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Claremont McKenna College

Harmless Constitutional Error: How a Minor Doctrine Meant to Improve Judicial Efficiency is Eroding America's Founding Ideals

submitted to

Professor Ralph A. Rossum

by

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for

Senior Thesis

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Errors are the insects in the world of law, traveling through it in swarms, often unnoticed in their endless procession. Many are plainly harmless; some appear ominously harmful. Some, for all the benign appearance of their spindly traces, mark the way for a plague of followers that deplete trials of fairness

– Roger J. Traynor, Foreword, in *The Riddle of Harmless Error*,

(Columbus: Ohio State University Press, 1970).

ABSTRACT

The United States Constitution had been in existence for almost two hundred years before the Supreme Court decided that some violations of constitutional rights may be too insignificant to warrant remedial action. Known as "harmless error," this statutory doctrine allows a court to affirm a conviction when a mere technicality or minor defect did not affect a defendant's substantial rights. The doctrine aims to promote judicial efficiency and judgment finality. The Court first applied harmless error to constitutional violations by shifting the statutory test away from the error's effect on substantial rights to its impact on the jury's verdict. Over time, the test evolved even further, now allowing a court to disregard the constitutional error when a majority of the justices believe that the untainted record evidence shows that the defendant is, in fact, guilty. This sacrifice of individual and institutional constitutional protections at the altar of judicial efficiency and judgment finality subverts the harmless error doctrine's purposes and strikes at the core of America's founding ideals. In particular, it allows appellate courts to invade the jury's constitutional role as the finder of fact and guilt, to sidestep their constitutional role to review and correct errors and protect the Constitution, and to incentivize government actors to commit constitutional violations with little-to-no-ramifications. After conducting a comprehensive review of the harmless error doctrine and its development, this thesis traces through the many substantive, theoretical, and practical problems with the doctrine's current application. It then proposes that the Constitution and the values that it protects should once again be elevated above the harmless error doctrine's pragmatic concerns of judicial efficiency and judgment finality.

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Chapter One: Introduction

The United States Constitution and Bill of Rights had been in existence for almost two hundred years before the Court, in *Chapman v. California,*[1] held that "there are some constitutional errors which in the setting of a particular case are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless …."[2] Thereafter, the Court has applied the harmless error doctrine to all but a select few constitutional violations.[3] The doctrine originally was created, however, to prevent mere technicalities and minutia that did not affect the parties "substantial rights"[4] from invalidating convictions and requiring unnecessary retrials.[5] Its goals include judicial efficiency, conviction finality, and pragmatism in reviewing minor trial defects.[6] Perhaps

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[1] *Chapman v. California,* 386 U.S. 18 (1967).
[2] Unless otherwise noted, this thesis focuses on harmless constitutional error in the federal direct appeal context. It generally does not discuss non-constitutional errors, state court proceedings, habeas corpus review, sentencing cases, or convictions based on plea agreements.
[3] *See Arizona v. Fulminante,* 499 U.S. 279 (1991). *See also* Justin Murray, "A Contextual Approach to Harmless Error Review," *Harvard Law Review* 130, no. 7 (2017): 1793; the instances of courts finding a constitutional violation not subject to harmless error review are "exceedingly rare" and, in applying the harmless error test, the courts find the constitutional violation to be harmless with "remarkable frequency."
[4] *See* 28 U.S.C. § 2111; "On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record, without regard to errors or defects which do not affect the substantial rights of the parties."
[5] *See Bruno v. United States,* 308 U.S. 287, 294 (1939); harmless error is "to prevent matters concerned with the mere etiquette of trials and the formalities and minutiae of procedure from touching the merits of a verdict;" *Bollenbach v. United States,* 326 U.S. 607, 614-15 (1946); "'technical errors'" or "[d]eviations from formal correctness do not touch the substance of the standards by which guilt is determined in our courts."
[6] *See* Roger A. Fairfax, Jr., "A Fair Trial, Not a Perfect One: The Early Twentieth-Century Campaign for the Harmless Error Rule," *Marquette Law Review* 93, no. 2 (2009): 455-56; Roger A. Fairfax, Jr., "Harmless Constitutional Error and the Institutional Role of the Jury," *Fordham Law Review* 76, no. 4 (2008): 2060-65; Steven H. Goldberg, "Harmless Error: Constitutional Sneak Thief," *The Journal of Criminal Law & Criminology* 71, no. 4 (1980): 440-41; Charles S. Chapel, "The Irony of Harmless

that is why, despite its creation in 1919, half-a-decade elapsed before the Court even considered extending the doctrine to constitutional violations in criminal cases.[7]

America's founding fathers likely would have challenged the Supreme Court justices to a duel had they attempted to invoke a harmless error doctrine to disregard constitutional rights in 1791.[8] The harmless error doctrine stands in stark contrast to the Constitution's "broader ethical vision"[9] to protect both individual rights and larger institutional concerns. Thus, for example, the Constitution espouses broad ideals of individual autonomy and dignity by resting primary power with the people,[10] limiting and separating the powers of the government,[11] and protecting against unfair and abusive

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Error," *Oklahoma Law Review* 51 (1998): 515; William M. Landes and Richard A. Posner, "Harmless Error," *Journal of Legal Studies* 30, no.1 (2001): 181; Helen A. Anderson, "Revising Harmless Error: Making Innocence Relevant to Direct Appeals," *Texas Wesleyan Law Review* 17 (2011): 396-400.

[7] *Kotteakos v. United States,* 328 U.S. 750, 764-65 (1946); "If, when all is said and done, the conviction is sure that the error did not influence the jury, … the verdict … should stand, except perhaps when the departure is from a constitutional norm or a specific command of Congress."

[8] As demonstrated by the Burr-Hamilton duel in 1804, the founding fathers were not afraid to take up arms.

[9] Murray, "A Contextual Approach," 1795. *See also* Tom Stacy and Kim Dayton, "Rethinking Harmless Constitutional Error," *Columbia Law Review* 88, no. 1 (1988): 94; Chapel, "Irony of Harmless Error," 508-10, 516, 532-33; Gregory Mitchell, "Against Overwhelming Appellate Activism: Constraining Harmless Error Review," *California Law Review* 82, no. 5 (1994): 1366; Vilija Bilaisis, "Harmless Error: Abettor of Courtroom Misconduct," *The Journal of Criminal Law & Criminology* 74, no. 2 (1983): 457-58; Harry T. Edwards, "To Err is Human, But Not Always Harmless: When Should Legal Error Be Tolerated?" *New York University Law Review* 80, no. 6 (1995): 1194-95; Goldberg, "Constitutional Sneak Thief," 432-33; Fairfax, "Harmless Constitutional Error," 2052-54.

[10] Edwards, "To Err is Human," 1194; Chapel, "Irony of Harmless Error," 508-10, 516, 533; Goldberg, "Constitutional Sneak Thief," 432.

[11] *See* U.S. Const. arts. I, II, III. *See also* U.S. Const. art. V; providing the process whereby the people retain control over any amendments to the Constitution.

government actors and majoritarian control.[12] The Constitution also cements the right to a public trial before an impartial jury of one's peers[13] to ensure not only individual fairness, but also the expression of community values, education of the public, and transparency and confidence in the criminal justice system.[14] Under the guise of streamlining the judicial process and affirming convictions of defendants that appellate judges believe to be guilty, harmless error has eroded principles that are fundamental to American democracy.[15]

Justice Benjamin Cardozo "long ago noted '[t]he tendency of a principle to expand itself to the limit of its logic.'"[16] As scholars have opined, the harmless error doctrine has exceeded its logic[17] and become the "beast that swallowed the Constitution."[18] In today's criminal justice system, enforcement of constitutional rights in

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[12] U.S. Const. amends. IV, V, VI, XIV. *See* Bilaisis, "Abettor of Courtroom Misconduct," 457-58; Edwards, "To Err is Human," 1194-95; Goldberg, "Constitutional Sneak Thief," 432; Chapel, "Irony of Harmless Error," 508-10, 533; Fairfax, "Harmless Constitutional Error," 2053-56; Mitchell, "Against Overwhelming Appellate Activism," 1356.
[13] U.S. Const. amend. VI.
[14] Murray, "A Contextual Approach," 1812-13, 1821; Bilaisis, "Abettor of Courtroom Misconduct," 457-58; Fairfax, "Harmless Constitutional Error," 2051-56; Mitchell, "Against Overwhelming Appellate Activism," 1355-56; Chapel, "Irony of Harmless Error," 536-39; Edwards, "To Err is Human," 1195-96; Daniel Epps, "Harmless Errors and Substantial Rights," *Harvard Law Review* 131, no. 8 (2018): 2178-80.
[15] *See* Epps, "Harmless Errors," 2151; "There is something unquestionably troubling about providing no remedy … for a recognized violation of a right important enough to be enumerated in our nation's founding charter …;" Fairfax, "Harmless Constitutional Error," 2027; Efficiency and finality concerns are diluting constitutional guarantees.
[16] Edwards, "To Err is Human," 1173; quoting Benjamin N. Cardozo, *The Nature of the Judicial Process* (New Haven: Yale University Press, 1921): 51. *See also* Goldberg, "Constitutional Sneak Thief," 426.
[17] Fairfax, "Harmless Constitutional Error," 2027; the harmless error doctrine "has exceeded the scope of the initial compromise" and we are "approaching a "'point of no return.'"
[18] Martha Davis, "Harmless Error in Federal Criminal and Habeas Jurisprudence: The Beast that Swallowed the Constitution," *Thurgood Marshall Law Review* 25 (1999): 45.

the face of a violation has become the exception rather than the rule.[19] In many cases, the error is disregarded entirely simply because a small panel of appellate judges believes that the defendant is, in fact, guilty.[20] Paradoxically, a rule designed to preclude defendants from using slight errors to obtain indefinite and unnecessary retrials has become a tool for courts, prosecutors, and police to transgress and trade constitutional rights for convictions in cases involving life and liberty.[21]

Consider the following case, which is riddled with injustice and misconduct:

Kirk Defendant was tried in 1985 along with his alleged accomplice, Tim Defendant, for the 1984 robbery, kidnapping, and first-degree murder of Donna Hare. The prosecution's case consisted of a confession by Tim, a later confession by Kirk, and witnesses that placed Tim at or near the convenience store at which Hare worked and from which she was taken. Tim's confession occurred after more than eleven hours of interrogation over two separate sessions, in between which Tim had a "dream" that led to his confession story. In it, he implicated Kirk and a third person, Odie, stating they robbed the store, abducted Hare, and took her to an area behind a power plant where she

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See also Goldberg, "Constitutional Sneak Thief," 421; the doctrine is a "constitutional sneak thief."

[19] *See* Goldberg, "Constitutional Sneak Thief," 427; The harmless error doctrine has no "substantive doctrinal base." It is an "appellate procedural doctrine which has caused 'mischief' beyond anyone's expectations." (Citation omitted).

[20] *See Harrington v. California,* 395 U.S. 250 (1969). *See also* Mitchell, "Against Overwhelming Appellate Activism," 1354-56 & n. 112; ibid., 1369; "[T]he Constitution entitle[s] a criminal defendant to a fair 'trial by jury,' not a 'trial by appellate court;'" Fairfax, "Harmless Constitutional Error," 2056; "The jury provisions … reflect … a reluctance to entrust plenary powers over life and liberty of the citizen to one judge or to a group of judges."

[21] Such control by a small group of judges over the individual rights of Americans is precisely what the founders sought to prevent by installing protections in the Constitution and Bill of Rights. *See supra* n. 20.

was raped. They then took her to an abandoned house behind the plant, where Odie, the alleged ringleader, stabbed her to death, after which the men set fire to her body and the house, burning it down. After Tim's confession, Kirk was arrested and, following two hours of unrecorded discussions with the police during which he insisted he was at a party all that night, he finally confessed substantially the same story as Tim. Kirk had a lower-than-average IQ and was suffering post-traumatic stress and guilt relating to his mother's accidental death earlier that year. The police told Kirk that Tim had already confessed and implicated him and Odie, and so Kirk might as well confess, too. Two days later, Kirk recanted his confession to the police and in letters to his attorney. The letters, which also contained alibi witness leads, were intercepted by the police.

The confessions turned out to be problematic regarding Odie, and he was exonerated of any involvement. Before this occurred, however, the prosecution interrogated Odie three times, during which officers fed him facts about the crimes and after which they brought him to Kirk's cell for identification. Kirk's description of Odie in his confession did not match Odie and Kirk could not identify Odie when he appeared. The police also brought some bones to Kirk's cell to persuade him to reveal the location of the "rest" of Hare's body because, despite the confessions, they were unable to locate any human remains at the burned-up house.

Early in 1986, Hare's body was discovered more than thirty miles from where Tim and Kirk said the murder occurred. Her cause of death was not stabbing or burning, but a single gunshot wound to the head. The owner of the abandoned house also revealed that he had personally burned the property down in 1983, a year prior to Hare's

abduction. Nonetheless, the prosecution pressed on, even after it received a pretrial ruling that Tim's confession was not sufficiently reliable and could not be used in Kirk's trial.

The men were tried separately. At Kirk's trial, the prosecution called two witnesses who allegedly saw Tim and another man departing with Hare from the convenience store. At the urging of the police, the witnesses testified that the second man resembled Kirk. In reality, they had described the second man to the police as a 6'2" male with sandy brown hair. Kirk is 5'9" with dark brown hair. In addition, the prosecution offered the testimony of an often-used jailhouse informant, who said Kirk confessed all of the same events to her. Finally, the case investigator took the stand, testified to Kirk's confession, and included statements about Tim's confession, to corroborate Kirk's.

The jury convicted Kirk. Kirk filed an appeal, and the prosecution argued that any errors that occurred are harmless. What should the court decide? Does the Constitution preclude the actions taken by the police and prosecutors and warrant a new trial for Kirk? Because answering these questions requires a thorough understanding of the Constitution and the harmless error doctrine, Chapter Two begins by outlining the Constitution's framework, guiding principles, and protective rights, and Chapter Three follows with the origin and expansion of the harmless error doctrine to constitutional violations. Chapter Four merges the preceding two chapters to demonstrate the constitutional, theoretical, and practical problems of applying harmless error review to constitutional infractions, while Chapter Five traces the numerous potential solutions for the conflict between constitutional rights and the harmless error doctrine proposed by scholars over the decades. Finally, Chapter Six closes with my view that the time has come for the Court or Congress to rethink the harmless error doctrine's application to constitutional rights. The

Court's current jurisprudence has so far deviated from the doctrine's original intent that it has disassociated constitutional violations from judicial remedies,[22] despite the Court's constitutional obligation to support and defend the Constitution.[23] This resulting shift impacts not only individual constitutional protections but also the core values and integrity of our constitutional system. When government actors or the courts ignore our nation's Constitution and laws, "it breeds contempt for the law; invites every man to become a law unto himself; it invites anarchy."[24]

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[22] *See* Brandon L. Garrett, "Innocence, Harmless Error, and Federal Wrongful Conviction Law," *Wisconsin Law Review* 2005, no. 1 (2005): 57, n. 104; *see* Murray, "A Contextual Approach," 1794; the harmless error rule is the "leading contributor to the expansive gap between rights and remedies in criminal procedure;" Sam Kamin, "Harmless Error and the Rights/Remedies Split," *Virginia Law Review* 88, no. 1 (2002): 5-6; harmless error "has the capacity to permanently sever rights from remedies."

[23] U.S. Const. art. III, §§ 1, 2; U.S. Const. art. VI; Garrett, "Innocence, Harmless Error," 57, n. 104; Chapel, "Irony of Harmless Error," 510, 517.

[24] *Olmstead v. United States*, 277 U.S. 438, 485, 48 S.Ct. 564, 575, 72 L. Ed. 944 (1928) (Brandeis, J., dissenting), *overruled in part by Berger v. New York*, 388 U.S. 41, 87 S.Ct. 1873, 18 L. Ed. 2d 1040 (1967), *and overruled in part by Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L. Ed. 2d 576 (1967). *See also* Bilaisis, "Abettor of Courtroom Misconduct," 457; "Society and the courts have a significant interest in promoting confidence in the administration of justice, and in preserving the judicial process from contamination by courses of action found illegal or deemed unfair."

Chapter Two: Constitutional Framework, Principles, and Rights

The Constitution of the United States was created by and for the People.[25] Indeed, the Preamble and Article XII serve as the Constitution's bookends, establishing thereby that it was created by "We the People" and projecting "the message of popular sovereignty."[26] The Constitution's original structure, as drafted by the people's representatives at the Constitutional Convention of 1787, aimed to ensure "life, liberty and the pursuit of happiness" for all people in reaction to the historical abuses of power by English monarchs as well as anti-majoritarian sentiments.[27] The founders believed that a divided government best prevented an "accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many," which they deemed "the very definition of tyranny."[28] In order to further constrain the ability of a majority in one branch from reducing the people's influence, however, the founders also reasoned that this partition "did not mean that these departments ought to have no PARTIAL AGENCY in, or no CONTROL over, the acts of each other."[29] Thus, the Constitution, in its Articles, establishes fundamental protections of the people's power

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[25] U.S. Const. pmbl.; "We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America."
[26] *See* Akhil Reed Amar*, America's Constitution: A Biography* (New York: Random House, 2005), 29.
[27] *See* The Declaration of Independence, ¶ 2.
[28] *See* The Federalist Papers, No. 47.
[29] Ibid. (Emphasis original).

through the separation of governmental powers and a system of checks and balances between them.[30]

Article I ensures that the people directly elect the members of Congress, who, by that election, then represent the people's voice in the creation of laws that "provide for the general Welfare of the United States" and that are "necessary and proper" for carrying such laws into execution.[31] Congress also possesses many administrative functions, such as the ability to investigate executive members of government and to define the jurisdiction of the judiciary, which it may use in checking the other branches.[32] Article II similarly provides that the State legislatures, which are reflections of the people's will, shall appoint representatives to elect the President, who is then responsible for enforcing the laws made by the Congress and preserving, protecting, and defending the

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[30] *See Myers v. United States,* 272 U.S. 52, 85 (1926); "The doctrine of the separation of powers was adopted … not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was not to avoid friction, but, by means of the inevitable friction incident to the distribution of the government powers among three departments, to save the people from autocracy." (Brandeis, J., dissenting), *overruled in part by, Humphrey's Executor v. United States,* 295 U.S. 602 (1935).

The founders drew from and refined the idea of "separation of powers" from John Locke's *Second Treatise of Civil Government* and Montesquieu's *Spirit of the Laws.* Locke proposed separating the powers of the executive and legislative branches. *See* John Locke and Peter Laslett, "Of the Legislative, Executive, and Federative Power of the Common-wealth," in *Two Treatises of Government* (Cambridge: Cambridge University Press, 1993), 130-31. Montesquieu expanded upon Locke, adding the third judiciary branch. Charles Louis de Secondat, Baron de Montesquieu, "Of the Laws Which Establish Political Liberty, with Regard to the Constitution," in *The Complete Works of M. de Montesquieu* (London: T. Evans, 1777), 4 vols. Vol. 1, 197-239.

[31] U.S. Const. art. I, §§ 1, 8. The Congress' powers include the passage of federal laws, establishment of federal courts below the United States Supreme Court, ability to override a presidential veto of a proposed law, and ability to impeach the president. *See* Ibid., §§ 1-10.

[32] Ibid., §§ 1-10.

Constitution.[33] This enforcement power is reserved to the executive branch, meaning that the president can refuse to execute orders from the Supreme Court,[34] and also is entitled to veto laws coming from Congress, absent a two-thirds majority vote in both houses.[35] Finally, Article III assigns to the people's senatorial representatives the authority to confirm the president's nomination of federal judges, whose judicial power then extends to all cases arising under the Constitution and Laws of the United States, with a specific duty to support the Constitution.[36] The Supreme Court holds the largest check on the other branches through judicial review, which allows it to determine whether a legislative or executive action violates any preexisting law and, if so, rule that it is unconstitutional.[37]

In addition to the rights and protections implicit in the Constitution, certain founders sought to enumerate specific fundamental rights within a Bill of Rights. Founder Alexander Hamilton opposed this movement, believing that a bill of rights was both unnecessary and dangerous. In Hamilton's view, the Constitution, by its structure and design, already protects fundamental individual liberties. For example, to prevent governmental abuse, the people, through their congressional representatives, possess the

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[33] U.S. Const. art. II, §§ 1, 3. The President's powers include the power to veto a proposed law, appoint federal judges and officials, make treaties, ensure that all laws are followed, issue pardons, and act as Commander in Chief. *See* Ibid., §§ 1-4.

[34] *See, e.g., Worchester v. Georgia,* 31 U.S. 515 (1832); President Jackson refused to execute the Supreme Court's order of this case.

[35] U.S. Const. art. II, §§ 1-4.

[36] U.S. Const. art. III, §§ 1, 2; U.S. Const. art. VI. The Judiciary's powers include the power to try federal cases and controversies, interpret the Constitution, and declare a law or executive act unconstitutional. *See* Ibid.

[37] U.S. Const. art. III, § 1; U.S. Const. art. VI. *See Marbury v. Madison,* 5 U.S. 137 (1803).

power of impeachment; the Constitution prohibits titles of nobility; all trials for crimes shall be by a jury of peers; and the Constitution allows speech in the form of political dissent without fear of being deemed treasonous. Hamilton added that a Constitution "by the people" necessarily means that the government possesses only those powers expressly granted to it and that all other powers remain with the people. A bill of rights would transgress this principle in two ways: first, express articulation of certain rights might imply that other, unmentioned individual rights are excluded from the Constitution and, second, limitations placed on certain government powers would suggest that the government's powers otherwise are plenary and not limited by the Constitution. In essence, it would give the government powers it did not originally possess and limit the people's rights when the Constitution imposed no such limits.[38] Of course, the Bill of Rights ultimately was ratified in 1791, although Amendments IX and X do appear to address Hamilton's concerns. Amendment IX clarifies that the enumeration of certain rights "shall not be construed to deny or disparage others retained by the people"[39] and Amendment X reinforces that "powers not delegated to the United States" are "reserved … to the people."[40]

Thus, any assessment of the Constitution and Bill of Rights must begin with the understanding that the government does not confer individual rights and liberties on the people but, instead, it exists to protect and uphold the rights people possess inherently by

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[38] *See* The Federalist Papers, No. 84 (Alexander Hamilton, co-authored with James Madison and John Jay).
[39] U.S. Const. amend. IX.
[40] U.S. Const. amend. X.

virtue of being human beings.[41] The question becomes, what rights did the founders believe to be so significant that they expressly reinforced them in the amendments to the Constitution? Most relevant for purposes of this thesis dealing with harmless error are the Fourth, Fifth, and Sixth Amendments, and, by extension, the later addition of the Fourteenth Amendment.[42] The Fourth Amendment protects the right to be secure from unreasonable searches and seizures,[43] and guards an individual's privacy interest, deters abusive police conduct violating this right, and results in exclusion of unlawfully obtained evidence at trial.[44] The Fifth, Six, and Fourteenth Amendments elaborate specific guarantees to ensure a fair trial. The Fifth Amendment prohibits charges without indictment by a grand jury based on probable cause, being placed in jeopardy for the same offense twice, being compelled to incriminate one's self, and deprivation of life, liberty, or property without due process of law.[45] This provision of due process is furthered by the Fourteenth Amendment, which adds the right to equal protection of the laws to prevent bias, prejudice, and discrimination.[46] And the Sixth Amendment elaborates on trial rights, namely to know the nature and cause of the criminal charge pressed, to confront and compel witnesses and have assistance of counsel in presenting a

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[41] Chapel, "Irony of Harmless Error," 509.
[42] While the Eighth Amendment also has bearing, it is not discussed in this thesis.
[43] U.S. Const. amend. IV.
[44] *See* Murray, "A Contextual Approach," 1812; Edwards, "To Err is Human," 1197-98; Epps, "Harmless Errors," 2178-80. *But see* Richard H. Fallon, Jr. and Daniel J. Meltzer, "New Law, Non-Retroactivity, and Constitutional Remedies," *Harvard Law Review* 104, no. 8 (1991): 1774; arguing that the Fourth Amendment protects only against search and seizure and does not provide a personal constitutional right to have the seized evidence excluded at trial.
[45] U.S. Const. amend. V.
[46] U.S. Const. amend. XIV.

defense, and to a speedy and public trial by an impartial jury of peers.[47] These amendments outline "the minimal parameters" for the jury trial that is required by Article 3, § 2[48] for a fair criminal proceeding.[49]

Notably, many of these provisions extend beyond protections for criminal defendants to larger societal and institutional concerns, particularly in terms of the jury's role as the voice of the community and its ability to reach a just conclusion in the context of a procedurally fair trial.[50] For example, from the individual defendant's perspective, the amendments ensure jury consideration of reliable and uncoerced evidence in an unbiased trial wherein the defendant is enabled to marshal contrary evidence with attorney assistance. From a broader perspective, the jury encompasses the "by the people" anchor of the Constitution. Just as the ballot serves as a mechanism for the people to decide who will represent them in both the executive and legislative branches, the jury acts as a means for the people to influence and oversee the judicial branch, which includes that branch's review of executive and legislative decisions.[51] The jury possesses the power to object to a law of Congress or a prosecutor's application of such law

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[47] U.S. Const. amend. VI.
[48] U.S. Const. art. 3, § 2; "The Trial of all Crimes … shall be by Jury."
[49] Chapel, "Irony of Harmless Error," 510.
[50] Fairfax, "Harmless Constitutional Error," 2051-60; Mitchell, "Against Overwhelming Appellate Activism," 1355-57; Chapel, "Irony of Harmless Error," 536-39; Murray, "A Contextual Approach," 1812-22; Edwards, "To Err is Human," 1195-98; Epps, "Harmless Errors," 2178-80.
[51] Fairfax, "Harmless Constitutional Error," 2053; Amar, *America's Constitution*, 237, 239, 229-30; *see Duncan v. Louisiana,* 391 U.S. 145, 156 (1968); "Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge."

through the use of jury nullification and the introduction of mercy in their deliberations.[52] Because of these interests and the importance of the jury's function as the bulwark against tyranny in our democracy,[53] which Hamilton described as "a valuable safeguard to liberty … [and] the very palladium of free government,"[54] the Constitution's right to trial by jury must remain paramount in all considerations of judicial fairness. As the Fifth Amendment broadly states, no person shall be deprived of life, liberty, or property without first receiving due process of law. And due process, in turn, reflects the participatory role of the community through the jury and, thereby, ensures the community's confidence in the legitimacy and reliability of the judicial process and safeguards provided by our democratic government.[55]

Articles III and VI state that it is the role of the federal courts to support the Constitution.[56] While the Constitution provides that the Supreme Court shall be the appellate court, it also grants the legislative branch the power to create inferior federal courts, such as the trial courts in which the juries operate and the intermediary appellate courts of review.[57] Indeed, the existence of a trial court is implicitly presumed, as without a trial court the jury would have no venue, and the Supreme Court would have no appellate purpose. It must be borne in mind, however, that the Constitution and its

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[52] Fairfax, "Harmless Constitutional Error," 2054-60; Mitchell, "Against Overwhelming Appellate Activism," 1355-57.
[53] *See Duncan,* 391 U.S. at 156; "Fear of unchecked power … found expression in the criminal law in the insistence upon [jury trials]."
[54] *See* The Federalist Papers, No. 83.
[55] *See supra* n. 50-54.
[56] U.S. Const. art. III, § 2; U.S. Const. art. VI, § 1.
[57] U.S. Const. art. III, § 2; U.S. Const. art. I, § 8.

amendments require a jury to act as the arbiter of guilt and justice after a fair trial.[58] Thus, distinctions must be drawn between proceedings in trial courts and appellate courts to understand their proper roles within the larger justice system.

A. The Roles of the Courts

Trial courts serve multiple purposes. They provide the public forum for juries to make the legal determination to convict or acquit based on findings of fact, for judges or juries to impose punishment upon guilty lawbreakers, and for public venting of disputes that impact the public interest and public policy. The United States criminal justice system is an accusatory one, but also one which presumes innocence unless the government proves every element of the crime charged beyond a reasonable doubt. A court must inform a jury of the crime's legal elements and provide a public forum in which it can assess the facts to reach a conclusion of legal guilt or innocence.[59] Thus, the Supreme Court has condemned the deprivation of life, liberty, or property in secret[60] and enforced the Sixth Amendment right to a public jury trial, which ensures community discourse and oversight in regard to law and accountability, as well as fair and trustworthy criminal proceedings for defendants.[61]

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[58] U.S. Const. art. III, § 2. This assumes, of course, that the jury has not been waived.
[59] U.S. Const. amend XIII.
[60] *Estes v. Texas,* 381 U.S. 532, 588 (1965); "Essentially, the public-trial guarantee embodies a view of human nature true as a general rule, that judges, lawyers, witnesses, and jurors will perform their respective functions more reasonably in an open court than in secret proceedings. A fair trial is the objective, and 'public trial' is an institutional safeguard for attaining it." (Harlan, J., concurring); *Spano v. New York,* 360 U.S. 315, 320-21 (1959); condemning a secret trial held in a police precinct and without benefit of counsel.
[61] Fairfax, "Harmless Constitutional Error," 2040 & n. 41; Chapel, "The Irony of Harmless Error," 511-12.

