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Harmful Use of Harmless Error in Criminal Cases

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HARMFUL USE OF HARMLESS ERROR IN CRIMINAL CASES

INTRODUCTION

Not all trial errors justify reversal of a judgment on appeal. If an error did not affect the trial's outcome, appellate courts may label it harmless[1] and, in the interest of judicial economy,[2] affirm the decision below. Errors that may have swayed the verdict warrant reversal.[3] Some errors, however, are so egregious that courts will automatically reverse the judgment below.[4] Further-

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[1] *See* Kotteakos v. United States, 328 U.S. 750, 764-65 (1946); Mause, *Harmless Constitutional Error: The Implications of Chapman v. California,* 53 MINN. L. REV. 519, 519-20 (1969).

[2] *See* R. TRAYNOR, THE RIDDLE OF HARMLESS ERROR 81 (1970); Mause, *supra* note 1, at 519-20.

[3] *See* Kotteakos v. United States, 328 U.S. 750, 765 (1946). Sometimes other factors, such as the fundamental nature of the right violated, call for reversal even if the error could not have prejudiced the defendant. *See* Coolidge v. New Hampshire, 403 U.S. 443, 449-55, 480-81 (1971) (reversible constitutional error for interested party to issue otherwise justifiable warrant). *See also In re* Murchison, 349 U.S. 133, 136 (1955) ("'justice must satisfy the appearance of justice'"). Consider, for example, the right to appear *pro se* as described in Faretta v. California, 422 U.S. 806 (1975). After dwelling at length on the value of preserving individual dignity and freedom of choice (*id.* at 821-26), the Court reversed for an error that was per se nonprejudicial. Some convictions merit reversal because certain official improprieties cannot be tolerated regardless of any actual prejudice to the defendant. *See* United States v. Stewart, 576 F.2d 50, 56 (5th Cir. 1978) (knowing introduction of confession in wake of *Miranda* violation merits reversal even if error harmless); United States v. Freeman, 514 F.2d 1314, 1321 (D.C. Cir. 1974) (appellate courts should consider prophylactic reversal to encourage prosecutors to behave).

Nevertheless, in reviewing errors that offend judicial sensibilities or deny a fundamental right, some appellate courts mistakenly focus on prejudice. In United States v. Boswell, 565 F.2d 1338 (5th Cir.), *cert. denicd,* 99 S. Ct. 81 (1978), the Fifth Circuit held that it was harmless beyond a reasonable doubt for a trial judge, in violation of rule 25(a) of the Federal Rules of Criminal Procedure, to leave the bench for four hours during jury argument. The defendants claimed that the trial court's failure to provide a statutorily competent judicial officer at all times during trial violated their sixth amendment right to trial by jury. The court of appeals did not reach the merits of this claim because it found that the error could not have prejudiced the defendants. *Id.* at 1342.

The *Boswell* court, however, failed to weigh all relevant considerations. An error such as this might seriously tarnish the image of the judiciary. The court could have justified reversal in the desire to discourage such irresponsible behavior and uphold the Federal Rules of Criminal Procedure.

[4] *See* Chapman v. California, 386 U.S. 18, 23 & n.8 (1967). Justice Stewart concurred, noting that convictions tainted with coerced confessions, denial of counsel, prejudice of

more, in criminal cases, where defendants' liberty and social interests are at stake,[5] appellate courts must apply the harmless error doctrine with circumspection.[6] In these cases, the doctrine should be "sparingly employed."[7]

Recently, however, federal courts have increased their use of the doctrine while simultaneously eroding its foundation.[8] Some have affirmed tainted convictions without recognizing that the errors caused unmeasurable prejudice.[9] Others have weakened the standard of certainty required before the court may hold an error harmless.[10] This Note argues that courts should employ a stringent standard of review for criminal trial errors[11] and hold the doctrine of harmless error inappropriate if they cannot fairly measure harmlessness with the requisite certainty.[12] Judicial speculation as to unascertainable prejudice invites a miscalculation that would doom the defendant to suffer the consequences of an unjust conviction.

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judge, or jury instructions embodying an unconstitutional presumption merit automatic reversal. *Id.* at 42-44. *See generally* Mause, *supra* note 1.

Nonconstitutional errors may trigger the automatic reversal rule. For example, the denial or impairment of the right to exercise peremptory challenges will cause reversal of a subsequent conviction without a showing of prejudice. *See* United States v. Dellinger, 472 F.2d 340, 367 (7th Cir. 1972), *cert. denied*, 410 U.S. 970 (1973). *See generally* Swain v. Alabama, 380 U.S. 202, 219 (1965); Lewis v. United States, 146 U.S. 370, 376 (1892).

[5] *See In re* Winship, 397 U.S. 358, 363 (1970). *See also* Saltzburg, *The Harm of Harmless Error*, 59 VA. L. REV. 988, 991-98 (1973).

[6] *See* Mause, *supra* note 1, at 520 ("uncertainty should almost always be resolved in favor of the criminal defendant").

[7] Chapman v. United States, 547 F.2d 1240, 1250 (5th Cir. 1977). The *Chapman* court stated: "The infusion of 'harmlessness' into error must be the exception, and the doctrine must be sparingly employed. A miniscule error must coalesce with gargantuan guilt, even where the accused displays an imagination of Pantagruelian dimensions." *Id.* at 1250. Pantagruel is a Rabelaisian character famous for his extravagant and boorish sense of humor. Because defendant's alibi approached implausibility, the *Chapman* court's image is not phenomenologically felicitous.

[8] *See* notes 36-39 and accompanying text *infra.*

[9] *See* notes 64-109 and accompanying text *infra.*

[10] *See* notes 60-62 and accompanying text *infra.*

[11] This Note will not deal extensively with civil errors. Because the civil litigant does not ordinarily risk stigmatization and loss of freedom, a lesser standard of proof applies in civil trials than in criminal trials. The standard employed in appellate review of civil errors should be more relaxed as well. The high stakes in criminal cases demand greater certainty before a conviction can take place or be upheld.

[12] *See* notes 64-109 and accompanying text *infra. But see* Saltzburg, *supra* note 5, at 1026. Saltzburg argues that the infinite variety of possible fact situations necessitates a case-by-case analysis. Where the facts are unique, he is correct. But for many types of errors, such as denial of counsel or an improper voir dire, the variation in the facts should not change the ultimate result. Because these errors foster unmeasurable prejudice, the conviction deserves automatic reversal.

I

DANGERS OF HARMLESS ERROR

Historically, even a trivial error at trial resulted in reversal.[13] Reversing courts typically explained that, in the event of error, a losing party had a legal right to a new trial[14] and that any other rule would force appellate courts to usurp the function of the jury.[15] Although this rule afforded litigants maximum protection from error, its exaltation of technicalities aroused opposition.[16] In 1919, Congress decreed that only errors that affected "the substantial rights of the parties" were reversible in federal court.[17] Subsequent cases followed the legislative lead.[18]

The doctrinal pendulum has now swung in the opposite direction. Commentators have repeatedly warned that increased use[19] of harmless error analysis is inherently dangerous regardless of whether the errors violate the Constitution, statutes, or the common law.[20]

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[13] *See, e.g.,* Carver v. United States, 160 U.S. 553, 555 (1896) (reversal for erroneous admission of second statement from dying declarant that her earlier declaration was true "in every particular"); Williams v. State, 27 Wis. 402, 403 (1871) (reversal warranted because indictment described offense as "against the peace of the State" rather than "against the peace and dignity of the State"). *See generally* R. TRAYNOR, *supra* note 2, at 3-4; 1 J. WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 21, at 367-68 (3d Ed. 1940). The rule of reversal applied to both civil and criminal cases. *Id.*

[14] *See* Sparks v. Oklahoma, 146 F. 371, 373 (8th Cir. 1906); 1 J. WIGMORE, *supra* note 13, § 21, at 368-69.

[15] *See* Crease v. Barrett, 1 C.M. & R. 919, 933, 149 Eng. Rep. 1353, 1359 (Ex. 1835); 1 J. WIGMORE, *supra* note 13, §21, at 368-70.

[16] *See* 1 J. WIGMORE, *supra* note 13, § 21, at 370-75.

[17] *See* Act of Feb. 26, 1919, ch. 48, 40 Stat. 1181. The statute stated:

> 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.

Id. A similar formulation remains in effect. *See* 28 U.S.C. § 2111 (1976); FED. R. CRIM. P. 52. *Cf.* FED. R. CIV. P. 61 (harmless error rule applies in civil cases where "substantial rights of the parties" are unaffected).

[18] *See* 1 J. WIGMORE, *supra* note 13, § 21, at 376-92 n. 17.

[19] *See* notes 36-39 and accompanying text *infra.*

[20] The commentators concentrate on constitutional errors. *See, e.g.,* Field, *Assessing the Harmlessness of Federal Constitutional Error—A Process in Need of a Rationale,* 125 U. PA. L. REV. 15 (1976); Mause, *supra* note 1; Note, *Harmless Constitutional Error,* 20 STAN. L. REV. 83 (1967); Note, *Principles for Applications of the Harmless Error Standard,* 41 U. CHI. L. REV. 616 (1974).

A. *Dangers to Defendants*

When appellate courts apply the doctrine of harmless error, they redefine the impact of the law upon the defendant. Every finding of harmlessness effectively curtails a defendant's rights; from the defendant's standpoint, the right might as well not have existed.[21] Furthermore, application of the doctrine distorts the appellate process; the court must determine the impact of an error and not merely rule on its existence. Setting aside the burden of persuasion issue,[22] affirming on harmless error grounds if no prejudice is apparent does not differ from holding that an inquiry into prejudice is relevant in deciding if any error occurred.[23]

The doctrine of harmless error threatens to erode the distinction between guilt in fact and guilt in law. Even if a defendant is guilty in fact, the state cannot punish him unless it can prove him guilty at law.[24] Clever lawyering occasionally frees the culpable, but society has judged this to be an acceptable cost of justice.[25] Appellate courts that strongly emphasize independent evidence of factual guilt as a justification for finding harmless error underestimate a defense attorney's shrewd use of our system's protective procedural mechanisms.

Finally, improper use of the harmless error doctrine may impede interpretation of the law, leaving future defendants uncertain about its meaning and impact. Appellate courts often abstain

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[21] *Cf.* Bachner v. United States, 517 F.2d 589, 599 (7th Cir. 1975) (concurring opinion, Stevens, J.) ("holding that the record discloses no 'fundamental defect which inherently results in a complete miscarriage of justice' is ... merely another way of saying that the Due Process Clause was not violated because the proceedings ... were not fundamentally unfair"). This denial may be meaningless if the error was truly "harmless," that is, if it did not prejudice the defendant in any way. However, such errors are exceptional; most offer some opportunity for prejudice.

