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The Sporting Approach to Harmless Error: The Supreme Court's "No Harm, No Foul" Debacle in Neder v. United States

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The Sporting Approach to Harmless Error in Criminal Cases: The Supreme Court's "No Harm, No Foul" Debacle in *Neder v. United States*

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Table of Contents

I. Introduction

I am not a fan of sports references in legal analysis. Whether it is a "slam-dunk" issue or a "three-strikes" law, I fear the ease of such metaphors obscures principled analysis.[1] Why is the issue "slam-dunk?" The law is clear? The facts indisputable? Why three strikes and not six? What if, instead of baseball, we designed a criminal penalty based on overtime in football? Would we say "sudden death" is the solution for persistent offenders rather than three strikes? Perhaps you can begin to see the problem here. Of course, a lack of reasoned legal analysis is not contingent on a sports reference. Shorthand thinking can exist even without shorthand expressions, sports or otherwise. The "harmless error" doctrine, however, has the dubious distinction of both lacking a

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1. With only a moderate apology to my colleague, Professor John Sims, (who was kind enough to read this article, but brazen enough to suggest that only his favorite sport, baseball, should be used as a sports reference) I will use references to various sports indiscriminately. Sports metaphors in legal parlance appear to shift somewhat randomly from baseball to football to basketball, and so will I.

sound analytical basis and representing an imprecise phrase. Not surprisingly, harmless error is also at times described in sports lingo as "no harm, no foul."[2] Thus, the harmless error doctrine has the unfortunate status of both a shorthand expression reflecting shorthand thinking and a sports metaphor. Moreover, I fear that the catchy sports phrase is accurate. Although the cases do not use the phrase, I believe that the courts have opted for a "no harm, no foul"[3] philosophy with harmless error, without fully analyzing either the "harm" or the "foul." By conceptualizing harmless error in a "no harm, no foul" manner, the courts have diminished the significance of constitutional violations and shifted the emphasis from the fairness of the process to the correctness of the result. A further byproduct of the "no harm, no foul" approach is the usurpation by the appellate court of the ultimate fact-finding responsibility, in contravention of the defendant's right to a jury trial. The Supreme Court's continuing misapplication of the harmless error doctrine as a "no harm, no foul" concept reached an even higher level of play in the Court's recent decision in *Neder v. United States*.[4] The Court failed to adhere to a principled analysis and instead reasoned in a shorthand fashion. Because "no harm, no foul" is an accurate description of the Court's approach and represents the inadequacy of the Court's

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2. Several authors have criticized the Court's harmless error cases as a "no harm, no foul" approach. *See, e.g.*, Steven H. Goldberg, *Harmless Error: Constitutional Sneak Thief*, 71 J. CRIM. L. & CRIMINOLOGY 421, 442 (1980) ("Lawyers should pause at the proposition that government can violate a basic restriction upon itself and, through a court, tell the individual who was the beneficiary of the restriction: 'no harm–no foul.'"); Erwin Chemerinsky, *No Harm, No Foul*, 16 CAL. LAW. 27 (Jan. 1996); Clancy DuBos, Note, *Arizona v. Fulminante–No Harm, No Foul?*, 37 LOY. L. REV. 1029 (1992).

3. What is the origin of the phrase "no harm, no foul"? Out of fear that a law review editor would make me cite a source for the phrase, I began to research it. Naturally, I ran the phrase through Westlaw and Lexis, expecting that some thorough professor had already done this research, and I could simply cite to his or her article. Life was not so simple. Although there were an abundance of references in articles to "no harm, no foul," I could not locate a reference to the origin of the phrase. No famous quotations reference helped me out either. I then turned to my most respected colleague in criminal jurisprudence, Professor Joshua Dressler. I knew that Professor Dressler was close to omniscient on criminal justice issues. But, would he have the intellectual depth to know the source of "no harm, no foul"? I was not to be disappointed—without even a moment of hesitation, Professor Dressler responded, "Oh, that phrase was coined by Chick Hearn when he was a sportscaster for the Los Angeles Lakers in the 1960s. I remember him using the phrase and, of course, there are articles about Chick Hearn that refer to this phrase." Now, why didn't I think of that?

You might think that I stopped there and decided to cite Professor Dressler, which would satisfy any law review editor. Instead, I felt that I should go all out for a string cite on this point. Our incredible library staff member, Sue Welsh, began a search that resulted in finding an article on "Chick-isms." According to that author (and Professor Dressler), Chick Hearn indeed coined or adapted the phrase "no harm, no foul" for basketball. *See* Mike "Lew" Lamar, Chick-isms, *at* http:/www.armory/com/~lew/sports/basketball (last updated May 10, 2001); Sam Smith, *Only Break Hearn Will Take is a Station Break*, CHI. TRIB., Feb. 16, 2000, at Sports, Pg. 2; *Chick Hearn–Broadcasting*, THE PRESS-ENTERPRISE, Aug. 24, 1999, at Sports, C03; Jim Carlisle, *L.A.'s Legendary Voices: Chick's Fabulous Forum*, VENTURA COUNTY STAR, May 17, 1999, at Sports, C01.

4. 527 U.S. 1 (1999).

reasoning, the phrase will form the game-plan for a discussion of *Neder* and the harmless error doctrine in this article.

The original concept of the harmless error doctrine was consistent with basic constitutional rights and designed to serve purposes of furthering finality and judicial efficiency.[5] Some error is so minor that principled judges could conclude the error is "harmless beyond a reasonable doubt". As described in the seminal 1967 case of *Chapman v. California*, [6] harmless beyond a reasonable doubt was viewed as synonymous with the concept that there was no "reasonable possibility that the evidence complained of might have contributed to the conviction." [7] As applied in *Chapman*, this test meant that an unconstitutional comment by the prosecutor on the defendants' failure to testify was not harmless. As the Court stated, there was a "reasonably strong 'circumstantial web of evidence'" against the defendants in a murder, robbery, and kidnap prosecution. [8] Nevertheless, the prosecution's commentary on the defendants' failure to explain facts, such as why they bought pistols shortly before the murder and why they used a false name at a motel shortly after the crime, was not harmless beyond a reasonable doubt. The Court could not conclude that the prosecutorial comments and follow-up instructions by the judge "did not contribute to petitioners' convictions."[9] With the emphasis on the erroneous comments by the prosecutor, and not on the amount of properly admitted evidence against the defendants, the Court was assessing the effect on the process before the actual trial jury.

