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Variations of a Common Theme: An Analysis of Louisiana's Experience with Harmless Error in Criminal Cases

Addison K. Goff IV

COMMENTS

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> Errors are the insects in the world of law, traveling through it in swarms, often unnoticed in their endless procession. Many are plainly harmless; some appear ominously harmful. Some, for all the benign appearance of their spindly traces, mark the way for a plague of followers that deplete trials of fairness. The well-being of the law encompasses a tolerance for harmless errors adrift in an imperfect world. Its well-being must also encompass the capacity to ward off the destroyers. So an inquiry into what makes an error harmless, though one of philosophical tenor, is also an intensely practical inquiry into the health and sanitation of the law.[1]

INTRODUCTION

"There is good news, and there is bad news. First the good news: The court below erroneously admitted the coerced confession. And now the bad news: The error was harmless and the conviction stands." Recently, holdings such as this hypothetical one have become substantially more common in the realm of criminal law. Accordingly, the harmless error doctrine has become the very essence of criminal law today.[2] Although this doctrine effectuates several strong policy considerations, American courts have been, with only minimal analysis, raking more and more errors under this rule.[3] Moreover, when the courts have

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1. Roger J. Traynor, The Riddle of Harmless Error, Foreword (1970).

2. Professor Goldberg has estimated that approximately ten percent of appellate criminal cases throughout the country are determined by a finding of harmless constitutional error. Steven H. Goldberg, *Harmless Error: Constitutional Sneak Thief*, 71 J. Crim. L. & Criminology 421 (1980).

3. Interestingly, Dean Paul M. Hebert predicted in 1932: "[I]n spite of these general principles, which, if adhered to, would prevent reversals where justice has been done, in dealing with the various classes of cases in which the problems arise *we will note a tendency of the Supreme Court to reverse many criminal cases when the error might properly be considered harmless.*" Paul M. Hebert, *The Problem of Reversible Error in Louisiana*, 6 Tul. L. Rev. 169, 184 (1932) (emphasis added).

analyzed the harmless error issue with any detail, their standards of analysis have not been consistent. The trend seems to be that the criminal will not go free—regardless of the magnitude of the constable's blunder (or anyone else's blunder).[4]

In analyzing Louisiana's standard of appellate review[5] of error in criminal cases, the writer will first discuss the origin of the harmless error doctrine. Second, the writer will examine the policies surrounding the doctrine, as well as the various "tests" the courts have used. Third, the writer will specifically analyze Louisiana's experience with the doctrine with a view toward determining the present state of Louisiana law on this subject as well as what the courts are likely to do next. Finally, the writer will recommend a preferred standard of review.

I. The History of the Harmless Error Rule

A. The Origin of the Harmless Error Rule in England

The original rule of harmless error in the English system was that an error by the court in admitting or rejecting a piece of evidence was not, standing alone, sufficient grounds for setting aside the verdict and ordering a new trial, unless after considering all the evidence, it appeared to the judge that the truth had not been reached.[6] This rule lasted until 1835, when the Court of Exchequer announced a different rule—that an error in the judge's ruling created a "per se" right to a new trial for the defeated party.[7] This rule became known as the "Exchequer Rule."

Under the Exchequer Rule, an error concerning the admission or rejecion of evidence was presumed to have caused prejudice. The English courts stringently applied this presumption—even to the most insignificant items of evidence. As a result, retrials became so commonplace in England that litigation "seemed to survive until the parties expired."[8]

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4. People v. DeFore, 150 N.E. 585, 587 (N.Y. 1926) (opinion of Cardozo, J.).

5. The harmless error doctrine is applied principally during appellate review; however, it also may be applied at the trial level by a judge who becomes convinced that certain evidence was improperly admitted when faced with the question of whether to grant a new trial. McCormick on Evidence § 182 at n.2 (Edward W. Cleary et al. eds., 3d ed. 1984) [hereinafter McCormick].

6. 1 John H. Wigmore, A Treatise on the Anglo-American System of Evidence in Trials at Common Law § 21, at 365 (3d ed. 1940). This rule existed for both civil and criminal cases.

7. Crease v. Barrett, 1 C.M. & R. 919 (1835), cited in Wigmore, *supra* note 6, § 21, at 367.

8. Wayne R. LaFave & Jerold H. Israel, Criminal Procedure § 27.6, at 1160 (2d ed. 1992).

Parliament responded to this problem with the Judicature Act of 1873. This act precluded a new trial unless "in the opinion of the Court of Appeal some substantial wrong or miscarriage has thereby been occasioned."[9] Although the act did not define the phrases "substantial wrong" and "miscarriage of justice," it did direct the courts to look to the actual impact of the error on the outcome of the proceeding.[10]

B. The Evolution of America's Harmless Error Rule

1. The Roots

Although American courts adopted their own version of the Exchequer Rule, they were not as readily influenced by England's rejection of it. The American courts extended the rule to a much broader spectrum of errors.[11] For example, in *State v. Sheppard*,[12] the defendant was charged with one of the foulest and most brutal murders recorded in the annals of crime.[13] During the trial a witness for the state testified, in the absence of the defendant, as follows:

> Q: What is your name, please?
> A: Flora Ayers.
> Q: What is your husband's name?
> A: Jont Ayers.[14]

The court noticed that the defendant was still in jail and suspended trial until the defendant was present. After the defendant was brought in, the prosecutor asked the witness the same questions, to which the witness responded with the same answers. Although the defense did not object or take an exception at the time, at the conclusion of trial, he did move to have the judgment arrested and the verdict thereby set aside. The trial court denied the motion.[15]

In reversing the conviction, the Supreme Court of Appeals of West Virginia noted:

> Johnson, P., quotes and approves the strongest part of the opinion in Jackson's Case and then says: "We will not inquire whether the prisoner was unfavorably or otherwise affected by

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9. *Id.*
10. *Id.*
11. *Id.*
12. 39 S.E. 676 (W. Va. 1901).
13. *Id.* at 677-78. Mr. Sheppard was accused of ax-murdering his wife and seven year old child.
14. *Id.* at 688.
15. *Id.*

> the cross-examination of the witness in his absence. . . . He had the right to observe every look, gesture, or move of the witness while he was testifying; and it mattered not that the court excluded the evidence and certified that it was repeated in his presence." From these authorities it is clearly a matter of no consequence that the evidence introduced in this case in the absence of the prisoner may not have affected him, and that he did not at the time take an exception. . . . [S]uch an error cannot be cured.[16]

There was a similar result closer to home in *State v. Larocca*.[17] In that case, the defendant stood trial for having carnal knowledge with a girl under eighteen years old. Accordingly, one element the prosecution had to prove was that the victim was under eighteen years old. To prove this element, the prosecution called the victim's mother to the stand. On direct examination the mother had trouble remembering the date of her daughter's birth. On cross examination the defense counsel brought out the fact that the mother could not remember the birthdates of the rest of her five children. The mother then testified that the only knowledge she had as to the victim's birthdate was from a birth certificate. Although the trial court would not allow the certificate into evidence, the court did not preclude the witness from testifying. The supreme court held that since the certificate was not a "contemporaneous memorandum made by the witness herself at the time, it could not be used for the purpose of refreshing her memory."[18] The court considered the error as well as the trial judge's instruction to the jury: "'Age, however, can be proven by witnesses who know the age of a person, or by the mother of the person *or by baptismal records*.'"[19] The court noted that since the jury could have given effect to both what was said by the witness with reference to the certificate and to its physical production and identification as such in the jury's presence, the conviction had to be overturned and the case remanded for a new trial.

On rehearing in *State v. Larocca*,[20] the Louisiana Supreme Court again dealt with the issue of harmless error. In Larocca's second trial, the prosecution had attempted to prove the victim's age by the testimony of a priest. The priest stated that he had baptized the victim when she was a month old. The priest produced the record he had made at the baptism. The defense counsel objected to the testimony because the

16. *Id.* at 689-90.
17. 156 La. 567, 100 So. 720 (1924).
18. *Id.* at 572, 100 So. at 721.
19. *Id.* (emphasis in original).
20. State v. Larocca, 157 La. 50, 101 So. 868 (1924) (*on rehearing*).

priest's only first-hand knowledge of the baby's age was what the baby's mother had told him, that is, the statement was hearsay. The court overruled the objection, and the defense counsel reserved the bill of exceptions. Larocca was again convicted.