[22] For discussion of the burdens of persuasion, see note 44 *infra.*

[23] *See* note 87 and accompanying text *infra.*

[24] *See* Bumper v. North Carolina, 391 U.S. 543, 552 (concurring opinion, Harlan, J.). Justice Harlan, in regard to a constitutional violation, commented:

> [R]eversal of this conviction is not a "penalty" imposed on the State for infringement of federal constitutional rights. Reversal by this Court results, as always, only from a decision that petitioner was not constitutionally proved guilty and hence there is no legally valid basis for imposition of a penalty upon him.

Id. The same principle applies to nonconstitutional errors. *See* Kotteakos v. United States, 328 U.S. 750, 763-65 (1946).

[25] *See In re* Winship, 397 U.S. 358, 372 (1970) (concurring opinion, Harlan, J.) ("it is for worse to convict an innocent man than to let a guilty man go free").

from reviewing a claim's merits on the ground that any error would be harmless;[26] important issues, therefore, remain undecided.[27] The purpose of the harmless error doctrine is to save the time and effort of retrial. It was not meant to shelter courts from difficult questions of law.[28]

B. *Dangers to the Judicial System*

The doctrine of harmless error blurs the traditional separation of responsibility between appellate and trial courts.[29] In de-

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[26] *See* United States v. Lyman, 592 F.2d 496, 500 (9th Cir. 1978); United States v. Johnson, 572 F.2d 227, 235 (9th Cir.), *cert. denied,* 437 U.S. 907 (1978); United States v. Mackey, 571 F.2d 376, 390 (7th Cir. 1978); United States v. Bynum, 566 F.2d 914, 926 (5th Cir. 1978); United States v. Jones, 542 F.2d 186, 213 (4th Cir.), *cert. denied,* 426 U.S. 922 (1976).

A similar problem is the failure to even characterize the challenged action as a possible error. *See* United States v. Stover, 565 F.2d 1010, 1014-15 (8th Cir. 1977) (probably unnecessary and possibly coercive charge to jury amounted to "harmless superfluity").

In addition, courts typically devote very little space to explaining why an error is harmless. *See, e.g.,* United States v. Searp, 586 F.2d 1117, 1125 (6th Cir. 1978).

[27] *See, e.g.,* Wright v. Estelle, 549 F.2d 971, 974 (1977), *aff'd en banc per curiam mem.,* 572 F.2d 1071 (5th Cir. 1978). By finding harmless error, the Fifth Circuit dodged the question of whether the defendant had a personal constitutional right to testify on his own behalf. The en banc concurrence noted that in this case the "application of the harmless error rule is nothing more than abdication of [the appellate court's] responsibility." 572 F.2d at 1072 n.2. *See* notes 100-102 and accompanying text *infra.*

[28] *See* Wright v. Estelle, 572 F.2d 1071, 1072 (5th Cir. 1978) (en banc) (concurring opinion). *See also* United States v. Chiantese, 560 F.2d 1244, 1256-57 (5th Cir. 1977) (en banc) (concurring opinion, Hill, J.).

[29] Ellis v. Short, 38 Mass. (21 Pick. 142, 145 (1838) ("This seems to us to trench upon the province of the jury. How can the court know how much influence each particular piece of evidence had upon the minds of the jury . . . ?"); Crease v. Barrett, 1 C.M. & R. 919, 932, 149 Ens. Rep. 1353, 1359 (Ex. 1835) ("the Court would in a degree assume the province of the jury"); Field, *supra* note 20, at 33-36. *But see* 1 J. WIGMORE, *supra* note 13, § 21, at 369 ("the theory of *usurpation* . . . ignores the doctrine and the history of the jury's function"). Wigmore argues that the jury's function is no more disturbed by an appellate court's harmless error analysis then by the trial judge ruling on admissibility of evidence or overturning a jury verdict. *Id.* at 370. He further states: "The 'usurpation,' if any, consists in setting aside the verdict, not in confirming it." *Id.* This argument forgets that the question is the validity of the verdict. A verdict founded upon improper evidence should not be presumed valid. Wigmore also errs in equating trial court attempts to correct and control the jury with the doctrine of harmless error. In keeping evidence from the jury or in overturning a verdict, trial judges do not guess at how the jury would have reacted. Such speculation is the heart of harmless error analysis. Furthermore, in a criminal proceeding, the trial judge's supervision of the jury often protects the defendant whereas the doctrine of harmless error allows a guilty verdict to stand despite error. In addition, although trial judges cannot direct a verdict against a criminal defendant, the doctrine of harmless error allows appellate courts to approximate that result.

termining whether the trier of fact would have reached the same result in an error-free trial, the appellate court evaluates the factual strength of the appellee's case.[30] This trespass on the province of the factfinder varies with the nature of the trial error.[31] For example, a district attorney's improper introduction of a noninflammatory piece of physical evidence during trial is a potentially prejudicial error. Nevertheless, the reviewing court can isolate the error's effect and determine its impact. This inroad on the duty of the factfinder is an acceptable cost of the harmless error doctrine. On the other hand, if the trial error cannot be easily isolated or its impact easily gauged, the appellate court must engage in "unguided speculation"[32] in order to reconstruct a "proper" verdict.[33] For example, to choose an extreme case, if a biased jury decided the case, an appellate court would in effect have to retry the case from the record. Usurping the factfinder's function to this degree is an unacceptable price to pay for the harmless error doctrine.

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[30] In criminal cases, the appellate court thereby intrudes upon the function of the jury. Some appellate courts are sensitive to the problem of overreaching. Concurring in Bumper v. North Carolina, 391 U.S. 543 (1968), Justice Harlan noted that, on appeal, "the test is not and cannot be simply whether this Court finds credible the evidence against [the defendant]. Crediting or discrediting evidence is the function of the trier of fact, in this case a jury." *Id.* at 552. The court in Kotteakos v. United States, 328 U.S. 750 (1946), stated that: "it is not the appellate court's function .... to speculate upon probable reconviction and decide according to how the speculation comes out.... Those judgments are exclusively for the jury, given always the necessary minimum evidence...." *Id.* at 763. *Cf.* McQueen v. Swenson, 560 F.2d 959, 963 (8th Cir. 1977) ("Appellant's proof of prejudice should not be defeated by the district court's low opinion of the credibility of relevant and admissible testimony. This is for the jury.").

[31] Some interference with the function of the trier of fact occurs in any inquiry into prejudice from error. *See* Field, *supra* note 20, at 33-34. *See, e.g.,* United States v. Matos, 444 F.2d 1071, 1074-75 (7th Cir. 1971) (concurring opinion, Pell, J.).

[32] Holloway v. Arkansas, 435 U.S. 475, 491 (1978). In such a situation the court ceases to act in a traditional judicial manner; it is not ruling on matters of law but is deciding uncertain facts on appeal. For example, in United States v. Wood, 550 F.2d 435, 441 (9th Cir. 1976), the Ninth Circuit rules that the exclusion of a defense witness was harmless error because the witness would not have been "credible." The court observed that the prospective witness was not disinterested and would likely have tried to exonerate the defendant. Although the witness may have been biased, many other, more elusive factors contribute to a witness' credibility. At best the court made an educated guess about the witness' credibility; at worst it intuited. This kind of ruling is second-hand fact finding without the guidance of any judicial standards.

[33] Such a determination poses the risk that the court would find that the defendant was guilty in fact rather than guilty in law. *See* notes 24-25 and accompanying text *supra.*

A finding of harmless error also lessens the incentive of the police or prosecutor to follow proper procedures.[34] A harmless error rule permits calculated error: a prosecutor may risk a slap on the wrist in exchange for a more convincing case.[35] A lenient rule encourages a prosecutorial team to trifle with a defendant's rights and is no more desirable than one which would reverse for trivial errors.

II

THE CURRENT STATE OF THE HARMLESS ERROR DOCTRINE

Despite its flaws, courts have invoked the doctrine of harmless error with ever increasing frequency. Changes in the standard of review and categories of harmless error cases underlie this trend.

A. *Rising Numbers of Cases*

In the last fourteen years, the total number of federal circuit court cases considering harmless error has dramatically increased.[36]

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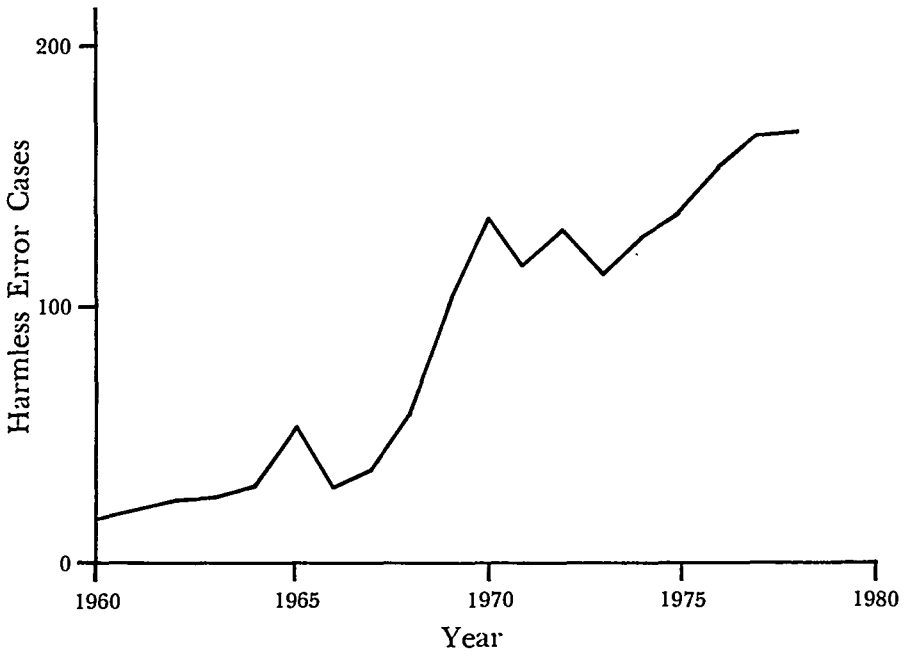
[34] Justice Clark, while sitting by designation, once admonished that: "'Harmless error' is swarming around the 7th Circuit like bees. Before someone is stung, it is suggested that the prosecutors enforce *Miranda* to the letter and that the police obey it with like diligence; otherwise the courts may have to act to correct a presently alarming situation." United States v. Jackson, 429 F.2d 1368, 1373 (7th Cir. 1970). *See* United States v. Stewart, 576 F.2d 50, 56 (5th Cir. 1978).