Since *Chapman*, however, the Court has molded the doctrine into a "no harm, no foul" approach. The problem is that the errors, or fouls, are underestimated and the consequence of those errors, or harm, is ignored. The Court has mutated the determination of harm from an analysis of the process into an analysis of the result. This "final score" approach dismisses errors when there is overwhelming evidence of the defendant's guilt, rather than penalizing errors that would affect the jury's decision regardless of the amount of evidence of guilt. The original focus on the actual jury's process of decision-making has devolved into appellate fact-finding speculation about a hypothetical jury verdict.[10] The

5. *See* Tom Stacy & Kim Dayton, *Rethinking Harmless Constitutional Error*, 88 COLUM. L. REV. 79, 86 (1988). The authors criticize the unthinking acceptance of finality and efficiency as the only purposes to fulfill; they suggest that the purposes of remedying a procedural wrong and deterrence need to be addressed as well. *Id.* at 88-91, 137.

6. 87 S.Ct. 824 (1967).

7. *Id.* at 828.

8. *Id.* at 829.

9. *Id.* at 828-29.

10. *See* Goldberg, *supra* note 2, at 427-32 (discussing harmless error as appellate fact-finding and critiquing the overwhelming evidence approach); David R. Dow & James Rytting, *Can Constitutional Error Be Harmless?*, 2000 UTAH L. REV. 483, 503, n.128 and accompanying text, 535, n.226 and accompanying text (2000) (exposing the conceptual illogic of harmless error analysis as necessarily based on a counterfactual premise that poses a hypothetical situation without error,

final score approach further undermines the value of the constitutional rights at stake by rendering most of them harmless. With "no harm" found so easily, the actual constitutional error is approaching a "no foul" status. Remember that the fouls we are talking about are constitutional violations, not a clipping charge. The constitutional fouls deserve greater attention and the harm should not depend on an appellate assessment of the defendant's guilt or innocence. In its recent harmless error decision in *Neder*, the Supreme Court again demonstrated its adherence to the final score interpretation of the doctrine and failed to appreciate the significance of either the foul or the harm. The Court's decision in *Neder* is an especially egregious demonstration of the dangers of the "no harm, no foul" approach, in which the defendant was deprived of his right to a jury verdict on all elements of the crime.

In *Neder*, the Court applied a harmless error analysis to the failure to instruct on an element of a crime. This case, more than any other in a series of decisions expanding the role of harmless error analysis, severs the doctrine from a principled mooring. Harmless error analysis depends upon the existence of a verdict of guilty beyond a reasonable doubt on the elements of the crime. The appellate court must assess the possibility that the error affected the jury's verdict.[11] If there is no verdict on an element of the crime, it is not possible to conclude that the error did not affect the verdict. In its haste to affirm a conviction, the Court used a "no harm, no foul" approach. Despite the absence of a jury verdict on an element of the crime, the Court found overwhelming evidence of the element in the record and viewed the final score of guilt as satisfactory.[12] Although there is some surface appeal to the result-oriented approach of the Court, the lack of a principled harmless error analysis undermines the constitutionally crafted structure of a criminal trial and appeal.

The evolution of the harmless error doctrine into a "no harm, no foul" approach and the recent travesty in *Neder* are analyzed in this article. Part II describes the classification of constitutional errors into those which are reversible per se and those which are subject to harmless error analysis. Part III explains the reasoning of the majority and dissent in the *Neder* case. Part IV provides a critique of the refereeing skills of the Supreme Court in its approach to the harmless error cases. The

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which cannot be proved, and the Court's failure to grapple with the conceptual difficulties of the doctrine).

11. The standard for harmless error varies depending on the stage of the post-trial proceedings. This article focuses on constitutional error, which is reviewed on direct appeal. On direct review, the issue is whether the error is harmless beyond a reasonable doubt. *See Chapman*, 386 U.S. at 828. In a federal habeas corpus proceeding, the standard is more lenient—whether the error "had substantial and injurious effect or influence in determining the jury's verdict." Brecht v. Abrahamson, 507 U.S. 619, 637 (1993) (quoting Kotteakos v. United States, 328 U.S. 750, 776 (1946)). For an interesting discussion of *Chapman* as constitutional common law, see Daniel J. Meltzer, *Harmless Error and Constitutional Remedies*, 61 U. CHI. L. REV. 1 (1994).

12. Neder v. United States, 527 U.S. 1, 16 (1999).

critique points out that the Court has lapsed into a final score approach to constitutional error in criminal cases, which is inconsistent with the underlying principles of our adversary system and the role of the appellate courts.

II. The Development of the "No Harm, No Foul" Approach to Constitutional Error

A. The Foul

The Supreme Court has in essence defined harmless error analysis by categorizing errors as "minor league" fouls and "major league" fouls. The major league fouls are more important than minor league fouls and get greater coverage—in other words, they have a greater impact on the litigation. Minor league constitutional fouls include violations of a defendant's rights, such as admission of a coerced confession,[13] admission of a co-defendant's statement in violation of the Confrontation Clause,[14] the use of mandatory presumptions in violation of the Due Process Clause,[15] admission of evidence obtained through an unconstitutional search or seizure,[16] and *Miranda* violations.[17] Major league constitutional fouls include conducting a trial with a biased judge or without representation,[18] and inaccurately instructing on the beyond a reasonable doubt standard.[19] Some fouls, just like some players, tried out for the major leagues, and undoubtedly have many of the traits of a major league foul, but were ultimately relegated to the minor leagues. These "aspiring fouls" include instructional error, such as misdescribing an element of the crime,[20] and failing to instruct on an element of the crime.[21]

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13. *See, e.g.*, Arizona v. Fulminante, 499 U.S. 279 (1990) (holding a coerced confession subject to harmless error analysis, but not harmless in the case).

