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Harmless Constitutional Error: The Implications of Chapman v. California

Philip J. Mause

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I. INTRODUCTION

A. BACKGROUND

All state[1] and federal courts[2] are governed by statutes which allow a trial court's verdict to be affirmed on appeal despite the existence of error in the conduct of the trial. Accordingly, various standards are formulated for determining when error at the trial stage shall be considered "harmless" and therefore not a basis for reversal. These statutes are largely the result of a wave of judicial reform in the nineteenth century.[3] Under common law, prior to the enactment of the harmless error statutes, any error, regardless of its significance, resulted in an automatic reversal of the trial court's decision.[4] It was felt that this rule of automatic reversal had two bad effects: It created an unnecessary burden on the judicial system by forcing the retrial of cases in which the result would be the same after the error had been corrected; it led to "sharp practices" on the part of lawyers who, sensing the weakness of their cases, would try to inject into the record error against their own side in order to achieve an automatic reversal on appeal.[5]

In balancing the interests at stake in formulating and applying a harmless error rule two aspects should be emphasized. Since the rule does not apply until it is determined that there is error in the record, the danger of an overly broad harmless error rule is that verdicts based on error may be affirmed. Depending on the nature of the error, this will lead both to an unjust result in the case to which the rule is applied, and to a whittling away

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* Assistant Professor, University of Iowa College of Law.

1. Chapman v. California, 386 U.S. 18, 48-49 (1967) (Justice Harlan dissenting). *See also* Note, *Harmless Constitutional Error,* 20 STAN. L. REV. 83 (1967) [hereinafter cited as Stanford Note].

2. FED. R. CRIM. P. 52(a); *see* 28 U.S.C. § 2111 (1964).

3. *See* Stanford Note. *See generally* Kotteakos v. United States, 328 U.S. 750, 758-66 (1946).

4. Although early common law recognized a harmless error rule, the "Exchequer rule" of automatic reversal was generally applied in the United States. *See* L. ORFIELD, CRIMINAL APPEALS IN AMERICA (1939).

5. *See* Stanford Note at 83-84.

of the impact of the rule of law which defines the error. On the other hand, an overly narrow harmless error rule will lead to a waste of judicial resources through the needless reversal and retrial of cases which should have been affirmed.

In applying the harmless error rule to criminal convictions—the focus of this article—the balance of interests therefore involves two dangers: affirming the conviction of an innocent defendant, or more precisely a defendant who would not have been convicted in the absence of the error; and causing the state the needless expense of retrying an appellant's case only to reach the same result reached in the first trial. To state the interests to be balanced is to emphasize that uncertainty should almost always be resolved in favor of the criminal defendant.

The problem is complicated when the error is a violation of the Federal Constitution and when the locus is a state trial court. Appeals from state trial courts to the state appellate level are normally governed by state procedural rules—including state harmless error rules. But when the appeal is based on a claim that the Federal Constitution has been violated, the presence of a strong federal interest militates in favor of judging the harmlessness of such violation according to a federal standard.

Until *Chapman v. California*,[6] it was unclear whether the harmlessness of federal constitutional error in a state court was to be judged by a state or federal standard. In fact, there was some suggestion that federal constitutional errors could never be held to be harmless, and that the automatic reversal of any criminal conviction based on such error was required. A series of cases did not even discuss the possibility that error might be harmless, but simply reversed convictions upon a finding of constitutional error in the trial record.[7] This has led some writers to speculate that federal constitutional error was always of such gravity as to make a finding of harmlessness inappropriate.[8] Other cases, however, indicated that federal constitutional error, even in a federal court, could be harmless,[9] although it was un-

6. 286 U.S. 18 (1967).

7. Klopfer v. North Carolina, 386 U.S. 213 (1967) (denial of a speedy trial); Haynes v. Washington, 373 U.S. 503 (1963) (admission of coerced confession); Gideon v. Wainwright, 372 U.S. 335 (1963) (denial of right to counsel); Stromberg v. California, 283 U.S. 359 (1931) (conviction based on unconstitutional statute).

8. *See* Manwaring, *California and the Fourth Amendment*, 16 STAN. L. REV. 318, 325-26 (1964).

9. *See* Motes v. United States, 178 U.S. 458 (1900). *See generally* Stanford Note *passim*.

clear what standard of harmlessness applied.

In only one case, *Motes v. United States*,[10] has the Supreme Court actually held constitutional error to be harmless. In that 1900 case, the defendant had confessed to the crime in court, but appealed the conviction on the ground that some evidence had been admitted in violation of his sixth amendment right to be confronted by the witnesses against him. The Supreme Court tersely dismissed the appeal:

> It would be trifling with the administration of the criminal law to award him [the Defendant] a new trial because of a particular error committed by the trial court, when in effect he has stated under oath that he was guilty of the charge preferred against him.[11]

The federal circuit courts divided on whether the admission of illegally seized evidence in violation of *Weeks v. United States*[12] could ever be harmless error in a federal court.[13] When the Supreme Court held in *Mapp v. Ohio*[14] that illegally seized evidence was inadmissable in state courts as well, it was not clear whether automatic reversal was required whenever such error occurred. Subsequently, a number of state appellate courts applied state harmless error statutes to *Mapp* violations.[15]

The confusion created by the application of state harmless error statutes to *Mapp* violations, as well as the general confusion as to the relation between harmless error rules and other constitutional violations in state and federal criminal trials, led the Supreme Court in 1963 to grant certiorari in *State v. Fahy*.[16] In *Fahy* the defendants were convicted after illegally seized evidence was admitted in violation of *Mapp*.[17] On appeal the Connecticut Supreme Court of Errors affirmed, holding that the admission of the illegally seized evidence was violative of *Mapp*, but that the error was harmless under the Connecticut harmless error statute.[18] The Supreme Court reversed the conviction, holding

10. 178 U.S. 458 (1900).
11. *Id.* at 476.
12. 232 U.S. 383 (1914).
13. *Compare* United States v. Perez, 242 F.2d 867, 870 (2d Cir.), *cert. denied*, 354 U.S. 941 (1957), *with* Honig v. United States, 208 F.2d 916, 921 (8th Cir. 1953).
14. 367 U.S. 643 (1961).
15. *See, e.g.*, People v. Parham, 60 Cal. 2d 378, 384 P.2d 1001, 33 Cal. Rptr. 497 (1963), *cert. denied*, 377 U.S. 945 (1964). At least 13 states applied their harmless error statutes to *Mapp* violations. *See* Stanford Note at 86 n.30.
16. 149 Conn. 577, 183 A.2d 256 (1962), *rev'd*, 375 U.S. 85 (1963).
17. 367 U.S. 643 (1961).
18. 149 Conn. 577, 183 A.2d 256 (1962), *rev'd*, 375 U.S. 85 (1963).

that it was unnecessary to decide whether violations of *Mapp* required automatic reversal,[19] because the admission of the illegally seized evidence was clearly not harmless.[20] Warren's cryptic opinion for the majority does not state what standard the Court used in this case to judge harmlessness. Some commentators felt that the Supreme Court was merely deciding that the Connecticut court had erred in its application of the Connecticut harmless error statute, and that the Supreme Court's decision was, in essence, an interpretation of the Connecticut statute.[21] There is nothing in the opinion to support this contention, and it would have been a colossal departure from precedent for the Supreme Court to overrule a state court's interpretation of a state statute.[22] But neither did the Court's opinion expressly create a federal standard for judging the harmlessness of federal constitutional errors in state courts, thereby forbidding state courts from applying state harmless error statutes to such errors. Instead, the Court simply stated:

> We are not concerned here with whether there was sufficient evidence on which the petitioner could have been convicted without the evidence complained of. The question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction. To decide this question, it is necessary to review the facts of the case and the evidence adduced at trial.[23]

In dissent, Mr. Justice Harlan saw this difficulty and accused the majority of skirting the key issue of the case:

> Does the 14th Amendment prevent a State from applying its harmless error rule in a criminal trial with respect to the erroneous admission of evidence obtained through an unconstitutional search and seizure?[24]

Harlan's answer to this question was "no"—although he did not make it clear whether he felt state harmless error statutes should be applicable to all federal constitutional errors. While he stated that "it may well be that a confession is never to be considered as nonprejudicial,"[25] Harlan argued that *Mapp* violations should be exposed to state harmless error statutes:

> Since the harmless error rule plainly affords no shield under which prosecutors might use damaging evidence, un-

19. 375 U.S. 85 (1963).
20. *Id.* at 86.
21. *See, e.g.*, Stanford Note at 86-87.
22. Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590 (1874).
23. 375 U.S. 85, 86-87 (1963).
24. *Id.* at 92.
25. *Id.* at 95.

> constitutionally obtained, to secure a conviction, there is no danger that application of the rule will undermine the prophylactic function of the rule of inadmissibility.[26]

Harlan was correct in accusing the majority of avoiding the issue as he posed it. The Court certainly could not have been simply reversing the Connecticut court's construction of a Connecticut statute; such a rationale would fly in the face of the well-established rule that the Supreme Court is bound by state court interpretations of state statutes.[27] If the Court meant that it was establishing a federal harmless error standard, it should have so stated. It should not have left open the very plausible implication that it was merely holding that the state court's decision—that the federal constitutional error was harmless in this particular case—was based on an "inadequate" state ground.[28]

Commentators were uncertain as to the meaning of the *Fahy* decision. One possibility was that state courts could continue applying state harmless error statutes to federal constitutional errors, being reversed only when the Supreme Court felt "there [was] a reasonable possibility that the evidence complained of might have contributed to the conviction."[29] In such a case the harmlessness of the error would constitute an inadequate state ground for affirming a conviction.[30] An alternative theory was that the Supreme Court had articulated a uniform federal standard, binding on all state appellate courts, for the determination of the harmlessness of federal constitutional error.[31] In practice, courts of a number of states—including California[32]—continued to apply state harmless error statutes to federal constitutional errors, even after *Fahy*.

B. *Chapman v. California*

In *Chapman*, the petitioners were convicted of murder in a California state court. Both petitioners chose not to testify during their trial, and, pursuant to Art. I, section 13 of the California

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26. *Id.* at 94.
27. *See* note 22 *supra*, and accompanying text.
28. *Cf.* Henry v. Mississippi, 379 U.S. 443 (1965).
29. *See* note 23 *supra*, and accompanying text.
30. *See* notes 66-67 *infra*, and accompanying text.
31. *Cf.* 38 TULANE L. REV. 787 (1964).
32. *See, e.g.*, People v. Cruz, 61 Cal. 2d 861, 395 P.2d 889, 40 Cal. Rptr. 841 (1964).

