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# THE WAYNE LAW REVIEW

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## THE RIDDLE OF HARMLESS ERROR IN MICHIGAN

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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. . . . 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.

Roger J. Traynor<sup>1</sup>

## I. INTRODUCTION

The concept of harmless error and its mirror image, harmful error, generally are given short shrift in law school. Despite the pragmatic importance of the subject, most law school professors and casebooks devote to it little, if any, time,<sup>2</sup> other than to briefly inform students that harmless error will not be grounds for appellate reversal and that harmful error is error that affects the "substantial rights" of the parties.<sup>3</sup> The reasons for this intellectual

1. ROGER J. TRAYNOR, *THE RIDDLE OF HARMLESS ERROR* at ix (1970).

2. *See, e.g.*, JON R. WALTZ & ROGER C. PARK, *CASES & MATERIALS ON EVIDENCE* 52-60 (8<sup>th</sup> ed. 1995) (discussing FRE 103(a) with no discussion on the harmless error rule).

3. *See* FED. R. EVID. 103(a) ("Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected."); FED. R. CIV. P. 61 ("No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties."); 28 U.S.C. § 2111 ("On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect

silence are varied. First, the law school courses most likely to address the topic—civil procedure and evidence—are overflowing with numerous conceptually challenging topics, leaving little pedagogical time for meaningful discussion of something as seemingly arcane as harmless error. Second, the law of harmless error itself is much more complex than it initially appears, making accurate and thorough instruction on the subject difficult, even assuming the time was available. The resulting intellectual void is both pervasive and perverse. Very few lawyers—and hence, judges—know much about harmless error, and their ignorance fuels perversities such as poor legal argument, unfocused reasoning, and seemingly inconsistent judicial decisions. In an attempt to fill the current intellectual void, this article explicates a broad-ranging, coherent synthesis of the law of harmless error in Michigan.

## II. WHAT IS HARMLESS ERROR?

Harmless error rules are, essentially, proxies for the level of assurance that an appellate court must have before it is permitted to set aside the judgment below. How a jurisdiction defines harmless error will thus reveal a good deal about how comfortable (or uncomfortable) policymakers in the jurisdiction feel about trial error, and correspondingly, how severe such error must be before it will result in appellate reversal. Harmless error analysis is thus perhaps best viewed as a quest to determine whether the trial resulted in a judgment that is manifestly just; if the judgment is deemed just, the error is deemed harmless, and the judgment will stand. In a very real sense, therefore, the standard for harmless error that is adopted will reflect a policy decision as to what constitutes "justice" at the trial level.

Attempting to define "justice" is, of course, a highly subjective task, since the term means different things to different people and varies further according to the facts. If we assume, therefore, that harmless error jurisprudence is designed to further trial court

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the substantial rights of the parties.").

"justice" (and hence to overturn only those judgments that are "unjust"), we must necessarily ask ourselves what we mean when we use the word "justice." Is our quest for justice, for example, limited to making sure that the *right result* was reached at the trial level? Or is justice about something *more*— such as ensuring that the trial was conducted in a fair manner? Does, in other words, the *appearance* of justice have value, even if the *result* reached at the trial level is most likely correct?

At early common law, getting the "right result" seemed almost irrelevant, and the appearance of justice reigned supreme. The "Exchequer Rule" of the early English courts— subsequently embraced by American courts—presumed that all trial errors were harmful, thus requiring a new trial.<sup>4</sup> In this atmosphere, reversals for relatively minor trial errors were commonplace. For example, in 1880, the California Supreme Court, in *People v. St. Clair*,<sup>5</sup> reversed a conviction for larceny because the indictment charged the defendant with entry into a building "with intent to commit larceny."<sup>6</sup> The court reasoned that because there was no such crime as "larceny," the indictment was fatally flawed, failing to charge the defendant with a specific criminal offense.<sup>7</sup> Likewise, in *Commonwealth v. Carney*,<sup>8</sup> the defendant was indicted for assaulting and beating James Hartman.<sup>9</sup> The Supreme Court of Virginia quashed the indictment because it failed to specify that the offense had been committed "against the peace and dignity of the Commonwealth."<sup>10</sup> The Wisconsin Supreme Court took a similar

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4. See WAYNER, LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE 995 (1985).

5. 56 Cal. 406 (1880).

6. *Id.* at 407.

7. See *id.* ("[T]his is more than a departure from an established form ; . . . it is a failure to describe an offense.")

8. 45 Va. (4 Gratt.) 546 (1847).

9. See *id.*

10. *Id.* at 547. See also *Williams v. State*, 27 Wis. 402 (1871) (reversing conviction for failure of indictment, which merely specified that offense was committed "against the peace of and dignity of the state").

view in *Williams v. State*,<sup>11</sup> reversing a conviction against a defendant indicted for an offense committed "against the peace of the State of Wisconsin."<sup>12</sup> The indictment's seemingly trivial failure to specify that the offense was "against the peace *and dignity* of the State" proved fatal.<sup>13</sup> Even as recently as 1945, the Texas Court of Criminal Appeals set aside a murder conviction due to a maddeningly technical error. In *Gragg v. State*,<sup>14</sup> the defendant's indictment charged him with killing his wife, Flora. Specifically, the indictment stated that Gragg had "drowned" his wife.<sup>15</sup> The error warranting reversal, according to the Texas Court of Criminal Appeals, was the failure of the indictment to allege the "means" by which the drowning was accomplished, other than merely water.<sup>16</sup>

These early common law cases exemplify an obsession with the *appearance* of justice, perhaps to the exclusion of justice itself. Focusing exclusively on the appearance of justice thus gave rise to a harmless error jurisprudence intolerant of even the most trivial trial court errors, indicating relative disinterest in ensuring that the *right result* was reached. Modern harmless error jurisprudence, on the other hand, is largely a reaction to the hyper-technical nature of early common law. As with most other areas of the law, the concept of harmless error fluctuates over time, much like a

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11. 27 Wis. 402 (1871).

12. *Id.*

13. *See id.* at 403 (emphasis added). The court based its decision on a provision of the Wisconsin Constitution which states that "all indictments shall conclude against the peace and dignity of the state." *Id.* It thus concluded that it had no authority to disregard what it viewed as a mandatory constitutional requirement. *See id.*

14. 186 S.W.2d 243 (Tex. Crim. App. 1945).

15. *See id.* at 247.

16. *See id.* Specifically, the court concluded that "there should be an averment of some overt act of the accused which brought about the drowning of his wife, if such act is known. To illustrate, that he pushed her from the bank into the water, or that he pushed her out of a boat into the water, or held her head under the water." *Id.*

pendulum swinging back and forth in reaction to the social and political forces around it. Thus, the harshness of early common law harmless error jurisprudence, with its emphatic emphasis on technicality over substance, marked one extreme of the pendulum swing. Ineluctably, perhaps, the pendulum is now swinging back, away from technicality, towards an emphasis on ensuring that trials reach the "right result." If the trial result appears substantively correct (i.e., in accordance with the evidence), the modern trend in Michigan is to let the trial judgment stand, even if the trial court committed errors—even constitutional errors—along the way.

### III. MICHIGAN STANDARDS OF HARMLESS ERROR

Modern harmless error analysis in Michigan involves consideration of four statutory and rule-based standards: (1) the criminal harmless error statute;<sup>17</sup> (2) the civil procedure rule;<sup>18</sup> (3) the rule of evidence;<sup>19</sup> and (4) the plain error doctrine.<sup>20</sup> Although there is great similarity in the language employed by each of these harmless error standards, the case law interpreting these rules and statutes varies widely.

In the criminal context, the applicable harmless error statute, section 26 of the Code of Criminal Procedure,<sup>21</sup> states that "[n]o judgment or verdict shall be set aside . . . in any criminal case . . . unless in the opinion of the court, after an examination of the entire cause, it shall *affirmatively appear that the error complained of has resulted in a miscarriage of justice.*"<sup>22</sup> In the civil context, the applicable rule of procedure states that "[a]n error . . . is not ground for granting a new trial, for setting aside a verdict, or for . . . otherwise disturbing a judgment or order, unless refusal to take this

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17. See MICH. COMP. LAWS § 769.26 (1979).