In contrast, appellate courts do not provide the public forum for determination of guilt and fact-finding, but act to defend the fairness and sanctity of the trial forum by identifying and reviewing errors presented there, fixing those errors when found, and clarifying the law to steer the course so that the same errors may be avoided in the future.[62] Errors come in different shapes and sizes. They may involve trial court discretionary rulings, such as the exclusion or admission of evidence, which is reviewed for abuse of discretion, factual determinations, such as a jury's verdict, which is reviewed for clear error,[63] or applications of the law, such as statements made in jury instructions, which are reviewed *de novo*.[64] When an error was objected to at trial and is raised on appeal, the appellate court should correct it, absent harmless error.[65] Regarding clarification of the law, appellate courts fulfill this role by the issuance of written legal opinions, which, in conjunction with *stare decisis,*[66] provide stability to the law and allow

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[62] Chapel, "Irony of Harmless Error," 514-15.

[63] Goldberg, "Constitutional Sneak Thief," 427; "Appellate courts never act as fact-finders for matters which must be determined beyond a reasonable doubt," or, at least they are not supposed to do so. Appellate courts are restricted to reviewing what the trial court fact-finders determined because they are in a better position to assess contradictory evidence and the credibility of witnesses, having seen them first hand. Ibid., 429.

[64] Susan E. Provenzano et al., *Advanced Appellate Advocacy* (New York: Wolters Kluwer, 2016), 26-39; *see also* Ruggero J. Aldisert, *The Judicial Process: Readings, Materials and Cases* (Eagan: West Publishing Company, 1976), 689; *De novo* review means that the appellate court conducts fresh review of the error, without any deference to the trial judge's decision, whereas abuse of discretion and clear error review both afford substantial deference to the decision of the trial judge or the jury.

[65] Provenzano et al., *Advanced Appellate Advocacy*, 33-34.

[66] *Stare decisis* "is the principle that a decision made in one case will be followed in the next case." Antonin Scalia, *A Matter of Interpretation* (Princeton: Princeton University Press, 1997), 7.

the public, attorneys, and courts to regulate their future behavior.[67] Ultimately, however, both trial and appeal courts must aim to preserve and protect the Constitution. Violations of constitutional rights, if allowed to go *un*corrected, *fail* the individual whose protections are transgressed, *fail* the institutional democratic ideals promoted by those protections, and *fail* to deter government officials such as police and prosecutors from committing abuses, thereby diluting protections against government abuse and tyranny.

B. The Role of Prosecutors

Prosecutors within the executive branch also play a critical role in ensuring that constitutional rights are protected. Indeed, it has been stated that prosecutors have "more control over life, liberty, and reputation than any other person in America."[68] The Constitution in Article VI and Congress by legislation thus both require that upon taking the oath of office, prosecutors must swear to "support and defend the Constitution" and "bear truth faith and allegiance" to it.[69] Almost a century ago, the judicial branch reinforced this mandate by more fully articulating the special responsibilities of the prosecutor in the American system of justice:

> The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and *whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that*

[67] Daniel J. Meador, Thomas E. Baker, and Joan E. Steinman, *Appellate Courts: Structures, Functions, Processes, and Personnel* (Newark: Lexis-Nexis Publishing Company, 2006), 5-9.
[68] *See* Robert H. Jackson, "The Federal Prosecutor," in *American Institute of Criminal Law and Criminology* 31 (1940): 3.
[69] *See* U.S. Const. Art. VI; U.S. Const. Art. I, § 8; 5 U.S.C. § 3331 (1966).

> *justice shall be done*. As such, he is in a peculiar and very definite sense the servant of the law, the *twofold aim* of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor – indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.[70]

As the Court has stated, and numerous commentators have explained,[71] American prosecutors occupy a unique position of serving in the dual role of "advocate" and "seeker of justice." On the one hand, "[t]hey are assigned the task of arguing for conviction" and, on the other hand, they "have special professional obligations to ensure that the system of criminal adjudication is just and procedurally fair [by] … enforcing the law [and] … interpret[ing] and apply[ing] the Constitution in good faith."[72] Juries *depend on* prosecutors fulfilling both of these roles, and juries *assume* that prosecutors will uphold, and not violate, constitutional rights.[73] Thus, criminal defendants whose rights are transgressed suffer a multi-leveled harm; not only are their rights violated, but they are prejudiced by the jury's assumption that no violation *could have* occurred. Prosecutors are

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[70] *Berger v. United States,* 295 U.S. 78, 88-89 (1935). (Emphasis supplied).
[71] *See, e.g.,* Eric S. Fish, "Prosecutorial Constitutionalism," *Southern California Law Review* 90 (2017); Bruce A. Green, "Prosecutorial Ethics in Retrospect," *Georgetown Journal of Legal Ethics* 30 (2017); Niki Kuches "Appendix A: Report to the ABA Commission on Evaluation of the Rules of Professional Conduct: Special Responsibilities of a Prosecutor," *Georgetown Journal of Legal Ethics* 22 (2009); Bruce A. Green, "Why Should Prosecutors 'Seek Justice'?" *Fordham Urban Law Journal* 26, no. 3 (1999).
[72] Fish, "Prosecutorial Constitutionalism," 239-40; Goldberg, "Constitutional Sneak Thief," 438-39.
[73] *Berger,* 295 U.S. at 88-89.

stamped with the imprimatur of rightfully seeking guilt within the framework of a trial that is assumed to be fair and just.

The duty of prosecutors to put justice before convictions does not always reflect reality, however, because prosecutors are not always adept at balancing their dual roles and because their personal futures often are at odds with this delicate balance. First, their role as advocate is premised on the Anglo-American-based "invisible hand" theory that by pitting two sides against each other, one side seeking conviction and the other side seeking acquittal, the resulting outcome will reflect a well-vetted, accurate, and just jury decision.[74] By contrast, their role as "ministers of justice" originates from the European civilian inquisitorial tradition of a single prosecutor fairly and even-handedly presenting all evidence, both favorable and unfavorable, to a single judge in the pursuit of a just verdict.[75] This combination of adversarial and inquisitorial roles necessarily creates conflict for American prosecutors. The former places the prosecutor in the role of a gladiator in a contest, while the latter places the prosecutor in a role akin to "second

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[74] Fish, "Prosecutorial Constitutionalism," 245-46; citing Jon H. Langein, "The Origins of Public Prosecution at Common Law," *American Journal of Legal History* 17, no. 4 (1973): 317-18, and Roger A. Fairfax, Jr., "Delegation of the Criminal Prosecution Function to Private Actors," *U.C. Davis Law Review* 43 (2009): 421-23; both explaining that in the historical English and pre-1800 American traditions, criminal punishment was through private pursuit of charges against a criminal and, therefore, necessarily adversarial in nature.

[75] The civilian legal tradition of many European countries must be contrasted with the common-law tradition of England. The former does not employ juries, reflects presentation of all facts and law, both positive and negative, to a single adjudicating judge, who may also order additional investigation should he or she deem it necessary. The latter reflects the adversarial method of two opposing sides presenting their best version of the law and facts to a jury, which then applies common sense and community values to reach the fairest outcome. A.N. Yiannopoulos, *Louisiana Civil Law System* (Baton Rouge, LA: Claitor's Publishing Division, 1977), 38-42.

judge" in a neutral proceeding.[76] Noting this tension, the Supreme Court repeatedly has elevated the prosecutor's truth-seeking function over it advocacy function, stating that "the adversary system of prosecution [must not] descend to a gladiatorial level unmitigated by any prosecutorial obligation for the sake of truth."[77] Policing themselves, lawyers have recommended a similar, albeit, nonbinding provision. American Bar Association Model Rule of Professional Conduct 3.8, comment 1, explicitly states that while serving as both an advocate and a minister of justice, a prosecutor has "specific obligations to see that the defendant is accorded procedural justice, that guilt is decided upon the basis of sufficient evidence, and that specific precautions are taken to prevent and to rectify the conviction of innocent persons."[78]

The Department of Justice's United States Attorneys' Manual provides similar institutional guidelines, and the States' ethical rules and disciplinary procedures bind prosecutors practicing within their jurisdictions.[79] The Manual expressly states that its provisions *are not* judicially enforceable by private parties, but the Justice Department's

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[76] Fish, "Prosecutorial Constitutionalism," 246-48.
[77] *Kyles v. Whitley,* 514 U.S. 419, 439-40 (1995) (citations omitted). *Accord Berger,* 295 U.S. at 88-89; A prosecutor is "the representative ... of a sovereignty ... whose interest ... in a criminal prosecution is not that it shall win a case, but that justice shall be done." *But see* Fish, "Prosecutorial Constitutionalism," 250; noting that a prosecutor must follow the Constitution and judicial interpretations of it, but otherwise may exploit "loopholes" that make obtaining a conviction easier as long as the position is taken in good faith.
[78] Model Rules of Prof'l Conduct rule 3.8, cmt. 1 (2016). *See also* ABA Criminal Justice Standards for the Prosecutor Function § 3-1.2(b) (1993); "The prosecutor is an administrator of justice, a zealous advocate, and an officer of the court."
[79] In 1998, Congress enacted the McDade Amendment after decades-long resistance from the Justice Department. The amendment provides that federal prosecutors are governed by State ethical rules and disciplinary proceedings in the State(s) in which they work. *See* 28 U.S.C.A. § 530B (1998). *See* Kuches, "Appendix A: Report," 466-70; detailing the debates leading up to the enactment of the McDade Amendment.

Office of the Inspector General and Office of Professional Responsibility are empowered to investigate prosecutorial violations internally.[80] State codes of professional conduct *are* enforceable based on a complaint by a private party or a judge, and the resulting State disciplinary proceedings may lead to several different types of sanctions against an attorney, including a prosecutor.[81] Comparison of State laws shows that all 50 States have adopted ABA Model Rule 3.8, entitled "Special Responsibilities of a Prosecutor."[82]

Together, State-law versions of ABA Model Rule 3.8 and the United States Attorneys' Manual impose on prosecutors a series of professional obligations, many of which are designed to protect the constitutional criminal procedural rights that appear in the Fourth, Fifth, Sixth, and Fourteenth Amendments. ABA Model Rule 3.8, as complemented by the United States Attorney's Manuel and other behavioral guides for prosecutors, requires that prosecutors shall:

(a) refrain from indicting a charge without adequate evidence that that the defendant committed the crime,[83] which supports the Fifth Amendment right to a proper

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[80] *See* United States Attorneys' Manual §§ 1-1.100, 1-4.100 (2015). According to Justice Department statistics, for the three-year period of 2015 to 2017, 128 new inquiries into alleged violations and 124 new formal investigations were opened. U.S. Dep't of Justice: Office of Prof'l Responsibility, Fiscal Year 2017 Annual Report 2017, accessed January 16, 2019, https://www.justice.gov/page/file/1082916/download.

[81] Examples of sanctions include attorney suspension, disbarment, reprimand, and, in rare cases, the reversal of a defendant's conviction. *See* Fish, "Prosecutorial Constitutionalism," 277 & n. 176.

[82] ABA CPR Policy Implementation Committee 2017, accessed January 16, 2019, https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_3_8.pdf. While at the time of the ABA Report, California's rules of professional conduct were structured differently, they now also contain Rule 3.8. *See* California Rules of Prof'l Conduct (2018). *See also supra* n. 78 & accompanying text.

[83] Model Rules of Prof'l Conduct rule 3.8(a) (2016); United States Attorneys' Manual §§ 9-27.200, 9-27.220, 9.27-320 (2015). *See also* ABA Criminal Justice Standards for the Prosecutor Function § 3-4.3 (1993).

grand jury indictment and due process,[84] and the Fourteenth Amendment right not to be targeted in violation of equal protection.[85]

(b)-(c) not seek a waiver of an unrepresented defendant's pretrial rights, but, instead, ensure that the defendant has been advised of the right to counsel, how to get one, and given a reasonable opportunity to obtain one, [86] all of which support the Sixth Amendment.[87]

(d), (g-h) make timely disclosure to the defense of all exculpatory, impeachment, or other evidence or information tending to negate the guilt of the accused or mitigate the offense, as well as any new such evidence that may later come to light, and even seeking release for a wrongful conviction,[88] all of which implicates numerous due process

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[84] U.S. Const. amend. V, XIV. *Compare* Model Rules of Prof'l Conduct rule 3.8(f) (2016); prohibiting prosecutors, law enforcement personnel, and others assisting them from violating a defendant's right to due process and a fair trial by making extrajudicial comments that might trigger or reinforce public condemnation of the defendant.

[85] *See* Akhil Reed Amar and Jonathan L. Marcus, "Double Jeopardy Law After Rodney King," *Columbia Law Review* 95, no. 1 (1995): 2; adding that the double jeopardy clause should preclude the dual sovereignty doctrine permitting federal prosecution following State prosecution for the same crime, unless the federal prosecution would also promote Fourteenth Amendment equal protection.

[86] Model Rules of Prof'l Conduct rule 3.8(b)(c) (2016); National Prosecution Standards § 2-5.6 (2009); ABA Criminal Justice Standards for the Prosecutor Function § 3-3.10(a) (1993). *See also* Model Rules of Prof'l Conduct rule 3.8(e) (2016); prohibiting a prosecutor from interfering with the right to counsel by precluding subpoena of a defendant's lawyer in an effort to indict or prosecute the defendant, except in limited circumstances; United States Attorneys' Manual §§ 9-5.150 (2015); imposing limitations on a prosecutor's ability to seek closed trial proceedings because the Sixth Amendment requires a public trial.

[87] U.S. Const. amend. VI.

[88] Model Rules of Prof'l Conduct rule 3.8(d), (g), (h) (2016); United States Attorneys' Manual §§ 9-5.001, 9-11.151, 9-11.231, 9-11.233 (2015). *See also* ABA Criminal Justice Standards for the Prosecutor Function § 3-2.7, 3-3.5, 3-3.6 (1993). *And see Brady v. Maryland,* 373 U.S. 83, 87 (1963); *United States v. Bagley,* 473 U.S. 667, 682 (1985); *Kyles,* 514 U.S. at 437.

constitutional protections relating to the lawfulness of and ability to address evidence and witnesses under the Fourth, Fifth, Sixth, and Fourteenth Amendments.[89]

All of the above binding State codes of professional conduct and the Department of Justice's professional guidance manuals serve as extrajudicial tools to ensure constitutional prosecutorial behavior. Or, at least, this premise is true in theory. Numerous commentators have noted that the States and Justice Department are reluctant to hold prosecutors accountable for ethical, even constitutional, violations.[90] Moreover, as mentioned earlier, a second unfortunate reality is that prosecutors have personal reasons for placing obtaining convictions over seeking justice. A prosecutor's position, promotions, and non-governmental career aspirations may depend on maintaining a high

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[89] U.S. Const. amend. IV, V, VI, XIV.

[90] Fish, "Prosecutorial Constitutionalism," 277-78; Green, "Prosecutorial Ethics," 462, 468, 471; Center for Public Integrity, *Harmful Error: Investigating America's Local Prosecutors* (Washington D.C.: Public Integrity Books, 2003), i, 2; Kathleen M. Ridolfi, Maurice Possley, and Northern California Innocence Project, "Preventable Error: A Report on Prosecutorial Misconduct in California 1997-2009," *Northern California Innocence Project Publications* 2 (2010): 3, https://digitalcommons.law.scu.edu/ncippubs/2/; David Keenan et al., "The Myth of Prosecutorial Accountability After *Connick v. Thompson*: Why Existing Professional Responsibility Measures Cannot Protect Against Prosecutorial Misconduct," *Yale Law Journal* 121 (2012): 220; Richard A. Rosen, "Disciplinary Sanctions Against Prosecutors for *Brady* Violations: A Paper Tiger," *North Carolina Law Review* 65, no. 4 (1987): 730-31; Fred C. Zacharias, "The Professional Discipline of Prosecutors," *North Carolina Law Review* 79, no. 3 (2001): 751-53; Bruce A. Green, "Policing Federal Prosecutors: Do Too Many Regulators Produce Too Little Enforcement," *St. Thomas Law Review* 8 (1995): 69, 94; Ken Armstrong and Maurice Possley, "The Verdict: Dishonor," *Chicago Tribune*, January 11, 1999, http://www.chicagotribune.com/new/watchdog/chi-020103trial1-story.html; Neil Gordon, "Misconduct and Punishment: State Disciplinary Authorities Investigate Prosecutors Accused of Misconduct," last modified January 24, 2018, *Center for Public Integrity*, http://www.publicintegrity.org/2003/06/26/5532/misconduct-and-punishment.

rate of convictions.[91] Prosecutors also face bureaucratic and professional pressures to convict, especially if they are elected officials.[92] All of these factors disincentivize prosecutors from making concessions, based on constitutional rights, that might lower their chances of winning. The courts' willingness to invoke the doctrine of harmless error to affirm convictions, despite constitutional errors, exacerbates the conflict presented by the prosecutor's dual role as advocate and seeker of justice by encouraging prosecutors to subordinate respect for the Constitution to the desire to convict. Prosecutors, knowing that the harmless error doctrine will likely neuter many of their errors, may ignore their oath to support the law and Constitution, opting, instead, to elevate convictions and personal interests over justice.

[91] Rachel E. Barkow, "Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law," *Stanford Law Review* 61, no. 4 (2008): 883; Prosecutors do not like to admit that they might have wasted resources investigating a non-culpable defendant, and they are incentivized to seek strong records of conviction and lengthy sentences so as to be promoted from within or land high-powered, non-governmental jobs later.
[92] Alex Kozinski, "Criminal Law 2.0," *Georgetown Law Journal Annual Criminal Law Review* 44 (2015): xxvi, xxxviii; Following the release of an innocent man a prosecutor had wrongfully convicted 30 years earlier, the prosecutor, tellingly, apologized:

> In 1984, I was 33 years old. I was arrogant, judgmental, narcissistic and very full of myself. I was not as interested in justice as I was in winning. To borrow a phrase from Al Pacino in the movie "And Justice for All," "Winning became everything."

Chapter Three: Harmless Error Then and Now

The Constitution's structure and protection of individual rights support and defend the ideal of a fair criminal trial. To understand why the doctrine of harmless constitutional error poses a significant danger to this structure and these rights, the harmless error doctrine's origin and evolution must be traced.

A. The Original Purpose and Evolution of Harmless Error Review

Despite the Constitution's creation in 1789, the concept of harmless constitutional error did not emerge in American law until almost two hundred years later. It evolved from the English system, despite significant differences existing between the two systems that, arguably, make harmless error analysis suitable for England, but destructive for the United States.[93] American appeals proceed on the record created in the trial court and the parties briefing regarding alleged errors that were either preserved by objection in the trial court or are "plain,"[94] with no additional testimony or evidence given on appeal and, frequently, the absence of oral argument. The appellate judges assess the record and render a written decision, and if the decision is to reverse a conviction, the result is a remand to the trial court for a new trial.[95] By contrast, English appeals are first screened by a single judge, who either grants or denies permission to appeal. If permission to

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[93] Chapel, "Irony of Harmless Error," 506-07, 516-23, 531.
[94] *See* Fed. R. Cr. P. 52(b); explaining that if a party does not bring a potential error to the trial judge's attention when it occurs, appellate courts apply the more difficult "plain error" standard of review, which requires that the complaining party demonstrate four things: (1) an error occurred; (2) the error was plain; (3) the error affected the party's substantial rights; and (4) the error "seriously affected the fairness, integrity, or public reputation of the judicial proceeding." *United States v. Olano,* 507 U.S. 725 (1993). The decision of whether the fourth prong is met lies within the appellate court's discretion.
[95] Chapel, "Irony of Harmless Error," 517-18.

appeal is granted, the judges proceed on a very different record. The record from the trial court is more limited, the parties do not file briefs, and oral argument, at which the parties may present new testimony and evidence and raise new errors, plays a significant role.[96] As a general rule, English appellate courts issue an oral decision either dismissing the appeal as meritless or allowing it and reversing the conviction or reducing the sentence, usually without a remand for a new trial.[97] Notably, the standard applied in English appeals is the accuracy of the verdict, whereas, in American appeals, appellate courts are bound to protect and preserve the constitutional criminal procedural rights contained in the written Constitution.[98] "The English concept of a fair trial thus requires only that the accused be proven guilty. The American concept of a fair trial requires much more," and these "fundamental differences" should influence differential application of the harmless error doctrine in the two systems.[99]

Despite these differences, the harmless error doctrine developed in the United States much like it did in England.[100] In England, appellate courts initially used harmless error review in the early nineteenth century to affirm convictions if sufficient evidence existed, independent of the error.[101] Over time, however, judges began to believe that this broad harmless error rule violated defendants' rights, provided inadequate remedies, and

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[96] Ibid. *See https://www.cps.gov.uk/legal-guidance/appeals-court-appeal.* Accessed January 25, 2019.
[97] Although English courts may remand for a new trial, this rarely occurs. Chapel, 517-18.
[98] Ibid.
[99] Ibid., 519.
[100] Chapel, "Irony of Harmless Error," 506.
[101] Epps, "Harmless Errors," 2127; quoting *Doe v Tyler*, 130 Eng. Rep. 1397 (Common Pleas 1830).

caused the rules of evidence to be less carefully considered by the courts.[102] Thus, in the mid-1830s, a stricter form of review arose called the "Exchequer Rule."[103] The rule stated that "a trial error as to the admission of evidence was presumed to have caused prejudice" and, therefore, required conviction reversal.[104] While this automatic reversal rule was intended to protect people's rights from violations that occurred in their previous trials, it also, unintentionally, resulted in overly-strict application of the standard, wherein judges would reverse convictions based on any technical error.[105] By the mid-nineteenth century, the standard became so ingrained in English common law that most trial errors found on appellate review resulted in automatic reversal. Not until decades later did Parliament enact the Judicature Act of 1873, which implemented a harmless error rule for civil disagreements,[106] and, even later, in 1907, a harmless error rule for criminal cases through the Criminal Appeal Act.[107] These Acts were slow to accomplish their intended

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[102] Craig Goldblatt, "Harmless Error as Constitutional Common Law: Congress's Power to Reverse *Arizona v. Fulminante,*" *University of Chicago Law Review* 60, no. 3/4 (1993): 994.

[103] Roger J. Traynor, *The Riddle of Harmless Error* (Columbus: Ohio State University Press, 1970), 8.

[104] Wayne R. LaFave, Gerald H. Israel, and Nancy J. King, *Criminal Procedure* Vol. 7, (Saint Paul: Thomson Reuters, 2015), § 27.6(a).

[105] *Crease v Barrett,* 149 Eng. Rep. 1353 (Exchequer 1835)*; see also* Traynor, *Riddle of Harmless Error*, 8; Justice Traynor says "the Exchequer Rule was not invented … in *Crease*, but rather by the judges who misread the precedent in applying *Crease* to the case of the moment." *Crease* does still serve as a historical marker of this change in review, however. *See* Fairfax, "A Fair Trial," 435.

[106] *See* Judicature Act, 1873, 36 & 37 Vict., c. 66, § 48 (Eng.).

[107] *See* Criminal Appeal Act, 1907, c. 23, § 4 (Eng.); "Provided that the court may, notwithstanding that they are of [the] opinion that the point raised on appeal might be decided in favour of the appellant, dismiss the appeal if they consider that no substantial miscarriage of justice has actually occurred." The word "substantial" was deleted in 1966. *See* Criminal Appeal Act, 1966, c. 31, § 2(1) (Eng.).

goals because appellate judges hesitated to apply harmless error to affirm verdicts that rested on errors.[108] Ultimately, however, the English harmless error rule did prevail.[109]

Meanwhile, in America, the Exchequer Rule borrowed from England continued to hold sway through the nineteenth century.[110] By the early twentieth century, however, it became noticeable that appellate judges were reversing criminal convictions based on minor errors of form or procedure.[111] Commentators labeled the appellate courts "impregnable citadels of technicality."[112] In one infamous example, mere omission of the word "the" before "peace and dignity" in an indictment resulted in reversal, after which a continued cumulation of minor errors resulted in the case being tried-reversed-and retried four times before reaching conclusion.[113] Defense lawyers became known for placing errors in the record, resting easy in the knowledge that even minor errors would overturn a conviction and give them a second chance at acquittal.[114] Public and professional outcry resulted in a coalition that pressed for remedial legislation. Spearheaded by the American

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[108] Traynor, *Riddle of Harmless Error*, 11. *See also* Epps, "Harmless Errors," 2127; Fairfax, "A Fair Trial," 2032.
[109] Chapel, "Irony of Harmless Error," 516-23, 531
[110] *See* Fairfax, "A Fair Trial," 436; "American courts and legislatures seemed to adhere steadfastly to practices inherited from the English, long after the English had discarded the approach as unsatisfactory." Daniel J. Meltzer, "Harmless Error and Constitutional Remedies," *University of Chicago Law Review* 61, no. 1 (1994): 20; quoting Traynor, *Riddle of Harmless Error*, 13-14; John M. Greabe, "The Riddle of Harmless Error Revisited," *Houston Law Review* 54, no. 1 (2016): 66-67.
[111] Edwards, "To Err is Human," 1174.
[112] Goldberg, "Constitutional Sneak Thief," 422 & n. 11, quoting, M.A. Kavanaugh, "Improvement of Administration of Criminal Justice by Exercise of Judicial Power," *American Bar Association Journal* 11, no. 4 (1925): 222.
[113] Edwards, "To Err is Human," 1174.
[114] Goldberg, "Constitutional Sneak Thief," 422-23. *See also* Kamin, "Rights/Remedies Split," 10; trials were transformed into "opportunities 'for sowing reversible error in the record.'" (Citation omitted).

Law Institute and the American Bar Association, legal intellectuals such as Roscoe Pound, John Henry Wigmore, Felix Frankfurter, and William Howard Taft[115] proposed adoption of a harmless error law which, in 1919, was enacted as an amendment to the Judicial Code. Act 269 provided: "On the hearing of any appeal, certiorari, writ of error, or motion for a new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties."[116] Reformers hoped the provision would improve judicial efficiency and enhance public confidence in the criminal justice system.[117]

Act 269 later was repealed and replaced by two provisions,[118] Federal Rule of Criminal Procedure 52(a), to govern proceedings at the trial court level, and 28 U.S.C. § 2111, to govern review on appeal. Created by the Supreme Court in 1946 under the authority granted to it by Congress to promulgate rules of criminal procedure,[119] Rule 52(a) states: "Any error, defect, irregularity, or variance that does not affect substantial

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[115] Goldberg, "Constitutional Sneak Thief," 422 & n. 15; Fairfax, "A Fair Trial," 437-41.

[116] Epps, "Harmless Errors," 2128; citing Act of Feb. 26, ch, 48, 1919, Pub. L. No. 65-281, 40 Stat. 1181, *repealed by* Act of June 25, 1948, ch. 646, 62 Stat. 892, 992.

[117] Fairfax, "A Fair Trial," 436-437. Ironically, they also recognized that concerns about fairness might arise under a standard that allows for affirmance, despite trial errors. They therefore endeavored to influence public opinion, the Senate, and the judiciary through the use rhetoric by blaming appellate courts for reversing convictions of criminals based on mere technicalities, while also pointed out increasing crime rates. Ibid., 443-48.

Prophetically, Congress initially was reticent to apply harmless error to criminal trials for fear that constitutional criminal procedural rights would be "too easily relaxed." David R. Dow and James Rytting, "Can Constitutional Error be Harmless?" *Utah Law Review* 2000, no. 3 (2000): 486, 484.

[118] Act of Feb. 26, ch, 48, 1919, Pub. L. No. 65-281, 40 Stat. 1181, *repealed by* Act of June 25, 1948, ch. 646, 62 Stat. 892, 992.

[119] Fairfax, "A Fair Trial," 450; Act of June 29, 1940, Pub. L. No. 76-675, 54 Stat. 688.

rights must be disregarded."[120] Enacted by Congress in 1949, § 2111 provides: "On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record, without regard to errors or defects which do not affect the substantial rights of the parties."[121]

The early cases to discuss the harmless error rule and its relationship to substantial rights did so in the context of non-constitutional errors, and while prior-legal reformers, Felix Frankfurter and William Howard Taft served as Justices. These Justices knew and articulated in their opinions both the harmless error rule's purposes and its limitations: "to prevent matters concerned with the mere etiquette of trials and the formalities and minutiae of procedure from touching the merits of a verdict."[122] Justice Frankfurter, citing Chief Justice Taft, further explained, "[t]he 'technical errors' against which Congress protected jury verdicts are of the kind which led some judges to trivialize law by giving all legal prescriptions equal potency. Deviations from formal correctness do not touch the substance of the standards by which guilt is determined in our courts, and it is these that Congress rendered harmless."[123]

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[120] Fed. R. Crim. P. 52(a) (2018). The comments to the rule explain that Rule 52(a) is a "restatement" of former Act 269 and that any changes are intended to be stylistic only. Ibid., comment (a) & amendment comments.
[121] 28 U.S.C. § 2111 (2018). Like Rule 52(a), § 2111 also "[i]ncorporates" the former harmless-error statute, Act 269, without any intention to change its meaning. H.R. Rep. No. 352, 81st Cong., 1st Sess., 18 (1949), U.S. Code Cong. Serv. 1949, 1248.
[122] *Bruno,* 308 U.S. at 294 (1939) (Frankfurter, J, writing for a virtually unanimous court, with Reynolds, J., concurring only in the result).
[123] *See Bollenbach,* 326 U.S. at 614-15 (1946) (Frankfurter, J); William Howard Taft, "Administration of Criminal Law," *Yale Law Journal* 15, no. 1 (1905): 15. *See also Tumey v. Ohio,* 273 U.S. 510, 535 (1927); Chief Justice Taft writing for the Court, of which Frankfurter was a member, and rejecting the government's argument that "the evidence shows clearly that the defendant is guilty … and therefore that he cannot complain of a lack of due process".