Constitution,[33] the prosecutor in his summation to the jury commented at length on their failure to testify and the inferences of their guilt that could be drawn from their silence.[34] After the trial, but before the California Supreme Court decision on appeal, the United States Supreme Court held in *Griffin v. California*[35] that Art. I, section 13 of the California Constitution was violative of the Federal Constitution. The Court reasoned that the practice of allowing prosecutors to comment on the silence of criminal defendants who refuse to testify unconstitutionally penalized the exercise of the fifth amendment right against compelled self-incrimination. In *Tehan v. United States ex rel. Shott*[36] the Supreme Court announced that *Griffin* would be applied only prospectively, but that cases which were not final on appeal before the *Griffin* decision was announced would be tested under the *Griffin* rule.

The California Supreme Court[37] held that, although the petitioners had been denied a federal constitutional right as defined in *Griffin*, the error was harmless under the California Constitution's harmless error provision. That provision provides that errors shall be harmless and verdicts below affirmed unless "the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice."[38]

The defendants filed a petition for certiorari arguing that violations of *Griffin* can never be held harmless and, alternatively, that under a federal standard, the error could not be considered harmless in the instant case. With Mr. Justice Black writing for a majority of seven, the Supreme Court held that: (1) "whether a conviction for crime should stand when a state has failed to accord federal constitutionally guaranteed rights"[39] is a federal question to be decided under federal law; (2) a rule of automatic reversal shall not apply to all federal constitutional errors because "there may be some constitutional errors which in the setting of a particular case are so unimportant and insig-

33. It provides:

> In any criminal case, whether the defendant testifies or not, his failure to explain or to deny by his testimony any evidence or facts in the case against him may be commented upon by the court and by counsel, and may be considered by the court or the jury.

34. People v. Teale, 63 Cal. 2d 178, 404 P.2d 209, 45 Cal. Rptr. 729 (1965), *rev'd sub nom.*, Chapman v. California, 386 U.S. 18 (1967).

35. 380 U.S. 609 (1965).

36. 382 U.S. 406 (1966).

37. People v. Teale, 63 Cal. 2d 178, 404 P.2d 209, 45 Cal. Rptr. 729 (1965).

38. CAL. CONST. art. VI, § 4½.

39. Chapman v. California, 386 U.S. 18, 20-21 (1967).

nificant that they may, consistent with the Federal Constitution, be deemed harmless;"[40] (3) a federal harmless error rule shall apply to all federal constitutional errors and the beneficiary of a constitutional error must "prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained;"[41] and (4) applying the federal standard to the instant case, the error cannot be held to be harmless.[42]

Justice Stewart concurred in a separate opinion and argued that a rule of automatic reversal should be applied to all violations of *Griffin v. California*.[43] Stewart's opinion highlighted one of the central ambiguities in the majority opinion. It is unclear whether, after *Chapman v. California*, there are any *classes of cases* to which the rule of automatic reversal still applies—or whether the new federal harmless error rule now applies to all violations of federal constitutional rights.[44] Certainly, Stewart is correct in arguing that there are a large number of pre-*Chapman* cases which hold that various kinds of constitutional error call for automatic reversal.[45] None of these cases are expressly overruled in the majority opinion. In fact, Black's citation of *Payne v. Arkansas*[46] in the closing paragraph of his opinion for the Court[47] seems to imply that certain classes of constitutional errors still call for automatic reversal.[48] But nothing is said explicitly, nor is any test suggested for determining which classes of constitutional error, if any, are appropriate for automatic reversal. It is not surprising that post-*Chapman* litigation has developed over this point.[49] It is simply unclear whether *Chapman* applies only to *Griffin* violations (minimal holding), to all constitutional violations (maximum holding),

40. *Id.* at 21-22.
41. *Id.* at 22-24.
42. *Id.* at 24-26.
43. *Id.*
44. *See id.* at 42-45.
45. *See* cases cited note 7 *supra.*
46. 356 U.S. 560 (1958). This case held that the admission of a coerced confession required the application of a rule of automatic reversal.
47. 386 U.S. 18, 26 (1967). *See* note 129 *infra.*
48. Justice Stewart seems to feel that none of the pre-*Chapman* automatic reversal holdings are overruled by *Chapman,* although he states that "one source of my disagreement with the Court's opinion is its implicit assumption that the same harmless error rule should apply indiscriminately to all constitutional violations." *Id.* at 44-45. Some commentators have argued that the *Chapman* rule now applies to all constitutional error and that automatic reversal will never be applied. *See* 81 HARV. L. REV. 69, 208 (1967).
49. *See* note 131 *infra.*

or to classes of violations other than those in *Griffin*, but not all. The only certainty is that state harmless error rules no longer apply to any violations of the Federal Constitution.

Mr. Justice Harlan dissented on the ground that a state's construction of its own harmless error rule constituted an independent and adequate state ground.[50] He argued that even the majority opinion seemed to concede that a federal harmless error rule is not constitutionally required[51] and that the decision must therefore rest on the spurious ground that the Supreme Court has a supervisory power over state courts. Harlan emphasized that "[t]he Court has no power . . . to declare which of many admittedly constitutional alternatives a state may choose."[52] Federal constitutional rights are sufficiently protected if the Supreme Court limits its review in this area to two questions. First, is the harmless error provision itself consistent with the guarantee of due process in the fourteenth amendment?[53] Second, when a harmless error provision is applied to a federal constitutional right, is the application reasonable and not an arbitrary attempt to evade the federal right?[54] He then went on to argue that both of these questions should be answered affirmatively in the *Chapman* case.

Harlan's dissent also focuses on an ambiguity in the majority opinion. The basis or rationale by which the Court undertakes to create federal law in this area is not made clear. Black's opinion raises a strong implication that Congress could create a statutory federal harmless error rule[55]—presumably acting under section five of the fourteenth amendment.[56] If the rule prescribed by

50. 306 U.S. 18, 45-47 (1967).

51. Justice Black wrote:

> We have no hesitation in saying that the right of these petitioners not to be punished for exercising their Fifth and Fourteenth Amendment right to be silent—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.

Id. at 21 (emphasis added). Justice Harlan interpreted this as an assertion that Congress could enact a different rule, and that, therefore, the Court's rule was not constitutionally required. *Id.* at 46.

52. *Id.* at 48.

53. *Id.* at 51.

54. *Id.* It is unclear whether Harlan would require the application of a state harmless error statute to be *both* unreasonable *and* evasive of federal rights before reversal by the Supreme Court would be justified—or whether any application which is *either* unreasonable *or* evasive of constitutional rights would justify reversal. *Id.* at 51, 54-56.

55. *See* note 51 *supra.*

56. *Cf.* Katzenbach v. Morgan, 384 U.S. 641 (1966).

the Court in *Chapman* is not, therefore, a constitutional necessity, it is unclear what kind of power the Court purports to wield over state procedure and how far, in fact, Congress could go in changing the *Chapman* rule. Although the opinion makes these problems academic at least until Congress acts, the decision might be read as enlarging the Court's power to supervise state procedure in the adjudication of federal constitutional rights. As a result, it may have considerable impact on creating uniform federal rules defining standards in other areas where state law affects the vitality of federal constitutional rights in state courts.

This article will thus consider the two primary questions left unanswered by the *Chapman* decision: the source of the Court's power exercised in *Chapman* and the applicability, after *Chapman*, of the rule of automatic reversal to other classes of constitutional error.

II. SOURCE OF POWER FOR A FEDERAL HARMLESS ERROR RULE

A. THE *Chapman* IMPLICATION

It is not in a purely academic spirit that the source of the power of the Supreme Court to impose federal law in this area is now scrutinized. Although Justice Black disposed of the problem rather tersely,[57] Justice Harlan felt that the Court's assertion of power in *Chapman* had a volcanic effect on the state-federal balance.[58] In addition, the problem does have overtones that may be significant in the future. Justice Black, writing for the majority, gratuitously intimated that Congress could change the *Chapman* result.[59] The extent of that putative Congressional power may depend on the nature of the power the Court asserted in fashioning the *Chapman* rule. For example, it is interesting to speculate on the Court's reaction to a federal statute redelegating the power to fashion harmless error rules to the states.[60] Finally, depending on the rationale supporting it, the power asserted by the Supreme Court in *Chapman* to create federal law,

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57. *See* text accompanying note 63 *infra*.
Whether a conviction for crime should stand when a state has failed to accord federal constitutionally guaranteed rights is every bit as much of a federal question as what particular federal constitutional provisions themselves mean, what they guarantee, and whether they have been denied.
386 U.S. 18, 21 (1967).

58. *Id.* at 57.

59. *See* note 51 *supra*.

60. *Cf.* United States v. Sharpnack, 375 U.S. 286 (1958).

binding on state courts, may constitute a precedent for the judicial promulgation of other rules binding on state courts in their adjudication of federal constitutional rights.[61]

If the Supreme Court had held that the federal harmless error rule set forth in *Chapman* was a constitutional requirement, there would, of course, have been little conceptual difficulty. The Supreme Court has the power to force state courts to follow the Federal Constitution under the supremacy clause.[62] The difficulty is that Black's opinion strongly implies that the federal harmless error rule is not a constitutional requirement by stating that Congress has the power to act in this area and further, by its characterization of the rule's promulgation:

> With faithfulness to the constitutional union of the States, we cannot leave to the States the formulation of the authoritative laws, rules, and remedies designed to protect people from infractions by the States of federally guaranteed rights. We have no hesitation in saying that the right of these petitioners not to be punished for exercising their Fifth and Fourteenth Amendment right to be silent—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.[63]

This led Justice Harlan to criticize the holding, by asserting: "The Court has no power, however, to declare which of many admittedly constitutional alternatives a state may choose."[64] As he correctly pointed out, "[t]here is no necessity for a state to have a harmless error rule at all."[65] Harlan's view that the Court's power to overrule state law regulating the adjudication of federal constitutional rights is limited to instances in which the state has chosen an unconstitutional "alternative" would still have left the Court with a number of rationales for limiting the impact of state harmless error rules on federal constitutional rights.[66]

B. Traditional Alternatives

In analyzing what the Court actually did in *Chapman*, it may be helpful to discuss briefly some other approaches that the Court could have taken to the problem presented by state harmless error rules.

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61. *See* 81 Harv. L. Rev. 69, 208-09 (1967).
62. Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816).
63. 386 U.S. 18, 21 (1967).
64. *Id.* at 48.
65. *Id.* at 48 n.2. Of course, if a state had no harmless error rule, it would apply the rule of automatic reversal and the constitutional issue of that rule's prejudice to federal rights would never arise.
66. *Id.* at 50-51.

