or unpreserved issues is the “most salient,” little to no guidance is provided as to what is an issue of sufficient public interest.<sup>454</sup> Some states have required the issue to be of either “great,”<sup>455</sup> “broad,”<sup>456</sup> or “widespread”<sup>457</sup> public import,” while others note that the interest must firmly transcend a private interest<sup>458</sup> or be of only “some” public interest.<sup>459</sup> Further, there is a substantial public interest in the finality of judgments underlying the raise or lose rule, and determining when the public interest to address the issue outweighs the public interest behind the general rule is no easy endeavor. As one commentator has

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<sup>452</sup> See Lea Brilmayer, *Judicial Review, Justiciability and the Limits of the Common-Law Method*, 57 B.U. L. Rev. 807, 811 (1977) (“If courts are to have a certain law declaring rule, then they must themselves be constrained by rules that dictate the relationship between the judiciary and society. One such rule is consistency in treatment; in a society of laws, elementary fairness requires that similar cases be decided in a similar fashion.”).

<sup>453</sup> See e.g., *Sandholm v. Kuecker*, 962 N.E.2d 418, 435 (Ill. 2012) (identifying certain factors in determining whether the public interest exception to mootness applies); *Fontaine v. Ebtec Corp.*, 613 N.E.2d 881, 887 (Mass. 1993) (summarily stating issue was “not of significance”); *Palmer v. Murphy*, 677 N.E.2d 247, 255 (Mass. App. Ct. 1997) (declining review as issue did not involve public interest). According to the Supreme Court of Illinois, the relevant factors in the public interest exception application include: (1) the public or private nature of the questions presented, (2) the desirability of an authoritative decision for future guidance of public officers; and (3) the likelihood of future cases). *Sandholm*, 962 N.E.2d at 435. See *Am. Auto. Mfrs. Ass’n v. Comm’r, Mass. Dep’t of Env’tl. Prot.*, 31 F.3d 18, 24 (1st Cir. 1994) (noting unpreserved issue of public interest but it “paled in degree compared” with other cases).

<sup>454</sup> See *Cross v. Cooper*, 127 Cal. Rptr.3d 903, 912 (Cal. Ct. App. 2011) (stating term or concept of public interest or public issue are “inherently amorphous”).

<sup>455</sup> *Alvarez Family Trust v. Ass’n of Apartment Owners of Kaanapali Ali*, 221 P.3d 452, 468 (Haw. 2009) (citing *Montalvo v. Lapez*, 884 P.2d 345, 353 (Haw. 1994)).

<sup>456</sup> *Roberts v. Am. Family Mut. Ins. Co.*, 144 P.3d 546, 549 (Colo. 2006) (stating if issue of “broad impact” court may address despite procedural default).

<sup>457</sup> *In re Estate of Hodges*, 247 P.3d 755, 758 n.5 (Okla. Civ. App. 2010) (stating exception to preservations rule “where questions of public policy or widespread public interest involved”).

<sup>458</sup> See *Gracia v. Bittner*, 900 P.2d 351, 356 (N.M. Ct. App. 1995) (“[T]his case does not involve matters of general public interest. [It] involves a private dispute between private parties and a garden-variety failure to adequately call the trial court’s attention to the precise manner in which the jury should have been instructed.”); see also N.M. R. APP. P. 12-216 (listing exceptions to review of unpreserved issues to include jurisdiction, general public interest, fundamental error).

<sup>459</sup> *Mullins v. Pine Manor Coll.*, 449 N.E.2d 331, 341 (Mass. 1983) (reaching otherwise waived issue because issue was of “some public importance”).



noted, “an exception for issues of important public interest seems desirable at first blush, but what is an important public interest to one court will be unimportant to another. The line will be particularly difficult to draw and will often appear nakedly political.”<sup>460</sup>

Second, the “public interest,” “novelty,” “constitutional,” and/or guidance considerations have no meaningful connection to the prudential concerns underlying the general raise or lose rule. Public interest or novel arguments of “first impression” are not uncommon particularly at the highest appellate court level. If the issue is truly novel and one of first impression, that is all the more reason to require that it be raised before the lower court.<sup>461</sup> The same can be said for “constitutional issues,” with the longstanding canon of constitutional jurisprudence requiring that courts are to not decide constitutional issues where a more narrow ground is available and thus avoid judicial encroachment on democratic interests.<sup>462</sup> The use of a loose “public interest,” “first impression,” or “novelty” rubric threatens to swallow any meaningful application of the general rule.

Third, the “public interest” circumstances are primarily rooted in the notion that it is the appellate court’s function to determine and declare the applicable law to any dispute, including as to future cases,<sup>463</sup> instead of

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<sup>460</sup> Miller, *supra* note 3, at 1306-07; see Dennerline, *supra* note 2, at 1002; *Raising New Issues*, *supra* note 2, at 656.

While ‘public policy’ may be a useful term in certain cases where some interest other than those of the particular litigants is involved, as it is now used it seems to be a mere rationalization to achieve a desired result and gives no hint as to the factors to be weighed in the great bulk of the cases where the sole public interest is in doing justice as between the two parties.