14. *See, e.g.*, Harrington v. California, 395 U.S. 250 (1969), discussed *infra* note 33 and accompanying text.

15. *See, e.g.*, Rose v. Clark, 478 U.S. 570 (1986) (holding that harmless error doctrine applies to unconstitutional presumption of malice); Carella v. California, 491 U.S. 263 (1989) (remanding for determination of harmless error a case involving unconstitutional presumptions regarding embezzlement and intent); Yates v. Evatt, 500 U.S. 391 (1991) (finding unconstitutional, and not harmless error, unlawful act and deadly weapon presumptions for malice).

16. *See, e.g.*, Chambers v. Maroney, 399 U.S. 42, 53 (1970) (approving lower courts' determination of harmless error for Fourth Amendment violation in the seizure of evidence); United States v. Baro, 15 F.3d 563 (6th Cir. 1994) (finding as harmless error the admission of unconstitutionally seized evidence).

17. *See, e.g.*, United States v. Meza-Corrales, 183 F.3d 1116 (9th Cir. 1999) (finding that error was harmless, even if it was a *Miranda* violation, given other incriminating evidence); Brecht v. Abrahamson, 507 U.S. 619 (1993) (holding use of post-Miranda silence for impeachment purposes was harmless error under the lesser standard for habeas proceedings).

18. *See* Neder v. United States, 527 U.S. 1, 8 (1999) (listing cases in which structural error was found).

19. *See, e.g.*, Sullivan v. Louisiana, 508 U.S. 275 (1993).

20. *See, e.g.*, Pope v. Illinois, 481 U.S. 497 (1987) (remanding for harmless error determination on an erroneous instruction on particular community's standard instead of "reasonable person" standard in obscenity case); Richardson v. United States, 526 U.S. 823 (1999) (remanding

A prejudicial effect on the proceedings is presumed with major league fouls. These fouls are not subjected to a harmless error analysis and result in an automatic reversal. The Court considers this type of error to be "structural" or to so infect the entire trial that harmless error analysis is meaningless. Thus, in the archetypal case of *Gideon v. Wainwright*,[22] the denial of representation by counsel is viewed as an error that affects "[t]he entire conduct of the trial from beginning to end . . . ." [23] Because of such an error, "a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence . . . ."[24]

In *Sullivan v. Louisiana*, [25] for example, the Court held that a harmless error standard was inapplicable to a defective instruction on the beyond a reasonable doubt standard. Writing for a unanimous Court, Justice Scalia pointed out that the defendant's Sixth Amendment right to a jury trial carries with it the right to have the jury find all elements of the crime beyond a reasonable doubt as required by the Due Process Clause. [26] Without a jury verdict on each of the elements beyond a reasonable doubt, the effect of the error was "unquantifiable and indeterminate," which qualified the error as structural. [27] The State fouled, the call was a jury right violation, and the penalty was reversal. No harmless error analysis applied.

Minor league fouls result in the application of harmless error analysis. For example, in *Arizona v. Fulminante*,[28] the Court assessed the extent to which the admitted coerced confession affected the verdict in the case.[29] In one of the rare examples in which an error was found not to be harmless, the Court concluded that the coerced confession contributed to the verdict. There was little evidence other than two confessions, the first of which was coerced. The believability of the second confession was dependent upon knowledge of the first confession, and the admission of the coerced confession led to the admission of damaging evidence regarding connections to organized crime that would not otherwise have been admitted.[30] In contrast, the erroneous admission of confessions by the co-defendants, who implicated the defendant in their statements, was

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for determination of whether harmless error analysis is appropriate for case in which the lower court failed to require a unanimous finding with regard to each of three narcotics violations in continuing criminal enterprise prosecution); United States v. Sun-Diamond Growers of California, 526 U.S. 398 (1999) (holding that the misdescription of the "official act" element of the illegal gratuity statute as "official position" was not harmless error).

21. *See, e.g., Neder*, 527 U.S. 1 (1999).
22. 372 U.S. 335 (1963).
23. Arizona v. Fulminante, 499 U.S. 279 at 309-10 (1990).
24. *Id.* at 310 (quoting Rose v. Clark, 478 U.S. 570, 577-78 (1986)).
25. 508 U.S. 275 (1993).
26. *Id.* at 277.
27. *Id.* at 282.
28. 499 U.S. 279 (1990).
29. *Fulminante*, 499 U.S. at 297-300 (1990).
30. *Id.*

viewed as harmless error in *Harrington v. California*.[31] Although the defendant was unable to cross-examine the co-defendants, which rendered the admission of their statements unconstitutional under *Bruton*,[32] the Court found that the evidence against Harrington was "overwhelming."[33] Thus, although the minor league fouls are violations of the defendant's constitutional rights, the appellate courts may ultimately conclude that the errors are too insignificant to necessitate reversal.

Because the categorization of the foul carries such a dramatic significance—reversal *per se* or harmless error analysis—it becomes critical to identify the characteristics of the major and minor league fouls. In *Sullivan*, Justice Scalia pointed out that it was not possible to assess the harm. Harmless error analysis requires a determination of the effect of the constitutional error on the "guilty verdict in the case at hand," not the effect on a reasonable, hypothetical jury.[34] Justice Scalia distinguished other situations, such as faulty presumptions, where harmless error analysis does apply. With faulty presumptions, he reasoned that the jury at least found the predicate facts beyond a reasonable doubt. If the presumed fact is inevitable from the predicate facts, then the defendant's right to a jury trial on each element is not jeopardized.[35] Moreover, using the *Fulminante* dichotomy between structural errors (no harmless error analysis applied) and trial errors (harmless error analysis applied), Justice Scalia easily concluded that the defective beyond a reasonable doubt instruction would be structural error that cannot be measured and cannot be harmless.[36] The "no harm, no foul" philosophy is, thus, inapplicable when there is no constitutionally obtained verdict to submit to a harmless error analysis.