18. See MICH. CT. R. 2.613.

19. See MICH. R. EVID. 103(a).

20. See MICH. R. EVID. 103(d).

21. MICH. COMP. LAWS § 769.26 (1979).

22. *Id.* (emphasis added).



action appears to the court *inconsistent with substantial justice*.<sup>23</sup> For errors predicated on the admission or exclusion of evidence, the applicable rule states that "[e]rror may not be predicated upon a ruling which admits or excludes evidence *unless a substantial right of the party is affected*, and [a timely objection or offer of proof has been made.]"<sup>24</sup> Finally, the plain error doctrine states that "[n]othing in this rule [of evidence] precludes taking notice of *plain errors affecting substantial rights* although they were not brought to the attention of the court."<sup>25</sup>

Looking at the language of these four harmless error standards, a salient question arises: Is there any difference among them? Is there, in other words, a substantive distinction to be drawn between error which results in a "miscarriage of justice" (criminal statute) versus error that is "inconsistent with substantial justice" (civil procedure rule) versus error which affects a "substantial right" (evidentiary rulings)? All four standards appear to hinge upon the word "justice," which, as has already been pointed out, is a highly subjective term. But is an error which results in a "miscarriage of justice" (criminal statute) a qualitatively different beast than an error which is "inconsistent with substantial justice" (civil procedure rule)? Would all miscarriages of justice, in other words, necessarily be inconsistent with *substantial* justice? Or is the addition of the word "substantial" in the civil procedure rule intended to place greater limitations on reversals for harmful error in civil trials? Moreover, is an error which affects a "substantial right" (rule of evidence) somehow different in kind from an error which miscarries or substantially affects justice? Could, in other words, an error affect a substantial right of the parties and yet have no effect on "justice"?

These kinds of questions naturally arise in the mind of a well-trained lawyer who reads the four Michigan harmless error standards. One finds oneself wondering: Why have four standards? And moreover, why have four standards which use similar, but not

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23. MICH. CT. R. 2.613 (emphasis added).

24. MICH. R. EVID. 103(a) (emphasis added).

25. MICH. R. EVID. 103(d) (emphasis added).

identical, language? Undertaking research with the hope of uncovering a logical explanation for the differing language is in vain. There does not appear to be any conscious effort by the drafters of any of these four standards to harmonize the standards with the other standards, nor to explain why different language was chosen. Michigan lawyers and judges, therefore, are left to struggle over these diaphanous words with virtually no guidance as to their meaning—and struggle they have.

#### IV. UNPRESERVED ERROR

Any explanation of harmless error should begin with an explanation of its legal cousin, plain error. The Michigan Rule of Evidence dealing with plain error does not attempt to define the term; rather, it merely states that "[n]othing in this rule precludes taking notice of *plain errors affecting substantial rights* although they were not brought to the attention of the court."<sup>26</sup> From this language, it is evident that four requisites exist for plain error: (1) there must have been an error committed by the trial court; (2) the error must be "plain"; (3) the error must affect a "substantial right"; and (4) the error was not brought to the attention of the court (i.e., it was not preserved by an appropriate objection or offer of proof). Assuming that an error has been committed, and that the error was not properly preserved, the salient questions therefore become: (1) what do we mean by "plain"?; and (2) what do we mean when we say that the error must affect a "substantial right"?

In *People v. Grant*,<sup>27</sup> the Michigan Supreme Court cited with approval the U.S. Supreme Court's definition of "plain" error from *United States v. Olano*,<sup>28</sup> which concluded that "plain" error was "synonymous with 'clear' or, equivalently, 'obvious error.'"<sup>29</sup> The *Grant* court also concluded that an unpreserved error affects a "substantial right" if the error "could have been decisive of the

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26. *Id.*

27. 520 N.W.2d 123 (Mich. 1994).

28. 507 U.S. 725 (1993).

29. *Id.* at 734.

outcome or . . . [if the error] falls under the category of cases, yet to be clearly defined, where prejudice is presumed or reversal is automatic."<sup>30</sup>

Plain error thus emerges from *Grant* as an obvious error—plain for the world to see, even without a proper objection or offer of proof being made—that is potentially outcome decisive or presumptively prejudicial. Harmful error that is not properly preserved by the party will therefore be grounds for appellate reversal only if the error was so plain that proper preservation is not needed to facilitate appellate review, and the error is so prejudicial that it is likely outcome determinative. The focus in the context of plain error therefore appears to be with making sure the *right result* is reached (outcome determination), not a broader concern about preserving the appearance of justice.<sup>31</sup>

This narrower conception of harmful error is likely warranted by a couple of factors present in the plain error context that are not present in other harmful error contexts. First, because plain error is, by definition, error which has not been properly preserved by the party claiming error, the harmed party has, to a certain extent, "dirty hands"—a degree of culpability not normally present with other types of harmful error. The trial error, in other words, is partially the fault of the party claiming error because that party failed to voice an objection or make an offer of proof that would have allowed the trial court to make a proper ruling. Because the party claiming error thus shares culpability for the error, the plain

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30. *Grant*, 520 N.W.2d at 131.

31. Indeed, the *Grant* court cited with approval Chief Justice Rehnquist's statement in *United States v. Mechanik* that

The reversal of a conviction entails substantial social costs: it forces jurors, witnesses, courts, the prosecution, and the defendants to expend further time, energy, and other resources to repeat a trial that has already once taken place . . . Thus, while reversal "may, in theory, entitle the defendant only to retrial, in practice it may reward the accused with complete freedom from prosecution," and thereby "cost society the right to punish admitted offenders."

*Id.* at 130 (quoting *United States v. Mechanik*, 475 U.S. 66, 72 (1986) (citations omitted)).

error doctrine is designed to minimize appellate reversal in his favor to those situations where the error was likely outcome determinative. Second, because the error has not been properly preserved (through an objection or offer of proof), the appellate court will not have any record upon which to base its review. Rather, the appellate court necessarily has to rely upon the "obviousness" of the error and attempt to divine, as best it can, whether and to what extent the error may have affected the trier of fact. The lack of a record thus impedes the appellate court's ability to conduct an appropriate review, which, in turn, creates a hesitation to reverse in such situations absent a conviction by the appellate court that the error likely affected the outcome. Because of the inherent difficulty in reviewing an error that was not preserved below—and the fact that the difficulty was caused, in part, by the party raising the error on appeal—the standard for plain error is a parsimonious one focused on outcome determination. The culpability of the party claiming error also helps predict and explain who bears the burden of proving the elements of plain error on appeal. The *Grant* court adopted the position of the U.S. Supreme Court in *United States v. Olano*,<sup>32</sup> which made it clear that the party complaining of an unpreserved error bears the burden of proving that the error was both plain and potentially outcome determinative.<sup>33</sup>

Although the elements and burden of proof in plain error are relatively clear, the application of those elements and carrying the burden is not. Whether an unpreserved error is sufficiently "obvious" to warrant appellate review and whether it potentially affected the outcome are inherently complex questions upon which reasonable minds can, and often do, differ. Generalizations are difficult, other than perhaps to state that a court is more likely to find plain error in a criminal case (particularly involving an error affecting the accused's constitutional rights) than a civil case, and even then it is a relatively rare occurrence.<sup>34</sup> As with the rest of

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32. 507 U.S. 725 (1993).

33. See *Grant*, 520 N.W.2d at 131; *Olano*, 507 U.S. at 741.

34. See 1 MCCORMICK ON EVIDENCE 211-212 (4th ed. 1992).

harmless error jurisprudence, plain error analysis is heavily fact-dependent and difficult to define or predict. "In the end, precision seems beyond reach. Verbal formulae do little to help distinguish between ordinary and plain error in degree of seriousness or obviousness, nor to explain when errors adversely affect the integrity of the system . . . . Decisions finding plain error or rejecting claims of such error reflect little more than the conclusions reached."<sup>35</sup>

## V. CONSTITUTIONAL ERROR

An important distinction in harmless error jurisprudence is made between constitutional and non-constitutional error, each of which has its own legal standards and case law. A constitutional error is an error which results in the violation of the party's constitutional rights; a non-constitutional error does not. Constitutional errors that violate a party's federal (as opposed to state) constitutional rights—as the vast majority of constitutional errors do—oblige state courts to look to federal precedents explicating harmless error.<sup>36</sup> Constitutional errors, moreover, are intellectually bifurcated into two categories: (1) structural; and (2) non-structural errors.