*Id.*

<sup>461</sup> See *Icicle Seafoods, Inc. v. Worthington*, 475 U.S. 709, 712 (1986) (stating application of law to fact is to be done initially by trial court); *Carducci v. Regan*, 714 F.2d 171, 177 (D.C. Cir. 1983) (“[W]here counsel has made no attempt to address the issue, we will not remedy the defect, especially where, as here, ‘important question of far-reaching significance’ are involved.”) (internal quotations and citations omitted); *but see* Carter, *supra* note 2 at 967 (“[A study concluded] that trial judges have greater difficulty adjusting to significant novel issues unless the law and procedure become settled in an appellate court. Novel issues are the province of the appellate courts because they present significant legal questions.”).

<sup>462</sup> See *Camreta v. Greene*, 131 S. Ct. 2020, 2031 (2011) (noting rule courts must avoid resolving constitutional questions unnecessarily); *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) (“The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground which the case may be disposed of.”); *Sony BMG Music Entm’t v. Tenenbaum*, 660 F.3d 487, 508 (1st Cir. 2011) (holding court violated constitutional avoidance doctrine by addressing due process claim).

<sup>463</sup> Dennerline, *supra* note 2, at 1001-02 (“The danger of establishing a misleading precedent and the desire to correct an erroneous interpretation of an important principle of law sometimes become decisive factors in the consideration of a new issues on review.”).

error correction. Massachusetts's version of exceptional circumstances, for instance, has found the public significance, novelty, first impression or guidance alone to be sufficient to justify review.<sup>464</sup> As to the First Circuit, it considers the "most salient" the "public interest" factor although at least still requiring a showing that the argument or issue be "compelling." Even then, however, since actual error is not required, the justification shifts to that of law declaration or clarification, as opposed to adjudicatory review for actual error. Indeed, the public interest rubric may have more to do with the tendency of appellate courts to gravitate to their lawmaking role as opposed to the perceived "mundane and routine error-correction role."<sup>465</sup> It may be that the very justification for maintaining the exceptional circumstance discretion apart from plain error is so the court can engage in law declaration or clarification unhampered by procedural default and any need for error correction.<sup>466</sup> In fact, some courts have justified review of an unpreserved issue on the grounds that the lower court's judgment was being affirmed.<sup>467</sup> After all, so the argument goes, the party who failed to preserve is not provided any advantage with the appellate court otherwise able to perform a law declaring function.<sup>468</sup>

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<sup>464</sup> See, e.g., *McLeod's Case*, 450 N.E.2d 612, 615 (Mass. 1983); *Gaw v. Sappett*, 816 N.E.2d 1027, 1032 (Mass. App. Ct. 2004) (citing *In re R.I. Grand Jury Subpoena*, 605 N.E.2d 840, 845 (Mass. 1993)); *McCallum v. Sherillo*, 806 N.E.2d 969, 2004 WL 895787, \*2 (Mass. App. Ct. 2004) (unpublished table decision).

<sup>465</sup> Justice on Appeal in Criminal Cases, at *supra* note 322, at 466 & 469 ("[T]he lawmaking duty is an article of faith for American appellate judges, and it seriously diminishes their interest in and commitment to their duties as error correctors."); William M. Richman, *Much Ado About the Tip of an Iceberg*, 62 WASH. & LEE L. REV. 1723, 1731 (2005) ("Without statutory authority, [federal appellate courts] have transformed themselves from courts of mandatory jurisdiction (whose primary function is error correction) into de facto certiorari courts, taking only those cases suitable for making law.").

<sup>466</sup> See *In re Pet Food Prods. Liab. Litig.*, 629 F.3d 333, 360 (3d Cir. 2010) (Weis, J., concurring and dissenting) ("Sua sponte determination of an issue may be especially appropriate where the matter involves more than just the individuals, and addresses a matter of concern to the courts and the judicial system."); *Roosevelt v. E.I. Du Pont de Nemours & Co.*, 958 F.2d 416, 419 n.5 (D.C. Cir. 1992) (noting discretion will be exercised in circumstances of uncertain state of the law).

<sup>467</sup> See *Mullins v. Pine Manor Coll.*, 449 N.E.2d 331, 341 (Mass. 1983) (considering new issue because of "some public importance" and where result reached unchanged); see also *Izquierdo Prieto v. Mercado Rosa*, 894 F.2d 467, 471 n.4 (1st Cir. 1990).

<sup>468</sup> But see *Raising New Issues*, *supra* note 2, at 656.

Other courts say that they will consider new issues when they will serve to sustain the result reached below but not when they will cause a reversal. This rule is unfair in that it makes the introduction of the new question dependent upon the decision below which was incorrectly arrived at, since the new issue was necessary to uphold it.