On appeal the court rejected the argument that the admission of the hearsay evidence as to the victim's age was harmless because the jurors saw her and thereby had an opportunity to judge her age. The court stated:

> When illegal evidence has been received on behalf of the state, in proof of a matter of importance in a criminal prosecution, *the trial is illegal, no matter how much legal evidence was received.* In such case, we cannot know whether a conviction is founded only upon the legal evidence or wholly or in part upon the illegal evidence.[21]

The court would retry Larocca for a third time.[22]

Regardless of the propriety or impropriety of this trend, decisions such as this apparently raised neither the legal profession's nor the criminal justice system's image in the public eye. The American people considered the appellate courts as "impregnable citadels of technicality" in criminal matters.[23] This public disapproval eventually spurred the legislatures around the country to create statutory regulations to govern the treatment of trial court errors on appeal. The enactment of the legislation was inevitable. Just as much then as now, courts are not entirely free from public sentiment.[24] Furthermore, as the crime situation worsens, it appears likely that fewer convictions will be overturned on appeal and stricter legislation will be passed.

In 1919, Congress passed the first of its harmless error statutes. This statute eventually became 28 U.S.C. § 2111, and it currently provides as follows: "On the hearing of any appeal or writ of certiorari

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21. *Id.* at 55, 101 So. at 869 (emphasis added).

22. Although this result may be contrary to certain policy notions behind the harmless error rule, namely judicial efficiency, it does seem to be in line with the often-disregarded promise to a citizen that he is entitled to a fair trial.

23. Hon. Marcus A. Kavanaugh, *Improvement of Administration of Criminal Justice by Exercise of Judicial Power*, 11 A.B.A. J. 217, 222 (1925). *Accord* John H. Wigmore, *Criminal Procedure: "Good" Reversals and "Bad" Reversals*, 4 Ill. L. Rev. 352 (1903). *See, e.g.*, Bram v. United States, 168 U.S. 532, 18 S. Ct. 183 (1897); People v. Bell, 53 Cal. 119 (1878).

24. LaFave, *supra* note 8, at 1160-61. As Professor Saltzburg notes, the appellate courts were appropriate targets for public criticism because the public wanted the convictions that were provided by the trial courts. Thus, even if the reversal was for a good reason, the public would likely disapprove, and the outcry would be even louder if the conviction were reversed on a technicality. Stephen A. Saltzburg, *The Harm of Harmless Error*, 59 Va. L. Rev. 988, 1006 n.56 (1973).

in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties."[25] Federal Rule of Criminal Procedure 52(a) provides quite similarly: "Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded."[26] All of the states that did not already have harmless error statutes of their own eventually followed suit.[27] Indeed, Louisiana adopted its first harmless error statute in 1928.[28] The problem, however, is that the courts have not consistently applied these statutes.

2. The Jurisprudence

Although there is a plethora of cases construing the harmless error rule,[29] there have been several seminal cases. In *Kotteakos v. United States*,[30] the Supreme Court dealt with the question of "whether petitioners [had] suffered substantial prejudice from being convicted of a single general conspiracy by evidence which the Government admit[ted] proved not one conspiracy [as was charged in the indictment], but some eight or more different ones of the same sort executed through a common key figure."[31] In construing the federal harmless error rule, the Court provided the following standard:

> If, when all is said and done, the [court] is sure that the error did not influence the jury, or had but very slight effect, the verdict and the judgment should stand, except perhaps where the departure is from a constitutional norm or specific command of Congress. But if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase

25. 28 U.S.C. § 2111 (1982).

26. Fed. R. Cr. P. 52(a). The text of this statute is very close to that of Louisiana Code of Criminal Procedure article 921: "A judgment or ruling shall not be reversed by an appellate court because of any error, defect, irregularity, or variance which does not affect substantial rights of the accused." The evolution of Article 921 will be discussed, *infra*.

27. *See* Chapman v. California, 386 U.S. 18, 22, 87 S. Ct. 824, 827 (1967). For a list of the early decisions and statutes of the various jurisdictions, *see* Wigmore, *supra* note 6, § 21, at 373 et seq.

28. La. R.S. 15:557 (1928 La. Acts, No. 2, § 1, art. 557).

29. As of 1980, *Chapman*, 386 U.S. 18, 87 S. Ct. 824, itself had been cited over 6000 times in Shepard's U.S. Citations. Goldberg, *supra* note 2, at 421 n.2.

30. 328 U.S. 750, 66 S. Ct. 1239 (1946).

31. *Id.* at 752, 66 S. Ct. at 1241.

> affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand.[32]

To show the shift in the federal jurisprudence, *Kotteakos* can be contrasted with the more recent and probably most seminal[33] case of *Chapman v. California*.[34] There, the Court tackled the question of the applicability of harmless error rules to federal constitutional errors. The defendants had been convicted of robbery, kidnapping, and murder.[35] At the trial of these charges, the prosecutor, pursuant to the express wording of article I, section 13 of the California Constitution,[36] took advantage of the defendants' failure to testify. Following the Constitution, the trial judge instructed the jury that adverse inferences could be drawn from the defendants' failure to testify.[37]

Between the trial and the time that Chapman's case reached the state's high court, the United States Supreme Court, in *Griffin v. California*,[38] held that a practice of inferring guilt from a defendant's decision not to testify was in violation of the United States Constitution. The California Supreme Court nonetheless affirmed Chapman's conviction because, in its opinion, there was no "miscarriage of justice" as per California's own harmless error provision.[39] The United States Supreme Court granted certiorari to determine whether the error was subject to a harmless error analysis and, if so, whether the error was in fact harmless.

Justice Black, for the majority, wrote the opinion with a four-step analysis. First, since it was a federal right that was violated, federal

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32. *Id.* at 764-65, 66 S. Ct. at 1247 (footnotes and citations omitted).

33. *See* Goldberg, *supra* note 2.

34. 386 U.S. 18, 87 S. Ct. 824 (1967). Although there have been *many* "harmless error" cases out of the U.S. Supreme Court since 1967 and between 1946 and 1967, *Chapman* was chosen because it is the "seed" of Louisiana's construction and application of the harmless error rule, notwithstanding the fact that the Louisiana Supreme Court has recently relied heavily on language from Arizona v. Fulminante, 111 S. Ct. 1246 (1991). *Compare Chapman* to State v. Gibson, 391 So. 2d 421 (La. 1980) *and* State v. Cage, 583 So. 2d 1125 (La. 1991). For other U.S. Supreme Court cases since *Chapman*, *see* United States v. Lane, 474 U.S. 438, 106 S. Ct. 725 (1986); Rose v. Clark, 478 U.S. 570, 106 S. Ct. 3101 (1986); Holloway v. Arkansas, 435 U.S. 475, 98 S. Ct. 1173 (1978); Harrington v. California, 395 U.S. 250, 89 S. Ct. 1726 (1969); and Yates v. Evatt, 111 S. Ct. 1884 (1991).

35. *Chapman*, 386 U.S. at 18-19, 87 S. Ct. at 825.

36. Article I, § 13, California Constitution, provided in pertinent part: "[I]n 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."

37. *Chapman*, 386 U.S. at 18-19, 87 S. Ct. at 825.

38. 380 U.S. 609, 85 S. Ct. 1229 (1965).

39. *Chapman*, 386 U.S. at 20, 87 S. Ct. at 826.

law, rather than state law should apply.[40] Second, in noting the utility of the harmless error rules, he decided that in some cases some constitutional errors are so unimportant and insignificant that, consistent with the federal constitution, they may be deemed harmless.[41] Third, in noting the possible drawbacks of harmless error rules, he utilized the Court's preferred federal harmless error rule: Is there "a reasonable possibility that the evidence complained of might have contributed to the conviction."[42] Finally, in applying the harmless error rule to the facts of the case, he reasoned that "[s]uch a machine-gun repetition of a denial of constitutional rights, 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."[43]

Although the Court ultimately remanded for a new trial, the case would have numerous repercussions in the realm of criminal law. No longer did the harmless error rule apply only to evidentiary rulings. As the Supreme Court has become more and more conservative throughout the 1970s and up through today, the Court has been able to rake more and more errors beneath the umbrella of the federal harmless error rule. This trend has been both lauded and criticized.[44] Thus, the policies underlying the harmless error rule must be examined in order to analyze Louisiana's use of the doctrine.

II. THE HARMLESS ERROR RULE

A. Point—Counterpoint: The Policy Behind the Harmless Error Rule

The rationale for regarding some errors as harmless rests largely upon considerations of economy and judicial efficiency.[45] But what has happened to those policies which spurred the Exchequer-type rules in the first place? One policy that must be kept in mind when considering an application of the harmless error rule is the distinction between the roles of the jury and the appellate court.[46] It is the juror who determines

40. *Id.* at 20-21, 87 S. Ct. at 826-27.

41. *Id.* at 22, 87 S. Ct. at 827.

42. *Id.* at 23, 87 S. Ct. at 827 (citing Fahy v. Connecticut, 375 U.S. 85, 86-87, 84 S. Ct. 229, 230 (1963)).

43. *Chapman*, 386 U.S. at 26, 87 S. Ct. at 829. *Cf.* Arizona v. Fulminante, 111 S. Ct. 1246 (1991).