### *A. Structural Constitutional Errors*

Structural constitutional errors have been described by the U.S. Supreme Court as "[a] structural defect [] in the constitution of the trial mechanism, which def[ies] analysis by 'harmless error' standards."<sup>37</sup> Furthermore, structural errors are "so basic to a fair trial" that they "can never be deemed as harmless."<sup>38</sup> As such, the U.S. Supreme Court has made it clear that, given their serious

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35. CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE 29-30 (2d ed. 1999).

36. See *Chapman v. California*, 386 U.S. 18, 24 (1967).

37. *Arizona v. Fulminante*, 499 U.S. 279, 309 (1991).

38. *Chapman*, 386 U.S. at 23.

nature, structural errors are the "exception and not the rule" amongst constitutional errors.<sup>39</sup> More importantly, once a constitutional trial error has been identified as structural, automatic reversal of the conviction is required.<sup>40</sup> Structural constitutional errors are, therefore, of such a serious nature that they will result in appellate reversal, regardless of whether the error was preserved at the trial level.

The basic description of structural error—an error that is never harmless—is, of course, circular; it essentially begs the question of how to *identify* such per se harmful errors. The Supreme Court's jurisprudence regarding structural errors is, therefore, a sort of "we know it when we see it" decision making found in other complex areas of the law, such as obscenity. But despite the diaphanous descriptions of structural error, the Court has provided pragmatic guidance by identifying several examples of structural errors, including the use of coerced confessions,<sup>41</sup> complete deprivation of the right to trial counsel,<sup>42</sup> the use of a biased or partial judge,<sup>43</sup> and directing a verdict against the criminal defendant.<sup>44</sup> Other examples include systematic exclusion of grand jurors who are of the same race as the defendant;<sup>45</sup> denial of the right of self-representation;<sup>46</sup> denial of the right to a public trial;<sup>47</sup> and providing a constitutionally improper reasonable doubt jury instruction.<sup>48</sup>

### *B. Non-structural Constitutional Errors*

Not all constitutional errors, however, require automatic reversal. Non-structural constitutional errors may be—indeed, often

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39. See *Rose v. Clark*, 478 U.S. 570, 578 (1986).

40. See *People v. Anderson*, 521 N.W.2d 538 (Mich. 1994).

41. See *Rose*, 478 U.S. at 577 (citing *Payne v. Arkansas*, 356 U.S. 560 (1958)).

42. See *id.* (citing *Gideon v. Wainwright*, 372 U.S. 335 (1963)).

43. See *id.* (citing *Tumey v. Ohio*, 273 U.S. 510 (1927)).

44. See *id.* at 578.

45. See *Vasquez v. Hillery*, 474 U.S. 254, 263-64 (1986).

46. See *McKaskle v. Wiggins*, 465 U.S. 168, 177 (1984).

47. See *Waller v. Georgia*, 467 U.S. 39, 49 n.9 (1984).

48. See *Sullivan v. Louisiana*, 508 U.S. 275, 281 (1993).

are—deemed harmless. Thus, although a party's constitutional rights may have been infringed, the categorization of certain constitutional errors as non-structural is a statement that such errors are not as inherently prejudicial and that "there can be no such thing as an error-free, perfect trial, and that the Constitution does not guarantee such a trial."<sup>49</sup>

A non-structural—or "trial type"—constitutional error has been described as an error that "occurs during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless."<sup>50</sup> As such, they do not require automatic reversal (as do structural errors), but rather are subject to a harmless error standard that requires the prosecutor to prove that the error was "harmless beyond a reasonable doubt."<sup>51</sup>

The "harmless beyond a reasonable doubt" standard for non-structural constitutional errors is a demanding one, requiring that the party seeking to affirm the trial verdict convince the appellate court that the error did not affect the verdict beyond a reasonable doubt. The presumption, therefore, is that non-structural constitutional errors are prejudicial, and the prosecutor bears a heavy burden of convincing the appellate court otherwise. Given the relative gravity of the error involved, the "beyond a reasonable doubt" standard for non-structural constitutional error is thus a compromise between the harshness of the automatic reversal rule for structural error and the laxity of lesser standards (e.g., "more probable than not") that would result in a greater number of affirmances. The "beyond a reasonable doubt" standard thus indicates that the appearance of justice is important, just not as important in the structural error context.<sup>52</sup>

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49. *United States v. Hasting*, 461 U.S. 499, 508-09 (1983) (citing *Brown v. United States*, 411 U.S. 223, 231-32 (1973)).

50. *Fulminante*, 499 U.S. at 307-08.

51. *Chapman*, 386 U.S. at 24.

52. *Accord LAFAVE & ISRAEL*, *supra* note 4, at 1006 (concluding that the *Chapman* "beyond a reasonable doubt" standard "clearly rejected a 'correct result' test [for harmless error].").

Most constitutional trial errors are thus non-structural in nature, particularly those constitutional errors involving the admission or exclusion of evidence, and are therefore not subject to automatic reversal. The U.S. Supreme Court has identified numerous examples of non-structural errors, including: the admission of a statement to a police officer in violation of the defendant's Sixth Amendment right to counsel;<sup>53</sup> denial of an accused's right to cross-examination;<sup>54</sup> comments by the prosecution, in violation of the Fifth Amendment right against self-incrimination, regarding an accused's failure to testify;<sup>55</sup> the admission of a statement by one defendant identifying and incriminating another (in violation of the *Bruton* doctrine);<sup>56</sup> the admission of evidence seized in violation of the Fourth Amendment;<sup>57</sup> and the admission of involuntary confessions.<sup>58</sup> Lower courts have expanded the list of non-structural errors to include such things as the admission of hearsay in violation of the Sixth Amendment Confrontation Clause;<sup>59</sup> the admission of statements obtained in violation of an accused's Fifth Amendment *Miranda* rights;<sup>60</sup> and the admission of the post-*Miranda* silence of an accused.<sup>61</sup>

One of the most significant Michigan cases involving non-structural constitutional error is a 1994 decision by the Michigan Supreme Court, *People v. Anderson*.<sup>62</sup> In *Anderson*, the defendant was charged with first degree criminal sexual conduct against his nine year-old daughter.<sup>63</sup> Shortly after the defendant's arrest (and

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53. See *Milton v. Wainwright*, 407 U.S. 371, 372-73 (1972).

54. See *Delaware v. Van Arsdall*, 475 U.S. 673, 683-84 (1986).

55. See *United States v. Hasting*, 461 U.S. 499, 510-12 (1983).

56. See *Brown v. United States*, 411 U.S. 223, 231-32 (1973).

57. See *Chambers v. Maroney*, 399 U.S. 42, 53 (1970).

58. See *Fulminante*, 499 U.S. at 310.

59. See, e.g., *United States v. Simmons*, 923 F.2d 934, 944 (2d Cir. 1991).

60. See, e.g., *Campaneria v. Reid*, 891 F.2d 1014, 1022 (2d Cir. 1989).

61. See, e.g., *United States v. Gonzalez*, 921 F.2d 1530, 1549-50 (11th Cir. 1991).

62. 521 N.W.2d 538 (Mich. 1994).

