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The Irony of Harmless Error

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Introduction

When a person is arrested, charged with a crime, and subjected to a public trial where his or her life or liberty is at risk, can there be any doubt that the government ought to conduct the trial in accordance with the law? If the due process clauses of the Fifth and Fourteenth Amendments to the United States Constitution have any meaning, surely it is that the government must afford a person accused of a crime a fair trial. A fair trial in the United States means "something more than merely ascertaining whether an accused is or is not guilty"; a fair trial requires that "the question of guilt . . . be determined by an orderly legal procedure, in which the substantial rights belonging to a defendant shall be respected."[1]

The notion that the government ought to follow its own rules in the conduct of a trial is so fundamental that few would disagree with it as a general principle. What then should result when the government does not follow its own rules in a

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1. People v. O'Bryan, 130 P. 1042, 1046 (Cal. 1913).

criminal trial and a conviction results?[2] Throughout most of the history of the United States, appellate courts reversed convictions for most any error committed at trial.[3] The slightest error, no matter how insignificant, resulted in automatic reversal.[4] Legal systems evolve, however, and in the early part of this century courts came under intense criticism for reversals based on insignificant errors.[5]

Consequently, Congress passed legislation that prohibited appellate courts from reversing convictions unless the error "affected the substantial rights" of the accused.[6] The statute, as originally enacted, specifically prohibited reversal for insignificant "technical" error.[7] Neither the original statute nor the amendment prohibits appellate courts from reversing for error which does not harm the accused. Rather, the statute has at all times focused on the "rights" of the accused. Harm or harmlessness is simply not an explicit element of consideration under the statute.

After the federal legislation passed, courts began developing the concept of "harmless error." Several theories and tests ensued,[8] but the general idea is that an error should not result in reversal unless the accused is harmed. No harm, no reversal. This concept came to be known as the "harmless error" rule. Its purposes are: (1) to preserve judicial resources, and (2) to preserve and protect public confidence in our justice system.[9]

While all state courts of last resort have harmless error rules, the United States Supreme Court has been the moving force behind the rule.[10] Initially, the Supreme Court focused on nonconstitutional errors, as it was generally thought that any constitutional error would result in automatic reversal.[11] However, in 1967 the Supreme Court held in *Chapman v. California* that certain constitutional errors

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2. This article considers the "harmless error" doctrine as it applies to criminal trials.

3. *See* ROGER J. TRAYNOR, THE RIDDLE OF HARMLESS ERROR 13 (1970).

4. *See* Honorable Marcus A. Kavanagh, *Improvement of Administration of Criminal Justice by Exercise of Judicial Power*, 11 A.B.A. J. 217, 219 (1925).

5. *See id.*; *see also infra* text accompanying notes 115-20.

6. As originally enacted the statute provided, "On the hearing of any appeal, certiorari, writ of error, or motion for a new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties." 28 U.S.C. § 391 (1911). The statute was subsequently amended and presently provides: "On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties." 28 U.S.C. § 2111 (1994) (original version at ch. 231, § 269, 36 Stat. 1163 (1911)).

7. *See* Bruno v. United States, 308 U.S. 287, 293 (1939).

8. *See infra* Part II.B.

9. *See* Charles F. Campbell, Jr., *An Economic View of Developments in the Harmless Error and Exclusionary Rules*, 42 BAYLOR L. REV. 499, 504-05 (1990); C. Elliot Kessler, *Death and Harmlessness: Application of the Harmless Error Rule by the Bird and Lucas Courts in Death Penalty Cases — A Comparison & Critique*, 26 U.S.F. L. REV. 41 (1991); *The Harmless Error Rule Reviewed*, 47 COLUM. L. REV. 450 (1947).

10. *See* Bram v. United States, 168 U.S. 532 (1897) (first reported case to consider whether trial court error could be overlooked if not prejudicial).

11. *See* Kotteakos v. United States, 328 U.S. 750 (1946).

were subject to the rule.[12] The Court has been inconsistent in its analysis and rationale.[13] It has found several particular constitutional errors to be prejudicial and therefore not harmless.[14] However, since *Chapman*, the breadth of constitutional errors to which the rule has been extended is astonishing,[15] and the effect of this development is staggering.[16] The Supreme Court has written in vague terms about errors which may not be subject to the rule[17] and about fictional distinctions between "structural" and "trial errors"[18] that purport to distinguish errors subject to automatic reversal from those subject to the harmless error rule. Most significant, however, has been the Supreme Court's inclination to

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12. *See* Chapman v. California, 386 U.S. 18, 22 (1967); *see also* Fahy v. Connecticut, 375 U.S. 85, 87 (1963).

13. *Compare Chapman*, 386 U.S. at 23 (opting not to use the California "overwhelming evidence" standard, but rather asking whether there is a reasonable possibility that the evidence might have contributed to the conviction) *with* Harrington v. California, 395 U.S. 250, 254 (1969) (holding that constitutional error may be harmless if there is "overwhelming" untainted evidence to support the conviction).

14. *See* Vasquez v. Hillery, 474 U.S. 254 (1986) (unlawful exclusion of members of defendant's race from grand jury); McKaskle v. Wiggins, 465 U.S. 168 (1984) (right to self-representation); Waller v. Georgia, 467 U.S. 39 (1984) (right to public trial); Gideon v. Wainwright, 372 U.S. 335 (1963) (deprivation of right to counsel); Payne v. Arkansas, 356 U.S. 560 (1958) (involuntary confession); Tumey v. Ohio, 273 U.S. 510 (1927) (biased judge).

15. *See, e.g.*, Clemons v. Mississippi, 494 U.S. 738 (1990) (unconstitutionally overbroad jury instruction); Carella v. California, 491 U.S. 263 (1989) (jury instruction containing erroneous conclusive presumption); Satterwhite v. Texas, 486 U.S. 249 (1988) (admission of testimony in violation of Sixth Amendment Counsel Clause); Pope v. Illinois, 481 U.S. 497 (1987) (jury instruction misstating an element of offense); Rose v. Clark, 478 U.S. 570 (1986) (erroneous malice instruction); Crane v. Kentucky, 476 U.S. 683 (1986) (erroneous exclusion of testimony regarding confession); Delaware v. Van Arsdall, 475 U.S. 673 (1986) (violation of Sixth Amendment Confrontation Clause); Rushen v. Spain, 464 U.S. 114 (1983) (right to be present at trial); United States v. Hasting, 461 U.S. 499 (1983) (violation of Fifth Amendment Self-Incrimination Clause); Hopper v. Evans, 456 U.S. 605 (1982) (statute improperly forbidding jury instruction on lesser included offense in violation of Due Process Clause); Kentucky v. Whorton, 441 U.S. 786 (1979) (failure to instruct jury on presumption of innocence); Moore v. Illinois, 434 U.S. 220 (1977) (admission of identification evidence in violation of Sixth Amendment Counsel Clause); Brown v. United States, 411 U.S. 223 (1973) (admission of out-of-court statement in violation of Sixth Amendment Counsel Clause); Milton v. Wainwright, 407 U.S. 371 (1972) (improperly obtained confession); Chambers v. Maroney, 399 U.S. 42 (1970) (admission of evidence obtained in violation of Fourth Amendment); Coleman v. Alabama, 399 U.S. 1 (1970) (denial of counsel in violation of Sixth Amendment Confrontation Clause). The preceding cases appear as listed in *Arizona v. Fulminante*, 499 U.S. 279 (1991). In addition, it is noteworthy that since *Fulminante*, the Court has expanded the harmless error doctrine to even greater lengths. *See, e.g.*, O'Neal v. McAninch, 513 U.S. 432 (1995) (burden of proof jury instruction); Brecht v. Abrahamson, 507 U.S. 619 (1993) (prosecution commenting on defendant's post-Miranda silence); United States v. Olano, 507 U.S. 725 (1993) (alternate sitting in on jury deliberations without participating).

16. After Nixon's appointments of Warren Burger, Harry Blackmun, Lewis Powell and William Rehnquist to the Supreme Court, it was widely thought that the Burger Court would overrule many of the controversial decisions of the Warren Court. However, very few of the controversial Warren Court decisions were explicitly overruled. Although the Burger Court did not overrule the Warren Court cases, it did effectively gut many of them through the extension of the harmless error rule. *See supra* note 15.

17. *See supra* note 14.

18. *See* Arizona v. Fulminante, 499 U.S. 279, 309-10 (1991) (Rehnquist, J.).

shift the emphasis of the analysis under the harmless error rule away from the error and towards the guilt of the accused.[19]

The present Supreme Court rules applicable to both nonconstitutional[20] and constitutional[21] errors have two components: (1) the effect of the error on the verdict,[22] and (2) a consideration of the evidence of guilt.[23] If aside from the error, the evidence establishes guilt,[24] the error is said not to have affected the verdict and it is therefore harmless. The due process requirement of a fair trial is met, notwithstanding serious trial error, if the record indicates evidence of guilt.[25]

Thus today we have the spectacle of appellate courts all over the United States[26] carefully parsing over appeal records and transcripts first to determine

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19. *See* Harrington v. California, 395 U.S. 250, 255 (1969) (Brennan, J., dissenting); *see also* Harry T. Edwards, *To Err is Human, But Not Always Harmless: When Should Legal Error Be Tolerated?*, 70 N.Y.U. L. REV. 1167, 1182 (1995); *see infra* text accompanying notes 145-60.

20. *See* Kotteakos v. United States, 328 U.S. 750 (1946).

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

22. *Kotteakos*, 328 U.S. at 764.

23. *Harrington*, 395 U.S. at 254.

24. *See infra* text accompanying notes 145-60.

25. *See* Rose v. Clark, 478 U.S. 570, 579 (1986) ("Where a reviewing court can find that the record developed at trial establishes guilt beyond a reasonable doubt, the interests of fairness have been satisfied and the judgment should be affirmed.").

26. Statistical proof evidencing the substantial and ever increasing use of the harmless error rule is virtually impossible to develop although crude efforts to do so have been attempted. *See* Edwards, *supra* note 19, at 1180 n.52; Donald A. Winslow, Note, *Harmful Use of Harmless Error in Criminal Cases*, 64 CORNELL L. REV. 538, 545 n.36 (1979). The principal reason for the inability to develop reliable data is that most cases are resolved by unpublished decisions in both the federal and state systems. However, commentators who have examined the use of the rule argue it is being used increasingly to resolve more serious claims of trial error. As an appellate judge who sits on a state court of last resort, the Oklahoma Court of Criminal Appeals, which annually decides approximately 750 felony appeals (including death penalty cases), I can state that the case to which the harmless error rule is not applied in one way or another is the exception in our court. To aid trial courts in retrials, it is the general practice in our court in death penalty cases to address and resolve all claims of error, even when reversal is required on a particular error. In 33 of 46 cases, or 72% of the published death penalty cases decided between January 1, 1995 and December 31, 1996, at least one claimed error was resolved by applying the harmless error rule. According to Professor Erwin Chemerinsky, the *Los Angeles Times* found that for the five-year period from 1990 through 1995, the California Supreme Court "affirmed 97% of all death penalty appeals — the highest rate of affirmance in capital cases of any state supreme court in the country." Erwin Chemerinsky, *No Harm, No Foul*, CAL. LAW., Jan. 1996, at 27, 27. Chemerinsky concluded that "the court has excused even blatant mistakes that compromised the defendant's fundamental constitutional rights." *Id.* As examples he cited: People v. Rowland, 841 P.2d 897 (Cal. 1992) (capital case penalty phase instruction that defendant's attempt to suppress evidence could be considered to show consciousness of guilt); People v. Garceau, 862 P.2d 664 (Cal. 1993) (instruction that past crimes could be considered for any purpose, including character assessment, in deciding guilt); People v. Thomas, 828 P.2d 101 (Cal. 1992) (prosecutorial misconduct where prosecutor described defendant as "perverted murderous cancer" and "walking depraved cancer"); People v. Walsh, 861 P.2d 1107 (Cal. 1993) (prosecutorial misconduct where prosecutor argued that capital punishment was supported by the Bible and that God's law implied the defendant deserved to die); People v. Cudjo, 863 P.2d 635 (Cal. 1993) (erroneous exclusion of confession to the crime by another person); People v. Johnson, 859 P.2d 673 (Cal. 1993) (erroneous admission of coerced confession); People v. Anderson, 801 P.2d 1107 (Cal. 1990) (trial judge told jury defendant's intent to kill was a "fairly simple question" and that it would very likely

whether or not error or errors occurred at trial and then upon finding error, affirming the conviction if the record indicates that notwithstanding error, the accused was proven guilty by "overwhelming evidence."[27] It is not uncommon for an appellate court to acknowledge multiple errors in a single trial and conclude each is harmless because the record established guilt.[28]

In a relatively short period of time our courts have gone from a rule of automatic reversal of convictions for insignificant trial error to a rule of harmless error which allows courts to affirm convictions where even very serious error occurs during a criminal trial. Judges, law professors and students have written numerous legal articles, most critical, about the harmless error rule and its application.[29] The theme most common to the criticism is that the harmless error

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reach a special-circumstances verdict on the first day of deliberations); People v. Hawthorne, 841 P.2d 118 (Cal. 1992) (prosecution during guilt phase argued it had a duty to present the truth but attorneys for the defense did not); People v. Fierro, 821 P.2d 1302 (Cal. 1991) (trial judge had the defendant shackled with no indication of necessity). Chemerinsky, *supra*, at 27-28. The preceding cases with issues decided are substantially as described by Professor Chemerinsky. There can be no doubt that the California experience is attributable to a combination of two factors. First, three judges of the California Supreme Court were removed from office by voters in a retention election in 1986. Second, the jurisprudence of the United States Supreme Court has made the harmless error rule applicable to almost any error. It might be argued that state courts of last resort which disagree with the Supreme Court's jurisprudence could resolve error claims on state law or state constitutional grounds.

27. *See, e.g.*, Harrington v. California, 395 U.S. 250 (1969); Schneble v. Florida, 405 U.S. 427 (1972).

28. *See* People v. Wash, 861 P.2d 1107, 1133-34 (Cal. 1993); People v. Clair, 828 P.2d 728, 729, 736 (Cal. 1992); Harris v. Texas, 790 S.W.2d 568, 588 (Tex. Crim. App. 1989).