44. *See generally* Wigmore, *supra* note 6, § 21, at 368 et seq. and Traynor, *supra* note 1.

45. McCormick, *supra* note 5, § 182.

46. The relevance of this distinction will become more apparent in the next section, which concerns the different approaches used in determining whether a particular error is harmless.

facts, not the appellate judge. Thus, an appellate court's review of the facts of a trial can be said to be a usurpation of the fundamental rights to a jury and a fair trial.[47]

However, some would say this theory is absurd because it ignores the doctrine and history of the jury function, for it has always been under the control and correction of the trial and appellate courts.[48] The judge determines questions of fact upon which the admissibility of evidence depends. Furthermore, the judge determines whether the evidence is sufficient to go to the jury and whether the verdict is against the weight of the evidence. "The 'usurpation,' if any consists in setting aside the verdict, not in confirming it."[49]

Is this theory necessarily so absurd? Generally, a defendant would not allow an appellate judge to sit on a jury. At the least, the defendant would find out who the judge was before failing to exercise a peremptory challenge. Assuming, for the sake of argument, that an attorney would try a case to a panel of appellate judges, he would not agree to waive his closing argument, nor to allow the new "jury" to know that a previous jury found the defendant guilty. Nor would the attorney allow the members of the "jury" to go back to their offices and review their notes at their own pace until they reach a decision. Any attorney who would agree to these circumstances would probably not have a problem with a three-person jury convicting the defendant by a vote of two to one.[50]

Furthermore, although a criminal defendant is not entitled to a perfect trial,[51] one must remember that evidentiary rules are not designed in a vacuum. Each rule, by balancing probative value, by excluding unreliable evidence, by barring extraneous matter, and by guiding the judge and jury in the proper performance of their decision-making function, is intended to play a role in guaranteeing a fair trial. Each rule reflects the policy of the state with respect to fairness regardless

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47. *Cf.* Duncan v. Louisiana, 391 U.S. 145, 88 S. Ct. 1444 (1968); Williams v. Florida, 399 U.S. 78, 90 S. Ct. 1893 (1970); Apodaca v. Oregon, 406 U.S. 404, 92 S. Ct. 1628 (1972); and Burch v. Louisiana, 441 U.S. 130, 99 S. Ct. 1623 (1979). These decisions form the framework of the criminal defendant's right to trial by jury.

48. Wigmore, *supra* note 6, § 21, at 370.

49. *Id.* In a quite poetic response to the theory of these rights, Wigmore wrote:

> As well might a gardener cut down a thriving vine because his henchman has used a hoe instead of a spade in planting it; or a farmer bring valuable bantams to the block because they were hatched by a meddlesome duck instead of their lawful parent. A glance at common affairs will awaken us to the intrinsic absurdity of the theory of legal right.

Id. at 369.

50. Goldberg, *supra* note 2, at 430-31.

51. Lutwack v. United States, 344 U.S. 604, 73 S. Ct. 481 (1953).

of the identity of the defendant.[52] "[T]he safeguards of liberty have frequently been forged in controversies involving not very nice people."[53]

Another policy factor that must be considered is the harmless error rule's promotion of prosecutorial misconduct. It has been said that the harmless error rule, as recently applied, "tacitly informs prosecutors that they can weigh the commission of evidentiary or procedural violations not against a legal or ethical standard of appropriate conduct, but rather, against an increasingly accurate prediction that the appellate courts will ignore the misconduct when sufficient evidence exists to prove the defendant's guilt."[54] Moreover, even in cases in which the evidence does not weigh heavily against the defendant, the increasing possibility of an error being said to be harmless can give the prosecutor an incentive to act unethically; for, in such a situation, he has nothing to lose and everything to gain through the unethical behavior.[55]

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52. Saltzburg, *supra* note 24, at 989.

53. United States v. Rabinowitz, 339 U.S. 56, 69, 70 S. Ct. 430, 436 (1950) (Frankfurter, J., dissenting).

54. Bennett L. Gershman, *The New Prosecutors*, 53 U. Pitt. L. Rev. 393, 425 (1992).

55. *Id.* at 431. Professor Gershman cites the following cases and explanations for situations in which federal courts have found prosecutorial misconduct harmless: United States v. Weiss, 930 F.2d 185, 196 (2d Cir.), *cert. denied*, 112 S. Ct. 133 (1991) (prosecutor's allusions to greed in Shakespeare's Merchant of Venice were not sufficiently shown to be anti-Semitic references, although prosecutor "could have chosen his words more carefully"); United States v. Smith, 930 F.2d 1081, 1088-89 (5th Cir. 1991) (prosecutor "mischaracterized the jury's role" by alluding to the grand jury's indictment as proof that case was a "federal case" but remarks were harmless); Fisher v. Nix, 920 F.2d 549, 552 (8th Cir. 1990) (prosecutor's "misleading" remarks were harmless); United States v. Sullivan, 919 F.2d 1403, 1425 (10th Cir. 1990) (court does not decide whether prosecutor's "highly improper" remarks that denigrated role of jury would have been basis for reversal); United States v. Smith, 918 F.2d 1551, 1562-63 (11th Cir. 1990) (prosecutor's appeal to jury to act as conscience of the community not improper when not "intended to inflame"); United States v. Phillips, 914 F.2d 835, 845 (7th Cir. 1990) (prosecutor's remarks that defendant [was] a "liar;" a "clumsy, thick tongued thug;" and a "bozo" were improper but harmless); United States v. North, 910 F.2d 843, 894-95 (D.C. Cir. 1990), *cert. denied*, 111 S. Ct. 2235 (1991) (prosecutor's statement that defendant used tactics favored by Adolf Hitler were inflammatory but harmless); United States v. Machor, 879 F.2d 945 (1st Cir. 1989), *cert. denied*, 493 U.S. 1081, 110 S. Ct. 1138 and 493 U.S. 1094, 110 S. Ct. 1167 (1991) (prosecutor's inflammatory statement that drugs "are poisoning our community[,] and our kids die because of this" were harmless); United States v. Parker, 604 F.2d 1327 (10th Cir. 1979) (evidence of prior conviction was not harmless); Coleman v. Saffle, 869 F.2d 1377 (10th Cir. 1989), *cert. denied*, 494 U.S. 1090, 110 S. Ct. 1835 (1990) (inflammatory reference to victim's death was harmless); United States v. Hernandez, 865 F.2d 925, 927-28 (7th Cir. 1989) (improper racial reference to "Cuban drug dealer" was harmless); United States v. Rodriguez-Estrada, 877 F.2d 153, 158-59 (1st Cir. 1989) (prosecutor's reference to defendant as "liar" and "crook" was improper but harmless); Hopkinson v. Shillenger, 866 F.2d 1185 (10th Cir. 1989) (prosecutor's expression of fear after murder of prospective witness was improper but harmless); Shepard v. Lane, 818 F.2d 615, 621-22 (7th Cir.), *cert.*

Although these comments may be said by the more "law-and-order" types to be a bit hyperbolic, they do show the need for great care by the courts when making determinations of harmlessness—especially since it appears that the harmless error rule is here to stay.

B. Different Approaches for Demonstrating Harmlessness

Although the Supreme Court espoused several fundamental principles in Chapman which have been somewhat consistently followed, the content of the federal standard has not always been explicitly addressed. Given the necessity of showing harmlessness "beyond a reasonable doubt," the question remains how to make this showing of "harmlessness."

1. The Federal Approaches

American courts have approached the issue of harmlessness in a variety of ways.[56] The methods of analysis used differ in light of the particular court's focus; that is, when determining whether a given error is harmless, a court will typically analyze the nature of the error;[57] the strength or presence of the remaining, properly-admitted evidence;[58] or the trial court's verdict.[59]

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denied, 484 U.S. 929, 108 S. Ct. 296 (1987) (calling defendant liar, dog, animal, and stating it was too bad arresting officer had not broken defendant's skull was "grossly improper" but harmless); Clark v. Wood, 823 F.2d 1241, 1251 (8th Cir.), *cert. denied*, 484 U.S. 945, 108 S. Ct. 334 (1987) (calling defendant a master liar, and that many persons believe he is "100% guilty" was improper but harmless); United States v. Sblendorio, 830 F.2d 1382, 1395 (7th Cir. 1987), *cert. denied*, 484 U.S. 1068, 108 S. Ct. 1034 (1988) (derogatory remarks about defense lawyer were improper but harmless); United States v. Giry, 818 F.2d 120, 133 (1st Cir.), *cert. denied*, 484 U.S. 855, 108 S. Ct. 162 (1987) (comparing defendant's denial of criminal intent with Peter's denial of Christ was grossly improper but harmless); United States v. Lowenberg, 853 F.2d 295, 302 (5th Cir. 1988), *cert. denied*, 489 U.S. 1032, 109 S. Ct. 1070 (1989) (calling defendant a "filthy pimp" and his lawyer a "jack-in-the-box" for making repeated objections was improper but harmless); United States v. O'Connell, 841 F.2d 1408, 1428-29 (8th Cir.), *cert. denied*, 487 U.S. 1210, 108 S. Ct. 2857 and 488 U.S. 1011, 109 S. Ct. 799 (1989) (inflammatory remarks about defense counsel were harmless); United States v. Jones, 839 F.2d 1041, 1049-50 (5th Cir.), *cert denied*, 486 U.S. 1024, 108 S. Ct. 1999 (1988) (claiming that defense counsel suborned perjury was "reprehensible" but harmless). *Id.* at 428 n.226.