1. *Inadequate State Ground*

Before *Chapman*, a state court's finding that a federal constitutional error was harmless under a state harmless error statute would normally have been an "independent and adequate" state ground for affirming the trial court's judgment, and would have precluded Supreme Court review under the long-established rule of *Murdock v. Memphis*.[67] It is clear, however, that the Supreme Court has the power to find a state ground "inadequate" in certain situations.[68]

The most recent authoritative discussion of the doctrine's limitations was Mr. Justice Brennan's opinion for the Court in *Henry v. Mississippi*.[69] Brennan first distinguished between "substantive" and "procedural" state grounds, and stated that the former always preclude Supreme Court reversal.[70] It is not certain whether a harmless error rule would be considered "substantive" or "procedural." Brennan further implied that even procedural state grounds can be overcome only when they serve "no substantial state interest."[71] However, state harmless error rules always serve a state interest—the interest of avoiding the time-consuming and expensive retrial of cases where the ultimate result after retrial will inevitably be the same as if the conviction had been affirmed.[72]

Of course, if state harmless error rules were applied in such a way as to discriminate against federal rights or to evade rules of constitutional due process, the state ground could be ruled inadequate.[73] But it might be difficult to prove such discrimination in view of the subjectivity involved in applying any harmless error test.[74] In addition, even a non-discriminatory harmless error test might easily be applied to erode federal rights; the mere fact that it also erodes rights granted under state law should make it no less objectionable.[75]

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67. 87 U.S. (20 Wall.) 590 (1875).

68. *See generally* Note, *The Untenable Nonfederal Ground in the Supreme Court*, 74 HARV. L. REV. 1375 (1961).

69. 379 U.S. 443 (1965).

70. *Id.* at 446-47.

71. *Id.* at 447-51.

72. Stanford Note at 83-85.

73. Chapman v. California, 386 U.S. 18, 51 (1967) (Harlan, J., dissenting).

74. Any harmless error standard will involve considerable judicial discretion. This is not only because each constitutional error is unique (for example, the nature and number of a prosecutor's comments on a defendant's failure to testify), but also because the harmlessness of each error must be evaluated on the basis of the entire record. (Justice Black does this in *Chapman, Id.* at 24-26).

75. A nondiscriminatory harmless error rule which was too loose

Even on the assumption that application of the inadequate state ground approach would be conceptually sound, serious difficulties would remain where the Supreme Court felt the application of such a statute operated to frustrate a federal constitutional right. The Supreme Court, a majority of which clearly feels that errors can be too easily held "harmless"[76] under present state statutes, would be committed to a case-by-case review of their application and a piecemeal adjudication of their "adequacy" as applied to an infinite variety of fact situations. The burden of petitions for certiorari on this issue would either absorb much of the Court's time or would force it to deny certiorari in the bulk of cases. The latter course could be defended because the resolution of any individual case in its unique fact setting would have little precedential value,[77] but would endanger the very constitutional rights the *Chapman* Court sought to protect; it would leave intact numerous convictions in which the Court would not be satisfied that the error was really "harmless beyond a reasonable doubt."[78] The promulgation of a federal harmless error rule in *Chapman* raises many of these same problems.[79] Indeed, the *Chapman* result would have been almost identical if the Court had held that the finding of harmless error was an inadequate state ground, and stated that a similar result would be reached in every case unless the state can "prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained."[80]

It would be difficult to expand the scope of the "inadequate state ground" rationale to the extent of achieving the same net result as was reached in *Chapman*. This is illustrated by Harlan's disposition of the issues in the case. Harlan would not support such a broad interpretation of the Court's power to find a state ground "inadequate." He would limit this power to cases in which the application of a state harmless error rule was "unreasonable" and "manifesting a purpose to defeat federal constitutional rights;"[81] he found that the California Supreme Court's finding of harmlessness in the *Chapman* case was not an in-

would affirm convictions in which any error—constitutional or non-constitutional—is not clearly enough non-prejudicial.

76. The *Chapman* test is stricter than most state standards. *See* 81 HARV. L. REV. 69, 206 n.12 (1967).

77. *See* note 74 *supra.*

78. Chapman v. California, 386 U.S. 18, 24 (1967).

79. *See* text accompanying notes 171-76 *infra.*

80. Chapman v. California, 386 U.S. 18, 24 (1967).

81. *Id.* at 56.

adequate state ground under that standard.[82]

The real issue, then, is not whether the inadequate state ground conceptualization should have been used, but whether the Supreme Court must always allow state appellate courts to affirm convictions on the basis of harmless error rules as long as those rules are not applied with an intent to defeat federal constitutional rights.

2. *Unconstitutionality of the Rule*

Another approach open to the Supreme Court would have been a finding that the harmless error rule itself is unconstitutional as a denial of due process.[83] Moreover, while a criminal defendant probably has no constitutional right to an appeal,[84] once a state creates that right, a combination of the due process and equal protection clauses prevents the state from limiting it so as to discriminate against the poor.[85] However, harmless error statutes could not be readily attacked under this rationale. If the state has no obligation to grant an appeal, it would seem permissible for a state to limit the right to reversal on appeal to those cases in which the trial court's error was clearly prejudicial.

A more specific attack on the constitutionality of harmless error rules is suggested in the Court's recent holding in *Duncan v. Louisiana*;[86] state harmless error rules could be attacked as violative of a criminal defendant's constitutional right to trial by jury in a state court.[87] When a state court affirms a conviction on the basis of a harmless error statute, its action could be analogized to a judicial retrial of the defendant's case. Arguably, the defendant has a constitutional right to another trial of his case before a jury—at least in cases where the appellate court loosely construes a harmless error rule and tests the harmlessness of the error by asking, for example, whether it would have reached the same verdict absent the error or whether it thinks the defendant is guilty. Of course, this rationale was not available at the time of the *Chapman* decision.[88]

82. *Id.* at 54-56.

83. Of course, if the harmless error rule itself is held unconstitutional—it could not be applied even to nonconstitutional errors.

84. "A State is not required by the Federal Constitution to provide appellate courts or a right to appellate review at all." Griffin v. Illinois, 351 U.S. 12, 18 (1956).

85. *Id.* at 16-20.

86. 391 U.S. 145 (1968).

87. The *Duncan* case was decided on May 20, 1968. Thus, this rationale was not really available to the Court in *Chapman*.

88. *See* note 87 *supra*.

A successful constitutional attack on a harmless error rule would mean that *any* application of the unconstitutional statute —whether to a federal constitutional error or to an error under state law—would be improper. It would also mean that Congress could not reverse the Court's ruling that the harmless error standard was unconstitutional.[89]

3. *Protection from Interference with Constitutional Rights— The "Part and Parcel" Doctrine*

The Court could also have held that a federal harmless error standard is "part and parcel" of the federal constitutional rights it protects. This rationale is suggested by *Jackson v. Denno*,[90] where the Court held unconstitutional the New York procedure of submitting the voluntary confession question to the jury if the judge determines that a "fair question" exists. In that case, the state procedure was ruled violative of the Constitution because it did not afford sufficient protection to the defendant's privilege against compelled self-incrimination.[91]

This rationale has never been applied to constitutional rights in general, but only to void a procedure or practice that interferes with some specific constitutional right. Of course, constitutional rights can be defined so as to include a harmless error standard. Thus, the right against compelled self-incrimination could be defined as a right not to be convicted on the basis of compelled self-incrimination or, more precisely, a right not to be convicted when it cannot be proved "beyond a reasonable doubt" that compelled self-incrimination "did not contribute to the verdict."[92]

The rigidity of the harmless error test might vary with the constitutional right. Harlan suggests that due process may require automatic reversal for certain classes of constitutional error.[93] On the other hand, the majority of the Court seems to feel that a defendant has no constitutional protection from a conviction based on evidence admitted in violation of *Mapp v. Ohio*.[94] Indeed, in any case in which a constitutional rule is not applied

89. *See* note 63 *supra*, and accompanying text.
90. 378 U.S. 368 (1964).
91. Griffin v. California, 380 U.S. 609 (1965), seems to rest on a similar rationale.
92. *See* Chapman v. California, 386 U.S. 18, 24 (1967) (the *Chapman* federal harmless error test).
93. *Id* at 52 n.7.
94. *But see* Linkletter v. Walker, 381 U.S. 618, 648 (1965) (Black, J., dissenting).

retrospectively, it is difficult to argue that a constitutional right not to be convicted on the basis of such error has been created.[95]

Defining constitutional rights so that they include or simply limit harmless error standards may appear to be little more than a semantic exercise. On the other hand, a constitutional right could become illusory if a sufficiently loose harmless error standard were permitted. Where the Constitution itself gives a criminal defendant a right not to be convicted on the basis of a certain kind of error, that right must include at least minimal protection against an overly broad harmless error test. The scope of such protection should be the constitutional limit on the extent to which Congress can displace the *Chapman* rule.[96]

C. Possible *Chapman* Rationales

1. *Supervisory Power*

Although the Court did not dwell on the source of its power to create a federal harmless error rule,[97] it has long been held that the Supreme Court has a supervisory power over the lower federal courts. Under this power, it can prescribe rules for these courts to follow even though the rules are not constitutional necessities. This power to mold judge-made law is exemplified in *McNabb v. United States*[98] and *Mallory v. United States*.[99] In these cases the Court held that although the exclusion of confessions, obtained after unreasonably long detention without indictment, was not constitutionally required, the Court would require it in its role as supervisor "of the administration of criminal justice in the federal courts."[100] Arguably, the rule of *Weeks v. United States*,[101] which required the exclusion from the federal courts of evidence obtained in violation of the fourth amendment, was also based on this supervisory power.[102]

Recent cases seem to indicate that the Supreme Court may have a similar supervisory power over state courts in their adjudication of federal constitutional rights. In *Miranda v. Arizona*,[103] Chief Justice Warren, writing for the majority, stated:

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95. *See* note 191 *infra*.
96. *See* text accompanying note 63 *supra*.
97. *See* note 57 *supra*.
98. 318 U.S. 332 (1943).
99. 354 U.S. 449 (1957).
100. McNabb v. United States, 318 U.S. 332, 341 (1943).
101. 232 U.S. 383 (1914).
102. *See* Wolf v. Colorado, 338 U.S. 25, 39 (1949) (Black, J., concurring).
103. 384 U.S. 436 (1966).

