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James Edward Wicht III[*]

I. INTRODUCTION

"That which is unjust can really profit no one; that which is just can really harm no one."[1]

The federal harmless error doctrine was enacted by Congress in 1919 to combat a serious problem plaguing the criminal justice system.[2] At the time, criminal convictions were reversed on appeal for such minor errors as the omission of the word "the" from the charging indictment. In fact, any technical defect resulted in reversal. Compounding this problem were defense attorneys who, knowing it would result in retrial, sometimes deliberately placed technical errors into the record or consciously allowed such errors to occur. While such reversals would put a strain on our modern judicial system, the burden was particularly acute given the logistics of the early 1900's, especially with regard to communication and transportation.

Congress responded to the problem by articulating what has come to be known as the harmless error rule. To be classified as harmless under the original rule, the error must not have affected the substantial rights of the parties.[3] By doing so, the harmless error rule prevented the setting aside of convictions for small errors which were unlikely to have influenced the outcome of the trial. The rule was broadly written and applied to a wide variety of situations. While the almost infinite number of technical errors prevented the drafting of specific rules to cover every con-

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1. AMERICAN QUOTATIONS 306 (Gorton Carruth & Eugene Ehrlich eds., Wings Books 1992) (quoting Henry George, THE IRISH LAND QUESTION (1884)).

2. Act of February 26, 1919, ch. 48, 40 Stat. 1181, JUDICIAL CODE § 269, 28 U.S.C. §391 (1919) (current version at 28 U.S.C. § 2111 (1996)).

3. *Id.*

ceivable situation, the general wording of the rule left open the question of just how broadly it was to be applied.[4]

Prior to 1967, courts held Constitutional errors could never be harmless. In cases where a defendant's federal Constitutional rights were violated, the reviewing courts reversed the convictions and remanded the cases for new trials free of Constitutional infirmity.[5] Despite these early cases,in *Chapman v. California*[6] the United States Supreme Court treated the issue of whether a Constitutional error could be subjected to harmless error analysis as a question of first impression. The Court answered the question by holding that under some circumstances the violation of a defendant's Constitutional rights could qualify as harmless error.[7]

After *Chapman*, the next and obvious question was which rights were subject to harmless error analysis. Initially, the Court addressed the issue on a case-by-case basis, often without articulating a rationale as to why a given error was subject to harmless error analysis. Finally, in 1991 the Court attempted to provide a general rule for guiding the determination of whether a particular Constitutional violation was subject to harmless error review. According to Chief Justice Rhenquist writing for the majority in *Arizona v. Fulminante*,[8] the *type* of right that was violated determines whether the harmless error rule applies. Constitutional errors characterized as trial errors are subject to harmless error analysis, whereas structural errors are not.[9]

While the original harmless error rule provided a necessary remedy to a legitimate jurisprudential problem, the rule has evolved well beyond merely addressing the small technical defects for which it was originally intended. So much so that under current Supreme Court case law, even the wrongful admission of a coerced confession may be deemed a harmless error.[10] This explosion of the harmless error doctrine goes beyond the original purpose of the rule and has taken Constitutional law as applied to criminal defendants down a road better left untraveled.

Part II examines the history of harmless error jurisprudence from the advent of the rule through the Supreme Court's articulation of the trial versus structural error distinction. Part III discusses the commonality shared by all Constitutional rights and demonstrates that they cannot be

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4. Kotteakos v. United States, 328 U.S. 750, 760 (1946).
5. *E.g.*, Payne v. Arkansas, 356 U.S. 560 (1958) (coerced confession); Gideon v. Wainwright, 372 U.S. 335 (1963) (right to counsel); Tumey v. Ohio, 273 U.S. 510 (1927) (impartial judge).
6. 386 U.S. 18 (1967).
7. *Id.* at 22.
8. 499 U.S. 279 (1991).
9. *Id.* at 306-10.
10. *Id.*

divided into the currently employed trial versus structural error framework. Next, Part IV examines the inherent difficulties of applying harmless error analysis to Constitutional errors. It first shows how the Supreme Court deviated from established precedent in holding that Constitutional errors could be subjected to harmless error analysis. It then explores the impossibility of a reviewing court being able to effectively weigh the impact a Constitutional error has on the trier of fact. Part IV also discusses what may be the greatest problem caused by the application of harmless error analysis to Constitutional rights: the lowering of the inherent value attached to those rights.