56. Martha A. Field, *Assessing the Harmlessness of Federal Constitutional Error—A Process in Need of Rationale*, 125 U. Pa. L. Rev. 15, 16 (1976); Traynor, *supra* note 1; Wigmore, *supra* note 6, § 21, at 367 et seq.

57. Arizona v. Fulminante, 111 S. Ct. 1246 (1991); State v. Cage, 583 So. 2d 1125 (La. 1991) (on remand from the U.S. Supreme Court, 111 S. Ct. 328 (1990)).

58. Harrington v. California, 395 U.S. 250, 89 S. Ct. 1726 (1969).

59. Chapman v. California, 386 U.S. 18, 87 S. Ct. 824 (1967); State v. Gibson, 391 So. 2d 421 (La. 1980).

In *Chapman v. California*,[60] the Court, rejecting tests which focus on the remaining, properly-admitted evidence,[61] relied on the test espoused in its earlier decision of *Fahy v. Connecticut*:[62] Is there "a reasonable possibility that the evidence complained of might have contributed to the conviction."[63] This test focuses on the improperly-admitted evidence or the actual error. A court employing this test considers the possible effect the actual error had on the verdict.[64]

In *Harrington v. California*,[65] the United States Supreme Court apparently used another test. The Court focused on the duplicative or cumulative nature of the excluded evidence, that is, the Court analyzed whether there was properly-admitted evidence which tended to prove the same thing as the erroneously-admitted evidence. In *Harrington*, the trial court, in violation of *Bruton v. United States*,[66] admitted confessions of two codefendants who did not take the stand at the defendant's trial. The confessions placed the defendant at the scene of the crime; however, several eyewitnesses and the defendant's own statement also placed the defendant at the scene. Furthermore, the third codefendant, who did take the stand, placed Harrington at the scene with a gun in his hand. Justice Douglas for the majority concluded that since the statement of the defendant that put him at the scene and the confession of the third codefendant were cumulative with the erroneously-admitted confessions, the *Bruton* violation did not harm the defendant.[67]

In *Milton v. Wainwright*,[68] the Supreme Court indicated that consideration of the untainted evidence would not be limited to precisely matching cumulative evidence. This case dealt with the harmlessness of the admission of the defendant's confession. The Court held that even if the confession had been taken in violation of the Sixth Amendment, the defendant suffered no prejudice, because the record included properly-admitted evidence that overwhelmingly pointed to the defendant's

60. *Chapman*, 386 U.S. 18, 87 S. Ct. 824.

61. *Id.* at 23, 87 S. Ct. at 827.

62. 375 U.S. 85, 84 S. Ct. 229 (1963).

63. *Id.* at 86-87, 84 S. Ct. at 230. For a discussion of *Chapman*, *see supra* text accompanying notes 34-45.

64. *See generally* Traynor, *supra* note 1, at 22-25.

65. 395 U.S. 250, 89 S. Ct. 1726 (1969).

66. 391 U.S. 123, 88 S. Ct. 1620 (1968). In *Bruton*, the Supreme Court held that when the state puts two defendants on trial in the same case, any statement made by one defendant which inculpates the other defendant cannot be admitted at the trial.

67. The Court did note that, apart from the confessions, the evidence against the defendant was overwhelming. *Harrington*, 395 U.S. at 254, 89 S. Ct. at 1728.

68. 407 U.S. 371, 92 S. Ct. 2174 (1972).

guilt.[69] This test had been expressly repudiated less than ten years earlier in *Chapman*.[70]

Professor Field notes it is possible to come up with a situation in which a conviction may be reversed under the "overwhelming evidence" test and not under the "contributed-to-the-verdict" approach.[71] For example, a particular constitutional error, if viewed alone, may lead a court to conclude that it could not have possibly influenced the jury. (For example, a defendant may have given an exculpatory statement without first having been given his *Miranda*[72] warnings.) However, the other evidence in the case may fall short of being "overwhelming," while still being sufficient to sustain the verdict.[73]

Field also notes that different results can be achieved by switching between an analysis using the "overwhelming evidence" approach and one using the "cumulative" evidence approach. For example, a defendant makes, on five different occasions, five identical statements to the police. All of the statements deny guilt, but they incriminate the defendant by placing him at the scene of the crime and thus provide a critical link in the chain of evidence against him. The first four statements were volunteered, but the fifth was given in violation of *Miranda*. The prosecutor introduced all statements at trial. The "cumulative evidence" approach would find the fifth statement harmless because it is identical in content to the other four statements. The "overwhelming evidence" test would, standing alone, find the admission harmless if the remaining evidence was compelling, as opposed to simply legally

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69. Although the challenged confession was described as containing "incriminating statements . . . essentially the same as those given in the prior confessions," the majority did not characterize it as "cumulative." *Id.* at 375-76, 92 S. Ct. at 2177.

70. Chapman v. California, 386 U.S. 18, 23-24, 87 S. Ct. 824, 827 (1967). This test was apparently also repudiated in Kotteakos v. United States, 328 U.S. 750, 764, 66 S. Ct. 1239, 1247-48 (1946). Section 167 of Sir James F. Stephen's Indian Evidence Act represents yet another approach to the determination of an error's harmlessness. That act provided:

> The improper admission or rejection of evidence shall not be ground of itself for a new trial or reversal of any decision in any case, if it shall appear to the Court before which such objection is raised that, independently of the evidence objected to and admitted, there was sufficient evidence to justify the decision, or that, if the rejected evidence had been received, it ought not to have varied the decision.

Indian Evidence Act § 167 (Stephen's ed. 1872), *quoted in* Wigmore, *supra* note 6, § 21, at 367 n.8.

71. For convenience, the writer will use Professor Field's terminology and refer to the *Chapman*-type test as the "contributed-to-the-verdict" test, the *Harrington*-type test as the "cumulative evidence" test, and the *Milton*-type test as the "overwhelming evidence" test.

72. Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602 (1966).

73. Field, *supra* note 56, at 19.

sufficient.[74] Although these different "tests" are essentially aimed at the same target—determining whether the error was "harmless beyond a reasonable doubt"—courts that are less sympathetic to the rights of the accused could select a particular test according to the result that test would achieve.

2. *Texas' Approach to Harmless Error*

Texas has adopted its own approach to the determination of harmlessness. The general Texas rule is: To be classified as harmless, the state must prove "beyond a reasonable doubt that the error made no contribution to the conviction or the punishment."[75]

In *Harris v. State*,[76] the court noted that the appellate court's role in conducting a harmless error analysis is not to put itself in the place of the jury and determine how it would have decided the case. Rather, the court is to determine how the error affected the verdict. The court noted that an "overwhelming evidence" test is an erroneous standard because the Texas statutory rule focuses on the error itself and not the weight of the untainted evidence. The court did acknowledge, however, that it was impossible to measure the effect of the error without also considering the evidence that was properly before the court. As such, it noted that the proper focus of the weight of the untainted evidence of guilt is an assessment of whether overwhelming evidence dissipates the error's effect upon the jury's function in determining the facts so that it did not contribute to the verdict or punishment.[77] Accordingly, the court set out factors for appellate courts to consider in applying the rule:

1. the source and nature of the error;
2. the extent to which the state used the error throughout the course of the trial;
3. the probable collateral implications of the error;
4. the probable weight a juror would place on such an error; and

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74. *Id.* at 40.

75. Tex. R. App. P. 81(b)(2). Thus, it appears that Texas has adopted the first approach discussed in the previous subsection—the "contributed-to-the-verdict" test. One important exception to this rule, however, is that an error cannot be held harmless if it results from the violation of a mandatory statute. However, a statute is not mandatory merely because of its obligatory language. For a discussion of this exception, *see* Charles D. Bubany, *Annual Survey of Texas Law, Criminal Procedure: Trial and Appeal*, 45 Sw. L.J. 293 (1991).

76. 790 S.W.2d 568 (Tex. Crim. App. 1989).

77. *Id.* at 587.