*Id.*

The ultimate antagonism lies in the fact that the public interest component for exceptional circumstances is more concerned with the law declaring as opposed to error correcting appellate function. Unlike plain error, which is directed to serve the interests of the appellate court to prevent a miscarriage of justice or obvious and plain error that affected the outcome in a particular dispute, the public interest prong of exceptional circumstances is focused on the appellate court's function of properly declaring or clarifying applicable law regardless of the presence or absence of any actual error. Further, a legal issue's uncertainty, by definition, precludes a finding of plain error.<sup>469</sup>

Whether "public interest" is a stand-alone exception (Massachusetts) or the "most salient factor" (First Circuit), it remains removed from error correction and dispute or adjudication. It is this tie to law declaring and removal from error correcting that causes significant pause. After all, it remains that "the error correcting function is essential to a regime of law and to public confidence in courts as the ultimate resolver of disputes."<sup>470</sup> More particularly, and on the federal level, the public interest factor, if devoid of any real concern for error correction, runs into the principles embodying the Article III "cases and controversies" requirement<sup>471</sup> as well as the institutional competence of the court to declare "the public interest." Reliance on such factors can lead to appellate decisions that are essentially "advisory opinions"<sup>472</sup> or otherwise create a discretionary standard that results in unequal treatment, particularly where reversal or remand result. In the related context of mootness,<sup>473</sup> many

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<sup>469</sup> See *Creel v. Johnson*, 162 F.3d 385, 390 n.3 (5th Cir. 1998) (distinguishing between reviewing unpreserved legal claim due to legal uncertainty versus under plain error); see also *Munoz v. Sociedad Espanola De Auxilio Mutuo Y Beneficiencia De P.R.*, 671 F.3d 49, 59 (1st Cir. 2012) (explaining failure to recognize well-established law is plain error).

<sup>470</sup> Appellate Courts: Structures, *supra* note 312, at 287.

<sup>471</sup> See *Raines v. Byrd*, 521 U.S. 811, 818 (1977) ("No principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies.") (quoting *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 37 (1976)).

<sup>472</sup> See *Richardson v. Ramirez*, 418 U.S. 24, 36 (1974) ("While the Supreme Court of California may choose to adjudicate a controversy simply because of its public importance, and the desirability of a statewide decision, [the court is] limited by the case-or-controversy requirement of Art. III to adjudication of actual disputes between adverse parties."); *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 241 (1937) ("[An Article III controversy] must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character . . ."); *Commonwealth v. Welosky*, 177 N.E. 656, 658 (1931) (stating advisory opinions not adjudications by court and do not fall within *stare decisis* doctrine). Some states have provided advisory opinion authority by constitutional provision. See MASS. CONST. pt. 2, ch. 3, art. II; COLO. CONST. art. VI, § 3; N.H. CONST. pt. 2, art. 24.

<sup>473</sup> See, e.g., *Commonwealth v. Cory*, 911 N.E.2d 187, 189 n.3 (Mass. 2009) (reviewing issues, although moot, because fully briefed, certain to recur, and involved significant public

courts have, in fact, rejected the public interest of an issue as meriting a stand-alone exception.<sup>474</sup> Even at the state level, regardless of any

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interest); *Commonwealth v. McCulloch*, 879 N.E.2d 685, 688 (Mass. 2008) (stating discretion to review regardless of mootness where significant public importance and uncertainty); *Acting Superintendent of Bournemouth Hosp. v. Baker*, 725 N.E.2d 552, 554 (Mass. 2000) (noting three part test for exception to mootness); *Dimino v. Sec'y of the Commonwealth*, 695 N.E.2d 659, 662 (Mass. 1998) (noting exception to mootness because involves public interest and uncertainty and confusion exist); *Newspapers of New Eng. v. Clerk-Magistrate of the Ware Div. of the Dist. Court Dep't.*, 531 N.E.2d 1261, 1262 n.4 (Mass. 1988) (addressing “clearly moot” issue “because of the strong public interest in the matter”); *Brown v. Guerrier*, 457 N.E.2d 630, 632-33 (Mass. 1983); *Geehan v. Trawler Arlington, Inc.*, 359 N.E.2d 1276, 1278 (Mass. 1977) (addressing otherwise moot issue because “first impression and was important to many litigants”); *Karchmar v. Worcester*, 301 N.E.2d 570, 578 (Mass. 1973) (stating same); *In re Laura L.*, 768 N.E.2d 605, 607-08 (Mass. App. Ct. 2002) (“[C]ivil commitment and treatment-related cases are matters of significant public interest that warrant an exception to the usual mootness rules.”).