Part V evaluates the merits of returning to a rule of automatic reversal. The beneficial effects of such a policy on the courts, prosecutors, defendants and the general public present compelling reasons for a renewed adherence to the automatic reversal rule. While criminal defendants may not be entitled to perfect trials, they do deserve proceedings free from Constitutional infirmity.

II. THE HISTORY OF THE HARMLESS ERROR RULE

In 1906, the state of Missouri tried and convicted Bruce Campbell for raping a young girl named Willie Clark.[11] During the trial, the prosecution presented detailed and convincing evidence of Mr. Campell's guilt, including compelling testimony from the victim, Ms. Clark.[12] Ms. Clark explained that she came to stay with Mr. Campbell and his wife while traveling to visit her father and brother.[13] She described precisely how Mr. Campbell returned to the house one morning when his wife was gone and raped her.[14] As further evidence of the defendant's guilt, Ms. Clark told the jury about Mr. Campbell's attempt to conceal his crime by offering her money in exchange for not reporting his vicious violation of her.[15]

In addition to the victim's testimony, the jury also heard the testimony of a neighbor who had seen Ms. Clark shortly after the attack.[16] Although not an eyewitness to the actual rape, the neighbor observed Ms. Clark crying, "bareheaded and disheveled" shortly after the alleged rape occurred.[17] A physician who examined Ms. Clark shortly after the attack provided further support for the state's case by informing the jury that her

11. State v. Campell, 109 S.W. 706, 707 (Mo. 1908).
12. *See Id.* at 707-08.
13. *Id.* at 707. Her father and brother lived in Joplin, Missouri.
14. *Id.*
15. *Id.* at 708.
16. *Id.* at 707-08.
17. *Id.*

medical condition was consistent with someone who had been raped.[18] Perhaps even more damning, a law enforcement officer testified that on the day the defendant posted bond, the defendant admitted to him, "I have a notion to plead guilty."[19] Based upon this evidence,[20] the jury found Mr. Campbell guilty of raping Ms. Clark.[21]

Despite this seemingly accurate verdict, the appellate court reversed Mr. Campbell's conviction.[22] The reversal occurred not because Mr. Campbell's federal Constitutional rights had been violated, not because the state failed to proffer evidence on one of the elements of rape[23]and not because the evidence was insufficient to support the conviction.[24] Instead, the appellate court reversed Mr. Campbell's conviction merely because the language at the end of the charging indictment alleged that the rape occurred "against the peace and dignity of state" rather than the required "against the peace and dignity of *the* state."[25]

Prior to the advent of the harmless error rule, results such as the one just described occurred all too often.[26] Because a conviction had to be achieved in an error-free trial, the threat of convictions being reversed on such minor technicalities was great.[27] Regrettably, the error-free conviction requirement reduced some criminal trials to nothing more than games for planting the seeds of reversible error into the appellate record.[28] Criminal defense attorneys played the game by allowing, and sometimes inten-

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18. *Id.*

19. *Id.*

20. In presenting his defense, Mr. Campbell denied the charge, denied making the statement to the officer and solicited circumstantial evidence from two witnesses making it less likely he committed the crime. *Id.* at 708.

21. *Id.* at 707-08.

22. *Id.* at 707, 715.

23. *Id.*

24. On the contrary, the Missouri Supreme Court found that the evidence was sufficient to support the conviction. *Id.* at 707-08.

25. *Id.* at 707-10 (emphasis added). At the time of trial, the Missouri constitution served as the governing authority on criminal procedure. It provided that:

> All writs and process shall run and all prosecutions shall be conducted in the name of the 'state of Missouri'; all writs shall be attested by the clerk of the court from which they shall be issued; and all indictments shall conclude, 'against the peace and dignity of the state.'

Id. at 709 (citing MO. CONST. art. VI, § 38 (repealed 1945)).