29. *See, e.g.*, Bennett L. Gershman, *The Gate Is Open but the Door Is Locked — Habeas Corpus and Harmless Error*, 51 WASH. & LEE L. REV. 115 (1994) (more relaxed harmless error test encourages state officials to overlook constitutional norms when sufficient proof of guilt); Gregory Mitchell, *Against "Overwhelming" Appellate Activism: Constraining Harmless Error Review*, 82 CAL. L. REV. 1335 (1994) (failure to create uniform standard makes analysis faulty, but test should be Chapman standard); Marla L. Mitchell, *The Wizardry of Harmless Error: Brain, Heart, Courage Required When Reviewing Capital Sentences*, 4 KAN. J.L. & PUB. POL'Y 51 (1994) (harmless error analysis has no place in capital sentence jurisprudence due to the quality of death in relation to other punishments); Kenneth R. Brown, *Constitutional Harmless Error or Appellate Arrogance*, Utah B.J., Jan. 1993, at 18 (harmless error doctrine promotes ends-justifies-the-means mentality instead of protecting integrity of our constitutional system of justice); Jason S. Marks, *Postscript: Harmless Error, Habeas Corpus, and a Constitutional Eclipse*, 8 CRIM. JUST. 30 (Fall 1993) (harmless error analysis should be replaced with a rule of automatic reversal for all constitutional violations); Craig Goldblatt, *Disentangling Webb: Governmental Intimidation of Defense Witnesses and Harmless Error Analysis*, 59 U. CHI. L. REV. 1239 (1992) (harmless error analysis should not apply to governmental intimidation of defense witnesses as it is a structural error); Jana J. Green, *Arizona v. Fulimante: The Harmful Extension of the Harmless Error Doctrine*, 17 OKLA. CITY U.L. REV. 755 (1992) (courts should return to automatic reversal for coerced confessions, as harmless error analysis is a waste of judicial resources); Tamara Lynne Jones, *Coerced Confessions and Harmless Error*, 18 OHIO N.U. L. REV. 877 (1992) (the harmless error doctrine should never apply to coerced confessions); Charles J. Ogletree, Jr., *The Supreme Court, 1990 Term; Comment: Arizona v. Fulminante: The Harm of Applying Harmless Error to Coerced Confessions*, 105 HARV. L. REV. 152 (1991) (harmless error should not apply to coerced confessions and other constitutional issues); Steven D. DeBrota, *Arguments Appealing to Racial Prejudice: Uncertainty, Impartiality, and the Harmless Error Doctrine*, 64 IND. L.J. 375 (1989) (courts should not apply harmless error analysis to racially prejudicial arguments); Henry P. Monaghan, *Harmless Error and the Valid Rule Requirement*,

rule particularly offends the values attributed to our constitutional system of individual rights and liberties.[30]

My analysis has one element in common with those commentators critical of the rule. I, too, believe the Supreme Court's harmless error rule to be inimical to our system, as it erodes our constitutional protections. My thesis is that the modern harmless error rule as developed by the Supreme Court derives from two faulty premises, both injudiciously adopted from the English system. The combination of the two premises results in an illogical rule which distorts the functions of both criminal trials and appellate review. The present harmless error rule is incompatible with and seriously undermines our Constitution. The guilt-based approach to error review cannot be redeemed and it should be replaced with a test directed at the rights of the accused.

The first faulty premise of the rule is that an error is harmless unless it affects the verdict. In Justice Roger Traynor's words, the crucial question is "whether error affected the judgment?"[31] Actually, under the harmless error statute,[32] the effect of an error on the verdict is irrelevant. Indeed, the crucial question is not whether the error affected the verdict, but whether the error affected a right of the

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1989 SUP. CT. REV. 195 (1989) (harmless error doctrine allows judge centered analysis emphasizing the sufficiency of guilt); James C. Scoville, *Deadly Mistakes: Harmless Error in Capital Sentencing*, 54 U. CHI. L. REV. 740 (1987) (harmless error should never apply to affirm the sentencing phase of a capital case); David M. Skoglind, *Harmless Constitutional Error: An Analysis of Its Current Application*, 33 BAYLOR L. REV. 961 (1981) (the benefits accompanying the harmless error doctrine fail to justify the potential danger of infringement of a defendant's constitutional privileges); Steven H. Goldberg, *Harmless Error: Constitutional Sneak Thief*, 71 J. CRIM. L. & CRIMINOLOGY 421 (1980) (the harmless error doctrine is the most insidious of all legal doctrines because it destroys constitutional and institutional values). *But see* Sara E. Welch, *Supreme Court Review: Fifth Amendment — Harmless Error Analysis Applied to Coerced Confessions*, 82 J. CRIM. L. & CRIMINOLOGY 849 (1992) (all errors should be subject to harmless error analysis); Kathleen M. Golden, *The Sequestration of Criminal Defendants: A Proposal for the Use of Harmless Error Analysis in the Aftermath of* Geders v. United States, 52 ALB. L. REV. 243 (1987) (harmless error inquiry is the appropriate standard for reviewing alleged errors in a trial court's issuance of sequestration orders); Steven K. Sharpe & John E. Fennelly, *Massachusetts v. Sheppard: When the Keeper Leads the Flock Astray — A Case of Good Faith or Harmless Error?*, 59 NOTRE DAME L. REV. 665 (1984) (harmless error doctrine would give judges the ability to make equitable suppression rulings); Shannon L. Bybee, Jr., *A Comment on Application of the Harmless Constitutional Error Rule to "Confession" Cases*, 1968 UTAH L. REV. 144 (1968) (harmless error doctrine should apply to coerced confession cases as long as the trial court acted in good faith); *The Harmless Error Rule Reviewed*, 47 COLUM. L. REV. 450 (1947) (harmless error rule is necessary to prevent the loss of public confidence in the judicial system due to frequent reversals).

30. Virtually all of the analysis and criticism of the modern harmless error rule which appears in the legal literature (including Justice Traynor's thoughts and comments in *The Riddle of Harmless Error*) are variations of arguments and theories which can be traced to a remarkable Second Circuit court dialogue which occurred during the period from the mid-1930s to the mid-1940s between Judge Learned Hand and a few of his colleagues and Judge Jerome Frank. Judge Hand and his colleagues carried the majority and persistently applied a guilt-based approach to harmless error. Judge Frank, in his dissents, forcefully argued against such an approach. *See* TRAYNOR, *supra* note 3, at 94 n.85.

31. TRAYNOR, *supra* note 3, at 26.

32. *See supra* note 6.

accused. There are many errors that cannot be held harmless and the effect of which, if any, on the verdict cannot possibly be determined.[33]

The second faulty premise of the rule is that evidence of guilt is relevant to a determination of the effect of an error on the verdict. The issue confronting any appellate court in the United States is not the guilt of the accused, but rather, whether the trial court committed error, and if so, whether the error affected the rights of the accused. Guilt determinations by appellate courts usurp the function of the jury in our system.[34]

If the underlying premises of the Supreme Court's syllogism can be shown to be false, the illogic of the harmless error rule becomes evident. Throughout this article I rely upon Traynor's 1970 essay, *The Riddle of Harmless Error*,[35] as a basis for consideration of the issues. Traynor's essay is useful for several reasons. It is remarkable in its thoroughness, presentation, and clarity.[36] More important, however, is the fact that his essay is universally regarded as *the* authority. In the twenty-eight years since its publication, it has been cited in virtually every Supreme Court case[37] and law review article on the subject of harmless error. For better or worse, Traynor's essay has been extremely influential in the development of the contemporary harmless error rule in the United States.

It occurs to me that it is difficult to examine meaningfully any rule governing how trial error ought to be treated without some knowledge of the author's perception of the legal system.[38] Because many of my conclusions rest upon my view of our system, it is necessary to set forth my concept of our legal system and the purposes of some of the institutions within the system. It is also necessary to develop briefly a comparison of our system to the English system to show that while a particular rule may make sense under the English system,[39] the same rule cannot necessarily be transported logically to our system.

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33. *See* TRAYNOR, *supra* note 3, at 64-73.

34. *See* Weiler v. United States, 323 U.S. 606, 611 (1945).

35. *See* TRAYNOR, *supra* note 3.

36. The fact that I criticize some of Justice Traynor's conclusions does not diminish my respect for his work. While I find fault with several of his conclusions, our system would be much better if his ideas and thoughts had been followed.

37. *See, e.g.*, Delaware v. Van Arsdall, 475 U.S. 673, 681 (1986); O'Neal v. McAnich, 513 U.S. 432, 437 (1995).

38. Scholars have discovered memoranda in Justice Jackson's files evincing Chief Justice Rehnquist's early perception of the legal system. Rehnquist, who served as a clerk to Jackson, wrote in a memorandum to him, "The ivory tower jurisprudence . . . has weakened local law enforcement . . . . It's been a boon to smart criminal lawyers," and as to reversals for coerced confessions, "the implicit premise is that if they can only show that the confessions was coerced, they can get a reversal even though they are guilty as sin." Charles J. Ogletree, Jr., Arizona v. Fulminante: *The Harm of Applying Harmless Error to Coerced Confessions*, 105 HARV. L. REV. 152, 171 (1991) (quoting David G. Savage, *Rehnquist Wins Confession Battle*, L.A. TIMES, Mar. 30, 1991, at A2).

39. Traynor's essay relies heavily on the English rationale, and such reliance is misplaced. *See infra* Part II.A.

I. Background Considerations

A. A Broad View of the Legal System

Any legal system applied to a community of individuals must, in the final analysis, exist for the purpose of preventing and resolving disputes. The community must generally understand how a system resolves disputes. The resolution of public disputes such as charges of criminal misconduct must appear reasonable. The success of a legal system inevitably depends upon the fairness of the system as perceived by the individuals it serves. Perceptions of fairness change over time. Thus, a legal system must evolve or change as the community itself evolves in order to retain the support of its patrons. Any new rule or change should not be developed in a vacuum but should be developed consistent with the legal system's purposes and objectives. In the United States the harmless error rule evolved as a response to negative public reaction to reversals of criminal convictions based upon "technicalities." The rule has been expanded over time in response to even harsher public criticism of reversals.[40]

In the United States, there is no federal law which specifies the purposes and objectives of the legal system or the institutions within it.[41] There are, of course, constitutions by which the people have granted limited powers to the federal and state governments.[42] The constitutions establish courts, legislatures, and executive departments, and provide procedures for the enactment and enforcement of laws. Constitutions and statutes specify jurisdictional limits of courts and set forth substantive laws and procedural rules governing the conduct of trials. The law, however, does not declare what a trial is supposed to accomplish. What are the systemic objectives and purposes of a trial?[43] What function do lawyers and judges serve in the system?[44] What function do jurors serve?[45] What is the purpose of an appeal, and what function do appellate courts serve?[46]

Much of our legal system, the institutions therein, and their purposes and objectives are drawn from our common law heritage. Although it is not possible to find in the law books the objectives of our system or many of its institutions, it is possible for anyone to observe the system and to draw conclusions. The difficulty with this approach is that different constituencies within the system draw

40. *See* Keith S. Hampton, *'Harmless Error' Bill Flawed*, DALLAS MORNING NEWS, Jan. 5, 1997, at J6 (attacking Texas Senate Bill 114 as overbroad and usurping judicial power to review cases).

41. *See* Stephen A. Saltzburg, *Lawyers, Clients, and the Adversary System*, 37 MERCER L. REV. 647, 649 (1986) ("[T]here is no universally accepted statement of the premises upon which the judicial system rests . . . .") [hereinafter Saltzburg, *Lawyers*].

42. *See infra* text accompanying notes 48-50.

43. *See infra* text accompanying notes 51-70.

44. See Marvin E. Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031, 1042-45 (1975) for a more detailed discussion as to judges, and Saltzburg, *Lawyers*, *supra* note 41, for a more detailed discussion as to lawyers.

45. *See* Duncan v. Louisiana, 391 U.S. 145 (1968).

46. *See infra* text accompanying notes 71-79.

different conclusions as to purposes and objectives.[47] However, if the purposes and objectives of a trial are not taken into account, it will be difficult to develop a rational harmless error rule. Any evaluation of the effect of error must be in relation to the systemic purposes and objectives of a trial. Otherwise, the evaluation is meaningless.

The legal system in the United States operates within the framework of our system of federalism. The federal and state systems differ conceptually, but they are similar enough to be analyzed as one. Ours is a constitutional system. The Constitution is the organic law from which all other law springs forth and which no other law may contravene. Our Constitution was developed in reaction to specific abuses of governmental powers by English monarchs. We know that "life, liberty and the pursuit of happiness" were foremost in our founders' minds when they chronicled abuses by King George, III.[48] Thus, our Constitution grants to the government only specific powers and reserves all others in the people. The original Constitution did not contain a bill of rights even though individual rights and civil liberties were foremost in the framers' minds. Such rights were considered so fundamental the framers felt that to include certain specified rights might be construed to exclude others.[49] Subsequently, of course, the Bill of Rights was adopted to memorialize particular rights, but again any rights not specified were retained by the people.[50]

Any analysis of the legal system in the United States must begin with the recognition that the right[51] to life and liberty does not flow from the government to the individual. Life and liberty are inherent individual rights possessed by every human being and may not be taken away by the government except in accordance with due process of law. Our entire criminal justice system is premised on the fact that governmental powers are limited by the individual's rights to life and liberty. All of our procedural and substantive criminal rules follow this fundamental concept. Constitutional and statutory procedural rights, charging procedures, pleading rules, evidentiary rules, trial rules, and appellate procedures in the United

47. For example, if asked the purpose of a criminal trial, a police officer might respond, "to get the bad guys off the streets"; a prosecutor, "to establish the truth of the charges and punish the defendant"; a trial judge, "to resolve fairly the question of the charges against the defendant"; a defense lawyer, "to preserve and protect the defendant's constitutional rights to life and liberty"; the mother of a homicide victim, "to avenge the death of my child." Although most of these views have overlapping components and each has a ring of accuracy, none adequately captures the essence of the purposes and objectives of a trial in our system. These views will, however, affect individual views as to what, if anything, ought to be done about an error occurring in the trial. It is unlikely that the cop, the prosecutor, or the mother of a homicide victim would agree with a reversal of a conviction for *any* error if there is a video tape of the defendant shooting the helpless victim in the course of an armed robbery of a convenience store. Should the only consideration in a trial be evidence of guilt? If so, can we excuse any error if there is overwhelming evidence of guilt? And, if any error is excusable, why even have a trial?