63. See *id.* at 540.



after his *Miranda* rights had been given), the defendant informed an officer that he had had "sexual thoughts about his daughter."<sup>64</sup> The prosecutor at trial attempted to introduce this post-arrest inculpatory statement; defense counsel objected to the statement's admission on grounds that the statement was obtained in violation of the defendant's right to counsel.<sup>65</sup> The trial judge held a mid-trial evidentiary hearing, overruled the objection, and admitted the statement.<sup>66</sup> The Michigan Court of Appeals affirmed the trial judge's ruling in an unpublished, per curiam decision.<sup>67</sup>

The Michigan Supreme Court unanimously reversed the defendant's conviction.<sup>68</sup> The court agreed that the defendant's Sixth Amendment rights were violated,<sup>69</sup> yet the court found that this error was non-structural in nature and hence, subject to a harmless "beyond a reasonable doubt" standard.<sup>70</sup> Applying this standard to the case at bar, the court characterized the erroneously admitted statement as "an inculpatory and highly prejudicial admission"<sup>71</sup> and reasoned that, given the effect of the statement on the defendant's credibility, it could not conclude "beyond a reasonable doubt that this inadmissible evidence did not tip the scale in favor of the prosecution and contribute to the jury's verdict."<sup>72</sup>

### *C. Constitutional Errors: Direct vs. Habeas Review*

Another important distinction to be drawn in the area of constitutional error is the difference between errors complained of on direct review versus those complained of on habeas corpus

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64. *Id.* at 541 (emphasis omitted).

65. *See id.* at 542.

66. *See id.* at 541.

67. *See id.* at 542, n.18.

68. *See id.* at 545-46.

69. *See id.* at 544.

70. *See id.* at 545.

71. *Id.*

72. *Id.* at 546.

review. The U.S. Supreme Court's five-four decision in *Brecht v. Abrahamson*<sup>73</sup> delineates the significance of this distinction. *Brecht* involved an instance of non-structural constitutional error—specifically, the prosecutorial use of post-*Miranda* silence to impeach the criminal defendant.<sup>74</sup> The Court was specifically asked to decide whether the "harmless beyond a reasonable doubt" standard<sup>75</sup> pronounced in *Chapman v. California* for non-structural constitutional error was the appropriate standard for use in reviewing such errors on habeas, as opposed to direct, review. A majority of the Court held that the *Chapman* "harmless beyond reasonable doubt" standard is inapplicable on habeas review; the proper standard in such cases comes instead from *Kotteakos v. United States*,<sup>76</sup> which held that error is harmful if it has a "substantial and injurious effect or influence in determining the jury's verdict."<sup>77</sup> Thus, habeas petitioners are not entitled to relief based upon trial court errors "unless they can establish that [such error(s)] resulted in 'actual prejudice.'"<sup>78</sup>

The *Brecht* Court reasoned that the "*Kotteakos* harmless error standard is better tailored to the nature and purpose of collateral review than the *Chapman* standard, and application of a less onerous harmless-error standard on habeas promotes the considerations underlying our habeas jurisprudence."<sup>79</sup> Specifically, because convictions being reviewed collaterally are "presumptively correct," the Court concluded that imposing a heavy burden on the prosecution to prove that the error was harmless beyond a reasonable doubt would "undermine[] the States' interest in finality and infringe[] upon their sovereignty over criminal matters.

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73. 507 U.S. 619 (1993).

74. The use of post-*Miranda* silence of an accused was held to violate the Constitution in *Doyle v. Ohio*, 426 U.S. 610 (1976). Numerous lower courts have held *Doyle* errors to be non-structural in nature. See *Gonzalez*, 921 F.2d at 1550; *Leecan v. Lopes*, 893 F.2d 1434 (2d Cir. 1990).

75. *Chapman*, 386 U.S. at 24.

76. 328 U.S. 750 (1946).

77. *Id.* at 776.

78. *Brecht*, 507 U.S. at 637.

79. *Id.* at 623.

Moreover, granting habeas relief merely because there is a 'reasonable probability' that trial error contributed to the verdict . . . is at odds with the historic meaning of habeas corpus—to afford relief to those whom society has 'grievously wronged.'<sup>80</sup>

The language in *Brecht* thus suggests that the burden of proving harmfulness of error on collateral review should not rest with the prosecution but with the habeas petitioner. Indeed, three dissenters in *Brecht*<sup>81</sup> explicitly noted this intimation, suggesting that the majority's holding does, in fact, place the burden of proving a "substantial and injurious effect" upon on the habeas petitioner.<sup>82</sup> Justice Stevens, however, did not agree with this portion of the majority's ruling, stating in his concurrence that the *Kotteakos* standard embraced by the majority "places the burden on prosecutors to explain why those errors were harmless."<sup>83</sup> Justice Stevens' dissension on the issue of burden of proof is important because it transforms the apparently "majority" statements into mere plurality statements. Stevens, after all, was one of the five Justices comprising the *Brecht* majority; his disagreement on the issue of burden of proof thus left only four Justices to support the proposition that the burden of proof should be placed upon the habeas petitioner.

In 1995, the U.S. Supreme Court resolved the ambiguity in *Brecht* regarding the burden of proof on habeas review. In *O'Neal v. McAninch*,<sup>84</sup> a six-three decision, the Court acknowledged that *Brecht* left unresolved the issue of who bears the burden of proof.<sup>85</sup> Interestingly, however, the *O'Neal* Court explicitly stated that it did not believe that habeas review of constitutional error should be expressed in terms of a "burden of proof."<sup>86</sup> Rather, because habeas

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80. *Id.* at 637.

81. The four dissenters were Justices White, Blackmun, and Souter. *Id.* at 644. Justice O'Connor filed a separate dissent.

82. *See id.* at 647 (White, J., dissenting).

83. *Id.* at 640 (Stevens, J., concurring) (emphasis added).

84. 513 U.S. 432 (1995).

85. *See id.* at 438-39.

86. *Id.* at 436 ("As an initial matter, we note that we deliberately phrase the

review of constitutional trial error involves the application of a legal standard to a trial record, the Court concluded that it was "conceptually clearer for the [appellate] judge to ask directly, 'Do I, the judge, think that the error substantially influenced the jury's decision?' than for the [appellate] judge to try to put the same question in terms of proof burdens (e.g., 'Do I believe the party has borne its burden of showing . . .?')."87

*O'Neal* thus makes it clear that, if an appellate judge is in "grave doubt" as to whether the error had a "substantial and injurious effect or influence in determining the jury's verdict," the judge must conclude that the error was harmful and grant habeas relief.<sup>88</sup> In this manner, *O'Neal* appears to establish a rule of thumb for close cases. If the appellate judge looks at the trial record and finds it "evenly balanced" such that he cannot definitively determine if the error affected the verdict or not, *O'Neal* instructs the appellate judge to err on the side of the accused and grant the habeas petition.<sup>89</sup>

*O'Neal's* rule—requiring that close cases be decided in favor of the habeas petitioner—thus effectively operates in the same way as if the burden of proof were placed upon the prosecutor. In other words, if the Court had chosen to explicitly place the burden of proof upon the prosecutor, a record in evidentiary equipoise would mean that the prosecutor had failed to carry his burden of proof, and the habeas petition would be granted. It is curious, therefore, why the Court appeared so adamant about avoiding the "burden of proof" label, when the pragmatic outcome of the *O'Neal* decision is the same as placing the burden on the prosecutor.<sup>90</sup> The

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issue in this case in terms of a judge's grave doubt, instead of in terms of 'burden of proof.')

87. *Id.* at 436-37.

88. *See id.* at 435-36.

89. *See id.* at 437 ("The case may sometimes arise, however, where the record is so evenly balanced that a conscientious judge is in grave doubt as to the harmlessness of an error. This is the narrow circumstance we address here.") (citation omitted).