Yet, the statutory term "substantial rights" remained a vague one. In *Kotteakos v. United States,*[124] and *Bollenbach v. United States,*[125] the Court clarified the term's meaning, the proper application of harmless error, and its limitations in relation to jury determinations. First, the Court explained that appellate judges are not to decide cases as if they are the jurors:

> [I]t is not the appellate court's function to determine guilt or innocence. Nor is it to speculate upon probable reconviction and decide according to how the speculation comes out. … Those judgments are exclusively for the jury ….
>
> [T]he question is, not were [the jurors] right in their judgment, regardless of the error or its effect upon the verdict. It is rather what effect the error had or reasonably may be taken to have had upon the jury's decision. The crucial thing is the impact of the thing done wrong on the minds of other men, not one's own, in the total setting.[126] [It] … is not whether guilt may be spelt out of a record,[127] but whether guilt has been found by a jury according to the procedure and standards appropriate for criminal trials in the federal courts.[128]

[124] *Kotteakos,* 328 U.S. 750.
[125] *Bollenbach,* 326 U.S. 607.
[126] *Kotteakos,* 328 U.S. at 764 (citations omitted).
[127] Here, the Court was responding to the government's argument that abundant other, untainted record evidence showed that the defendant was guilty of the crime charged.
[128] *Bollenbach,* 326 U.S. at 614-15 (Frankfurter, J.).

Next, the Court explained the harmless error test as one assessing the impact of the error:

> 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, except perhaps when the departure is from a constitutional norm or a specific command of Congress.
>
> 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."[129]

Finally, the Court warned against too broad of an application of the harmless error rule:

> From presuming too often all errors to be 'prejudicial,' the judicial pendulum need not swing to presuming all errors to be 'harmless' if only the appellate court is left without doubt that one who claims its corrective process is, after all, guilty. In view of the place of importance that trial by jury has in our Bill of Rights, it is not to be supposed that Congress intended to *substitute* the belief of appellate judges in the guilt of an accused, however, justifiably engendered by the dead record, *for* ascertainment of guilt by a jury under appropriate judicial guidance, however cumbersome that process may be.[130]

In *Bollenbach,* the Court found that a trial judge's erroneous answer to a jury question about what was sufficient evidence to convict was harmful, stating "we cannot

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[129] *Kotteakos,* 328 U.S. at 764-65. (Citations omitted).
[130] *Bollenbach,* 326 U.S. at 614-15. (Emphasis supplied).

treat the manifest misdirection in the circumstances of this case as one of those 'technical errors' which 'do not affect the substantial rights of the parties …'"[131] In *Kotteakos,* the Court held that a variance between an indictment charging one conspiracy and proof that established only "separate and distinct offenses" to be harmful, stating "our government is not one of mere convenience or efficiency. It too has a stake, with every citizen, in his being afforded our historic [sic] individual protections, including those surrounding criminal trials. About them we dare not become careless or complacent …."[132]

B. Application of Harmless Error Review to Constitutional Rights

For many decades, it seemed inconceivable that the harmless error rule would be applied to *constitutional* errors.[133] Afterall, a constitutional error could not be viewed as a "mere technicality," and the Court had demonstrated its desire to be protective of individual rights in criminal trials.[134] In 1963, however, the Court flirted with the possibility that harmless error might apply to constitutional violations in *Fahy v.*

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[131] Ibid., 614. *See Kotteakos,* 328 U.S. at 760; "a check upon arbitrary action and essential unfairness in trials," "without giving men fairly convicted the multiplicity of loopholes." *See also Bihn v. United States,* 328 U.S 633, 639 (1946); jury instruction that suggested erroneous standard of guilt found harmful. The Court stated, "[n]or is it enough for us to conclude that guilt may be deduced from the whole record. Such a course would lead to serious intrusions on the historic [sic] functions of the jury under our system of government."

[132] *Kotteakos,* 328 U.S. at 773. *See also Krulewitch v. United States,* 336 U.S. 440, 445 (1949); erroneous admission of hearsay evidence that implied the defendant was guilty was harmful. The Court rejected the government's argument that the evidence was "merely cumulative," stating "[w]e cannot say that the erroneous admission of the hearsay declaration may not have been the weight that tipped the scales against petitioner."

[133] Kamin, "Rights/Remedies Split," 9; "Prior to the 1960s, there was reason to think that no error of constitutional dimension could ever be regarded as 'harmless.'" (Citation omitted).

[134] *See supra* nn. 131-32. *See also* Edwards, "To Err is Human," 1175.

Connecticut.[135] There, although an illegal search and seizure occurred in violation of the Fourth Amendment, and although *Mapp v. Ohio*[136] had held that evidence obtained this way was inadmissible and required reversal, the Connecticut Supreme Court found that the error was harmless under the State's harmless error statute.[137] On writ of certiorari, the United States Supreme Court did not directly answer the question of whether harmless error applies to federal constitutional violations; instead, it reversed because the unlawful evidence introduced at Fahy's trial was prejudicial.[138] In so doing, however, the Court made a foundational statement: "the question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction."[139] This statement presaged the standard that the Court would adopt when it finally held, in just a matter of years, that the harmless error doctrine applies to federal constitutional violations.

That holding came in *Chapman v. California*.[140] *Chapman* involved a California State provision that allowed the prosecutor to comment on the defendants' failure to testify at trial. After the trial, but before the appeal, the United States Supreme Court decided *Griffin v. California,*[141] which invalidated the California provision, holding that it violated the Federal Constitution's Fifth Amendment right against self-incrimination.

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[135] *Fahy v. Connecticut,* 375 U.S. 85 (1963).
[136] *Mapp v. Ohio,* 367 U.S. 643 (1961).
[137] *Connecticut v. Fahy,* 183 A.2d 256, 261-62 (Conn. 1962).
[138] *Fahy,* 375 U.S. at 91-92. *See also Bumper v. North Carolina,* 391 U.S. 543 (1968); admission of rifle obtained in violation of Fourth Amendment was "plainly damaging evidence," requiring reversal.
[139] *Fahy,* 375 U.S. at 86-87.
[140] *Chapman,* 386 U.S. 18 (1967).
[141] *Griffin v. California,* 380 U.S. 609 (1965).

On appeal, the California Supreme Court recognized *Griffin* and the constitutional violation, but held the error harmless under its State provision forbidding reversal unless "the error complained of ha[d] resulted in a miscarriage of justice."[142] The State court's application of this test asked whether, putting aside the error, "overwhelming evidence" existed in the record to support the defendants' convictions.[143] The California Supreme Court held that such evidence did exist and affirmed.

Reversing the California Supreme Court, the United States Supreme Court first articulated that federal law applies to violations of the Federal Constitution,[144] and then rearticulated the purpose of the harmless error rule to "block setting aside convictions for small errors or defects that have little, if any, likelihood of having changed the result of the trial."[145] Next, however, it made a rather shocking statement when juxtaposed against the reasons for the harmless error rule: "Although our prior cases have indicated that there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error,"[146] "there may be some constitutional errors which in the setting of a particular case are *so unimportant and insignificant* that they may, consistent with the Federal Constitution, be deemed harmless, not requiring the automatic reversal

[142] *People v. Tealer,* 404 P.2d 209 (1965), citing Cal. Const. art. VI, § 4.5 (1965).
[143] *Chapman,* 386 U.S. at 23.
[144] Ibid., 22; Kamin, "Rights/Remedies Split," 16; This result was "born of concern that state courts, if left free to apply their own harmless error standards, would dilute federal constitutional norms by too easily finding that constitutional errors were not prejudicial," quoting Meltzer, "Constitutional Remedies," 5; ibid., 1-6; explaining that federal law preempts state law in matters presenting federal constitution questions; ibid.; noting that in 1891, Congress created a statute granting all federal criminal defendants a right of appeal, citing Act of March 3, 1891, ch. 517; § 5, 2, 5 State 826.
[145] *Chapman,* 386 U.S. at 22.
[146] *See infra* Pt. D; discussing the difference between "structural" errors, which require automatic reversal, and "trial" errors, which are subject to harmless error review.

of the conviction."[147] The Court then fashioned a harmless error test to be applied to these "unimportant and insignificant" constitutional violations that differed from both the California test and the federal test applied to non-constitution errors under *Kotteakos*. First, the Court rejected the California test that put aside the error and looked for "overwhelming evidence" of guilt, noting that the federal harmless error statutes focus on harm to "substantial rights," not on "miscarriage of justice."[148] Next, the Court placed the burden of proving harmlessness on the government because the government is the beneficiary of the constitutional violation. Finally, opting not to adopt the *Kotteakos* standard but, instead, drawing upon its prior statement in *Fahy*, the Court said that the *Fahy* test effectively required the government either "to prove that there was *no injury* or to suffer reversal," and that this test differed little, if at all, from the standard it was articulating now as the appropriate test for constitutional violations.[149] For federal constitutional violations, "[the government must] prove *beyond a reasonable doubt* that the [constitutional] error complained of *did not* contribute to the verdict,"[150] and "the

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[147] *Chapman,* 386 U.S. at 22. (Emphasis supplied).

[148] Notably, the first proposed American federal harmless error statute in 1908 proposed using the "miscarriage of justice" standard, which most believed meant a "correct result was reached" approach. Murray, "A Contextual Approach," 1803, n. 64. Congress rejected this approach in 1919 and, instead, focused on the error and its effect on substantial rights. Epps, "Harmless Errors," 2128, citing Act of Feb. 26, ch, 48, 1919, Pub. L. No. 65-281, 40 Stat. 1181, *repealed by* Act of June 25, 1948, ch. 646, 62 Stat. 892, 992. By contrast, in England, the Criminal Appeal Act of 1907 allowed dismissal of the appeal if the judges found "no substantial miscarriage of justice has actually occurred." *See* Criminal Appeal Act, 1907, c. 23, § 4 (Eng.).

[149] *Chapman,* 386 U.S. at 23-24. (Emphasis supplied).

[150] Ibid., 23-24. (Emphasis supplied). *Contrast Kotteakos,* 328 U.S. at 764-65; whether "fair assurance" exists that "the judgment was not substantially swayed by the error." Several commentators have argued that the Supreme Court was wrong to apply harmless error to federal constitutional violations. *Compare* Goldberg, "Constitutional Sneak Thief," 421; calling it "among the most insidious of legal doctrines;" James Edward

court must be able to declare a belief that [the constitutional error] was *harmless beyond a reasonable doubt*."[151] Ultimately, in *Chapman,* the Court determined that the *Griffin* violation was not harmless because the State's argument and trial court's instruction repeatedly urged the jury to draw adverse inferences from the defendants' silence at trial, thus turning their right to remain silent into a form of self-incrimination.[152]

Many believed that the *Chapman* harmless error standard closely resembled the automatic reversal rule and would lead appellate courts to reverse convictions in most cases presenting constitutional errors.[153] In reality, the opposite occurred. While the test

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Wicht, III, "There is No Such Thing as Harmless Constitutional Error: Returning to a Rule of Automatic Reversal," *Brigham Young University Journal of Public Law* 12, no. 1 (1997): 109; "[T]oleration of the harmless error rule in the Constitutional context reflects poorly on the value now placed on individual rights. … [T]he current rule undermines the inherent value of constitutional rights." *But see* Mitchell, "Against Overwhelming Appellate Activism," 1339 & n. 23; noting Goldberg's position as well-founded, but believing that harmless error review is here to stay, stating that "the Court has not once [re]considered the validity of the doctrine."

Presumably, under U.S. Const. art. I, §§ 1, 8, Congress possesses the power to pass a federal law overruling or modifying the harmless error tests adopted by the Supreme Court. See Henry P. Monaghan, "The Supreme Court, 1974 Term – Foreword: Constitutional Common Law," *Harvard Law Review* 89, no. 1 (1975): 2-3. To date, Congress has not chosen to do so.

[151] *Chapman,* 386 U.S. at 24.

[152] Ibid., 25-26. In *Brecht v. Abrahamson,* 507 U.S. 619 (1993), the Court held that the *Chapman* standard only applies to constitutional errors raised on direct appeal and not those raised on habeas corpus review, which, instead, are reviewed under the *Kotteakos* standard. This thesis addresses only direct review of federal constitutional violations and not habeas corpus collateral review.

[153] *See* Traynor, *Riddle of Harmless Error,* 43-44; Mitchell, "Against Overwhelming Appellate Activism," 1342-43. As Chief Judge Chapel explains, both Justice Traynor and Professor Saltzburg miss the Court's nuanced use of the *Fahy* test to fashion a new articulation for assessing harmless constitutional errors. The Court used *Fahy* as a jumping off point; it did not endorse the test articulated by the Court in *Fahy* as *the test.* Professor Saltzburg, thus, wrongly argues against the "reasonable doubt" standard included in the *Chapman* test in favor of the "reasonable possibility" language employed in *Fahy.* Justice Traynor similarly argues incorrectly for a "highly probable" test. Chapel, "Irony of Harmless Error," 524, n. 139. As aptly noted by Anne Bowen Poulin, these

under *Chapman* hinges on the "federal constitutional error [being] … harmless beyond a reasonable doubt,"[154] it has been "diluted" in its application, even "distorted" beyond its "contemplation."[155] Just two years after *Chapman,* the Court announced its decision in *Harrington v. California,*[156] which – despite its "special facts"[157] – has served as the seminal case for applying the "overwhelming evidence" harmless error test to constitutional errors, even though the Court expressly *rejected* that test in *Chapman*. Dissenting in *Harrington*, Chief Justice Warren and Justices Brennan and Marshall called it as they saw it, stating: "The Court today overrules *Chapman v. California."*[158] Meanwhile, the *Harrington* majority claimed: "We do not depart from *Chapman*; nor do we dilute it by inference. We reaffirm it."[159]

Such a stark difference of opinion somewhat defies explanation. On the one hand, the mere fact that the majority and dissent, *albeit* applying different tests, reached different outcomes, should itself demonstrate that the constitutional error was not

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standards are *not* the same, and they fall on a spectrum that runs from more government-friendly to more defendant-friendly, which, of course, makes a difference in error assessment. Ann Bowen Poulin, "Tests for Harm in Criminal Cases: A Fix for Blurred Lines," *University of Pennsylvania Journal of Constitutional Law* 17 (2015): 1007-13. Apply this ranking to the three standards just discussed, they would run from more government-friendly ("highly probable") to in-between ("reasonable possibility") to more defendant-friendly ("beyond a reasonable doubt"). Ibid.

[154] *Chapman,* 386 U.S. at 24.

[155] *See* Poulin, "Tests for Harm," 1007; That the *Chapman* test is hinged to reasonable doubt is clear; dilution of the test has occurred as a result of "the manner in which it has been applied." Goldberg, "Constitutional Sneak Thief," 426; post-*Chapman* cases "relaxed the rigor of the test and applied it to circumstances which could not have been contemplated and, indeed, would have been disavowed by the *Chapman* majority."

[156] *Harrington,* 395 U.S. 250.

[157] Ibid., 251, 253; The majority noted the "special facts" of the case twice in its opinion. *See also* ibid., 254; "Our decision is based on the evidence in this record."

[158] Ibid., 255 (dissent).

[159] Ibid., 254 (majority).

"harmless beyond a reasonable doubt." At the least, it made proper articulation of the governing *legal* test critical to the case outcome. On the other hand, one explanation for the Court's split not proposed in scholarly commentary could be that the majority intended to limit the holding of *Harrington* to its "special facts."[160] The majority opinion is extremely short (barely more than one page) and describes the erroneously admitted evidence as cumulative of other evidence, including the defendant's statement.[161] But it is questionable whether the highest court in the land, which leads the entire federal judiciary and the decisions of which have a lasting impact on the nation, should decide a case based simply on its peculiar facts. Under Article 3, § 2, juries are supposed to be the arbiters of facts and legal guilt or innocence.[162] Further, it is doubtful whether the Supreme Court would *change the legal test* if its sole aim was to correct a perceived, peculiar factual error.[163] Nevertheless, the *test* applied by the *Harrington* majority had a lasting impact on the development of harmless error review of constitutional violations.

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[160] *See supra* n. 157 & accompanying text.

[161] *Harrington,* 395 U.S. at 253-54. *See infra* n. 177; explaining that the writing justice in *Harrington* dissented from its application in a later case that also involved a *Bruton* violation but different facts.

[162] *See Duncan,* 391 U.S. at 156; "Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge."

[163] *See* Supreme Court Rule 10 (1967), accessed January 25, 2019, https://www.supremecourt.gov/pdfs/rules/rules_1967.pdf; Appropriate considerations for granting review include such things as "compelling" legal issues arising from federal circuit court conflicts and federal or state decisions impacting important federal legal questions. The Supreme Court does not generally grant certiorari to review cases based on their facts. *Compare* Supreme Court Rule 10 (2017), accessed January 25, 2019, https://www.supremecourt.gov/filingandrules/2017RulesoftheCourt.pdf; which today states, "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of *erroneous factual findings* or the misapplication of a *properly stated rule of law*." (Emphasis supplied).

As in *Chapman, Harrington* presented the Court with the situation of applying a new constitutional holding to a case decided before it was announced. After the state-court trial and appellate affirmance of Harrington's conviction for felony murder, the United States Supreme Court decided *Bruton v. California,*[164] which held that, in a joint trial, a co-defendant's confession that implicates the defendant may not be admitted unless the confessing defendant testifies, because to allow otherwise would violate the defendant's Sixth Amendment right to confrontation. As the majority describes the *Harrington* facts: several eyewitnesses placed Harrington at the scene of the crime, as did Harrington himself; of the three co-defendant confessions admitted, the one co-defendant who implicated Harrington in the crime testified at trial and was subjected to cross-examination; the other two co-defendants did not testify but were unable to name Harrington and could only state that the fourth perpetrator was "the white guy;" finally, the trial judge gave a limiting instruction to the jury that it was to consider each confession only against the confessor.[165] After outlining these facts, the majority held that the case against Harrington was "so overwhelming" that the "violation of *Bruton* was harmless beyond a reasonable doubt, unless we adopt the minority view in *Chapman* []

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[164] *Bruton v. California,* 391 U.S. 123 (1968). The *Bruton* decision was handed down in May of 1968 whereas the state court review in *Harrington* reached its terminal point in January of 1968, when the California Supreme Court denied review. *See People v. Bosby*, 256 Cal. App. 2d 209 (Ct. App. 1967), *review denied* (Cal., 01-18-1968), *affirmed sub nom., Harrington*, 395 U.S. 250.

[165] *Harrington,* 395 U.S. at 251-53. The majority's description of the facts suggests that it might, alternatively, have held that no *Bruton* constitutional error occurred because the non-testifying co-defendants' confessions did not implicate Harrington. Of course, the dissent described the case facts differently, highlighting how far afield from a court of legal review the Court had moved, given each side's in-depth factual review (and, perhaps, spin) of the record. As a deserved reminder, U.S. Const. art. 3, § 2 requires that jurors – not appellate judges – serve as the arbiters of fact and guilt.

that a departure from constitutional procedures should result in an automatic reversal, *regardless of the weight of the evidence.*"[166] It further stated, "[o]ur judgment must be based on *our own reading of the record* and on what seems to us to have been the *probable impact* of the two confessions on the minds of *an average jury.*"[167]

As the dissent noted in reaching a contrary result by applying the *Chapman* standard, the majority had shifted the legal test. The majority first set up a compelling factual statement to convince any reasonable reader that the defendant was, *in fact*, guilty. It then altered the *Chapman* test by including review of the *untainted* record evidence to look for "overwhelming evidence" of guilt; by importing a "probable impact" standard rather than one based on "beyond a reasonable doubt;" and by pushing the jurisprudence farther away from the automatic reversal rule while expanding the potential category of constitutional errors subject to harmless error review. The dissent astutely recognized that the majority was not only changing the course of the development of harmless error law but promoting appellate court usurpation of the jury's role as finders of fact and legal guilt.[168] Harmless error in the context of constitutional violations moved from the "narrowly circumscribed" focus on the error and its harmlessness only in situations where it "made no contribution to the criminal conviction," to a focus "away from" the error to the surrounding record evidence, which *Chapman,* itself, had disavowed.[169] Moreover,

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[166] *Harrington,* 395 U.S. at 254. (Emphasis supplied). *See also* ibid., the evidence was "so overwhelming, that unless we say that *no violation of Bruton* can constitute harmless error, we must leave the state conviction undisturbed." (Emphasis supplied).
[167] Ibid. (Emphasis supplied).
[168] Ibid., 255-57 (dissent); *see also* Chapel, "Irony of Harmless Error," 525-56; noting that this shift has enabled the Court to pay lip-service to the *Chapman* standard while applying a fact-based, "overwhelming evidence" test.
[169] *Harrington,* 395 U.S. at 255 (dissent).

the arbiters of this shifted-test would not be jurors, but appellate judges, who, in groups of three, would be making factual determinations to assess guilt or innocence.[170] In the dissent's view, "apply[ing] [sufficiency or substantiality of the evidence] standards as threshold requirements to the raising of constitutional challenges to criminal convictions is to shield from attack errors of a most fundamental nature and thus to deprive many defendants of basic constitutional rights."[171] Ominously, the dissent also noted the dilution of constitutional criminal procedural rights: "As a result [of the majority's shift], the deterrent effect … on the actions of both police and prosecutors, not to speak of trial courts, will be significantly undermined."[172]

Following England's lead, the United States' conversion to an "overwhelming evidence" test seemed set.[173] But, as previously noted, the differences between the two systems made this test appropriate for England, but not necessarily for American. In England, appellate judges may review new evidence and arguments and reach different factual conclusions in determining whether a "miscarriage of justice occurred."[174] In

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[170] Ibid., 256 (dissent); "The [proper] task of appellate courts is to appraise the impact of *tainted* evidence on a *jury's* decision. …" (Emphasis supplied).
[171] Ibid., 257 (dissent).
[172] Ibid., 255 (dissent). *See* Goldberg, "Constitutional Sneak Thief," 427-28; noting that Harrington's conviction would have been reversed had the *Chapman* standard been properly applied.
[173] Chapel, "Irony of Harmless Error," 526; arguing that by the mid-1970s, the *Harrington* approach "was firmly entrenched in the Supreme Court's jurisprudence as *the* test of harmless error. (Emphasis original); *But see* Provenzano, et al., *Advanced Appellate Advocacy*, 34; asserting that only a minority of federal circuit courts use the "overwhelming evidence" test and that the majority look at the prejudicial effect of the error on the jury.
[174] Chapel, "Irony of Harmless Error," 506-07, 517-123, 531. *See* *https://www.cps.gov.uk/legal-guidance/appeals-court-appeal.* Accessed January 25, 2019.

America, appellate judges are limited to the trial record and the fact-findings of the jury, and the statute directs review of the "error's" impact on "substantial rights," making appellate court weighing of the *un*tainted record evidence procedurally and constitutionally inappropriate.[175] Nonetheless, with rare exceptions, the United States Supreme Court continued to affirm criminal convictions by applying the *Harrington* harmless error test, while paying lip-service to the *Chapman* standard.[176] Thus, just three years after *Harrington,* the Court affirmed convictions in *Schneble v. Florida*[177] and *Brown v. United States,*[178] despite *Bruton* violations in those cases, and in *Milton v. Wainwright,*[179] despite a coerced confession in that case. In *Scheble,* the Court employed a "probable impact" standard and, arguably, shifted the burden of proof to the defendant.

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[175] U.S. Const. art. 3, § 2; right to jury trial in criminal case; *Duncan,* 391 U.S. at 156; reiterating the purposes for that right. As noted by Goldberg, "until the Court approved the 'overwhelming evidence' approach to harmless error, no court had the power to enter a guilty verdict on its own judgment when the defendant properly exercised his right to a trial by jury." Goldberg, "Constitutional Sneak Thief," 427.

[176] *C.f. Harrington,* 395 U.S. at 255; the dissent opining, "[in *Chapman*], we left no doubt that for an error to be 'harmless' it must have made *no* contribution to a criminal conviction." (Emphasis supplied). *See* Garrett, "Innocence, Harmless Error," 57; While the Warren Court had been protective of "fair trial rights, the Rehnquist Court assiduously preserved th[e] [Court's] landmark rulings as a constitutional matter, while weakening the rights in an indirect way by limiting the remedies for their violation, by ratcheting the strength of the doctrine of harmless error."

[177] *Schneble v. Florida*, 405 U.S. 427 (1972). Notably, Justice Douglas, who had authored the majority opinion in *Harrington,* dissented from the application of *Harrington* in *Schneble,* stating "[t]hat decision was limited to a factual setting in which the defendant admit[ted] being at the scene, and the improperly admitted statements of the co-defendants [were] merely cumulative evidence." Ibid., 433. Justice Douglas did not dissent from the companion case of *Brown v. United States, infra* n. 178 & accompanying text, which also involved a *Bruton* error, but closely mirrored the facts presented in *Harrington.*

[178] *Brown v. United States,* 411 U.S. 223, 230-32 (1973); "The testimony erroneously admitted was merely cumulative of other overwhelming and largely uncontroverted evidence properly before the jury."

[179] *Milton v. Wainwright,* 407 U.S. 371 (1972).

After citing *Chapman,* it stated that it was required to determine the outcome based on "'our own reading of the record and [] what seems to us to have been the probable impact … on the minds of an average jury,'" and it "conclude[d] that the 'minds of an average jury' would not have found the State's case significantly less persuasive had the [co-defendant's] testimony … been excluded."[180] In *Milton,* the Court went even further, assuming, without deciding, that a Sixth Amendment violation occurred, and affirming the conviction because "the record clearly reveal[ed] that any error in its admission was harmless," as the defendant had made three prior confessions.[181] The majority did not mention that the three prior confessions occurred after an 18-day interrogation, without counsel, and with the defendant denying guilt for ten days and only cracking after two detectives tag-team questioned him for eight hours straight. Noting the improper factual manipulation and review by the majority, the dissent accused the majority of ignoring the question presented, namely "whether the great constitutional lesson of *Powell v. Alabama*[182] [that a defendant has a right to counsel] is to be ignored." The dissent "would not [have] ignore[d] it, but would [have] honor[ed] its 'fundamental postulate . . . 'that

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[180] *Schneble*, 405 U.S. at 432. *See* Goldberg, "Constitutional Sneak Thief," 428; "By a subtle rearrangement of words and ideas, Justice Rehnquist converted a test which forced the prosecution to show beyond a reasonable doubt that the error did not contribute to the verdict, into a test which forced the defendant to show that the error was of such significance that without it the defendant would be entitled to a directed verdict of acquittal."

As in *Harrington,* the dissent in *Schneble* again objected that "[u]nless the Court intends to emasculate *Bruton* …. or to overrule *Chapman* [], … then I submit that its decision is clearly wrong." Ibid., 437 (dissent).

[181] *Milton,* 407 U.S. at 372.

[182] *Powell v. Alabama,* 287 U.S. 45 (1932).

there are certain immutable principles of justice which inhere in the very idea of free government which no member of the Union may disregard.'"[183]

The power of the harmless error doctrine over constitutional violations became firmly entrenched. Within ten years, the Supreme Court held that harmless error analysis is required to be applied, despite the magnitude of the constitutional violation or even prosecutorial misconduct taking advantage of the violation. Federal courts may not employ their supervisory power to overturn a conviction, absent a finding of harmful prejudice to the defendant.[184] The considerations guiding supervisory power – implementation of a remedy for violation of rights, preservation of judicial integrity in criminal trials, and deterrence of unlawful conduct – were not sufficient, in the Court's view, to justify reversal of a conviction and a retrial.[185] Turning the original, limited purpose for the harmless error doctrine on its head and prioritizing it as more important than fundamental constitutional rights, the Court deemed the above interests to be "[in]significant" "when the error to which [they] are addressed is harmless."[186] A few years later, in *Delaware v. Van Arsdall,*[187] the Court went even further, stating "the

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[183] *Milton,* 407 U.S. at 383-84 (dissent); also noting that none of the prior four federal courts that considered Milton's case had found the error to be harmless.
[184] *United States v. Hasting,* 461 U.S. 499 (1983); there, the trial court had reversed the defendant's conviction based on prosecutorial misconduct, and the Seventh Circuit had affirmed, noting that the misconduct repeatedly was arising in that district. The Supreme Court reversed and reinstated the conviction. *See also Bank of Nova Scotia v. United States,* 487 U.S. 250, 253 (1988); stating a court does not have authority to dismiss an indictment based on prosecutorial misconduct without a finding of prejudice to the defendant.
[185] *Hasting,* 461 U.S. at 505.
[186] Ibid., 506. The Court also chastised the Seventh Circuit for not considering the trauma that the victims would suffer in having to undergo a retrial.
[187] *Delaware v. Van Arsdall,* 475 U.S. 673 (1986). There, the defendant had been precluded from cross-examining a witness about a deal he struck with the prosecution in

central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence."[188] It cited numerous factors that inform whether a conviction should be reversed under harmless error analysis, including "the importance of the witness' testimony in the prosecution's case; whether the testimony was cumulative; the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points; the extent of cross-examination otherwise permitted; and, of course, the overall strength of the prosecution's case."[189] Rather than clarifying harmless error law, the Court contributed to the confusion by creating yet another test and, seemingly, rendering the constitutional error merely one of many factors for consideration.[190]

C. Harmless Error Review When the Jury Does Not Make a Required Finding

Appellate review, even for harmless error, should depend on having something to review, and that something should be a finding of the jury in a jury trial. In *In re Winship,*[191] the Court recognized that it is the jury's role to find that the elements of the charged crime are proved beyond a reasonable doubt and it is the prosecution's burden to prove each element beyond a reasonable doubt to the jury. When the defendant exercises the Sixth Amendment right to a jury trial, the Constitution does not allow a judge to find

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return for testifying against the defendant. The Court remanded the case to the Delaware Supreme Court to conduct harmless error analysis because the Delaware Supreme Court had erroneously found the error to be structural. *See infra* Pt. D.