> It is impossible for us to foresee the potential alternatives for protecting the privilege [against compelled self-incrimination] which might be devised by Congress or the States in the exercise of their creative rule-making capacities. Therefore, we cannot say that the Constitution necessarily requires adherence to any particular solution for the inherent compulsions of the interrogatory process as it is presently conducted. Our decision in no way creates a constitutional straitjacket which will handicap sound efforts at reform, nor is it intended to have that effect. We encourage Congress and the states to continue their laudable search for increasingly effective ways of protecting the rights of the individual while promoting efficient enforcement of our criminal laws. However, unless we are shown other procedures which are at least as effective in apprising accused persons of their right of silence and in assuring a continuous opportunity to exercise it, the following safeguards must be observed.[104]

The fact that the *Miranda* rule is not constitutionally required, or at least that there are no constitutional alternatives, suggests that its promulgation rests on a power of the Supreme Court to create non-constitutional law binding state courts in the adjudication of federal rights.[105]

2. *Federal Common Law*

Another line of cases asserts a power to create federal common law, binding on state courts in the adjudication of federal causes of action. *Dice v. Akron, Canton & Youngstown Railroad*[106] was an action brought under the Federal Employer's Liability Act in a state court. On appeal the Supreme Court held that both the substantive standards for determining the validity of releases and the procedure for adjudicating their validity was a matter of federal rather than state law. A number of cases support this general approach.[107] Of course, a criminal trial in a state court is not a federal cause of action, and this rationale would not seem to enable federal standards to govern the *trial* on the mere justification that a federal issue is involved. But once a defendant is convicted and appeals on the ground that his conviction is violative of the Federal Constitution, his *appeal* is analogous to a federal cause of action. If it is fictionalized as a separate action, the appeal is a cause of action in a state court based entirely on federal law.

104. *Id.* at 467.
105. *Cf.* 80 HARV. L. REV. 91, 201-07 (1966).
106. 342 U.S. 359 (1952).
107. *See, e.g.*, Central Vermont Ry. v. White, 238 U.S. 507 (1915); *cf.* Clearfield Trust Co. v. United States, 318 U.S. 363 (1943). *See generally* Friendly, *In Praise of Erie*, 39 N.Y.U.L. REV. 383 (1964).

This constitutional characterization of appeals as "federal causes of action" may supply a rationale for the *Chapman* rule. The federal harmless error rule applies only on *appeal*; it has no impact on the *trial* of criminal cases in state courts. In fashioning it, therefore, the Court is merely asserting the role of federal common law as governing federal causes of action in state courts. This conceptualization of the *Chapman* decision would limit the Court's assertion of power to appeals based on federal grounds, and would imply that the power of the states over the *trial* of state criminal cases is not challenged by the *Chapman* decision as Justice Harlan seems to fear.[108] Moreover, if an appeal is viewed as a separate action, it can be argued that the harmless error test is a substantive, rather than a procedural rule. The standard for judging the harmlessness of error is in fact the standard for deciding whether to reverse or affirm. Thus, *Chapman* may not seriously alter the general rule that state law governs state appellate procedure—even in the adjudication of federal rights.[109]

Whether it is conceptualized as "federal common law" or a "supervisory power," it now seems clear that the Supreme Court has the power to make non-constitutional law, binding on the state courts, when such law is necessary to protect constitutional rights. Although the rationale given above may furnish a justification for limiting this power to substantive rules governing appeals, it is likely that the Court will extend it when necessary. For example, Chief Justice Warren's opinion in *Miranda v. Arizona* suggests that this power extends to pretrial procedure.[110] It is not unthinkable that trial procedure, procedure for jury selection, and appellate procedure will come within its scope.

D. Judicial Economy—A Doctrine of Necessity

What may seem objectionable about the Court's assertion of power is the refusal to elucidate the standards for determining when its exercise is *necessary* to protect constitutional rights. In *Chapman*, the creation of the federal harmless error rule may be *necessary* to avoid the wasteful case-by-case confrontation between the Supreme Court and state appellate courts that would occur were the Court to rely on the due process, part and parcel, or inadequate state ground rationales.[111] Rather than re-

108. *See* Chapman v. California, 386 U.S. 18, 56-57 (1967).
109. *See, e.g.*, Parker v. Illinois, 333 U.S. 571 (1948).
110. 384 U.S. 436 (1966).
111. This is what might have occurred if, for example, the Court

verse individual state court decisions because they either violate the Constitution or fail to protect constitutional rights, the Supreme Court in the interest of judicial economy has simply announced a standard and proclaimed that the failure to meet it will result in reversal.

Perhaps this approach is *necessary* whenever the Court is faced with a similar situation. Whenever the Court would be forced either to grant certiorari and review a multitude of individual and unique cases or to deny certiorari in many of them and thereby allow constitutionally tainted convictions to stand,[112] the Court should have the power to paint a bright line over which state appellate courts cannot step. Although the line protects a larger area than is constitutionally required, its existence is necessary to avoid forcing the Court either to adjudicate exhaustively the jagged edges of the constitutional right or to leave the adjudication to the States. This would seem to be one rationale for the *Miranda* rule. The Court was faced with the possibility of a case-by-case adjudication of the voluntariness of confessions;[113] a clear rule, at least clearer than the standard of "voluntariness," was necessary to protect the Court from the burden of reviewing numerous cases on their facts.[114]

If this is the justification for the *Chapman* rule, it is questionable whether the federal harmless error rule achieves its desired goal. All harmless error tests are subjective in nature.[115] As Justice Harlan pointed out, the formulation of a particular standard for harmless error really gives lower courts little guidance.[116] The Supreme Court may often differ with state courts on whether there was a "reasonable possibility" that an error led to a conviction in the fact setting of a particular case, or that a certain error was "harmless beyond a reasonable doubt." Thus, the Court may be faced with the same gargantuan task of review it seems to be trying to avoid; it will be forced to review numer-

had merely based its decision in *Chapman* on an inadequate state ground rationale and not given any guidance as to its standards for deciding when a state ground will be found to be "inadequate." *See* 20 VAND. L. REV. 1157, 1160-61 (1967).

112. The certiorari practice of the Supreme Court might dictate a policy of refusing to review cases which would afford little guidance as precedent because the decisions would be based on assessments of unique fact situations. *See generally* Hart, *Forward: The Time Chart of the Justices, The Supreme Court, 1958 Term,* 73 HARV. L. REV. 84, 96-98 (1959).

113. *See* text accompanying notes 196-200 *infra.*

114. *Id.*

115. *See generally* Note, *The Harmless Error Rule Reviewed,* 47 COLUM. L. REV. 450 (1947).

116. 386 U.S. 18, 53 (1967); *see* 45 NO. CAR. L. REV. 1044, 1047 (1967).

ous individual applications of the federal harmless error rule.[117] Automatic reversal, at least for certain categories of constitutional error, may be the only real solution to this dilemma.

III. THE STATUS OF AUTOMATIC REVERSAL AFTER *CHAPMAN*

A. THE PRE-*Chapman* POSITION

A number of Supreme Court decisions before *Chapman* expressly or impliedly held that a rule of automatic reversal is to be applied to various classes of constitutional error. These decisions are often ambiguous, and sometimes the Court seems to have been operating upon an unconscious assumption that all constitutional errors require the application of a rule of automatic reversal.

In *Tumey v. Ohio*,[118] the defendant's right to due process was violated because the trial judge had a financial interest in his conviction. The Court tersely disposed of the contention that the conviction should be affirmed due to the overwhelming evidence on the record against the defendant, by stating that "[n]o matter what the evidence was against him, he had the right to have an impartial judge."[119] This has been taken to mean that a rule of automatic reversal applies to this kind of constitutional violation,[120] although the Court did not explicitly grant the defendant a *right* of reversal whenever the judge is not impartial.

In *Gideon v. Wainwright*,[121] the Supreme Court did not discuss the possibility that the denial of a constitutionally guaranteed right to counsel might constitute harmless error. Other cases explicitly state that, when there has been a denial of the right to counsel, "we do not stop to determine whether prejudice resulted."[122]

In *Payne v. Arkansas*,[123] the defendant was convicted in a trial at which an involuntary confession was admitted into evidence. The contention that the conviction could be affirmed on

117. It seems that the Court has decided to review state interpretations of the *Chapman* rule. *See* cases cited note 132 *infra*.

118. 273 U.S. 510 (1927).

119. *Id.* at 535.

120. *See* Note, *Individualized Criminal Justice in the Supreme Court: A Study of Dispositional Decision Making*, 81 HARV. L. REV. 1260, 1273-74 (1968).

121. 372 U.S. 335 (1963).

122. Hamilton v. Alabama, 368 U.S. 52, 55 (1961). *See also* White v. Maryland, 373 U.S. 59, 60 (1963).

123. 356 U.S. 560 (1958).

the ground that the admission of the confession constituted "harmless error" was rejected by the Court:

> Respondent suggests that, apart from the confession, there was adequate evidence before the jury to sustain the verdict. But where, as here, a coerced confession constitutes a part of the evidence before the jury and a general verdict is returned, no one can say what credit and weight the jury gave to the confession. And in these circumstances this Court has uniformly held that even though there may have been sufficient evidence, apart from the coerced confession, to support a judgment of conviction, the admission in evidence, over objection, of the coerced confession vitiates the judgment because it violates the Due Process Clause of the Fourteenth Amendment.[124]

In other areas, the Court has either explicitly held that automatic reversal applies[125] or acted under an implicit assumption that lack of prejudice can never be a ground for affirming a conviction.[126]

B. THE *Chapman* AMBIGUITY

Black's opinion for the Court in *Chapman* does little to clarify the current status of these cases or the possibility of expanding the rule of automatic reversal into other areas. He states:

> We conclude that 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 of the conviction.[127]

But it is not clear whether "some constitutional errors" means "certain classes of constitutional error" or "any kind of constitutional error which is unimportant and insignificant in the context of a particular case." Black later states:

> 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, this statement in *Fahy* itself belies any belief that all trial errors which violate the Constitution automatically call for reversal.[128]

But, again, it is unclear whether "some constitutional errors" means "some classes of error" or "some particular cases of error."[129] Finally, he closes with a favorable reference to *Payne v. Arkansas*:

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124. *Id.* at 567-68 (footnote omitted).

125. *See* Klopfer v. North Carolina, 386 U.S. 213 (1967).

126. *See, e.g.*, Rideau v. Louisiana, 373 U.S. 723 (1963) (right to fair jury impaired by prejudicial publicity). *See also* O'Connor v. Ohio, 385 U.S. 92 (1966), in which the Supreme Court reversed on the basis of *Griffin* without considering whether the error was harmless.

127. 386 U.S. 18, 22 (1967).

128. *Id.* at 23 (footnote omitted).