90. *Accord* *Sinnott v. Duval*, 139 F.3d 12, 15 (1st. Cir. 1998).

avoidance of the "burden of proof" label has also proven difficult for lower courts, which appear to think instinctively in such terms. After *O'Neal*, it is not unusual for lower courts still to address habeas cases in terms of burdens of proof and—even more interestingly—to place the burden upon the habeas petitioner.<sup>91</sup>

In the end, adopting the *Kotteakos* standard rather than the *Chapman* standard for harmless error on habeas review is, perhaps, more of a semantic than substantive difference. Either standard requires a large degree of judgment which is difficult, if not impossible, to express with precision. As Justice O'Connor pointed out in her dissent in *Brecht*, "*Kotteakos*, it is true, is somewhat more lenient; it will permit more errors to pass uncorrected. But that simply reduces the number of cases in which relief will be granted. It does not decrease the burden of identifying those cases that warrant relief."<sup>92</sup> As Justice Stevens shrewdly noted in his concurrence in *Brecht*, "In the end, the way we phrase the governing standard is far less important than the quality of the judgment with which it is applied."<sup>93</sup>

## VI. NON-CONSTITUTIONAL ERROR

### A. Civil Cases

The harmless error standard for civil cases is found in Michigan Court Rule 2.613, which uses an "inconsistent with substantial

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91. See, e.g., *Murr v. United States*, 2000 U.S. App. LEXIS 123, at \*33 (6th Cir. 2000) ("To warrant habeas relief because of incorrect jury instructions, Petitioner must show that the instructions, as a whole, were so infirm that they rendered the entire trial fundamentally unfair."); *United States v. Chavez*, 193 F.3d 375, 379 (5th Cir. 1999) ("Under [the *Brecht*] standard, habeas petitioners may obtain plenary review of their constitutional claims, but they are not entitled to habeas relief based on trial error unless they can establish that it resulted in actual prejudice."); *Dearth v. Hickman*, 1999 U.S. Dist. LEXIS 5278, at \*10 (N.D. Calif. 1999); *Kouretas v. Prunty*, 1998 U.S. Dist. LEXIS 2881, at \*5 (N.D. Calif. 1998).

92. *Brecht*, 507 U.S. at 656 (O'Connor, J., dissenting).

93. *Id.* at 643 (Stevens, J., concurring).

justice" standard.<sup>94</sup> A recent decision of the Michigan Supreme Court, *Merrow v. Bofferding*,<sup>95</sup> illustrates the application and meaning of harmless error in civil litigation. In *Merrow*, the plaintiff, a tenant, sued his landlord after sustaining injuries when his arm went through a glass storm door at the residence.<sup>96</sup> The plaintiff's legal theory was that the landlord was negligent in installing or retaining the glass storm door, which the landlord knew or should have known presented a hazard to residents and their guests.<sup>97</sup> The plaintiff claimed that his injury was caused when the storm door, which had just been opened, began to close upon his infant daughter.<sup>98</sup> In an effort to stop the door from hitting his daughter, the plaintiff stuck out his arm, shattering the plate glass, and causing extensive injury to the plaintiff.<sup>99</sup>

The landlord's conjecture as to what caused the plaintiff's injuries was quite different. Specifically, at trial the landlord offered into evidence the hospital record of the plaintiff's injury, which stated that the plaintiff "was involved in a fight with his girlfriend and subsequently put his right arm through a plate glass window."<sup>100</sup> This evidence, argued the landlord, indicated that the plaintiff's injury had not been caused by the landlord's negligence, but rather by the plaintiff's own intervening act.<sup>101</sup>

The plaintiff in *Merrow* objected to the admission of the hospital record on grounds of hearsay.<sup>102</sup> Specifically, the plaintiff argued that the document: (1) was not made for purposes of diagnosis or treatment as required under the medical records

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94. "An error . . . is not ground for granting a new trial, for setting aside a verdict, or for . . . otherwise disturbing a judgment or order, unless refusal to take this action appears to the court *inconsistent with substantial justice*." MICH. CT. R. 2.613 (emphasis added).

95. 581 N.W.2d 696 (Mich. 1998).

96. See *id.* at 697.

97. See *id.* at 698.

98. See *id.* at 697.

99. See *id.* at 697-98.

100. *Id.* at 698 (emphasis omitted).

101. See *id.*

102. See *id.*

hearsay exception;<sup>103</sup> and (2) was not "trustworthy" enough to qualify under the business records hearsay exception.<sup>104</sup> The trial court admitted the hospital record under the hearsay exception for business records.<sup>105</sup> The jury then returned a special verdict in favor of the landlord, finding that the landlord was negligent but concluding that the landlord's "negligence was *not* the proximate cause of the plaintiff's injury."<sup>106</sup>

The plaintiff appealed the judgment, raising as a point of error the trial court's admission of the hospital record. A divided panel of the Michigan Court of Appeals, in an unpublished opinion, reversed the judgment, concluding that the trial court had abused its discretion in admitting the hospital record under the business records hearsay exception.<sup>107</sup> The Michigan Supreme Court agreed to review the decision of the court of appeals and, in a five-two decision, ruled in favor of the plaintiff.<sup>108</sup> The court concluded that the trial court had committed error by admitting the hospital record, which contained hearsay within hearsay,<sup>109</sup> the document itself being admissible as a business record,<sup>110</sup> but the statement *within* the hospital record—to the effect that the plaintiff "had a fight with his girlfriend"—*did not* qualify for any hearsay exception.<sup>111</sup>

The trial court's error in admitting the hearsay hospital record was, moreover, harmful error, according to the Michigan Supreme Court.<sup>112</sup> The court concluded that the admission of the hospital record affected a "substantial right" of the plaintiff because the hospital record was the key piece of evidence supporting the landlord's theory that the plaintiff's injury was not accidental, but

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103. *See id.*; *see also* MICH. R. EVID. 803(4).

104. *See Merrow*, 581 N.W.2d at 698; *see also* MICH. R. EVID. 803(6).

105. *See Merrow*, 581 N.W.2d at 699.

106. *Id.* at 700 (emphasis added).

107. *See id.*

108. *See id.*

109. *See id.*

110. *See id.*

111. *See id.* at 701.

112. *See id.* at 704.

deliberate.<sup>113</sup> Without the hospital record, in other words, the landlord clearly could not have convinced the jury to find that the landlord's negligence was not the proximate cause of the plaintiff's injury. Moreover, the court pointed out that the special verdict form used by the jury clearly revealed the impact that the hospital record had on the jury.<sup>114</sup> Since the jury's special verdict found the landlord negligent, but further found that the landlord's negligence was not the proximate cause of plaintiff's injury, the jury must have believed the statement contained in the hospital record that the plaintiff had been "involved in a fight with his girlfriend and subsequently put his right arm through a plate glass window."<sup>115</sup> Given that there was virtually no other evidence to support the landlord's theory and the jury's conclusions as revealed by the special verdict form, the Michigan Supreme Court concluded that the erroneous admission of the hospital record had affected a substantial right of the plaintiff by affecting the outcome of the jury's verdict.<sup>116</sup>

In an earlier decision of the Michigan Supreme Court, *Ilins v. Burns*,<sup>117</sup> two cars collided, resulting in a negligence suit between the drivers.<sup>118</sup> No ticket was issued to either driver; however, at trial, the defense counsel, on direct examination, asked his client whether she had received a ticket after the collision (to which she answered no).<sup>119</sup> The plaintiff's counsel objected to this question on relevancy grounds and requested a mistrial, which the trial judge denied.<sup>120</sup> A police officer then took the stand, and defense counsel asked the officer if a ticket was issued after the collision.<sup>121</sup> Before the officer had a chance to answer the question, plaintiff's counsel

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113. *See id.*

114. *See id.*

115. *Id.* at 698 (emphasis added).

116. *See id.* at 704.

117. 201 N.W.2d 624 (Mich. 1972).

118. *See id.* at 625.

119. *See id.* at 625-26.

120. *See id.* at 626.

121. *See id.* at 626-27.



again objected to such questioning.<sup>122</sup> The trial judge sustained the plaintiff's objection and instructed the jury "not to consider in your deliberations whether any traffic tickets were or were not issued to either driver."<sup>123</sup> The jury returned a verdict in favor of the defendant<sup>124</sup> and plaintiff appealed, citing as error the trial judge's failure to grant a mistrial based upon the defense counsel's prejudicial questions relating to whether a ticket was issued.<sup>125</sup>

The Michigan Court of Appeals agreed with the plaintiff that defense counsel's questions had a "prejudicial effect," but nonetheless concluded that the trial judge's failure to grant the mistrial motion was harmless error.<sup>126</sup> Specifically, the court concluded that the trial judge's instruction to disregard the questions provided an adequate cure for the error.<sup>127</sup>

The Michigan Supreme Court reversed, in favor of the plaintiff, stating that "[o]nce prejudicial error is found, the cases call for reversal *regardless of whether the trial judge gave an instruction in an attempt to cure the error.*"<sup>128</sup> The court further clarified that there are three relevant factors to consider in determining whether a trial error is "prejudicial" (i.e., harmful):

- (1) "the excessiveness or unfairness of the verdict;"
- (2) the "intent of counsel in introducing [the] evidence;" and
- (3) "whether the evidence went to the substantive issues of the case."<sup>129</sup>

Thus, the court concluded that if the erroneously admitted testimony is inadvertent, the error is not repeated, and proper curative instructions are provided, the court "would uphold the

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122. *See id.*

123. *Id.* at 627.