[188] *Van Arsdall,* 475 U.S. at 681.

[189] Ibid., 684.

[190] *See* Mitchell, "Against Overwhelming Appellate Activism," 1345-46, 1342; claiming the Court created a new, third hybrid test different from the two *Chapman* and *Harrington* tests, thereby engendering "considerable confusion;" Stephen A. Saltzburg, "The Harm of Harmless Error," *Virginia Law Review* 59, no. 6 (1973): 988; "Chaos surrounds the standard for appellate review of errors in criminal proceedings."

[191] *In re Winship,* 397 U.S. 358, 364 (1970).

that the elements are met or to direct a verdict of guilt.[192] Nevertheless, in *Rose v. Clark*,[193] the Court extended harmless error "review" even to cases where the jury *had not made* a finding regarding an element of the charged crime. In *Rose,* the trial court had shifted the burden of proof for the element of malice by instructing the jury that all homicides are presumed to be malicious unless the defendant rebuts that presumption.[194] A divided Court held that harmless error review applied and remanded to the State court to make that determination. In so doing, it expressly turned the harmless error exception into the general rule, stating that when "a defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other errors that may have occurred are subject to harmless error analysis."[195] It guided the State court's decision on remand by declaring that if the record, as a whole, established guilt, then "the interest of

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[192] U.S. Const. art. III, § 2; U.S. Const. amend. V (due process), VI (right to impartial jury), XIV (application to the States). *See also Duncan,* 391 U.S. at 155; "The guarantee[] of jury trial … reflect a profound judgment about the way in which law should be enforced and justice administered" and "is a fundamental right." *In re Winship,* 397 U.S. at 364; "[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."
[193] *Rose v. Clark,* 478 U.S. 570 (1986).
[194] Previously, in *Sandstrom v. Montana,* 442 U.S. 510 (1979), the Court had held that a jury instruction stating "the law presumes that a person intends the ordinary consequences of his voluntary acts" violates Due Process. The Court left open, however, the question of whether harmless error review could be applied to such an instruction. Ibid., 527-28. Later, in *Connecticut v. Johnson,* 460 U.S. 73 (1983), the Court's plurality decision revealed a four-four-one split regarding whether harmless error review applies to this instruction. Ibid. Justices Blackmun, Brennan, White, and Marshall opposed harmless error review unless the defendant either was acquitted or admitted the element at issue; Justices Powell, Burger, Rehnquist, and O'Connor favored harmless error review, generally; and Justice Stevens believed the issue was not a federal one and should be left to the State court's determination.
[195] *Rose,* 478 U.S. at 579.

fairness has been satisfied and the judgment should be affirmed."[196] Concurring in the judgment only, Justice Stevens objected to the majority's conversion of *Chapman's* rigorous harmless error exception into the general rule, its sole focus on trial reliability when the Constitution protects values beyond the "truth-seeking function," and the danger of encouraging prosecutors to "subordinate" constitutional rights to their desire to obtain convictions.[197] Dissenting, Justices Blackmun, Brennan, and Marshall believed the erroneous instruction required automatic reversal because the Constitution requires that the jury make all elemental findings and forbids both trial judges, in the first instance, and appellate judges, on review, from making those findings for the jury.[198]

With the entrance of Justice Antonin Scalia to the Court, harmless error review of jury non-findings appeared to shift as his viewpoint coincided more closely with the *Rose* dissenters, Justices Brennan, Marshall, and Blackmun. Thus, when the Court, in *Carella v. California,*[199] issued a per curiam decision that a jury instruction imposing a state-law mandatory presumption of intent violated Due Process, these four justices concurred only in the judgment and outlined a limited application of harmless error in this context. They explained that such review should not – as was stated in *Rose* – seek to uncover whether the record, as a whole, supports conviction. To allow such judicial review would be to "'invade[] the fact-finding function which in a criminal case the law assigns solely to the

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[196] Ibid., 578-79, 580 & n.8. *Accord Pope v. Illinois,* 481 U.S. 497 (1987).
[197] *Rose,* 478 U.S. at 585-89 (concurrence).
[198] Ibid., 590-95 (dissent); "A trial that was fundamentally unfair … because the jury was not compelled to perform its constitutionally required role, cannot be rendered fundamentally fair in retrospect by what amounts to … an appellate review of the sufficiency of the evidence." Ibid., 590.
[199] *Carella v. California,* 491 U.S. 263 (1989).

jury.'"[200] Only in three instances should an instruction with an unconstitutional presumption or one that omits or seriously misdescribes an element be deemed harmless: (1) when the defendant was acquitted of the crime; (2) when the defendant admitted the crucial element;[201] or (3) "[w]hen the predicate facts relied upon in the instruction, or other fact necessarily found by the jury, are so closely related to the ultimate fact to be presumed that no rational jury could find those facts without also finding that ultimate fact."[202] When none of these circumstances occur, overwhelming record evidence of guilt is irrelevant because the jury will not have made a required finding susceptible to review, and appellate judges are not free to make the finding for it.

A few years later, in *Sullivan v. Louisiana,*[203] the Court reconfirmed the proper roles of the jury and the appellate court. Again writing, Justice Scalia this time commanded a unanimous Court in holding that an erroneous reasonable doubt instruction is not a harmless error because it violates the Sixth Amendment right to a jury trial and Fifth Amendment right to Due Process. As the Court explained, "[t]he [harmless error] inquiry [under *Chapman*] … is not whether, in a trial that occurred *without the error*, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error."[204] In Sullivan's case, without a proper reasonable doubt instruction, there could be no valid jury verdict. And without a

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[200] Ibid., 267-73.
[201] The first two instances of harmless error were mentioned in the plurality opinion of *Johnson,* 460 U.S. 73.
[202] *Carella,* 491 U.S. at 270-71. The third instance of harmlessness occurred in *Pope,* 481 U.S. 497, where the jury was misinstructed to consider community values, rather than a reasonable person standard, in determining the issue of obscenity.
[203] *Sullivan v. Louisiana,* 508 U.S. 275 (1993).
[204] Ibid., 279. (Emphasis original).

valid jury verdict, no *object* existed for review of any kind, harmless or otherwise.[205] "The most an appellate court can conclude is that a jury *would surely have found* petitioner guilty beyond a reasonable doubt – not that the jury's actual finding of guilty beyond a reasonable doubt *would surely not have been different* absent the constitutional error." [206] An appellate court is not free to "speculate" about what a reasonable jury, hypothetically, might have decided. If such appellate guesswork occurs, then "the wrong entity judge[s] the defendant guilty."[207] The determination of guilt or innocence rests with the actual jury of the defendant's case, said the Court, and the consequences of the denial of that jury determination are "unquantifiable and indeterminate."[208] Thus, as of *Sullivan,* the Court seemed primed to reign in harmless error review and protect the jury's "fundamental" role in the "American scheme of justice."[209]

This protection did not last long, however. Six years later, in *Neder v. United States,*[210] the Court reverted to the "overwhelming evidence" analysis espoused in *Rose v. Clark*[211] even though, in *Rose*, the Court stated that its analysis would have been different if, rather than a presumption instruction, it had addressed an instructional error that

[205] Ibid. "If there being no [valid] jury verdict of guilty-beyond-a-reasonable-doubt, the question whether the *same* verdict … would have been rendered absent the constitutional error is utterly meaningless." (Emphasis original).
[206] Ibid., 281; citing *Bollenbach* (1946). (Emphasis original).
[207] Ibid., 280-82; "misdescription of the burden of proof … vitiates *all* the jury's findings." Ibid., 281. (Emphasis original).
[208] Ibid., 281-82.
[209] Ibid. But, Justice Rehnquist did concur to note that a defective reasonable doubt instruction is a "breed apart" from other instructional errors. Ibid., 284.
[210] *Neder v. United States,* 527 U.S. 1 (1999).
[211] *Rose,* 478 U.S. 570.

"prevent[s] a jury from considering an issue."[212] The latter scenario is precisely what occurred in *Neder* – as did obliteration of the proper roles for the jury and judges in criminal trials. Even worse, *Neder* could have been quickly and cleanly affirmed using one of the three *Carella* exemptions – omission of an element which the defendant did not contest. In *Neder,* the element withheld from the jury and, instead, found to exist by the trial judge, was the undisputed element of materiality.[213]

The majority instead used *Neder* as a vehicle for reestablishing the *Rose* test and extending it to the omission of criminal elements from jury instructions. According to *Sullivan,* the failure of the jury to determine a required element of the crime – which the government was required to prove to it beyond a reasonable doubt – should have rendered the jury's verdict invalid and unreviewable. Yet, the *Neder* majority concluded that *Sullivan* presented a unique case where *all* of the jury findings were vitiated by the instructional error and that any broader reading of *Sullivan* did not "square with … harmless-error cases."[214] And, rather than using the easily-applicable *Carella* exemption for non-instruction of an element that the defendant did not contest, the majority purposefully rebuffed *Carella's* three harmless error rules as both too "restrictive" and too case-specific."[215] Instead, if "[i]t [is] clear beyond a reasonable doubt that a rational

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[212] Ibid., 578-79; "Because a presumption does not remove the issue of intent from the jury's consideration, it is distinguishable from other instructional errors that prevent a jury from considering an issue." Ibid., 580 & n. 8. Justice Rehnquist also distinguished errors that do not "remove[] an element of the offense from the jury's consideration in *Sullivan*." *See Sullivan,* 508 U.S. at 283.
[213] *Neder,* 527 U.S. at 7; the element of "materiality was not in dispute."
[214] Ibid., 10-11.
[215] Ibid., 13-14.

jury would have found the defendant guilty absent the error, then the instructional omission is harmless.[216]

Concurring in the judgment, Justice Stevens objected to the majority's harmless error review both analytically and principally, just as he had in *Rose*. Analytically, he believed the case fit clearly within the *Carella* parameters for finding an error harmless. Principally, he viewed the majority opinion as "[in]sensitive to the importance of protecting the right to have a jury resolve critical issues."[217] Justices Scalia, Souter, and Ginsberg issued a vehement dissent.[218] They noted that, in the Constitution, the people reserved to themselves, as jurors, the right to determine guilt precisely because of their distrust of prosecutors and judges. The Constitution does not afford a trial judge the right to direct a verdict of guilty or an appellate judge the right to scour the record for evidence of guilt, despite the constitutional error. By resorting back to the *Rose* test, the majority missed the distinction between "*confirming* the jury's verdict" and "*making a judgment that the jury has never made.*"[219] In their view, the majority in *Neder* ignored their proper role as appellate judges and created a gateway for "trampl[ing] over the jury's function."[220] It placed judicial expediency over constitutional bedrock, thereby shifting the democratic foundation: "Whereas *Sullivan* confined appellate courts to their proper role of reviewing *verdicts,* the Court [] put[] the appellate courts in the business of

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[216] Ibid., 18 (concurrence).
[217] Ibid., 25-29.
[218] Ibid., 38 (dissent).
[219] Ibid., (dissent). (Emphasis original).
[220] Ibid., 36 (dissent).

reviewing the defendant's *guilt*" when the Constitution expressly requires the opposite as a protection of our liberty."[221]

D. Structural Error: The Few Constitutional Rights that Remain Inviolate

After *Neder,* the Court has continued to apply harmless error review to an expanding list of constitutional violations and limited automatic reversal to a small, select group of errors.[222] In *Chapman,* the Court had stated that "some constitutional rights [are] so basic to a fair trial that their infraction can never be treated a harmless error,"[223] citing as examples cases involving an impartial trial judge,[224] the denial of the right to counsel at trial,[225] and the admission of a coerced confession.[226] Other than these three examples, however, the Court did not offer guidance for determining which constitutional violations would be shielded from harmless error review.[227] That framework would come twenty-five years later, in *Arizona v. Fulminante,*[228] where a splintered Court listed sixteen sample constitutional errors susceptible of harmless error review,[229] added coerced confessions to that list despite *Chapman's* statement to the contrary, and established a distinction between "trial" errors, to which harmless error applies, and "structural" errors,

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[221] Ibid., 39-40 (dissent). (Emphasis original).
[222] *See* Edwards, "To Err is Human," 1176-77, 1180; Chapel, "Irony of Harmless Error," 527; Murray, "A Contextual Approach," 1793; Fairfax, "Harmless Constitutional Error," 1184-86 & n. 81; Mitchell, "Against Overwhelming Appellate Activism," 1339 & n. 23; Goldberg, "Constitutional Sneak Thief," 421 n. 3.
[223] *Chapman,* 386 U.S. at 23.
[224] Ibid., 23 n. 8; citing *Tumey,* 273 U.S. 510.
[225] Ibid., 23 n. 8; citing *Gideon v. Wainwright,* 372 U.S. 335 (1963).
[226] Ibid., 23 n. 8; citing *Payne v. Arkansas,* 356 U.S. 560 (1958).
[227] Fairfax, "Harmless Constitutional Error," 2037-38.
[228] *Fulminante,* 499 U.S. 279.
[229] Ibid., 306-07.

to which it does not apply.[230] According to the Court, "trial" errors "occur[] during the presentation of the case to the jury, and [] may therefore be quantitatively assessed in the context of other evidence presented in order to determine whether [the] admission was harmless beyond a reasonable doubt."[231] By contrast, "structural" errors are "defects in the constitution of the trial mechanism," whereby "[t]he entire conduct of the trial from beginning to end is … affected," because the defect is in "the framework within which the trial proceeds, rather than simply an error in the trial process itself."[232] "Structural" defects, thus, implicate such "basic protections" that their deprivation renders the criminal trial both an unreliable "vehicle for determination of guilt or innocence" and "fundamentally[un]fair."[233]

Dissenting from the application of harmless error review to coerced confessions, Justices White, Marshall, Blackmun, and Stevens argued that the majority distorted precedent,[234] created a dichotomy that did not work even for undisputed automatic

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[230] Ibid. Justices Marshall, Brennan, and Stevens joined the opinion written by Justice White in its entirety; Justice Scalia joined Parts I and II; and Justice Kennedy joined Parts I and IV. Ibid. As a result, different majorities of the Court found two things: (1) Fulminante's confession was coerced; and (2) harmless error applied, but the admission of Fulminante's confession was not harmless. *See* Greabe, "Riddle Revisited," 75-76 & nn. 76-79; Epps, "Harmless Errors," 2138; four justices thought the confession was coerced and that harmless error did not apply; four justices thought the confession was voluntary and that harmless error did apply; Justice Scalia agreed with the first four that the confession was coerced, but with the second four that harmless error applied; and Justice Kennedy agreed with the second four that the confession was voluntary, but, due to the lack of a majority on that point, agreed that under harmless error analysis, the error was not harmless.

[231] *Fulminante,* 499 U.S. at 307-08.

[232] Ibid., 309-10.

[233] Ibid., 310.

[234] For example, in *Payne,* the Court subjected a coerced confession to automatic reversal "*regardless* of the amount of other evidence" of guilt because the confession "vitiate[d] the judgment." Ibid., 290 (dissent); citing *Payne,* 356 U.S. 560. (Emphasis supplied).

reversal errors such as a defective reasonable doubt instruction,[235] and ignored that harmless error analysis requires consideration of "the nature of the right at issue and the effect of an error upon the trial."[236] They believed that admission of a coerced confession violates Due Process in a way that does not compare with other wrongfully admitted evidence because, not only is a jury unlikely to ignore it, it is so damaging that a jury might convict on its basis, alone.[237] The dissent added that coerced confessions mandate automatic reversal because they may be "untrustworthy" and they "offend an underlying principle … of our criminal law [] that ours is an accusatorial process."[238] Allowing the police or the State to violate the law and wring a confession out of a defendant sacrifices "human values" and endangers the constitutional precept that no person shall be deprived of life or liberty without due process.[239] The only point for which the dissenters, joined by Justice Kennedy, carried the day was in the majority holding that Fulminante's coerced confession was not harmless because the State had not demonstrated that the confession's admission did not contribute to the guilty verdict. They succeeded in overcoming the minority's attempt simply to review the record for "overwhelming evidence" of guilt, apart from the constitutional error.[240]

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[235] Ibid., 291 (dissent); citing *Sullivan,* 508 U.S. at 283, and explaining that a defective reasonable doubt instruction also occurs during trial and, yet, has been held to "distort[] the very structure of it because it creates the risk that the jury will convict … even if the State has not met its required burden of proof."
[236] Ibid., 291 (dissent).
[237] Ibid., 292 (dissent).
[238] Ibid., 293 (dissent).
[239] Ibid., 293-94 (dissent).
[240] *Compare* ibid., 296, *with* ibid., 312.

While the majority's holding in *Fulminante* has been roundly criticized,[241] today, the reality is that most constitutional errors fall into the category of "trial" errors subject to harmless error review. The limited list of errors still deemed to be structural defects, and subject to automatic reversal, include: (1) deprivation of the right to counsel at trial;[242] (2) lack of an impartial trial judge;[243] (3) discrimination in the selection of grand or petit jurors;[244] (4) violation of the right to self-representation at trial, to counsel of choice at trial, and to exercise autonomy over critical decisions made during trial;[245] (5) an erroneous reasonable doubt instruction;[246] and (6) denial of the right to a public trial.[247] In recent years, however, the Court has clarified in ways favorable to defendants that *Fulminante's* assessment of "trial" error versus "structural" defect is not all-

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[241] *See, e.g.,* Epps, "Harmless Errors," 152; Fairfax, "Constitutional Harmless Error," 2039-51; Chapel, "Irony of Harmless Error," 527 & n. 162; Greabe, "Riddle Revisited," 75-76, 101-08; Edwards, "To Err is Human," 1180.
[242] *Gideon,* 372 U.S. 335.
[243] *Tumey,* 273 U.S. 510. In *Williams v. Pennsylvania,* 136 S.Ct. 1899 (2016), the Court reaffirmed that under the Due Process Clause, when an appellate judge had earlier, personal involvement in the defendant's case, failure to recuse from reviewing the case on appeal constitutes structural error, even if the judge's vote was not determinative to the ultimate appellate decision.
[244] *Vasquez v. Hillery,* 474 U.S. 254 (1986); *Batson v. Kentucky,* 476 U.S. 79 (1986).
[245] *McKaskle v. Wiggins,* 465 U.S. 168 (1984); *United States v. Gonzales-Lopez,* 548 U.S. 140 (2006); *McCoy v. Louisiana,* 138 S.Ct. 1500 (2018).
[246] *Sullivan,* 508 U.S. at 283.
[247] *Waller v. Georgia,* 467 U.S. 39 (1984). If, however, the defendant raises this issue in the context of an ineffective assistance of counsel claim, rather than by a contemporaneous trial objection and an issue for review on direct appeal, then the defendant must prove prejudice pursuant to the *Strickland* standard for ineffective assistance of counsel or, perhaps, show proof of a fundamentally unfair trial. *See Weaver v. Massachusetts,* 137 S.Ct. 1899 (2017). On the facts presented in *Weaver,* the Court declined to address whether the latter option always exists because it did not find fundamental trial unfairness. Ibid., 1911. It also did not find an error under *Strickland v. Washington,* 466 U.S. 668 (1984), which held that a defendant must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Ibid., 687.

encompassing. Thus, in *Gonzalez-Lopez,* the Court rejected as "inflexible" any rule that "*only* those errors that *always* or *necessarily* render a trial fundamentally unfair and unreliable" are structural,[248] as had been suggested in *Fulminante.* Instead, recent cases have stated that the reason a constitutional error is structural varies from error-to-error and, thus far, the Court has discerned three viable reasons that, either alone or in combination, can render an error structural:[249] (1) if the error "cause[s] fundamental unfairness, "either to the defendant in the specific case or by pervasive undermining of the systemic requirements of a fair and open judicial process," in which case any State attempt to prove harmlessness will be futile;[250] (2) if the "effect of the error is too difficult to measure or ascertain," in which case any assessment of the error for harmlessness will be mere speculation;[251] or (3) if the "right at issue is not designed to protect the defendant from erroneous conviction but instead protects some other interest," in which case the issue of harm is irrelevant."[252] These recent Supreme Court decisions and their broader rationale inspire hope that, in the future, constitutional errors will be scrutinized more closely to ensure that the purposes for constitutional rights are honored

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[248] *Gonzales-Lopez,* 548 U.S. at 149-50 & n. 4 (emphasis original); ibid.; deprivation of the right to counsel of one's choice was structural error because of "the difficulty in assessing how alternate counsel might have performed."

[249] *See Weaver,* 137 S.Ct. at 1911-12; recapping these three purposes even though, there, the denial of a public trial for only a short time was not deemed structural error.

[250] *See Williams,* 136 S.Ct. at 1909-10; failure of judge to recuse; *Gideon,* 372 U.S. at 343–345; right to counsel; *Sullivan,* 508 U.S. at 279; erroneous reasonable-doubt instruction; *Tumey,* 273 U.S. 510; right to an impartial judge.

[251] *See Vasquez,* 474 U.S. 254; discrimination in selection of grand jurors; *see also supra* n. 248; also presenting unquantifiable errors.

[252] *See McCoy,* 138 S.Ct. at 1511; deprivation of right to autonomy to make critical decisions; *Gonzales-Lopez,* 548 U.S. at 149-50; deprivation of right to counsel of choice; *McKaskle,* 465 U.S. 168; denial of the right to self-representation.

and to prevent appellate “review” from reducing these rights to mere exceptions to the harmless error rule.

Chapter Four: Erosion of Constitutional Rights and Liberties

Up until now, however, the actual instances of courts finding a structural constitutional defects remain "exceedingly rare" and, in applying the harmless error test, they find the constitutional error to be harmless with "remarkable frequency."[253] The progression to this point largely reflects the Burger and Rehnquist Courts' manipulation of the constitutional criminal procedural rights established up to and during the Warren Court era.[254] "In the case of fair trial rights, the[] … [Burger and] Rehnquist Court[s] assiduously preserved … landmark rulings [protecting rights] as a constitutional matter, while weakening the rights in an indirect way by limiting the *remedies* for their violation."[255] The Court did so in two primary ways: (1) by shifting the harmless error test to one of review for "overwhelming" untainted record evidence of guilt from

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[253] Murray, "A Contextual Approach," 1793.
[254] The Warren Court ended in 1969, the same year *Harrington* was decided.
[255] Brandon L. Garrett, "Judging Innocence," *Columbia Law Review* 108, no. 1 (2008): 57 (emphasis supplied). *See also* Epps, "Harmless Errors," 2136, n. 120; "That a narrower reading of *Chapman* would prevail is unsurprising given the Court's right-ward shift as the Warren Court became the Burger Court and, later, the Rehnquist Court;" Chapel, "Irony of Harmless Error," 503, n. 16; "Although the Burger Court did not overrule the Warren Court cases, it did effectively gut many of them through the extension of the harmless error rule;" Stacy and Dayton, "Rethinking Harmless Constitutional Error," 79-80; noting the "Burger and … Rehnquist Court's increasingly widespread use of … harmless constitutional error" and view that it "presumptively applies to virtually all types of federal constitutional errors." *And see infra* Pt. C; presenting my argument that such control by a group of nine justices over the individual rights of Americans is precisely what the founders sought to prevent by installing protections in the Constitution and Bill of Rights.

Harrington forward;[256] and (2) by limiting the class of structural defects subject to automatic reversal after *Fulminante.*[257]

A. Invading the Province of the Jury

That appellate courts too easily dismiss constitutional error results, in part, from their failure to recognize their proper role in our system of justice and their shifting of constitutional protections away from the defendant and in favor of the prosecution. As a consequence, rather than serving as the minimally-required rules for a fair criminal trial, constitutional rights have become the exception to a harmless error procedural doctrine that was designed to promote efficiency and finality.[258] But criminal jury trials serve larger purposes for the defendant, including as the forum for (1) the jury to assess the evidence and make credibility calls in reaching its legal determination of guilt or

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[256] *See* Mitchell, "Against Overwhelming Appellate Activism," 1358; By contrast, "[t]he *Chapman* test requires an examination of whether the error … possibly affected the decision of 'at least one member of the jury.'" (Citation omitted). Saltzburg," The Harm of Harmless Error," 1014; "[B]ecause of the enormous burden of proof placed on the prosecutor …, a small showing of prejudice should suffice to convince an appellate court that an error during the course of the trial [is] reversible."

[257] Two additional forms of limitation have also occurred: (1) dilution of certain constitutional rights by creating exceptions to their substantive application, such as in the area of search and seizure; *see South Dakota v. Opperman,* 428 U.S. 364 (1976); and (2) embedding a prejudice requirement into the elements of proving the violation of certain rights, such as with ineffective assistance of counsel and failure to disclose exculpatory information; *see Strickland,* 466 U.S. 668; *Brady,* 373 U.S. 83. Garrett, "Innocence, Harmless Error," 57, 62 & n. 137, 129. These additional limitations are not discussed, in-depth, in this thesis, but for further information, *see* Kamin, "Rights/Remedies Split," 50-55.

[258] *See* Goldberg, "Constitutional Sneak Thief," 427; The harmless error doctrine has no "substantive doctrinal base." It is an "appellate procedural doctrine which has caused 'mischief' beyond anyone's expectations." (Citation omitted).

innocence,[259] (2) the community's expression of values and common-sense through that jury determination, where the jury is free to engage in jury nullification[260] or extend mercy,[261] and (3) the public airing of disputes to educate the citizenry and ensure fairness and integrity in legal proceedings as a whole.[262] A defendant who exercises the jury trial right expects to be judged by his peers, not by three legally-expert appellate judges who might be jaded by repeated encounters with convicted defendants.[263] Indeed, in *Duncan v. Louisiana,*[264] the Court recognized that the jury trial is a fundamental constitutional protection "against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge."[265] While later cases have held that the jury need not be made

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[259] *See* Chapel, "Irony of Harmless Error," 513; The verdict of guilt or innocence is a legal one, not a factual one. A defendant may be found legally guilty when, in fact, he is innocent, and a defendant may be found legally innocent when, in fact, he is guilty.
[260] Mitchell, "Against Overwhelming Appellate Activism," 1356-57; "Substantive laws may be misguided, sentencing laws may be overly harsh, prosecutions may be selectively imposed, and judges may be biased. Citizens therefore rely on the common sense and mercy of a jury, through its nullification power, to keep both laws and government officials from working injustice."
[261] Bilaisis, "Abettor of Courtroom Misconduct," 457; "A criminal conviction is not only a determination of guilt in fact; it is an establishment of legal guilt following settled procedural rules that are based on societal notions of fairness and on constitutional rights."
[262] Chapel, "Irony of Harmless Error," 511-14 & n. 74; Mitchell, "Against Overwhelming Appellate Activism," 1354-56 & nn. 112, 120.
[263] Mitchell, "Against Overwhelming Appellate Activism," 1354-56 & n. 112; ibid., 1369; "[T]he Constitution entitle[s] a criminal defendant to a fair 'trial by jury,' not a 'trial by appellate court;'" Fairfax, "Harmless Constitutional Error," 2056; "The jury provisions … reflect … a reluctance to entrust plenary powers over life and liberty of the citizen to one judge or to a group of judges."
[264] *See Duncan,* 391 U.S. 145.
[265] Ibid., 156; *see also* Mitchell, "Against Overwhelming Appellate Activism," 2050; under the "overwhelming evidence" harmless error test, "the defendant is protected from neither."

up of twelve people[266] and the verdict need not necessarily be unanimous,[267] the Court drew the line at anything less than a unanimous six-person jury[268] and established that the Sixth Amendment requires an impartial jury drawn from "a fair cross section of the community."[269] A panel of three appellate judges, who are legal experts, who encounter now-convicted appellants on a regular basis, and who do not witness the evidentiary case presentation but nonetheless weigh the factual record, thus falls short of the Court's own recognized constitutional requirements.[270]

Appellate courts should instead adhere to their appropriate roles, which include (1) error review and correction, (2) development of the law, and (3) supervision of trial court proceedings.[271] Because the Constitution reserves to the individual the right to have a jury assess guilt or innocence and does not confer this authority on the courts,[272] appellate courts overstep their authority and invade the province of the jury when they

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[266] *Williams v. Florida,* 399 U.S. 78 (1970).
[267] *Apodaca v. Oregon,* 406 U.S. 404 (1972) (plurality opinion).
[268] *Burch v. Louisiana*, 441 U.S. 130 (1970); *Ballew v. Georgia,* 98 U.S. 223 (1979).
[269] *Taylor v. Louisiana,* 419 U.S. 522 (1975); *Duren v. Missouri,* 439 U.S. 357 (1979); *Batson,* 476 U.S. 79 (1986).
[270] Goldberg, "Constitutional Sneak Thief," 430-31; ibid; also noting that the defendant does not get to conduct voir dire to determine the fairness of the appellate judges or to present countervailing evidence in response to what the appellate judge might have in his or her mind; *see* Fairfax, "Harmless Constitutional Error," 2048-49; the appellate court is not reviewing to preserve the jury's findings, but supplementing with non-findings of the jury; Mitchell, "Against Overwhelming Appellate Activism," 1340; the "appellate court [is] reviewing the trial record to come to its own, independent conclusion of guilt."
[271] Chapel, "Irony of Harmless Error," 511-14 & n. 74; Mitchell, "Against Overwhelming Appellate Activism," 1354-56.
[272] U.S. Const. art. III, § 2 (right to jury trial); U.S. Const. amend. VI (right to an impartial jury); U.S. Const. amend. X (the "powers not delegated to the United States" are "reserved … to the people"). Of course, this assumes the jury was not waived.

assume a fact-finding position in conducting harmless error review.[273] By carving out the constitutional error and selectively viewing only the remaining, allegedly untainted, evidence, the appellate court makes a fresh determination of guilt, one based "upon facts which have never been considered by a jury and which, given [the appellate court's] finding of guilt, never will be."[274] It must be remembered that if the government cannot prove beyond a reasonable doubt that its constitutional violation did not prejudice the defendant's rights, the result is a new trial, not an acquittal that sets the defendant free forever. The *Harrington* standard of "overwhelming" record evidence review places procedural efficiency and finality above the substantive right of the defendant to receive a constitutionally-fair trial by a jury, even though the result is merely a redo.[275]

Shifting of the burden of proof and inferences drawn in favor of the government, on appeal, further impede the defendant's basic fundamental right to a fair trial that is devoid of any constitutional error. In our accusatory system, a criminal defendant is presumed innocent unless the government establishes guilt beyond a reasonable doubt for every element of the crime charged.[276] The government must carry this burden of proof

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[273] Edwards, "To Err is Human," 1193; the error is that "the wrong entity judge[s] the defendant's guilt."
[274] Goldberg, "Constitutional Sneak Thief," 430 & n. 67; ibid., 429, 427; The court "is sitting as an appellate jury," when appellate courts are not supposed to "act as fact-finders for matters which must be determined beyond a reasonable doubt;" Chapel, "Irony of Harmless Error," 515; fact-finding is not the appellate court's role or purpose. *See also infra* nn. 286.
[275] Chapel, "Irony of Harmless Error," 514; "any system that demands fairness in its proceedings but fails to provide for [it on] review mocks the concept of fairness."
[276] *In re Winship,* 397 U.S. 358; explaining that the standard of "proof beyond a reasonable doubt" gives "concrete substance" to the "presumption of innocence" by

by constitutionally-permitted means[277] and the courts must label as foul any attempt by the government to do so in violation of constitutional rights. These premises are bedrock principles from which any jurist should start.