48. *See* THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

49. *See* THE FEDERALIST NO. 84 (Alexander Hamilton).

50. *See* U.S. CONST. amend. IX.

51. *See* ROSCOE POUND, SOCIAL CONTROL THROUGH LAW (1942), *reprinted in* THE LEGAL PROCESS 86, 86-88 (Carl A. Auerbach et al. eds., 1961).

States are all designed and developed to protect the individual's right to a fair trial, and therefore, his right to life and to liberty from abuse by the government. This fundamental understanding of our legal system is the context within which a criminal trial must be placed. Thus, it is not enough that an accused is tried, that the government present evidence of guilt and that the accused is convicted. The trial must also comport with principles of due process and conform to such basic constitutional guarantees as the right to counsel and the right to silence. Such a trial is necessary to legitimize the propriety of the verdict and sentence in the eyes of not only the accused but also the public. Courts in our system have the ultimate responsibility to preserve and protect our constitutional rights. Appellate courts can preserve those rights only if they deter violations of rules affecting individual rights by ordering retrials for serious error. The government must know that it will suffer the consequences if it violates an accused's rights.

Perhaps the single most troubling aspect of the harmless error rule is the Supreme Court's willingness to use it to erode fundamental protections afforded by the Constitution. Professor Steven Goldberg has referred to the rule as being "among the most insidious of legal doctrines" and characterized it as a "sneak thief" stealing away our rights and values.[52] The rule can be characterized as insidious because its underlying purpose is pure, but its use and application are underhandedly detrimental to our system and values. United States Circuit Judge Harry Edwards has noted that between 1970 and 1985 the Supreme Court "carved out numerous exceptions to criminal procedure rules mandated by the constitution, particularly the exclusionary rule" and that the use of the harmless error rule "allows a court to preserve a conviction without seeming to erode an important right by declaring a breach of it to be harmless."[53]

The framers of our Constitution recognized that civilization requires reasonable limitations upon individual rights. The rights set forth in the Bill of Rights, however, are absolute limitations on the government. In my view of our constitutional scheme, the rights set forth in the Fourth, Fifth, Sixth, Seventh, Eighth, and Ninth Amendments define the minimal parameters of a fair trial. No person is legally guilty of any crime until he or she has been convicted in a fair trial. Irrespective of how guilty a person might be, he or she is entitled to a fair trial conducted in substantial compliance with the law. If in the course of securing a conviction the government seriously violates a right of an accused, it is the appellate court's duty to reverse the conviction and to require a retrial or dismissal. Any harmless error rule which allows a conviction to be affirmed in the face of a serious violation of a right is itself unconstitutional.

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52. *See* Steven H. Goldberg, *Harmless Error: Constitutional Sneak Thief*, 71 J. CRIM. L. & CRIMINOLOGY 421, 421 (1980).

53. Edwards, *supra* note 19, at 1182 (Judge Edwards, a Circuit Judge, noting that "[p]ropriety and common sense preclude me from venturing to verify this hypothesis").

B. Purposes of a Criminal Trial

A trial in our legal system has as its nominal purpose settlement of a dispute among the parties. A criminal trial resolves the question of whether under the law the accused is guilty of an offense against the public. However, a trial serves several purposes. One important purpose is that trials form the basis for the development of the law. Since a trial affects the public interest and concerns public policy, another purpose of a trial is to vent the dispute publicly. Trials also serve the purpose of meting out punishment. Finally, trials have a fact-finding purpose.

Under our constitutional system, appellate courts serve the vital purpose of developing the law.[54] A trial in our system forms the basis for the development of law. However, courts are not free to issue decisions simply because they perceive a problem. A court can only decide actual cases and controversies.[55] Thus, while courts make law they can only do so in the context of issues arising from trials. It is important to the development of the law that the integrity of trials not be compromised by procedures which impact the validity of the process. A harmless error rule which disregards serious trial error must surely call into question the validity of the trial process. The application of any harmless error rule will thus affect the development of the law. It is imperative, therefore, that the rule and its application be carefully reasoned and based upon sound principles.

A criminal trial involves alleged offenses against the public. Ours is an accusatory system.[56] The accused is presumed innocent until proven guilty beyond a reasonable doubt. These factors militate in favor of resolving the issues in a public forum. It is essential that no person should be subjected to possible loss of life or liberty in secret proceedings.[57] Both the state and the accused are entitled to their day in open court. Open and public trials assure the public that government proceedings against the individual are fair and trustworthy.

A criminal trial also serves the important purpose of assessing punishment. In most jurisdictions, sentencing is one of the roles the judge performs in a trial, although in a minority it is the responsibility of the jury. The facts as developed at trial form the factual constitutional basis for the jury's verdict and the judge's sentence. Typically, guidelines developed by the legislature limit the sentence to a range of punishment. Sentences outside the permitted range are beyond the power of the sentencer and are frequently considered on appeal.[58] However,

54. *See* DANIEL J. MEADOR, APPELLATE COURTS 4-5 (1994) [hereinafter MEADOR, APPELLATE COURTS 1994 ED.]

55. *See* U.S. CONST. art. III, § 2; *see also* Marbury v. Madison, 5 U.S. 137, 175-76 (1803).

56. *See* Arizona v. Fulminante, 499 U.S. 279, 293 (1991); Miranda v. Arizona, 384 U.S. 436, 460 (1966); Schmerber v. California, 384 U.S. 757, 762 (1966).

57. *See* Estes v. Texas, 381 U.S. 532, 588 (1965); *see also* Spano v. New York, 360 U.S. 315, 320-21 (1959) (finding that a secret trial without counsel in the police precinct effectively supplanted the public trial guaranteed by the Bill of Rights).

58. *See* Hill v. State, 511 P.2d 604, 607 (Okla. Crim. App. 1973).

except for the death penalty, appeals of sentences within the designated range of punishment are not generally subject to much review.[59]

It is often said that the purpose of a trial is to discover the "truth" or that a trial has a "truth seeking" purpose.[60] Usually, when lawyers or judges use the word "truth" they mean "facts" or, more precisely, "adjudicative facts."[61] A trial definitely has a fact-finding purpose. It is essential that the fact-finding purpose work reasonably well in order for the fact finder's verdict to be reasonably reliable. Without reasonably reliable verdicts our system could not retain public credibility. However, many of the components and procedures unique to our system work in direct contravention of a trial's fact-finding purpose. By definition an adversary

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59. *But see* MEADOR, APPELLATE COURTS 1994 ED., *supra* note 54, at 870.

60. *See Estes*, 381 U.S. at 540 (noting that "[c]ourt proceedings are held for the solemn purpose of endeavoring to ascertain the truth"); *see also* Tehan v. United States *ex rel.* Shott, 382 U.S. 406, 416 (1965) (stating that "[t]he basic purpose of a trial is the determination of truth").

61. The word "truth" in the English language is an emotionally charged word with several connotations. Truth may refer to a factual, scientific, objective truth which denotes something objectively existing. Truth may also refer to a moral, spiritual truth which denotes something subjective. These concepts are often confused. I prefer the words "adjudicative facts," which Professor Kenneth C. Davis defined as follows: "when . . . [a court] finds facts concerning immediate parties — what the parties did, what the circumstances were, what the background conditions were — the . . . [court] is performing an adjudicative function, and the facts may conveniently be called adjudicative facts." Kenneth C. Davis, *An Approach to Problems of Evidence in the Administrative Process*, 55 HARV. L. REV. 364, 402 (1942); *see also* FED. R. EVID. 201(a) cmts. I am not inclined to semantic hair splitting. If "truth" seeking function equals fact-finding function I wholeheartedly agree that a trial has such as one of its most important purposes. However, to me clarity of thought compels noting the distinction. The moral and philosophical concept of "truth" has implications that far exceed the boundaries of valid discourse on ordinary legal topics. Some thoughtful writers on legal issues who dare to invoke the word "truth" recognize the complexity of this problem. Others are not as perceptual. Thus, Judge Marvin Frankel, in his article, was cautious. He did, of course, use the word "truth," but his article is not an essay on truth. Rather, it is a compendium of complaints about the inherent conflicts between our adversarial system and the fact-finding mechanisms of our judicial system. *See* Frankel, *supra* note 44. Monroe Freedman was able to refute effectively Frankel's complaints without the necessity of debating the meaning of truth. *See* Monroe Freedman, *Judge Frankel's Search For Truth*, 123 U. PA. L. REV. 1060 (1975). Frankel's caution should be compared with a more recent article, Judge Thomas L. Steffen, *Truth as Second Fiddle: Reevaluating the Place of Truth in the Adversarial Trial Ensemble*, 1988 UTAH L. REV. 799. While Steffen's essay entices the reader with a section entitled "The Meaning and Discernment of Truth," in which he criticizes others' attempts to define truth, *id.* at 805-07, he offers no useful definition of the concept. One is left with the distinct impression that truth to Steffen is like pornography to Justice Potter Stewart. He knows it when he sees it but cannot define it. Rather than logic, Steffen offers up simplistic platitudes ("Truth is both spirit and life's blood to justice. Its ample, unadulterated presence empowers justice to fairly acquit or convict, punish or forebear."). *Id.* at 804. Steffen's root complaint, like most others who invoke emotionally charged words such as "truth," is that our adversary system and constitutional procedural rights allow some guilty persons to escape conviction. While Frankel would tinker with the edges of the adversary system to resolve the problem, Steffen would scuttle the adversary system and replace it with an inquisitional system. Moreover, he would enthusiastically eviscerate the Fourth, Fifth, and Sixth Amendments in seeking to assure conviction of the guilty. He claims to have faith in the jury system, but does not acknowledge that even if all of his extreme suggestions were adopted, the jury in our system is free to disregard the facts and/or the law and return an "untruthful" verdict.

system is in large part inconsistent with the fact-finding purpose of a trial.[62] In an adversarial system it is defense counsel's duty to prevent adverse facts from being admitted against his client if he can do so legally and not violate professional rules. Moreover, most of our constitutional rights, statutory procedural rules, and evidentiary rules work against the fact-finding function, as they are designed not to further fact-finding but rather to protect the rights of the accused. Notwithstanding these obstacles, it can be fairly said that trials in our system do a reasonably good job of fact-finding.

That trials in our system have a fact-finding function occasionally leads to the mistaken idea that our legal system can and should provide certainty. The notion that the law, or a trial, can provide certainty is at the root of many misunderstandings about our system. It is, however, a "myth."[63] No legal system or trial procedure that can provide certainty has ever been developed. As Second Circuit Judge Jerome Frank observed, the law seeks to regulate conduct which is a function of the human mind and is not subject to any known limitations.[64] Since the law cannot possibly contemplate all human conduct and ideas, it cannot provide certainty. Moreover, while many proclaim a desire for certainty, the fact is "that law is uncertain and must be uncertain, [and] that overeagerness for legal certainty . . . [is] harmful."[65]

Although the law cannot provide certainty, it can provide ways and means for preventing and resolving disputes. The institutions within a legal system can be designed to resolve disputes *equitably* and *fairly*. Unlike certainty, fairness is obtainable.[66] Fairness in our system equals justice.

The United States Supreme Court's harmless error jurisprudence purports to add to the list of purposes of a trial. The Court in considering the harmless error doctrine has asserted that "the central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence."[67] The Court's assertion is open to serious question. A criminal trial does not determine factual guilt. Rather, a criminal trial determines legal guilt of the defendant.[68] A defendant who is factually innocent may be found legally guilty in our system. The Court's assertion that the "central purpose of a criminal trial is to determine the . . . innocence of the defendant" is even more questionable. No criminal trial in our system

62. *See* Frankel, *supra* note 44; Freedman, *supra* note 61; Saltzburg, *Lawyers*, *supra* note 41.

63. *See* JEROME FRANK, LAW AND THE MODERN MIND 3-12 (1930).

64. *See id.* at 6-7.

65. FRANK, *supra* note 63, at 239 (elaborating on Justice Cardozo's view of legal certainty).

66. It should also be noted that the verdict, which is the end result of a trial, is the product of a jury. The jury is comprised of human beings who act collectively and are not (except in theory) obligated to follow the law, but rather can decide the issues on any basis and for any reason. And, in our system, in a criminal trial the jury issues a general verdict which provides no reason as to how or why it reached its decision.

67. Delaware v. Van Arsdall, 475 U.S. 673, 681 (1986). For this remarkable statement the Court's sole citation of authority is to *United States v. Nobles*, 422 U.S. 225, 230 (1975), which quoted *Berger v. United States*, 295 U.S. 78, 88 (1935) in saying that "[t]he dual aim of our criminal justice system is 'that guilt shall not escape or innocence suffer.'"

68. *See* Kotteakos v. United States, 328 U.S. 750, 764 (1946).

determines factual innocence.[69] Trials in our system determine legal guilt only. An accused in our system may very well be found not guilty and not be innocent.[70] In our system, factual innocence cannot be inferred from a not guilty verdict.

The criminal trial serves a variety of vitally important purposes and functions. Due process implicitly contemplates some form of review for error occurring at trial. Any system that demands fairness in its proceedings but fails to provide for review mocks the concept of fairness.

C. Purposes of Appellate Courts

The United States Constitution does not specifically provide for appeals from trial court verdicts. Notwithstanding the lack of constitutional basis, our appellate system is so well established that it is now generally held to be imbued with due process values.[71] Indeed, the United States Supreme Court has specifically held that while the Constitution does not require states to provide appeals for criminal convictions, if an appellate process is provided, it must comport with federal due process requirements.[72] The traditional view is that appellate courts serve two purposes: (1) error review and correction, and (2) development of the law.[73] If our appellate courts are to fulfill their error review and law development purposes and to maintain their systemic integrity, they must correct serious errors found on appeal.