129. Since Black, in making the above statement, cites *Payne v.*

> Such a machine-gun repetition of a denial of constitutional rights, all designed and calculated to make petitioners' version of the evidence worthless, can no more be considered harmless than the introduction against a defendant of a coerced confession. *See*, e.g., *Payne v. Arkansas*, 356 U.S. 560. Petitioners are entitled to a trial free from the pressure of unconstitutional inferences.[130]

This statement seemingly acknowledges that the admission of coerced confessions calls for automatic reversal.

Rather than dwell on the delphic complexity of Black's opinion, we can probably assume that the Court did not intend to overrule *Tumey*, *Payne* or *Gideon sub silentio*, and that the harmless error rule will not be applied to those three classes of constitutional errors.[131] It is still important, however, to try to formulate criteria for deciding whether automatic reversal is appropriate for any other general classes of constitutional error. In the absence of an extension of the principle of automatic reversal, the Supreme Court will shoulder the heavy burden of supervising the application of a necessarily vague federal harmless error rule—a rule which will raise a potential issue in almost every case of a constitutional error. In addition, state appellate courts will also have a heavy burden of deciding the harmlessness of particular constitutional errors. Of course, state courts

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Arkansas, *Gideon v. Wainwright*, and *Tumey v. Ohio*, he probably means that any error which falls into the categories established by these cases calls for the application of a rule of automatic reversal.

130. 386 U.S. at 26.

131. *But see* 81 HARV. L. REV. 69, 208 (1967). Supreme Court opinions since *Chapman* have only beclouded this question. In Burgett v. Texas, 389 U.S. 109, 111 (1967), Douglas writing for the Court stated,

> The admission of a prior criminal conviction which is constitutionally infirm under the standards of *Gideon v. Wainwright* is inherently prejudicial and we are unable to say that the instructions to disregard it made the constitutional error harmless beyond a reasonable doubt within the meaning of *Chapman v. California*.

It is unclear whether this means that a rule of automatic reversal applies to violations of *Burgett* or merely that *Burgett* is violated despite an instruction to disregard the tainted conviction.

In Stovall v. Denno, 388 U.S. 293, 300 (1967), Brennan, writing for the Court, applied *Chapman* to a violation of Gilbert v. California, 388 U.S. 263 (1967) (right to counsel at a line-up). *See also* Biggers v. Tennessee, 390 U.S. 404, 409 (1968) (Douglas, J., dissenting).

Harlan dissented in Roberts v. LaVallee, 389 U.S. 40 (1967), and argued that *Chapman* should be applied to an unconstitutional denial of the right to a preliminary hearing transcript.

In Hamilton v. California, 389 U.S. 921, 922 n.4 (1967), Fortas, in a dissent from a denial of certiorari, implies that *Chapman* should be applied to the unconstitutional admission of an admission.

In Whitney v. California, 389 U.S. 138, 140 (1967), Douglas applied *Chapman* to a denial of change of venue because of prejudicial pretrial television publicity.

have always had this burden, but until *Chapman*, a substantial number of these cases were probably affirmed on appeal due to the application of state harmless error rules. Under *Chapman*, it is likely that—depending on how strictly the Supreme Court supervises state court application of the federal harmless error rule[132]—very few cases will be affirmed which would not have been affirmed under an automatic reversal rule.[133]

C. CLASSIFICATION OF CASES WORTHY OF AUTOMATIC REVERSAL

While the Court has rejected a blanket application of an automatic reversal rule to all constitutional error,[134] it may be possible to define classes of cases to which automatic reversal should be applied. It should be remembered that the claimed advantage for a harmless error rule over a rule of automatic reversal is judicial economy—those cases in which error is held to be harmless will be affirmed and therefore need not be retried on remand. However, the Court's harmless error rule will lead to very few convictions being affirmed,[135] and the small number of retrials avoided by holding errors harmless may not justify the burden of constant litigation on the harmlessness of error issue. Mr. Justice Stewart's concurring opinion takes the position that judicial economy would actually be served more efficiently by a rule of automatic reversal—at least with respect to *Griffin* violations.[136] Of course, it should be noted that the definition of classes of cases worthy of automatic reversal may also involve a process which requires considerable litigation. This burden should be taken into account in determining the net judicial economy. It may also suggest the wisdom of instituting an automatic reversal rule for all federal constitutional errors.

Our task, then, should be to analyze criteria for determining purposive categories of cases to which automatic reversal should be applied.

1. *Inherently Prejudicial Errors*

Certain definable classes of constitutional error are almost

132. The Supreme Court has already asserted its power to review state decisions construing the *Chapman* standard. Fontaine v. California, 390 U.S. 593 (1968). This issue can arise not only on certiorari, but also on review of a petition for *habeas corpus*. *See, e.g.*, Anderson v. Nelson, 390 U.S. 523 (1968).

133. *See* 81 HARV. L. REV. 69, 207-08 (1967).

134. *See* note 127 *supra*, and accompanying text.

135. *See* note 133 *supra*, and accompanying text.

136. 386 U.S. 18, 45 (1967).

never "harmless." Arguably, judicial economy would be best served by applying a rule of automatic reversal to all cases that fall within such classes, rather than by allowing the state to argue that the error was harmless and lose in the overwhelming majority of cases. Application of a rule of automatic reversal will lessen the burden on the judicial system by removing the issue of "harmlessness" from a large number of cases on appeal. Simple judicial economy, then, may dictate the application of a rule of automatic reversal.

There are two reasons why a class of cases may be appropriate for automatic reversal under this rationale. The first is that the prejudicial impact of certain kinds of constitutional error is inherently indeterminable. In these situations, it is simply impossible to determine the extent to which the error damaged the defendant's chances for acquittal. Therefore, *a fortiori*, it should be impossible ever to find such error harmless under the *Chapman* test which demands a showing that there was not "a reasonable possibility that the evidence complained of might have contributed to the conviction"[137] and that the error was "harmless beyond a reasonable doubt."[138]

The impact of violations of *Gideon v. Wainwright*,[139] for example, cannot be intelligently assessed because no appellate court can fairly determine what would have happened at the trial stage had the defendant not been denied his constitutional right to counsel.[140] The rule of automatic reversal has been,[141] and should be in the future,[142] applied to violations of *Gideon* since it would be impossible ever to find such errors harmless under the *Chapman* standards.

Any error which impinges on the integrity of the jury is likewise inherently indeterminable in prejudicial impact. It is impossible, and perhaps a denial of a defendant's constitutional right to trial by jury,[143] for an appellate court to speculate on the result had the defendant been provided with a constitutional jury. Such speculation would substitute an appellate court, which can never have the benefit of observing the demeanor of

137. *Id.* at 24.
138. *Id.*
139. 372 U.S. 335 (1963).
140. *See* Powell v. Alabama, 287 U.S. 45, 68-69 (1932).
141. *See* cases cited note 122 *supra.*
142. *But see* Gilbert v. California, 388 U.S. 109 (1967). It would seem that to the extent that any pretrial proceeding prejudices a defendant's case, the failure to accord him the right to counsel at such a proceeding should result in automatic reversal.
143. *See* Duncan v. Louisiana, 391 U.S. 145 (1968).

the witnesses, for the jury to which the defendant has a constitutional right. It would be tantamount to a directed verdict of "guilty." For this reason, denial of the right to a jury in a state court,[144] pretrial publicity violations,[145] racial discrimination in selection,[146] and any other error which goes to the integrity of the jury which convicted the defendant, should invoke the application of an automatic reversal rule.

Similarly, errors which involve the integrity or the impartiality of the judge before whom the defendant was tried cannot rationally be found "harmless beyond a reasonable doubt" under the *Chapman test.* Because of the scope of discretion permitted the trial judge under our system and his possible reliance on demeanor in making these rulings, an appellate court cannot determine with sufficient certainty which rulings would have been made if the judge had acted constitutionally. For example, decisions of a prejudiced trial judge on the admission of certain evidence[147] or on sentencing[148] may not be reversible error in themselves because they are within the discretion permitted to the trial judge. But it would be impossible for an appellate court to find with sufficient certainty that an unprejudiced trial judge would have made the same decisions. For this reason, constitutional errors involving the fitness or impartiality of the judge before whom a defendant has been tried[149] should not be reviewed to determine the harmlessness of the error, but should instead constitute grounds for automatic reversal.

Other classes of constitutional error exhibit similar inherent unpredictability in prejudicial effect. To deny unconstitution-

144. Duncan v. Louisiana, 391 U.S. 145 (1968) (right to a trial by jury in state courts). *See also* Turner v. Louisiana, 379 U.S. 446 (1965) (official intrusion into the privacy of jury deliberation).

145. Rideau v. Louisiana, 373 U.S. 723 (1963).

146. Whitus v. Georgia, 385 U.S. 545 (1967) (racial discrimination in the selection of jurors); Coleman v. Alabama, 377 U.S. 129 (1964) (trial judge excluded all testimony tending to prove that Negroes had been excluded from the jury).

147. A number of evidentiary rules involve the vesting of considerable discretion in the trial judge. *See, e.g.,* C. MCCORMICK, EVIDENCE, § 157(c), at 332-33 (1954) (discretion of trial judge to exclude evidence of prior convictions even when it has independent relevance).

148. The trial judge has almost unreviewable discretion over sentencing in many states. *See* Note, *Procedural Due Process at Judicial Sentencing for Felony,* 81 HARV. L. REV. 821, 843-46 (1968).

149. Tumey v. Ohio, 273 U.S. 510 (1927) (judge with a financial interest in the outcome); *see* Offutt v. United States, 348 U.S. 11, 12 (1954).

ally a defendant the opportunity to summon witnesses[150] is an error which cannot fairly be found to be "harmless beyond a reasonable doubt," because it is impossible to ascertain what the testimony of the witnesses would have been had they been summoned. Nor can an appellate court intelligently assess the damage done to a defendant's case by an unconstitutional denial of the right to cross-examine prosecution witnesses.[151] There is no way of knowing "beyond a reasonable doubt" what the results of the cross-examination would have been.