26. Like *Campbell*, in *Williams v. State*, 27 Wis. 402 (1871), the defendant's conviction was reversed because the indictment read "against the peace of the State of Wisconsin" instead of the required "against the peace and dignity of the State." In *People v. Vice*, 21 Cal. 345 (1863), the defendant's conviction for robbery was reversed because the charging indictment had not alleged that the property in question did not belong to the defendant. *See also* Robert W. Calvert, *The Development of the Doctrine of Harmless Error in Texas*, 31 TEX. L. REV. 1, 13-15 (1952) (detailing the history and development of the harmless error doctrine in the state of Texas).

27. Kotteakos v. United States, 328 U.S. 750, 759 (1946).

28. *Id.*

tionally placing, any technical defect available into the trial record.[29] If the defendant was later convicted, the technical error would result in a reversal of the conviction on appeal. Then, after the appellate reversal, the game resumed on retrial.[30]

This "gamesmanship" caused both "widespread and deep" concern about the criminal justice process.[31] Responding to these concerns, Congress passed § 269 of the Act of February 29, 1919, which 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 substantive rights of the parties.[32]

This law, and others like it,[33] came to be known as harmless error rules. Underlying these rules is the belief that some errors occurring during the trial process do not affect the outcome. As explained by Justice Rutledge:

> The general object [of the harmless error rule] was simple: To substitute judgment for [the] automatic application of rules; to preserve review as a check upon arbitrary action and essential unfairness in trials, but at the same time to make the process perform that function without giving men fairly convicted the multiplicity of loopholes which any highly rigid and minutely detailed scheme of errors, especially in relation to procedure, will engender and reflect in a printed record.[34]

To meet this broad objective, the harmless error rule was written in broad, general terms.[35] However, because of the many types of errors and the complexity inherent in analyzing each error, there was, and continues to be, difficulty in applying the rule. And the requirement that each error be analyzed in the context in which it occurred adds to that difficulty.

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29. *Id.*
30. *Id.*
31. *Id.*
32. Act of February 26, 1919, ch. 48, 40 Stat. 1181, JUDICIAL CODE § 269, 28 U.S.C. §391 (1919) (current version at 28 U.S.C. § 2111 (1996)).
33. By 1967, the year in which the Supreme Court found Constitutional errors could be harmless, every state had enacted harmless error rules. *See, e.g.*, Chapman v. California, 386 U.S. 18, 21-22 (1967).
34. *Kotteakos*, 328 U.S. at 759-60.
35. *Id.*

As the Court observed in *Kotteakos*, "[j]udgment, the play of impression and conviction along with intelligence, varies with judges and . . . circumstance."[36] In simplest terms, "[w]hat may be [a] technical [issue in] one [trial might be] substantial [in] another; what [is] minor or unimportant in one setting [may be] crucial in another."[37] Written in such general language, the rule provided little guidance as to how broadly the harmless error doctrine was to be applied. Similarly, the texts of modern rules offer no additional guidance. Under the current standard, Federal Rule of Criminal Procedure 52(a), "[a]ny error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded."[38] Similarly, the U.S. Code provides: "On hearing of any appeal writ or certiori 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."[39]

As was true of the originally enacted legislation, the modern rules leave open for judicial interpretation the types of errors which affect the substantial rights of criminal defendants. Most critically, the text of the rules leaves unresolved whether a criminal defendant's Constitutional rights are within the boundaries of what the harmless error rule labels "substantial rights."

Until the 1960s, it was presumed that violating a defendant's Constitutional rights "affected" his or her "substantial rights." Therefore, Constitutional errors were immune from harmless error analysis.[40] After all, what rights are more basic and substantial than Constitutional rights? Nevertheless, in 1967, some forty-eight years after Congress passed the first federal harmless error rule, the Supreme Court held that the violation of some Constitutional rights could be subjected to harmless error analysis.[41] In *Chapman v. California*,[42] the Supreme Court applied harmless

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36. *Id.* at 761.

37. *Id.*

38. FED. R. CRIM. P. 52(a).

39. 28 U.S.C. § 2111 (1996).