A trial error may be defined as a failure by the trial court to apply correctly existing law to the case before it.[74] In the event an alleged error is properly preserved and raised on appeal, it is the appellate court's duty to review the allegation and, if error occurred, to correct the error. Error review and correction is an appellate court's first reason for existence. The second, law development, runs parallel and sometimes simultaneous with error review. In developing the law of its jurisdiction, the appellate court issues written opinions setting forth the reasons for its decisions. This process, along with the principle of *stare decisis*,

69. Actual factual innocence is, of course, very relevant in any criminal trial, as actual innocence is usually a defense. *But see* Herrera v. Collins, 506 U.S. 390 (1993). However, it cannot be said that a criminal trial's purpose is to determine factual innocence.

70. For an interesting twist on this observation, see *Flores v. State*, 896 P.2d 558, 560 (1995), where a trial judge, in noting the distinction, decided to discard the required instruction that the defendant was "presumed innocent" in favor of an instruction that the defendant was "presumed not guilty."

71. *See* PAUL D. CARRINGTON ET AL., JUSTICE ON APPEAL 7 (1976).

72. *See* Evitts v. Lucy, 469 U.S. 403, 400-02 (1985); *see also* CARRINGTON, *supra* note 71, at 34-38.

73. *See* DANIEL J MEADOR, APPELLATE COURTS: STAFF AND PROCESS IN THE CRISIS OF VOLUME 1-3 (1974), *reprinted in* MEADOR, APPELLATE COURTS 1994 ED., *supra* note 54, at 4-5. Professor Meador adds a third purpose — supervision of trial courts — which can be viewed as implicit within the first two purposes. *See also* CARRINGTON, *supra* note 71, at 2-3.

74. An appellate court's duty to review error requires it to examine allegations of discrete trial error. Error may include incorrect rulings or misapplication of the law during the course of the trial. Allegations of error must be reviewed and, if found, the error must be corrected irrespective of whether or not it affected the verdict, unless it is determined to be harmless.

provides for stability in the jurisprudence and enables individuals to plan their future activities.[75]

In developing the law, an appellate court guides trial courts, prosecutors, defense counsel, and the public. The present harmless error rule undermines the law development purpose of appellate courts. The rule allows courts to avoid deciding hard issues by declaring that *if* any error occurred it was harmless without analyzing or resolving the legal issue before it.[76] Equally bad is the practice of some courts of reviewing for error, finding none, and then adding that even if error had occurred it would have been harmless.[77] These practices stand the system on its ear. By refusing to decide an issue, the court defaults in performing either of the functions which justifies its existence. If a court does not review alleged error, it provides no guidance for similar problems which may arise in the future,[78] and it cannot correct error if it does not review claimed error.

The harmless error rule also pushes appellate courts into the role of fact finders. It is not the purpose of appellate courts to determine guilt.[79] However, as a direct result of the Supreme Court's harmless error jurisprudence, appellate courts in the United States today spend a substantial part of their time analyzing the appeal record to determine whether the accused was proven guilty. This misplaced concentration on guilt raises serious concern about whether appellate courts are fulfilling their systemic purposes and whether they are usurping the function of juries. Notwithstanding whether Sixth and Seventh Amendment rights are being violated in the application of the rule, appellate courts are not designed to develop facts and determine guilt. Appellate courts work from a cold record. They do not hear or see the witnesses, nor are they participants in the dynamics of the trial. Appellate courts simply cannot adequately afford litigants due process of law if they purport to function as fact finders.

II. What Makes Error Harmless? An Update

Traynor began his inquiry into *The Riddle of Harmless Error* with the question, "How does a judge determine whether an error is harmless or not?"[80] Implicit in the question are several assumptions.

First, of course, the question assumes that an error has been committed. A finding of trial error by an appellate court is not inconsequential. Counsel for the accused must preserve the error for review by raising the issue through an

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75. *See* MEADOR, APPELLATE COURTS 1994 ED., *supra* note 54, at 4.

76. *See* Dowthitt v. State, 931 S.W.2d 244, 251 (Tex. 1996) ("We need not address the merits of this allegation because any error would be harmless.").

77. *See, e.g.*, United States v. Williams, 980 F.2d 1463, 1466 n.1 (1992) (finding that even if there had been a rule violation, the error would have been harmless); Cockrell v. State, 933 S.W.2d 73, 90 (Tex. Crim. App. 1996) (finding trial court did not err in refusing to give requested instruction, yet any error was harmless).

78. *See, e.g.*, Edwards, *supra* note 19, at 1182.

79. *See* Kotteakos v. United States, 328 U.S. 750, 763 (1946) (citing Weiler v. United States, 323 U.S. 606, 611; Bollenbach v. United States, 326 U.S. 607, 613-14 (1946)).

80. *See* TRAYNOR, *supra* note 3, at 3.

objection based upon proper grounds so that the trial judge may have an opportunity to correct the error. If the trial judge overrules the objection, counsel must raise the issue in the direct appeal brief. Appellate judges will only then consider the claim of error. Failure to preserve properly the error through objection waives all but plain error. Appellate judges begin consideration of a claim of error with a presumption of correctness in the trial court proceedings. The appellant must overcome this presumption and convince not one, but a majority of appellate judges on the court that an error was in fact committed. Only after all of this can an appellate court find trial error. Such a finding means that the state, in seeking to deprive the accused of his or her life or liberty, has violated its own rules, the same reason the accused was put on trial.

Second, implicit in the question, "How does a judge determine whether an error is harmless or not?" is the notion that if the error is deemed harmless the state ought not suffer any sanction for the violation. This assumption could be interpreted to mean that trial judges are free to violate the law in conducting trials so long as the accused is not harmed. One purpose of appellate courts is to correct errors and thereby to deter trial courts from intentionally committing error. Unless appellate courts hold trial courts to high standards, the deterrence factor is nil.

Third, and finally, the question assumes that an appellate judge in our system can in fact determine whether or not an error is harmless. If the test of harmlessness of an error is its effect on the judgment, the assumption that an appellate judge can determine harmlessness is incorrect because a judge cannot possibly know or review what in the minds of the jurors led to the verdict.[81] Traynor dismisses this problem by concluding that "an appellate court can evaluate a verdict of guilty in terms of whether there has been harmless error or harm by reference to what a rational jury might do."[82] But asking whether an error affected a "rational" jury begs the question Traynor deemed crucial: did the error affect *this* verdict, not a verdict rendered by some hypothetical jury?

The assumptions implicit in Traynor's opening question are worth keeping in mind while considering his thoughts on resolving the problem of how appellate courts ought to evaluate trial error. In resolving the issues presented by the rule, Traynor was influenced by the rule as applied in the English courts[83] and also by Judge Jerome Frank's views[84] on the problem.

A. The English Precedent

Our system shares with England a strong common law tradition. There are similarities between our system and the English system that make valid a consideration of how trial errors are treated in the appellate courts of England. Such

81. *See* MARTIN SHAPIRO, COURTS 37-41 (1981), *reprinted in* MEADOR, APPELLATE COURTS 1994 ED., *supra* note 54, at 13.

82. TRAYNOR, *supra* note 3, at 33.

83. *See id.* at 4-13.

84. *See id.* at 35-36.

consideration is, however, "risky business,"[85] since there are more differences than similarities between the two systems.

England has no written constitution.[86] Moreover, the English judicial system is much more formal than its American counterpart.[87] While English judges seek specific language in a statute, a rule, or case law upon which to base a decision, American judges are much more likely to feel free to exercise discretion in interpreting and applying constitutional and statutory provisions. The English system does not assign to its judges the responsibility of defining and preserving due process values. Such responsibility is left with the English legislature — Parliament. English appellate judges are, of course, concerned about preserving the English litigant's right to a fair trial. But their role cannot be compared to American appellate judges who have the systemic responsibility to define, develop, preserve and protect our due process rights against abuses by the executive and legislative branches of the government and against oppressive majorities. American judges develop law; English judges are much less likely to do so.[88]

Just as important as the broad systemic differences are the procedural and functional differences between the appellate systems of England and the United States. The American appellate system reviews claims of errors based upon the record of the trial below and written briefs. Error must be properly preserved or be "plain."[89] Oral arguments are rare, the defendant is almost never present for any part of the appeal process, and a written opinion setting forth the decision is almost always issued. Reversals of convictions for trial error in the United States

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85. *See* MEADOR, APPELLATE COURTS 1994 ED., *supra* note 54, at 751.

86. The English opinions do refer to constitutional principles. When they do so, they are referring to unwritten principles. Harold J. Berman has noted:

> The unwritten English constitution is a historically evolving set of principles embodied in such political and legal instruments as the Magna Carter of 1215, the Petition of Right of 1628, the Habeas Corpus Act of 1676, the Bill of Rights itself [of 1689], and, perhaps above all, the common law as it had evolved and continued to evolve in the decisions and opinions of the courts.

Harold J. Berman, *The Impact of the Enlightenment on American Constitutional Law*, 4 YALE J.L. & HUMAN., 311, 320 (1992).

87. *See* P.S. ATIYAH & R.S. SUMMERS, FORM AND SUBSTANCE IN ANGLO-AMERICAN LAW 32 (1987).

88. There is a very strong sentiment in the English culture that judges ought not make law. English judges frequently say they do not make law; they declare what the law is. Quite obviously, however, English judges do make law, but they are much less inclined and have less authority to do so than American judges. In part this attitude can be explained by the formal nature of the English system. In England the legislature is supreme; the courts have no power of judicial review. In the United States courts trump the legislature in defining constitutional rights. American judges are much more likely to define, interpret and give effect to the "purpose" or "intent" of the constitution and statutes. Moreover, the American criminal justice system is dominated by constitutional law, an area of the law in which the legislature has little ultimate authority. Thus, as to constitutional criminal procedure, American judges are not just lawmakers, they are the only lawmakers. *See* ATIYAH & SUMMERS, *supra* note 87, at 139-43 (1987); *see also* Daniel J. Meador, *English Appellate Judges from an American Perspective*, 66 GEORGETOWN L.J. 1349 (1978).

89. *See* Simpson v. State, 876 P.2d 690, 693 (Okla. Crim. App. 1994); FED. R. CRIM. P. 52(b).

are usually remanded for a new trial and only rarely do appellate courts dismiss the charges.[90]

In the English system appeals are screened by a single judge who either grants or denies leave to appeal. If the single judge grants leave to appeal, the appeal record provided to the appellate judges consists of a Notice and Grounds of Appeal form (similar to a Petition in Error), a copy of the trial judge's "summing up"[91] (similar to jury instructions in our system), and a bench memo prepared by the court's central staff. The parties file no written briefs. Rather, a three judge panel considers appeals at scheduled hearings at which counsel for both parties present oral arguments. The accused has a right to be present,[92] witnesses may be called and evidence presented,[93] and issues which were not presented at trial may be raised.[94] The appellate judges hear the arguments and witnesses, if any, and immediately announce their decision and opinions orally. Very few appeals result in written opinions.[95] If the conviction is reversed, the appeal is said to be "allowed" and if affirmed, it is "dismissed." Only since 1964 have English appellate judges been permitted to reverse and remand for a new trial. Before 1964, the English version of double jeopardy prohibited retrial after reversal.[96] For most of England's history, a reversal meant dismissal of the charges; even now, reversals usually result in dismissal, as orders for retrial are rare.

In the English system, appellate judges focus not on the accused's rights, but on the accuracy of the verdict. The contrast between the English appellate courts' concern with guilt and the American appellate courts' concern with procedural rights is a function of the fundamental difference between the two systems. The United States Constitution defines the parameters of a fair trial much more broadly than does English doctrine. In addition to what goes on at the trial, the United States appellate judge is concerned about how evidence was gathered, how and when the defendant was arrested, how long he was detained before he was taken before a magistrate, whether the defendant was warned about his rights, when and if counsel was appointed, how the defendant was interrogated, and, if a statement was given, whether it was voluntary. The American judge is concerned about these matters because the constitution so requires. Not so in England. As Atiyah and Summers have stated:

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90. Dismissals usually occur only where the evidence is found to be insufficient.

91. The trial judge may include in his summing up his opinion of the case, something American trial judges should never do.

92. *See* MEADOR, APPELLATE COURTS 1994 ED., *supra* note 54, at 791.

93. *See* MEADOR, APPELLATE COURTS 1994 ED., *supra* note 54, at 792 (citing Criminal Appeal Act of 1968, § 23).

94. *See* Stirland v. Director of Public Prosecutions, 1944 App. Cas. 315, 328 (appeal taken from Eng.).

95. Indeed very few opinions are even reported, and those few are usually reported by private barristers functioning as reporters.

96. In 1964, a statute was passed to allow retrial if there was new evidence. *See* TRAYNOR, *supra* note 3, at 11 (citing Criminal Appeal Act 1964, ch. 43, § 1(1)).

> English judges look *at the trial itself* to see if the accused has had a fair trial. It is, of course, the overriding duty of an English judge (as no doubt it is of an American judge) to see that the accused has a fair trial; but English judges do not generally look *behind* the trial to see what went on before the case was presented to the court. *If the evidence was presented, and if it shows that the accused did violate the criminal law, that is sufficient to constitute a trial with due process of law according to English doctrine* . . . If the police are in fact guilty of regular violations of the law . . . then, according to the English view, there are other ways of dealing with these violations.[97]

The English concept of a fair trial thus requires only that the accused be proven guilty. The American concept of a fair trial requires much more. That this fundamental difference should impact how appellate courts in the two systems might view trial error is self evident. A guilt based approach to harmless error is entirely reasonable in the English system given the English concept of a fair trial.

We should be mindful of the systemic and procedural differences between the English and American systems when English cases involving "harmless error" concepts are used to support a position as to what the harmless error rule in the United States is or ought to be. It is not possible to conclude that because the harmless error rule in the English system is thus and so, the same rule can or should be applied in our system. Our legal culture and procedures are too different. We can benefit from the analysis and logic of the English cases, but we should be careful.