Aspiring fouls are subject to a harmless error analysis, but are clearly the most controversial calls. For example, in the 1987 case of *Pope v. Illinois*,[37] the trial court erroneously instructed the jury to decided whether allegedly obscene material had "literary, artistic, political, or scientific value" on the basis of a state community standard rather than on the basis of a reasonable person standard, which would include value in

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31. 395 U.S. 250 (1969).

32. Bruton v. United States, 391 U.S. 123 (1968), held that a statement by a non-testifying co-defendant that implicates the defendant, although properly admissible against that co-defendant, creates constitutional error in a trial in which the defendant and co-defendant are tried jointly. Despite a limiting instruction that the statement is admissible only against the co-defendant, the Court held there is too great a likelihood that a jury will fail to make that distinction in the situation in which the defendant is unable to cross-examine the co-defendant. *Id.* at 130. In that situation, either the references to the defendant must be excised, *id.* at 134 n.10, from the co-defendant's statement or the trials must be severed. *Id.* at 131-32.

33. Harrington v. California, 395 U.S. 250, 252-54 (1969). The Court focused on the evidence admitted against the defendant, including his own statements and the testimony of eyewitnesses. *Id.*

34. Sullivan v. Louisiana, 508 U.S. 275, 279 (1993).

35. *Id.* at 280-81.

36. *Id.* at 280-82.

37. 481 U.S. 497 (1987).

other communities. The Supreme Court remanded the case for a determination of harmless error—whether "no rational juror, if properly instructed, could find value in the magazines . . . ."[38] Although one might have expected Justice Scalia to dissent because there was no actual verdict on the reasonable person standard for value, he concurred on the basis that the state of Illinois's community was comparable to the reasonable person standard.[39] Four justices dissented, however, on the basis that harmless error analysis was inapplicable when the defendant was denied his right to a jury determination of an element of the crime.[40] The dissenters' reasoning is the same reasoning that continues to separate the Court in later cases, including *Neder*.

The implications of *California v. Roy*,[41] decided in 1996, exemplify the continuing division of the Court over the propriety of harmless error analysis. In *Roy*, a unanimous Court reaffirmed that the harmless error standard on review of habeas proceedings is the less demanding *Kotteakos-Brecht* standard, not the *Chapman* standard.[42] The more significant conclusion in the case, however, involves the error made and the Court's response to it. Roy was accused of murder on an accomplice theory. The trial court instructed the jury that in order to convict, it had to find that Roy aided or abetted "'with knowledge of' the confederate's 'unlawful purpose,'" but failed to instruct that Roy had to act with the "'knowledge [and] intent or purpose of committing, encouraging, or facilitating' the confederate's crime."[43] Although the case was remanded for a determination under the less demanding harmless error standard for habeas cases,[44] the per curiam opinion suggests that this "misdescription" error is a common, non-controversial trial error, to which harmless error analysis easily applies.[45] Concurring on the applicability of the *Kotteakos-Brecht* standard to habeas proceedings, Justice Scalia nevertheless pointed out that the failure to have a jury verdict on an element of the crime precludes the use of a harmless error analysis, unless the actual jury verdict on other elements necessarily meant that there was a jury finding on the intent.[46] The rivalry of the two opposing teams on the rationale for harmless error was clearly growing.[47]

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38. *Id.* at 503-04.

39. *Id.* at 504.

40. *Id.* at 507-11 (Stevens, J., dissenting).

41. 519 U.S. 2 (1996).

42. *Id.* at 4-5.

43. *Id.* at 3.

44. *See supra* note 11 (setting forth the *Brecht* standard). Kotteakos v. United States, 328 U.S. 750 (1946), was the case relied upon by the Court when it clarified in *Brecht* that the harmless error standard for habeas proceedings was a lesser burden than the harmless error standard on direct appeal. Brecht v. Abrahamson, 507 U.S. 619, 637 (1993).

45. *Roy*, 519 U.S. at 5.

46. *Id.* at 6-8 (Scalia, J., concurring) (referring to the standard for harmless error on habeas review as the *Brecht-O'Neal* standard). O'Neal v. McAninch, 513 U.S. 432 (1995), is another case involving a determination of harmless error in a habeas case. *O'Neal* clarified that a judge with a

B. The Harm

As in sports, some constitutional fouls in criminal trials are automatically deemed to cause harm. An intentional face mask violation in football or a technical foul[48] in basketball merit immediate reprise. Similarly, major league constitutional fouls, such as denial of counsel, warrant an automatic reversal of a conviction. Undoubtedly because the consequence of an automatic reversal is so great, we see the Court stretch its reasoning, as discussed above, in order to assign fouls to the minor league camp. Thus, the vast majority of constitutional fouls do not warrant an automatic penalty. In fact, there is no penalty at all imposed for most fouls because the courts find no harm from the violation. We technically require the party who fouled (the State) to demonstrate the lack of harm. In reality, of course, the party fouled against (the defendant) does a full-court press to prove the harm. No one asks the fouled basketball player to demonstrate that he or she would have made the basket if not fouled. The defendant, on the other hand, combs the record to explain why the coerced confession or illegally seized evidence contributed to the verdict.

Proving the harm is a difficult task. Failing to prove the harm is comparable to being stopped on the one-yard line in a close football game. The defense has moved the ball all the way down the field by proving the constitutional fouls, but in the end cannot win the game. Although the Court claims that it is not simply looking at the amount of properly admitted evidence and is, in fact, looking at the effect of the erroneously considered evidence, it is often difficult to see more than result-driven analysis.

It is most apparent that the courts are simply result-driven in cases in which the erroneous evidence carries quite a punch, but the properly admitted evidence is abundant. The 5:4 split in *Fulminante* is a case in point. Confessions are considered powerful evidence in criminal trials. Therefore, an erroneously admitted coerced confession is likely to carry great weight—so much, in fact, that four justices thought that such error should be a major league foul with automatic harm assessed.[49] In the end, five justices found that, applying harmless error analysis, the

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"grave doubt" about the harmlessness of an error must conclude that the error is not harmless. *Id.* at 436.

47. For a discussion of cases and comments on the Court's approaches, see Benjamin E. Rosenberg, *The Effect of Sullivan v. Louisiana on Harmless Error Analysis of Jury Instructions That Omit an Element of the Offense*, 29 RUTGERS L. J. 315 (1998).