40. Chapman v. California, 386 U.S. 18, 42 (1967) (Stewart, J., concurring in the result); Philip J. Mause, *Harmless Constitutional Error: The Implications of Chapman v. California*, 53 MINN. L. REV. 519, 520 (1969).

41. *Chapman*, 386 U.S. at 22. However, the Supreme Court had been asked to determine whether the harmless error doctrine was applicable to Constitutional violations four years earlier in *Fahy v. Connecticut*, where the Court declined to squarely address the issue. 375 U.S. 85 (1963). The Court reasoned such a determination was unnecessary because, in this particular case, the error was not harmless. *Id.* at 86. The Court reversed the conviction, concluding there was a reasonable possibility that the illegally obtained evidence introduced into the trial might have contributed to the defendant's conviction. *Id.* at 86-87.

Ironically, the opposite approach to decision-making frequently appears in harmless error cases. The reviewing court sidesteps an issue on the premise that even if it was error, it is irrelevant because any such error was harmless. While judicial economy and the theory that the Court should only decide those issues dispositive to the case are not to be ignored, strict adherence to these

error analysis to the violation of Mr. Chapman's right to remain silent.[43] The prosecution violated the right by improperly commenting on the defendant's decision not to testify.[44]

The Court concluded the harmless error doctrine applied by examining the question as a matter of first impression.[45] Yet the majority opinion admitted that prior cases had held some rights were so basic to a fair trial that their violation could never be harmless.[46] Indeed, Justice Stweart's *Chapman* concurrence discusses the earlier cases.[47]

In holding that some Constitutional errors could be harmless, the *Chapman* Court characterized the role of the harmless error rule as preventing the setting aside of convictions "for small errors or defects that have little, if any, likelihood of having changed the result of the trial."[48] Implicit in the Court's reasoning was the belief that the violation of a defendant's Constitutional rights could, at least in some instances, amount to such an insignificant error. As support for this conclusion, the Court observed that, in addition to the federal harmless error rule passed by Congress, all fifty states had also enacted harmless error rules.[49] Like the federal rule, none of the state rules made a facial distinction between federal, Constitutional and other errors.[50] Based on this absence of a statutory distinction, the Court explained there may be Constitutional errors which, under the circumstances of a particular case, "are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless" and which therefore do not require a defendant's conviction to be automatically reversed.[51]

For purposes of analyzing errors under the harmless error doctrine, a Constitutional error is harmless if the reviewing court is convinced, beyond a reasonable doubt, that the error did not contribute to the conviction.[52] In terms of allocating the burden of proof, the party benefiting from the error carries the burden.[53] Thus, in criminal cases, the prosecution has the burden of convincing the reviewing court, beyond a reason-

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principles in the harmless error arena goes too far. This is an issue discussed in greater detail in Part V, A.

42. 386 U.S. at 22.
43. *Id.*
44. *Id.* at 25-26.
45. *Id.* at 24.
46. *Id.* at 23 n.8.
47. *Id.* at 42 (Stewart, J., concurring).
48. *Id* at 22.
49. *Id.* at 21-22.
50. *Id.* at 22. Other errors would include, for example, errors of state or federal statutes or rules.
51. *Id.*
52. *Id.* at 23-24.
53. *Id.* at 24.

able doubt, that the Constitutional error complained of did not contribute to the defendant's conviction.

In fashioning the rule, the majority admitted that appellate courts are not ordinarily placed in the position of making such original determinations.[54] However, because the Court considered the harmless error standard to be familiar to all courts, the majority believed the standard to be workable.[55] As will be seen, the standard is not workable after all. This task is one which cannot be reliably performed by reviewing courts and continued adherence to the current rule frustrates basic notions of fairness and justice.