5. the likelihood that a finding of harmlessness would encourage the State to repeat the error with impunity.[78]

The reviewing court should apply these factors in light of the policies of maintaining the integrity of the criminal justice process and a defendant's right to a fair trial.[79] Moreover, the court should apply these factors within a two-step framework. The court is first to isolate the error and its effects. Second, the court is to ask itself "whether a rational trier of fact might have reached a different result if the error and its effect had not resulted."[80]

Although the Texas harmless error rule is essentially the "contributed-to-the-verdict" test as discussed in the previous subsection, Texas has taken its analysis a step further. By providing factors with which other reviewing courts can work, the Texas court has taken steps to maintain a balance of its policies, without rote reliance on the United States Supreme Court.

III. The Louisiana Experience

A. Louisiana's Statutory Harmless Error Rule

1. The Statutes

Louisiana Revised Statutes 15:557 was Louisiana's original "harmless error" provision.[81] This provision was changed to Louisiana Code of Criminal Procedure article 921 in the 1966 revision of the Criminal Code. The new article essentially retained the same language.[82] In 1979,

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78. *Id.*

79. *Id.* at 588.

80. *Id. See also* Arnold v. State, 786 S.W.2d 295 (Tex. Crim. App. 1990), *cert. denied*, 498 U.S. 838, 111 S. Ct. 110 (1990), in which the court set out nine factors for courts to determine harmlessness in the context of parole law instruction.

81. La. R.S. 15:557 provided:

> No judgment shall be set aside, or a new trial granted by any appellate court of this State, . . . unless in the opinion of the court . . . after an examination of the entire record, it appears that the error complained of has probably resulted in a miscarriage of justice, is prejudicial to the substantial rights of the accused, or constitutes a substantial violation of a constitutional or statutory right.

1928 La. Acts No. 2, § 1, art. 557. It was while this article was in place that Dean Paul M. Hebert wrote his law review article on prejudicial error in Louisiana. Hebert, *supra* note 3.

82. 1966 La. Acts No. 310, § 1. The Official Revision Comments note that the article retains the "sacramental" language of the former statute and omitted only the "unnecessary and cumbersome verbiage." La. Code Crim. P. art. 921, official revision comment (a).

the article was rewritten to provide (as it presently does): "A judgment or ruling shall not be reversed by an appellate court because of any error, defect, irregularity, or variance which does not affect substantial rights of the accused."[83] The statute appears to provide a fair, easily-applicable standard for the accused—if the error *affects* an accused's right that the court deems substantial, then the court should reverse the conviction.

2. *Jurisprudence Construing the Louisiana Harmless Error Statutes*

For some time after Article 921's inception, the courts generally tended to apply the statute textually. For example, in *State v. Ferguson*,[84] the court held that the trial judge's reversal of the order of challenging jurors violated a substantial right guaranteed to the accused. At voir dire, nine veniremen had been examined. Two of them were accepted by the state and the defendant. The district attorney examined three more jurors and then tendered them to the defense for examination. After the defense examined the prospective jurors, the defense counsel tendered the prospective jurors back to the state for the state's rejection or acceptance of them—before the defendant exercised his right to accept or peremptorily reject them. The trial judge ruled: "[T]he 'district attorney had the right to examine the jurors and tender them to counsel for defendant for acceptance or rejection with the right on the part of the district attorney to re-examine said jurors if he so desired and to accept or reject them as he [saw] fit.'"[85] Accordingly, defendant exhausted his peremptory challenges before the jury panel was completed.

Justice Fournet, writing for the majority, noted the trial court's admission of error in its ruling.[86] If the prospective juror is tendered

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83. 1979 La. Acts No. 86, § 1.

84. 187 La. 869, 175 So. 603 (1937).

85. *Id.* at 870, 175 So. at 603.

86. *Id.* at 873, 175 So. at 605. Louisiana Revised Statutes 15:358 provided:

> The jurors shall be tendered first to the prosecution, and, if accepted, then tendered to the defense. After a juror has been accepted by both sides, neither side has the right to challenge him peremptorily, but it shall be within the discretion of the court, and not subject to review to allow either side to peremptorily challenge jurors up to the time that the jury is impaneled.

Louisiana Revised Statutes 15:359 provided: "Although a juror may have been accepted by both the prosecution and the defense, he may, none the less, up to the beginning of the taking of evidence, be challenged for cause by either side, or be excused either for cause or by consent of both sides." These statutes were included in the 1966 revision of the Louisiana Code of Criminal Procedure as articles 789 and 795, respectively. 1966 La. Acts No. 310, § 1. The basic substance of the former statutes was included within the revision, and the reasoning of the *Ferguson* line of cases was included to clarify the law. La. Code Crim. P. arts. 789 and 795, official revision comments.

to the defense, after the juror has been examined on his voir dire, then such is in itself an acceptance of the juror by the district attorney. The state must first exercise its right of challenge and then present the juror to the defendant for his acceptance or rejection.[87] The court then held that the improper procedure violated the accused's right to peremptorily challenge jurors under article I, section 10 of the Louisiana Constitution of 1921.[88] Since this right is substantial, then the conviction must be reversed.[89]

This case illustrates the court's textual application of the statutory harmless error rule. The court neither conducted a balance of policies nor weighed the evidence against the accused. Rather, the court merely applied the statute as it was written.

During this period, the court did not limit its definition of "substantial right" to constitutional violations.[90] For example, in *State v. Robinson*,[91] the court held that improperly-admitted opinion testimony was a violation of an accused's substantial right. In *State v. Ray*,[92] the court held that the failure to tell the jury that the court admitted a prior inconsistent statement only for credibility and not as substantive evidence of the defendant's guilt was reversible error.[93]

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87. *Ferguson*, 187 La. at 876, 175 So. at 605.

88. Louisiana Constitution article I, section 10 (1921) provided: "In all criminal prosecutions, the accused shall be informed of the nature and cause of the accusation against him; and when tried by jury shall have the right to challenge jurors peremptorily, the number of challenges to be fixed by law." *Cf.* La. Const. art. I, § 17 (1974).

89. *Ferguson*, 187 La. at 876, 175 So. at 605.

90. Although the revised Louisiana Code of Criminal Procedure article 921 did not keep the exact language of former Louisiana Revised Statutes 15:557 ("substantial violation of a *constitutional* or *statutory* right." (emphasis added)), the comments to article 921 make it clear that no change was intended, as the drafters kept the "sacramental language." The drafters omitted only the "unnecessary and cumbersome verbiage." La. Code Crim. P. art. 921, official revision comment (a).

91. 223 La. 595, 66 So. 2d 515 (1953), on rehearing. In *Robinson*, a negligent homicide case, a police officer who arrived at the accident scene thirty to forty-five minutes after the accident, was qualified as an expert and was permitted to testify as to the speed of the vehicles. *Cf.* State v. Maines, 183 La. 499, 164 So. 321 (1935) (holding an error in the admission of opinion evidence harmless because the jury was just as competent to draw the conclusions as the witness); State v. Scott, 221 La. 643, 60 So. 2d 71 (1952) (holding an error in the admission of opinion evidence harmless).

92. 259 La. 105, 249 So. 2d 540 (1971). Although the court did not require a motion for a limiting instruction in this case, on rehearing, it did note that it would prospectively require such a motion. *Cf.* La. Code Evid. art. 105 and comment thereto.

93. *Accord* State v. Doucet, 177 La. 63, 147 So. 500 (1933) (reversible error when court misinstructed the jury when the jury asked about mercy recommendations); State v. Gendusa, 190 La. 422, 182 So. 559 (1938) (omission in the indictment caused the verdict to be invalid, hence reversible error); State v. Keen, 215 La. 577, 41 So. 2d 223 (1949) (failure to allow defendant to cross examine state's witness as to his previous indictments was reversible error when credibility of witness was important); State v.

There really should be no difficulty in this area of law in Louisiana. The legislature has spoken (long ago), and its message is clear: if an error affects substantial rights of the accused, then the reviewing court should reverse the conviction. The courts would only need to determine the definition of a "substantial right." This too should not be too difficult. It would appear that nearly any violation of an evidentiary rule would be a violation of a substantial right. As stated earlier, the rules of evidence were not designed in a vacuum. Each rule, by balancing probative value, by excluding unreliable evidence, by barring extraneous matter, and by guiding the judge and jury in the proper performance of their decision-making functions, is intended to play a role in the guarantee of a fair trial. The legislature, in enacting the evidence code, enumerated certain rights that litigants have. If one right, for example the right not to have hearsay evidence admitted at one's trial, is found harmless, then the prosecutor will have no incentive to refrain from tendering the same type of evidence the next time he tries a case. Moreover, trial judges will not have to worry about reversal. The result is that certain rights guaranteed by the legislature will become hollow.