48. I find it ironic that a "technical" foul in basketball is taken seriously while constitutional violations that are viewed as "technicalities" are scorned as inconsequential.

49. Arizona v. Fulminante, 499 U.S. 279, 288-95 (1990) (White, J., dissenting, joined by Justices Marshall, Blackmun, and Stevens).

coerced confession indeed contributed to the verdict.[50] It is striking that four justices would have found the coerced confession harmless error. Speaking for the dissenters, Justice Rehnquist wrote that the coerced confession was a "classic case of harmless error" because there was a second confession.[51] In contrast, Justice Kennedy, concurring to form a majority to reverse, wrote of the "indelible impact a full confession may have on the trier of fact . . . ."[52] The proper issue is not how much other evidence there is of the defendant's guilt, but rather whether the unconstitutionally obtained evidence affected the verdict. Surely Justice Kennedy is correct in stating it is highly likely a confession will carry enormous weight in the jurors' minds.

The same reasoning of the *Fulminante* dissenters, in easily finding error harmless, is apparent in most of the other harmless error cases. As noted in the last section, the Court in *Harrington v. California*[53] concluded that the erroneous admission of two co-defendant confessions in violation of the Confrontation Clause was harmless in light of the "overwhelming" evidence that Harrington was guilty of a robbery and murder.[54] Similarly, in lower court cases, error is often found to be harmless through an analysis of the amount of evidence against the defendant.[55] Thus, the focus on the properly admitted evidence, rather than on the effect of the erroneous evidence, simply turns the harmless error test into one of the "right" result.[56] This interpretation of the *Chapman* standard exacerbates the effect of the "no harm, no foul" approach. The harm almost never exists and, thus, the foul is irrelevant.

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50. *Id.* at 297-302 (Opinion by White, J., joined by Justices Blackmun, Marshall, Stevens, and Kennedy).

51. *Id.* at 312.

52. *Id.* at 313.

53. 395 U.S. 250 (1969).

54. *Id.* at 254.

55. *See, e.g.*, Chemerinsky, *supra* note 2, at 27 (documenting that the California Supreme Court found error harmless in 88/101 cases surveyed, including constitutional error); Harry T. Edwards, *To Err is Humar, But Not Always Harmless: When Should Legal Error Be Tolerated?*, 70 N.Y.U.L. REV. 1167, 1180-82 (1996) (discussing the increased use of harmless error in appellate decisions in general, although also commenting on a recent decline possibly due to construing the defendants' rights more narrowly which results in finding no error at all).

56. For excellent discussions of the Court's shift from the effect of the erroneous ruling to the guilt of the defendant, see David McCord, *Is Death "Different" for Purposes of Harmless Error Analysis? Should It Be?: An Assessment of United States and Louisiana Supreme Court Case Law*, 59 LA. L. REV. 1105 (1999) (assessing the cases and the Court's hybrid balancing approach); Charles S. Chapel, *The Irony of Harmless Error*, 51 OKLA. L. REV. 501 (1998) (proposing an "effect on the rights of the accused" test); Gregory Mitchell, *Against "Overwhelming" Appellate Activism: Constraining Harmless Error Review*, 82 CAL. L. REV. 1335 (1994) (documenting the outcomes of cases using a "contributes" test, an "overwhelming" test, and a "weighing" test); Marla L. Mitchell, *The Wizardry of Harmless Error: Brain, Heart, Courage Required When Reviewing Capital Sentences*, 4 KAN. J. L. & PUB. POL'Y 51 (Fall 1994) (reviewing the "affect test" and the "overwhelming test").

III. "No Harm, No Foul" as a Continuing Game Plan—*Neder v. United States*: A Bad Call

The cases involving a failure to instruct on an element of the crime have elevated the "no harm, no foul" policy over reasoned analysis. Although there is no verdict on an element of the crime in violation of the defendant's constitutional rights, the Court applies a harmless error analysis. The *Neder* case is the Court's most troubling moment. A serious, fundamental foul is called, but there is no penalty.

Mr. Neder was charged with various federal fraud crimes, tax fraud among them. The trial court failed to instruct the jury that they had to find materiality of false statements in the tax fraud case.[57] In fairness to the trial judge, he believed that materiality was an issue for the court and decided it accordingly. Subsequently, the Supreme Court held that materiality was a jury issue. The Court of Appeals for the Eleventh Circuit, reviewing Mr. Neder's conviction, found that the failure to instruct the jury on materiality was indeed error, but harmless.[58] The foul, as in *Sullivan*, was the violation of the defendant's right to a jury trial.

Writing for the majority, Justice Rehnquist did not hesitate to apply a "no harm, no foul" policy. Using both prior case law and equating a "fair" trial with a correct result, he easily did an end run around the lack of a jury verdict on an element of the crime. In the majority's view, a misdescribed element, a conclusory presumption, and an omitted element were all the same.[59] Because the Court had previously applied the harmless error doctrine to cases where there was no jury finding on an element because it was misdescribed or treated as a presumption, *a fortiori* a jury verdict on each element was not a prerequisite for harmless error analysis. The majority rejected the argument that the prior cases with harmless misdescribed or presumptive elements were limited to situations in which the jury had found the "functional equivalent" of those facts in the course of deciding the other elements.[60] Instead, the majority wanted a brighter line for distinguishing structural versus trial errors. The Court distinguished the erroneous beyond a reasonable doubt instruction in *Sullivan* as an instance in which the error invalidated the

57. Neder v. United States, 527 U.S. 1, 6 (1999). Neder also challenged the trial court's failure to instruct on materiality in the mail fraud, wire fraud, and bank fraud charges. Unlike materiality with the tax fraud charge, the Eleventh Circuit held that materiality was not an element of the other fraud charges. *Id.* at 7. The Supreme Court reversed, holding that materiality was an element of the other fraud crimes, but remanded for a determination of harmless error since the Eleventh Circuit had not yet addressed it. *Id.* at 25. On remand, the Eleventh Circuit found the failure to instruct harmless. United States v. Neder, 197 F.3d 1122, 1124 (11th Cir. 1999).