124. *See id.*

125. *See id.*

126. *See id.*

127. *See id.*

128. *Id.* at 628 (emphasis added).

129. *Id.*

assessment of a trial judge that the error, though potentially prejudicial, was harmless."<sup>130</sup>

Applying this reasoning to the case at bar, the Michigan Supreme Court held that the trial error was *harmful* because defense counsel's questioning was "deliberate and not an incident that inadvertently occurred"<sup>131</sup> and the offensive line of questioning was repeated, thereby increasing the likelihood that an instruction would not cure the prejudicial effect upon the jury.<sup>132</sup> Thus, in the context of civil litigation, *Ilins* instructs that the provision of jury instructions to disregard erroneously admitted evidence will often, but not always, cure error.<sup>133</sup> However, if the error is deliberate and/or repeated, the chances substantially increase that the error is reversible (i.e., harmful), even if a curative instruction is provided.

### *B. Criminal Cases*

In Michigan, a special statute exists to define harmless error in criminal cases: "No judgment or verdict shall be set aside . . . unless . . . after an examination of the entire cause, it shall *affirmatively appear* that the error complained of has resulted in a *miscarriage of justice*."<sup>134</sup> The criminal harmless error statute is thus differentiated from its civil counterpart<sup>135</sup> by the addition of the mandate that the error complained of "affirmatively appear" to result in a miscarriage of justice. This phrase, as will be discussed more extensively below, has been interpreted by the Michigan Supreme Court to have significant meaning. Moreover, the criminal

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130. *Id.*

131. *Id.*

132. *See id.*

133. Justice Jackson once said that the idea that curative instructions can cure otherwise prejudicial error is a "naive assumption" that "all practicing lawyers know to be unmitigated fiction." *Krulewitch v. United States*, 336 U.S. 440, 453 (1949) (Jackson, J., concurring).

134. MICH. COMP. LAWS § 769.26 (1979) (emphasis added).

135. "An error . . . is not ground for . . . setting aside a verdict . . . unless refusal to take this action appears to the court inconsistent with substantial justice." MICH. CT. R. 2.613.

and civil standards differ in their characterization of the degree of injustice required for the appellate court to set aside the judgment below. Specifically, the civil harmless error statute requires that the judgment below be "inconsistent with substantial justice" before the appellate court may characterize the error as harmful,<sup>136</sup> whereas the criminal harmless error statute states that the appellate court must find a "miscarriage of justice" before it may characterize the error as harmful.<sup>137</sup>

The question thus arises as to whether there is any substantive distinction to be drawn between an error that is "inconsistent with substantial justice" and one which causes a "miscarriage of justice." At first glance, the civil standard ("inconsistent with substantial justice") appears more conservative than the criminal standard ("miscarriage of justice") because the civil standard would permit appellate reversal only for those errors inconsistent with a concept of "substantial" justice, implying that "complete" justice is not required. In other words, if an error in a civil trial can be grounds for appellate reversal only upon a showing that "substantial" justice has not been achieved, does this imply that something less than complete justice is acceptable? In the criminal harmless error statute, by contrast, any error which results in a "miscarriage of justice" is grounds for appellate reversal, suggesting that "justice"—not just "substantial" justice—is the hallmark in the criminal context. This difference between "justice" and "substantial justice" is not merely semantics. Indeed, it intuitively makes sense for the criminal harmless error standard to be more liberal than its civil analogue. After all, more is at stake in a criminal trial than a civil trial; one's liberty or even life is on the line. Thus, a harmless error standard predicated on a "miscarriage of justice"—of any degree—indicates that society is unwilling to tolerate as many errors in a criminal trial as it would in a civil trial.<sup>138</sup>

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136. *See id.*

137. *See* MICH. COMP. LAWS § 769.26 (1979).

138. We recognize, of course, that some may argue that the use of the word "miscarriage" in the criminal harmless error standard suggests that not all errors of justice warrant reversal, and thus that the criminal harmless error standard

*1. People v. Lukity*

Most errors in criminal trials, of course, do not result in a violation of the accused's constitutional rights. In Michigan, the harmless error standard for such non-constitutional errors has undergone great change in recent months. Most significantly, in July 1999, the Michigan Supreme Court decided *People v. Lukity*.<sup>139</sup> This five-two decision, penned by Justice Taylor, notably overruled a 1998 decision by the court in *People v. Gearns*.<sup>140</sup>

In *Lukity*, the jury convicted the defendant of first degree criminal sexual conduct against his fourteen year-old daughter.<sup>141</sup> The Michigan Court of Appeals reversed Lukity's conviction, reasoning that the cumulative effect of three separate trial errors denied Lukity the right to a fair trial.<sup>142</sup> One of the three trial errors, according to the Michigan Court of Appeals, was the admission of evidence bolstering the daughter's character for truthfulness before the defendant had attacked her veracity.<sup>143</sup> Specifically, the prosecutor at trial was allowed to introduce evidence from the daughter's teacher, mother, brother, and the investigating police officer regarding her good character for veracity, despite the fact that her veracity had not been attacked by the defendant.<sup>144</sup>

The Michigan Supreme Court agreed that the trial court erred

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implicitly incorporates a "substantial" justice standard analogous to the civil harmless error standard. We disagree with this argument, however, since the phrase "miscarriage of justice" appears more likely intended to be synonymous with "harmful to justice," suggesting more of a descriptive than substantive standard. See WEBSTER'S NEW COLLEGIATE DICTIONARY 728 (1981) (defining "miscarriage" as "a failure in the administration of justice.").

139. 596 N.W.2d 607 (Mich. 1999).

140. 577 N.W.2d 422 (Mich. 1998), *overruled by* *People v. Lukity*, 596 N.W.2d 607 (1999).

141. *See Lukity*, 596 N.W.2d at 609.

142. *See id.*

143. *See id.*

144. *See id.* at 610.

in allowing such bolstering evidence to be admitted.<sup>145</sup> Once such error had been found, the court immediately turned its attention to the criminal harmless error statute.<sup>146</sup> The court quickly confessed that the statute does not address the "level of assurance" that an appellate court must have that the error did *not* result in a "miscarriage of justice."<sup>147</sup> The court acknowledged that, one year earlier, a majority in *People v. Gearns*,<sup>148</sup> had, in fact, agreed upon a "level of assurance" test.<sup>149</sup> Specifically, in *Gearns* the court concluded that, for non-constitutional error, the burden is on the prosecutor to convince the appellate court that it is "highly probable" that the erroneously admitted evidence did *not affect* the verdict.<sup>150</sup>

*Gearns* thus created a presumption that a non-constitutional error is *harmful* (i.e., requires reversal) unless the prosecutor demonstrates that it is "highly probable" that the error was, in fact, harmless.<sup>151</sup> The *Lukity* majority explicitly overruled *Gearns*, substituting in its place two rather remarkable new rules. First (and most importantly), *Lukity* shifted the burden of persuasion from the prosecution to the criminal defendant.<sup>152</sup> Second, *Lukity* substituted the "highly probable" standard for a new, less rigorous "more probable than not" standard of proof.<sup>153</sup>

The burden shift of *Lukity*—from prosecutor onto the criminal defendant—was necessitated, according to the Michigan Supreme Court, by the language of the Michigan criminal harmless error statute.<sup>154</sup> Specifically, the court stated that placing the burden upon the prosecutor, as had been done in *Gearns*, was inconsistent with the language of section 26 because "Section 26 states that the types

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145. See *id.* at 610-11.

146. See *id.* at 611.

147. See *id.* at 611-12.

148. 577 N.W.2d 422 (Mich. 1998).