The "overwhelming evidence" test for harmless error converts this fundamental constitutional framework using an alleged "no harm – no foul" theory[278] and, by its application, has become a prosecutor-friendly test, *in spite of* criminal defendants' constitutional rights. The Court is certainly free to employ the more stringent *Chapman* standard for harmless error,[279] but the malleability of the chosen test has tended to lead to a far higher percentage of affirmances using the *Harrington* test.[280] "The administration

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ensuring against unjust convictions. Ibid., 363. *See also* Chapel, "Irony of Harmless Error," 511, 528; Fairfax, "Harmless Constitutional Error," 2040.

[277] *See* Bilaisis, "Abettor of Courtroom Misconduct," 458-59; Constitutional errors allow jury consideration of cases that present incompetent evidence as if it were competent or that omit other, significant, competent evidence. In turn, the violation "biases the trial in favor of the state and denies the defendant due process;" ibid., 463-70; providing illustrative examples, such as wrongful appeal to jury passions and prejudices or comment on the defendant's silence at trial, and explaining how they erode the presumption of innocence, lighten the government's burden of proof, and create an unfair rebuttal burden of proof for the defendant.

[278] Goldberg, "Constitutional Sneak Thief," 437.

[279] *See* Mitchell, "Against Overwhelming Appellate Activism," 1360; "whereas the *Chapman* test requires harmless error review to be uniformly strict, requiring reversal if the error had any possible causal impact on the verdict, the [*Harrington*] test[] permits movement [to] a fairly lenient review of the record." Mitchell notes that the test chosen often makes a difference to the case outcome. Ibid., 1335, 1338, 1347-51, 1363.

[280] Kamin, "Rights/Remedies Split," 62; ibid., 17-18; the malleability of the harmless error test provides a "powerful tool" for a "result-driven court;" Greabe, "Riddle Revisited," 100, nn. 223-24; judges usually care about the strength of the evidence of guilt rather than the standard employed to assess harmless error. *See also* Mitchell, "Against Overwhelming Appellate Activism," 1347-50; conducting an informal survey of Westlaw cases and finding that federal courts are twice as likely to use the *Harrington* test than to use the *Chapman* test; Edwards, "To Err is Human," 1215-28; surveying 53 District of Columbia federal judges, prosecutors, and defenders, and finding that judges

of the harm assessment test[] determine[s] the value of the rules that protect criminal defendants. If the defendant cannot obtain a remedy because the court finds a lack of harm, the right that was violated does not protect the defendant."[281] The "overwhelming evidence" harmless error test addresses neither the constitutional error nor the procedural impropriety of the government's conduct; instead, it goes in search of other record evidence of guilt, *without regard* to the impact that the error or resulting government presentation may have had on the jury.[282] As numerous commentators have noted, "[t]he Court apparently views the ultimate end of the criminal process and constitutional criminal procedure as securing the accused a fair trial. But, the Court has expressed a reductionistic notion of what a 'fair trial' means, defining it merely as a trial designed to produce a reliable verdict."[283] This "end-justifies-the-means" approach, which Congress rejected when it created the harmless error statute,[284] leaves the fate of a citizen in the

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voted to affirm convictions even more so than did prosecutors, and that most were persuaded based on "overwhelming evidence" that the defendant was, in fact, guilty.

[281] Poulin, "Tests for Harm," 995 & n. 13. Poulin also notes that in one-third of the first 200 cases wherein defendants were exonerated based on DNA evidence, the appellate courts previously had affirmed based on the harmless error test, finding "overwhelming evidence" of guilt, despite the defendants' actual innocence. Ibid., 996.

[282] Mitchell, "Against Overwhelming Appellate Activism," 1340; "what a jury might have done in an error-free trial is irrelevant;" Anderson, "Revising Harmless Error," 396; "this ostensible concern with the question of guilt is not rationally tied to the reliability of the conviction."

[283] Stacy and Dayton, "Rethinking Harmless Constitutional Error," 86; *see also* Murray, "A Contextual Approach," 1794; finding most troubling "the dissonance between the modern harmless error doctrine's reductionism and criminal procedure's diverse normative ambitions."

[284] The first proposed federal harmless error statute in 1908 effectively was a "correct result was reached" approach. Murray, "A Contextual Approach," 1803, n. 64. Congress rejected this approach in 1919 when, instead, it focused on the error and its effect on substantial rights. Epps, "Harmless Errors," 2128, citing Act of Feb. 26, ch, 48, 1919,

hands of a few, despite the Constitution's clear construction to avoid this result.[285] It is not the appellate court's role to affirm a conviction based on *its* factual assessment that, *putting aside* the error, the record otherwise shows the government had a strong case of guilt.[286] In effect, this test shifts the burden to the defendant to prove that the constitutional error affected the jury's verdict, when, constitutionally, the government bears the burden of proving that the error was harmless beyond a reasonable doubt.[287]

Even worse, some appellate courts have collapsed the "overwhelming evidence" harmless error test into one of the mere sufficiency of the evidence, which represents no more than "the baseline requirement" the government must meet in order to obtain a conviction.[288] The government also is assisted, at times, by the appellate courts' tendency to view the record evidence and draw all reasonable inferences in favor of the

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Pub. L. No. 65-281, 40 Stat. 1181, *repealed by* Act of June 25, 1948, ch. 646, 62 Stat. 892, 992.

[285] Congress also was reticent, initially, to apply harmless error review to criminal trials out of concern that constitutional criminal procedure rights would be "too easily relaxed." Dow and Rytting, "Can Constitutional Error be Harmless," 486, 484.

[286] *See supra* nn 126-30, 148-51 & accompanying text; quoting *Bollenbach, Kotteakos, Bihn,* and *Chapman; Sullivan*, 508 U.S. at 277; wherein the Court reconfirmed the proper roles of the jury and of the courts. *See also* Goldberg, "Constitutional Sneak Thief," 427; until the "overwhelming evidence" harmless error test, "no court had the power to enter a guilty verdict on its own judgment when the defendant exercised his right to a jury trial."

[287] Poulin, "Tests for Harm," 1019-21, 1033.

[288] Poulin, "Tests for Harm," 1009; ibid, 1046; harmless error test should require "more than mere sufficient evidence;" Stacy and Dayton, "Rethinking Harmless Constitutional Error," 128; "the Supreme Court has stated unequivocally that harmless error analysis is not a sufficiency of the evidence test." *But see,* Edwards, "To Err is Human," 1187, Stacy and Dayton, "Rethinking Harmless Constitutional Error," 128-30, Anderson, "Revising Harmless Error," 400; all noting that some courts find harmless error based merely on the sufficiency of record evidence of guilt.

prosecution.[289] As a preliminary matter, this focus constitutes yet another invasion of the jury's fact-finding role. Because jury deliberations occur in secret, involve the dynamic interaction of twelve different personalities, and result only in a general verdict of guilt or innocence, the appellate court cannot possibly know what evidence the jury credited, what inferences it accepted, or how it weighed the various pieces of evidence and inferences within the larger balance of the record.[290] At best, the appellate court's judgment "is based on its own probabilistic impressions of what a jury actually did," which necessarily reflects its "own views of the weight and credibility of evidence."[291]

In addition, while viewing the record evidence and drawing all inferences in the government's favor might be appropriate for a sufficiency of the evidence issue, the focus should work in the *opposite* direction for harmless error review.[292] Under a sufficiency of

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[289] Poulin, "Tests for Harm," 1033; Edwards, "To Err is Human," 1187 & n. 84; *see* Lee Epstein, William M. Landes, and Richard A. Posner, *The Behavior of Federal Judges: A Theoretical and Empirical Study of Rational Choice* (Boston: Harvard University Press, 2013): 36; "The temptation is to view the record favorably to the verdict winner … and give short shrift to the defendant's theories;" Stacy and Dayton, "Rethinking Harmless Constitutional Error," 127; the court may simply be inclined to assure itself that the defendant is, in fact, guilty; Landes and Posner, "Harmless Error," 175; if the court believes the defendant is likely to be convicted on retrial, it will tend not to reverse.

[290] Edwards, "To Err is Human," 1187 & n. 84; citing Traynor, *Riddle of Harmless* Error, 28; Lee E. Teitelbaum, Gale Sutton-Barbere, and Peder Johnson, "Evaluating the Prejudicial Effect of Evidence: Can Judges Identify the Impact of Improper Evidence on Juries?" *Wisconsin Law Review* 1983 (1983): 1152-53.

[291] Stacy and Dayton, "Rethinking Harmless Constitutional Error," 133, 127, 130; *see* Chapel, "Irony of Harmless Error," 516; the court "cannot possibly know or review what in the minds of the jurors led to the verdict;" Mitchell, "Against Overwhelming Appellate Activism," 1358; the court is "hypothesiz[ing] a guilty verdict that was never in fact rendered."

[292] Poulin, "Tests for Harm," 1048-52; *see* ibid., 1033; noting courts "find error harmless where the jury *could* convict if it drew the necessary inference in favor of the prosecution." (Emphasis original).

the evidence challenge, no constitutional error is alleged, the record is not susceptible to change, and the defendant simply claims that, based on a tangible and known record, the government failed to produce proof for every element of the crime charged. In this inquiry, the reviewing courts ask whether, "after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."[293] They end their inquiry upon finding record evidence to support the elements and, therefore, the resulting jury verdict of guilt.

By contrast, when a defendant alleges constitutional error, the record is not so tangible and known. Depending on the alleged error, for example, the record might be overinclusive because it contains evidence that should not have been admitted or underinclusive because it lacks evidence that should have been admitted. In short, from a constitutional standpoint, the record is not properly comprised. In this setting, where the error is a constitutional violation committed by the government, which bears the burden of proving harmlessness, the record should be viewed and all reasonable inferences drawn in favor of the defendant.[294] Giving the government the benefit of the doubt, and viewing the evidence and drawing all inferences in the government's favor, significantly

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[293] *Jackson v. Virginia,* 443 U.S. 307, 319 (1979).

[294] *Compare Van Arsdall,* 475 U.S. at 684; "The correct inquiry is whether, *assuming that the damaging potential of the [error] were fully realized*, a reviewing court might nonetheless say that the error was harmless beyond a reasonable doubt." (Emphasis supplied). *See also* Poulin, "Tests for Harm," 1049-5; advocating "draw[ing] all inferences in favor of the defendant, giving weight to arguments that reframe the evidence in light of the identified error."

lightens the government's burden of proof.[295] And, by doing so based on a tenuous record, the appellate court merely speculates about what a jury *might have done* with a proper record, devoid of the constitutional violation. Because, as a bedrock principle, the government bears the burden of proving guilt beyond a reasonable doubt by constitutionally-permitted means, giving the government the benefit of all favorable evidence and inferences, when assessing constitutional error, compounds the constitutional injury.

Notably, under both tests – sufficiency of the evidence and harmless error – appellate judges may not substitute their personal viewpoints for that of the jury.[296] The difference, however, is that, for sufficiency of the evidence, the court looks at an untainted record to see if evidence exists to substantiate each criminal element; the court need not speculate beyond what is there, in the record. For harmless error, however, a constitutional violation taints the record, which, as a result, does not accurately reflect what the jury should have considered. The court's focus on the limited portion of the record that it believes to be untainted does not solve the problem. The court should, instead, focus on the constitutional error and recognize "that the jury might have

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[295] Poulin, "Tests for Harm," 1048, review of the record in favor of the prosecution biases the court in favor of affirming the conviction; Stacy and Dayton, "Rethinking Harmless Constitutional Error," 128; "This approach obviously does not adequately protect a defendant's right to a jury trial, for it presupposes that the jury did or will resolve all evidentiary conflicts in the prosecution's favor;" Anderson, "Revising Harmless Error," 400; unlike the sufficiency of the evidence test, the harmless error test "requires no such deference to the state's evidence."
[296] *Jackson,* 443 U.S. at 318-19; *Bollenbach,* 326 U.S. at 614-15.

developed a reasonable doubt or credited different evidence if the case [had been] tried without the [constitutional] flaw."[297]

B. Ill-Equipped to Perform Fact-Intensive, Retrospective Analyses

An issue exists, however, regarding whether appellate judges are equipped to do so. As a preliminary matter, the cold, paper record on appeal, which some judges review only in part,[298] is a poor substitute for the trial event, where the jury sees and hears all witness testimony and evidence, first hand. Jury decisions usually turn on credibility calls and witness demeanor. As Justice Traynor discusses, "age, sex, intelligence, experience, [and] occupation" all factor into credibility determinations.[299] And only a person who actually experiences a witness' examination can assess witness truthfulness. The written record on appeal does not reflect "the unreasonable pause, the inappropriate smile, the sarcasm that changes a 'sure' which means 'yes' to a 'sure' which means 'I don't believe

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[297] Poulin, "Tests for Harm," 1049; "Taking this approach, courts should not dismiss claims of harm simply because the government's case is strong, the evidence in question is merely cumulative or impeaching, or the defense is unpersuasive to the court." Poulin notes that this approach is particularly critical when the government's case is purely circumstantial or the defense theory of the case might have been impacted by the error. Ibid., 1035-36. *See also* Anderson, "Revising Harmless Error," 400; courts should not ignore that often the "evidence is interrelated and likely tainted by the error."
[298] D. Alex Winkelman et al., "An Empirical Method for Harmless Error," *Arizona State Law Journal* 46 (2014): 1418; "[C]ommonly," appellate judges review a truncated record comprised of "the trial court opinion, the litigants' briefs, and memoranda from court clerks. While some appellate judges may actually review the raw trial court record, even then, the judges are a step removed from the live testimony of the real trial;" Goldberg, "Constitutional Sneak Thief," 430; the record on appeal might not be accurate, complete, or reviewed in its entirety; *accord* Fairfax, "Harmless Constitutional Error," 2048-49.
[299] Traynor, *Riddle of Harmless Error*," 20-21; *accord* Edwards, "To Err is Human," 1193-94 & n. 110.

that' or 'I don't agree;'"[300] it does not reveal that "a witness answered some questions forthrightly but evaded others" or show that "a convincing and truthful answer in writ[ing] … sounded unreliable at [trial]," or "[a] well-phrased sentence in the record… [came across as] rehearsed," or "[a] clumsy sentence [possessed] the ring of truth [when] the witness groped his way to its articulation."[301] And there is also the issue of contradictory witness testimony and evidence, where jurors must choose between competing versions of a story.[302] Only the spectators of the trial presentation can assess what is true, half-true, or a lie. "There is a great risk that the appellate court will get it wrong" in its review of the "cold, antiseptic record."[303]

Several experts opine that appellate court fact-finding and evidence-weighing based on the cold, emotionless record fails to do justice and unconstitutionally violates due process and the right to confrontation.[304] On appeal, a criminal defendant cannot offer new arguments, supplement the record with new evidence, or even, necessarily, answer the appellate judges' concerns through oral argument. This lack of interaction is

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[300] Goldberg, "Constitutional Sneak Thief," 430; *see also* Edwards, "To Err is Human," 1193-94 & n. 110.
[301] Traynor, *Riddle of Harmless Error*," 20-21; *accord* Edwards, "To Err is Human," 1193-94 & n. 110.
[302] *See* Poulin, "Tests for Harm," 1059; "Jurors relate to each side of the case as a narrative story rather than an assembly of items of evidence."
[303] Chapel, "Irony of Harmless Error," 530-31; Goldberg, "Constitutional Sneak Thief," 430; Mitchell, "Against Overwhelming Appellate Activism," 1340.
[304] Chapel, "Irony of Harmless Error," 515; Goldberg, "Constitutional Sneak Thief," 430; Fairfax, "Harmless Constitutional Error," 2048-49; Mitchell, "Against Overwhelming Appellate Activism," 1353-54, Bilaisis, "Abettor of Courtroom Misconduct," 458-59.

particularly concerning. As the American Academy of Appellate Lawyers notes, oral argument has great value from a systemic perspective:

> [It] is the only time where a party and [his] advocate can interact with the decision-maker. It is a time when the court's views on the issues are on display for the public and for [the parties], and counsel has the opportunity to address potential [record] misconceptions or overlooked facts. In that manner, oral argument is the most tangible manifestation of the critical role that appellate courts play in the resolution of public and private disputes traversing our legal system.[305]

And yet, as the Academy points out in its Task Force Report and Initiative on Oral Argument, with the exception of the District of Columbia and Seventh Circuit Courts of Appeals, only about 22% of all federal appeals are granted oral argument before a panel of appellate judges;[306] the remaining appeals are decided based on the parties' briefs.[307] Even more notably, of those appeals decided based on the briefs, some might be

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[305] James Martin and Susan Freeman, "Wither Oral Argument? The American Academy of Appellate Lawyers Say Let's Resurrect It!" *American Academy of Appellate Lawyers,* August 14, 2017: 1, https://www.appellateacademy.org/publications/oral_argument_initiative.pdf.

[306] The District of Columbia and Seventh Circuits' percentages are higher, 55% and 45% of all cases, respectively. American Academy of Appellate Lawyers, "Task Force Report and Initiative on Oral Argument," *American Academy of Appellate Lawyers,* August 14, 2017: 13, Table II, https://www.appellateacademy.org/publications/oral_argument_initiative.pdf.

[307] Ibid., 13 (Table II). The latest compilation of statistics from the Administrative Office of the U.S. Courts, which is for the year of 2014, likewise shows that federal appellate courts grant oral argument in only about 20 % of all cases, a 50% decrease from the percentage of oral arguments granted twenty years ago. *See* Debra Cassens Weiss, "Oral

handled primarily by court staff attorneys, who draft decisions and present them to judges for their approval, and others might be handled primarily by a single judge, who circulates a draft decision electronically to the remaining two judges. Whether the judges always collaborate regarding the draft decision is uncertain. The Academy warns that this process "invites[s] a moral peril: a judge engaged in other matters may sign off on a trusted colleague's draft without engaging in the case. And the third judge, unaware that the second judge did not engage, is at even greater risk of failing to engage after a draft has two votes."[308] These dangers further call into question the logic and legitimacy of harmless constitutional error review: a criminal defendant, who likely has no responsive input to the judges, but whose liberty hangs in the balance, is strapped to a static record, which is tainted with constitutional error, and based upon which, possibly, a sole judge, or even a staff attorney, primarily determines whether the jury would have found him guilty, anyway, despite the error.[309]

Some commentators and empirical studies suggest that appellate judges do a "poor job" in performing this task.[310] First, lay jurors and appellate judges do not process

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arguments are losing ground in federal appeals courts; would 'hot-court culture' reverse trend?" *American Bar Association Bar Journal,* June 1, 2018, http://www.abajournal.com/news/article/oral_arguments_are_losing_popularity_in_federal_appeals_courts_is_a_hot_cou/.

[308] American Academy of Appellate Lawyers, "Task Force Report," 4-5.

[309] Contrast the English system, from which the American harmless error doctrine emerged, but which, unlike the American system, does allow open response to judges' concerns and introduction of new evidence and arguments on appeal. Chapel, "Irony of Harmless Error," 518, 531.

[310] *See* Stacy and Dayton, "Rethinking Harmless Constitutional Error," 129 & n. 196; listing citations.

cases in the same way. Lay jurors tend to relate to the parties' presentations as if they are narrative stories, with even slight inferences sometimes proving to be powerful[311] and jurors' life experiences informing their assessments.[312] The deliberative process further impacts the ultimate verdict. Citing numerous studies, the Supreme Court in *Ballew v. Georgia* explained that a jury of fewer than six jurors tends to lead to inaccurate and inconsistent verdicts because they do not fairly represent a cross-section of the community and often militate in favor of finding a defendant guilty.[313]

As noted, appellate judges assessing harmless constitutional error do not necessarily engage in a robust deliberation in making their decision. Moreover, judges bring their own personal experiences, perspectives, and specialized legal training to the decision-making process, and they often fail to recognize that certain admitted evidence, omissions of evidence, or the interrelatedness of evidence might impact the record and

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[311] *See* Poulin, "Tests for Harm," 1059 & nn. 278, 280; noting that storytelling helps jurors organize the evidence and, at times, might make their credibility determinations appear less than objective; *see also* Teitelbaum, Sutton-Barbere, and Johnson, "Evaluating the Prejudicial Effect," 1153, "'Hundreds of different elements enter into a verdict – the education, associations, environment, family connections, religious convictions, social habits, prejudices, ambitions, and moral character of each juror, which must be multiplied by twelve for each panel.'" (Citation omitted).

[312] *See* Nancy Pennington and Reid Hastie, "Explaining the Evidence: Tests of the Story Model for Juror Decision Making," *Journal of Personality and Social Psychology* 62, no. 2 (1992): 189-206; noting that certain principles influence the jury's acceptance of a story, including a story's coverage, coherence, and uniqueness.

[313] *Ballew,* 435 U.S. at 229-34; citing numerous empirical and statistical studies and finding that deliberation by a smaller number of jurors increases "the risk of convicting an innocent person." Ibid., 232.

the jurors' decision in a different way.[314] For example, errors relating to eyewitness misidentification, false confessions, flawed forensics, and biased jailhouse informants, can have a corrupting influence on the remaining evidence or an improperly bolstering effect,[315] yet, routinely, these factors are overlooked when courts find the errors to be harmless.[316] Similarly, evidence that appellate judges view as "merely cumulative or

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[314] Anderson, "Revising Harmless Error," 401; Stacy and Dayton, "Rethinking Harmless Constitutional Error," 131; Poulin, "Tests for Harm," 1059-60; Teitelbaum, Sutton-Barbere, and Johnson, "Evaluating the Prejudicial Effect," 1152-53.

[315] Anderson, "Revising Harmless Error," 397-400: Eyewitness misidentification can influence "subsequent identifications, and even confessions." Ibid., 397. False confessions not only have a "devasting effect" on a jury, but "one confession may lead to a repetition, or a jailhouse informant's claim that it was repeated." Ibid., 398. Unvalidated or improper forensics, such as "bite mark identification, blood serology, [and] hair and fiber analysis," may deprive a defendant of due process. Ibid., 399 & n. 55. And jailhouse snitches may have been offered a favorable deal by the government without their bias being revealed and requiring collateral challenge for introduction of "evidence outside the record." Ibid., 399-400. *See* Kozinski, "Criminal Law 2.0," iii-xiii; adding to the Anderson list: misinterpreted fingerprint evidence; flawed foot and tire print, voice, handwriting, ballistics, and arson analyses; contaminated DNA evidence; and manufactured or embellished false memories; Green, "Prosecutorial Ethics," 463-64; adding to the Anderson list: faulty scent analysis testimony by a dog handler.

[316] *See, e.g.,* Garrett, "Judging Innocence," 76-96; In his study of 200 wrongfully convicted defendants, Garrett found: (i) of the 28% wrongfully convicted defendants who raised witness misidentification, none of them prevailed, even though 78% of them were convicted, at least in part, based on mistaken identification; ibid., 76, 80; (ii) no defendant who challenged a false confession on direct appeal prevailed, although one was successful on collateral review based on an ineffective assistance of counsel claim; ibid., 90, 96; and (iii) of 12 defendants who challenged informant testimony, only one prevailed. Ibid., 77, 86-87. *See also* Kozinski, "Criminal Law 2.0," iv-vii; the National Registry of Exonerations shows that "mistaken eyewitness testimony was a factor in more than a third of wrongful conviction cases;" ibid., iv & n. 9; fingerprint evidence suffers from a "significant rate of error;" ibid., iv; "voice identification errors are as high as 64%," "handwriting error rates average around 40% and sometimes approach 100%," "error rates for bite marks run as high as 64%," and "hair comparisons are about 12%;" ibid., iv-v; "wrongful convictions have been the result of faulty witness memories, often manipulated by the police or the prosecution; ibid., vii; and "between 2 and 8 percent of convicted felons are innocent people who pleaded guilty." Ibid., vii & n. 34.

impeaching" may have reinforced the "coherence and persuasiveness" of the defendant's case story in the eyes of the jurors.[317] In one empirical study comparing lay person, lawyer, and judge behavior in reaction to numerous iterations of erroneously admitted or omitted evidence, the authors found sharply varying decision-making among the three groups, suggesting that the assessment of harmless error is highly subjective.[318] They also uncovered that lawyers and judges often present with one of two mentalities, either pro-prosecution or pro-defendant, and that this personal mentality influences harmless error outcomes.[319] It leads to "a result-driven approach," whereby a judge may pick the best articulation of the harmless error test to achieve a desired result.[320] These subjective, even consciously-driven results led the study authors to conclude that harmless error analysis is a "speculative enterprise" and that many judges substitute their own viewpoints, with no real deference to the jury, let alone consideration of what the jury might have done, had the error not tainted the record.[321]

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[317] Poulin, "Tests for Harm," 1060; *see also* Pennington and Reid, "Explaining the Evidence," 189-91; jurors will accept the story with the greatest coverage and coherence.
[318] Teitelbaum, Sutton-Barbere, and Johnson, "Evaluating the Prejudicial Effect," 1155, 1160
[319] Ibid., 1173.
[320] Mitchell, "Against Overwhelming Appellate Activism," 1352; "Personal values may influence which test is chosen, with conviction-prone judges choosing the *Harrington* test because of its grant of greater discretion to review the record. Conversely, reversal-prone judges might choose the *Chapman* test because it calls for a very strict interpretation." *Accord* Kamin, "Rights/Remedies Split," 17-18; the malleability of the test chose provides a "powerful tool" for a "result-driven court;" Edwards, "To Err is Human," 1210-28; surveying 53 federal judges, prosecutors, and defense attorneys regarding harmless error application and finding votes to affirm invariably came from prosecutors and judges, while votes to reverse came from defenders.
[321] Teitelbaum, Sutton-Barbere, and Johnson, "Evaluating the Prejudicial Effect," 1184, 1187-92. *See also* Winkelman et al., "Empirical Method," 14-15; whose own study

Further, psychological research shows that, in addition to being influenced by their conscious leanings and subjective viewpoints, appellate judges may labor under the effects of many subconscious biases, including hindsight bias, outcome bias, status quo bias, confirmation bias, and belief persistence. Hindsight bias predisposes appellate judges to look past the error and see a defendant as guilty based on the faulty belief that the past jury verdict signifies future predictability, even on retrial without the error.[322] Outcome bias similarly influences judges to view the jury's initial, *albeit* error-affected, decision as correct, [323] and status quo biases reinforces this feeling, as the defendant no longer presents as presumed innocent but, instead, as a convicted felon.[324] Confirmation bias bears more upon actual record review, reflecting the judge's tendency to interpret and credit evidence in a way that supports the guilty verdict and discredit contradictory evidence and inferences.[325] Belief persistence similarly causes judges to stick with an

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revealed that wrongly-admitted evidence impacts jury verdicts, a defense objection to it, at trial, exacerbates the impact on verdicts, and jurors are not likely to heed judges' limiting instructions to ignore wrongly-admitted evidence.

[322] Poulin, "Tests for Harm," 1039; Keith A. Findley and Michael S. Scott, "The Multiple Dimensions of Tunnel Vision in Criminal Cases," *Wisconsin Law Review* 2006 (2006): 317-22, 350; Jason M. Solomon, "Causing Constitutional Harm: How Tort Law Can Help Determine Harmless Error in Criminal Trials," *Northwestern Law Review* 99, no. 3 (2005): 1086-87; *see also* Winkelman et al., "Empirical Method," 1411-12, referring to these cognitive phenomena as "mental contamination."

[323] Poulin, "Tests for Harm," 1039; Mitchell, "Against Overwhelming Appellate Activism," 1353; Findley and Scott, "Dimensions of Tunnel Vision," 319-20; Winkelman et al., "Empirical Method," 1411-12.

[324] Winkelman et al., "Empirical Method," 1411.