[35] "Despite . . . verbal slaps-on-the-wrist, prosecutorial misconduct continues to provide 'one of the most frequent contentions of defendants on appeal.' Our experience thus suggests that courts must begin to take prophylactic considerations together with probable prejudice to defendant in deciding whether to reverse." United States v. Freeman, 514 F.2d 1314, 1321 (D.C. Cir. 1975) (footnote omitted). *See also* United States v. Agee, No. 76-389-1, slip op. at 40 (3d Cir. Mar. 6, 1979) (dissenting opinion, Gibbons, J.) (by acknowledging that trial judge used bad practice but holding error harmless, majority furnished trial judges with "a blueprint for the partial evasion" of rulings in prior cases protective of defendants' rights).

[36] A LEXIS (registered trademark of Mead Data Central, Inc.) computer search on March 22, 1979, of cases decided by federal courts of appeals between January 1, 1960 and December 31, 1978 generated data for this section. The search produced 1,621 cases mentioning the phrase "harmless error" from the "CIRCUIT" file of the "GENERAL FEDERAL" library, which contains all cases from the second series of the Federal Reporter.

CHART 1
INCREASE IN TOTAL NUMBER OF CASES
CONSIDERING "HARMLESS ERROR"

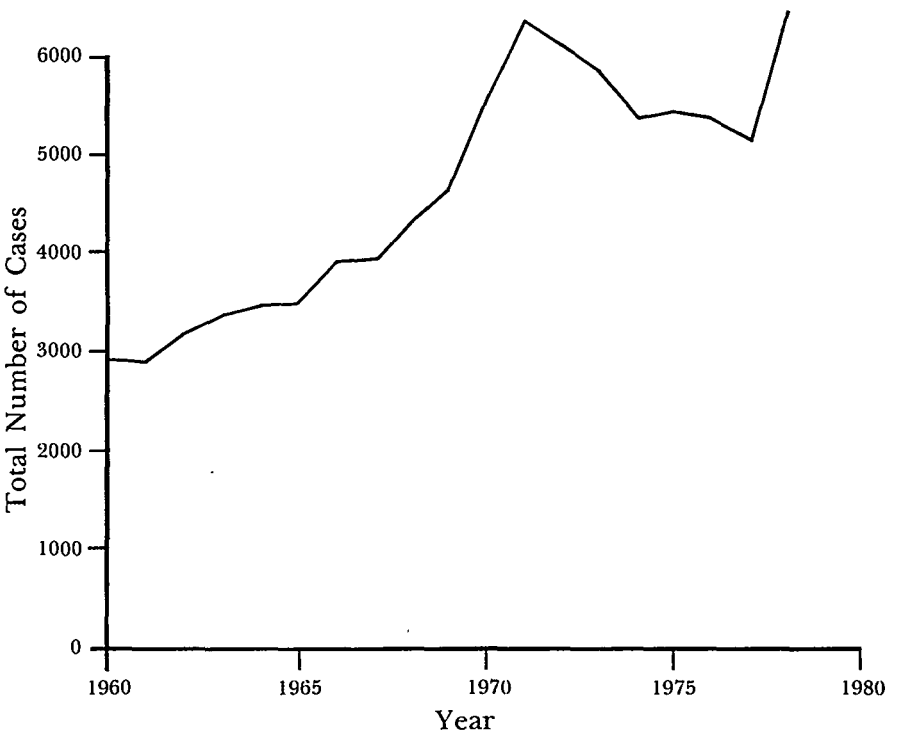


Circuit Court Cases

Year	Total Cases	"Harmless Error" Cases	"Harmless Error" Cases as Percent of Total Cases
1978	6370	167	2.62
1977	4967	166	3.34
1976	5211	152	2.92
1975	5234	134	2.56
1974	5085	126	2.48
1973	5821	112	1.92
1972	6076	127	2.09
1971	6235	115	1.82
1970	5688	131	2.30
1969	4734	99	2.09
1968	4290	57	1.33
1967	3974	37	.93
1966	3815	30	.79
1965	3496	52	1.49
1964	3444	30	.87
1963	3302	25	.76
1962	3184	23	.72
1961	2832	20	.71
1960	2865	18	.63

Total caseloads have increased as well, but in smaller proportion.

CHART 2
TOTAL NUMBER OF CASES

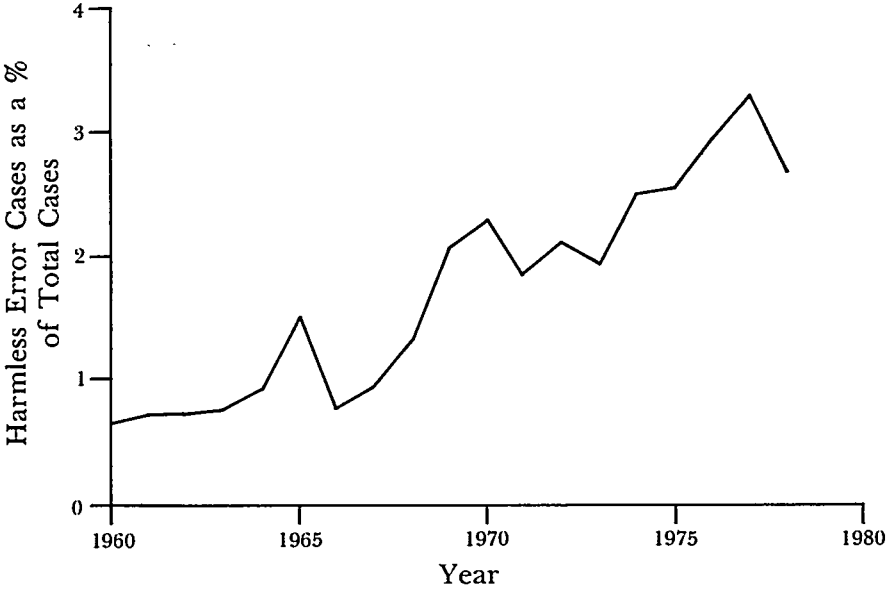


Therefore, an increasing percentage of total cases in the courts of appeals deal with harmless error.

This sampling technique is imprecise. It is overinclusive because it retrieves all cases discussing harmless error, not merely those that hold an error harmless. It is underinclusive because it does not identify cases that hold an error harmless without using the phrase "harmless error." Therefore, this study does not measure with exactness the use of the harmless error doctrine; it only suggests that this use is on the rise.

The cause of the apparent increase remains unclear. The most dramatic proportional increase in harmless error cases, however, occurred during 1967-70, the approximate period of two landmark Supreme Court cases on harmless constitutional error: Chapman v. California, 386 U.S. 18 (1967), and Harrington v. California, 395 U.S. 250 (1969). *Chapman* and *Harrington* exposed constitutional errors to harmless error review; in addition circuit courts may have read them as countenancing a more liberal use of the doctrine in assessing all errors.

CHART 3
"HARMLESS ERROR" CASES AS A PERCENTAGE OF TOTAL CASES



For example, courts of appeals in only thirty of the 3,815 cases (.78%) reported in 1966 engaged in analysis of harmless error. In 1977, 166 of the 4,967 cases (3.3%) reveal such analysis.

The frequency of harmless error cases varies among the circuits.[37] Although this unevenness in application may indicate dif-

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DISTRIBUTION OF HARMLESS ERROR CASES AMONG CIRCUITS (JAN. 1 to DEC. 31, 1978)

Circuit	Total Reported Cases	"Harmless Error" Cases	"Harmless Error" Cases as Percent of Total Reported Cases
D.C.	247	4	1.62
1st	310	7	2.26
2d	405	18	4.44
3d	614	9	1.47
4th	277	10	3.61
5th	1513	33	2.18
6th	671	21	3.13
7th	695	15	2.16
8th	646	16	2.48
9th	675	23	3.41
10th	296	10	3.38
Other	20	1	5.00
TOTALS	6370	167	Overall Avg. 2.62

fering attitudes toward the propriety of employing the doctrine, it could also simply reflect differing procedures for handling caseloads within each circuit.[38] Some circuits, for example, report a higher percentage of their cases than do other circuits.[39] Comparisons between the circuits, therefore, explain little.

B. *Changing Standard of Certainty for a Finding of Harmless Error*

Errors occur during both civil and criminal trials. In civil disputes, which typically contest some form of property rights, trial courts must decide which party has the better case. A reviewing court may appropriately affirm only upon finding that the trial error more-probably-than-not did not affect the judgment.[40] A

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[38] *See* Chanin, *A Survey of the Writing and Publication of Opinions in Federal and State Appellate Courts,* 67 L. LIB. J. 362, 362-67 (1974); Note, *Written Opinions in the Modern Legal System: Publish and Perish,* 41 ALBANY L. REV. 813, 827-32 (1977). *See also* Morgan, *The Fifth Circuit: Expand or Divide,* 29 MERCER L. REV. 885, 888-90 (1978).

[39] *See* REPORTS OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, [1977] ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 179 [hereinafter cited as 1977 JUDICIAL CONFERENCE REPORT].

One might expect busier courts to find a higher proportionate share of errors harmless in order to relieve their overcrowded dockets. However, a circuit-by-circuit comparison of caseload per judge and frequency of harmless error does not support this hypothesis.

Comparison of Caseload to Use of Harmless Error

Circuit	Harmless Error Cases as Percent of Total (1978)	Cases Per Appellate Judge (Filings, Terminations, and Pending Caseload 1977)
D.C.	1.62	131
1st	2.26	188
2d	4.44	299
3d	1.47	192
4th	3.61	237
5th	2.18	238
6th	3.13	203
7th	2.16	173
8th	2.48	140
9th	3.41	223
10th	3.38	161

1977 JUDICIAL CONFERENCE REPORT, *supra* note 39, at 168. The correlation between these two variables is weak. Moreover, the relationship between the Fifth Circuit's use of the doctine and its caseload per judgeship seems inconsistent with the rough trend observable for the other circuits. This example, however, illustrates the problems of intercircuit comparison because the Fifth Circuit employs a sophisticated screening procedure to expedite its work. *See* Morgan, *supra* note 38, at 888-90.

[40] *Cf.* Saltzburg, *supra* note 5, at 993 & n.14 (appellate court may reverse upon finding that trial error *probably* affected judgment).

criminal case, on the other hand, implicates more important rights, and proof of guilt must meet a higher standard—beyond a reasonable doubt.[41] Before affirming an error-tainted criminal conviction, an appellate court should require a correspondingly high degree of certainty.[42]

Criminal defendants benefit from both constitutional and nonconstitutional procedural rights. The Supreme Court has articulated different standards of review for criminal appeals depending on the character of the error committed. In the groundbreaking case of *Chapman v. California,*[43] the Court held that "before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt."[44] Even violations of substantial constitutional rights may be held harmless if the record contains independent, overwhelming evidence of guilt.[45] The Court requires a lesser degree of certainty to affirm convictions flawed by nonconstitutional procedural errors. Under *Kotteakos v. United States,*[46] the reviewing court, after considering all aspects of the case, need only find with "fair assurance" that the error did not affect the trial's outcome.[47]

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[41] *In re* Winship, 397 U.S. 358, 363-64 (1970).