English courts do not use the term "harmless error." In 1907 Parliament adopted the Criminal Appeal Act which included the following: "Provided that the court may, notwithstanding that they are of opinion that the point raised in the appeal might be decided in favor of the appellant, dismiss the appeal if they considered that no substantial miscarriage of justice has actually occurred."[98]

After 1907, English courts, in considering whether an error required correction, uniformly referred to and applied "the proviso" of the Criminal Appeal Act. Prior to 1907, the English cases, upon finding error, allowed or dismissed appeals depending upon "the nature of the case and the weight of the evidence."[99] The cases before or after 1907 do not uniformly discuss or analyze errors in terms of prejudice or harm. Moreover, the similarity of the analysis is remarkable in the cases before and after the enactment of the proviso.

Two cases, which Traynor discusses in *The Riddle of Harmless Error*, are instructive as to both the analysis and consistency of application in the English system. In *Rex v. Ball*, an 1807 forgery case, evidence of prior bad conduct was

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97. ATIYAH & SUMMERS, *supra* note 87, at 180.

98. *See* TRAYNOR, *supra* note 3, at 10-11 (citing 7 Edw., ch. 23, § 4(1); the word "substantial" was eliminated in 1966 (Criminal Appeal Act of 1966, ch. 31); this provision is now in § 2(1) of the Criminal Appeal Act of 1968).

99. *See* Rex v. Ball, 168 Eng. Rep. 721, 721 (K.B. 1807).

erroneously admitted.[100] The conviction was affirmed and the appeal dismissed upon the following analysis:

> If the case were made out by proper evidence in such a way as to leave no doubt of the guilt of the prisoner in the mind of any reasonable man, . . . *so there could not be a new trial in felony*, such a conviction ought not be set aside, because some other evidence had been given which ought not to have been received; but if the case without such improper evidence were not so clearly made out, and the improper evidence might be supposed to have had an effect on the minds of the jury, it would be otherwise.[101]

In *Stirland v. Direction of Public Prosecutions*,[102] another forgery case, again evidence of prior bad conduct was improperly admitted, and again the conviction was affirmed. The appeal was dismissed with the following analysis:

> Apart from the impeached questions . . . , there was an overwhelming case proved against the appellant. When the transcript is examined it is evident that no reasonable jury, after a proper summing up, could have failed to convict the appellant on the rest of the evidence to which no objection could be taken. There was, therefore, no miscarriage of justice, and this is the proper test to determine whether the proviso . . . should be applied.[103]

A fair reading of the holdings of these two cases indicates that in both, the appellate judges did the following: (1) found trial court error, (2) reviewed the evidence and determined that the defendant was guilty, (3) determined that apart from the error, the evidence was sufficient to convict the defendant, and (4) upheld the convictions.

Traynor contends that the *Ball* decision is similar in its analysis to *Chapman*. To the contrary, both *Ball* and *Stirland* are more comparable to *Harrington v. California*,[104] which applied an overwhelming evidence of guilt test which Traynor opposed. Irrespective of the rationale, the decisions in *Ball* and *Stirland* are most likely explained by the simple fact that the errors in these cases simply were not serious enough to warrant reversal when viewed in light of the English double jeopardy rule prohibiting retrials existing at the time of those decisions.

Traynor concludes that *Stirland* announced in dicta[105] a stricter rule which requires reversal for error in most cases, and that subsequent English cases apply the stricter test which "requires near certainty that the error did not affect the judgment."[106] I have been unable to verify this conclusion. Indeed, my review of

100. *See id. Ball* was decided a century before the adoption of the proviso.
101. *Id.* at 722-23 (emphasis added).
102. 1944 App. Cas. 315, 328 (appeal taken from Eng.).
103. *Id.* at 321.
104. 395 U.S. 250 (1969).
105. *See* TRAYNOR, *supra* note 3, at 11-12.
106. *See id.*

modern English cases indicates that the proviso, much like the harmless error rule, is being used more often to affirm convictions.[107] The English courts have emphasized that the applicability or nonapplicability of the proviso in one case cannot be used with reliability as authority to decide whether the proviso will be applied in another case.[108]

When the English precedent and the birth and development of the harmless error rule in the United States are put into perspective, several points become evident. As American courts considered the federal harmless error statute during the period from 1935 through 1946,[109] the courts looked to the English decisions and their treatment of errors in the English system.[110] The English courts primarily concerned themselves with accuracy of the verdict as to guilt and considered the effect of the error on the verdict. Since the English rule of double jeopardy at that time prohibited retrial upon reversal, courts were reluctant to reverse if the record indicated evidence of guilt. The American courts adopted the English premises that the question is the "effect of the error on the verdict" and that the appellate court could ascertain that effect by reviewing the evidence of guilt. American courts and Traynor accepted these premises without adequate consideration of the differences between the two systems. The American legal system assigns a higher value to individual rights than to accuracy of verdicts,[111] and in theory at least, appellate courts in this country do not determine or relitigate the issue of guilt. The American appellate procedures do not lend themselves well to fact determinations. The appellate procedures of American courts are designed and developed to protect the accused's right to a fair trial. Moreover, nothing in our law prevents retrials in most reversals for error.[112] These differences militate against adopting the English approach to harmless error. The Supreme Court did not consider these differences, but rather appears to have adopted the English rationale without question.

B. Wayward Course of Harmless Error in the United States Revisited

The United States Supreme Court was first presented with the issue of whether constitutional error could be harmless in the 1897 case of *Bram v. United States*.[113] In *Bram*, the government argued that a statement by the accused which had been erroneously admitted into evidence could be held harmless. The court rejected the argument, and *Bram* was subsequently interpreted as establishing a rule requiring automatic reversal in cases of constitutional trial error.[114]

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107. *See* Anderson v. The Queen, 1972 App. Cas. 100 (P.C. 1971) (appeal taken from Jam.); *see also* Case and Comment, Appeal, Anderson v. The Queen, 1971 CRIM. L. REV. 701.

108. *See* R. v. Thorpe, 59 Crim. App. 295 (C.A. 1974).

109. *See supra* note 29.

110. *See* Bollenbach v. United States, 326 U.S. 607, 615 n.1; United States v. Antonelli Fireworks Co., 155 F.2d 631, 651-52 (2d Cir. 1946) (Frank, J., dissenting).

111. "That it is better 100 guilty persons should escape than that one innocent person should suffer, is a maxim that has been long and generally approved." Letter from Benjamin Franklin to Benjamin Vaughan (Mar. 14, 1785), *in* 9 THE WRITINGS OF BENJAMIN FRANKLIN 293 (Albert H. Smyth ed., 1906).

112. Insufficiency of evidence is an exceptional case in which retrial is not permitted.

113. 168 U.S. 532 (1897).

114. *See* Stephen A. Saltzburg, *The Harm of Harmless Error*, 59 VA. L. REV. 988, 1000 (1973)

The early 1900s brought significant changes to the United States. The country shifted from an agrarian to an industrial economy. Population and crime increased dramatically. Citizens became increasingly frustrated with appellate court reversals of criminal convictions.[115] A 1925 American Bar Journal article labeled this country's appellate courts "impregnable citadels of technicality,"[116] and set forth numerous examples of reversals for purely inconsequential errors.[117] Subsequently, influential lawyers, judges, and law professors lobbied for legislation to create a federal harmless error statute,[118] as the English Parliament had done in 1907. Many states, heeding the outcry, passed harmless error statutes.[119] In 1919 Congress passed the federal statute, which declared that convictions shall not be reversed for "errors or defects which do not affect the substantial rights of the parties."[120]

The courts paid little attention to the harmless error statute until the mid-1930s. The period from the mid-1930s to the mid-1940s produced a remarkable series of cases in the United States Court of Appeals for the Second Circuit concerning harmless error.[121] In these cases, Judges Learned Hand and Jerome Frank engaged in a discourse regarding the harmless error rule. The Second Circuit court, with Hand writing for the majority, consistently affirmed convictions after concluding trial error was harmless using "effect on the verdict" and "evidence of guilt" tests.[122] In each of the cases in which Frank participated, he dissented with particular vehemence against the guilt based approach to harmless error.[123] The Supreme Court, consistent with its then view that trial error was presumed prejudicial, reversed the Second Circuit court in most of the cases and sided with

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[hereinafter Saltzburg, *Harm*].

115. *See id.* at 1006 n.56.

116. Kavanagh, *supra* note 4, at 222.

117. *See id.*

118. *See* Goldberg, *supra* note 52, at 422.

119. Justice Black, writing in 1967 for the majority in *Chapman*, was able to declare that all fifty states had adopted harmless error statutes or rules. Chapman v. California, 386 U.S. 18, 22 (1967); *see, e.g.*, 20 OKLA. STAT. § 3001.1 (1991) ("No judgment shall be set aside or new trial granted by any appellate court of this state in any case, civil or criminal, on the ground of misdirection of the jury or for error in any matter of pleading or procedure, unless it is the opinion of the reviewing court that the error complained of has probably resulted in a miscarriage of justice, or constitutes a substantial violation of a constitutional or statutory right").

120. 28 U.S.C. § 2111 (1994); *see supra* note 6.

121. *See* TRAYNOR, *supra* note 3, at 35, 94 n.85.

122. *See* Kotteakos v. United States, 328 U.S. 750 (1946).

123. *See* United States v. Antonelli Fireworks Co., 155 F.2d 631, 651 (2d Cir. 1946) (Frank, J., dissenting); United States v. Bennett, 152 F.2d 342, 348-49 (2d Cir. 1945) (Frank, J., dissenting); United States v. Rubenstein, 151 F.2d 915, 920-25 (2d Cir. 1945) (Frank, J., dissenting); United States v. Mitchell, 137 F.2d 1006, 1012 (2d Cir. 1943) (Frank, J., dissenting); United States v. Liss, 137 F.2d 995, 1001-06 (2d Cir. 1943) (Frank, J., dissenting).

Frank.[124] Later, in the case of *Harrington v. California*[125] the Supreme Court came around to Hand's guilt based approach to harmless error determination.

Traynor argues that the harmless error statute, which prohibits reversals for errors that "do not affect the substantial rights of the parties," is not specific enough to establish standards for determining when errors are harmless. As he says, to ask whether an error affects the substantial rights of a party begs the question: was the error harmless?[126] However, to ask whether an error affects the verdict also begs the question: was the error harmless? Asking either question does not answer or define the issue, but merely establishes the premise. Irrespective of which question is asked, a test of harmlessness must be developed. In *Kotteakos v. U.S.*,[127] the Supreme Court first construed the federal harmless error statute and set forth a test of harmless error. It is at this point that the Court went wrong. The statute itself asks the *crucial* question: did the error "affect the substantial rights"[128] of the accused? The Court, however, reformulated the issue as whether the error "affected the verdict." In so doing it adopted Frank's view of harmless error[129] and the English approach to the rule.[130] The stage was thus set for the current quagmire of harmless error jurisprudence.

In *Kotteakos*, Justice Wiley Rutledge put forth the Court's first harmless error test developed under the federal statute:

> If, when all is said and done, the conviction is sure that the error did not influence the jury, or had but very slight effect, the verdict and the judgment should stand, except perhaps where the departure is from a constitutional norm or a specific command of Congress. But if one cannot say, with a fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand.[131]

The *Kotteakos* test for harmless error may be stated as "errors are to be disregarded only if the reviewing court can say with fair assurance that the error

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124. *See, e.g.*, United States v. Bollenbach, 147 F.2d 199 (2d Cir. 1944), *rev'd*, 326 U.S. 607 (1946); United States v. Bruno, 105 F.2d 921 (2d Cir.1939), *rev'd*, 308 U.S. 287 (1939); United States v. Berger, 73 F.2d 278 (2d Cir.1934), *rev'd*, 295 U.S. 78 (1935).

125. 395 U.S. 250 (1969).

126. *See* TRAYNOR, *supra* note 3, at 15-16.

127. 328 U.S. 750 (1946).

128. *See supra* note 6.

129. *See* United States v. Antonelli Fireworks Co., 155 F.2d 631, 647 (2d Cir. 1946) (Frank, J., dissenting); *see also* TRAYNOR, *supra* note 3, at 94 n.85.

130. *See* Bollenbach v. United States, 326 U.S. 607, 615 n.1 (1946).

131. *Kotteakos*, 328 U.S. at 764-65 (footnote omitted) (citation omitted).

had no substantial effect upon the verdict that was rendered."[132] *Kotteakos* is significant for four additional reasons: (1) it ended the era during which error was presumed prejudicial,[133] (2) it declined to adopt a presumption of harmlessness and to assign a burden to either party as to harmlessness or prejudice,[134] (3) it found that in applying the harmless error analysis each case must be considered on a case-by-case basis,[135] and (4) it suggested that constitutional errors were not subject to harmless error analysis.[136]

For the next twenty years the general consensus was that constitutional errors required automatic reversal. In *Chapman v. California*, decided in 1967, the Court for the first time wrote that "there may be some constitutional errors which in the setting of a particular case are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless, not requiring automatic reversal of the conviction."[137]

The test put forth in *Chapman* of whether the error affected the verdict is that "the court must be able to declare a belief that it was harmless beyond a reasonable doubt."[138] The "harmless beyond a reasonable doubt standard" was intended to create a more rigorous standard for determining constitutional error harmless than had been established in *Kotteakos* for nonconstitutional error. Indeed, Traynor and Professor Stephen Saltzberg read *Chapman* as establishing a rule requiring reversal for constitutional error if it is *reasonably possible* that the error affected the verdict.[139]

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132. Edwards, *supra* note 19, at 1175.

133. *See* Saltzburg, *Harm*, *supra* note 114, at 1009. Saltzburg contends that in *Kotteakos* "[n]othing is more interesting than the result. Having set forth its tests, the Court proceeds to misapply them . . . and reverse the conviction." *Id.* at 1109 n.64.

134. This business of who has the "burden" has for some inexplicable reason been of great interest to commentators and a matter of great difficulty to some courts. Some of the interest and confusion probably stems from the unfortunate discussion in *Chapman v. California* concerning the burden shifting to the "beneficiary of a constitutional error" to show that the error "did not contribute to the verdict." *Chapman*, 386 U.S. at 24. However, Traynor correctly analyzed the 'presumption' and 'burden' issues as being totally irrelevant to the issue. They are, as he noted, irrelevant because on appeal it is too late for such devices, as no evidence is taken on appeal. *See id.* at 31-32.

135. Justice Rutledge stated, "In the final analysis judgment in each case must be influenced by conviction resulting from examination of the proceedings in their entirety, tempered but not governed in any rigid sense of stare decisis by what has been done in similar situations." *Kotteakos*, 328 U.S. at 762.