Although it would be nearly impossible to categorize all of the various types of errors that would presumably "ring a bell" as not being harmless in the mind of a reviewing judge, the writer will attempt to briefly survey the recent jurisprudence regarding the "status" of a number of specific types of error before specifically analyzing the Louisiana courts' jurisprudential harmless error rule.[94]

Green, 231 La. 1058, 93 So. 2d 657 (1957) (judge's comment on facts of case in overruling an objection was reversible error because the defendant should have been granted a mistrial); State v. White, 244 La. 585, 153 So. 2d 401 (1963) (while defendant was not present, the trial judge substituted an alternate juror when the judge had the juror brought to chambers and permitted him to state that he felt there was a conflict of interest); State v. Johnson, 229 La. 476, 86 So. 2d 108 (1956) (reversible error when the trial judge refused to instruct the jury to disregard gratuitous testimony relative to an oral confession). *Contra* State v. Gunter, 180 La. 145, 156 So. 203 (1934) (harmless error to admit testimony of defendant's wife); State v. Killgore, 186 La. 233, 172 So. 2 (1937) (since defendant ultimately convicted of manslaughter, possible improper exclusion of testimony which tended to reduce murder charge to manslaughter was harmless); State v. Breedlove, 199 La. 965, 7 So. 2d 221 (1941) (harmless error when prosecutor asked an improper question and withdrew it after defendant's counsel objected but before the witness answered it); and State v. Chinn, 229 La. 984, 87 So. 2d 315 (1955) (no reversible error when trial judge refused to appoint disinterested physicians to examine the defendant when an issue in the case was insanity at the time of the alleged offense).

94. The writer will attempt to tailor the following sections to those listed in Hebert, *supra* note 3, at 184-200. This brief survey will present the law regarding errors in areas of law not listed as "structural errors" in *Cage*, *infra*—complete denial of counsel, an impartial judge, exclusion of members of defendant's race from the grand jury, denial of the right to self-representation at trial, violation of the right to a public trial, and selection of a jury with racially based exclusions—which will presumably always warrant

3. *A Brief Survey of Error in Specific Areas*

a. *Overruling a Motion for a Bill of Particulars*

Louisiana Code of Criminal Procedure articles 484 and 485 provide for the filing of a motion for a bill of particulars.[95] The articles reflect the constitutional requirement that the accused must be informed of the nature and cause of the accusation against him.[96] The bill of particulars is designed to inform the accused of what the state intends to prove so that he may properly defend himself.[97] As has been the case for quite some time, the decision whether to grant a bill of particulars rests solely within the discretion of the trial judge. Accordingly, the judge's ruling will not be disturbed on appeal absent a clear showing of abuse which results in prejudice to the accused.[98]

b. *Arraignment and Pleading to the Indictment*

In Louisiana, the arraignment consists of the reading of the indictment to the defendant and the court calling upon the defendant to enter a plea. The arraignment's purpose is to join issues between the state and the defendant.[99] The United States Constitution requires that the guilty plea be voluntary.[100] Before a trial court can accept a guilty plea from a defendant, the record must show that the defendant was "Boykinized." That is, the record must show that the defendant fully waived (1) his Fifth Amendment right against self-incrimination, (2) his Fifth Amendment right to trial by jury, and (3) his Sixth Amendment right to confront and cross examine witnesses against him. Waiver will not be presumed from a silent record. The dialogue between the defendant and the trial judge must reflect that the defendant was aware that he was waiving his "*Boykin* rights," or the plea will be set aside.[101]

c. *Refusal of a Continuance*

As is the case with a motion for a bill of particulars, the decision whether to grant a continuance rests largely in the discretion of the

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a reversal. As such, the following sections will for the most part update Dean Hebert's sections.

95. 1978 La. Acts No. 735, § 2; 1981 La. Acts No. 440, § 1.

96. La. Code Crim. P. art. 484, official revision comment (a). La. Const. art. I, § 13 (1974). *See also* Comment, James A. Hobbs, *The Bill of Particulars in Criminal Trials*, 12 La. L. Rev. 457 (1952).

97. State v. Nelson, 306 So. 2d 745 (La. 1975).

98. State v. Huizar, 332 So. 2d 449 (La. 1976).

99. La. Code Crim. P. art. 551 and comment (a).

100. Boykin v. Alabama, 395 U.S. 238, 89 S. Ct. 1709 (1969).

101. State v. Williams, 400 So. 2d 868 (La. 1981). *See also* State v. Scott, 461 So. 2d 557 (La. App. 3d Cir. 1984); State v. Hill, 404 So. 2d 966 (La. 1981); and State v. LaFleur, 391 So. 2d 445 (La. 1980); and State v. Bowick, 403 So. 2d 673 (La. 1981).

trial court.[102] The trial judge's ruling, whether it be because the defense counsel did not have time to prepare or because witnesses were absent, will not be disturbed on appeal unless such is manifestly prejudicial to the rights of the accused.[103]

In *State v. Leopold*,[104] the court held that the trial judge committed reversible error when he refused a continuance requested because of the absence of a material defense witness. The sole reason for refusing the continuance was a desire to try the case before an important prosecution witness left the state.

In *State v. Brett*,[105] the defendant, charged with murder, was convicted of manslaughter. The defendant moved for a continuance because of the absence of certain witnesses who would testify as to facts that would tend to prove the defendant was guilty of manslaughter rather than murder. The trial judge denied the continuance. The Supreme Court held the trial judge's error was harmless because the jury ultimately convicted the defendant of manslaughter. If, on the other hand, the defendant had been convicted of murder, then the trial judge's denial of the continuance would have been reversible error.

d. Selection of the Jury

Generally, an erroneous ruling of a trial judge which results in depriving a defendant of one of his peremptory challenges constitutes a substantial violation of a constitutional or statutory right and thus is reversible error.[106] The same is true when the defendant is improperly denied a challenge for cause.[107] However, for reversible error to result from a denial of a challenge for cause, the defendant must have exhausted all of his peremptory challenges before the selection of the jury is complete.[108] Furthermore, after jeopardy attaches, the right of a defendant to have particular jurors, who have been selected to try

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102. La. Code Crim. P. arts. 707-715 and comments thereto. The revision of the Louisiana Code of Criminal Procedure in 1966 did not change the rules regarding continuances. *Id.*

103. State v. Satcher, 124 La. 1015, 50 So. 835 (1909).

104. 169 La. 749, 126 So. 48 (1930). The summary of this case is essentially that which appears in Hebert, *supra* note 3, at 186. The case is apparently still good law.

105. 6 La. Ann. 658 (1851). This case was also summarized in Hebert, *supra* note 3, at 186. This case too is apparently still good law.

106. State v. McIntyre, 365 So. 2d 1348 (La. 1978). *See* La. Code Crim. P. arts. 782-808. *See also* State v. Ferguson, 187 La. 869, 175 So. 603 (1937), discussed in subsection entitled "Jurisprudence Construing the Louisiana Harmless Error Statutes," *supra*, at notes 85-95.

107. State v. Isgitt, 590 So. 2d 763 (La. App. 3d Cir. 1991).

108. *Id.* at 766-67.

the defendant, is a substantial right, the deprivation of which, without good cause, warrants a reversal.[109]

Notwithstanding the above-cited examples, recent Louisiana courts, when dealing with issues of harmless error, have generally not relied on the text of Article 921. Instead, the courts have tended to fashion their own "tests," on a case-by-case basis, to determine whether particular errors are harmless.[110]

B. Louisiana's Jurisprudential Harmless Error Rule

1. Vacillations Among Standards by the Louisiana Courts

In general, the recent Louisiana jurisprudence is riddled with inconsistent applications of the harmless error rule. The trend appears that the courts are holding all but the most blatant violations harmless. It is curious that Dean Hebert remarked in 1932 that: "[I]n spite of these general principles, which, if adhered to, would prevent reversals where justice has been done, in dealing with the various classes of cases in which the problems arise we will note a tendency of the Supreme Court to reverse many criminal cases when the error might properly be considered harmless."[111] The pendulum now swings in the other direction. With all due deference, it appears that either the standard is not fully understood or that "hard facts make bad law."

In 1974, the Louisiana Supreme Court handed down the opinion of *State v. Michelli*.[112] In *Michelli*, a hearsay statement was admitted into evidence. The Supreme Court evidenced its distrust of the harmless error standard by practically disregarding the *Chapman* opinion, which was handed down just seven years before. Instead, the court, in construing the pre-1979 language of Article 921, relied on certain language from the 1946 decision of *Kotteakos*.[113] The court noted that an error which had little or no influence on the jury would nevertheless warrant a reversal if the error resulted from the departure from a constitutional norm.[114] Since there was a substantial violation of a constitutional or statutory right, the conviction would be reversed.[115]

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109. State v. White, 244 La. 585, 153 So. 2d 401 (1963).