[42] *See* United States v. Burton, 584 F.2d 485, 513 (D.C. Cir. 1978) (dissenting opinion, Rohinson, J.).

[43] 386 U.S. 18 (1967).

[44] *Id.* at 24. Another formulation of this test is that the beneficiary of the error must show that there was no reasonable possibility that the error contributed to the verdict. *Id.* As Chapman illustrates, the prosecution bears the burden of proof in harmless error analysis. This is consistent with the government's burden at trial to prove the defendant guilty beyond a reasonable doubt. *See* Cooper v. Fitzharris, 586 F.2d 1325, 1341 (9th Cir. 1978) (en banc) (dissenting opinion, Hufstedler, J.). Nevertheless, because of their ambiguity, several recent opinions suggest that the defendant-appellant should bear the burden of proving prejudice. *Id.* & nn.19, 21. *See* notes 87-90 and accompanying text *infra.* Such a shift of the burden would seem to be a radical and unfair development in harmless error jurisprudence.

[45] *See, e.g.,* Harrington v. California, 395 U.S. 250, 254 (1969).

[46] 328 U.S. 750 (1946). The error in *Kotteakos* violated a common law right. Some doubt exists as to whether the *Kotteakos* or the *Chapman* standard applies to errors tbat infringe upon statutory rights. *See, e.g.,* United States v. Cavender, 578 F.2d 528, 534-35 (4th Cir. 1978); United States v. Smith, 551 F.2d 348, 366 (D.C. Cir. 1976). The confusion over the applicable standard may stem from *Kotteakos* itself, which suggested that errors infringing a "specific command of Congress" should receive the same appellate scrutiny as constitutional errors. 328 U.S. at 765.

[47] 328 U.S. at 764-65. *See* Virgin Islands v. Toto, 529 F.2d 278, 282-83 (3d Cir. 1976); United States v. Freeman, 514 F.2d 1314, 1320-21 (D.C. Cir. 1975); United States v. Bozza, 365 F.2d 206, 218 (2d Cir. 1966). *Cf.* United States v. Alston, 551 F.2d 315, 321 (D.C. Cir. 1976) (citing Kotteakos v. United States, 328 U.S. 750, 764 (1946)) ("serious doubts as to whether a defendant was prejudiced by trial defects should be resolved in the defendant's favor").

These different standards of certainty, however, do not necessarily yield different results. The beyond-a-reasonable-doubt standard reverses more convictions than the fair assurance test, but not many more. Some courts have restated the fair assurance standard as the "high probability" standard advocated by former Chief Justice Traynor of the California Supreme Court.[48] Few cases that meet the high probability test will fail to satisfy the beyond-a-reasonable-doubt standard.[49] Furthermore, according to Judge Weinstein,[50] the high probability test approximates the English test reported by Sir Frederick Lawton: "Could a reasonable jury after a proper summing up have failed to convict? If the answer is no, the verdict stands."[51] Under this standard, appellate courts judge nonconstitutional errors nearly as stringently as constitutional violations. Indeed, one circuit court has reversed for nonconstitutional error under the beyond-a-reasonable-doubt standard.[52]

The ultimate similarity of the *Kotteakos* and *Chapman* standards is not surprising. Although the standard of proof at trial can make a difference in a given case,[53] trial judges do not appear to have reached a consensus on the requisite probabilities.[54] Lack of agreement has resulted in a narrow gap between the clear-and-convincing and beyond-a-reasonable-doubt standards.[55] A similar phenomenom may have occurred at the appellate level where judges apply similar tests in second-hand review. Indeed,

[48] 1 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 103[06], at 103-50 n.8 (1978) [hereinafter cited as WEINSTEIN'S EVIDENCE]. *See* United States v. Corey, 566 F.2d 429, 432 (2d Cir. 1977) ("A nonconstitutional error . . . is harmless if it is 'highly probable' that the error did not contribute to the verdict."); Virgin Islands v. Toto, 529 F.2d 278, 283-84 (3d Cir. 1976) (Traynor's "highly probable" test appropriate standard of appellate review). Traynor defines three standards of certainty for determining the harmlessness of errors, *i.e.*, the chance that the error did not affect the trial's outcome: more probable than not, highly probable, and almost certain. *See* R. TRAYNOR, *supra* note 2, at 34-35.

[49] *See* note 55 *infra*.

[50] 1 WEINSTEIN'S EVIDENCE, *supra* note 48, ¶ 103[06], at 103-50 n.8.

[51] Lawton, *The Criminal Trial in England: The Appeal of Verdicts*, N.Y.L.J., Aug. 18, 1971, at 4, col. 2.

[52] *See* United States v. Dubart, 496 F.2d 941, 945 (9th Cir.), *cert. denied*, 419 U.S. 967 (1974).

[53] *See* Speiser v. Randall, 357 U.S. 513, 520-21 (1958); United States v. Fatico, 458 F. Supp. 388, 411-12 (E.D.N.Y. 1978); Underwood, *The Thumb on the Scales of Justice: Burdens of Persuasion in Criminal Cases*, 86 YALE L.J. 1299, 1309-11 (1977).

[54] *See* United States v. Fatico, 458 F. Supp. 388, 409-11 (E.D.N.Y. 1978); Underwood, *supra* note 53, at 1309-11.

[55] In United States v. Fatico, 458 F. Supp. 388, 410 (E.D.N.Y. 1978), Judge Weinstein cites a survey of the judges in his district. That study indicated those judges believe the probability associated with a clear and convincing standard of proof (roughly equivalent to Traynor's highly probable standard) is 60-75% and that associated with a beyond-a-reasonable-doubt standard is 76-95%.

Judge Learned Hand doubted the ability of appellate judges to distinguish between any of the appellate standards of review.[56]

The convergence of the *Kotteakos* and *Chapman* standards is theoretically justifiable as well. A convicted defendant loses his liberty, reputation, and social standing regardless of the harmless error's character.[57] Furthermore, the line between constitutional and nonconstitutional errors is often very fine.[58] One commentator argues persuasively that the *Chapman* test should govern review of all errors in criminal cases:

> It would make little sense to adopt [a standard of proof for trial] which is designed to prevent criminal convictions if there is even a reasonable doubt in the minds of jurors as to the guilt of the person charged, and then on appeal to emasculate that evidentiary standard by allowing a conviction to stand when the trial court has violated evidentiary rules which might have influenced the jury by creating the requisite doubt.[59]

Unfortunately, some courts have eroded the standard of certainty for a finding of harmlessness.[60] The Ninth Circuit, for example, apparently retains the *Chapman* reasonable doubt test for constitutional errors, but will not reverse nonconstitutional errors if the error more-probably-than-not did not affect the jury's verdict.[61] Because this test allows affirmance even if the certainty of

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[56] *See* United States v. Feinberg, 140 F.2d 592, 594 (2d Cir.), *cert. denied,* 322 U.S. 726 (1944), *overruled on other grounds;* United States v. Taylor, 464 F.2d 240 (2d Cir. 1972).

[57] *See In re* Winsbip, 397 U.S. 358, 363 (1970).

[58] *Compare* United States v. Benedetto, 558 F.2d 171, 176-78 (3d Cir. 1977) (jury instruction eliminating government's burden of proof on one element of offense held reversible constitutional error under *In re* Winship, 397 U.S. 358 (1970)) *with* United States v. Valle-Valdez, 554 F.2d 911, 915-16 (9th Cir. 1977) (erroneous jury instruction omitting one element of offense held nonconstitutional error). *See also* United States v. McClain, 545 F.2d 988, 1003 (5th Cir. 1977) (to deny jury opportunity to decide relevant factual question would deprive defendants of constitutional right to jury trial).

[59] Saltzburg, *supra* note 5, at 992. *Accord,* United States v. Clavey, 565 F.2d 111, 126 (1977), *aff'd en banc per curiam mem. by an equally divided court,* 578 F.2d 1219 (7th Cir.) (dissenting opinion, Swygert, J.), *cert. denied,* 99 S. Ct. 351 (1978).

[60] This erosion can be covert as well as overt. A covert weakening, however, is nearly indiscernible because the standard is unquantifiable. For a general discussion of the quantification problem, see J. MAGUIRE, J. WEINSTEIN, J. CHADBOURN & J. MANSFIELD, CASES AND MATERIALS ON EVIDENCE 871-73 (6th ed. 1973); 9 J. WIGMORE, *supra* note 13, § 2497, at 325. *See generally* United States v. Fatico, 458 F. Supp. 388 (E.D.N.Y. 1978), *discussed in* note 55 *supra.* Indeed, one judge has characterized the standards as "elusive and unhelpful." *Id.* at 410.

[61] United States v. Valle-Valdez, 554 F.2d 911, 916-17 (9th Cir. 1977). Although it approved a "more-probable-than-not" test, the *Valle-Valdez* court did not clearly state how the test operates. Subsequent decisions by the Ninth Circuit explain that the reviewing court can "affirm only if it is more *probable* than not tbat the error did not materially affect the verdict." United States v. Dixon, 562 F.2d 1138, 1143 (9th Cir. 1977), *cert. denied,* 435

harmlessness is barely greater than fifty percent, courts using it will affirm more convictions than those using the *Kotteakos* standard of "fair assurance."[62]

The Ninth Circuit has erred in striking such a precarious balance between defendants' rights and considerations of efficiency. Conceptually, its test differs by less than a single percentage point from one that would affirm errors that probably *did* prejudice a defendant. Of course, respect for the ultimate unquantifiability of prejudice should restrain affirmance in very close cases. But even though the certainty target cannot be pinpointed, the Ninth Circuit plainly is aiming quite low.

The Ninth Circuit position raises serious problems. A low standard of proof may tempt appellate courts to covertly adopt a flexible position in reviewing harmlessness. The willingness to "shave" only a few percentage points from an already weakened standard may lead to unjust affirmances.[63] Only a high standard of proof in all aspects of a criminal case can protect against this undesirable result.

C. *Use of Harmless Error in Inappropriate Case Types*

The marked increase in the use of the harmless error doctrine in recent years is attributable, in part, to the willingness of courts to expand the doctrine's scope. In effect, some courts now assess the harmlessness of an error even when they cannot fairly calculate its effect on the trial's outcome. This journey through the realm of unguided speculation as to an error's prejudicial effect is often inappropriate.

The rule of automatic reversal immunizes certain constitutional errors from infelicitous harmless error analysis.[64] The rule manifests a recognition that certain errors pose great but incalculable harm to defendants. Such harm is not unique to constitutional errors; some nonconstitutional errors merit application of the rule as well because they also engender unmeasurable prejudice to defendants.[65] A harmless error decision in such cases

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U.S. 927 (1978)(emphasis in original). *See* United States v. Indian Boy X, 565 F.2d 585, 592 (9th Cir. 1977).