136. *See Kotteakos*, 328 U.S. at 764-65 (citing Bruno v. United States, 308 U.S. 287, 294 (1939)).

137. Chapman v. California, 386 U.S. 18, 22 (1967).

138. *Id.* at 24.

139. Both Traynor and Saltzburg rely upon the language in *Chapman* which referred to *Fahy v. Connecticut*, 375 U.S. 85 (1963). *Fahy*, a case decided four years earlier, in which the Court had declined to rule on the question of whether constitutional error could be harmless, had referred to a "reasonable possibility" test. *Id.* at 86. Saltzburg also states, "The beyond a reasonable doubt test is, for all practical purposes, the exact converse of the 'reasonable possibility' standard." Saltzburg, *Harm*, *supra* note 114, at 1014 n.88. Saltzburg argues in favor of reasonable possibility as the test for all errors. *Id.* at 1031. Traynor argues the test should be that all errors should be deemed harmless unless it is highly probable that the error affected the judgment. *See* TRAYNOR, *supra* note 3, at 44-45.

Traynor's analysis of the wayward course of the harmless error rule in the United States ends with an optimistic assessment of *Harrington v. California*,[140] decided just before his essay was published. He thought *Chapman* too stringent a rule, coming "close to automatic reversal," resulting in courts giving the test "lip service while tacitly discounting it."[141] In *Harrington*, Traynor seized on the words "probable impact"[142] and expressed the hope that the Court might be shifting from *Chapman's* reasonably possible test to his preferred test based on probabilities.[143]

Traynor was amazingly astute in his observation that courts in the future would give lip service to *Chapman*, but discount it in application. However, he missed the mark completely in his assessment of *Harrington*. In fact, *Harrington* can be read as overruling *Chapman* and creating a new test of harmless error.[144]

In *Harrington* the trial court erroneously admitted confessions of nontestifying co-defendants in violation of Harrington's Sixth Amendment right of confrontation.[145] The Supreme Court in a brief opinion stated "the case against Harrington was so overwhelming that we conclude that this violation of *Bruton* was harmless beyond a reasonable doubt."[146] By these few words the Court changed the course of development of harmless error jurisprudence in the United States. Justice Brennan, for the dissenters, said:

> The Court today by shifting the inquiry from whether the constitutional error contributed to the conviction to whether the untainted evidence provided "overwhelming" support for the conviction puts aside the firm resolve of *Chapman* . . . . As a result, the deterrent effect of such cases as *Mapp v. Ohio, Griffin v. California, Miranda v. Arizona, United States v. Wade, Bruton v. United States*, on the actions of both police and prosecutors, not to speak of trial courts, will be significantly undermined.[147]

Chapman, to this day, remains the most often cited harmless error case.[148] Most citations to *Chapman*, however, are generic and refer only to the fact that constitutional errors may be harmless, and do not apply *Chapman's* specific test of harmlessness. *Harrington* shifted the emphasis of the test from whether beyond

140. 395 U.S. 250 (1969).

141. TRAYNOR, *supra* note 3, at 43-44.

142. *Harrington*, 395 U.S. at 254.

143. *See* TRAYNOR, *supra* note 3, at 46.

144. The *Harrington* majority, of course, explicitly reaffirmed its allegiance to *Chapman* but did in fact apply a different test. The dissenters essentially concluded that *Chapman* was overruled. *See Harrington*, 395 U.S. at 255 (Brennan, J., dissenting).

145. *See* Bruton v. United States, 391 U.S. 123, 126 (1968).

146. *Harrington*, 395 U.S. at 254.

147. *Id.* at 255 (Brennan, J., dissenting) (citations omitted).

148. *Chapman* is one of the most cited cases ever decided by the U.S. Supreme Court. One commentator calculated that *Chapman* had been cited over 6000 times by 1980. *See* Steven H. Goldberg, *supra* note 52, at 421 n.2.

a reasonable doubt the error possibly affected the verdict to a determination of whether the accused is guilty.

The Court confirmed the shift to an evidence of guilt test in two 1972 cases. In *Milton v. Wainright*,[149] a police officer obtained statements from Milton relating to the offense after he had obtained counsel. The statements were admitted at his trial, ostensibly in violation of Milton's Fifth and Sixth Amendment rights. The Supreme Court, considering the denial of Milton's habeas corpus petition, declined to rule on the alleged constitutional violations. Instead, the Court held that "assuming, arguendo, that the challenged testimony should have been excluded, the record clearly reveals that any error in its admission was harmless."[150] The Court found any error would be harmless because the jury "in addition to hearing the challenged testimony, was presented with overwhelming evidence of the petitioner's guilt, including no less than three full confessions that petitioner made prior to his indictment."[151] And, in *Schneble v. Florida*,[152] the Court held harmless another *Bruton* confrontation clause error finding "the independent evidence of guilt . . . overwhelming."[153]

By the mid-seventies the evidence of guilt test was firmly entrenched in the Supreme Court's jurisprudence as *the* test of harmless error. The Court continued to pay lip service to *Chapman*, but the focus of the test centered on the singular question of guilt.[154] The Court did not put forth the rationale for its guilt based approach to harmless error until its decision in *Delaware v. Van Arsdall*, where then Justice William Rehnquist, speaking for the majority, said:

> The harmless-error doctrine recognizes the principle that the central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence, . . . and promotes public respect for the criminal process by focusing on the underlying fairness of the trial rather than on the virtually inevitable presence of immaterial error.[155]

Van Arsdall and *Rose v. Clark*[156] added a new element to the Supreme Court's harmless error formula: the reliability of the verdict in a criminal trial.[157] In

149. 407 U.S. 371 (1972).

150. *Id.* at 372.

151. *Id.* at 372-73.

152. 405 U.S. 427 (1972).

153. *Id.* at 431.

154. *See, e.g., Milton*, 407 U.S. at 372. The Court states that "any error . . . was harmless beyond a reasonable doubt," but reaches that conclusion by applying an overwhelming evidence test. *Id.*

155. Delaware v. Van Arsdall, 475 U.S. 673, 681 (1986) (citations omitted). For the remarkable statement that "the principal purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence," the Court's sole citation of authority is to *United States v. Nobles*, 422 U.S. 225, 230 (1975) which quoted *Berger v. United States*, 295 U.S. 78, 88 (1935) in saying "[t]he dual aim of our criminal justice system is 'that guilt shall not escape or innocence suffer.'"

156. 478 U.S. 570 (1986).

157. It has been suggested that the Court's emphasis on reliability evidences a concern for judicial efficiency. *See* Charles F. Campbell, Jr., *An Economic View of Developments in the Harmless Error and Exclusionary Rules*, 42 BAYLOR L. REV. 499 (1990).

Rose,[158] the Court said, "[w]here a reviewing court can find that the record developed at trial establishes guilt beyond a reasonable doubt, the interests of fairness has been satisfied and the judgment should be affirmed."[159] Concern about the accuracy of verdicts and evidence of guilt propelled the Court's harmless error jurisprudence into the nineties[160] and quite probably continues to reflect the view of a majority of the Court today.

In *Arizona v. Fulminante*[161] the court faced three issues: (1) whether or not Fulminante's confession was coerced, (2) if so, whether error of the trial court in admitting into evidence a coerced confession was subject to harmless error analysis, and (3) if so, whether the error was harmless. An extremely divided court issued two separate majority opinions in the case. Rehnquist, writing for a majority of five, held that the harmless error rule could be applied to erroneously admitted coerced confessions. Justice Byron White, writing for a majority of five, held that Fulminante's confession was coerced and its admission into evidence was not harmless.

Fulminante represents the epitome of the extension of the harmless error rule.[162] The Court had long held that the erroneous admission of a coerced confession was subject to a per se rule of automatic reversal.[163] As Justice White said for the dissenters:

> The majority today abandons what until now the Court has regarded as the "axiomatic [proposition] that a defendant in a criminal case is deprived of due process of law if his conviction is founded, in whole or in part, upon an involuntary confession, without regard for the truth or falsity of the confession, and even though there is ample evidence to support the conviction." The Court has repeatedly stressed the view that the admission of a coerced confession can be harmless error because of the other evidence to support the verdict is "an impermissible doctrine," for "the admission in evidence, over objection, of the coerced confession vitiates the judgment because it violates the Due Process Clause of the Fourteenth Amendment."[164]

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158. 478 U.S. 570 (1986).

159. *Id.* at 579.

160. *See* Arizona v. Fulminante, 499 U.S. 279, 303 (1991) (Rehnquist, J., majority opinion).

161. 499 U.S. 279 (1991).

162. The *Fulminante* decision has been the subject of much comment. *See* Craig Goldblatt, *Harmless Error as Constitutional Common Law: Congress' Power to Reverse Arizona v. Fulminante*, 60 U. CHI. L. REV. 985 (1993); Jason S. Marks, *Postscript: Harmless Error, Habeas Corpus, and a Constitutional Eclipse*, 8 CRIM. JUST. 30 (Fall 1993); Jana J. Green, *Arizona v. Fulminante: The Harmful Extension of the Harmless Error Doctrine*, 17 OKLA. CITY U. L. REV. 755 (1992); Kenneth R. Kenkel, *Arizona v. Fulminante: Where's the Harm in Harmless Error?*, 81 KY. L.J. 257 (1992-93); Tamara Lynne Jones, *Coerced Confessions and Harmless Error*, 18 OHIO N.U. L. REV. 877 (1992); Charles J. Ogletree, Jr., Comment, *Arizona v. Fulminante: The Harm of Applying Harmless Error to Coerced Confessions*, 105 HARV. L. REV. 152 (1991-92).

163. *See* Bram v. United States, 168 U.S. 532 (1897).

164. *Fulminante*, 499 U.S. at 288-89 (citations omitted).

Justice White emphasized that a confession cannot be compared to any other evidence. "A defendant's confession is 'probably the most damaging evidence that can be admitted against him,' so damaging that a jury should not be expected to ignore it even if told to do so . . . ."[165] Thus, White argued that the harmless error rule ought not be applied to this error "because in any event it is impossible to know what credit and weight the jury gave to the confession."[166] The dissenters also put forth other compelling reasons for a rule of automatic reversal, including: (1) coerced confessions may be untrustworthy, and (2) more importantly, "permitting a coerced confession to be a part of the evidence on which a jury is free to base its verdict of guilty is inconsistent with the thesis that ours is not an inquisitional system of criminal justice."[167] Our system is an accusatorial system and guilt must be established by the state with evidence freely obtained without coercion. In our system, the police must obey the law. We should not permit a conviction to stand where police have forced a confession from a defendant against his will because "in the end, life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves."[168]

Notwithstanding these concerns, a majority of the Court, speaking through Rehnquist, held that the erroneous admission of a coerced confession is subject to harmless error analysis. In reaching this conclusion, Rehnquist attempted to delineate a framework for use in analyzing whether a particular constitutional error may be subject to harmless error analysis or subject to a rule of automatic reversal. In doing so he identified three types of errors: (1) trial error, (2) structural error, and (3) error that transcends the criminal process. According to Rehnquist, trial error is "error which occurred during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence in order to determine whether its admission was harmless beyond a reasonable doubt."[169] Structural error is error which affects "the framework within which the trial proceeds, rather than simply an error in the trial process itself . . . [and without which] a criminal trial cannot reliably serve its function as a vehicle for the determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair."[170] Rehnquist neither defined error which "transcends the criminal process" nor provided examples. All trial error, it follows, is subject to harmless error analysis. Structural error requires automatic reversal, as presumably[171] would error which transcends the criminal process.

Rehnquist's analytical framework does very little to assist in distinguishing the various types of error he described. Rehnquist's examples of trial error could just as easily be classified as structural errors. And, as Professor Charles Ogletree has

165. *Id.* at 292 (citations omitted).
166. *Id.*
167. *Id.* at 293-94.
168. *Id.* at 293 (citing Spano v. New York, 360 U.S. 315, 320-21 (1959)).
169. *Id.* at 307-08.
170. *Id.* at 310 (citing Rose v. Clark, 478 U.S. 570, 577-78 (1986) (citation omitted)).
171. The *Fulminante* opinion does not specifically state this proposition.

observed, error such as a biased judge or lack of counsel (two errors which Rehnquist classified as structural error) could just as easily be classified as trial error because in each case one can envision there being overwhelming evidence of guilt.[172] The problem with these classifications is that the difference between them is simply a matter of degree. They appear only to further Rehnquist's views that the test for harmless error is whether, aside from the error, there is evidence of guilt and that the primary concern of a fair trial is accuracy in the result. Under these views most every error is subject to harmless error review.

Fulminante, of course, is not directly on point as to the development of the test of harmlessness. The issue decided did not require the court to put forth a new test. The issue was, rather, whether to apply the existing harmless error test. However, *Fulminante* provides an excellent example of the confusion that exists on the Supreme Court, not only as to how the harmless error rule ought to be applied, but also as to what the harmless error rule is.[173] It is clear that Rehnquist and White, writing for different majorities of the Court, were not on the same wavelength when writing about the test of harmless error. Rehnquist applied the evidence of guilt test in finding the admission of the coerced confession harmless as he wrote "this seems to me to be a classic case of harmless error: a second confession giving more details of the crime than the first was admitted in evidence and found free of any constitutional objection."[174] White, on the other hand, wrote that in deciding the error is harmless "it must be determined whether the State has met its burden of demonstrating that the admission of the confession . . . did not contribute to Fulminante's conviction."[175] White, therefore, applied an effect on the verdict test and cites *Chapman*.[176] Thus the development of the harmless error rule continued in its confused and wayward pattern.[177]

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172. *See* Ogletree, Jr., *supra* note 162, at 163.

173. Several commentators have written on such confusion. *See, e.g.*, Gregory Mitchell, *Against "Overwhelming" Appellate Activism: Constraining Harmless Error Review*, 82 CAL. L. REV. 1335 (1994).

174. *Fulminante*, 499 U.S. at 312.

175. *Id.* at 296.