<sup>474</sup> See *Wright*, *supra* note 61, at § 3533.9; at n. 10 (collecting cases); see, e.g., *Hickman v. Missouri*, 144 F.3d 1141, 1144 (8th Cir. 1998) (“[T]here is no such exception in [the] federal courts.”); *N.J. Tpk. Auth. v. Jersey Cent. Power & Light*, 772 F.2d 25, 30 (3d Cir. 1985) (“Although we recognize that the substantive issues are of considerable public interest, we believe that this alone does not impart Article III justiciability when there is ‘no reasonable expectation that the wrong will be repeated.’”) (quoting *United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953)); *Alton & S. Ry. Co. v. Int’l Ass’n of Machinists & Aerospace Workers*, 463 F.2d 872, 880 (D.C. Cir. 1972) (“The court will not decide a moot case on the sole ground of public importance.”); cf. *Bowman v. Corr. Corp. of Am.*, 350 F.3d 537, 549-50 (6th Cir. 2003) (rejecting as “not convincing” district court’s belief exceptional circumstances warranted consideration of medical policy’s constitutionality). Massachusetts does permit “advisory opinions” but they are circumscribed limited to “important questions of law and upon solemn occasions.” *In re Answer of Justices to Council*, 962 N.E.2d 166, 167 (Mass. 2012) (“The Massachusetts Constitution requires the Justices of the Supreme Judicial Court to give opinions to the Governor, the Legislature, or the Executive Council ‘upon important questions of law, and upon solemn occasions.’”) (quoting MASS. CONST. pt. II, c. 3, art. 2)). “A ‘solemn occasion’ arises in the context of a ‘serious and unusual exigency,’ when a branch of government, ‘having some action in view, has serious doubts as to their power and authority to take such action, under the Constitution, or under existing statutes.’” *Id.* (citing *Answer of the Justices*, 366 N.E.2d 730, 732 (Mass. 1977)); but see *Carpenter v. Suffolk Franklin Sav. Bank*, 346 N.E.2d 892, 895 (Mass. 1976) (“State courts need not become enmeshed in the Federal complexities and technicalities and are free to reject procedural frustrations in favor of just and expeditious determinations on the ultimate merits.”); see also *Fialka-Feldman v. Oakland Univ. Bd. of Trs.*, 639 F.3d 711, 715 (6th Cir. 2011) (rejecting “far reaching proposition” federal courts may hear moot issues under stand alone public interest). According to the Sixth Circuit:

It invokes a “public interest” exception to the mootness doctrine, claiming that the federal courts may hear non-live disputes whenever the resolution of important legal questions will serve the public. But to state such a far-reaching proposition is to doubt it. The “case or controversy” requirement prohibits all advisory opinions, not just some advisory opinions and not just advisory opinions that hold little interest to the parties or the public. If advisory opinions “are ghosts that slay,” it is hard to grasp why the risks associated with them would be ameliorated, as opposed to accentuated, when the public has a keen interest in the resolution of the issue. Matters of great public interest are precisely the kinds of issues that demand the federal courts to be most vigilant in this area—vigilant that the powers they exercise

perceived importance of an issue, the issue should be reached only if necessary to the adjudication or determination of the rights of the parties before the court.<sup>475</sup> As Professor Carrington has aptly noted:

[T]he process of choosing whether to decide a case on the basis of public interest celebrates the public and political importance of the most visible decisions and diminishes, even demeans, the consideration given to the individual

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are powers the Constitution gives them and vigilant that they exercise those powers in disputes with the “clear concreteness provided when a question emerges precisely framed and necessary for decision from a clash of adversary argument.” A stand-alone public interest exception to Article III has no meaningful pedigree. The Supreme Court has never recognized any such exception and in several instances has refused to adopt one.

*Id.* at 715-16 (internal citations omitted). Massachusetts has not so expressly held although it has been noted that most states do recognize such a stand-alone exception. *See, e.g.,* *Zoning Bd. of Adjustment v. DeVilbiss*, 729 P.2d 353, 356 n.4 (Colo. 1986); *Rush v. Ray*, 332 N.W.2d 325, 326 (Iowa 1983); *Mead v. Batchlor*, 460 N.W.2d 493, 496 (Mich. 1990), *abrogated by* *Turner v. Rogers*, 131 S. Ct. 2507 (2011); *see also* *Gator.com Corp. v. L.L. Bean, Inc.*, 398 F.3d 1125, 1141 (9th Cir. 2005) (en banc) (Fletcher, J., dissenting) (“[A]lmost every state in the union has an exception for cases on appeal that raise questions of ‘continuing public importance’”). *But see* *Collins v. Lombard Corp.*, 508 S.E.2d 653, 655 (Ga. 1998); *Loisel v. Rowe*, 660 A.2d 323, 332 (Conn. 1995); *see also* *Richardson*, 418 U.S. at 36 (“While the Supreme Court of California may choose to adjudicate a controversy simply because of its public importance, and the desirability of a statewide decision, we are limited by the case-or-controversy requirement of Art. III to adjudication of actual disputes between adverse parties.”); *Fialka-Feldman*, 639 F.3d at 716.

[T]his reality reflects an essential difference between the two court systems—that the federal courts are courts of limited jurisdiction and that the state courts are courts of general jurisdiction. Article III does not constrain the state courts. Many state courts thus not only have authority to relax their rules on mootness, but they also permit advisory opinions and indeed some State constitutions explicitly provide for them.