58. *Neder* 527 U.S. at 6-7.

59. *Id.* at 11-14.

60. *Id.* at 13-14.

entire verdict.[61] Moreover, the Court viewed a fundamentally unfair trial as "an unreliable vehicle for determining guilt or innocence."[62] A trial is not such an unreliable vehicle when there is "overwhelming" and "uncontroverted" evidence of the omitted element.[63] Justice Rehnquist made it quite clear that the absence of a jury verdict on an element does not in and of itself obviate the conviction. In the end, the Court expressly stated that it was balancing the defendant's right to a jury verdict on each element with a societal interest in convicting the guilty.[64]

Despite Justice Rehnquist's misguided version of harmless error, it is interesting that the majority states its holding narrowly. The Court finds the error harmless in *Neder* with the following language: "In this situation, where a reviewing court concludes beyond a reasonable doubt that the omitted element was uncontested and supported by overwhelming evidence, such that the jury verdict would have been the same absent the error, the instruction is properly found to be harmless."[65] The Court pointed out that Neder argued at neither the trial level nor at the appellate level that his false statement was immaterial. The Court further identified uncontroverted evidence at trial that the false statements regarding $5 million in income were material.[66] The Court's carefully limited holding thus leaves open room for an argument that an erroneously omitted element of a crime would only be harmless if the element were uncontested and supported by overwhelming evidence. The opinion further allows for the position that contesting the element at trial or on appeal would be sufficient to establish the harm.

In dissent, Justice Scalia pointed out the error of the majority's reasoning. He criticized the majority's approach of analyzing whether the "right" result was reached, rather than how the result was derived.[67] As in *Sullivan*, Justice Scalia emphasized that the defendant has a constitutional right to a jury determination of each element of the crime. Regardless of the amount of the evidence in the record demonstrating the missing element, if there is no actual jury determination of that element, the trial is flawed and must be reversed. Otherwise, the appellate court abrogates the constitutional right to a jury decision on that element.[68] Thus, the same principle applies here, when one element is omitted, as in *Sullivan*, when there was no jury decision beyond a reasonable doubt on any element of the crime. Just as the court cannot direct a guilty verdict against a defendant, neither can the court direct a verdict on any one element of the crime. Justice Scalia pointed out that the majority made a

61. *Id.* at 10-11.
62. *Id.* at 9.
63. *Id.* at 17.
64. *Id.* at 18.
65. *Id.* at 17.
66. *Id.* at 16.
67. *Id.* at 34 (Scalia, J., dissenting).
68. *Id.* at 38-9 (Scalia, J., dissenting).

specious distinction in stating that *Sullivan* was different because the entire verdict was defective, whereas only one element was missing here. He queried, then how many elements could be omitted?[69] In other words, one could not distinguish omitting one element, four elements, or all elements.[70] In each case, there would be no jury verdict on that element, in violation of the Constitution. Justice Scalia found the other cases cited by the majority to be distinguishable. Either the jury necessarily found the missing element beyond a reasonable doubt in its findings on the other elements[71] or on remand, harmless error should not be found.[72]

In the end, Justice Scalia chastised the Court for abusing the role of the appellate courts. Allowing an appellate court to decide guilt or innocence on an element of a crime "throws open the gate for appellate courts to trample over the jury's function."[73] In his analysis, consistent with his *Sullivan* opinion, Justice Scalia concluded that the failure to instruct on an element of the crime had to be structural error, which is automatically reversible. No amount of evidence could compensate for this procedural flaw, which invalidates the verdict by the jury on all elements. In this way, the flawed verdict is comparable to proceedings in which there is a verdict by an inadequate beyond a reasonable doubt instruction, a biased judge, or the absence of counsel. In each instance, the defendant is denied a right that casts the entire proceedings as fundamentally flawed. Although unheeded by the majority, Justice Scalia's analysis of the majority's "no harm, no foul" approach accurately identified the misconception of both the harm and the foul.

IV. The Harm and the Foul of "No Harm, No Foul" Jurisprudence

The irony of the catchy phrase "no harm, no foul" is that there is in fact a foul whether one is discussing sports or criminal trials. In sports

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69. *Id.* at 33 (Scalia, J., dissenting).

70. Recently, the Sixth Circuit was thoughtful enough, however, to distinguish *Neder* and find a *per se* reversible error when there was error in failing to instruct at all on a lesser included offense. *See* United States v. Monger, 185 F.3d 574 (6th Cir. 1999).

71. Justice Scalia indicates that this principle explains the *Roy*, *Carella*, and *Pope* decisions. *Roy* and *Carella* were remanded for a harmless error determination. *Neder*, 527 U.S. at 35-36 (Scalia, J., dissenting). Consistent with his *Neder* dissent, Justice Scalia's concurrences in those cases pointed out that there had to be a determination that the jury necessarily found the omitted element through its other findings before the error could be deemed harmless. *See* California v. Roy, 519 U.S. 2, 6-8 (1996); Carella v. California, 491 U.S. 263, 267-273 (1989); Pope v. Illinois, 481 U.S. 497, 504-05 (1987).

72. Justice Scalia also distinguished *Johnson v. United States*, 520 U.S. 461 (1997), on the basis that Johnson had waived his right to raise the absence of an instruction on an element by failing to request such an instruction at trial. In this type of case, Justice Scalia would view that error under a "plain error" standard, which inherently contains an element of demonstrating an effect on the proceedings. *Neder*, 527 U.S. at 34-35 (Scalia, J., dissenting); *see also* G. Fred Metos, *Harmless Error, Plain Error and Standards of Review Revisited*, 22 THE CHAMPION 45 (MAY 1998) (discussing *Johnson* and predicting the Court's decision in *Neder*).

73. *Neder*, 527 U.S. at 36 (Scalia, J., dissenting).

terminology, it means that we are not going to call the foul because there is insufficient harm to the team that was fouled.[74] In contrast, in a criminal trial, the foul is called on appeal, but the finding of no harm renders the foul inconsequential. Despite the difference in calling the foul, the sports reference is a fitting analogy for criminal trials if one assumes that the "no harm" part of the analysis is that the prosecution would have won anyway. This final score approach, however, is at odds with the underlying logic of the harmless error analysis.