The second reason that certain classes of constitutional error should always dictate automatic reversal is closely related to the first. To the extent it is ever possible to evaluate the prejudicial impact of an error below, the result of such evaluation with respect to certain classes of constitutional error will almost inevitably be a finding that the error was not "harmless beyond a reasonable doubt" under the *Chapman* rule. Thus, judicial economy, the only real justification for a harmless error rule, may dictate the application of a rule of automatic reversal to these classes of cases. For example, the unconstitutional admission of a confession into evidence will almost always have an extremely prejudicial impact on a defendant's case. Although the state may produce a mountain of other evidence of the defendant's guilt, an appellate court could rarely, if ever, make a finding that there was not "a reasonable possibility that the evidence complained of [here, the confession] might have contributed to the conviction."[152] The California Supreme Court held in *People v. Schader*[153] that even under the more lenient California harmless error rule,[154] which was overruled in *Chapman*, any wrongful admission of a confession should invoke a rule of automatic reversal:

> After holding that the confession should not have been admitted, we can only be concerned with the effect of the confession upon the jury's deliberation, regardless of the type of error involved. It is because of the effect of the confession that the reversal is compelled. . . . In either case the confession operates as a kind of evidentiary bombshell which shatters the defense. . . . Since we have concluded that the trial court should not have admitted the confessions, we need not consider other contentions urging their inadmissibility.[155]

150. U.S. CONST. amend. VI.
151. *See* Pointer v. Texas, 380 U.S. 400 (1965); Douglas v. Alabama, 380 U.S. 415 (1965).
152. *See* Chapman v. California, 386 U.S. 18 (1967).
153. 62 Cal. 2d 716, 401 P.2d 665, 44 Cal. Rptr. 193 (1965).
154. *See* CAL. CONST. art. VI, § 4½.
155. 62 Cal. 2d 716, 730-31, 401 P.2d 665, 673-74, 44 Cal. Rptr. 193, 201-02 (1965).

It is already clear that under *Payne v. Arkansas*[156] the admission of a coerced confession will always lead to an automatic reversal.[157] The California Court's *Schader* opinion expresses a persuasive argument for extending the rule of automatic reversal to all confession cases:

> In determining the prejudicial effect of the illegally obtained confession at trial we are not concerned with the nature of the error that caused the illegality. The *reason* that the confession should not have been introduced into evidence is no longer material. As to its impact upon the jury and the prejudicial effect, the confession obtained in violation of defendant's right to counsel cannot be distinguished from the confession obtained in violation of defendant's right to be free of coercion.
>
> In this inquiry we cannot logically distinguish between the different bases for the exclusion of the confession. It makes no difference whether the confession was improperly obtained by physical brutality, by threats of physical abuses or severe punishment, by implied promises of lenience or probation, by the officer's promise to release defendant's wife or relative upon defendant's confession, or by retention of the defendant incommunicado. It is immaterial whether the confession should have been excluded as the fruit of an illegal arrest or illegal search, or whether the admission of a confession was improper because it was given after a refusal to allow defendant to consult or after an interference with his right to counsel or because it was given by defendant without advice of his rights to counsel and to remain silent.
>
> . . . [T]he argument that an illegally obtained confession should be differently treated if it is "voluntarily" rendered cannot stand. To argue that a "voluntary" confession is more apt than an "involuntary" one to be trustworthy and *therefore* its *effect* upon the jury is different is to rest upon a non sequitur. It is again to confuse considerations as to inadmissibility of a confession with its *effect* upon a jury.[158]

Of course, it is possible to conjure up hypothetical cases in which the admission of a confession—whether *voluntary* or *coerced*—could be held to be harmless. For example, the prosecution might admit two confessions, one free from error and the other unconstitutional.[159] Or a confession might be unconstitutionally admitted into evidence after a defendant took the stand and admitted his guilt. In these cases, an appellate court might

156. 356 U.S. 560 (1958).

157. *See* note 129 *supra*, and accompanying text. The possible rationales for applying a rule of automatic reversal when the confession is coerced, but allowing an appellate court to find the unconstitutional admission of *voluntary confessions* to be harmless error are discussed later. *See* notes 190-202 *infra*, and accompanying text.

158. 62 Cal 2d. 716, 729-30, 401 P.2d 665, 673-74, 44 Cal Rptr. 193, 201-02 (1965) (citations omitted).

159. *See* People v. Jacobson, 46 Cal. Rptr. 515, 405 P.2d 555 (1965) (conviction affirmed where prosecution introduced 10 confessions, two of which violated *Escobedo*).

well find that there was not "a reasonable possibility that the evidence complained of might have contributed to the conviction."[160] But in fashioning a rule which will maximize judicial economy, the number of such cases should be balanced against the overwhelming majority of confession cases in which it will be virtually impossible for an appellate court to find that the error is harmless under the *Chapman* rule.

Arguably, the inherently prejudicial nature of confessions dictates the application of the automatic reversal rule to violations of *Jackson v. Denno*[161] and all other constitutional errors involving situations where the objectionable confession is somehow disclosed to the jury.[162] This would be true even though it may not be formally admitted into evidence and although the jury may be instructed to disregard the confession.[163] The same "evidentiary bombshell" effect described above in *Schader*[164] obtains in these situations.

The application of the automatic reversal rule to confessions should be extended to improper presentation to the jury or admission into evidence of inculpatory admissions.[165] Here, a defendant has not "confessed" to the crime, but he has admitted some element of the prosecution's case or has made some out-of-court statement from which guilt inferences can be drawn. The "bombshell effect" of a confession is present in most of these cases. The statement appears before the jury clothed in special persuasiveness because it came from the mouth of the defendant.[166]

Another class of constitutional violations which could rarely, if ever, be held harmless under the *Chapman* standard involves cases in which the wrongful admission into evidence of the defendant's prior convictions is ruled constitutional error. In *Burgett v. Texas*[167] the Supreme Court held that the admission of a prior conviction, tainted because it resulted from a trial in which

160. Chapman v. California, 386 U.S. 18 (1967).

161. 378 U.S. 368 (1964) (voluntary confession question cannot be submitted to jury).

162. *Cf.* Rogers v. Richmond, 365 U.S. 534 (1961).

163. Jackson v. Denno, 378 U.S. 368, 389 n.162 (1964).

164. *See* note 155 *supra,* and accompanying text.

165. *But see* People v. Hillery, 62 Cal. 2d 692, 401 P.2d 382, 44 Cal. Rptr. 30 (1965) (California harmless error test applied to voluntary admissions).

166. Defendant's inculpatory remarks in Escobedo v. Illinois, 378 U.S. 478 (1964), were actually an admission rather than a confession. The Supreme Court, however, did not even discuss the possibility that admissions were to be treated differently from confessions.

167. 389 U.S. 109 (1967).

the defendant had been denied his right to counsel, was itself constitutional error. Mr. Justice Douglas stated for the Court that the error in *Burgett* could not be held harmless and implied that all violations of *Burgett* call for automatic reversal:

> The admission of a prior criminal conviction which is constitutionally infirm under the standards of Gideon v. Wainwright is inherently prejudicial and we are unable to say that the instructions to disregard it made the constitutional error "harmless beyond a reasonable doubt" within the meaning of Chapman v. State of California. . . .[168]

Prior convictions tend to have an incalculably potent impact on the minds of jurors,[169] both because they are evidence of the defendant's criminal proclivities and therefore of the likelihood that he is guilty as charged, and because they can prejudice the jury against the defendant and lead them to convict him as a "bad man" regardless of the weight of the evidence. For these reasons, prior convictions are generally inadmissible at common law.[170] The inherently prejudicial impact of the wrongful admission of prior convictions will mean that appellate courts will rarely be able to find such error "harmless beyond a reasonable doubt." Because a consideration of the harmlessness of this class of error will almost always lead to reversal under *Chapman*, judicial economy again seems to dictate that a rule of automatic reversal apply.

The discussion thus far has assumed that state appellate courts will faithfully follow the *Chapman* test and therefore that few errors which fall into the classes discussed above will ever be found harmless. On this assumption, the rule of automatic reversal makes sense purely in terms of judicial economy at the state level. Automatic reversal will lead to few retrials which would not have occurred under a harmless error test, and will free state appellate courts from appraising harmlessness in a large number of cases.

Of course, it is also possible that state appellate courts will be less than diligent in their application of the *Chapman* rule and that a large number of petitions for certiorari will result.[171]

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168. *Id.* at 112.

169. *See* C. McCORMICK, EVIDENCE § 157(c) (1954).

170. *See generally* J. WIGMORE, EVIDENCE §§ 192-194 (3d ed. 1940). *See also* Marshall v. United States, 360 U.S. 310 (1959).

The American Law Institute has advocated an extension of this rule of inadmissibility to protect a defendant from the introduction of prior convictions even when het testifies in his own behalf. UNIFORM RULES OF EVIDENCE 21.

171. *See* Fontaine v. California, 390 U.S. 593 (1968).

The Supreme Court may then be forced into a painstaking examination of these petitions followed by a series of decisions deciding the harmlessness of particular errors. However, the decisions will offer little guidance in the litigation of the harmlessness of future errors in different fact situations; Black's opinion that the error was not harmless in *Chapman* rests at least in part on a conclusion that "absent the constitutionally forbidden comments, honest fair-minded jurors might very well have brought in not-guilty verdicts."[172] Such a conclusion involves an analysis of the entire record, and therefore is little more than a statement that the error is prejudicial in that particular case.

One alternative to such a burdensome case-by-case supervision of the application of *Chapman*[173] would be to deny certiorari in most, if not all, cases contesting a state court's application in a particular fact situation; the ground would be that the pressing business of the Court does not allow the luxury of granting certiorari when the decision cannot have any impact beyond the petitioner's case.[174] This would be unfortunate because it might lead to a perpetuation of the very injustices which the rigid harmless error test of *Chapman* was designed to correct.[175] It was partially a similar dilemma—a choice between a case-by-case adjudication of the voluntariness of confessions and the risk of injustice—that influenced the Court to adopt rather formal rules regulating the admissibility of confessions.[176] A rule of automatic reversal, at least applied to those classes of cases in which a review on certiorari would almost always result in a finding of prejudice, would seem preferable to either of the alternatives available in its absence.

2. *Errors with an Inherent Tendency to Undermine the Reliability of the Guilt-Determination Process*

Many constitutional rules exist to preserve the integrity and

172. 386 U.S. 18, 25-26 (1967).

173. It has been argued that the construction of the *Chapman* standard be left to state appellate courts. 81 HARV. L. REV. 1260, 1271-72 (1968).

174. *See* 1961 SUP. CT. REV. 1 *passim* (a case does not ordinarily reach the Supreme Court on certiorari unless it raises questions of general importance).