Like the harmless error rule it interpreted, the majority in *Chapman* articulated their opinion in general terms.[56] The Court's holding gave no indication that it was limited either to the facts of the case or to commenting upon a defendant's failure to testify. The Court did not articulate an exhaustive list of every Constitutional right that could be subjected to harmless error analysis. On the other hand, it did indicate that some Constitutional rights may be "so basic to a fair trial" that their violation may never be treated as harmless.[57] In a footnote, the Court cited admitting coerced confessions,[58] denying the defendant the right to counsel,[59] and denying the defendant the right to an impartial judge[60] as examples of errors to which the harmless error doctrine would not apply.[61]

In retrospect, the *Chapman* decision was the first crack in the dam controlling the flow of Constitutional errors through the appellate courts. That dam would soon give way. In the years following *Chapman*, the Supreme Court expanded the application of the harmless error doctrine considerably and currently holds that most Constitutional errors can be harmless.[62] In many cases, the Court simply applied the harmless error rule without evaluating why the particular error should or should not be subjected to it.[63] It was not until 1991 that the Court articulated a test for de

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54. *Id.*
55. *Id.*
56. *Id.*
57. *Id.* at 23. Note that the Supreme Court uses the terms "coerced confession" and "involuntary confession" interchangeably "by way of convenient shorthand." Arizona v. Fulminante, 499 U.S. 279, 287 n.3 (1991) (citing Blackburn v. Alabama, 361 U.S. 199, 207 (1960)); *Chapman*, 386 U.S. at 23.
58. *See, e.g.*, Payne v. Arkansas, 356 U.S. 560 (1958).
59. Gideon v. Wainwright, 372 U.S. 335 (1963).
60. Tumey v. Ohio, 273 U.S. 510 (1927).
61. *Chapman*, 386 U.S. at 23 n.8.
62. *Fulminante*, 499 U.S. at 306.
63. For example, in *Bumper v. North Carolina*, 391 U.S. 543, 550 (1968), the Court, citing *Chapman*, decided with only one sentence of discussion that the erroneous admission of evidence obtained contrary to the Fourth Amendment could in some circumstances be harmless error. Similarly, in *Coleman v. Alabama*, 399 U.S. 1, 10-11 (1970), the Supreme Court applied the

termining whether a particular right was, or was not, subject to the rule. Instead, the expansion occurred on a case by case basis. Examples of this expansion include: allowing unconstitutionally overbroad jury instructions at the sentencing phase of a capital case,[64] violating the Counsel Clause of the Sixth Amendment through the admission of evidence at the sentencing stage of a capital case,[65] allowing a jury instruction containing an erroneous conclusive presumption,[66] allowing the jury to receive an instruction misstating an element of the offense,[67] allowing the jury to hear an instruction containing an erroneous rebuttable presumption,[68] erroneously excluding the defendant's testimony about the circumstances under which he (or she) confessed,[69] erroneously restricting the right of a defendant to cross-examine a witness for bias and thereby violating the Confrontation Clause of the Sixth Amendment,[70] denying the defendant the right to be present at trial,[71] allowing the prosecution's improper comment upon the defendant's silence consequently violating the Self Incrimination Clause of the Fifth Amendment,[72] following a statute improperly forbidding the trial judge from giving the jury an instruction on a lesser included offense in violation of the Due Process Clause of the Fourteenth Amendment,[73] failing to instruct the jury on the presumption of the defendant's innocence,[74] admitting identification evidence in violation of the Counsel Clause of the Sixth Amendment,[75] admitting evidence obtained in violation of the Fourth Amendment[76] and denying a defendant counsel at a preliminary hearing in violation of the Confrontation Clause of the Sixth Amendment.[77] All these errors came within the scope of harmless error review as a result of the *Chapman* decision.

Finally, in *Arizona v. Fulminante*[78] the Court attempted to develop a more concrete structure to the general rule first articulated in *Chambers*. As already discussed, *Chambers* was written in broad, general terms:

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harmless error rule to the denial of counsel at a preliminary hearing without articulating any underlying rationale.