*Id.* As to the general power to hear matters not directly before the court, the Supreme Judicial Court of Massachusetts has stated it will do so if the matter has been fully briefed, “when there is a public interest in obtaining a prompt answer to the question, and when the answer to be given is reasonably clear.” *Brown*, 457 N.E.2d at 631. This consideration is sometimes referenced as consonant with judicial economy and aiding the administration of justice. *See* *United States v. Patrick*, 359 F.3d 3, 8 n.2 (1st Cir. 2004). In *United States v. Patrick*, for instance, the concept of restitution under the Federal Juvenile Delinquency Act was found to be a legal question likely to arise in other cases and against a “paucity of case law [such that] declining to hear the issue will neither promote judicial economy nor aid in the administration of the juvenile system.” *Id.*

<sup>475</sup> *See* Stephen R. Barnett, *Making Decision Disappear: Depublication and Stipulated Reversal in the California Supreme Court*, 26 LOY. L.A. L. REV. 1033, 1039 n.30 (1993) (“It is basic assumption of our adversary system that neither a trial nor an appellate court will consider or decide questions of law, no matter how important, unless they arise in the course of a justiciable controversy calling for determination of rights of particular adversary parties.”) (quoting BERNARD E. WITKIN, *MANUAL OF APPELLATE COURT OPINIONS* 165 (1977)).

fates of the parties . . . . [An] orientation away from case specifics and individual fates . . . threaten[s] the role of the Court . . . .<sup>476</sup>

Certain plain error formulations have expressly incorporated a “public interest” component.<sup>477</sup> Texas, for instance, expressly combines fundamental error with the public interest factor stating that in “determining whether fundamental-error review should apply to a matter of public interest: (1) the error complained of must implicate a significant public interest or policy of the state, articulated by statutes, constitution, or case law; and (2) the nature of the error must be such that it impacts a truly general public interest, and not solely that of private litigants.”<sup>478</sup> Notably, the public interest is not a stand-alone exception nor is a “compelling” argument or “virtually assuring success” enough. The touchstone of appellate review remains whether there was actual error.

### 5. Consistency and Equal Treatment

In the end, plain error represents a more consistent approach providing for equal treatment of cases while also preserving the necessary individualized, fact intensive inquiry.<sup>479</sup> There must be found an error, that

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<sup>476</sup> Paul D. Carrington, *The Function of the Civil Appeal: A Late-Century View*, 38 S.C. L. REV. 411, 421, 422 (1987).

<sup>477</sup> See *Barefoot Architect, Inc. v. Bunge*, 632 F.3d 822, 835 (3d Cir. 2011). For instance, the Third Circuit links the two directly stating that the rule of waiver may be relaxed whenever in the public interest. *Id.*

<sup>478</sup> See *id.*

<sup>479</sup> See *Puckett v. United States*, 556 U.S. 129, 142 (2009) (“The fourth prong is meant to be applied on a case-specific and fact-intensive basis. We have emphasized that a ‘*per se*’ approach to plain-error review is flawed.”) (quoting *United States v. Young*, 470 U.S. 1, 17 n.14 (1985)); *Shinseki v. Sanders*, 556 U.S. 396, 411-12 (2009).

[T]he factors that inform a reviewing court’s “harmless-error” determination are various, potentially involving, among other case-specific factors, an estimation of the likelihood that the result would have been different, an awareness of what body (jury, lower court, administrative agency) has the authority to reach that result, a consideration of the error’s likely effects on the perceived fairness, integrity, or public reputation of judicial proceedings, and a hesitancy to generalize too broadly about particular kinds of errors when the specific factual circumstances in which the error arises may well make all the difference.

*Id.*; *United States v. John*, 597 F.3d 263, 285-86 (5th Cir. 2010) (noting fairness and integrity prong of plain error fact intensive); *United States v. Gandia-Maysonet*, 227 F.3d 1, 6 (1st Cir. 2000) (“The ‘fairness, integrity or reputation’ plain-error standard is a flexible one and depends significantly on the nature of the error, its context, and the facts of the case.”); see generally

is plain, that causes prejudice (i.e., affecting the outcome)<sup>480</sup> and resulting in either a miscarriage of justice<sup>481</sup> or affecting the “fairness, integrity or public reputation of judicial proceedings.”<sup>482</sup> The discretion under plain error lies in the court’s determination as to whether, even absent any miscarriage of justice (actual innocence), the plain error affected the fairness integrity or public reputation of the proceeding before the court.<sup>483</sup> The public interest prong is tied directly to the purported error and is thus centered on the integrity and fairness of the proceeding and litigants before the court. The result is an approach more in keeping with the paramount obligation of error adjudication as well as the substantial value of equal treatment.<sup>484</sup>

To be sure, the case law remains not particularly illuminating as to the criteria to be used in the discretionary determination as to whether the plain error affected the fairness, integrity or public reputation of the proceeding.<sup>485</sup> Not only is there some question of whether, in application,

Benjamin Kaplan, *Do Intermediate Appellate Courts have a Lawmaking Function?* 70 MASS. L. REV. 10, 11 (1985) (“[O]f course the law is to some considerable extent indeterminate rather than fixed; that is the price the law must pay for dealing with human material.”).