110. An update of Dean Hebert's subsection regarding errors in the charge to the jury is excluded because of the *Cage* decision, which is discussed, *infra* text accompanying notes 136-142.

111. Hebert, *supra* note 3, at 184.

112. 301 So. 2d 577 (La. 1974).

113. Kotteakos v. United States, 328 U.S. 750, 66 S. Ct. 1239 (1946).

114. *Michelli*, 301 So. 2d at 580.

115. *Id.*

Moreover, the court expressly repudiated the "overwhelming evidence" test.[116] The administration of the test requires that the entire trial record be before the appellate court, and such a practice is contrary to the Louisiana Constitution, which extends the appellate jurisdiction to questions of law only.[117] The court also noted that the Louisiana courts are not as free as the United States Supreme Court to institute new rules of law and procedure where the legislature has spoken. Later that same year, the Louisiana Supreme Court again repudiated the "overwhelming evidence" test in *State v. Herman*.[118]

Similarly, in *State v. Muse*,[119] the Supreme Court again evidenced its mistrust of the harmless error rule. In *Muse*, the defendant was charged with using a pistol to commit a battery upon Jerome Hamilton. Hamilton was a bystander victim of a drive-by-shooting-type incident. At trial, a state's witness was questioned about the victim's reputation in the community. The prosecutor objected. The judge sustained the objection. The trial judge reasoned that the victim's general reputation in the neighborhood was strictly irrelevant and immaterial to the issue before the court—especially since the victim was an innocent bystander.[120] The Supreme Court reversed.

Justice Summers, writing for the majority, noted that an attack on the witness' credibility may have mitigated the evidence pointing to the guilt of Muse. Thus, the trial court did not permit the defendant to fully cross examine the state's witness—in violation of article I, section 16 of the Louisiana Constitution of 1974.[121] Justice Summers further noted:

> The right of confrontation occupies the status of a paramount and fundamental right *indispensable to a fair trial.* It is a *substantial*, substantive and valuable right which assures the accused that he shall have the opportunity to be confronted by the witnesses against him and this includes not only the right to attend the trial and hear the witnesses but also the right to

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116. *Id.* at 580-81.

117. *Id.* at 580, n. 7 (citing La. Const. art. VII, § 10 (1921)). *Cf.* La. Const. art. V, § 5(C) (1974), which provides: "Except as otherwise provided by this constitution, the jurisdiction of the supreme court in civil cases extends to both law and facts. In criminal matters, its appellate jurisdiction extends only to questions of law." La. Const. art. V, § 10 (1974) provides similarly for the courts of appeal.

118. 304 So. 2d 322, 325 (La. 1974). The court followed the reasoning set forth in *Michelli*.

119. 319 So. 2d 920 (La. 1975).

120. *Id.* at 921.

121. Article I, section 16 of the Louisiana Constitution of 1974 provides in pertinent part as follows: "An accused is entitled to confront and cross examine witnesses against him . . . ."

> cross-examine them at the trial. It is a constitutional right, not a mere privilege.[122]

Although the opinion did not go into a detailed harmless error analysis, it did refuse to hold the error harmless. Justice Summers reasoned: "We cannot subscribe to the trial judge's opinion that the error was harmless for we do not know what defense counsel may have elicited from the witness, nor its effect upon the jury's determination of the defendant's guilt."[123]

This reasoning did not last, for later the same year the Supreme Court did an "about face" and adopted the "overwhelming evidence" test in a line of cases that did not even acknowledge the test's inconsistency with the constitution or *Michelli*. This line of cases that utilized the "overwhelming evidence" test would continue until 1980.[124]

In *State v. Gibson*,[125] the court returned to the *Michelli* end of the continuum. Although the court did not return to the strict language of *Michelli* as *Herman* did, the court did return to the basic policies underlying the decisions. In *Gibson*, the court noted that notwithstanding Article 921's amendment, the Louisiana Constitution still extends appellate jurisdiction only to questions of law in criminal matters.[126] Thus, the Louisiana Supreme Court may not act as a surrogate jury and "substitute its determination of what the jury, in the absence of the error, would or should have decided in place of the jury's actual verdict."[127] Accordingly, the court adopted the *Chapman* standard:

> [T]he federal harmless error standard, as stated and applied in Chapman v. California, is the standard most compatible with this Court's view of its own criminal appellate jurisdiction. Whether there is a reasonable possibility that the constitutional error complained of might have contributed to the conviction is a question of law to which our appellate jurisdiction ex-

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122. *Muse*, 319 So. 2d at 922-23 (citing State v. Giordano, 259 La. 155, 249 So. 2d 558 (1971) (emphasis added)).

123. *Id.* at 923. *Accord* State v. Murphy, 542 So. 2d 1373 (La. 1989) (holding that a violation of the defendant's right to face-to-face confrontation with an alleged child victim of indecent behavior was not harmless error) and State v. Jenkins, 476 So. 2d 475 (La. App. 1st Cir. 1985) (holding it is prejudicial error to limit a defendant's right to cross examine a state's witness about that witness' criminal charges in order to show bias).

124. *See, e.g.*, State v. Berain, 360 So. 2d 822 (La. 1978); State v. Meunier, 354 So. 2d 535 (La. 1978); State v. Stripling, 354 So. 2d 1297 (La. 1978); State v. Williams, 347 So. 2d 184 (La. 1977); State v. Fort, 311 So. 2d 851 (La. 1975); and State v. Ivy, 307 So. 2d 587 (La. 1975).

125. 391 So. 2d 421 (La. 1980).

126. *Id.* at 426 (citing La. Const. art. V, § 5(C) (1974)).

127. *Id.* at 427.

> tends. . . . Focusing on the incriminating quality of the tainted evidence is less intrusive on the jury's function than the overwhelming evidence test.[128]

The court also noted that this standard is more consistent with the notion that all accused persons, even if guilty, are entitled to a fair trial. "Injudicious application of the harmless error doctrine tends 'to shield from attack errors of a most fundamental nature and thus to deprive many defendants of basic constitutional rights.'"[129]

Notwithstanding the strong language of *Gibson*, the courts seemingly went on as though nothing had ever happened. The "overwhelming evidence" test again reared its ugly head.[130] However, it was not alone. In another line of cases, the court was applying the "cumulative evidence" test. In *State v. Banks*,[131] the Court of Appeal for the Fourth Circuit noted that notwithstanding *Gibson*, several cases since then have used both the "overwhelming evidence" test and the "cumulative evidence" test. The court then applied the test and upheld the conviction.[132] The Louisiana Supreme Court granted writs and reversed. [133]

In reversing the court of appeal, the supreme court evidenced a "lack of enthusiasm" for the "cumulative evidence" test and "distinguished and seemingly limited the post-*Gibson* cases."[134] Presumably breathing new life into *Gibson*, Chief Justice Dixon, writing for the majority, stated: "It cannot be said, beyond a reasonable doubt, that the improperly admitted hearsay . . . *did not contribute to the verdict*."[135] However, the court would again turn around.[136]

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128. *Id.* (citations omitted).

129. *Id.* at 427 (quoting Harrington v. California, 395 U.S. 250, 257, 89 S. Ct. 1726 (1969) (Brennan, J., dissenting)).

130. *See, e.g.*, State v. Billiot, 421 So. 2d 864 (La. 1982); State v. Quimby, 419 So. 2d 951, 958 (La. 1982); State v. Moore, 414 So. 2d 340, 347 (La. 1982); State v. Smith, 408 So. 2d 1110, 1112 (La. 1981); State v. Perry, 408 So. 2d 1358, 1362 (La. 1982); State v. Connor, 403 So. 2d 678, 680 (La. 1981); and State v. Smith, 401 So. 2d 1179, 1180 (La. 1981).

131. 428 So. 2d 544 (La. App. 4th Cir.), *rev'd*, 439 So. 2d 407 (1983). *See also* State v. Lindsey, 404 So. 2d 466 (La. 1981); State v. Darby, 403 So. 2d 44 (La. 1981); State v. Spell, 399 So. 2d 551 (La. 1981); and State v. Bodley, 394 So. 2d 584 (La. 1981).

132. *Banks*, 428 So. 2d at 546-47.

133. State v. Banks, 439 So. 2d 407 (La. 1983).

134. George W. Pugh & James R. McClelland, *Evidence, Developments in the Law, 1983-84*, 45 La. L. Rev. 309 (1984).

135. *Banks*, 439 So. 2d at 410 (emphasis added). Chief Justice Dixon reasoned:

> The hearsay information injected into the case by the officer cannot be harmless. It explained why the police were where they were, why they were on the lookout, and why they approached him as soon as he was identified, wearing the clothes described by the informer. Without the forbidden hearsay, the jury

In May 1991, the Louisiana Supreme Court decided *State v. Cage*.[137] In *Cage*, the court dealt with the harmlessness of an erroneous jury instruction on reasonable doubt given during the guilt phase of defendant's trial. In holding the error harmless, the court relied heavily on the recent United States Supreme Court decision of *Arizona v. Fulminante*.[138] In so relying, the court distinguished between "trial errors" and "structural errors." Trial errors occur during the presentation of a case and must be assessed in the context of the other evidence to determine whether the admission at trial is harmless beyond a reasonable doubt. Structural errors, or structural defects in the trial mechanism, affect the framework of the trial and consequently cannot be subjected to a harmless error analysis.[139] The court held that the erroneous jury

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might have had considerably more difficulty rejecting the testimony of the defense witness Gooden.