The "no harm, no foul" approach seductively allows the court to look only at the amount of evidence the prosecution has stacked up against the defendant. As Justice Scalia has pointed out in case after case, the final score approach begs the question of how the game was played. And, in the case of a criminal trial, the Constitution is the rules book. The rules book requires that the defendant have a jury verdict on each element of the crime beyond a reasonable doubt. Thus, the cases involving a failure to instruct on an element, such as *Neder*, should be "textbook" examples of major league fouls.

Moreover, the "no harm, no foul" philosophy obscures the significance of the foul. The foul is constitutional error. In cases like *Neder*, the failure to require a finding of guilt beyond a reasonable doubt on all elements of the crime is an error that strikes at the heart of procedural fairness. It is not an insignificant play. Indeed, the foul is not contested; all referees (the Supreme Court justices) are in agreement that there is a foul. Just as in sports, however, if the court does not penalize the foul, for all practical purposes it did not occur.[75] Reminding ourselves that constitutional rights are in fact qualitatively different from fair play in a basketball game, it is unfortunate that the "no harm, no foul" approach lessens the importance of rights guaranteed to anyone facing a deprivation of liberty.

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74. Our common understanding of "no harm" as no harm to the advancement of the team fouled against may not have been the original intent of the framer of the phrase. According to the article on Chick-isms, *supra* note 4, the phrase meant that no foul was called despite *significant* physical contact with the offended player. This definition has nothing to do with the actual play in process. It implies that no foul was called because there was no permanent damage to the other player. Thus, the article refers to the phrase also as "no blood, no ambulance." By analogy, in a criminal proceeding, we would look at whether "blood" was drawn in the offensive contact with the defendant. This would put the focus on the blow to the defendant's rights rather than on the outcome of the trial. With that interpretation, one would surely find that "blood" was drawn in denying Neder a right to a jury verdict on an element of the crime.

75. In fact, when I first began discussing "no harm, no foul" with my sports-fanatic friends, several thought there truly was no foul in the sport. Upon further reflection, they realized that indeed there was a foul (or one would not need the phrase), but it was insignificant in the game. The phrase speaks volumes in terms of the psychology, however, that there might as well not have been any foul because there is no consequence for it. *See* Goldberg, *supra* note 2, at 432 ("[Harmless error doctrine] diminishes the level of protection provided by specific constitutional provisions . . . ."); *id.* at 437 n.145 (commenting that basketball changed into a "war zone" sport after the onset of a "no harm, no foul" approach); Edwards, *supra* note 55, at 1182 ("Courts sometimes openly decline to decide whether a defendant's rights have been violated, instead evading the issue by stating that any error that might have occurred was harmless.").

The harm of "no harm, no foul" is also problematic. The harm is misapplied on two levels. First, the courts define harm correctly but apply it incorrectly. Using the *Chapman* language, the courts correctly ask: can the court conclude that beyond a reasonable doubt, the constitutional error did not contribute to the verdict? However, the courts often apply a different test: was there enough evidence to convict the defendant beyond a reasonable doubt without the error? By relying upon the second question, the courts are able to find almost all error harmless. Second, the Court has asked the wrong question conceptually in the cases in which there is an incomplete verdict. Each level of misapplication deserves attention.

The first level of misapplication, the dissonance between the definition and the application, can be demonstrated with an example. Suppose that there is a rape-murder prosecution in which the evidence admitted at trial includes: the defendant's DNA, found at the scene of the crime; his fingerprints, found everywhere at the scene; the fact that he was the victim's estranged husband and jealous of her relationship with another man; the fact he had threatened her; and his confession to the crime. Now assume that, on appeal, the confession is found to be unconstitutionally coerced. If the question is whether there is enough evidence without the confession to conclude that the jury would have found the defendant guilty beyond a reasonable doubt, the answer is probably yes. If, however, the question is whether the erroneously admitted confession contributed to the verdict in a significant way, it is much more difficult to conclude that the error was harmless. The confession was probably a highly important piece of evidence to the jury, as the defendant's own words. In that case, the confession most certainly "contributed" to the verdict, even though there is a significant amount of properly admitted evidence. The *Chapman* standard recognizes that the defendant, guilty or innocent, is entitled to the procedural fairness of a verdict that is not affected by the erroneous evidence.[76] The perversion of the *Chapman* standard into an overwhelming evidence test has pushed harmless error analysis to a final score approach to the fairness of criminal trials. Even if such an approach is appropriate in sports, it is inconsistent with the concept of providing every accused, even the

76. A good example of the Court applying the *Chapman* standard in terms of the effect on the verdict, rather than focusing on the sufficiency of the evidence, occurred in Satterwhite v. Texas, 486 U.S. 249 (1988). In *Satterwhite*, the Court held that the admission of a psychiatrist's testimony in the penalty phase of a capital case, in violation of the defendant's Sixth Amendment right to counsel, was not harmless. The Court noted: "The question, however, is not whether the legally admitted evidence was sufficient to support the death sentence, which we assume it was, but rather, whether the State has proved 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" *Id.* at 258-59. For a further critique of the use of harmless error analysis in the penalty phase of capital cases, see McCord, *supra* note 56; Linda E. Carter, *Harmless Error in the Penalty Phase of a Capital Case: A Doctrine Misunderstood and Misapplied,* 28 GA. L. REV. 125 (1993).

guiltiest, with fundamentally fair proceedings.[77] Our criminal justice system is based on treating the accused with dignity, which in turn promotes respect for the system and its results. The final score approach to the harmless error doctrine drastically undermines the procedural fairness of a criminal trial by rendering virtually all error harmless and irrelevant.[78]