[62] The *Kotteakos* fair assurance standard and the high probability standard require approximately 60-75% certainty of harmlessness before allowing affirmance. *See* notes 40-59 and accompanying text *supra.*

[63] *See* United States v. Fatico, 458 F. Supp. 388, 411 (E.D.N.Y. 1978).

[64] *See* Chapman v. California, 386 U.S. 18, 23; *id.* at 42-44 (concurring opinion, Stewart, J.). *See* note 4 *supra.*

[65] Courts and commentators, however, usually discuss the rule solely in the context of constitutional error. *See, e.g.,* Note, *supra* note 20, 41 U. CHI. L. REV., at 617-18. *Cf.* United

would not result from reasoned analysis, but from guesswork. Application of the automatic reversal rule should turn upon the nature of the harm to the defendant rather than the character of the error.[66]

1. *Errors in Jury Instruction*

Jury instructions are crucial to the trial process because, ideally, they explain each question that the jury must answer.[67] Certain critical errors in jury instructions, such as omissions of elements of the crime,[68] incorrect statements of law,[69] instructions with no basis in the evidence presented,[70] and failure to inform defense counsel of a jury's request for instruction,[71] merit au-

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States v. Lee, 489 F.2d 1242, 1246 n.10 (D.C. Cir. 1973) ("The harmless error doctrine permits the Court to disregard any nonconstitutional error which does not affect the substantial rights of the defendant.").

[66] Such a rule would acknowledge that these errors infringe upon "substantial rights" of defendants (*see generally* 28 U.S.C. § 2111 (1976)), regardless of whether the right is constitutionally protected.

[67] *See* United States v. Alston, 551 F.2d 315, 321 (D.C. Cir. 1976).

[68] Some courts hold that the harmless error doctrine is not applicable to jury instructions that omit elements of the crime. In United States v. McClain, 545 F.2d 988 (5th Cir. 1977), the Fifth Circuit declared:

> When the jury is not given an opportunity to decide a relevant factual question, it is not sufficient "to urge that the record contains evidence that would support a finding of guilt even under a correct view of the law. . . ." The jury here was the only body that could have properly made the inference [to be determined] and [an affirmance] by us . . . would, by supplanting our determination for the jury's verdict, deprive the defendants of their right to a jury trial.

Id. at 1003 (quoting United States v. Casale Car Leasing, Inc., 385 F.2d 707, 709 (2d Cir. 1967)). *Accord,* United States v. Howard, 506 F.2d 1131, 1133-34 (2d Cir. 1974). *But see* United States v. Stewart, 513 F.2d 957, 960 (2d Cir. 1975) (harmless error if clear evidence on omitted element); United States v. Gilbert, 433 F.2d 1172, 1173 (D.C. Cir. 1970) (harmless error if evidence overwhelming). The Ninth Circuit has held that erroneous instructions will result in affirmance if, more probably than not, the error did not affect the verdict. *See* United States v. Valle-Valdez, 554 F.2d 911, 916 (9th Cir. 1977).

[69] "The error involved a statement of the law, and there is no basis for the government's speculation that the jury disregarded the judge's instruction to apply the law as explained in the charge." United States v. Heyman, 562 F.2d 316, 318 (4th Cir. 1977). Erroneous statements of law do not now require automatic reversal. *See* Hamling v. United States, 418 U.S. 87, 108 (1974) (reversal required only where there is probability that incorrect standard in instruction prejudiced defendant).

[70] *See* United States v. Breitling, 61 U.S. (20 How.) 252, 254-55 (1857) (instruction with no basis in evidence confusing and warrants reversal); Morris v. United States, 326 F.2d 192, 195 (9th Cir. 1963). *But see* United States v. Clavey, 565 F.2d 111, 115-16 (7th Cir. 1977) (error harmless because jury could not find guilt beyond reasonable doubt on theory upon which no evidence given), *aff'd en banc per curiam mem. by an equally divided court,* 578 F.2d 1219 (7th Cir.), *cert. denied,* 99 S. Ct. 351 (1978).

[71] This failure violates rule 43 of the Federal Rules of Criminal Procedure. *See* note 80 and accompanying text *infra.* Some courts have held the error harmless. *See* United States

tomatic reversal because the amount of harm is potentially great and necessarily uncertain.[72] Because a general verdict masks the jury's rationale, no basis exists in the record for finding that the jury disregarded these errors.[73]

Unfortunately, the availability of harmless error analysis has led reviewing courts astray. For example, in *United States v. Clavey*,[74] the Seventh Circuit first held harmless a jury instruction allowing conviction on a theory upon which the prosecution introduced no evidence.[75] The jury found the defendant guilty of the charge but their general verdict gave no hint as to the theory they adopted. The *Clavey* majority reasoned that, because the jury had no evidence before them, they could not have found the suspect theory proven beyond a reasonable doubt. Judge Swygert dissented relying on the Supreme Court's decision in *United States v. Breitling*.[76] *Breitling* had held that such instructions constitute reversible error because they confuse jurors rather than aid in their analysis.[77]

The majority's argument rests heavily on the jury's ostensibly independent comprehension and rationality. The jurors, however, may have believed that instruction on a theory meant that suffi-

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v. Breedlove, 576 F.2d 57 (5th Cir. 1978); United States v. Clavey, 565 F.2d 111 (7th Cir. 1977), *aff'd en banc per curiam mem. by an equally divided court*, 578 F.2d 1219 (7th Cir.), *cert. denied*, 99 S. Ct. 351 (1978).

[72] Some errors in jury instructions are clearly harmless. *See, e.g.*, United States v. Smith, 550 F.2d 277, 284 (5th Cir.) (harmless error to give instruction on charge not in indictment when defendant found innocent of it), *cert. denied*, 434 U.S. 841 (1977). Moreover, courts will frequently hold erroneous instructions harmless in light of curative events. *See, e.g.*, United States v. Vega, 589 F.2d 1147, 1153 (2d Cir. 1978) (jury charge contained some language that offset challenged language).

[73] *See* United States v. Heyman, 562 F.2d 316, 318 (4th Cir. 1977) (no basis for government's speculation that jury disregarded judge's erroneous instruction); United States v. Benedetto, 558 F.2d 171, 176 (3d Cir. 1977) (cannot say with any certainty that jury did not follow court's erroneous instructions). Judge Traynor has stated: "in the absence of definitive studies to the contrary, we must assume that juries for the most part understand and faithfully follow instructions. The concept of a fair trial encompasses a decision hy tribunal that has understood and applied the law to all material issues in the case." R. TRAYNOR, *supra* note 2, at 73-74 (footnote omitted).

[74] 565 F.2d 111 (7th Cir. 1977), *aff'd en banc per curiam mem. by an equally divided court*, 578 F.2d 1219 (7th Cir.), *cert. denied*, 99 S. Ct. 351 (1978).

[75] *Id.* at 115-16.

[76] 61 U.S. (20 How.) 252 (1857), *discussed in* United States v. Clavey, 565 F.2d 111, 124-25 (7th Cir. 1977) (dissenting opinion), *aff'd en banc per curiam mem. by an equally divided court*, 578 F.2d 1219 (7th Cir.), *cert. denied*, 99 S. Ct. 351 (1978).

[77] *Id.* at 254-55 (1857). *See* United States v. Easom, 569 F.2d 457, 459 (8th Cir. 1978); United States v. Moynagh, 566 F.2d 799, 804 (1st Cir. 1977), *cert. denied*, 435 U.S. 917 (1978); United States v. Benedetto, 558 F.2d 171, 175-76 (3d Cir. 1977); United States v. Natelli, 527 F.2d 311, 324-25 (2d Cir. 1975), *cert. denied*, 425 U.S. 934 (1976); Morris v. United States, 326 F.2d 192, 195 (9th Cir. 1963).

cient evidence existed to support it. Indeed, the instructions generally puzzled the *Clavey* jury.[78] Given documented jury confusion, a reversal under *Breitling* was all the more appropriate.

A second nonconstitutional error complicated *Clavey*. Although the jury requested additional instruction, the trial judge neither informed the defense counsel of nor responded to the request.[79] The majority held that this inaction violated rule 43 of Federal Rules of Criminal Procedure,[80] but found the error harmless. To reach this result, the court must have guessed at the cause of the jurors' uncertainty and concluded that they had resolved all doubts in favor of the defendant.[81]

The majority's position is plausible, but ultimately unpersuasive. The extent of jury confusion was unknown because the trial judge stifled juror inquiry. Furthermore, only a mind reader could ascertain whether the jury correctly interpreted the instructions it did receive. And, of course, the record could not disclose whether the jury would have reached a different verdict if properly instructed. The doctrine of harmless error was patently inapplicable in *Clavey*. Judgments flawed by those types of errors merit automatic reversal.[82]

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[78] 565 F.2d at 118-20.

[79] *Id.* at 118-19.

[80] *Id.* at 119-20. The trial judge unquestionably erred. *See* Rogers v. United States, 422 U.S. 35 (1975); Bollenbach v. United States, 326 U.S. 607 (1946). The *Rogers* Court stated:

> Federal Rule Crim. Proc. 43 guarantees to a defendant in a criminal trial the right to be present "at every stage of the trial including the impaneling of the jury and the return of the verdict." Cases interpreting the Rule make it clear . . . that the jury's message should have been answered in open court and that petitioner's counsel should have been given an opportunity to be heard before the trial judge responded.

422 U.S. at 39. The *Bollenbach* Court held: "Discharge of the jury's responsibility . . . depended on discharge of the judge's responsibility to give the jury the required guidance by a lucid statement of the relevant legal criteria. When a jury makes explicit its difficulties a trial judge should clear them away with concrete accuracy." 326 U.S. at 612-13.

[81] 565 F.2d at 119-20. In his dissent, Judge Swygert stated:

> The majority strains to construct an apology for the judge's error, but at best its hindsight effort is speculation and at worst a sophism. For example, the majority speculates that the last two questions asked by the jury "appear" to be related, and that when read together the final question "appears" to be only a specific version of the one asked the night before. The majority then hypothesizes that because the defendant was acquitted on certain (but not all) counts to which the last question related, the judge's answer, if given, could not have "produced a more favorable result for him." The majority apparently rules out the possibility of a complete acquittal had the judge taken the steps the majority says he should have taken.

Id. at 126 (dissenting opinion).