<sup>480</sup> See *United States v. Dominguez Benitez*, 542 U.S. 74, 76 (2004) (“a reasonable probability that, but for the error, he would not have entered the plea”).

<sup>481</sup> The miscarriage of justice element is traditionally defined under an “actually innocent” concept. See *United States v. David*, 83 F.3d 638, 647 (4th Cir. 1996); see also *Thirty-Ninth Annual Review of Criminal Procedure: Appeals*, 39 GEO. L.J. ANN. REV. CRIM. PROC. 856, 887 n.2630 (2010) (collecting federal appeals court cases using terms “plain error,” “miscarriage of justice,” “actually innocent”).

<sup>482</sup> *United States v. Olano*, 507 U.S. 725, 736 (1993) (quoting *United States v. Atkinson*, 297 U.S. 157, 160 (1936)).

<sup>483</sup> See *Greenlaw v. United States*, 554 U.S. 237, 262 (2008).

<sup>484</sup> See *Essinger v. Liberty Mut. Fire Ins. Co.*, 534 F.3d 450, 452 (“Some standard approach [to waiver] is desirable because one of the fundamental goals of appellate review must be uniformity in treatment of cases.”); Mary Massaron Ross, *Reflections on Appellate Courts: An Appellate Advocate’s Thoughts for Judges*, 8 J. APP. PRAC. & PROCESS 355, 386 (2006) (“[T]o be a principled adjudicator involves more than just acknowledging the true grounds of decision; it also requires being consistent within and across cases.”) (quoting Richard A. Posner, *The Federal Courts: Challenge and Reform* 312 (2d Harv. U. Press 1999)).

<sup>485</sup> See Michael H. Graham, *Abuse of Discretion, Reversible Error, Harmless Error, Plain Error, Structural Error; A New Paradigm for Criminal Cases*, 43 CRIM. L. BULL. 955, 963-64 (2009) (noting no discernible pattern in cases applying fourth prong of *Olano* plain error test); see Dennerline, *supra* note 2, at 1000-01.

[I]t is doubtful that lawyers or judges can either define or consistently recognize an added increment of seriousness showing error to be not only reversible but ‘plain’ . . . . It is this confusion between the ‘plainness’ of an error and its gravity which breeds much of the criticism of the plain error principle . . . . [with] the exception . . . seen as basically ad hoc in nature without any neutral standards to apply.

*Id.*; Dustin D. Berger, *Moving Toward Law: Refocusing The Federal Courts’ Plain Error*

the public interest prong has collapsed into the prejudice prong,<sup>486</sup> but concern over whether the discretionary prong of plain error is hopelessly ad hoc.<sup>487</sup> Yet, despite any shortcomings, it remains directly tied to the need for plain or obvious error thus serving the primary error correcting function as well as seeks (outside of traditional miscarriage of justice) to require something more than just outcome determinative error. When focused on an assessment of the nature and quality of the underlying right, the prong is concerned with errors that rise to the level of challenging the legitimacy of the underlying judicial process itself<sup>488</sup> and does so in the context of the dispute and litigants before the court.<sup>489</sup>

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*Doctrine in Criminal Cases*, Columbia Public Law Research Paper, available at <http://ssrn.com/abstract=1809726> (“United States v. Olano, is poorly suited to discovering and correcting even the serious errors that the plain error doctrine was intended to remedy. Because the doctrine is discretionary and fact-specific, it fails to generate precedents to guide future courts and litigants and perpetuates a guilt-based approach to evaluating errors.”).

<sup>486</sup> See Graham, *supra* note 485, at 963-64 (noting Court folded affecting substantial rights and public interest prongs in *Johnson and Cotton*).

<sup>487</sup> See *Dilliplaine v. Lehigh Valley Trust Co.*, 322 A.2d 114, 117 (Pa. 1974).

The other major weakness of the basic or fundamental error theory is its ad hoc nature. The theory has been formulated in terms of what a particular majority of an appellate court considers basic or fundamental. Such a test is unworkable when neither the test itself nor the case law applying it develop a predictable, neutrally-applied standard.

*Id.* See Berger, *supra* note 485, at 19-20 (“[T]he discretionary system [for plain error] fails to appreciate that a system of well-defined rules and exceptions can also *foreclose* the prospects of appellate review of an unpreserved error.”); Carter, *supra* note 2, at 948 (“Standards such as plain error, fundamental error, or manifest injustice, provide little notice and have, to some courts, become an impediment to the efficient administration of our judicial system.”) (internal quotations omitted); Dennerline, *supra* note 2, at 1000-01 (noting plain error “basically ad hoc in nature, without any neutral standards to apply”); see also *United States v. Marcus*, 130 S. Ct. 2169, 2169 (Stevens, J., dissenting) (“In our attempt to clarify [plain error], we have, I fear, both muddled the waters and lost sight of the wisdom embodied in the Rule’s spare text.”).