The second level of misapplication occurs when the wrong question is asked. The wrong question is posed in those cases in which the error results in an incomplete verdict. As Justice Scalia has asserted, it is illogical to attempt to assess the effect of an error on a verdict when there is only a fictional verdict.[79] This is not even instant replay material; the play never happened. The "no harm, no foul" approach applied in these cases does more than distort the fundamental fairness of the trial—it completely disintegrates the proceeding. There is no proceeding to be replayed and reviewed for the effect of the error. Whether there is a failure to instruct on an element of a crime or a misdescription of an element, the critical question is whether or not the jury actually found the existence of the element beyond a reasonable doubt. If the jury did not address the facts in question under the beyond a reasonable doubt standard, even if evidence of the missing facts was presented at trial, there is no actual verdict on the element as guaranteed by the Constitution. If an appellate court steps in to review such an incomplete verdict under harmless error analysis, the appellate court is acting as a fact-finder.[80] The division between the trial court as fact-finder and the appellate court as reviewer of questions of law is a fundamental precept in our system. Any inroad on these basic roles invades the balance between these two levels of the court system. Moreover, the defendant is

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77. *See* Stacy & Dayton, *supra* note 5, at 88-91, 127 (suggesting that there are "truth-impairing" and "truth-neutral" rights; the latter should not be dependent on the "correct result").

78. *See* Chapel, *supra* note 56, at 540 ("[A]ppellate courts . . . routinely deem harmless lower court actions of breaking rules in order to affirm convictions and sentences of those caught breaking rules.").

79. *See* Sullivan v. Louisiana, 508 U.S. 275, 279-80 (1993).

80. An example of the logical, but unfortunate, extension of *Neder* to even more extensive appellate fact-finding occurred in *United States v. Jackson*, 196 F.3d 383 (2d Cir. 1999), *cert. denied*, Jackson v. United States 530 U.S. 267 (2000), in which the Second Circuit found harmless error even though the defendant *contested* the missing element. In the criminal extortion prosecution of the woman who claimed to be Bill Cosby's daughter, the trial court failed to instruct that a "threat to reputation" must be "wrongful." *Id.* at 387. The threat is wrongful if "the defendant has no plausible claim of right to the money demanded or if there is no nexus between the threat and the defendant's claim." *Id.* Although finding error in the failure to instruct on the element of "wrongful," the court found that the jury would have convicted even if they had considered the evidence the defendant did introduce relevant to this point and the evidence that she would have offered on this element if permitted to do so. *Id.* at 388. In essence, the Second Circuit granted a directed verdict on this element to the government, finding the facts insufficient. For an excellent discussion of this case, see Kathryn Keneally, *White-Collar Crime: More Harm Done by the Harmless Error Rule*, 24 THE CHAMPION 49 (Jan./Feb. 2000). *See also* United States v. Gracidas-Ulibarry, 231 F.3d 1188,1197 (9th Cir. 2000) (finding failure to instruct on specific intent element harmless where defendant contested the element but, according to the court, had insufficient evidence to support the defense).

guaranteed by the Constitution that a jury, if he or she so wishes, will decide the issue of guilt or innocence. As Justice Scalia has repeatedly pointed out to the Court (usually, unfortunately, to no avail), the framers of the Constitution valued the right to a jury trial as one of the most basic guarantees.[81] The ease of the "no harm, no foul" approach has blinded the Court to the importance of conceptual clarity and the protection of constitutional rights.

V. Conclusion

Quick and easy phrases are vulnerable to misconceptions. For starters, one must understand the reference in order to get the point. If one does not watch football, for example, then an "end run" around an issue will not convey the point that the court avoided handling the issue directly. Even a "slam dunk" requires an understanding that it is a solid, easy basket in order to transfer the meaning to a legal issue that is clear-cut.[82] "No harm, no foul" as a description of harmless error is catchy, but obscures the underlying concepts. Like the sports term, the legal phrase harmless error has become a catch phrase for the Court. And, as with other quick references, the Court is no longer fully evaluating the meaning and purpose of harmless error analysis. *Neder* exemplifies the misguided transformation of harmless error analysis into a "no harm, no foul" approach, both in terms of jurisprudential philosophy and erroneous application.

The *Neder* decision, and the Court's overall approach to harmless error analysis, fail to appreciate the underlying concepts. The catch phrase "no harm, no foul" is apt in a literal sense to the Court's decisions, as well as in exemplifying a lack of analysis. The decision in *Neder* is probably a "no harm, no foul" situation in terms of Neder's actual guilt. It is hard to argue that a $5 million error is not material on a tax return. The problem is that the "harm" is not the guilt or innocence of Neder. The harm is whether or not Neder received a fundamentally fair trial. A fundamentally fair trial includes the right to a jury verdict on all elements of the crime. Neder did not have such a verdict. The harmless error doctrine should ask if the error contributed to the verdict. In Neder's case, the answer is that there is no verdict on the element. Therefore, the question is pointless because the predicate of a verdict is missing.

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81. *See, e.g.*, Neder v. United States, 527 U.S. 1, 30-32 (1999) (Scalia, J., dissenting).

82. Over the years, I have found that international students are at the most disadvantage with sports references. I have explained "slam dunk," for example, to foreign students. Of course, other culturally bound references can also be confusing. I referred to an issue as a "red herring" one day in class and was asked about it by two foreign students afterwards. I explained the concept, but could not answer their question about the source of the phrase. Thinking that I should know the answer, I searched until I found the source. If you feel the need to know the source and cannot find it, call me and I will tell you what I found. In the sporting event of law school, this is called "hiding the ball."

The Supreme Court must be careful that it does not approach trials as one would referee a sports event. Although there are some similarities between winning a game and prevailing at trial, the harmless error analysis was not intended to focus only on the final score of guilt or innocence. The role of the appellate courts is to assess whether the error contributed to the verdict, not whether they agree with the verdict based on the evidence in the record. A shift to whether the result was correct infringes on the defendant's right to a jury verdict in any case, but is especially apparent if there is no jury verdict on an element of the crime. In a case such as *Neder*, the Court has ignored the principled approach required by the Constitution and abridged Neder's right to a jury trial. "No harm, no foul" may accurately describe the Court's approach, but there is in fact both a harm and a foul that deserve a correct call. The "no harm, no foul" approach deserves rethinking and revision. The constitutional fouls are significant and the harm should be analyzed in terms of the fundamental procedural rights of the defendant.