175. This is particularly true if convictions were affirmed under an overly-loose construction of the *Chapman* test.

176. In "voluntariness" cases, the Supreme Court has asserted the power to engage in "an independent examination of the whole record." Clewis v. Texas, 386 U.S. 707 (1967). The *Miranda* rule will usually make this kind of exhaustive examination of the facts unnecessary. *Id.*

the reliability of the process of guilt determination. Violations of these rules detract from that integrity and reliability, and may result in the conviction of an innocent man. It is therefore arguable that convictions which are tainted with such violations are inherently unreliable and should be scrutinized with special care. Of course, every harmless error test is intended to achieve this scrutiny by providing for the reversal of any conviction which was obtained through error. Proper application of the *Chapman* test would seem to be a sufficient safeguard against conviction of the innocent. But it has been argued that because constitutional errors which endanger the reliability of the guilt-determination process create a special peril, they should be subjected to a rule of automatic reversal.[177]

Most classes of constitutional error affect the reliability of the process of guilt determination and are errors for that very reason. Involuntary confessions are inherently unreliable.[178] Denial of the right to counsel may result in the conviction of an innocent man.[179] Findings of a prejudiced judge or jury are infected with the danger of falsehood.[180] There are, in fact, few constitutional errors which do not present this danger. Violations of *Mapp v. Ohio*[181] do not really affect the reliability of the process of guilt-determination. Evidence which has been obtained through an unconstitutional search is not inherently unreliable[182] and its admission creates no real tendency to convict the innocent.[183] The reason that all evidence obtained through an unconstitutional search must be excluded is that such a rule deters unconstitutional police conduct.[184]

In his concurring opinion in *Chapman*,[185] Stewart suggests that although a rule of automatic reversals should apply to violations of *Griffin v. California*,[186] a harmless error rule may be applicable to violations of *Mapp v. Ohio*:

> For example, quite different considerations are involved when evidence is introduced which was obtained in violation of the Fourth and Fourteenth Amendments. The exclusionary rule in

177. This is the position advanced in the Stanford Note at 88-91.
178. *See* Payne v. Arkansas, 356 U.S. 560, 568 n.15 (1958).
179. *See* Gideon v. Wainwright, 372 U.S. 335 (1963).
180. *See* Tumey v. Ohio, 273 U.S. 510 (1927).
181. 367 U.S. 643 (1961).
182. *See* Linkletter v. Walker, 381 U.S. 618, 638-39 (1965).
183. *Id.*
184. J. LANDYNSKI, SEARCH AND SEIZURE AND THE SUPREME COURT 76 (1966). *See generally* Stanford Note at 93-94.
185. 386 U.S. 18, 42-45 (1967).
186. 380 U.S. 609 (1965) (comment on defendant's refusal to testify violates fifth amendment self-incrimination protection).

> that context balances the desirability of deterring objectionable police conduct against the undesirability of excluding relevant and reliable evidence. The resolution of these values with interests of judicial economy might well dictate a harmless-error rule for such violations.[187]

A similar argument might be made with respect to confessions excluded under *Miranda*.[188] When such confessions are "voluntary," the real reason for their exclusion is not the danger of their unreliability, but rather a policy of discouraging police misconduct.[189] This argument is reinforced by the fact that *Miranda* has been applied only prospectively.[190] If the policy of either *Mapp* or *Miranda* were to safeguard the reliability of the guilt-determination process and to prevent the conviction of the innocent, a retrospective application would seem necessary.[191] Of course, "involuntary" confessions do present special problems of reliability; their exclusion is at least partially due to their inherent tendency to be false.[192] This may be the rationale behind the application of the rule of automatic reversal to coerced confession cases.[193]

Thus, the policy with respect to confessions, suggested by the reliability of the guilt-determination rationale, would involve a number of steps: first, it must be determined whether there is constitutional error; then, if there is constitutional error, one must determine whether the confession was "voluntary" or "involuntary." If it is held to be "involuntary," a rule of automatic reversal should be applied. If the confession is "voluntary," but its admission constituted a violation of *Miranda*, the harmless error test under *Chapman* should be applicable. This approach is suggested by the dissent in *People v. Schader*:

> Under the holding of *Dorado*, the improper admission of such statements and confession, found to have been voluntarily given, is placed in the same category as the admission of an involuntary confession and the effect upon the jury is deemed prejudicial as a matter of law compelling reversal. I believe this holding in *Dorado* to have been error and that the prejudice

187. 386 U.S. 18, 44 n.2.
188. 384 U.S. 436 (1966).
189. *Id.* at 456-57. *See generally* Stanford Note at 94-95.
190. Johnson v. New Jersey, 384 U.S. 719 (1966).
191. *But see id.* at 728-29: "We emphasize that the question whether a constitutional rule of criminal procedure does or does not enhance the reliability of the fact-finding process at trial is necessarily a matter of degree." The balance between the degree of unreliability and the inconvenience caused by a rule of automatic reversal may be resolved differently from the balance involved in deciding for or against retrospective application.
192. Payne v. Arkansas, 356 U.S. 560 (1958).
193. *Id.*

> which results from the use of an improperly received *voluntary* confession is not necessarily the same as that which the Supreme Court of the United States has held to result from the use of an *involuntary* confession.
>
> . . . A *voluntary* confession does not suffer the disabilities of an involuntary one. A voluntary confession is normally trustworthy, it does not offend "the community's sense of fair play and decency" because it has not been the product of coercion or force, and its exclusion does not serve to discourage improper police tactics.[194]

The majority held that all confessions should invoke a rule of automatic reversal.[195]

The difficulty with this process is that it would involve appellate courts in the same after-the-fact voluntariness determinations that the rule of *Miranda* was designed to avoid.[196] The *Miranda* opinion stressed that coercion was inherent in the interrogatory process,[197] and its broad exclusionary rule seems to have been partially intended to insure the exclusion of every coercion-tainted confession.[198]

Even assuming that "voluntary" confessions should not invoke a rule of automatic reversal, the process of determining whether a particular confession was voluntary would be burdensome. The Supreme Court would have to supervise it closely to protect the rights of defendants.[199] In addition, the process would not effect a net judicial economy; even admission of *voluntary* confessions would be prejudicial under the harmless error rule in the overwhelming majority of cases.[200] Thus, based on the reliability of the guilt-determination process rationale, the interests of judicial economy dictate that a rule of automatic reversal be applied to all confession cases.

One difficulty with the reliability of the guilt-determination process approach is that the Court may have implicitly rejected it in *Chapman* by applying the harmless error rule to violations of *Griffin*.[201] One of the reasons *Griffin* prohibits prosecutors from commenting on and drawing inferences from a defendant's silence is that "the inference of guilt is not always so natural or irresistible."[202] *Griffin* violations, therefore, impair the reli-

194. *See* 62 Cal. 2d 716, 734-35, 401 P.2d 665, 676, 44 Cal. Rptr. 193, 204 (1965).
195. *See id.* at 729-30, 401 P.2d at 673-74, 44 Cal. Rptr. at 201-02.
196. *See* text accompanying note 176 *supra*.
197. 384 U.S. 436, 461-67 (1968).
198. *See* text accompanying note 176 *supra*.
199. *Id.*
200. *See* text accompanying notes 152-160 *supra*.
201. *See* text accompanying note 186 *supra*.
202. 380 U.S. 609, 614-15 (1965).

ability of the guilt-determination process and should be subjected to a rule of automatic reversal.

It can also be argued, however, that the central thrust of the *Griffin* rule did not relate to the reliability of the guilt-determination process.[203] In *Tehan v. United States ex rel. Shott*[204] the Supreme Court held that the *Griffin* rule would not be applied retrospectively and stated:

> The basic purposes that lie behind the privilege against self-incrimination do not relate to protecting the innocent from conviction, but rather to preserving the integrity of a judicial system in which even the guilty are not to be convicted unless the prosecution "shoulder[s] the entire load."[205]

This is a rather conclusory rationale for the *Griffin* rule, but it would seem that if the purpose of *Griffin* were really to protect the innocent from conviction, justice would have required its retrospective application. At any rate, analysis of *Griffin* not only indicates that the Supreme Court may have already rejected the reliability of the guilt-determination process approach, but also illustrates the difficulty of discovering *why* certain errors are held to violate the Constitution. This difficulty will mean that weeding out those classes of error which taint the reliability of the guilt-determination process will itself consume considerable judicial energy—another factor to be considered in fashioning a rule which will promote net judicial economy.

The conclusion must be that the only constitutional errors which clearly do not taint the reliability of the guilt-determination process are violations of *Mapp v. Ohio*.[206] An application of the rationale discussed in this section might limit the harmless error rule to *Mapp* violations and necessitate automatic reversal for all other constitutional errors.

3. *Errors which Undermine Deterrence of Unconstitutional Police Conduct*

Some constitutional rules have as at least one of their purposes the deterrence of unconstitutional police conduct. Thus, the fruits of unconstitutional police searches are excluded under *Mapp*[207] to discourage such searches by making them pointless. Similarly, the rule of *Miranda*[208] and even the exclusion of co-

203. *See generally* Stanford Note at 89-90.
204. 382 U.S. 406 (1966).
205. *Id.* at 415.
206. 367 U.S. 643 (1961).
207. *Id.*
208. 384 U.S. 436 (1966).

erced confessions[209] are at least partially an attempt to deter unconstitutional tactics by police. It has been argued that the court's role of "policing the police" can be fulfilled only if violations of these constitutional rules are made grounds for automatic reversal. Professor Kamisar has argued that this is the rationale for the application of the rule of automatic reversal to coerced confessions:

> The Court has been reluctant to spell out that the function of the "automatic reversal" rule involves disciplining of police-prosecutor activity, perhaps because of loud cries that the courts should not "police the police." But this *is* what the Court is *doing*. The only good reason for overturning a conviction whenever a coerced confession is introduced at the trial—even though the testimony of your twenty bishops covers the same matter—is to be found in the "police methods" rationale which now underlies the constitutional ban against coerced confessions.[210]

It has been pointed out above that there are other, more persuasive rationales for automatic reversal in coerced confession cases.[211]

It would seem that the increment to deterrence of unconstitutional police conduct that automatic reversal would achieve would be negligible.[212] The *Chapman* harmless error test should provide a sufficient safeguard against the danger that police will go on misbehaving in the hope that the fruits of that misbehavior will enable them to obtain convictions. Innocent police misconduct will not be deterred by even a rule of automatic reversal. And, of course, conscious police misconduct which is not motivated by a desire to obtain convictions cannot be affected at all by the nature of the conviction reversal rule. Only on the presumption that some police will violate constitutional standards, in the hope that the trial judge will erroneously admit the evidence obtained and that the appellate court will erroneously find the error harmless, will a harmless error rule encourage police misconduct motivated by a desire to obtain convictions.[213]

4. *Errors which Undermine the Deterrence of Unconstitutional Prosecutorial Conduct*

The combination of the adversary system and the respon-

209. *See* Malinski v. New York, 324 U.S. 401 (1945).
210. Kamisar, *Betts v. Brady Twenty Years Later*, 61 MICH. L. REV. 219, 239-40 (1962) (footnotes omitted).
211. *See* text accompanying notes 152-160 *supra*.
212. *See* 81 HARV. L. REV. 69, 208 (1967).
213. *Id.*

sibility of the prosecutor under oath to uphold the Constitution creates a tension central in the prosecutorial role. Almost all constitutional rules defining criminal due process have as one purpose, or at least as an indirect result, the deterrence of untoward prosecutorial conduct. For example, the *Miranda* and *Mapp* rules deter the prosecution from attempting to introduce objectionable evidence by providing for reversal of at least those convictions in which the admission of such evidence had a prejudicial impact. It has been argued that the special sensitivity of a prosecutor toward automatic reversal dictates application of such a rule to all violations of rules which deter prosecutorial misconduct:

> It would seem that a prosecutor is significantly more sensitive to reversal on appeal than a policeman. Thus the real damage which would have been wrought by an abandonment of the "automatic reversal" principle would not have been a deletion of the deterrent effect of the confession doctrines on the *police*, considerable though this might have been, as much as the immeasurable diminution of the force of these doctrines on the *prosecution*.[214]

However, such an approach would whittle down the *Chapman* harmless error rule to almost nothing. Almost every constitutional error involves some prosecutorial misconduct—certainly the *Griffin* rule, to which the harmless error rule was applied in *Chapman*, focuses solely on prosecutorial misconduct.