149. See *Lukity*, 596 N.W.2d at 611-12.

150. See *id.* at 611; see also *Gearns*, 577 N.W.2d at 438.

151. See *Gearns*, 577 N.W.2d at 437-38.

152. See *Lukity*, 596 N.W.2d at 611-13.

153. See *id.* at 612-13.

154. See *id.* at 611-12.

of errors listed are not grounds for reversal unless it shall 'affirmatively appear' that such error resulted in a miscarriage of justice."<sup>155</sup> Thus, the use of the phrase "affirmatively appear" in the Michigan criminal harmless error statute was interpreted by the court as imposing a presumption that errors in criminal trials are *harmless*. It is only if the criminal defendant introduces evidence by which it "affirmatively appears" that the error resulted in a miscarriage of justice that errors in criminal trials may be deemed harmful. The phrase "affirmatively appear," thus interpreted, was intended by the Michigan legislature to shift the burden of proof onto the criminal defendant.

This conclusion by the court was certainly not without controversy, even among the Justices themselves. Justice Brickley reluctantly concurred with the majority's conclusion as to the burden of proof, concluding that "as a matter of policy [the 'highly probable' standard of *Gearns*] is appropriate, [however,] I am unable to reconcile the *Gearns* test with Michigan's harmless error statute. The statute states that the verdict should not be disturbed unless 'it shall affirmatively appear' that the error was prejudicial. The majority's standard is more consistent with this language than the standard we set forth in *Gearns*."<sup>156</sup>

Two dissenters in *Lukity*, Justices Cavanagh and Kelly, took issue with the majority's interpretation of the phrase "affirmatively appear":

In the words 'affirmatively appear' . . . the majority finds lurking a rebuttable presumption of harmlessness. While the word 'affirmatively' . . . must be surely be given meaning, [we] cannot fathom any definition of the word that includes a meaning such as 'in sufficient fashion as to defeat a rebuttable presumption of harmlessness.' And yet, that is how the majority 'reads' the statute . . .<sup>157</sup>

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155. *Id.*

156. *Id.* at 617 (Brickley, J., concurring).

157. *Id.* at 618 (Cavanagh, J., dissenting).

The dissenters thus believed the phrase was not intended by the Michigan Legislature to shift the burden of proof from the prosecution to the criminal defendant. Instead, they believed that "[a] more literal and simpler definition of affirmatively, which, in its various forms, implies an assertion that something is true, might well speak more to a court having some *level of assurance* than it does to any rebuttable presumption. While claiming (correctly) that § 26 'controls' our inquiry, the majority must, in effect, add a considerable amount of text to the statute in order for it to 'control' its chosen result."<sup>158</sup> The dissenters therefore interpret the phrase "affirmatively appear" to denote a "level of assurance" rather than an indication of who bears the burden of proof. In other words, the phrase "affirmatively appear" was intended by the legislature to indicate that an appellate court reviewing a claim of harmful error in a criminal trial must have a relatively high level of assurance that the claimed error was, in fact, harmful, before it would be appropriate to overturn the defendant's conviction. The claimed error thus must "affirmatively" appear to the appellate court to be harmful before setting aside the conviction. Thus viewed, the phrase does not necessarily implicate the separate question regarding *who*—prosecutor or criminal defendant—bears the burden of convincing the appellate court that the error affirmatively appears.

The *Lukity* dissenters also took issue with the pragmatic implications of the majority's decision to shift the burden of proof upon the criminal defendant:

Exactly how, I would ask, will this presumption ever be rebutted? . . . [T]he appellate court (particularly if it sanctions inference piling) will always be in a position to state 'a reasonable jury could have found' and rely on whatever untainted testimony . . . exists in the record. The majority has constructed a hurdle that cannot be cleared, not because of its height, but because of the wall on the

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158. *Id.*

other side.<sup>159</sup>

By shifting the burden upon the criminal defendant to prove that the trial error was harmful, the *Lukity* majority requires that the criminal defendant convince the appellate court that, but for the trial error, the defendant would have been acquitted. If there is other, untainted evidence pointing to the defendant's guilt upon which a reasonable jury could rely, the appellate court is, under *Lukity*, instructed to affirm the conviction.

The emphasis of *Lukity* is thus on getting the "right result" and disregarding all errors in criminal trials that are not proven by the defendant to have resulted in a wrongful conviction. On the one hand, such a standard makes instinctive sense, both from a philosophical and economic standpoint. Philosophically, *Lukity* ensures that criminal convictions are not set aside by appellate courts unless the appellate court is convinced—by the defendant—that the trial error resulted in a conviction that would not otherwise have occurred. In this way, appellate courts are instructed by *Lukity* to affirm the vast majority of convictions so long as there is a sufficient quantum of untainted evidence upon which to base the defendant's conviction. Viewed this way, the conviction is "right" based upon the evidence, so why should we, societally, reverse it? Moreover, by placing the burden of proof upon the criminal defendant, *Lukity* serves as a deterrent to appeals of criminal convictions. Thus, from an economic standpoint, there are likely to be fewer appeals of criminal convictions clogging the already crowded dockets of Michigan courts and taxpayers will not have to fund as many retrials that are likely to result in the same verdict.<sup>160</sup> It is evident, therefore, that *Lukity* is far removed from

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159. *Id.* at 619 (Cavanagh, J., dissenting).

160. Of course, one could argue that, by making reversal of criminal convictions more difficult, *Lukity* may be viewed as economically inefficient due to the resulting increase in the prison population. Whether this is true or not is unclear, since the size of the prison population is dependent upon numerous other factors not affected by *Lukity*, including availability of parole, sentencing decisions, and culture.



the common law conception of the "appearance of justice." Justice, as it appears today, is a broader, more attainable concept. Technical errors in a criminal trial no longer automatically taint the appearance of justice. Justice is achieved, in short, if the jury reached the "right result" (i.e., in accordance with the evidence), even if there were one or more errors committed by the trial court.

The *Lukity* decision is also notable because of its holding regarding the standard—or level of proof—that it establishes. In other words, not only did *Lukity* decide that the burden of proof should fall upon the criminal defendant, but it also tells us what quantum of evidence the criminal defendant must introduce in order to convince the appellate court that the alleged error was harmful. Specifically, *Lukity* requires the criminal defendant to prove that it is "more probable than not" that the error affected the trial verdict.<sup>161</sup> According to the majority, this standard was also necessitated by the language of the criminal harmless error statute.<sup>162</sup> Specifically, the majority concluded that because "[s]ection 26 places the burden on a defendant to demonstrate a miscarriage of justice, any higher standard, e.g., 'highly probable,' would place a greater burden on defendants than Section 26 envisions."<sup>163</sup>

This reference to the "highly probable" standard is clearly intended to address the court's previous holding in *Gearns*, which had ruled that the prosecution bore the burden of proving that it was "highly probable" that an alleged error was harmless.<sup>164</sup> Once the *Lukity* majority concluded that the criminal harmless error statute mandated that the burden of proof be placed upon the criminal defendant (i.e., that the burden of proof allocation of *Gearns* be overruled), it appeared hesitant to impose a quantum of proof standard higher than "more probable than not." *Gearns*, in other words, was wrong on both counts: its interpretation of the criminal harmless error statute as placing the burden of proof upon

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161. See *Lukity*, 596 N.W.2d at 613.

162. See *id.* at 611-12.

163. *Id.* at 612.

164. See *Gearns*, 577 N.W.2d 422, 438 (Mich. 1998).

the prosecution was wrong, as was its interpretation of the statute relating to the quantum of evidence required to be adduced. The court's 1998 decision in *Gearns*, of course, purported to be an interpretation of the same criminal harmless error statute that was being interpreted in *Lukity*. Yet the court—one short year later—reached a completely different interpretation. In dissent, Justices Cavanagh and Kelly took issue with the majority's about-face: "*Gearns* and its companion were not easy cases, and there certainly was no lack of deliberation or debate among the Court. Now, but a year later, we are summarily told that *Gearns* was wrongly decided . . . ."165 The vitriolic dissenters also appeared to question the motives of the Justices in the majority, stating that

Justice Taylor and the Chief Justice, upon finding that there is now a majority . . . to join them, are . . . free to cast their formerly rejected view as our new rule. Such endeavors, however, are likely to suggest that the decisions of this Court are only as stable as its composition, and that changes in it might be presumed by some to evidence a mandate for wholesale changes in the other, even in the absence of the passage of time, changes in circumstances, or any other of the more noble reasons to reevaluate our past decisions.<sup>166</sup>

Whether one agrees with the holding of *Lukity* or not, the court's sudden reinterpretation of the language of the criminal harmless error statute is baffling. The language of the statute did not change in the intervening year between *Gearns* and *Lukity*. Indeed, as Justices Cavanagh and Kelly point out in their dissent, the only thing that did appear to change in the intervening year was the composition of the Michigan Supreme Court. And while it is certainly true that each jurist brings to the court his or her own views, it is equally true that the rule of *stare decisis* is supposed to temper fluctuations in the law predicated on the individual ideology

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165. *Lukity*, 596 N.W.2d at 617 (Cavanagh, J., dissenting).