[325] Poulin, "Tests for Harm," 1039; Findley and Scott, "Dimensions of Tunnel Vision," 309; *see also* Winkelman et al., "Empirical Method," 1411-12; adding that because judges are part of a judicial social network, they tend to lean toward affirming fellow judges.

initial assessment of guilt, resisting any change, even when undermining, erroneously-excluded evidence becomes part of harmless error consideration.[326]

Often, these cognitive biases go unrecognized while the judge's subconscious mind tilts away from the harm and toward affirming guilt, despite knowledge of the error.[327] And, even when the biases are recognized, they are difficult to resist.[328] Several commentators posit that the ease of finding evidence supportive of guilt using the "overwhelming evidence" harmless error test is exacerbated by these biases.[329] "The number of cases in which the court[s] characterize[] the prosecution evidence as overwhelming *without careful scrutiny* suggests biased review,"[330] yet another negative facet of assessing, retrospectively, whether the error affected the defendant's constitutional rights.[331]

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[326] Poulin, "Tests for Harm," 1040; Findley and Scott, "Dimensions of Tunnel Vision," 313-14; *see also* Winkelman et al., "Empirical Method," 1411; referring to "belief persistence" as "coherence-based reasoning."
[327] Findley and Scott, "Dimensions of Tunnel Vision," 350; *see* Winkelman et al.; "Empirical Method," 1411; "mental contamination" causes judges exposed to the error to make their views "cohere with that of the trial jury."
[328] Poulin, "Tests for Harm," 1040; Stacy and Dayton, "Rethinking Harmless Constitutional Error," 130-31.
[329] Poulin, "Tests for Harm," 1040; *see also* Stacy and Dayton, "Rethinking Harmless Constitutional Error," 130-31; noting courts deem errors harmless if the evidence is "overwhelming," even without assuring that the impacted evidence would not have changed the jurors' minds; Winkelman et al., "Empirical Method," 1412; "the very enterprise of after-the-fact review is doomed …. Judges simply cannot see the errors because psychological biases make it hard to imagine that cases would have come out differently."
[330] Poulin, "Tests for Harm," 1040 (emphasis supplied).
[331] Poulin, "Tests for Harm," 1040; *see also* Solomon, "Causing Constitutional Harm," 1067; Winkelman et al., "Empirical Method," 1412; one study found that "less than 20% of the [judges'] analyses [even] used a test for determining harm," and several studies noted that resulting decisions seemed "arbitrary and conclusory." *C.f.,* U.S. Const.

C. Evading Appellate Courts' Constitutional Roles

Indeed, the disturbing trend among appellate courts not to give careful consideration to the constitutional error, but, instead, to move directly to harmless error analysis negatively impacts both the courts' error review and law development roles.[332] At times, courts do not address the error at all or discard the error without analysis, stating something like "even if" or "assuming" a constitutional violation occurred, the error is harmless.[333] This approach skirts the appellate courts' role to analyze constitutional issues and provide guidance to the public, district courts, and prosecutorial and defense litigants.[334] Written appellate decisions that interpret and explain

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amend. VI; guaranteeing every criminal defendant the right to an impartial assessment of guilt or innocence.

[332] The appellate courts' role in the judicial system is to review and correct error, interpret the law, and supervise trial proceedings. Chapel, "Irony of Harmless Error," 511-14 & n. 74; Mitchell, "Against Overwhelming Appellate Activism," 1354-56.

[333] *See, e.g. Milton*, 407 U.S. 371; "On the basis of the argument … and our examination of the extensive record …, we have concluded that the judgment … must be affirmed without reaching the merits of petitioner's present claim. Assuming, arguendo, that the challenged [confession] should have been excluded, the record clearly reveals that any error in its admission was harmless …," ibid., 372; because the jury was otherwise presented with "overwhelming evidence of guilt," we find beyond a reasonable doubt that the jury would have reached the same verdict. Ibid., 377-78. *Davis v. Ayala,* 135 S.Ct. 2187 (2015), "At issue here is Ayala's claim that the *ex parte* portion of the *Batson* hearings violated the Federal Constitution." Ibid., 2198; "[W]e find it unnecessary to decide that question." Ibid., 2197; "Assuming without deciding that a federal constitutional error occurred, the error was harmless …." Ibid., 2198. *See* Chapel, "Irony of Harmless Error," 515, "by refusing to decide constitutional issues, courts "default[] in performing … the functions which justif[y] its existence."

[334] Kamin, "Rights/Remedies Split," 38; this process allows the court to skip any consideration of the alleged error and affirm based solely on its harmless error factual assessment that the defendant is guilty, thus impeding the law-declaration function of appellate courts; Chapel, "Irony of Harmless Error," 514-15; this process allows the court to avoid deciding hard issues of constitutional law; Goldberg, "Constitutional Sneak Thief," 433; this process interferes with the orderly development of constitutional law.

constitutional rights, along with the doctrine of *stare decisis,*[335] provide stability in the law and notice so that individuals may guide their future actions.[336] By shortcutting the appropriate order of analyses and assessing harmlessness as if it were the only issue, appellate courts fail to provide guidance that – had it been given – might obviate future constitutional violations and future appeals seeking to clarify the same constitutional claims.[337]

Of course, in a nuanced way, the opposite result may be true. By developing a large body of jurisprudence based on the doctrine of harmless error, the Court has given a sort of negative guidance to the public, courts, and litigants that it will not enforce substantive constitutional rights or recognize the larger individual and institutional values that they protect. For example, when the Court in *Harrington* adopted the "overwhelming evidence" harmless error test, it implicitly telegraphed that a *Bruton* violation of the Sixth Amendment's confrontation right does not matter if, in the court's view, the defendant is, in fact, guilty. Thereafter, in later cases, the Court affirmed convictions using the same

[335] *See* Murray, "A Contextual Approach," 1824, n. 176, explaining *stare decisis* as a "'hierarchy' … under which 'precedents … enjoy a super-strong presumption of correctness'" pursuant to the theory that "'legislatures 'remain[] free to alter' judicial interpretations ….'" (Citations omitted).
[336] Chapel, "Irony of Harmless Error," 514-15; Edwards, "To Err is Human," 1980-82.
[337] Kamin, "Rights/Remedies Split," 38-39, 51; *see* Chapel, "Irony of Harmless Error," 515; "If a court does not review alleged error, it provides no guidance for similar problems which may arise in the future, and it cannot correct error if it does not review claimed error;" Edwards, "To Err is Human," 1182; "What may be an important [constitutional] question … is therefore sidestepped by the application of a doctrine that itself presupposes the existence of such an error." *See also* Goldberg, "Constitutional Sneak Thief," 434; "Ironically, harmless error is based on a concern for judicial economy."

harmless error standard, despite *Bruton* violations in those cases.[338] In this way, application of harmless error affects constitutional rights both affirmatively, by depreciating their value, and negatively, by failing to address them when violated.[339] Constitutional rights are lost in the balance. Under the *Harrington* test, courts look only to whether it believes the result is correct based on allegedly untainted factual evidence, without regard to how the constitutional error might have affected the defendant's rights.

The resulting body of harmless error jurisprudence then takes on a "quasi-substantive" life of its own as trial judges, prosecutors, and investigative authorities operate within a system under which constitutional harms seem justified.[340] Implicit within harmless constitutional analysis are the assumptions that: (1) "the state, in seeking to deprive the accused of his or her life or liberty, has violated its own rules, the same reason the accused was put on trial;" and (2) "[because] the error is deemed harmless[,] the state ought not to suffer any sanction for the violation."[341] In other words, it is okay

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[338] *See Schneble*, 405 U.S. 427; *Brown,* 411 U.S. 223.

[339] *See* Goldberg, "Constitutional Sneak Thief," 435; When courts refuse "to decide a matter on the merits in favor of a procedural doctrine invented to avoid retrials over omitted 'the's,' the loss is exceeded only by the danger of that same doctrine changing the constitutional process without warning."

[340] Murray goes so far as to state "that *stare decisis* may prove to be a formidable obstacle to harmless error reform." Murray, "A Contextual Approach," 1823. He notes, however, that a way around this conundrum exists. The Supreme Court has held that "[u]nless inexorably commanded by statute, a procedural principle of [significant] importance should not be kept on the books in the name of *stare decisis* once it is proved to be unworkable in practice; the mischievous consequences to litigants and courts alike from the perpetration of an unworkable rule are too great." Ibid., 1825, n. 184 (citation omitted); *see also* ibid.; "*stare decisis* applies much more strongly to rights than to remedies." (Citation omitted).

[341] Chapel, "Irony of Harmless Error," 516.

for the police and prosecutors to commit and trial courts to approve a violation of the Constitution if, in an appellate court's assessment, the defendant appears to be guilty anyway. And this premise further assumes that an appellate court is capable of making that factual assessment, which, for reasons previously discussed, is legally misplaced and realistically doubtful. One begins to wonder why, or perhaps how, the constitutional criminal rights contained in the Bill of Rights are still in existence. They have not been eliminated by the people, through constitutional amendment.[342] Instead, they have been diluted by judicial fiat[343] – itself a violation of the Constitution's separation of powers[344] and the courts' duty to protect and preserve the Constitution.[345] Remarkably, an accepted understanding for the Bill of Rights includes protection against arbitrary rule by a few and government abuse of individuals when it so chooses.[346] The Court's creation of a "harmless constitutional error" doctrine thus turns the Constitution on its head on multiple levels. It fails to deter governmental abuse or to recognize that larger institutional values inform the Constitution's provisions.[347]

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[342] *See* U.S. Const. art. V; requiring two-thirds of the House or State legislatures to propose an Amendment and ratification by three-fourths of the State legislatures.
[343] U.S. Const. art. I, §§ 1, 8. The power to create laws rests with Congress, not the courts.
[344] *See* THE FEDERALIST NO. 47; a divided government was chosen to prevent "accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many."
[345] U.S. Const. art. III, §§ 1, 2; U.S. Const. art. VI.
[346] Chapel, "Irony of Harmless Error," 517; the courts have a responsibility to protect constitutional rights against abuses by the executive and legislative branches of the government and against oppressive majorities;" Goldberg, "Constitutional Sneak Thief," 433; constitutional rights are meant to be permanent and "immune to the political process."
[347] Edwards, "To Err is Human," 1194-95; harmless error erodes constitutional rights and fails to deter future misconduct; Bilaisis, "Abettor of Courtroom Misconduct," 470;

i. Failure to Deter Abuse by Those in Power

Harmless constitutional error that focuses on the weight of the evidence takes no stock of the propriety of government actors' conduct.[348] Instead, the more impactful harmless error becomes in relation to a particular constitutional violation, the greater its directive power over the behavior of police, prosecutors, and inferior courts.[349] Knowing that a violation likely will not result in a conviction reversal, the police see little risk, for example, in obtaining evidence illegally, forcing a defendant's confession, or manipulating testimony or evidence at trial.[350] For the same reason, prosecutors have

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harmless error has "two pernicious effects": (1) discouraging adherence to the rules, and (2) systematic erosion of justice. *See also* Mitchell, "Against Overwhelming Appellate Activism," 1366; the *Harrington* standard does not deter official misbehavior and reinforces government error and abuse.

[348] Poulin, "Tests for Harm," 995, n. 13; Kamin, "Rights/Remedies Split," 38, 57-59; Bilaisis, "Abettor of Courtroom Misconduct," 468-70.

[349] Goldberg, "Constitutional Sneak Thief," 436-37 & n. 142; "[I]f a particular error is declared to be harmless a sufficient number of times, then the cumulative effect of such holdings will be that both the prosecution and the trial judge will tend to ignore error and commit it again;" Albert W. Alschuler, "Courtroom Misconduct by Prosecutors and Trial Judges," *Texas Law Review* 50 (1972): 662; affirmances on harmless error grounds "might be misread" by police and prosecutors as "evidence of the court's willingness to tolerate" error or even as "winking at lawlessness."

[350] Goldberg, "Constitutional Sneak Thief," 439. *See* Edwards, "To Err is Human," 1195-96; citing examples of coerced confessions and unlawful searches and seizures that go uncorrected and, therefore, embolden the police to violate the law. *See also* Garrett, 61; "The message to law enforcement officers is that unconstitutional ends justify the means to obtain evidence of guilt;" Kozinski, x & n. 49; "[t]he Justice Department and FBI [] formally acknowledged that nearly every examiner in an elite FBI forensic unit gave flawed testimony in almost all [of the 268] trials in which they offered evidence against criminal defendants over more than a two-decade period before 2000." *See, e.g.,* ibid, xi; citing the 2013 release of a death row inmate convicted based on a supposed oral confession that was fabricated by Detective Saldate, "a serial liar," and citing a second case where a defendant spent 39 years in jail based on a twelve-year-old boy's eyewitness testimony that had been "fe[d] to him" by the police.

little incentive to avoid use of that evidence at trial[351] or to refrain from committing their own constitutional errors, such as commenting on a defendant's failure to testify or withholding exculpatory evidence.[352] Even the prosecutor's dual role "to seek justice" has been massaged to be compatible with these actions.[353] Weak court enforcement of constitutional obligations emboldens these state actors because they interpret judicial nonintervention as judicial approval.

Thus, police, prosecutors, and courts watch carefully as a constitutionally-harmful body of harmless error jurisprudence develops. The existence of this jurisprudence permits police and prosecutors to view certain constitutional violations as legally

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[351] *See* Fish, "Prosecutorial Constitutionalism," 297-298; arguing that prosecutors should instead serve a gatekeeping role to prevent the use of dubious evidence.

[352] *See* Bilaisis, "Abettor of Courtroom Misconduct," 458-59, 463-70; demonstrating how these errors allow jury consideration of cases that present incompetent evidence as if it were competent or that omit other, significant competent evidence, thereby biasing the case in favor of the government and eroding defendants' presumption of innocence. *See also* Garrett, "Innocence, Harmless Error," 61; "The message to prosecutors is that, if there is some other reliable evidence of guilt, even a constitutional violation may be excused." *See* Kozinski, xxii-xxiii; "[T]here are disturbing indications that a non-trivial number of prosecutors – and sometimes entire prosecutorial offices – engage in misconduct … rang[ing] from misleading the jury, to outright lying in court and tacitly acquiescing or actively participating in the presentation of false evidence by police." Ibid., xxii-xxiii.

[353] Goldberg, "Constitutional Sneak Thief," 438-39; "[T]he prosecutor's duty to 'justice,' may raise some doubt about how he should respond to a constitutional violation, but the prosecutor's instincts as a lawyer combined with the harmless constitutional error doctrine, demand that the prosecutor abdicate any role as a positive force for the maintenance of constitutional guarantees;" Bilaisis, "Abettor of Courtroom Misconduct," 459; "Although the duty of the prosecutor is 'to seek justice, not merely to convict,' the adversarial system demands aggressive advocacy to the limits of law." (Citation omitted). *But see* Green, "Prosecutorial Ethics," 468; "[L]eaving prosecutors to decide for themselves what it means to 'seek justice' in any given situation is a doomed regulatory strategy;" The Federalist No. 80: "No man ought certainly to be a judge in his own cause, or in any cause in respect to which he has the least interest or bias."

acceptable and compels trial and intermediate appellate courts to find them acceptable virtually in the same breath that they may disapprove of them.[354] As a result, government actors are vested with discretion[355] to disregard the law, even to violate it deliberately.[356] Indeed, numerous reviews have documented just how frequently prosecutors do engage in such actions. In 2003, the Center for Public Integrity reviewed almost 12,000, post-1970 cases and found that prosecutorial misconduct occurred in more than 2,000 of them.[357] Over time, the results have not improved. Tellingly, in 2016, the Innocence Project drew direct connections between confirmed cases of prosecutorial misconduct,

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[354] Goldberg, "Constitutional Sneak Thief," 437-38, 439 & nn. 157-58; because they are compelled by binding precedent to so do, "the court[s] [keep] affirming and the prosecutors [keep] [committing violations];" Edwards, "To Err is Human," 1195; we can hardly expect prosecutors to respect the rights of criminal defendants … when we as judges are unwilling to do so;" Bilaisis, "Abettor of Courtroom Misconduct," 458-59; "Appellate court expressions of disapproval and warnings of impropriety provide little deterrence if convictions resulting from error-tainted trials are allowed to stand."

[355] Murray, "A Contextual Approach," 1796. Murray extends this unlimited license to the courts and structural rights, arguing that "remedial deterrence" motivates courts to construct the right in such a way as to avoid the consequence of an automatic reversal. Ibid., 1810 & n. 107.

[356] *See* Alschuler, "Courtroom Misconduct," 631, 645-47; despite judicial condemnation of prosecutorial misconduct, it continues; Bilaisis, "Abettor of Courtroom Misconduct," 458-59 & n. 8; academic commentators "bemoan[] [the] frequency" of prosecutorial misconduct;" Rachel E. Barkow, "Organizational Guidelines for the Prosecutor's Office," *Cardozo Law Review* 31, no 6 (2010): 2090; prosecutorial misconduct "is not an infrequent occurrence." *See also* Kamin, "Rights/Remedies Split," 86; "the current system of harmless error does not provide prosecutors incentives either to educate themselves on the law or to shy away from intentional or knowing misconduct;" Kozinski, xxxviii; "Faced with the remote possibility of being found out, and the likelihood that nothing bad will happen even if they are, many prosecutors will turn a blind eye or worse."

[357] Brook Williams, "Methodology: The Team for Harmful Error," last modified May 19, 2014, *Center for Public Integrity,* https://publicintegrity.org/accountability/methodology-the-team-for-harmful-error/. In addition, concurring or dissenting judges found misconduct in about 500 more cases. Ibid.

harmless error determinations, and discipline of prosecutors for their actions: of 660 cases of confirmed prosecutorial misconduct between 2004-2008, 527 cases were affirmed based on harmless error review and only one prosecutor was disciplined.[358]

Courts should hold legal authorities accountable for wrongful behavior.[359] In those cases where courts have done so, defendants' rights were vindicated even while government actors continued to refuse to acknowledge their misconduct.[360] But the courts do not take action often enough. And the Supreme Court, rather than exhorting them to do so, has recognized absolute immunity for prosecutorial actions taken while in the role of prosecutor and relegated enforcement of the law, against those obligated to uphold the law, largely to other remedies.[361] As a review of recent research demonstrates, these

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[358] Innocence Project, "Prosecutorial Oversight: A National Dialogue in the Wake of *Connick v. Thompson*," *The Innocence Project*. March 2016, https://www.innocenceproject.org/wp-content/uploads/2016/04/IP-Prosecutorial-Oversight-Report_09.pdf.

[359] *See* Bilaisis, "Abettor of Courtroom Misconduct," 470; "The [c]ourts themselves are instruments of law enforcement [and] [t]hey must preserve their own integrity;" Kozinski, xxxiii; "[J]udges have an affirmative duty to ensure fairness and justice, because they are the only ones who can force prosecutors and their investigators and experts to comply with due process."

[360] *See* Kozinski, xxiii-xxvi; highlighting three cases where, despite being caught red-handed, prosecutors continued to resist acknowledging their misconduct until forced to do so by district judge intervention or investigations. In the first case, the court ordered an investigation that forced the Justice Department to admit its wrongdoing and move to vacate the conviction. Ibid., xxiv. In the second case, the Ninth Circuit vacated a conviction and, on remand, a State appellate court barred a retrial; still, the district attorney complained about the courts' actions. Ibid., xxv. In the third case, a court disqualified an entire prosecutor's office from further participation in the case based on its manufacture of false confessions. Ibid., xxvi.

[361] The Court has suggested that the following mechanisms will cause prosecutors to comply with their constitutional duties: discipline by state bar associations, civil liability under 42 U.S.C. § 1983, contempt of court, and criminal liability. *See Connick v. Thompson,* 563 U.S. 51 (2011); *Imbler v. Pachtman,* 424 U.S. 409 (1976).

remedies are rarely enforced and do not deter constitutional violations.[362] Indeed, prosecutor lobbying bars resist criminal justice reforms designed to hold them more accountable. Paradoxically, many of the arguments they give equally underscore the flaws in the harmless error doctrine that they use to support convictions:[363]

Rules governing prosecutorial conduct cannot take into account "how prosecutors should behave in a given situation;" "prosecutors' conduct is too complicated to be dictated by enforceable rules"	Harmless error cannot take into account what a jury would have done in a given situation devoid of constitutional error; jury conduct is too complex to analyze by use of the harmless error doctrine
Rules governing prosecutors' conduct "usurp" the role of the legislature	The harmless error doctrine usurps the role of the people, both by weakening constitutional rights and invading the jury's role

[362] The ineffectiveness of these "checks" on deterring police or prosecutorial misconduct is well-documented. *See, e.g.,* The Innocence Project, "Prosecutorial Oversight,"12-20; Kamin, "Rights/Remedies Split," 79-84; Alschuler, "Courtroom Misconduct," 674; Bilaisis, "Abettor of Courtroom Misconduct," 475; Barkow, "Organizational Guidelines," 2090, 2093-98; Green, "Prosecutorial Ethics," 474-78; Fish, "Prosecutorial Constitutionalism," 254-59; Keenan, et al., "The Myth of Prosecutorial Accountability," 234-40; Ellen Yaroshefsky, "Wrongful Convictions: It Is Time to Take Prosecution Discipline Seriously," *University of the District of Columbia Law Review* 8 (2004): 288.

Studies and news reports support these scholars' views. *See* Ridolfi, Possley, and North California Innocence Project, "Preventable Error," 3; Of more than 4,000 appellate decisions surveyed, the court found prosecutorial misconduct is almost one-fifth (707) cases, but only seven prosecutors were disciplined; Armstrong and Possley, "The Verdict;" finding more than 11,000 homicide cases involving prosecutorial misconduct between 1963 and 1999, without a single one resulting in a prosecutor's public sanction and only two prosecutors suffering short term suspensions; Brad Heath and Kevin McCoy, "Prosecuting Offices' Immunity Tested," *USA Today* (McLean, VA), Oct. 6, 2010, http://usatoday30.usatoday.com/news/Washington/judicial/2010-10-05-federal-prosecutor-immunity_N.htm; finding 201 prosecutorial ethics violations between 1997-2010, with only one prosecutor sanctioned. *See also* Joel B. Rudin, "The Supreme Court Assumes Errant Prosecutors Will Be Disciplined by Their Offices or The Bar: Three Case Studies That Prove That Assumption Wrong," *Fordham Law Review* 80, no. 2 (2011): 539-41; finding rampant prosecutorial misconduct in the New York boroughs.

[363] *See* Green, "Prosecutorial Ethics," 480-83; the source for all prosecutor argument quotations within the chart. The comparisons to harmless error arguments are my own.

Rule-makers have been “captured by the defense bar”	The courts have been captured by their use of harmless error
Ethics rules will lead to “frivolous and oppressive disciplinary complaints” and a resulting waste of “prosecutor’s time and intrus[ion] into the[ir] confidential” decision-making	Harmless error has moved beyond mere technicalities and minutiae, leading to time-consuming litigation about constitutional errors and review of the “overwhelming” record evidence, despite the jury’s role as confidential fact-finder
“[H]eightened risk of discipline … will make prosecutors overly cautious, impeding their effectiveness”	Harmless error will allow prosecutors to violate the law to obtain convictions, regardless of the impact on defendants’ rights
Defendants will take advantage of the rules, “potentially creating new, unintended legal rights”	Prosecutors will take advantage of harmless error, in spite of the existence of constitutional rights
“[N]orms governing prosecutors are uncertain and contested,” and as “elected or appointed” members of a “democratic process,” they should be “subject to political accountability, not judicial oversight”	All power not granted to the government rests with the people, and the courts are accountable to uphold the people’s constitutional rights rather than negating them through harmless error oversight
Ethics rules are “over-inclusive” and might “be interpreted to forbid conduct that does not deserve to be punished”	Harmless error can be interpreted to punish innocent defendants while, simultaneously, not punishing government constitutional violations
Conduct rules are “invariably uncertain,” resulting in “confus[ion] for prosecutors”	Harmless error makes the meaning of constitutional rights uncertain, failing to given guidance to the public, courts, or litigants
Conduct rules are “unnecessary” because no “widespread” prosecutorial misconduct exists and “[s]ingling out prosecutors” would be “unfair” and “demoralizing”	Constitutional rights serve as protection against government abuse, and distorting these rights to obtain convictions is unfair to the defendant and detrimental to society

In sum, government actors do not appear to want judicial oversight; they want to call their own shots.[364] But courts are obligated to cleanse the system of constitutional errors, not to perpetuate violations or, worse, turn them into tools to be used *against* defendants.[365] The harmless error doctrine has gone from closing reversal loopholes created by mere technicalities, minutia, or defense inserted-minor errors, to allowing police and prosecutors to commit and insert constitutional errors into the record for jury consideration, with little-to-no ramifications. The Court has distorted the doctrine 180-degrees from its purpose, and any judicial economy and finality achieved by its application simply cannot sustain the harm done to individual and institutional constitutional values.[366]

ii. <u>Failure to Protect Individual and Institutional Values</u>

Several commentators have suggested that the harmless error doctrine no longer serves its goals of economy, finality, and pragmatism. [367] Appellate courts now spend

[364] Green, "Prosecutorial Ethics," 480; "The thirty-year review of prosecutorial ethics is largely a story about federal prosecutors' obstruction of ethics regulation at every turn."
[365] *See* Landes and Posner, "Harmless Error," 176; "If the appellate court reverses a conviction when error occurs, a prosecutor will have a greater incentive both to refrain from committing intentional and deliberate errors and to invest resources in preventing inadvertent errors from occurring than if the court, invoking the harmless error rule, declines to reverse;" Green, "Prosecutorial Ethics," 467; additional rules governing prosecutors' conduct and stricter enforcement of existing rules are needed.
[366] Chapel, "Irony of Harmless Error," 540; "courts [are what] stand between citizens and a police state;" Garrett, "Innocence, Harmless Error," 62; harmless error "undermines precisely those rights designed to prevent the wrongful conviction of the innocent."
[367] *See* Fairfax, "Harmless Constitutional Error," 2060-65; Fairfax, "A Fair Trial," 455-56; Goldberg, "Constitutional Sneak Thief," 440-41; Chapel, "Irony of Harmless Error," 515; Landes and Posner, "Harmless Error," 181; Anderson, "Revising Harmless Error," 396-400.

exorbitant resources on record review for “overwhelming evidence” of factual guilt, which is an inefficient use of court time and inconsistent with its systemic purpose.[368] Harmless error also does not necessarily lessen the number of court proceedings or more quickly bring matters to conclusion. For example, constitutional errors that allow use of evidence that the prosecution otherwise would not have obtained, permit a trial to occur that might not otherwise have happened, followed by an appeal from that trial, and substantial time invested in that appellate review.[369] And, if the error ultimately is not harmless, yet a second trial and, likely, a second appeal will occur for a case that the prosecutor should not have brought in the first place.[370] The harmless error doctrine, thus, increases both the number of criminal trials and appeals. If appellate courts would more frequently enforce constitutional rights, rather than accepting their breach, multiple stages of litigation could be avoided.[371] In addition, actually addressing constitutional errors, rather than moving directly to harmless error review, would lighten appellate court caseload “by laying down clear rules of law to guide prosecutors, defense counsel and trial courts” for both current and future cases.[372] By contrast, “too lax a standard of harmlessness … reduc[es] the cost to prosecutors of errors, increase[s] the number of

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[368] Chapel, “Irony of Harmless Error,” 515; “To pursue such a course in order to determine whether error is harmless, so that judicial economy might be served is not only ironic, it is nonsensical;” Goldberg, “Constitutional Sneak Thief,” 441; highlighting “the increase in court time spent on [review] due to the ‘overwhelming evidence’ harmless error test.”
[369] Goldberg, “Constitutional Sneak Thief,” 440.
[370] Ibid.
[371] Ibid., 441; “As a corollary, suppression of a right increases the number of trials, which will be followed by an appeal.”
[372] Landes and Posner, “Harmless Error,” 181.

errors and hence the number of appeals and the number of issues per appeal ….”[373] Finally, as a practical matter, an original problem of defense attorneys inserting minor technical errors into the record to trigger auto-reversal is simply inapplicable for constitutional errors. “It is difficult [for defense counsel] to place a bad search, a bad statement, a bad lineup, or other [government-controlled] error into the record.”[374]

Nor does harmless constitutional error necessarily serve its additional goals of ensuring fairness and public confidence in the justice system.[375] Once the Court whittled the criminal trial's central purpose to assessing factual guilt or innocence,[376] it reduced review of constitutional errors to their truth-seeking function and the reliability of the trial result.[377] But the reliability of the trial result cannot be presumed based on a review of the untainted "overwhelming evidence." As previously discussed, constitutional errors affect the body of evidence that the jury considered and the jury might have "developed a reasonable doubt or credited different evidence"[378] had the error not occurred.[379] The last three decades of DNA exonerations prove that the harmless error "overwhelming

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[373] Ibid.
[374] Goldberg, "Constitutional Sneak Thief," 441.
[375] Fairfax, "Harmless Constitutional Error," 2065; Anderson, "Revising Harmless Error," 396-400. *See also* Green, "Prosecutorial Ethics," 466-67.
[376] *Van Arsdall,* 475 U.S. at 681; *Rose,* 478 U.S. at 578-79.
[377] *See* Stacy and Dayton, "Rethinking Harmless Constitutional Error," 86-87; harmless constitutional error "presumes the reliability of the result and judicial economy to be the *only* values relevant to deciding the appropriate remedy for constitutional error; (emphasis original);" Goldberg, "Constitutional Sneak Thief," 432; harmless constitutional error effectively says that all other interests are outweighed by the nonconstitutional value of judicial economy.
[378] Poulin, "Tests for Harm," 1049.
[379] *See supra* nn. 291, 328-29 & accompanying text.

evidence" test "is not rationally tied to the reliability of convictions" because it is not conducted with "an awareness of the contributors to wrongful conviction[s]."[380] And these exonerations stand as proof of criminal justice gone awry at times, with a resulting loss of public confidence in the system.[381]

Harmless constitutional error also trades individual and institutional protections for the goal of punishing a presumably guilty defendant. The doctrine's emphasis on the trial result stands in stark contrast to the Constitution's "broader ethical vision, which encompasses a diverse array of 'non-truth-furthering' interests … in addition to 'truth-furthering' objectives.'"[382] These non-truth furthering interests serve as proxies for larger societal values. Thus, the Constitution espouses broad ideals of individual autonomy and dignity by resting primary power with the people,[383] limiting and separating the powers

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[380] Anderson, "Revising Harmless Error," 396, 401; citing to the Innocence Project, Anderson explains that "[w]ith the number of DNA exonerees …, it is no longer possible to ignore the possibility of wrongful convictions;" John Paul Stevens, "Justice Stevens Criticizes Election of Judges," *Washington Post*, August 4, 1996, https://www.washingtonpost.com/wp-stat/sitemaps/archive-23.xml; "The recent development of reliable scientific evidentiary methods has made it possible to establish conclusively that a disturbing number of persons who had been sentenced to death were actually innocent."