Id.

136. In State v. Creel, 540 So. 2d 511 (La. App. 1st Cir. 1989), *writ denied*, 546 So. 2d 169 (1989), the court nonetheless applied the "cumulative evidence" test to hearsay testimony involving the charges of crime against nature and aggravated crime against nature. This case is especially egregious. In *Creel*, the alleged victim was punished by his bus driver for misconduct on the bus. The victim's older brother approached the bus driver and asked her that she not report the misconduct to the school authorities because the brothers' foster father would force the victim to engage in oral copulation as punishment. The bus driver then reported the brother's statement to the appropriate authorities. Accordingly, the foster father was charged with aggravated crime against nature. At the trial the bus driver testified to the above. The brother was not even called as a witness. Thus, the brother's out-of-court statement was offered to prove the truth of the matter asserted and was clearly hearsay. La. Code Evid. arts. 801-806. The court held that the error was harmless. Arguably, the problem with this reasoning is that some foster children do not care for their foster parents. Therefore, there was at least a possible incentive for the older brother to lie. Furthermore, when the facts and circumstances are viewed as a whole, there could have been a situation in which the older brother was merely coming to the rescue of his younger brother to keep him out of trouble. If the brother were called to the stand, then the jury could have weighed the credibility of the brother; hence, the policies underlying the hearsay rules would be satisfied. Although, the foregoing is mainly hypothesis, the court should have at least given it consideration. Instead, the court held the error harmless because the bus driver's testimony was essentially the same as the victim's testimony. This case is a clear example of the problems which surround the courts' switching back and forth between harmless error approaches. It also illustrates the problems within this area of law in general. Surely, the right not to have hearsay evidence admitted against you is a substantial right as per Louisiana Code of Criminal Procedure article 921.

137. 583 So. 2d 1125 (La. 1991) (on remand from the U.S. Supreme Court, 111 S. Ct. 328 (1990)).

138. 111 S. Ct. 1246 (1991). *Fulminante* held that illegally admitted coerced confessions are subject to a harmless error analysis.

139. *Cage*, 583 So. 2d at 1127. Examples cited by the court of structural errors are provided in the following cases: Gideon v. Wainwright, 372 U.S. 335, 83 S. Ct. 792 (1963) (complete denial of counsel); Tumey v. Ohio, 273 U.S. 510, 47 S. Ct. 437 (1927)

instruction was a trial error and was thus subject to a harmless error analysis.

When it applied the harmless error analysis, the court did not cite a single Louisiana case. Rather, it relied entirely on the federal jurisprudence. Particularly, it relied on the federal jurisprudential interpretations of *Chapman* and held that the *Chapman* standard "mandates consideration of the entire record prior to reversing a conviction for constitutional errors that may be harmless."[140] The court then proceeded to analyze the facts of the case under the "overwhelming evidence" test: "Because of the overwhelming evidence establishing defendant's guilt, the erroneous reasonable doubt instruction given . . . during the guilt phase of trial was harmless beyond a reasonable doubt."[141] The court then switched into a sufficiency analysis when analyzing the erroneous jury instruction's effect on the sentencing stage of the trial.[142] Ironically, the court concluded:

> Viewing the record as a whole, the jury had sufficient evidence to find defendant guilty beyond a reasonable doubt. . . . The erroneous instruction by the trial judge *did not contribute* to the defendant's conviction or sentence. Accordingly, the erroneous instruction was harmless beyond a reasonable doubt.[143]

What is the standard after *Cage*?[144] As pointed out earlier, the courts have not been consistent in their analyses or standards when applying the harmless error test. The jurisprudence prior to and including *Cage* makes this obvious. Furthermore, the courts have for the most part strayed from a statutory approach to harmless error.

(impartial judge); Vasquez v. Hillery, 474 U.S. 254, 106 S. Ct. 617 (1986) (exclusion of members of defendant's race from grand jury); McKaskle v. Wiggins, 465 U.S. 168, 104 S. Ct. 944 (1984) (denial of right to self-representation at trial); Waller v. Georgia, 467 U.S. 39, 104 S. Ct. 2210 (1984) (violation of the right to a public trial); and Powers v. Ohio, 111 S. Ct. 1364 (1991) (selection of a jury with racially based exclusions).

140. *Cage*, 583 So. 2d at 1128 (quoting United States v. Hastings, 461 U.S. 499, 508 n.7, 103 S. Ct. 1974, 1980 n.7 (1983)).

141. *Id.*

142. *Id.* at 1129.

143. *Id.* (emphasis added).

144. Recently in State v. Smith, 600 So. 2d 1319, 1326 (La. 1992), the Louisiana Supreme Court held that a *Cage*-like jury instruction was not harmless. Noting Justice Lemmon's concurrence in *Cage* ("In conducting a harmless error analysis, we do not merely excise the error and review the remainder of the record for sufficiency under *Jackson v. Virginia* [443 U.S. 307, 99 S. Ct. 2781 (1979)]."), Justice Cole for the majority applied the "contributed-to-the-verdict" test, citing State v. Gibson, 391 So. 2d 421 (La. 1980) and Yates v. Evatt, 111 S. Ct. 1884, 1893 (1991) (to say an error did not "contribute" to the verdict is to find the error unimportant in relation to everything else the jury considered).

IV. RECOMMENDATIONS

The reasoning of *Cage* is disturbing. The court once again completely disregarded the sound reasoning of *Gibson*. In doing so, it completely ignored both Louisiana Code of Criminal Procedure article 921 (Is the right to have the jury determine guilt beyond a reasonable doubt not a substantial right?) and article V, section 5 of the Louisiana Constitution. As such, the court has once again compounded the unpredictability of the Louisiana law in this area. Although one may agree with the court because the defendant apparently "did it," such a conclusion misses the point. All defendants, guilty or not, deserve a fair trial. Allowing a court to look at the record and weigh the facts in this manner is an upside down interpretation.

Accordingly, if the courts are not going to textually apply Article 921, then they should at least return to the *Gibson* standard, streamlined by the five-factor approach used by the Texas courts. Again these factors are: (1) the source and nature of the error; (2) the extent to which the state used the error throughout the course of the trial; (3) the probable collateral implications of the error; (4) the probable weight a juror would place on such an error; and (5) the likelihood that a finding of harmlessness would encourage the prosecution to repeat the error with impunity.

These factors clearly focus on the main points of the "contributed-to-the-verdict" approach, which is arguably the most consistent with the power of the Louisiana courts. If the court were to use these factors, the standard of review as well as the important policies would be clear to courts in the future. Moreover, the courts would be in line with their constitutional mandate—no appellate review of facts. Furthermore, in using this test, the courts would still be taking into consideration the economics of justice. Accordingly, the best balance would be made, and the jagged line of Louisiana harmless error cases would finally be straightened out.

V. CONCLUSION

For some period after the inception of Louisiana's statutory harmless error rule, the courts tended to try to textually apply the statute. However, such has not been the case in recent years. The Louisiana courts have vacillated among the various jurisprudentially created harmless error "tests"—often in contravention of an accused's "substantial rights." Thus, with the harmless error doctrine in such a flux right now, the Louisiana courts should reexamine the policies they wish to promote in this area of law. As such, the integrity of the criminal justice system and the provision of a fair trial to all should top the list. Regardless of the test used, if the test is changed every two or three years, then neither of these policies is promoted. Accordingly,

the Louisiana Supreme Court should pick one test and stay with it so the rule can develop. If the courts must use the jurisprudential rules instead of textual, statutory analysis, then the *Gibson* approach is preferable. If the courts apply this approach by using the Texas courts' factors, then they will, while still providing a balance to the economics of judicial review, provide a fair standard that is in line with the criminal appellate jurisdiction provided by the Louisiana Constitution. For, as the late Dean Paul M. Hebert said:

> The problem of prejudicial error is a problem in professional psychology. No rules can be framed which will solve it, for rules can only be drawn in general terms, and it is in the interpretation of the rules that the difficulty comes.[145]

Addison K. Goff, IV

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145. Hebert, *supra* note 3, at 170 (citing Edson R. Sunderland, *The Problem of Appellate Review*, 5 Tex. L. Rev. 126 (1926)).