166. *Id.* at 617 n.1 (Cavanagh, J., dissenting).

of members of the bench. Given that Justices of the Michigan Supreme Court are elected, perhaps the reverence generally given to *stare decisis* is naive.

## 2. *People v. Graves*

One additional recent Michigan Supreme Court case is worth noting regarding non-constitutional error in a criminal trial. In *People v. Graves*,<sup>167</sup> the defendant was charged with first degree murder. "At the close of the prosecution's case, defense counsel moved for a directed verdict of acquittal regarding the first-degree murder charge. The trial court denied the motion and instructed the jury that it could find [Graves] guilty of first-degree murder, second-degree murder, or voluntary manslaughter,"<sup>168</sup> or that it could find Graves not guilty.<sup>169</sup> The jury found Graves guilty of voluntary manslaughter, and Graves appealed the conviction, arguing that the trial court "erred in submitting the first degree murder charge to the jury."<sup>170</sup> Specifically, Graves argued that the first degree murder charge submission was unwarranted by the proof because there was no evidence of premeditation and deliberation.<sup>171</sup>

The Michigan Court of Appeals reversed Graves' conviction, holding that the decision of the Michigan Supreme Court in *People v. Vail*,<sup>172</sup> required automatic reversal.<sup>173</sup> *Vail* held that

where a jury is permitted consideration of a charge unwarranted by the proofs there is always prejudice because a defendant's chances of acquittal on any valid charge is substantially decreased by the possibility of a compromise

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167. 581 N.W.2d 229 (Mich. 1998).

168. *Id.* at 231.

169. *See id.*

170. *Id.*

171. *See id.*

172. 227 N.W.2d 535 (Mich. 1975).

173. *See Graves*, 581 N.W.2d at 231.

verdict. For this reason it is reversible error for a trial judge to refuse a directed verdict of acquittal on any charge where the prosecution has failed to present evidence from which the jury could find all elements of the crime charged.<sup>174</sup>

*Vail* thus set forth a rule of automatic reversal for a specific type of preserved, non-constitutional error (submission of a charge unwarranted by the proof). And while the Michigan Court of Appeals in *Graves* reversed the defendant's conviction based upon the automatic reversal rule of *Vail*, they did so reluctantly. Indeed, two of the court of appeals judges urged the Michigan Supreme Court to overrule *Vail*.<sup>175</sup>

Not surprisingly, the Michigan Supreme Court agreed to review the decision of the court of appeals in *Graves*. In a close, four-to-three decision, the supreme court accepted the invitation of the court of appeals to overrule *Vail*, concluding that "the automatic reversal rule of *Vail* is inconsistent with this Court's modern harmless-error jurisprudence."<sup>176</sup> The court specifically found that *Vail* was inconsistent with the language of the Michigan criminal harmless error statute which, by its terms, does not appear to require automatic reversal for any criminal trial errors.<sup>177</sup> The court further reasoned that criminal defendants have "no room to complain" if a charge is improperly submitted to the jury, so long as the defendant is acquitted of the improperly submitted charge and the basis of the defendant's conviction is a "charge that was properly submitted to the jury."<sup>178</sup> Requiring automatic reversal in such situations—as *Vail* required—is disrespectful of juries because automatic reversal is premised on speculation that jurors compromise their views in violation of their instructions.<sup>179</sup> Finally, the *Graves* court noted that the automatic reversal rule of *Vail*

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174. *Vail*, 227 N.W.2d at 536.

175. See *People v. Graves*, 569 N.W.2d 911, 913 (Mich. Ct. App. 1997).

176. *Graves*, 581 N.W.2d at 232.

177. See *id.* at 233.

178. *Id.*

179. See *id.* at 234.

results in an inefficient use of scarce judicial resources "by automatically reversing an otherwise valid conviction."<sup>180</sup>

The three dissenters in *Graves*—Justices Cavanagh, Mallett, and Kelly—defended the automatic reversal rule of *Vail* on the grounds that it was consistent with the "highly probable" standard for non-constitutional error pronounced in *Gearns*.<sup>181</sup> The majority, of course, disagreed, perhaps intimating the court's forthcoming reversal of *Gearns* in the *Lukity* decision.

What is to be learned from *Graves* beyond perhaps that it foretold the outcome in *Lukity*? There are likely two alternative ways of viewing the holding in *Graves*. The narrow holding of *Graves* is that submission to a criminal jury of a charge not warranted by the proof is not grounds for automatic reversal (i.e., it is not per se harmful error). A broader view of the holding in *Graves*—and one that is more consistent with the court's decision in *Lukity*—is that, because of the language of the criminal harmless error statute, non-constitutional errors can never result in automatic reversal. Indeed, after the court's decision in *Lukity*, it is reasonable to presume that *all* appeals based upon non-constitutional errors will require that the criminal defendant convince the appellate court that the error "more probably than not" affected the outcome of the trial.

## VII. CONCLUSION

This article has attempted to answer the deceptively simple question, "What is 'harmless' error in Michigan?" As we hope we have demonstrated, answering this question is a complex task that requires the consideration of numerous factors, including: (1) Was the alleged error preserved or unpreserved at the trial level? (2) Did the alleged error involve a violation of the party's constitutional rights? (3) If the alleged error involved a violation of constitutional rights, is the constitutional error structural or non-structural in

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180. *Id.*

181. *Id.* at 236 (Cavanagh, J., dissenting).

nature? (4) If the alleged error involved a violation of constitutional rights, is the point of error being raised on direct or habeas corpus review? (5) If the alleged error did not involve a violation of constitutional rights, did the error occur in a civil or criminal trial? How one answers these basic questions will provide a basic indication of the test, or standard, for harmless error that a court would apply, as well as an indication as to who would bear the burden of proving that the error is harmful (or harmless).

On a deeper level, the "standard" adopted for harmless error, and the allocation of the burden of proving it, reveals a policy judgment about the level of assurance that an appellate court requires before it will reverse a judgment. Thus, courts reserve the highest standard—automatic reversal—for structural constitutional errors raised on direct review—a type of trial error courts deem to be the most serious and likely to be prejudicial. Somewhat lower standards (e.g., the "beyond a reasonable doubt" standard for non-structural constitutional errors raised on direct review) likewise reveal a need to have a very high level of assurance in the correctness of the verdict before a court will affirm a conviction on appeal. Still lower standards (e.g., "more probable than not" standard for non-constitutional errors on direct review or the *Kotteakos* standard for habeas review requiring affirmance unless the defendant can show a "substantial and injurious effect") reveal a lesser need for assurance in the correctness of the verdict before a court will affirm it on appeal. Moreover, to whom we allocate the burden of proof is clearly a policy decision reflecting what the outcome of an appeal should be in a close case. Thus, for example, by shifting the burden onto the criminal defendant in *Lukity*, the court expressed its belief that the Michigan Legislature wanted appellate courts to affirm rather than reverse criminal convictions in a close case.

In the end, a simple, uniform definition of harmless error proves elusive in Michigan as elsewhere. But if one understands the purpose of harmless error, one begins to see that the bewildering array of standards reflect a common idea: that courts should customize the definition of harmless error to reflect the degree of

seriousness to which society ascribes particular types of trial error and our varying notions of "justice" in particular types of cases. Viewed this way, harmless error in Michigan is still a riddle, but a riddle with an answer to which one can make an educated guess.