It may make sense to apply automatic reversal to those cases in which an element of the constitutional error itself is the *knowing* misconduct of the prosecutor. In most cases, it makes no difference whether the prosecutor was blackhearted; violations of *Griffin*, *Miranda*, and *Mapp* do not depend on whether the prosecutor realized that his conduct was wrong. But, in cases like *Mooney v. Holohan*,[215] or *Alcorta v. Texas*,[216] in which the constitutional error is the knowing use of perjured testimony, an element of the constitutional violation is *scienter* on the part of the prosecutor. Similarly, in cases like *Brady v. Maryland*,[217] in which it was held that defendant's right to due process was violated by the prosecution's suppression of evidence favorable to the defense, the prosecutor's knowledge is an essential element of the constitutional violation. In these cases it has been argued that automatic reversal may deter prosecutors from ever attempting the forbidden conduct: ...

214. *See* Kamisar, *supra* note 210, at 244.
215. 294 U.S. 103 (1935).
216. 355 U.S. 28 (1957).
217. 373 U.S. 83 (1963).

> This reasoning may ring true for many cases, even most, but it simply does not warrant reversal in *all* cases where perjured testimony is knowingly used, however overwhelming the other untainted evidence. It does not satisfactorily explain upsetting a conviction when, for example, the perjured testimony is confirmed in every respect by the testimony of twenty bishops. Whatever the Court's linguistics when and if it formulates a rule of "automatic reversal" in the perjury cases, whether or not it will dwell on the police or prosecutor *misconduct* in the case, misconduct by officers of the law will nevertheless be the decisive factor.[218]

Although a strict application of the *Chapman* standard would seem to provide sufficient deterrence to prosecutorial use of perjured testimony or prosecutorial suppression of evidence, the special sensitivity of prosecutors to a rule of automatic reversal may justify its application here as an added deterrent.

5. *Errors which Undermine Public Respect for the Adjudicatory System*

Mr. Justice Harlan's dissenting opinions in both *Chapman*[219] and *Fahy*[220] suggest another category of constitutional errors appropriate for automatic reversal. Certain errors, regardless of the merits of the particular case and the extent of their prejudicial impact to the defendant, may have such an adverse effect on public confidence in the judicial system that their presence dictates automatic reversal. Certainly, any error which goes to the competence or impartiality of either the judge or the jury before whom the defendant is tried tends to subvert public respect for the adjudicatory system. As discussed above,[221] these classes of constitutional error also have an indeterminable impact on the outcome of the proceedings and should trigger automatic reversal for that reason as well.

Harlan gave *Tumey v. Ohio*[222] and *Berger v. United States*[223] as examples of cases requiring automatic reversal under this rationale. In *Berger*, which involved prosecutorial misconduct in a federal case, the decision to reverse was based more on the Supreme Court's supervisory power of federal courts than on the requirements of constitutional due process.[224] Writing for a

218. *See* Kamisar, *supra* note 210, at 242.
219. 386 U.S. 18 (1967).
220. 375 U.S. 85 (1963).
221. *See* notes 143-149 *supra*, and accompanying text.
222. 273 U.S. 510 (1929); *see* notes 118-120 *supra*, and accompanying text.
223. 295 U.S. 78 (1935).
224. *See* 2 P. FREUND, A. SUTHERLAND, M. HOWE, & E. BROWN, CONSTITUTIONAL LAW 1120 (2d ed. 1961).

unanimous Court, Mr. Justice Sutherland stated:

> In these circumstances prejudice to the cause of the accused is so highly probable that we are not justified in assuming its non-existence. If the case against Berger had been strong, or, as some courts have said, the evidence of his guilt "overwhelming," a different conclusion might be reached.[225]

This implies that a harmless error rule, rather than a rule of automatic reversal, was being applied by the *Berger* Court. On the other hand, more recent decisions[226] have applied a rule of automatic reversal to cases of intentional prosecutorial misconduct. Indeed, in *Mesarosh v. United States*,[227] the unintentional use by the prosecutor of perjured testimony was held to be ground for automatic reversal because of a need to insure that "the waters of justice are not polluted."[228]

It has also been suggested that concern with the appearance of justice is the basis upon which a rule of automatic reversal is and should be applied to errors which involve official misconduct.[229] A similar basis existed in cases such as *Black v. United States*[230] and *O'Brien v. United States*[231] in which defendants were subjected to official eavesdropping and automatic reversal was applied.[232]

Another example of this consideration is *Rochin v. California*,[233] the notorious stomach-pump case. Mr. Justice Frankfurter, writing for the Court, stated:

> To sanction the brutal conduct which naturally enough was condemned by the court whose judgment is before us, would be to afford brutality the cloak of law. Nothing would be more calculated to discredit law and thereby to brutalize the temper of a society.[234]

The Supreme Court, in its role as guardian of the legal system, reversed the conviction in *Rochin* despite the fact that the evidence objected to was perfectly reliable.

In all of these cases—the use of perjured testimony, official interference with the jury, government eavesdropping, and the stomach-pump case—official misconduct is involved. As dis-

225. 295 U.S. 78, 89 (1935).
226. *See, e.g.*, Napue v. Illinois, 360 U.S. 264 (1959); Remmer v. United States, 350 U.S. 377 (1956).
227. 352 U.S. 1 (1956).
228. *Id.* at 14.
229. Chapman v. California, 386 U.S. 18, 52 n.7 (1967) (dissenting opinion).
230. 385 U.S. 26 (1966).
231. 386 U.S. 345 (1967).
232. *But see* Hoffa v. United States, 387 U.S. 231 (1967). *See generally* 81 HARV. L. REV. 1260, 1273-76 (1968).
233. 342 U.S. 165 (1952).
234. *Id.* at 173-74.

cussed above, an alternative rationale for the automatic reversal of these cases is the deterrence of such misconduct. These two rationales—preserving the appearance of justice and deterring official misconduct—are usually complementary; both seem to militate in favor of automatic reversal in the same categories of cases. In cases involving unintentional official misconduct[235] automatic reversal can probably be justified only on the appearance of justice rationale. The gravamen of the opinion is that certain kinds of official misbehavior are so objectionable and so greatly undermine public respect for the system, that the Supreme Court has a duty to reverse convictions achieved through such misbehavior; this would emphasize to the public officials and the public at large that such misbehavior is anathema. Perhaps the importance of a public denunciation of certain gross forms of official misconduct outweighs the judicial economy that might be achieved by the application of a harmless error rule to these cases and thereby dictates automatic reversal.

D. Conclusion

The various rationales for applying automatic reversal to different classes of cases often overlap. Coerced confessions, for example, are (1) inherently prejudicial, (2) inherently unreliable, (3) examples of police misconduct, (4) examples of prosecutorial misconduct, and (5) examples of conduct which will undermine public confidence in the system of criminal adjudication. Other classes of constitutional error may seem appropriate for automatic reversal under one or more of the approaches suggested above.[236]

If different categories of constitutional error are to be established for this purpose, it is important that they be *easily definable.* After all, the justification for a harmless error rule is judicial economy; this goal is hardly served faithfully if the question of which category a particular instance of constitutional error falls into is a subject of constant litigation. Thus, a category of "coerced confessions" would prove unworkable because the "voluntariness" of the erroneously admitted confession would be a difficult issue to resolve in a large number of cases.

The first approach suggested—application of a rule of auto-

235. *See, e.g.,* Mesaroch v. United States, 352 U.S. 1 (1956).

236. For example, jury discrimination is inherently prejudicial, taints the reliability of the conviction, and decreases public respect for the adjudicatory system, but does not involve police or prosecutorial misconduct.

matic reversal to those classes of error which are inherently prejudicial in nature—may make the most sense; it deals with the harmless error problem in terms of the justification for a harmless error rule—judicial economy. The other approaches involve the notion that such policies as insuring reliability, deterring police and prosecutor misconduct, and preventing affronts to the judicial system demand automatic reversal. All of these policies should be achieved by the strict application of the *Chapman* harmless error rule—the innocent will not be convicted on unreliable and unconstitutional evidence, police and prosecutors will be deterred from trying to achieve convictions through unconstitutional conduct, and public respect for the system will be preserved if no man whose conviction is based on shocking official misbehavior is imprisoned. But special care in preserving these policies may militate in favor of the application of automatic reversal when it appears that the policy behind the constitutional rule may thereby be advanced substantially.[237] In addition, the Court should bear in mind the danger that state appellate courts will construe *Chapman* loosely and the Supreme Court will be inundated with petitions for certiorari. Such a situation would force the Court to choose between neglecting its other business and allowing the rights safeguarding unreviewable state court decisions.[238]

If the net impact of this analysis is a suggestion that the application of a rule of automatic reversal to *all* constitutional errors might not be an appropriate resolution of these problems, that suggestion is not altogether unintended. Perhaps, as Mr. Justice Stewart intimated in his concurring opinion in *Chapman*,[239] a general rule of automatic reversal could permit certain exceptions—particular categories of constitutional error to which a harmless error rule might be applied. The definition of such categories would involve the exact reverse of the analysis undertaken here.[240] As long as *Chapman* stands, however, the Court, if only in an effort to further the interest of net judicial economy, should attempt to delineate certain well-defined classes of constitutional error which require automatic reversal.

237. For example, the fact that prosecutors are more sensitive to reversal on appeal than are policemen may mean that automatic reversal would further the goal of deterring untoward prosecutorial misconduct, but have little impact on police misconduct.

238. *See* 1961 SUP. CT. REV. 1 *passim*.

239. 386 U.S. 18, 42-45 (1967).

240. *See id.* at 44 n.2.