176. Judge Edwards observes hopefully that since Justice White's opinion drew a majority and since *O'Neal v. McAnnich*, 513 U.S. 432 (1995) also reverts to the effect on the verdict test, perhaps the Court is shifting on the question of the test of harmlessness. *See* Edwards, *supra* note 19, at 1188, 1199-200.

177. The 1995 case of *O'Neal v. McAnich*, like *Fulminante*, does not directly deal with the test but should be further noted. In 1993 the Court held in *Brecht v. Abrahamson*, 507 U.S. 619, 638 (1993), that on collateral review the federal courts would apply the less strict *Kotteakos* harmless error test of whether the error had a substantial and injurious effect or influence in determining the jury's verdict, rather than the stricter *Chapman* test. In *O'Neal* the court addresses the issue of what ought to be the result when the habeas judge, using the *Kotteakos* effect on the verdict test, simply cannot decide based on the record whether or not the error is harmless. In such event, according to the majority, the petitioner should win. In discussing the harmless error rule throughout the opinion, the test applied is the effect on the verdict test and not the evidence of guilt test. The opinion drew a three justice dissent, but the dissent did not question the majority's discussion as to the test of harmlessness. It should be emphasized, however, that the discussion as to the test is dicta. Judge Edwards views *O'Neal* optimistically as perhaps indicating a shift by the Court away from a guilt based approach. *See* Edwards, *supra* note 19, at 1199-1200; *see also* California v. Roy, 117 S. Ct. 337, 338 (1996) (on the application of *Brecht* and *O'Neal* on collateral review).

C. Other Tests of Harmless Error

As earlier described, the present Supreme Court harmless error test has two components: (1) the effect of the error on the verdict, and (2) a consideration of the evidence of guilt. If, apart from the error, the evidence establishes guilt, the error is said not to have affected the verdict and is therefore harmless. However, historically there have been other tests. These should be noted because at least two have actually been used by appellate courts and another has been proposed by a highly authoritative source.

In *The Riddle of Harmless Error*, Traynor reviewed the merits of the "not clearly wrong"[178] (an error is harmless if the verdict is not clearly wrong) and the "correct result"[179] (an error is harmless if the verdict is the correct result) tests, and he proposed the "highly probable"[180] test (an error is not harmless if it is highly probable that it affected the verdict). Traynor objected to both the "not clearly wrong" and "correct result" tests because both, ultimately, involve the appellate court in guilt determinations.

Traynor published his essay in response to *Chapman v. California*, a case based on the "reasonable possibility" (an error is not harmless if there is a reasonable possibility that it affected the verdict) test, which he believed would result in too many reversals if applied and would therefore be discounted. As an alternative to the reasonable possibility test, he put forth the highly probable test.[181] The crucial question asked in Traynor's highly probable test is whether it is highly probable that the error affected the verdict.

Notwithstanding Traynor's skillful effort to distinguish the highly probable test, it, like the "not clearly wrong," "correct result," and "reasonable possibility" tests, is afflicted with the same two deficiencies. First, each test asks the wrong question: whether the error affected the verdict? Second, by focusing on the verdict, the appellate court is inevitably led to guilt determination.

The face of the harmless error statute clearly dictates that any harmless error test should focus on the right affected by the error. The statute plainly directs appellate courts to disregard only errors which do not "affect the substantial rights" of the accused.[182] The statute, of course, is broadly drafted. That only means that it is left up to the courts to develop a test or standards to determine whether or not an error affects a right. Such a test can and should be developed without rewriting the statute through judicial interpretation. Appellate courts in the United States are designed to review claims of trial error. The very purpose of their existence is to review such claims in order to determine if the accused's right to a fair trial has been violated. Appellate courts are not designed to relitigate on appeal the

178. TRAYNOR, *supra* note 3, at 17-18.

179. *Id.* at 18-19.

180. *Id.* at 37-45; *see also* Fahy v. Connecticut, 375 U.S. 85 (1963).

181. *See* TRAYNOR, *supra* note 3, at 35 ("This test was supported by Jerome Frank in his provocative dialogue with Learned Hand on harmless error.").

182. *See supra* note 6.

accuracy of the verdict. The effect of an error on the verdict simply is *not* the question.

All of the foregoing tests, including Traynor's highly probable test, focus not on the rights of the accused but on the verdict. Any such test inevitably leads the appellate court into a review of the evidence of guilt.[183] Unlike the English system in which appellate courts are designed to consider the issue of guilt on appeal, appellate courts in America are not designed to conduct such a "quasi trial"[184] on appeal. Traynor described in detail the arguments against appellate court determinations of guilt.[185] A quasi trial on appeal denies the accused of the right to a public trial. A trial court and jury see and hear the witnesses and observe their demeanor. Appellate judges only work from a cold record. "Worse still," appellate court guilt determinations deprive an accused of his right to confront witnesses.[186] Although the accused confronted the witnesses at trial, the appellate court cannot glean the impact of such live confrontation. "Worst of all" appellate court determinations of guilt deny the accused his constitutional right to trial by jury.[187] It is not the appellate court's role to determine whether the accused is guilty. All of these arguments are applicable to any test that seeks to determine harmlessness by reconsidering the evidence. Such an approach is defective under our constitutional system and should be replaced with a test devised to ascertain whether the error affected a right of the accused.

D. Presumptions and Burdens of Proof

Before offering a proposed new test of harmless error, it is worth considering, as did Traynor in *The Riddle of Harmless Error*, whether the appellate court might use the trial concepts of presumptions and burdens of proof in determining the harmlessness of error. Who should have the burden of proving harmlessness of an error? Should prejudice be presumed from error? These questions have inexplicably fascinated the Supreme Court and commentators.[188] To suggest, as does the Court in *Chapman*, that the burden of proving harmless error can or should be assigned to either party is another legal non sequitur that has subtly and curiously crept into harmless error jurisprudence. Harmless error determination is an appellate issue. Proof is neither offered nor received in United States appellate practice. Therefore, since neither party can possibly prove harmlessness, the suggestion is quite illogical. It might be argued that the foregoing analysis is a bit too cute and that all the Court was suggesting is that the party who benefits from an error should have the burden to convince the appellate court through argument of the harmlessness of the error. But this suggestion is equally invalid.

As Traynor noted, burdens and presumptions serve valid trial purposes:

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183. *See* Edwards, *supra* note 19, at 1193; *see also* TRAYNOR, *supra* note 3, at 13-14.

184. *See* TRAYNOR, *supra* note 3, at 20.

185. *See id.* at 20-21. Traynor describes these as conventional arguments. These arguments were well developed first by Judge Frank in his dissents, referenced *supra* note 30.

186. *See* TRAYNOR, *supra* note 3, at 21.

187. *See id.* at 21.

188. *See supra* text accompanying notes 48-55, 58-63.

> They are allocated to one party or another according to the dictates of logic or social policy or expediency. Presumptions ordinarily are procedural devices to aid the party with the burden of proof by giving him the benefit of the assumption that given a basic fact, it is highly probably that the presumed fact exists. It falls to the party bearing the burden of proof to initiate the presentation of evidence and bear the risk of nonpersuasion.[189]

Presumptions and burdens "expedite the trial process of recreating the facts."[190] However, on appeal, however, in determining the harmlessness of error, they serve no useful purpose. It is too late for presumptions and burdens. The responsibility for determining the harmlessness or effect of an error is on the appellate court. That is the duty of the court, not the parties. The parties through their counsel might aid the court through argument, but assigning burdens or presumptions serves no purpose except to confuse.

E. A Proposed Test of Harmless Error

All legal rights, including constitutional rights, have reasonable limits dictated by civilization. The most famous statement of this principle is Justice Holmes' example of free speech and shouting "fire" in a crowded theater.[191] The rights of one person must be weighed against the rights of others. So it is with those rights and values associated with a fair trial. The individual who is accused of a crime has a right to a fair trial which must be weighed against the rights of the community to protect itself from those who violate its laws.

The weighing and balancing of rights is the business of the legal profession. That is what lawyers do. That is the very reason for the existence of a judicial system. Every trial and every appeal involves judges weighing and balancing rights. It should not, therefore, be too difficult, once the issue is correctly identified, to develop a test with reasonable guidelines to assist appellate judges in deciding whether error is harmless.

The key to this analysis is the bane of every lawyer — issue identification. The successful resolution of any legal problem requires the issue first to be correctly discerned. The problems and difficulties manifested in the application of contemporary harmless error tests stem directly from the fact that the issue has been misidentified. The issue is not the effect of error on the verdict, but rather, the effect of error on the rights of the accused.[192]

As previously stated, it is not enough to identify the issue, because to ask whether error affected the accused's rights begs the question of whether the error is harmless.[193] Appellate judges need and must have a test with standards to guide them in weighing the accused's rights to a fair trial against the rights of the

189. TRAYNOR, *supra* note 3, at 25 (footnote omitted).
190. *Id.* at 25.
191. *See* Schenk v. United States, 249 U.S. 47, 52 (1919).
192. *See* 28 U.S.C. § 2111 (1994); *supra* note 6 ("affect[s] . . . substantial rights").
193. *See* TRAYNOR, *supra* note 3, at 15-16.

community to convict and punish those who violate the law. Without standards the appellate courts would have unbridled discretion in deciding whether error is harmless. Such discretion must be controlled with guidelines.[194]

Developing a new test of harmless error requires certain assumptions implicit in the test for it to be clearly understood. Virtually every trial is afflicted with error, most of which is harmless, not because it did not affect the verdict, but because it simply did not seriously affect a right. A reasonable harmless error test can be devised in conformance with the values and purposes of our legal system, and if it is fairly and consistently applied it will: (1) protect the rights of the accused; (2) preserve public confidence in our legal system; and (3) preserve judicial resources. The issue is not whether there should be a rule of harmless error. There must be a rule. Reverting to a rule of automatic reversal for any error is not an option.

Because of our historical experiences, our inherent distrust of government, and our anti-majoritarianism concerns, our legal system places a high value upon individual rights and liberties. Any new test of harmless error should reflect these values. The current test of harmless error does not adequately reflect these values. Certainly, public safety and community concerns must also be assigned high values. But in weighing individual rights against the rights of the community, our system has always tipped the scale in favor of individual rights.

Any new test must provide guidelines to channel the appellate judge's discretion. The test must be neither too strict nor too lax. If the test is too strict as in *Chapman*, Traynor observed, courts may pay lip service, but it will be discounted because it would result in well-nigh automatic reversal. If the test is too lax, well-nigh automatic affirmance would result in individual rights suffering. The essential element in any test must be its reasonableness.

The new test should be applied to all errors on a case-by-case basis. There should be *no* error or class of errors subject to automatic reversal. When applied to very serious errors, the test should always result in reversal. Similarly, when applied to minor "technical"[195] errors, the test should always result in affirmance. However, the test should be applied to each error, from the very serious to the inconsequential, and the appellate court should do what it is designed to do: make a judgment as to the effect of the error on the rights of the accused.

Any new test of harmless error ought to begin with the statute. The harmless error statute provides that appellate courts shall disregard errors "which do not affect the substantial rights" of the accused.[196] I therefore propose a new test of harmless error: the "effect on the rights of the accused" test of harmless error. Appellate courts would apply the test when finding error on appeal. Any

194. *See id.* at 15.

195. Technical errors under the federal harmless error statute were defined by Justice Frankfurter as being "matters concerned with the mere etiquette of trials and . . . formalities and minutiae of procedure" of a trial. Bruno v. United States, 308 U.S. 287, 294 (1939).

196. 28 U.S.C. § 2111 (1994).

determination of harmlessness would thereafter be subject to review by another court only for abuse of discretion.

The "effect on the rights of the accused" test may be stated as: The appellate court shall review and decide all claims of error and shall then determine whether any error had a significant adverse effect upon a right of the accused. If so, the error shall be deemed prejudicial and must be corrected through appropriate relief. If the court determines that the error did not have a significant adverse effect upon a right, the error shall be deemed harmless. In either event, in making its determination the court shall apply the following guidelines:

(1) An error may be summarily determined to be prejudicial, and therefore not harmless, if the reviewing court is of the opinion that in no event could the error be considered as not having a significant adverse effect upon a right of the accused;

(2) An error may be summarily determined to be harmless if the reviewing court is of the opinion that the error can in no event rise above insignificant error;

(3) If neither of the foregoing guidelines are applicable, the reviewing court should take into consideration the following factors in reaching its opinion as to harmlessness:[197]

(a) The right affected should be identified and its purpose considered in relationship to the significance of the error.

(b) In evaluating the significance of the error on the right, the court should consider the totality of the circumstances surrounding the error; and

(c) The deterrence factor, if any, against the government on the right affected by the error should be considered.

Using these guidelines, the reviewing court should apply the test to each error found. It should be noted that this test does not attempt to measure the *substantiality* of the right, as the critical issue is not the substantiality of the right but the significance of the effect of the error on the right.

The foregoing proposed "effect of the error on the rights of the accused" test of harmless error attempts to redirect the analysis toward a consideration of the seriousness of an error which adversely affects an accused's rights and away from a consideration of guilt. Serious errors implicate the underlying purposes and reasons for a right; insignificant errors do not. The test is thus consistent with both the language of the harmless error statute and our legal system's overriding concern with preserving and protecting individual rights.

No test can be perfect, as all tests must be devised and administered by human beings. Surely, others can improve the foregoing test to determine harmlessness of trial error. And, we must try. It is critically important that the appellate courts

197. Tom Stacy and Kim Dayton proposed a harmless error test with some of the characteristics set forth here. Tom Stacy & Kim Dayton, *Rethinking Harmless Constitutional Error*, 88 COLUM. L. REV. 79, 91-98 (1988). Their proposed test would require the appellate court to consider (1) "whether the violation has impaired . . . the constitutional right in question," (2) "whether redoing the adjudicative process can . . . cure the harm caused by the violation," and (3) whether "reversal [may be] necessary to deter future violations." *Id.* at 91-92.

of this country get out of the business of redetermining the issue of guilt on appeal through "quasi mini-trials" conducted in secret in stark violation of the Fourth, Fifth, Sixth, Seventh, Eighth, and Ninth Amendments to the Constitution.