[82] Keen v. United States, 569 F.2d 547 (10th Cir. 1977), provides a variant of the *Clavey* problem. The trial judge in a civil case improperly allowed the introduction of an

2. *Ineffective Assistance of Counsel*

The sixth amendment guarantees criminal defendants effective assistance of counsel.[83] Courts agree that an improper denial of counsel at trial merits automatic reversal on appeal.[84] The circuits are split, however, on the applicability of the harmless error doctrine to cases involving ineffective assistance of counsel. Some circuits have adopted a rule of automatic reversal—they do not require a showing of actual prejudice.[85] In what may amount to a de facto automatic reversal rule, some circuits have placed the burden on the government to demonstrate absence of prejudice.[86] Several circuits, applying different rationales, require defendants to show actual prejudice.[87] The Eighth Circuit jus-

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admission of key facts with the instruction that the jury accept them as a matter of law. The judge gave no subsequent instructions on the point. The Tenth Circuit found the error harmless because the facts had been argued at trial. Even under the relaxed standards of civil cases (*see* notes 40-42 and accompanying text *supra*), the Tenth Circuit engaged in unwarranted speculation and came to an unjustifiable result.

[83] U.S. CONST. amend. 6. *See* McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970); Glasser v. United States, 315 U.S. 60, 69-70 (1942). Before the sixth amendment was applied to the states, ineffective assistance of counsel could amount to a denial of due process in state trials. *See* Avery v. Alabama, 308 U.S. 444, 446-47 (1940); Powell v. Alabama, 287 U.S. 45, 68-71 (1932).

[84] *See* Chapman v. California, 386 U.S. 18, 23 & n.8 (1967) (dictum); *id.* at 43 (concurring opinion, Stewart, J.); Glasser v. United States, 315 U.S. 60, 76 (1942). *Cf.* Castaneda-Delgado v. Immigration & Naturalization Serv., 525 F.2d 1295, 1300-02 (7th Cir. 1975) (denial of counsel at deportation proceedings never harmless error). Denial of counsel at other critical stages in the criminal process may be harmless error. *See, e.g.*, Coleman v. Alabama, 399 U.S. 1, 11 (1970) (remanding to determine if denial of counsel at preliminary hearing constituted harmless error).

[85] *See* United States v. Yelardy, 567 F.2d 863, 865 n.1 (6th Cir. 1978); United States *ex rel.* Healey v. Cannon, 553 F.2d 1052, 1057 n.7 (7th Cir.), *cert. denied*, 434 U.S. 874 (1977); Beasley v. United States, 491 F.2d 687, 696 (6th Cir. 1974). The Ninth Circuit applies the rule to cases where "counsel is prevented from discharging his normal functions." Cooper v. Fitzharris, 586 F.2d 1325, 1332 (9th Cir. 1978) (en banc). Where the claim of ineffective assistance rests on "specific acts and omissions of defense counsel at trial," however, the defendant must show actual prejudice. *Id.* at 1327.

[86] *See* United States v. DeCoster, 487 F.2d 1197, 1204 (D.C. Cir. 1973); Coles v. Peyton, 389 F.2d 224, 226 (4th Cir. 1968). The District of Columbia Circuit may have misgivings about this rule—*DeCoster* has yet to be finally decided after remand. *See* United States v. DeCoster, No. 72-1283 (D.C. Cir. Oct. 19, 1976), *vacated for en banc consideration*, No. 72-1283 (D.C. Cir. Mar. 17, 1977).

[87] *See* Cooper v. Fitzharris, 586 F.2d 1325, 1327 (9th Cir. 1978) (en banc), *discussed in* note 84 *supra*; United States v. Bad Cob, 560 F.2d 877, 880 (8th Cir. 1977); Haggard v. Alabama, 550 F.2d 1019, 1022 (5th Cir. 1977); United States v. Easter, 539 F.2d 663, 666 (8th Cir. 1976); Thomas . Wyrick, 535 F.2d 407, 413-14 (8th Cir.), *cert. denied*, 429 U.S. 868 (1976); United States *ex rel.* Green v. Rundle, 434 F.2d 1112, 1115 (3d Cir. 1970). These courts have clouded the distinction between the tests for ineffective assistance of counsel and harmless error. For example, in Cooper v. Fitzharris, 586 F.2d 1325 (9th Cir.

tifies burdening the defendant by noting that "proof of prejudice is usually more within [his] knowledge"[88] and argues that a different rule would penalize the prosecution for acts beyond its control.[89] The Fifth Circuit has argued that it can only speculate about the effect of a different attorney, and thus refuses to reverse unless the facts indicate that counsel could have employed more fruitful tactics.[90]

The rationales advanced in support of a "proof of actual prejudice" rule are unpersuasive. Although ineffective assistance of counsel always threatens irreparable harm to the defendant, the record often does not reveal prejudice.[91] The record rarely shows what tactics competent counsel might have employed; it cannot show the impact that competent counsel may have had on the trial's outcome.[92] A barren transcript coupled with defen-

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1978) (en banc), the Ninth Circuit required the defendant to show that counsel was not reasonably competent and, as part of his claim of error, demonstrate that counsel's errors prejudiced his defense. *Id.* at 1331. Defendant need not demonstrate that he would have been acquitted but for the error. *Id.* at 1333. Because defendant could not make the requisite showing of actual prejudice, the court refused to find ineffective assistance of counsel. *Id.*

In McQueen v. Swenson, 498 F.2d 207 (8th Cir. 1974), the Eighth Circuit found ineffective assistance of counsel *before* assessing prejudice to the defendant. *Id.* at 218. The court then explicitly engaged in harmless error analysis. Subsequent decisions have incorporated a prejudice criterion into the ineffectiveness of counsel test. *See, e.g.*, Morrow v. Parratt, 574 F.2d 411, 412-13 (8th Cir. 1978); United States v. Bad Cob, 560 F.2d 877, 880 (8th Cir. 1977); United States v. Easter, 539 F.2d 663, 666 (8th Cir. 1976). The circuit continues to equate its prejudice requirement with harmless error analysis. *See* United States v. Runge, No. 77-1315, slip op. at 6-8 (8th Cir. Feb. 13, 1979) (per curiam); Morrow v. Parratt, 574 F.2d 411, 413 & n.2 (8th Cir. 1978).

Notwithstanding the mechanics of their rules, both the Eighth and Ninth Circuits engage in harmless error analysis when they require a showing of prejudice. Under the usual harmless error analysis, lack of prejudice results in affirmance despite error; under the Eighth and Ninth Circuits' formulation, lack of prejudice results in no error. One possible distinction between the analyses centers on the standard of proof: what constitutes a showing of prejudice?

[88] *See* Thomas v. Wyrick, 535 F.2d 407, 414 (8th Cir.), *cert. denied*, 429 U.S. 868 (1976).

[89] *See* McQueen v. Swenson, 498 F.2d 207, 219 (8th Cir. 1974).

[90] *See* Haggard v. Alabama, 550 F.2d 1019, 1022-23 (5th Cir. 1977).

[91] Recognizing this problem one circuit requires the government to show absence of prejudice. *See* Unites States v. DeCoster, 487 F.2d 1197 (D.C. Cir. 1973), *discussed in* note 86 and accompanying text *supra.*

[92] For example, if counsel fails to investigate the facts or the law "the record may not indicate which witnesses he could have called, or defenses he could have raised." *Id.* at 1204. *See* United States v. Thompson, 475 F.2d 931 (D.C. Cir. 1973) (per curiam). In *Thompson,* the court rejected appellant's affidavits from witnesses who would have given favorable testimony but who were not interviewed by defense counsel. Relying on the record alone, the court found no "satisfactory basis for considering the issue of ineffectiveness." *Id.* at 932.

dant's own scant awareness of legal errors[93] may create an insurmountable barrier to proof of actual harm.[94]

Denial of counsel and ineffective assistance of counsel pose the same threat—prejudice to the defendant that is substantial yet difficult to prove. Indeed, "[t]he purpose of *Gideon* was not merely to supply criminal defendants with warm bodies, but rather to guarantee reasonably competent representation."[95] Courts should extend the automatic reversal rule to ineffective assistance cases, and thus draw them under the same protective umbrella that now shelters denial of counsel claims. In short, the automatic reversal rule should apply to every infringement of the sixth amendment right to counsel.[96]

3. *Errors of Exclusion of Key Evidence*

When appellate courts review wrongful exclusion of key evidence at trial, they should apply the rule of automatic reversal rather than engage in harmless error speculation. Assessing the harmlessness of wrongful exclusion requires judicial appraisal of both the content of the excluded evidence and its potential impact upon the jury.[97] The result of this analysis can only be the prod-

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[93] *See* Argersinger v. Hamlin, 407 U.S. 25, 31 (1972) (quoting Powell v. Alabama, 287 U.S. 45, 68-69 (1932)).

[94] Therefore, in evaluating effectiveness of counsel, courts should consider only readily measurable factors, such as the attorney's preparation, performance, and loyalty; actual harm to the defendant should not be relevant.

[95] Cooper v. Fitzharris, 551 F.2d 1162, 1164 (9th Cir. 1977), *rev'd en banc*, 586 F.2d 1325 (1978). The Supreme Court has found that complete absence of counsel is not a prerequisite to finding denial of counsel. *See* Gedders v. United States, 425 U.S. 80, 91 (1976) (refusal to permit defendant to consult with attorney during overnight recess between direct- and cross-examination violated sixth amendment right to assistance of counsel); Herring v. New York, 422 U.S. '853, 858, 862-65 (1975) (denial of right to make summation at criminal trial violates sixth amendment right to assistance of counsel regardless of simplicity of case or strength of prosecution's evidence).

[96] Courts that incorporate a prejudice requirement into their criteria for evaluating the effectiveness of counsel (*see* note 87 *supra*) would have to eliminate this burden on the defendant in order to be consistent with the underlying rationale of the automatic reversal rule. That rule makes prejudice irrelevant.

The marked unwillingness of courts, even when confronted with obvious blunders, to find a breach of attorney's duties will probably limit the impact of an automatic reversal rule. *See, e.g.*, United States v. Yelardy, 567 F.2d 863, 865 n.2 (6th Cir. 1978) (reasonable belief in client's guilt diminishes counsel's obligation to investigate).