<sup>488</sup> *Dragway 42, L.L.C. v. Kokosing Constr. Co.*, No. 09CA0073, 2010 WL 3796586, at \*6 (Ohio Ct. App. Sept. 30, 2010) (finding error did not rise to level of challenging legitimacy of underlying judicial process).

<sup>489</sup> See *United States v. Mudekunye*, 646 F.3d 281,300 (“Without an exacting and limited application of [the *Olano* public trust] prong, it becomes illusory.”) (internal quotations omitted). Under Massachusetts practice, there is no such stated discretionary prong with the inquiry focused solely on whether there was error and whether it may have materially affected the outcome. Indeed, no Massachusetts case has referenced or otherwise required or adopted an integrity prong. In most circumstances, errors that do not impact the verdict do not seriously impugn the fairness, integrity or public reputation of judicial proceedings. See *United States v. Cotton*, 535 U.S. 625, 634 (2002). In *Cotton*, the Supreme Court argued that correcting a plain error when confronted with overwhelming evidence of guilt would harm rather than further the fairness and integrity of the judicial system. *Id.* Not surprisingly, even if the plain error is a structural constitutional right and thus presumed to affect substantial rights it still remains for the court to determine, in its discretion, whether the error “seriously affects the fairness, integrity or public reputation of the judicial proceeding.” *United States v. Keys*, 67 F.3d 801, 811 (9th Cir.



“Exceptional circumstances” discretion, apart from plain error, is unruly. Pocked with diverse factors, many of which are removed from the underpinnings to the raise or lose rule, the exceptional circumstances exception suffers from lack of true consensus, the lack of any means of consistent or predictable application, and, too often, is severed from the fundamental error correcting function of the appellate court. The use of two seemingly separate lines of discretionary exception can dilute the error correction and dispute resolution function of appellate courts and otherwise further a lack of consistency and equal treatment.<sup>490</sup> “[A] legal system which tolerates needless dis-uniformity and incoherence is not keeping faith with those who are subject to its dominion, for it has forsaken commitment to even handed decision-making.”<sup>491</sup>

The need for consistency and equal treatment of similarly situated litigants is paramount. The plain error rule is more consistent with this important value striking a workable balance between the rigors and obligations to follow procedural rules and the need to always protect fundamental fairness regardless of any procedural default. It is a default standard that applies equally to all unpreserved error or new issues on appeal. It does so with a focus on whether or not there was fundamental error in order to ensure fairness and justice was done between the litigants. Indeed, it is the error correcting and dispute resolution function of the appellate court that provides the necessary confines to the discretion.

## V. PROPOSED CONSTRUCT

In an effort to improve consistency and principled decision-making, a possible construct for addressing forfeiture and waiver is offered as follows:

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1995) (quoting *United States v. Olano*, 507 U.S. 725, 736 (1993)); see *United States v. Lopez*, 71 F.3d 954, 960 (1st Cir. 1995) (“In all events, our best guess is that the Supreme Court would regard an omitted element reversible error *per se* if there were a timely objection-although not automatically plain error if no objection occurred . . .”) (internal quotations omitted), *abrogated by* *United States v. Wells*, 519 U.S. 482 (1997); see also *United States v. Ross*, 77 F.3d 1525, 1540-41 (7th Cir. 1996) (performing similar analysis); *United States v. Marder*, 48 F.3d 564, 574-75 (1st Cir. 1995) (performing similar analysis); *United States v. Xavier*, 2 F.3d 1281, 1287 (3d Cir. 1993) (performing similar analysis). But see *United States v. Birbal*, 62 F.3d 456, 461 (2d Cir. 1995); *United States v. Colon-Pagan*, 1 F.3d 80, 82 (1st Cir. 1993).

<sup>490</sup> See Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1178 (1989).

<sup>491</sup> Justice on Appeal, *supra* note 296, at 12; Scalia, *supra* note 490, at 1178 (“When a case is accorded a different disposition from an earlier one, it is important, if the system of justice is to be respected, not only that the later case *be* different, but that it *be seen to be so*.”).

*1. Is the issue jurisdictional? (If yes, the issue is reviewed directly and de novo. If it is not jurisdictional, proceed to No. 2).*

This initial question goes to the authority of the court. It is a preliminary question seeking to determine whether the raise or lose rule even applies. Care should be given to be sure the issue is truly one of “jurisdiction” or the authority or power of the court to consider the issue or action.

*2. Did the party seeking review of a new or unpreserved issue sufficiently brief the waiver/forfeiture issue and the basis for consideration?*<sup>492</sup> *(If no, the inquiry ends, if yes, proceed to No. 3).*

This element is in keeping with the party presentation and court competency principles. If the issue of waiver or forfeiture has not been raised or adequately briefed the appellate court should be inclined not to address the issue. If the court deems it necessary to do so *sua sponte* it should clearly articulate its reasons for doing so and otherwise be sure to provide opportunity to the parties to brief or present argument no matter how confident the appellate court may be on the matter.