III. Salient Types of Error

The new test should be applied to *all* errors, constitutional as well as non-constitutional. The Supreme Court's effort to distinguish constitutional errors from nonconstitutional errors serves no purpose. Its attempt in *Fulminante* to distinguish "trial error" from "structural error" was particularly unhelpful.[198] The Constitution is the basis of all law within our system. Any error can be traced to a constitutional right or provision. Any effort to draw a meaningful distinction between constitutional or nonconstitutional error, and trial error or structural error, is doomed to failure because any such distinction is a matter of degree. Also, as Justice John Marshall Harlan, dissenting in *Fahy v. Connecticut*, observed that nonconstitutional error can be as prejudicial to a defendant as Constitutional error, and in some instances more harmful.[199] There appears to be no good reason to draw such distinctions. I note, as did Traynor,[200] that the harmless error statute does not distinguish constitutional errors from nonconstitutional errors, and presumably applies to both.

A. Errors Summarily Determinable Prejudicial

The proposed effect on the rights of the accused test of harmless error does not contemplate "automatic reversal" for any error. By its terms the test must be applied to *all* errors. I concede that the test contemplates a range of errors so serious or egregious that in no event could the error be concluded as not having a significant adverse effect upon a right of the accused. Such errors would in every case be so serious in relation to the purpose of the right violated that reversal would be required without further analysis. These errors are then essentially those errors classified by Traynor as "Errors Requiring Automatic Reversal"[201] and "Errors Prejudicial to the Judicial Process."[202] Traynor admitted that reversals for these very serious errors could not be explained or rationalized under the "effect on the verdict" test because these errors require reversal whether or not they affect the verdict. In his words, "[t]here may be some 'errors or defects' that so 'affect the substantial rights of the parties' as to call for automatic

198. *See* Arizona v. Fulminante, 499 U.S. 279, 290 (1991).

199. Fahy v. Connecticut, 375 U.S. 85, 94 (1963) (Harlan, J., dissenting); *see also* TRAYNOR, *supra* note 3, at 55-56; Goldberg, *supra* note 52, at 430; Saltzberg, *Harm*, *supra* note 114, at 989.

200. *See* TRAYNOR, *supra* note 3, at 57.

201. *Id.* at 57. It should be noted, however, that many of the errors deemed by Traynor subject to automatic reversal have subsequently been deemed subject to harmless error analysis by the United States Supreme Court. *See supra* note 15; *see also* Edwards, *supra* note 19, at 1176.

202. TRAYNOR, *supra* note 3, at 64.

reversal . . . without any review of the evidence to determine whether such errors or defects affected the judgment."[203]

The "effect on the rights of the accused" test does explain reversals for such errors. Reversal is required because in each instance the error has a significant adverse effect upon a right of the accused. Thus, the test, if applied to a complete denial of the right to jury trial, would dictate a summary finding that the error is prejudicial and therefore not harmless. The test's rationale for the reversal would be that the purpose of the Sixth Amendment is to guarantee an accused of the right to a jury trial by his peers. Such an error could only be described as significant error because the right is completely denied. Correction of the error requires reversal.

Similar results and rationale would exist for errors involving lack of jurisdiction of person or subject matter, complete denial of the accused's right to testify, complete denial of counsel at any critical point in the proceedings, denial of the right to present an absolute defense, and denial of the right to an unbiased judge. The list is not exclusive. Compiling a complete list of errors which might be subject to a summary finding as to prejudice would be neither possible nor wise. Each error should be considered individually in the context of the case before the court.

B. Errors Summarily Determinable Harmless

At the other extreme under the effect on the rights of the accused test are errors or defects the court may reasonably conclude to in no event have had a significant adverse effect upon the rights of the accused. Although I am reluctant to use the word, these errors are those the statute once referred to as "technical" errors.[204] Justice Felix Frankfurter defined "technical errors" under the statute as being those concerned with the 'mere etiquette of trials and with the formalities and minutiae of procedure."[205] Here, the rationale is precisely the opposite of the rationale under the test for the summary finding of prejudice. The error or defect is simply so inconsequential that it cannot reasonably be said to have significantly adversely affected a right of the accused. For example, the accused has a Sixth Amendment right "to be informed of the nature and cause of the accusation."[206] A charging document which omits a date or word may be claimed to be error.[207] However, the omission of a date or word from a charging document which otherwise provides notice of the charges sufficient to enable the accused to defend himself cannot reasonably be said to be significant.

Other minor errors which might be summarily deemed harmless include failure to provide the accused with written notice of a right, reliance upon an incorrect

203. *Id.* at 57.

204. *See* 28 U.S.C. § 391 (1934) (repealed).

205. Bruno v. United States, 308 U.S. 287, 294 (1939).

206. U.S. CONST. amend. VI.

207. *See* State v. Campbell, 109 S.W. 706, 711-13 (1908) (reversing rape conviction due to indictment describing the charge as "against the peace and dignity of state" instead of "against the peace and dignity of *the* state" (emphasis added)).

sentencing statute if the sentence is within the range of the correct statute, and the right of the accused to be free of shackles if the jury does not see the shackles.

C. Errors Carrying a High Risk of Affecting the Rights of the Accused

Most errors, of course, will fall somewhere between those that can be summarily determined prejudicial and those found to be summarily harmless. The effect of most errors on the rights of the accused must be determined by weighing the seriousness of the error against the right involved. In making this determination, the test directs the appellate court to identify the right involved and its purpose, to take into consideration the totality of the circumstances surrounding the error, and to consider whether failure to enforce the accused's rights against the government would impair any deterrence factor a reversal might have. If the appeal record discloses serious trial error which infringes upon a right of the accused and affirming the conviction would only serve to encourage future violations, the appellate court should reverse. Certainly, errors of such magnitude as mob domination of the trial, prejudicial pretrial or trial publicity, the prosecution's knowing use of perjured testimony and suppression of evidence favorable to the accused would all indicate serious errors evincing a high risk of affecting the accused's rights. They also would ordinarily require reversal both to preserve and to protect the rights of the accused and to deter the government from committing such errors in the future. Affirmance would send the wrong message to the government.

Errors involving the admission and exclusion of evidence involve a myriad of rights and issues which do not lend themselves to generalizations. However, this class of errors is instructive on the confusion that frequently exists in close cases on such issues as (1) whether the claim of error has validity, or (2) whether the error is harmless.[208] The appellate court should always keep the distinction in focus. If the claim can be resolved by concluding that no error occurred, the court should do so and not reach the harmless error issue.[209]

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208. A claim of error in the admission of prior bad conduct may appear relatively innocuous. However, if the erroneously admitted evidence is emphasized in the prosecutor's closing argument, the error ought not be deemed harmless. On the other hand, an error involving improper argument by the prosecutor which appears particularly egregious may have been invited by the argument of the accused's counsel. Likewise the appellate court may conclude the record reflects that the accused failed to object to a particular claimed error and apply the doctrine of waiver. Similarly, the record may reveal an objection to a claimed error which the trial judge sustained and instructed the jury to disregard. In such event the appellate court may conclude the error was cured.

The theories of invited error, waiver, and cure are all important concepts in appellate practice. Their applicability to the harmless error analysis is somewhat suspect. If the error was invited, cured, or waived, the appellate court ought to be able to dispose of the claim without resort to harmless error analysis. If cured, there is no error. If waived or invited, an error ought not be corrected on equitable grounds. It is errors that are not invited, cured, or waived to which the harmless error rule is applicable. However, compare the analysis of these theories by TRAYNOR, *supra* note 3, at 74-80.

209. For a curious twist on this point see *People v. Stroble*, 226 P.2d 330, 334-36 (1951) discussed by TRAYNOR, *supra* note 3, at 62, in which the California Supreme Court held one coerced confession out of six confessions was harmless, and the U.S. Supreme Court upon review held the confession was

If, for example, the court is presented with a claim that a coerced confession was erroneously admitted into evidence against the accused, the first decision for the court is whether the confession was coerced. *Fulminante* presented the court with a significant issue as to whether the confession at issue was in fact a coerced confession.[210] One wonders whether Rehnquist could have gained a majority for his opinion that a coerced confession could be subjected to harmless error analysis if the facts were clear that the confession was obtained through physical coercion. If the facts were that the police physically beat Fulminante to get his confession, it is probable that a majority of the Court would not have joined Rehnquist. *Fulminante*, perhaps, can best be explained by the old adage that "hard cases make bad law."

Once the appellate court concludes error occurred, it must then apply the harmless error test. Under the effect of the error on the rights of the accused test, the erroneous admission of a coerced confession would invariably require reversal. A confession is the most damaging probative evidence that can be admitted against an accused. It is critical therefore that confessions be reliable and voluntarily obtained. Admitting a coerced confession is a very serious trial error. Moreover, by admitting coerced confessions we run the risk of allowing unscrupulous officials to turn our accusatorial system into an inquisitorial system. Reversals deter such conduct. The suggested guidelines to the effect of the error on the rights of the accused test dictate reversal for such errors.

Traynor would, apparently, permit the admission of a coerced confession where the evidence indicates it is cumulative of other voluntary confessions.[211] I would not. Cumulative evidence forms the rationale for frequent harmless error determinations where the evidence of guilt test is used to determine harmless error. Apparently, under the effect on the verdict test of harmless error, the end justifies the means.

Errors relating to the admission of other crimes evidence can, depending upon the circumstances of the case, be prejudicial or harmless. An accused should be convicted, if at all, for the crime with which he is currently charged and not for other crimes. Evidence of other crimes may be probative of other relevant issues, and its admission, while prejudicial, may not be error. However, even if erroneously admitted, the seriousness of the error can be analyzed. Certainly evidence that the defendant in a murder trial was speeding when arrested is an insignificant error, while erroneously admitted evidence of an unrelated ten-year-old conviction for manslaughter might be determined very serious and prejudicial. Similarly, errors in a prosecutor's argument may be harmless when considered in the context of a trial and defense counsel's argument. Routine errors relating to erroneous admission of hearsay evidence may be determined harmless or prejudicial depending upon the facts. Such errors involve confrontation rights and can easily be weighed by the court against the rights of the accused.

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not coerced. *Compare Stroble*, 226 P.2d at 332 *with* Arizona v. Fulminante, 499 U.S. 279, 287 (1991).

210. *See Fulminante*, 499 U.S. at 287.

211. *See* TRAYNOR, *supra* note 3, at 61-62.

Claims of errors related to discrimination in jury selection present very challenging issues as to whether errors were in fact committed.[212] Again, however, if error is found, the importance of Fifth and Fourteenth Amendment equal protection rights and the deterrence considerations will usually require reversal for such errors.

Errors in instructions "fly every which way."[213] Frequently, the argument is made that jurors disregard instructions because they are too complicated, too lengthy, and written in legalese. Since many jurors disregard instructions, any error in instructions can be deemed harmless.[214] The argument, therefore, has some logical merit, especially to laymen. However, our legal system contemplates a fully informed jury, correctly instructed on the applicable law, applying the law to the facts and rendering a just verdict. Each juror swears that he or she will apply the law as instructed. As Traynor noted, the "concept of a fair trial encompasses a decision by a tribunal that has understood and applied the law to all material issues in the case."[215]

Instruction errors range from very serious to inconsequential. Under the effect on the rights of the accused test, examples of serious instruction errors which ordinarily would require reversal include failure to instruct on the elements of the offense charged,[216] on the accused's defense,[217] on the correct burden of proof,[218] and on conflicting or confusing language relating to a material issue.[219] Not infrequently a trial judge will give an erroneous instruction that actually is beneficial to the accused. Such errors do not adversely affect an accused's right to a fair trial and may easily be deemed harmless. Other examples of errors that may be deemed harmless under the effect on the rights of the accused test include erroneous instructions which are duplicative of correct instructions given elsewhere, minor variances from uniform instructions, and minor errors as to language or dates. Even when such defects are found in instructions, a reviewing court can easily weigh the seriousness of the error against the right of an accused to be tried by a properly instructed tribunal and can conclude the error is harmless.

Applying the effect of the error on the rights of the accused test will undoubtedly result in more reversals than the evidence of guilt approach to harmless error. The proposed test would not, however, result in more reversals than the test as contemplated in *Chapman v. California*.[220] Furthermore, the number of reversals

212. *See* Batson v. Kentucky, 476 U.S. 79, 86-87 (1986); Powers v. Ohio, 499 U.S. 400, 408 (1991).

213. TRAYNOR, *supra* note 3, at 73.

214. *See id.* at 73.

215. *Id.* at 74.

216. *See* California v. Roy, 519 U.S. 2, 3 (1996), *reh'g denied*, 117 S. Ct. 719 (1997) (failure to instruct on the element of intent in murder conviction not harmless); Yates v. Evatt, 500 U.S. 391, 411 (1991) (instruction allowing presumption of malice from use of a deadly weapon).

217. *See* Williams v. State, 915 P.2d 371, 381 (Okla. Crim. App. 1996).

218. *See* Francis v. Franklin, 471 U.S. 307, 314 (1985) (shift of burden of persuasion to defendant on element of intent after prosecutor proved the predicate facts not harmless).

219. *See* Flores v. State, 896 P.2d 558, 563 (Okla. Crim. App. 1995), *reh'g denied*, 899 P.2d 1162, 1163 (Okla. Crim. App. 1995).

220. 386 U.S. 18, 24 (1967).

is not the issue under any test. Indeed, reversals based upon reasonable analysis of the issue and fair application of constitutional principles benefit our system. It should always be emphasized that in our system appellate courts preserve and protect our constitutional rights. Only the courts stand between our citizens and a police state. Finally, it should be noted that reversals under our system do not generally result in dismissal of charges or in the accused going free. Rather, reversal, in most cases, simply means that the case is remanded for a new trial. In our constitutional system, it is critical that trials be conducted in accordance with the law. If they are not conducted in substantial compliance with the law, they ought to be redone.[221]

Conclusion

It must be one of the supreme ironies of our time that appellate courts in the United States routinely deem harmless lower court actions of breaking rules in order to affirm convictions and sentences of those caught breaking rules. Certainly, there is a place in our jurisprudence for a rule which overlooks trial error that does not affect a right of the accused. But just as we should not overlook a serious violation of the law by an individual, neither should we overlook a serious violation by the government seeking to deprive a person of his or her life or liberty.

221. *See* Stacy & Dayton, *supra* note 197, at 94.