[97] Appellate courts have less difficulty reviewing the wrongful *admission* of key evidence. There, unlike in cases of exclusion, the evidence appears in the record and, therefore, the court need only determine impact. On the other hand, the improper restriction of impeachment materials constitutes an intermediate case. Impeachment attempts to undermine the credibility of properly admitted evidence. Hindrances to impeachment, such

uct of guesswork.[98]

The rule of automatic reversal is particularly appropriate when the trial court excludes testimony of witnesses favorable to the defendant.[99] Appellate court attempts to assess the harmlessness of the exclusion of defendants' own testimony starkly reveal the dangers of harmless error analysis. In *Wright v. Estelle,*[100] for example, the Fifth Circuit held that, even if the trial court had denied the defendant his "personal constitutional right" to testify on his own behalf,[101] the error was harmless because it "would not

as the prosecutor's failure to produce requested material or court's improper limitation of cross-examination, produce more easily ascertainable harm than the omission of new, positive evidence favorable to the defendant. Nevertheless these errors pose serious problems for appellate determination of prejudice. For example, the Supreme Court has called the wrongful limitation of defense counsel's impeachment of a prosecution witness "a constitutional error of the first magnitude." Davis v. Alaska, 415 U.S. 308, 328 (1974) (quoting Brookhart v. Janis, 384 U.S. 1, 3 (1966)). Only when special circumstances ameliorate the effects of the limitation will the courts hold the error harmless. *See* United States v. Price, 577 F.2d 1356, 1362 (9th Cir. 1978) (error harmless if evidence overwhelming and impeaching information entered record in another form); United States v. Mayer, 556 F.2d 245, 252 n.10 (5th Cir. 1977) (possible harmless error if impeachment impaired but not denied); United States v. Duhart, 511 F.2d 7, 9-10 (6th Cir.) (error harmless if testimony not that of key witness and other evidence of guilt overwhelming), *cert. dismissed,* 421 U.S. 1006 (1975). Impeachment evidence may do more than merely discredit other testimony thus making prejudice even harder to measure. For example, in Johnson v. Brewer, 521 F.2d 556, 562 (8th Cir. 1975), the Eighth Circuit found reversible error in the trial court's exclusion of impeachment evidence profferred to show an attempt by an informant—the prosecution's only witness—to frame a different defendant in a similar case and thus to suggest that the witness did so in this case.

[98] Courts can review trivial omissions with greater certainty. A good example is an omitted document of definite content that could have had little subjective impact on a jury. *See* United States v. Liddy, 542 F.2d 76, 83 (D.C. Cir. 1976).

[99] *See, e.g.,* Hughes v. Mathews, 576 F.2d 1250, 1255-56, 1259 (7th Cir.) (improper exclusion of psychiatric testimony offered to show that defendant lacked capacity to form requisite intent for first degree murder conviction, held constitutional error and not harmless), *cert. dismissed,* 99 S. Ct. 43 (1978); United States v. McClure, 546 F.2d 670, 672-73 (5th Cir. 1977) (reversible error to exclude testimony possibly favorable to defendant). *But see* United States v. Wood, 550 F.2d 435, 441 (9th Cir. 1976) (testimony wrongly excluded but no prejudicial error because witness would not have been credible).

A similar problem arises when the prosecution fails to disclose the existence of a favorable defense witness. In Jackson v. Wainwright, 390 F.2d 288 (5th Cir. 1968), the court refused to "assume that this evidence would not have affected the jury's deliberations" (*id.* at 298-99) and reversed, reasoning that "nondisclosure . . . even when there was no showing of the prosecution's bad faith, offends the fundamental conceptions of a fair trial essential to due process" (*id.* at 299).

[100] 549 F.2d 971 (1977), *aff'd en banc per curiam mem.,* 572 F.2d 1071 (5th Cir.), *cert. denied,* 99 S. Ct. 617 (1978).

[101] It is unclear whether a personal constitutional right to testify exists; neither the panel opinion nor the en banc dissent cited controlling authority. The panel opinion assumed arguendo that the trial court had committed a constitutional error, and applied the *Chapman* standard, which dicates reversal unless the error is harmless beyond a reasonable doubt. *Id.* at 974. The trial court may not have erred. Defense counsel prevented the defendant, against his wishes, from testifying. The attorneys did not tell the court of this

have altered the verdict" in light of the overwhelming evidence of guilt.[102]

The Fifth Circuit displays unwarranted confidence in its ability to measure prejudice.[103] The record, however, seldom provides sufficient information from which to posit the content of defendant's testimony.[104] Furthermore, that testimony might have had great impact upon the trier of fact.[105] In *United States v. Cavender*,[106] the Fourth Circuit noted that the defendant is often in the best position to offer exculpatory testimony and that courts cannot easily say he could not influence the jury.[107] A

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conflict, and the defendant was convicted. Wright v. Estelle, 572 F.2d 1071, 1074 (5th Cir. 1978) (en banc) (dissenting opinion, Godbold, J.). Wright's attorneys may simply have employed a tactical device. *See id.* at 1072 (concurring opinion). *Wright* avoided deciding this hard question by using the harmless error doctrine. *See* notes 26-28 and accompanying text *supra*.

[102] 549 F.2d at 974.

[103] The judges of the Fifth Circuit occasionally take pains to emphasize that courts should invoke the doctrine of harmless error sparingly in light of its potential hazards. *See, e.g.*, Chapman v. United States, 547 F.2d 1240, 1250 (5th Cir.), *cert. denied*, 431 U.S. 908 (1977). A review of the circuit's harmless error decisions, however, reveals an often aggressive attitude toward its ability on appeal to determine the amount of prejudice the defendant suffered as a result of trial errors. For example, the Fifth Circuit requires that an appellant show actual prejudice to establish ineffective counsel. *See* Haggard v. Alabama, 550 F.2d 1019, 1022 (5th Cir. 1977); notes 83-96 and accompanying text *supra*. The Fifth Circuit, in addition, willingly judges, based on the paper record, the relative credibility of witnesses. *See, e.g.*, United States v. Beasley, 576 F.2d 626 (5th Cir. 1978). In *Beasley*, a crucial point in the prosecution's case depended solely on the testimony of two witnesses, one of whose testimony was subsequently stricken. The Fifth Circuit was left to balance the "convincing" testimony of the remaining witness against Beasley's personal denial. *Id.* at 633. Even though the witness had borne the defendant's child (*id.* at 627) and may not have been entirely disinterested, the court affirmed the conviction.

Because an appellate court cannot observe the demeanor of trial witnesses, it should not decide close questions of witness credibility. The Fifth Circuit has produced a large body of harmless error authority (note 37 *supra*) and the judges have undoubtedly gained great familiarity with the doctrine. Although experience could make them more comfortable in making the fine factual distinctions required in harmless error cases it is often impossible to calculate the precise effect an error may have had on a jury. Frequent use of harmless error could also cause insensitivity to trial errors that, although not prejudicing this defendant, could mar the appearance of justice. The Fifth Circuit, for example, called harmless a federal judge's absence from the bench during four hours of jury argument. *See* United States v. Boswell, 565 F.2d 1338, 1341-42 (5th Cir.), *cert. denied*, 99 S. Ct. 81 (1978). *See also* note 96 *supra*.

[104] In *Wright*, for example, the defense attorney suspected that the defendant's testimony would have conflicted with other testimony. 549 F.2d at 974. The defendant, however, denied that his story would have been substantially different. *Id.*

[105] *See* A. AMSTERDAM, TRIAL MANUAL FOR THE DEFENSE OF CRIMINAL CASES § 390, at 1-386 (3d ed. 1974) (in many cases accused's testimony may provide direct factual support of defense theory).

[106] 578 F.2d 528 (4th Cir. 1978).

[107] *Id.* at 534-35. The *Cavender* court found that defendant did not testify because of the trial court's erroneous ruling that his remote prior convictions would be admissible to im-

defendant's demeanor is more critical than that of other witnesses.[108] When the jury focuses on his credibility as a witness, they judge him personally. Moreover, if the trial court prevents the defendant from testifying on his own behalf, he not only loses the chance to tell his story to the jury, but faces the possibility that the jury will draw a negative inference from his failure to testify.[109]

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peach his testimony without a finding of their probative value. *Id.* at 529-30. The court held that the error could not be harmless under either the *Kotteakos* standard for nonconstitutional errors or the *Chapman* standard for constitutional errors. *Id.* at 535.

[108] In his dissent in Wright v. Estelle, 572 F.2d 1071 (5th Cir. 1978) (en banc), Judge Godbold noted:

> [T]reatment of the issue [here] as an evidentiary problem is appropriate if the excluded testimony is that of a mere witness. Judges can, with a reasonable degree of assurance, identify and sort out merely trivial or cumulative evidence and form a reasoned judgment on possible impact upon the jury of what it erroneously heard or failed to hear.... Where the error is in keeping the defendant from the stand the judge can consider the content of what the defendant might have said the same as for a nonparty witness. But he cannot weigh the possible impact upon the jury of factors such as the defendant's willingness to mount the stand rather than avail himself of the shelter of the Fifth Amendment, his candor and courtesy (or lack of them), his persuasiveness, his respect for court processes. These are elusive and subjective factors, even among persons who might perceive and hear the defendant, but more significantly, they are matters neither communicated to an appellate judge nor susceptible of communication to him. Appellate attempts to appraise impact upon the jury of such unknown and unknowable matters is purely speculative.

Id. at 1081-82 (footnote omitted). Judge Godbold also encouraged reversal in order to maintain proper judicial appearances. *Id.* at 1081.

Edward Bennett Williams once wrote that:

> When [the defendant takes the stand] you and I, of course, know that this is the most important part of any criminal case. The spotlight of attention is on him. He is the chief actor in the drama of any criminal trial and the impression that he makes on the jury will be the most important single factor in determining whether or not he is convicted or acquitted.
>
> He dwarfs in importance every other figure in the trial. He must create an atmosphere of understanding and sympathy and warmth in the minds and hearts of the twelve jurors.

Williams, *The Trial of a Criminal Case,* 29 N.Y. ST. B. A. BULL. 36, 42 (1957). *See* A. AMSTERDAM, *supra* note 105, § 390, at 1-386 to -387 (defendants who do not testify forego opportunity to appeal directly and personally to sympathy of jurors).

[109] Jurors often construe defendant's failure to testify as an indication that he has something to hide. A. AMSTERDAM, *supra* note 105, § 390, at 1-386. A survey conducted by the American Institute of Public Opinion revealed that 71% of the people questioned saw the defendant's failure to testify as an indication of guilt. *See* Note, *To Take the Stand or Not to Take the Stand: The Dilemma of the Defendant with a Criminal Record,* 4 COLUM. J. OF L. AND SOC. PROB. 215, 221 (1968). Not surprisingly then, the vast majority of judges and lawyers believe that the defendant generally increases his chances of acquittal by testifying. *Id.* at 221.

D. *The Supreme Court's Harmless Error Boundary: Holloway v. Arkansas and Errors of Pervasive Prejudice*

In *Holloway v. Arkansas,*[110] the Supreme Court laid the foundation for constructing principled categories of errors that require automatic reversal. The three *Holloway* defendants made timely motions at trial for appointment of separate counsel, arguing that their shared, court-appointed attorney could not provide each of them with effective assistance of counsel. Defendants alleged that counsel possessed confidential information that would force him to represent conflicting interests. The trial judge denied the motions without taking adequate steps to investigate their bases[111] and later prohibited defense counsel from cross-examining each defendant on behalf of the other defendants. The jury convicted; the Supreme Court reversed.[112] The Court followed *Glasser v. United States,*[113] interpreting it to hold that "whenever a trial court improperly requires joint representation over timely objection reversal is automatic."[114]

Chief Justice Burger, writing for the majority, gave three interrelated reasons for rejecting harmless error analysis. First, prejudice is presumed to flow from improper joint representation.[115] Second, "the assistance of counsel is among those 'constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error'"[116]—once a court finds counsel ineffective the defendant need not show actual prejudice to obtain reversal.[117] Finally, the error of requiring joint represen-

[110] 435 U.S. 475 (1978).