*3. Did the party have a fair opportunity to raise the issue below? (If so, proceed to No. 4. If not, there is no waiver or forfeiture and the matter should be reviewed under the applicable standard for preserved errors).*

Assuming the issue is non-jurisdictional and has been briefed, this element seeks to address whether the raise or lose rule even applies. If there was never any fair opportunity to raise the issue then there has been no forfeiture or waiver. The appellate court may address under the preserved error standard or otherwise remand.

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<sup>492</sup> See *Bruno v. Bd. of Appeals of Wrentham*, 818 N.E.2d 199, 203-04 (Mass. App. Ct. 2004); *Turkey Creek, L.P. v. Layn*, No. C062080, 2011 WL 675935, at \*4 (Cal. Ct. App. Feb. 25, 2011) (declining to consider argument because party did not sufficiently brief why exception applied).

*4. Was the failure to properly preserve or raise inadvertent or was it strategic, or is the error claiming party otherwise estopped? (If strategic or the party is estopped, the inquiry ends. If not present, proceed to No. 5).*

This element also seeks to determine whether the raise or lose rule even applies. It is understood that determining whether the failure to preserve was inadvertent or strategic, or that the claimed error on appeal was invited, is not necessary easy. It may well be one of degree. Nonetheless, it is a necessary question which, depending on the circumstances, will require refusal to address the issue or otherwise militate against reversal unless the existence of plain error and its affect upon the integrity, fairness or reputation of the proceedings is apparent and pervasive.

*5. Is there a sufficient record for the appellate court to fairly and fully address the new issue? (If not, the inquiry ends. If so, proceed to No. 6 or otherwise remand or request missing or needed briefing if applicable).*

This is a vital competency element. It includes even those instances when the appellate court is considering the need to address the issue for law declaring or clarification reasons as opposed to error adjudication (see element No. 8). It is an institutional imperative that the appellate court first be content and convinced that the record is adequate.

*6. Will the opposing party suffer prejudice if the issue is addressed on appeal? (If yes, the inquiry ends. If no, proceed to No. 7).*

This is in keeping with the party presentation principle. The appellate court should be fairly searching in this inquiry with the appellant charged with demonstrating the lack of prejudice.

*7. Was there an obvious error that affected outcome, and would the failure to consider the issue result in a miscarriage of justice or seriously affect the fairness, integrity or public reputation of judicial proceedings? (If yes, the inquiry ends. If no, proceed to No. 8).*

This plain error rubric applies to both civil and criminal proceedings. The caveat is that the existing reluctance to find plain error in

civil cases remains. The life and liberty aspects at issue in criminal proceedings and absent in civil proceedings dictate such a practice. Consideration and weight, however, should be given for matters such as civil commitments, juvenile detentions, competency, and parental fitness or child custody matters, and should depend on the particular facts presented. It is understood and recognized that many courts, including Massachusetts (as well as even those that do not recognize a discretionary exception outside of a plain error type review), do not require a showing beyond outcome determinative impact. Despite the shifting of the burden of proof between harmless and plain error, absent “something more,” then affecting the outcome provides a virtually imperceptible distinction with harmless error. This construct advocates, particularly in civil cases, that something more than individualized harm must be shown—harm that is fundamental to the integrity of the particular proceeding either from the litigant or public perspective.

*8. Regardless of lack of error, does the issue present a matter of such substantial and widespread public interest and need for appellate law declaration or clarification that it merits appellate attention outweighing the concerns behind: (a) declaring/clarifying law not necessary to resolve the dispute between the specific litigants before the court; and (b) the significant interests underlying the raise or lose rule?*

This last element should be utilized sparingly. The appellate court should not be forced to resolve a dispute based on the parties terms where it would require issuing an inaccurate statement of the law. However, it should be invoked only where the appellate court is convinced, with a compelling and reliable basis, that lower courts need guidance or the law needs clarification in order to prevent future litigants or the public from being misled as to the applicable law or grounds for the decision. Appellate courts need to be highly sensitive to any instance of law declaration or clarification that is removed from and unnecessary to resolve the controversy of the litigants before the court. It is to provide recognition of the law declaring role of appellate courts but which must be significantly tempered in the unpreserved context and, at minimum, not utilized to either reverse or remand absent plain error. Intermediate appellate courts need to be particularly wary given their primary function of error review and correction.

## VI. CONCLUSION

A rigid judicial practice where courts would invariably and under all circumstances refuse to hear any issue or question not properly preserved would be potentially out of step with fundamental justice in a particular case. Leaving the determination to judicial discretion is certainly salutary in principle, as it is aimed to allow for the striking of the proper balance on specific facts and circumstances between avoiding a resulting injustice and the prudential concerns underlying the raise or lose maxim. Nonetheless, there remains a lack of evenness in articulation and application given that “exceptional circumstances” has evolved to encompass both the plain error/substantial risk of miscarriage of justice default standard of review as well as a multi-factor strain of discretionary exception. Consolidation of the existing strands of discretion under a unified default standard of review provides for a measure of consistency and equal treatment of cases. It is likewise in keeping with the indispensable task of review centered on the question of error as well as transparency and public accountability.