[381] Green, "Prosecutorial Ethics," 462; noting "public disillusionment" as a result of wrongful convictions; *see also* Fairfax, "Harmless Constitutional Error," 2065; the care taken to ensure due process will encourage public confidence in the system.

[382] Murray, "A Contextual Approach," 1795. *See also* Stacy and Dayton, "Rethinking Harmless Constitutional Error," 94; Chapel, "Irony of Harmless Error," 508-10, 516, 532-33; Mitchell, "Against Overwhelming Appellate Activism," 1366; Bilaisis, "Abettor of Courtroom Misconduct," 457-58; Edwards, "To Err is Human," 1194-95; Goldberg, "Constitutional Sneak Thief," 432-33; Fairfax, "Harmless Constitutional Error," 2052-54.

[383] Edwards, "To Err is Human," 1194; Chapel, "Irony of Harmless Error," 508-10, 516, 533; Goldberg, "Constitutional Sneak Thief," 432.

of the government,[384] and protecting against unfair and abusive government actors or majoritarian control.[385] The Constitution cements the right to a public trial before an impartial jury of one's peers[386] to ensure not only fairness, but also the expression of community values, education of the public, and transparency and confidence in the criminal justice system.[387] And, the Constitution provides the rights to privacy,[388] to confront and compel witnesses, to legal representation, and against self-incrimination to promote both the truth-furthering function of verdict reliability and the non-truth-furthering goals of fairness and protection from government abuse.[389]

Any doctrine of harmless constitutional error that analyzes only truth-furthering interests, to the extent it reliably can do so,[390] but neglects non-truth-furthering concerns,

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[384] *See* U.S. Const. arts. I, II, III. *See also* U.S. Const. art. V; providing the process whereby the people retain control over any amendments to the Constitution.

[385] U.S. Const. amends. IV, V, VI, XIV. *See* Bilaisis, "Abettor of Courtroom Misconduct," 457-58; Edwards, "To Err is Human," 1194-95; Goldberg, "Constitutional Sneak Thief," 432; Chapel, "Irony of Harmless Error," 508-10, 533; Fairfax, "Harmless Constitutional Error," 2053-56; Mitchell, "Against Overwhelming Appellate Activism," 1356.

[386] U.S. Const. amend. VI.

[387] Murray, "A Contextual Approach," 1812-13, 1821; Bilaisis, "Abettor of Courtroom Misconduct," 457-58; Fairfax, "Harmless Constitutional Error," 2051-56; Mitchell, "Against Overwhelming Appellate Activism," 1355-56; Chapel, "Irony of Harmless Error," 536-39; Edwards, "To Err is Human," 1195-96; Epps, "Harmless Errors," 2178-80.

[388] U.S. Const. amend. IV; Murray, "A Contextual Approach," 1812; Edwards, "To Err is Human," 1197-98; Epps, "Harmless Errors," 2178-80.

[389] U.S. Const. amend. V, VI, XIV; Bilaisis, "Abettor of Courtroom Misconduct," 457-58; Edwards, "To Err is Human," 1195; Goldberg, "Constitutional Sneak Thief," 432-33; Chapel, "Irony of Harmless Error," 510. Murray creates a third category of "truth-obstructing" objectives, which he states the Fourth, Fifth, and Sixth Amendments also serve. Murray, "A Contextual Approach," 1812-13; *see also* Stacy and Dayton, "Rethinking Harmless Constitutional Error," 89, 110-13.

[390] *See supra* Pt. B.

ignores the Constitution's complex structure and degrades those constitutional protections that promote larger societal values.[391] "The Constitution does not create a hierarchy of rights or values," and there is no "reason to suppose that the framers intended rights having truth-furthering purposes to carry more weight than rights having other purposes."[392] Instead, the Constitution aims to preserve and protect individual and institutional rights against "contrary claims of necessity by the government,"[393] such as those interests that are allegedly promoted by harmless constitutional error review.

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[391] Murray, "A Contextual Approach," 1813, 1799; *see also* Stacy and Dayton, "Rethinking Harmless Constitutional Error," 80-81; Chapel, "Irony of Harmless Error," 532; Mitchell, "Against Overwhelming Appellate Activism," 1366.
[392] Stacy and Dayton, "Rethinking Harmless Constitutional Error," 90. *See also* Murray, "A Contextual Approach," 1813; the Constitution's "normative structure" "belie[s] the notion that the pursuit of truth – or any other single value – constitutes criminal procedure's overarching 'thrust.'"
[393] Goldberg, "Constitutional Sneak Thief," 432.

Chapter Five: Possible Solutions to the Harmfulness of Harmless Error Review

For decades, scholars have grappled with a harmless error doctrine that has expanded beyond its purposes to infringe constitutional protections. Most commentators agree that the *Harrington* test, which disregards the constitutional error in search of other record evidence of overwhelming guilt, is wrong as a matter of law.[394] This test also, simultaneously, permits those whom we entrust with enforcing the law, such as police and prosecutors, to violate constitutional protections with little-to-no ramifications.[395] Proposed solutions to these dilemmas, however, have not proven to be any more determinate,[396] and few of them get any closer to the original intent of the harmless error statute.[397] Some scholars have continued to argue that harmless error review was never intended apply to constitutional violations.[398] But this position was rejected by the Court

[394] *See supra* Ch. 4. *See also Chapman,* 386 U.S. at 23-24; "For federal constitutional violations, "[the government must] prove beyond a reasonable doubt that *the [constitutional] error* complained of *did not* contribute to the verdict," and "the court must be able to declare a belief that *[the constitutional error]* was harmless beyond a reasonable doubt." (Emphasis supplied).
[395] *See supra* Ch. 4, Pt. C(i).
[396] *See infra* Pts. A and B.
[397] Ibid. There are some exceptions, however, including the proposals of Justice Traynor, Chief Judge Chapel, and Professor Greabe, who advocate a rights-based approach tied to 28 U.S.C. § 2111, with which I agree. *See infra* nn. 419-50 & accompanying text.
[398] *See* Goldberg, "Constitutional Sneak Thief," 441-42; "The Court should adopt a rule of automatic reversal, fulfill its function with respect to the Constitution, and make its judgments in full light of the undiluted effect of the rules it makes;" Wicht, "No Such Thing as Harmless Constitutional Error," 109; "[T]he current rule undermines the inherent value of constitutional rights;" Dow and Rytting, "Can Constitutional Error be Harmless," 503-04; Advocating automatic reversal because the harmless error counterfactual (*i.e.,* had the error not occurred, the result would have been the same) is not subject to "empirical verification" and, as a result, is "logically impossible." *Compare* Fairfax, "Harmless Constitutional Error," 2031; advocating that that "any error that wholly subverts the institutional role of the jury should be subject to automatic reversal."

in *Chapman*[399] and the harmless error statute, itself, draws no distinction between constitutional and non-constitutional violations.[400] The statute's history also shows that Congress considered whether applying harmless error to criminal trials might allow constitutional criminal procedural rights to be "too easily relaxed"[401] and, still, it focused the statute on "substantial rights," without isolating constitutional from non-constitutional errors.[402]

Given the expansion of harmless error to reach most constitutional rights over the last half-century, other scholars have offered different solutions based on the assumption that the doctrine has become too ubiquitous to reject it[403] and the fear that too strict of a rule might encourage courts to define constitutional rights narrowly.[404] Their proposals range from advocating a return to the strict *Chapman* standard of proof beyond a reasonable doubt that the error did not impact the verdict,[405] to a rights-based approach

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[399] *Chapman,* 386 U.S. at 21–22; "We decline to adopt any such rule."
[400] *See* 28 U.S.C. § 2111; *see also infra* n. 431.
[401] Dow and Rytting, "Can Constitutional Error be Harmless," 486, 484.
[402] In conducting constitutional and statutory interpretation, the Court must begin with the text. Antonin Scalia and Bryan A. Garner, *Reading the Law: The Interpretation of Legal Texts* (Eagan, MN: West Publishing Company, 2012), 56.
[403] *See* Mitchell, "Against Overwhelming Appellate Activism," 1339 & n. 23; noting that Goldberg's position is well-founded, but believing that harmless error review is here to stay, as that "the Court has not once [re]considered the validity of the doctrine."
[404] *See* Edwards, "To Err is Human," 1182; describing such narrowing as "a kind of backhanded use of the harmless-error rule;" Murray, "A Contextual Approach," 1810 & n. 107; arguing that "remedial deterrence" motivates courts to construct the right in such a way as to avoid the consequence of an automatic reversal; *see also* Traynor, *Riddle of Harmless Error,* 43; if the test is too stringent, it will invite courts "to give [it] lip service while tacitly discounting it;" *accord* Chapel, "Irony of Harmless Error," 533; if the test is too lax, it will lead to automatic affirmances and violations of rights.
[405] *See* Edwards, "To Err is Human," 1199-1209; Mitchell, "Against Overwhelming Appellate Activism," 1364-69.

that focuses on the substantial right violated per § 2111,[406] to a remedy-based, contextual approach that takes into account the truth-seeking and non-truth-seeking functions of the constitutional right,[407] and, finally, to what may be considered a violation-based approach, which incorporates harm as an element into the analysis of whether a constitutional error occurred at all.[408] While each proposal offers a unique solution for the malleability that has come to dominate harmless error review, at times they do overlap, and they all unite in their rejection of the *Harrington* "overwhelming evidence" harmless error test. But this rejection does not mean that other record evidence should be ignored. As the following proposals show, the record provides the context for assessing the alleged constitutional harm under most of these proposed tests.

A. *Chapman's* Focus on the Verdict versus Section 2111's Focus on Rights

The proponents of the *Chapman* standard draw much for the Court's explanation of it in *Sullivan*[409] and stress that only this single, strict test will protect constitutional rights while serving the purposes of harmless error review.[410] The proper focus, they argue, is on what the actual jury considered, including the error, not what a different, hypothetical jury might decide, absent one.[411] The error, moreover, must be placed in the

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[406] *See* Chapel, "Irony of Harmless Error," 533-40; Traynor*, Riddle of Harmless Error,* 42-51; Greabe, "Riddle Revisited," 116-19.
[407] *See* Murray, "A Contextual Approach," 1810-20; Stacy and Dayton; "Rethinking Harmless Constitutional Error," 91-98.
[408] *See* Epps, "Harmless Errors," 2158-63. The term "violation-based approach" is my own, and should not be attributed to Professor Epps.
[409] *Sullivan,* 508 U.S. 275.
[410] *See* Edwards, "To Err is Human," 1175, believing that the broad harmless error statute does not offer sufficient guidance on what errors demand reversal.
[411] Edwards, "To Err is Human," 1200-01; citing *Sullivan,* 508 U.S. 275; Mitchell, "Against Overwhelming Appellate Activism," 1368; same.

context of the entire record, with appellate judges asking whether the error (1) involved a "central issue in the case," (2) "significantly undermine[d] the untainted evidence," (3) provided a "crucial link in the government's case," (4) "adversely affect[ed]" the defendant's ability "to present his case," or (5) "shift[ed] the burden of proof from the government to the defendant."[412]

For example, coerced confessions and erroneous jury instructions that omit or seriously misstate a criminal element likely cannot be found beyond a reasonable doubt not to have affected the jury under these criteria.[413] In the first instance, little evidence presented to a jury can be more damaging to a defendant's claim of innocence than a confession.[414] In the second instance, because the jury failed to decide a critical element, no actual verdict exists on which to conduct harmless error review.[415] In these scenarios, while the *Harrington* harmless error test would lead to affirmance if other, overwhelming evidence of guilt exists, *Chapman's* test would not. By contrast, when erroneously admitted evidence is insignificant, but other overwhelming evidence of guilt does not exist, *Harrington* would require reversal while *Chapman* would not.[416] These sample

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[412] Edwards, "To Err is Human," 1206. *Compare* Teitelbaum, Sutton-Barbere, and Johnson, "Evaluating the Prejudicial Effect," 1181; in inquiring into the actual jury's state of mind, courts should consider (1) "whether the tainted evidence itself added weight to the government's case," (2) "whether the evidence added weight to other evidence properly before the jury," and (3) "whether the resulting increase in the weight of the state's case moved the jury from a state of nonpersuasion to one of persuasion beyond a reasonable doubt regarding the defendant's guilt."
[413] Edwards, "To Err is Human," 1206; Mitchell, "Against Overwhelming Appellate Activism," 1362; Fairfax, "Harmless Constitutional Error," 2051-60.
[414] *Fulminante,* 499 U.S. at 313 (Kennedy, J., concurring); ibid., 292 (White, Marshall, Blackmun, and Stevens, JJ., dissenting).
[415] *Sullivan,* 508 U.S. at 280; erroneous reasonable doubt instruction; *Neder,* 527 U.S. at 7; omitted element of "materiality."
[416] Mitchell, "Against Overwhelming Appellate Activism," 1362.

juxtapositions demonstrate how *Chapman* – and not *Harrington* – both protects constitutional rights and promotes the harmless error doctrine's focus on "insignificant errors."[417] The *Chapman* test also ensures fundamental fairness by allowing the defendant to argue the protective purposes of the constitutional right infringed, preserving the Sixth Amendment right to a jury assessment of guilt without the taint of a constitutional error, and preserving public respect for the system by foreclosing reversals for insignificant mistakes or technicalities.[418]

But proponents of the rights-based approach argue that the *Chapman* Court "lost sight of [the harmless error statute and rule] and should have used them to ground its harmless error [analysis]."[419] Their approach quite logically begins at the roots, with the texts of the Constitution and harmless error statute, rather than Court interpretations. First, the Constitution contains a Bill of Rights that the founders believed to be so fundamental to enshrine in them perpetuity, to protect against majoritarian control and government tyranny.[420] The Fourth, Fifth, Sixth, and Fourteenth Amendments outline

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[417] Ibid.; Edwards, "To Err is Human," 1206; the focus remains on the error's impact rather than on all of the evidence except the error.
[418] Edwards, "To Err is Human," 1209; Mitchell, "Against Overwhelming Appellate Activism," 1364-69.
[419] Traynor, *Riddle of Harmless Error,* 42; *see also* Chapel, "Irony of Harmless Error," 535-40; noting that § 2111 and Rule 52(a) apply to both constitutional and non-constitutional errors; Greabe, "Riddle Revisited," 116; the Court should "jettison *Chapman* in favor of a simplified, unitary, and transcontextual … test – reconceived as an elaboration of 28 U.S.C. § 2111 …."
[420] Chapel, "Irony of Harmless Error," 533; "Because of our historical experiences, our inherent distrust of government, and our anti-majoritarianism concerns, our legal system places a high value upon individual rights and liberties. Any test of harmless error should reflect these values;" Stacy and Dayton, "Rethinking Harmless Constitutional Error," 81; "[T]he Court's harmless error decisions rest on a premise that ignores the purposes of many fundamental constitutional protections enumerated in the Bill of Rights."

"the minimal parameters" for the fair jury trial that is required by Article 3, § 2.[421] These amendments also extend beyond individual protections for the defendant to larger societal and institutional concerns underlying our democracy,[422] such as participation of the community through the jury system and assurance of public confidence in the legitimacy of our laws and judicial processes.[423]

Second, for appellate review, Congress created a harmless error statute hinged to protecting "substantial rights." 28 U.S.C. § 2111 provides: "On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record, without regard to errors or defects which do not affect the substantial rights of the parties."[424] Proponents of the statute-based test argue that the focus should be on these rights and the effect of their violation on the accused.[425] While some scholars and judges disagree that this statute provides the basis for review of constitutional errors,[426] the plain

[421] Chapel, "Irony of Harmless Error," 510; While Chapel includes the Eighth Amendment, that amendment lies beyond the scope of this thesis. *See* U.S. Const. art. 3, § 2; "The Trial of all Crimes … shall be by Jury."
[422] Fairfax, "Harmless Constitutional Error," 2051-60; Mitchell, "Against Overwhelming Appellate Activism," 1355-57; Chapel, "Irony of Harmless Error," 536-39; Murray, "A Contextual Approach," 1812-22; Edwards, "To Err is Human," 1195-98; Epps, "Harmless Errors," 2178-80.
[423] Fairfax, "Harmless Constitutional Error," 2054-60; Amar, *America's Constitution,* 237, 239, 229-30; Mitchell, "Against Overwhelming Appellate Activism," 1355-57.
[424] 28 U.S.C. § 2111 (2018). *See also* Fed. R. Crim. P. 52(a) (2018); stating: "Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded."
[425] Chapel, "Irony of Harmless Error," 533-3; Traynor, *Riddle of Harmless Error,* 42.
[426] Some scholars argue that harmless constitutional error is not statutory, but a form of "constitutional common law." For example, Meltzer says that if § 2111 was meant to make conviction reversals harder, *Chapman* would not have imposed a more demanding reversal standard for constitutional errors. Meltzer, "Constitutional Remedies," 20-26. But this point ignores that § 2111 aimed only to preclude reversals based on insignificant technicalities and minutia. Similarly, Epps asserts that "the Court's observation in *Chapman* that its need to 'fashion[] the necessary rule' arose 'in the absence of

language of its text does not distinguish between constitutional and non-constitutional violations.[427] Instead, Congress chose the words "substantial rights."[428] Most scholars and judges *would* agree, however, that, as a theoretical matter, a constitutional right is a

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appropriate congressional action' provides a strong clue that the Court thought it was doing something more legislative than … constitutional interpretation." Epps, "Harmless Errors," 2150. But Epp's reverse-juxtaposition of these quotations appears to distort the Court's meaning. The Court actually stated: "We have no hesitation in saying that the right … – expressly created by the Federal Constitution itself – is a federal right which, in the absence of appropriate congressional action, it is our responsibility to protect by fashioning the necessary rule." *Chapman,* 386 U.S. at 21. The Court in *Chapman* also cited § 2111 and Rule 52(a). *See infra* n. 427. Later justices and scholars have claimed, however, that harmless constitutional error is not statutorily-based, but, rather, based on yet a third option: the Constitution's requirement of due process. *See, e.g., United States v. Lane,* 474 U.S. 438, 460 (1986); Justices Brennan and Blackman, concurring and dissenting, stating that "constitutional errors are governed by the Due Process Clause of the Fifth and Fourteenth Amendments rather than by § 2111 or Rule 52(a);" Goldberg, "Constitutional Sneak Thief," 424, n. 31; describing *Chapman's* rule as a "constitutional judgment".

[427] *See Chapman,* 386 U.S. at 21-22; "[T]he United States long ago through its Congress established for its courts the rule that judgments shall not be reversed for 'errors or defects which do not affect the substantial rights of the parties." 28 U.S.C. § 2111. None of these rules on its face distinguishes between federal constitutional errors and errors of state law or federal statutes and rules;" *Lane,* 474 U.S. at 445; majority noting that § 2111 does not distinguish error types, but instead rests on substantial rights; *Gonzales-Lopez,* 548 U.S. at 157; Justice Alito arguing, in dissent, that Rule 52(a) applies to all constitutional errors. *See* Traynor, *Riddle of Harmless Error,* 57; "Since Section 2111 does not distinguish constitutional violations from other errors, it apparently governs them also …."; *accord* Chapel, "Irony of Harmless Error," 534; Greabe, "Riddle Revisited," 119.

[428] Congress *rejected* a *Harrington*-like, "correct result was reached" approach in 1919 and, instead, focused on the error and its effect on substantial rights. Murray, "A Contextual Approach," 1803, n. 64; Epps, "Harmless Errors," 2128; citing Act of Feb. 26, ch, 48, 1919, Pub. L. No. 65-281, 40 Stat. 1181, *repealed by* Act of June 25, 1948, ch. 646, 62 Stat. 892, 992. A text should be interpreted only within the range of "textually permissible meanings," choosing an interpretation that "would serve, rather than frustrate, [its] manifest purpose," and without supplementing it, as the text's "limitations … are as much a part of its 'purpose' as its affirmative dispositions." Scalia and Garner, *Reading the Law,* 57, 174-79.

substantial right[429] and, as a threshold matter, an error must occur before the harmless error statute applies.[430] Thus, giving effect to the words Congress used,[431] the harmless error statute appears largely to turn on what the nouns "error or defect" and the verb "affects" mean when assessing whether an "error or defect" "affects substantial rights."[432] In *United States v. Olano,* the Court explained that "defect" is synonymous with "error,"[433] which it defined as "[d]eviation from a legal rule" that has not been knowingly and voluntarily waived.[434] The verb "affects" subscribes to the broad definition of "to influence in some way,"[435] and it has been interpreted liberally in the

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[429] *See* Epps, "Harmless Errors," 2151; "There is something unquestionably troubling about providing no remedy whatsoever for a recognized violation of a right important enough to be enumerated in our nation's founding charter …." *But see Chapman,* 386 U.S. at 22; "[T]here may be some constitutional errors which *in the setting of a particular case* are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless." (Emphasis supplied).

[430] If no constitutional "error or defect" exists, then there is no "object" for harmless error assessment. *See* Edwards, "To Err is Human," 1182; "application of [the] doctrine … presupposes the existence of … an error." *But see* Epps, "Harmless Errors," 2158-63; incorporating harm analysis as a component of *defining* the right.

[431] "In construing a statute, [the Court is] obliged to give effect, if possible, to every word" and should not interpret the statute in a way that would render "evasion under the law … almost certain." Scalia and Garner, *Reading the Law,* 63-64, 174-79.

[432] 28 U.S.C. § 2111 (2018). *See also* Fed. R. Crim. P. 52(a) (2018).

[433] *Olano,* 507 U.S. at 732-33; "the phrase 'error or defect' is more simply read as 'error.'"

[434] Ibid. The Court contrasted forfeiture: "whereas forfeiture is the failure to make the timely assertion of a right, waiver is the 'intentional relinquishment or abandonment of a known right.'" Ibid.

[435] "Affect *vb.* (15c) 1. Most generally, to produce an effect on; to influence in some way." Black's Law Dictionary (10th ed. 2014), accessed March 29, 2019, www.westlaw.com.

less-demanding civil context.[436] Yet, the harmless error statute also requires "an examination of the record."[437] Thus, the context in which the error occurs also matters.[438]

Scholars of the right-based, § 2111 approach delineate categories for determining whether, in the context of the trial, an error affects the accused's substantial rights.[439] The first two categories are easy. First, "if in no event could the error be considered as not having a significant adverse effect," then the court should summarily reverse and order a new trial.[440] Examples, such as complete denial of the right to jury trial, to testify, to assistance of counsel, and to an impartial judge, sound very much like the "structural" errors noted by the Court in *Fulminante*.[441] Second, if "the error can in no event rise above insignificant error," then the court should summarily affirm the conviction.[442] Examples include quintessential harmless errors of mere technicality, etiquette, and formality, such as an omitted word or date or shackling the defendant when the jury cannot see it.[443] The third category proves most problematic, however, as it captures those errors with a "high risk of affecting rights."[444] In this setting, the rights-based

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[436] "[A]ffects doctrine (1996) *Constitutional law.* The principle allowing Congress, under the Commerce Clause, to regulate intrastate activities that have a substantial effect on interstate commerce. • The doctrine is so called because the test is whether a given activity 'affects' interstate commerce." Black's Law Dictionary (10th ed. 2014), accessed March 29, 2019, www.westlaw.com.
[437] 28 U.S.C. § 2111 (2018).
[438] *See supra* n. 429; *see also* Scalia and Garner, *Reading the Law,* 33; "This critical word *context* embraces not just textual purpose but also … a word's immediate syntactic setting—that is, the words that surround it in a specific utterance." (Emphasis original).
[439] Chapel, "Irony of Harmless Error," 534-40.
[440] Ibid., 534.
[441] Ibid., 535-36; *see also supra* Chapter 3, Pt. D. & accompanying text.
[442] Chapel, "Irony of Harmless Error," 534.
[443] Ibid., 536-37.
[444] Ibid., 537.

approach directs (1) identification of the right involved and its purpose, (2) consideration of the totality of the circumstances surrounding the error, and (3) assessment of whether failure to enforce the right would impair the deterrence effect against wrongful government conduct.[445] Proponents of this approach appear to lean toward reversal when government misconduct is knowing or intentional, when failure to reverse will encourage future violations, or when a right promoting a significant societal value, such as nondiscrimination, is impacted.[446] Closer calls, such as introduction of a defendant's prior criminal activity[447] or an error in jury instructions, hinge to how significant an impact the error likely had on the jury.[448] Again, the assessment is of the actual jury, not a future hypothetical one,[449] but the proponents of this test submit that it will not result in more reversals than the *Chapman* test would.[450]

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[445] Ibid., 534. *Compare supra* Chapter 3, nn. 249-52 & accompanying text; the Court has discerned three viable purposes that can render an error harmful *per se*: (1) the error causes unfairness "either to the defendant in the specific case or by pervasive undermining of the systemic requirements of a fair and open judicial process;" (2) the "effect of the error is too difficult to measure or ascertain;" or (3) the "right at issue is not designed to protect the defendant from erroneous conviction but instead protects some other interest."

[446] Chapel, "Irony of Harmless Error," 537-40.

[447] These scholars draw no distinction between constitutional and non-constitutional violations and eschew categorization of constitutional violations as either structural or trial errors. Chapel, "Irony of Harmless Error," 535, Traynor, *Riddle of Harmless Error,* 42, 48-49; Greabe, "Riddle Revisited," 119.

[448] Chapel, "Irony of Harmless Error," 537-40. *E.g.,* introduction of a speeding ticket pales by comparison to introduction of a ten-year-old manslaughter conviction in a murder trial, and a jury instruction that is beneficial to the defendant, or merely duplicative, differs in impact from one that omits or misstates an element. Ibid.

[449] Traynor, *Riddle of Harmless Error,* 22; "The crucial question is not what might happen tomorrow on an edited rerun, but what did happen yesterday on the actual run."

[450] Chapel, "Irony of Harmless Error," 539; *see* Traynor, *Riddle of Harmless Error,* 42-51; Greabe, 116-19, both arguing that this test would employ a "highly probable" (or "clear and convincing evidence") standard, whereas *Chapman* mandates a "beyond a reasonable doubt" (or "almost certain") standard.

B. Remedy-Based Approach versus Violation-Based Approach

A majority of scholars argue that harmless error review is remedy-based and designed to assess what action, if any, is needed to redress an acknowledged constitutional violation.[451] A minority view posits, instead, that the "harm" inquiry is really an element in determining whether a constitutional violation occurred at all.[452] Recent work in these areas highlight the differences between the two positions as well as the nuances within each one.[453] While neither view is perfect, the remedy-based approach and its recognition of a constitutional violation seems sounder than an approach that defines the scope of the constitutional right based on whether harm occurred.

The remedy-based approach promoted both recently and by past scholars first must be distinguished from the result-driven approach of *Harrington.* While *Harrington* largely ignores the constitutional error in search of other record evidence of guilt, the remedy-based approach contextually asks "not just whether an error contributed to the outcome, but also the implications of an error on the broader 'constellation of interests' served" by the constitutional rule."[454]

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[451] *See* Murray, "A Contextual Approach," 1793; harmless error review is "a set of closely related remedial rules;" Stacy and Dayton, "Rethinking Harmless Constitutional Error," 91; harmless error is a "remedial rule," Meltzer, "Constitutional Remedies," 17; "harmless error is best viewed as a question of remedies."
[452] *See* Epps, "Harmless Errors," 2121.
[453] *See* Murray, "A Contextual Approach," (2017); Epps, "Harmless Errors," (2018); Brandon L. Garrett, "Patterns of Error," *Harvard Law Review Forum* 130, no. 7 (2017); responding to Murray; John M. Greabe, "Criminal Procedure Rights and Harmless Error: A Response to Professor Epps," *Columbia Law Review Online* 118, no. 6 (2018), https://columbialawreview.org/content/criminal-procedure-rights-and-harmless-error-a-response-to-professor-epps/.
[454] Garrett, "Patterns of Error," 288; quoting Murray, "A Contextual Approach," 1811. *See also* Stacy and Dayton, "Rethinking Harmless Constitutional Error," 91-98; ibid, 94; the criminal process possesses a broad array of "non-truth-furthering" values. Murray

This constellation of interests includes not only "truth-furthering" functions, but also "non-truth-furthering" ones.[455] And many rights have "mixed purposes,"[456] both to foster the "truth-furthering" interest in the reliability of the outcome[457] and promote "non-truth-furthering" interests that extend beyond a particular defendant's concerns. The Fourth Amendment protects the right to be secure from unreasonable searches and seizures,[458] and guards an individual's privacy interest, deters abusive police conduct violating this right, and results in exclusion of unlawfully obtained evidence at trial.[459] The Fifth Amendment prohibits charges without indictment by a grand jury based on probable cause, being placed in jeopardy for the same offense twice, being compelled to incriminate one's self, and deprivation of life, liberty, or property without due process.[460] This provision of due process is furthered by the Fourteenth Amendment, which adds the right to equal protection to prevent prejudice and discrimination.[461] And the Sixth Amendment elaborates on trial rights, namely to know the nature and cause of the

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notes that Judge Chapel's proposal is not incompatible with a contextual, value-based approach, as it also asks "'whether any error had a significant effect upon a right of the accused'" and would answer that question based, in part, on the "'purpose'" of the infringed rule. Murray, "A Contextual Approach," 1797, n. 31; quoting Chapel, "Irony of Harmless Error," 534.