[111] Precisely what steps are adequate remains unclear. *Id.* at 493 (dissenting opinion, Powell, J.).

[112] The Arkansas Supreme Court had affirmed the trial court's result. *See* Holloway v. State, 260 Ark. 250, 539 S.W.2d 435 (1976).

[113] 315 U.S. 60 (1942).

[114] 435 U.S. at 488.

[115] *Id.* at 489.

[116] *Id.* (quoting Chapman v. California, 386 U.S. 18, 23 (1967)). *But cf.* Coleman v. Alabama, 399 U.S. 1, 10-11 (1969) (remand to determine whether denial of counsel at preliminary hearing prejudicial).

[117] The District of Columbia Circuit has interpreted *Holloway* as saying that a sixth amendment violation can never be harmless. United States v. Burton, 584 F.2d 485, 491 n.19 (D.C. Cir. 1978). *Holloway* itself, however, waffles on this issue. At one point, the Court said that "when a defendant is deprived of the presence and assistance of his attorney, either throughout the prosecution or during a critical stage in, *at least, the prosecution of a capital offense,* reversal is automatic." 435 U.S. at 489 (emphasis added). The question may still be open for noncapital cases, but the severity of the offense does not seem to be a logical distinguishing point.

Some circuits have attempted to restrict *Holloway*'s holding. The First Circuit reads *Holloway* as demanding a slight showing of prejudice. *See* United States v. DiCarlo, 575

tation of conflicting interests may not produce identifiable prejudice. The harm caused by the impairment of counsel's effectiveness, unlike that of discrete trial errors, may not appear in the record. Hence, judges cannot measure prejudice in an "intelligent, evenhanded" manner: [118]

> It may be possible in some cases to identify from the record the prejudice resulting from an attorney's failure to undertake certain trial tasks, but even with a record of the sentencing hearing available it would be difficult to judge intelligently the impact of a conflict on the attorney's representation of a client. And to assess the impact of a conflict of interests on the attorney's options, tactics, and decisions in plea negotiations would be virtually impossible. Thus, an inquiry into a claim of harmless error here would require, unlike most cases, unguided speculation.[119]

Holloway's rationale naturally extends beyond the sixth amendment: [120] it suggests that a rule of automatic reversal should

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F.2d 952, 957 (1st Cir. 1978) *cert. denied*, 99 S. Ct. 115 (1978). In Reynolds v. Mabry, 574 F.2d 978 (8th Cir. 1978), the Eighth Circuit postulated that *Holloway* demands automatic reversal for ineffectiveness of counsel only if the plaintiff establishes that the attorney has a conflict of interest. *Id.* at 981. The *Reynolds* court considered prejudice relevant even in that case. *Id.* at 981 n.5. In restricting the rule of automatic reversal, the Eighth Circuit is consistent with its earlier ineffective assistance of counsel cases. *See* note 87 and accompanying text *supra*. The limiting distinctions made by these circuits are inconsistent with the rationale of *Holloway*. If counsel is ineffective during trial, it matters not why. The defendant suffers whether his counsel is incompetent or bas conflicting interests. *See* notes 83-96 and accompanying text *supra*.

[118] 435 U.S. at 490. An earlier Supreme Court case had held that denial of counsel at a crucial pleading stage could not be harmless error because the "degree of prejudice can never be known." Hamilton v. Alabama, 368 U.S. 52, 55 (1961). Nevertheless in United States v. Crowley, 529 F.2d 1066, 1070 (3d Cir.), *cert. denied*, 425 U.S. 995 (1976), the Third Circuit found the improper denial of counsel at a hearing to withdraw a guilty plea harmless beyond a reasonable doubt because defendant alleged neither that he was innocent nor that his original plea was involuntary and clearly could not withdraw the plea. Turning the speculation argument around, the *Crowley* court refused to assume new counsel could have called old counsel and shown the old plea to be improper because nothing in the record would indicate it possible. *Id.* at 1071. *But cf.* United States v. Williams, 544 F.2d 1215, 1218 (4th Cir. 1976) (failure to appoint required number of counsel raises irrebuttable presumption of prejudice). *See also* United States v. Carrigan, 543 F.2d 1053, 1056 (2d Cir. 1976) (lack of satisfactory judicial inquiry into joint representation shifts burden of proof on question of prejudice to government).

[119] 435 U.S. at 490-91.

[120] Several judges have reached conclusions similar to *Holloway's* in cases outside of the sixth amendment context. *See* Wright v. Estelle, 572 F.2d 1071, 1081-82 (5th Cir. 1978) (en banc) (dissenting opinion, Godbold, J.) (harm from preventing defendant from testifying cannot be assessed on appeal because impossible to know what effect testimony may have had on jury); United States v. Clavey, 565 F.2d 111, 126 (7th Cir. 1977) (dissenting opinion, Swygert, J.) (majority's conclusion that jury resolved uncertainty and confusion with respect to instructions such that further instruction by the judge could not have produced

apply to those fundamental, pervasive errors that have uncertain prejudicial impact.[121] Courts may employ harmless error analysis in cases involving such errors as improper introduction of inadmissible evidence. Because such errors have fairly narrow and specific effects, appellate courts can confidently evaluate their harmlessness.[122] But when appellate courts cannot isolate the effects of an error, such as in cases of ineffective assistance of counsel[123] and factfinder bias,[124] they should reverse.

This reasoning should be carried further. For instance, any finding of ineffective assistance of counsel merits automatic reversal; the harm suffered by the defendant is the same, regardless of whether it results from a conflict of interest or his counsel's incompetence. Some types of isolated, discrete errors may also cause unmeasurable prejudice because of, for example, their inflammatory nature.[125] These errors should receive the same treatment that pervasive errors receive. The rule of automatic reversal should be extended to all errors, whether or not pervasive or constitutional, that result in unascertainable prejudice.[126]

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more favorable result for the defendant based upon assumptions not fact), *aff'd en banc per curiam mem. by an equally divided court*, 578 F.2d 1219, *cert. denied*, 99 S. Ct. 351 (1978). *Cf.* United States v. Matos, 444 F.2d 1071, 1074-75 (7th Cir. 1971) (concurring opinion, Pell, J.) (if prosecutor's statement possibly caused one juror to disbelieve defendant, then error reversible; otherwise appellate court indulges in speculation).

[121] 435 U.S. at 490. *See, e.g.*, Chapman v. California, 386 U.S. 18, 24-26 (1967). The *Holloway* Court emphasized the uncertainty of prejudice. Apparently contemplating fundamental errors that damage the appearance of justice, the Court also noted that certain errors require automatic reversal "'even if the defendant was clearly guilty.'" 435 U.S. at 489 (quoting Chapman v. California, 386 U.S. 18, 43 (1967) (concurring opinion, Stewart, J.)).

[122] Estelle v. Williams, 425 U.S. 501, 504-05, 512-13 (1976) (forcing defendant to stand trial in prison uniform reversible constitutional error unless no objection made).

[123] *See* United States v. Burton, 584 F.2d 485, 491 (D.C. Cir. 1978) (harmless error doctrine inapplicable to sixth amendment violations). *But see* Reynolds v. Mabry, 574 F.2d 978, 981 & n.5 (8th Cir. 1978).

[124] *See* Tumey v. Ohio, 273 U.S. 510, 534-35 (1927) (reversible violation of due process for interested judicial official to try cases). *But cf.* United States v. Staszcuk, 417 F.2d 53, 60 n.20 (7th Cir.) (en banc), *cert. denied*, 423 U.S. 837 (1975) (without finding error, court disapproved of trial judge's failure during voir dire to make inquiries that would help ensure unbiased jury).

[125] Isolated errors may cause unmeasurable prejudice. *See* Miller v. North Carolina, 583 F.2d 701, 708 (4th Cir. 1978) (prosecutor's racially prejudicial closing remarks held constitutional error and required automatic reversal because potential for prejudice too great).

[126] The development of principled categories of errors for which harmless error analysis is appropriate would avoid the uncertainty and nonuniformity resulting from case-by-case determinations. *But see* United States v. Ong, 541 F.2d 331, 338 (2d Cir. 1976) (harmless error a relative term requiring case-by-case analysis), *cert. denied*, 429 U.S. 1075, 430 U.S. 934 (1977).

CONCLUSION

The doctrine of harmless error conserves judicial resources by obviating retrial for trivial mistakes. The doctrine's role in criminal cases, however, has expanded to include parts that it is ill-suited to play. Harmless error analysis is inappropriate for errors with intrinsic but unmeasurable prejudice. A rule of automatic reversal should apply to errors such as improper jury instructions, infringements of the right to effective counsel and exclusion of key evidence.

Nevertheless, defendants on appeal must always be aware of the doctrine's pervasive influence. Even a rule of automatic reversal imperfectly guarantees defendants' rights against appellate neglect. Courts could readily circumvent such a rule by not finding error at all and substituting mere disapproval of an improper practice.[127] The ultimate safeguard lies in enhanced judicial sensitivity to the extraordinary dangers of the harmless error doctrine along with acceptance of a rule of automatic reversal in appropriate cases.

Donald A. Winslow

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[127] This phenomenon has occurred with voir dire and peremptory challenge practices. Ostensibly, the defendant need not show prejudice to obtain reversal if the trial judge improperly limits his questioning of prospective jurors during voir dire or improperly impinges his right to disqualify jurors by peremptory challenge. *See* United States v. Dellinger, 472 F.2d 340, 367 (7th Cir. 1972), *cert. denied*, 410 U.S. 970 (1973). *See generally* Swain v. Alabama, 380 U.S. 202, 219 (1965); Lewis v. United States, 146 U.S. 370, 376 (1892). Yet some courts have affirmed despite disapproving the improper voir dires or other limitations on peremptory challenges and without clearly finding error. *See* United States v. Mitchell, 556 F.2d 371, 378-79 (6th Cir.), *cert. denied*, 434 U.S. 925 (1977) (better practice to disqualify potentially biased juror for cause and save peremptory challenge for defendant); United States v. Staszcuk, 517 F.2d 53, 60 n.20 (7th Cir.) (en banc), *cert. denied*, 423 U.S. 837 (1975) (disapproval of trial judge's refusal to ask relevant questions during voir dire). Appellate disapproval of trial court actions resembles a harmless error finding. Each "doctrine" operates on a nonprejudicial trial court "error"; the appellate court attempts to provide guidance for future cases without disturbing the result of the instant case. Both doctrines are apposite only if the reviewing court can accurately measure the error's prejudice. If prejudice is unmeasurable due to the nature of the impropriety, appellate courts cannot, through disapproval or harmless error, properly circumvent reversal.