[455] Murray, "A Contextual Approach," 1810-20; Stacy and Dayton, "Rethinking Harmless Constitutional Error," 91-98. Writing twenty years after Stacy and Dayton, Murray notes that his and their views regarding redressability for non-truth-furthering interests do not always coalesce. Murray, "A Contextual Approach," 1813, n. 126.

[456] *See* Stacy and Dayton, "Rethinking Harmless Constitutional Error," 89; Murray, "A Contextual Approach," 1812.

[457] *See, e.g.,* U.S. Const. amend. IV.

[458] U.S. Const. amend. IV.

[459] *See* Murray, "A Contextual Approach," 1812; Edwards, "To Err is Human," 1197-98; Epps, "Harmless Errors," 2178-80.

[460] U.S. Const. amend. V.

[461] U.S. Const. amend. XIV.

criminal charge pressed, to confront and compel witnesses and have assistance of counsel in presenting a defense, and to a speedy and public trial before an impartial jury.[462] Larger interests linked to individual dignity and autonomy as well as community participation, oversight, and confidence in the judicial system inform many of these amendments. Proponents of the remedy-based, contextual approach urge that when a constitutional error triggers concerns about "non-truth-furthering" interests, courts must carefully scrutinize the impact on those interests in fashioning the appropriate remedy.[463]

The exact test to be applied as articulated by these scholars differs in some respects, although their analytical outcomes appear to be similar. Some scholars posit that the court should consider: (1) "whether the violation has impaired … the constitutional right in question;" (2) "whether redoing the adjudicative process can … cure the harm caused by the violation;" and (3) whether "reversal [may be] necessary to deter future violations."[464] A more recent iteration states that the court should: (1) "begin by

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[462] U.S. Const. amend. VI.
[463] *See, e.g.,* Stacy and Dayton, "Rethinking Harmless Constitutional Error," 93-98; advocating reversal, for instance, for denial of the right to self-representation because it implicates dignitary and autonomy concerns; Murray, "A Contextual Approach," 1810-20; adding, as an example, violation of the right against self-incrimination "out of 'respect for the inviolability of the human personality.'" Ibid. 1812 (citation omitted). These authors also list in the "non-truth-furthering" category the right to a jury and right against discrimination because of the societal concerns associated with community participation and fair play. Stacy and Dayton, "Rethinking Harmless Constitutional Error," 110-13; Murray, "A Contextual Approach," 1812-13.
[464] Stacy and Dayton, "Rethinking Harmless Constitutional Error," 91-92. As examples, violation of the right to confrontation might not require a redo, provided the excluded evidence was proffered into the record, whereas violation of the right to counsel would require a redo because the record lacks counsel's input. Ibid., 93. By contrast, while introduction of illegally obtained evidence might have but a minimal effect when considering the entire record, a redo might be desired to deter future violations. Ibid., 95-96. And, when the violation is one likely to escape detection, such as withholding

identifying the interest (or range of interests) protected" by the right; and (2) "conduct contextual harmless error review … [so that the] remedies … correspond" to protecting those interests.[465] This latter test would also, however, take deterrence into account when the right involved implicates that concern.[466] Ultimately, the goal of the tests is "to address the serious concern that 'nearly ubiquitous use of a harmless error rule focusing on the outcome of the trial … denigrates important constitutional protections … that promote values other than the reliability of verdicts.'"[467] Reversal and a new trial, perhaps even sanctions, may be required to vindicate these "non-truth-furthering" protections.[468]

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exculpatory evidence or offering perjured testimony, reversal and redo are necessary to eliminate future incentives to commit the same wrongdoing. Ibid., 95-98.

[465] Murray, "A Contextual Approach," 1795. Murray further cabins these interests into two sub-categories: result-correlated interests and result-independent interests. Ibid., 1814-20. Result-correlated interests, such as the Fourth Amendment's interests in protecting privacy and deterring future violations, will negatively impact the truth- and non-truth-furthering functions similarly, depending on the extent to which the illegally-introduced evidence enhanced conviction chances. Ibid., 1815-16. By contrast, result-independent interests, such as discrimination in jury selection, which creates bias in the proceeding and erodes public confidence, do not necessarily align with the truth-seeking interests or, if they do, only coincidentally. Looking purely at the case outcome, therefore, will not vindicate these interests. Ibid., 1817-18.

[466] Murray, "A Contextual Approach," 1820-23; citing a "prototypical" case involving failure of a judge to recuse where there appeared to be a conflict of interest or bias. Noting that the purpose of the rule "'is to promote confidence in the judiciary by avoiding even the appearance of impropriety,'" on harmless error review, the Court considered three factors, only the first of which related solely to the "truth-seeking" interest: (1) "the risk of injustice" to the parties in the case; (2) "the risk that the denial of relief will produce injustice in other cases;" and (3) "the risk of undermining the public's confidence in the judicial process." Ibid., 1821 (citation omitted). The second prong focused on "deterring future infractions" and the third prong focused on "shoring up judicial legitimacy," both of which are "non-truth-furthering" interests. Ibid., 1822.

[467] Murray, "A Contextual Approach," 1799; quoting Stacy and Dayton, "Rethinking Harmless Constitutional Error," 80-81. As noted, Murray's and Stacy and Dayton's arguments and goals are similar.

[468] Stacy and Dayton, "Rethinking Harmless Constitutional Error," 95-98; Murray, "A Contextual Approach," 1813, 1818-20. *But see* Garrett, "Patterns of Error," 288, 293-95; responding to Murray, *inter alia,* that his contextual approach likely will confer more

By contrast, the recently-espoused, violation-based approach would fold the harm inquiry into the assessment of whether any constitutional violation occurred at all.[469] This premise essentially conflates the error with whether it resulted in any harm, "inexorably" tying harmful- or harmless-ness with the process of defining the right.[470] As a result, harmless error no longer serves as a remedial review standard, but, instead, becomes part of the substantive nature of the right itself.[471]

As a preliminary matter, for scholars who view the harmless error statute as applicable to constitutional errors, the violation-based theory is a non-starter.[472] It makes harmless error analysis part of determining whether an error occurred, but, under the statute, an error must exist, first, for harmless error review to apply.[473] Next, the proposal renders the meaning of constitutional rights nebulous by tying their meaning to the peculiar facts of each individual case. It therefore offers no guidance to American

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discretion on judges to rely on their cognitive biases and personal value judgments. "Telling judges to broaden their focus is unlikely to help," Garrett says. Ibid., 295.

[469] Epps, "Harmless Errors," 2158-63.

[470] Ibid., 2121-22; the appellate court "is really asking whether a defendant's constitutional rights have been violated at all."

[471] *See* Ibid., 2163; "[I]f one understands harmless error as part and parcel of constitutional rights, and not as part of the law of remedies, the mystery vanishes." *And see* Greabe, "A Response to Epps," 119, 121; noting that under Epps's proposal, harmless error would no longer be a remedial doctrine.

[472] *See supra* n. 426 & accompanying text. *But see* Epps, "Harmless Errors," 2144; The Supreme Court's harmless error "'cases are not about figuring out what Congress meant, in 1919, by "affect the substantial rights of the parties."'" (Citation omitted).

[473] 28 U.S.C. § 2111 (2018); stating in pertinent part: "On the hearing of any appeal …, the court shall give judgment after an examination of the record, without regard to *errors or defects* which do not affect the substantial rights." (Emphasis supplied). *See also* Fed. R. Crim. P. 52(a) (2018); stating: "*Any error, defect, irregularity, or variance* that does not affect substantial rights must be disregarded." (Emphasis supplied). In my view, both the statute and the rule assume an error *has occurred*. *But see* Epps, "Harmless Errors," 2165; arguing that, rather than providing a remedial review standard, the statute simply "command[s] against *overenforcing* rights." (Emphasis original).

citizens, who have a fundamental right to rely on the Constitution's protections *before they act*, and it strips the right of any objectively identifiable meaning, effectively rendering the right valueless. In addition, trial judges, who must decide in the midst of proceedings, *before the record is fully developed,* whether a constitutional violation has or is about to occur, have no direction if the right's meaning is yet-to-be-determined by an appellate court, on review of the particular case.[474] This dynamic also creates a disconnect between what rights mean at the trial court and appellate court levels. The proponent of the violation-based test implicitly acknowledges this weakness by urging trial courts to act more stringently when faced with a potential constitutional violation.[475] But, as a responsive scholar has questioned, "if trial courts should [take such action], why should appellate courts more narrowly define the scope of the relevant right?"[476]

Finally, the violation-based test begs the question of what constitutes sufficient harm to require reversal by merely moving the harm assessment to a different place. Any analogy to those few constitutional issues that do incorporate harm into the analysis of assessing a violation, such as ineffective assistance of counsel and failure to disclose exculpatory evidence,[477] are distinguishable. "Neither … right is enumerated in the Constitution and neither right is typically capable of being asserted … and vindicated in

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[474] Greabe, "A Response to Epps," 124-26.
[475] Epps, "Harmless Errors," 2171.
[476] Greabe, "A Response to Epps," 125. Paradoxically, the proponent simultaneously argues that the violation-based approach "would require courts to be clearer about the values at stake." Epps, "Harmless Errors," 2186.
[477] *See* Epps, "Harmless Errors," 2160, arguing for extension of *Strickland,* 466 U.S. 668 (ineffective assistance of counsel) and *Brady,* 373 U.S. 83 (failure to disclose exculpatory or impeaching evidence). Both tests embed the prejudice requirement into the elements of proving the violation.

real time …, before a violation occurs."[478] In addition, the violation-based test runs the risk of diluting constitutional rights by making the harm assessment determinative of whether the right, as articulated in the Bill of Rights, even exists and, if so, to what extent.[479] It easily could result in courts defining constitutional rights narrowly in their assessment of whether harm occurred in the context of a particular case.[480]

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[478] Greabe, "A Response to Epps," 126. *See also* Ibid., 123, quoting Epps, "Harmless Errors," 2170, who concedes that, outside of *Strickland* and *Brady,* the Supreme Court has rejected the suggestion to treat harm as part of the determination of whether a violation occurred in other constitutional contexts.

[479] Ibid., 125.

[480] *Compare* Edwards, "To Err is Human," 1182; noting, based on his experience as a judge, that an automatic-reversal rule would encourage courts to define constitutional rights more narrowly. Here, the same could occur as appellate courts define "rights" as part of a "violation" determination that incorporates "harm" in the context of particular case facts. The global impact of those holdings might potentially narrow constitutional protections across-the-board. *See also* Greabe, "A Response to Epps," 126. Ibid.; noting that *Strickland* and *Brady* have come under "criticism for being insufficiently protective of the rights of criminal defendants."

Chapter Six: Conclusion

At bottom, a Constitution that is by and for the People means that constitutional rights should reflect what society deems to be acceptable, which is why the jury role is so important.[481] The government does not confer rights and liberties. It exists only to protect and uphold them.[482] And, yet, the prevailing harmless error doctrine allows courts and government officials to disregard constitutional rights, effectively neutering violations and eviscerating constitutional principles.[483] As the prior discussions show, no readily-available solution is in sight. Scholars agree that harmless error has exceeded its original purposes but cannot agree about how to fix it.[484] As demonstrated by numerous close cases from the Supreme Court, the justices also are divided.[485] The harmless constitutional error doctrine has become a legal quagmire of indeterminacy, malleability, and unpredictability.

A correction from the Supreme Court or from Congress is long overdue. Enforcement of constitutional rights should not be "exceedingly rare."[486] Control over life and liberty by appellate judges using a doctrine designed to promote economy,

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[481] *See supra* Chapter 4, Pt. A.
[482] Chapel, "Irony of Harmless Error," 509.
[483] *See supra* Chapter 3.
[484] *See supra* Chapter 5.
[485] *See Fulminante,* 499 U.S. 279; where the Court splintered in several directions concerning whether coerced confessions can be harmless; *Neder,* 527 U.S. 1; where the Court divided six-three concerning whether omission of a criminal element from jury instructions can be harmless; *Gonzales-Lopez,* 548 U.S. 140; where a five-four vote determined whether denial of counsel can be harmless; *Williams,* 136 S.Ct. 1899; where a six-three split addressed failure of a judge to recuse; *McCoy,* 138 S.Ct. 1500; where a six-three vote addressed deprivation of defendant's autonomy to decide whether to admit guilt or maintain innocence.
[486] Murray, "A Contextual Approach," 1793.

finality, and pragmatism[487] is precisely what the founders sought to prevent by installing permanent protections in the Constitution and Bill of Rights.[488]

This disassociation of constitutional violations from judicial remedies also contradicts the harmless error statute's terms and breaches the Court's obligation to adopt remedies that safeguard constitutional rights.[489] The statutory terms allow a finding of "harmlessness" only when the error did not affect the defendant's substantial rights.[490] The Court in *Chapman* wrongly shifted the focus away from the error's effect on rights to the error's effect on the verdict.[491] Later, in *Harrington,* it egregiously shifted the focus away from even the error, to a review of other, untainted record evidence.[492] Justice

[487] *See supra* Chapter 4, Pts. A & C.

[488] *See supra* Chapter 2.

[489] Garrett, "Innocence, Harmless Error," 57, n. 104; *see* Murray, "A Contextual Approach," 1794; the harmless error rule is the "leading contributor to the expansive gap between rights and remedies in criminal procedure;" Kamin, "Rights/Remedies Split," 5-6; harmless error "has the capacity to permanently sever rights from remedies;" Epps, "Harmless Errors," 2151; "there is … something troubling about providing no remedy … for a … violation of a right important enough to be enumerated in our nation's [Constitution]." It is worth emphasizing, at this point, that the Supreme Court has an obligation to preserve and protect constitutional rights. Chapel, "Irony of Harmless Error," 510, 517.

[490] 28 U.S.C. § 2111 (2018); *see also* Fed. R. Crim. P. 52(a) (2018).

[491] Chapel, "Irony of Harmless Error," 506-07; claiming the error's effect on the verdict is irrelevant under the statute's terms, and the court has "rewritten the statute through judicial interpretation." Ibid., 530-31.

[492] Ibid.; asserting other record evidence of guilt simply is not part of the statutory test. Explanations for this change in approach go beyond mere changes in the Court's membership. Chief Judge Edwards notes the coincidence of the "overwhelming" evidence test with the significant increase in crime and judicial dockets in the United States in the 1960s. The number of appeals virtually tripled during the Burger and Rehnquist Court eras. Edwards, "To Err is Human," 1191 & n. 103. As Goldberg complains, however, "if society … has been damaged by the change in the relationship between the individual and the state as incarcerator, that is a matter to be addressed on the merits, not through the procedural backdoor of harmless error review." Goldberg, "Constitutional Sneak Thief," 432.

Benjamin Cardozo "long ago noted '[t]he tendency of a principle to expand itself to the limit of its logic.'"[493] It is time for a history lesson on why the harmless error doctrine exists and a constitutional lesson on why it *cannot* be used to subordinate constitutional protections.[494]

Numerous articles and studies have documented the Court's slide down the slippery slope, shifting from greater recognition of inviolate constitutional rights, to a focus on the impact of the constitutional violation on the verdict, and, finally, to review of the untainted record evidence, apart from the constitutional error, in search of "overwhelming evidence" of guilt.[495] Prevailing harmless error review today thus

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[493] Edwards, "To Err is Human," 1173; quoting Benjamin N. Cardozo, *The Nature of the Judicial Process* (New Haven: Yale University Press, 1921): 51. *See also* Goldberg, "Constitutional Sneak Thief," 426; "Any new doctrine or exception to an established doctrine must be expected to grow past the parameters set in the decision which created it."

[494] I realize, and accept, that the result likely will be that more constitutional violations result in reversal. As emphasized previously, however, reversal does not result in acquittal. It results in a new and fair trial, which is not too large a sacrifice for our society to make when considering that an individual's life and liberty are at risk and larger societal protections against government control, even abuse, are at issue. *See supra* Chapter 4, Pt. C.

[495] Murray, "A Contextual Approach," 1793, n. 10; recounting numerous studies. *See* Landes and Posner, "Harmless Error," 182–84; reviewing federal appellate criminal decisions that considered harmless error between 1996 and 1998 and finding, "[i]n 87 percent of the cases, the errors were held to be harmless," ibid., 184; Solomon, "Causing Constitutional Harm," 1065–67, 1067 n.64; reviewing published federal appellate habeas corpus decisions that conducted harmless error review between 1993 and 2004 and finding errors harmless in "nearly two out of three analyses," ibid., 1067; Goldberg, "Constitutional Sneak Thief," 421; estimating, based on citations to the 1967 *Chapman* decision, that, as of 1980, harmless error had "determined as many cases as almost any precedent," ibid., n. 2; *but see* Edwards, "To Err is Human," 1180–81 & nn. 50, 52; reviewing published federal appellate decisions (*including civil cases*) and finding that about 2% mentioned "harmless error" between 1969 and 1985 and about 1.58% mentioned it between 1986 and 1994, whereas about 0.79% mentioned it pre-*Chapman*. Review of harmless error at the state level also revealed significant, impactful influence on appellate judgments. *See* Kamin, "Rights/Remedies Split," 62–72; reviewing one

involves *appellate courts* weighing the evidence for *factual* guilt, rather than *legally* determining whether the government proved that the error could not have affected the defendant's substantial rights.[496] The warning given after the harmless error doctrine's creation has now become a reality: the "judicial pendulum" has swung "to presuming all errors to be 'harmless'" when appellate courts believe that the defendant complaining of the constitutional violation is, in fact, guilty. But, "[i]n view of the place of importance that trial by jury has in our Bill of Rights," harmless error review should not "substitute the belief of appellate judges in the guilt of an accused, however, justifiably engendered by the dead record, for ascertainment of guilt by a jury under appropriate judicial guidance, however cumbersome that process may be."[497] The harmless error doctrine's

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state's death penalty decisions between 1976 and 1996 and finding that, during this period, "the reversal rate … dropped from 94% to 14%," ibid., 62, and "differential use of the harmless error doctrine" accounted for "nearly all of the difference in death penalty outcomes," ibid., 63; Chapel, "Irony of Harmless Error," 504 n. 26; finding, based on review of one state court's death penalty decisions in 1995 and 1996, that in 72% of the cases, "at least one claimed error was resolved by applying the harmless error rule;" Thomas Y. Davies, "Affirmed: A Study of Criminal Appeals and Decision-Making Norms in a California Court of Appeal," *American Bar Foundation Research Journal* 7, no. 3 (1982); finding that in fiscal year 1974, criminal appellate dispositions in one state court reflected "at least one harmless error reference in approximately a quarter of all affirmed and modified appeals," ibid, 604, and that "[i]ssues where . . . the harmless error rule . . . [was] likely to apply had very low success rates," ibid., 617.

[496] *See* Edwards, "To Err is Human," 1171-72; "I believe that, more often than not, we [judges] review the record to determine how we might have decided the case; the judgment as to whether an error is harmless is therefore dependent on our judgment about factual guilt of the defendant." Mitchell, "Against Overwhelming Appellate Activism," 1361; while *Chapman* focuses on the nature and context of the error, *Harrington* directs attention away from the error to the rest of the evidence; Stacy and Dayton, "Rethinking Harmless Constitutional Error," 80; the Court has extend[ed] its preoccupation with factual guilt beyond rhetoric."

[497] *Bollenbach,* 326 U.S. at 614-15. (Emphasis supplied). *See also Kotteakos,* 320 U.S. at 760; "our government is not one of mere convenience or efficiency. It too has a stake, with every citizen, in his being afforded our historic [sic] individual protections, including those surrounding criminal trials. About them we dare not become careless or

interests of pragmatism, efficiency, and finality have, impermissibly, allowed courts to invade the role of the jury and erode fundamental individual rights and institutional democratic protections.[498]

The courts' continued use of the harmless error doctrine also allows, even encourages, unlawfulness and abuse by the very governmental branches charged with enforcing the law.[499] The Constitution's protections against governmental abuse and majoritarian rule, and its protections of the larger values enshrined within constitutional rights, are placed in jeopardy, as a result. The courts should, instead, seek to uphold the law and Constitution and deter government officials from violating them. As Justice Brandeis stated in dissent to a case that the Court later overturned,[500] the Constitution limits the power and authority of federal actors and precludes them from taking advantage of constitutional violations, even to obtain convictions.[501] The courts, in turn,

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complacent ….;" *Bihn,* 328 U.S at 638-39; "[n]or is it enough for us to conclude that guilt may be deduced from the whole record. Such a course would lead to serious intrusions on the historic [sic] functions of the jury under our system of government;" *Chapman,* 386 U.S. at 22; rejecting an "overwhelming evidence" of guilt test and stating that the purpose of the harmless error doctrine is "to block setting aside convictions for small errors or defects." *Compare* Murray, "A Contextual Approach," 1803, n. 64, and Epps, "Harmless Errors," 2128; both noting that Congress rejected a "correct result was reached" approach and, instead, focused on whether the error affected substantial rights when creating the harmless error statute.

[498] Fairfax, "A Fair Trial," 455-56; Fairfax, "Harmless Constitutional Error," 2027, 2060-65.

[499] Chapel, "Irony of Harmless Error," 515-16; *See also* Bilaisis, "Abettor of Courtroom Misconduct," 470; "Courts themselves are instruments of law enforcement."

[500] *Olmstead v. United States*, 277 U.S. 438, 482, 48 S.Ct. 564, 574, 72 L. Ed. 944 (1928), *overruled in part by Berger v. New York*, 388 U.S. 41, 87 S.Ct. 1873, 18 L. Ed. 2d 1040 (1967), *and overruled in part by Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L. Ed. 2d 576 (1967).

[501] Ibid., 484; "The confirmed criminal is as much entitled to redress as his most virtuous fellow citizen."

must deny federal actors the benefit of their violations in order to protect and promote constitutional values, respect for the law, and public confidence in the justice system:[502]

> Decency, security, and liberty alike demand that government officials shall be subjected to the *same rules of conduct* that are commands to the citizen. In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. *If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy*. To declare that in the administration of the criminal law the end justifies the means – to declare that the government may commit crimes in order to secure the conviction of a private criminal – would bring terrible retribution. *Against that pernicious doctrine this court should resolutely set its face*.[503]

But the courts have not always done so, as illustrated by the "hypothetical" outlined in Chapter 1, which is a slightly-altered version of a real case, as well as numerous other cases.[504] Kirk Defendant is actually Karl Fontenot, the well-publicized

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[502] Ibid.
[503] Ibid., 485. (Emphasis supplied). *See also* Bilaisis, "Abettor of Courtroom Misconduct," 457; "Society and the courts have a significant interest in promoting confidence in the administration of justice, and in preserving the judicial process from contamination by courses of action found illegal or deemed unfair."
[504] *See e.g.,* Kozinski, "Criminal Law 2.0," xi, xxiv-xxv; citing the 2013 release of a death row inmate convicted based on a supposed oral confession that was fabricated by Detective Saldate, "a serial liar," and the prosecution's withholding, for decades, of exculpatory *Brady* evidence; ibid., xxvi; another case involving a serial jailhouse snitch that the prosecutor knew to be a liar, but routinely placed near target defendants' jail cells

subject of books, articles, and television series that dub him "the innocent man."[505] On appeal, the court affirmed Fontenot's conviction.[506] It rejected his challenge to his confession, despite his claims of coercion and the stark differences between his confession and the actual circumstances of the victim's death. It refused his arguments that the police fed the suspects the same information for the confessions – information that turned out to be incorrect – or that Fontenot's mental deficiencies or psychological state rendered his confession untrustworthy. Finally, the court approved of the detective's testimony about the co-defendant's confession during Fontenot's trial, despite the earlier court order that the confession could not be used and was unreliable in regard to him.[507]

Karl Fontenot has now been in prison for 35 years. The defendants in the second murder case, in which the same jailhouse informant falsely claimed the two men had confessed, have since been exonerated by DNA evidence.[508] The parallels between the

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anyway; ibid, xxvii; prosecution withheld the statements of seventeen witnesses, all of whom said they saw the victim alive after the defendant was arrested and incarcerated for murder.

[505] *See* John Grisham, *The Innocent Man: Murder and Injustice in a Small Town* (New York: Random House, 2006): 430; condemning a system that condones "bad police work, junk science, faulty eyewitness identifications, bad defense lawyers, lazy prosecutors, [and] arrogant prosecutors;" Robert Mayer, *The Dreams of Ada* (New York: Broadway Books, 2006): jacket; recounting "the nightmare of a small town obsessed with delivering justice, and the bizarre dream of a poor, uneducated man accused of murder – a case that chillingly parallels [another] one, occurring in the very same town;" Nick Schager, "'The Innocent Man': Inside the Two Gruesome Murders Haunting a Small Oklahoma Town," *The Daily Beast*, December 10, 2018, https://www.thedailybeast.com/the-innocent-man-inside-the-two-gruesome-murders-haunting-a-small-oklahoma-town; *The Innocent Man,* directed by Clay Tweel, (Los Gatos, CA: Netflix, Inc., 2018), television.

[506] *Fontenot v. State of Oklahoma,* 992 P.2d 69 (Okla. Crim. App. 1994). *See Fontenot v. State of Oklahoma,* 742 P.2d 31 (Okla. Crim. App. 1987); giving additional facts.

[507] Ibid.

[508] Innocence Project, "Ron Williamson," *The Innocence* Project, accessed February 13, 2019, https://www.innocenceproject.org/cases/ron-williamson. Williamson and his co-defendant, Dennis Fritz, were exonerated in 1999 after serving eleven years in prison for

two murder cases are too obvious to miss: both had "minimal physical evidence, the use of 'dream' confessions, [] reliance on testimony by [the same] jailhouse informant[], [and] … a similar cast of characters: Peterson was the prosecutor and Rogers was the investigator."[509] Unfortunately, for Fontenot and his co-defendant, DNA evidence no longer exists in their case.

In early 2019, Fontenot's counsel learned that voluminous, undisclosed police records exist that document the police investigations, interrogations, intimidation of witnesses, and interception of Fontenot's attorney letters, as were noted in the case sketch.[510] But, the records also contain many other, undisclosed witness statements saying that the victim had long been stalked by an unknown assailant; that Fontenot was not one of the men at the convenience store; and that Fontenot was at the party the entire

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a crime they did not commit. Williamson was only five days away from execution when the court issued a stay. As the record demonstrates, the State fought the defendants' attempts to prove their innocence at every turn. *See Williamson v. State,* 812 P.2d 384 (Okla. Crim. App. 1991), *order corrected by,* 905 P.2d 1135 (Okla. Crim. App. 1991), *cert. denied,* 503 U.S. 973 (1992), *rehearing denied,* 504 U.S. 968 (1992). *See also Williamson v. State,* 852 P.2d 167 (Okla. Crim. App. 1993), *cert. denied,* 511 U.S. 1115 (1994). *And see Williamson v. State,* 904 F.Supp. 1529 (E.D. Okla. 1995), *affirmed,* 110 F.3d 1508 (10th Cir. 1997). *See Fritz v. State*, 811 P.2d 1353 (Okla. Crim. App. 1991), *affirmed,* 64 F.3d 338 (10th Cir. 1995), *cert. denied,* 519 U.S. 1119 (1997).

[509] *Peterson v. Grisham,* 594 F.3d 723, 726 (10th Cir. 2010). In this civil suit, State Prosecutor William Peterson, Police Officer Gary Rogers, and State forensic hair expert Melvin Hett sued the book authors for, *inter alia,* defamation. The Tenth Circuit affirmed the district court's dismissal of their suit. After noting that "[t]he books themselves are substantially true," the district court "faced … th[e] basic question: What two words best describe a claim for money damages by government officials against authors and publishers of books describing purported prosecutorial misconduct? Answer: Not plausible." *Peterson v. Grisham*, No. CIV-07-317-RAW, 2008 WL 4363653, at *1, *6 (E.D.Ok., Sept. 17, 2008).

[510] *See supra* Chapter 1, pp. 4-6.

night of the crimes.[511] Fontenot's attorneys are, again, challenging his conviction. They have lodged claims of prosecutor and police misconduct, which include *Brady* nondisclosures, Fifth Amendment violations of the rights against self-incrimination and deprivation of due process, and Sixth Amendment violations of the rights to compel and confront witnesses and to assistance of counsel.[512] Whether Fontenot's claims succeed likely will depend on the importance the reviewing court places on constitutional rights and its interpretation of harmless constitutional error. It is this author's hope that the dialogue will be something like one described by a judge who clearly places constitutional values and trial fairness above pragmatic harmless error concerns of efficiency and finality. That fine judge stated:

> While considering my decision in this case I told a friend, a layman, I believed the facts and law dictated that I must grant a new trial to a defendant who had been convicted and sentenced to death.
>
> My friend asked, "Is he a murderer?"
>
> I replied simply, "We won't know until he receives a fair trial."
>
> God help us, if ever in this great country we turn our heads while people who have not had fair trials are executed. That almost happened in this case.[513]

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[511] *See Fontenot v. Allbaugh,* case number 6:16-cv-00069, doc. number 123 (E.D.Ok., March 19, 2019).
[512] Ibid.
[513] *Williamson*, 904 F. Supp. at 1576–77 (Seay, J.).

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