64. Clemons v. Mississippi, 494 U.S. 738, 752-54 (1990).
65. *Fulminante*, 499 U.S. at 306 (citing Satterwhite v. Texas, 486 U.S. 249 (1988)).
66. Carella v. California, 491 U.S. 263, 266 (1989).
67. Pope v. Illinois, 481 U.S. 497, 501-04 (1987).
68. *Fulminante*, 499 U.S. at 307 (citing Rose v. Clark, 478 U.S. 570 (1986)).
69. Crane v. Kentucky, 476 U.S. 683, 691 (1986).
70. *Fulminante*, 499 U.S. at 307(citing Delaware v. Van Arsdall, 475 U.S. 673 (1986)).
71. *Id.* (citing Rushen v. Spain, 464 U.S. 114, 117-18, (1983)).
72. *Id.* (citing United States v. Hasting, 461 U.S. 499 (1983)).
73. *Id.* (citing Hooper v. Evans, 456 U.S. 605 (1982)).
74. *Id.* (citing Kentucky v. Whorton, 441 U.S. 786 (1979)).
75. *Id.* (citing Moore v. Illinois, 434 U.S. 220 (1977)).
76. *Id.* (citing Chambers v. Maroney, 399 U.S. 42, 52-53 (1970)).
77. Coleman v. Alabama, 399 U.S. 1, 10-11 (1970).
78. 499 U.S. at 297 (1991).

"We conclude that there may be some [C]onstitutional 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 the automatic reversal of the conviction."[79] In *Fulminante*, the Court attempted to devise an analytical framework for determining whether a given Constitutional error could be subject to harmless error analysis. The Court reasoned that there are two types of Constitutional errors: trial errors and structural errors.[80] Under *Fulminante*, the category of the Constitutional error determines whether it is subject to the harmless error rule.

According to *Fulminante's* majority, a trial error is a constitutionally erroneous admission of evidence.[81] Such errors occur during the trial process and may, therefore, be quantitatively assessed in the context of all the evidence to determine whether their admission was harmless beyond a reasonable doubt.[82] The Supreme Court's belief that these errors are finite in nature renders them reviewable. In essence, the Supreme Court believes it can measure the effect of any evidentiary error, Constitutional or otherwise. Examples range from erroneously admitting an incorrectly worded indictment to allowing the jury to hear a defendant's coerced confession.

Unlike trial errors, structural errors permeate the entire trial mechanism.[83] Their effect, according to the Supreme Court, is not nearly as finite as that of trial errors. Instead, they affect the trial from beginning to end.[84] This type of Constitutional error affects the complete framework in which a trial is conducted as opposed to a mere defect in the trial process itself.[85] Because these errors affect the reliability of the criminal trial process as a mechanism for determining the guilt or innocence of the defendant, automatic reversal is the only appropriate remedy for structural errors.[86] Examples of structural defects include unlawfully excluding members of a defendant's race from grand jury proceedings,[87] denying the defendant the right of self-representation at trial,[88] and violating the defendant's right to a public trial.[89] Further, the *Fulminante* majority considered depriving the defendant of counsel at trial or subjecting the defen-

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79. Chapman v. California, 386 U.S. 18, 22 (1967).
80. Arizona v. Fulminante, 499 U.S. 279, 307-08 (1991).
81. *Id.* at 310.
82. *Id.* at 307-08.
83. *Id.* at 310.
84. *Id.*
85. *Id.*
86. *Id.*
87. *Id.* (citing Vasquez v. Hillery, 474 U.S. 254 (1986)).
88. *Id.* (citing McKaskle v. Wiggins, 465 U.S. 168, 177-78 n.8 (1984)).
89. *Id.* (citing Waller v. Georgia, 467 U.S. 39, 49 n.9 (1984)).

dant to a trial without an impartial judge as being beyond the scope of harmless error analysis.[90] It is worth noting that these last two Constitutional rights were considered so basic to a fair trial that their violation could never be deemed harmless by the Supreme Court in *Chambers*.[91] More interestingly, the *Chambers* Court considered the erroneous admission of an involuntary confession to be of similar character to denying the defendant counsel or subjecting the defendant to trial without an impartial judge.[92]

While the *Chambers* Court had not decided which Constitutional errors were subject to harmless error analysis, the Court did state, albeit in dicta, that there are some Constitutional rights so basic to a fair trial that their violation can never be harmless error.[93] The Court cited the wrongful admission of a coerced confession as one such example.[94] Nevertheless, in applying the newly developed structural error versus trial error rationale, the *Fulminante* majority held in direct contradiction with the *Chambers* decision that even the wrongful admission of a coerced confession was subject to harmless error analysis.[95] This result followed from the Court's analysis of the error from within the trial versus structural error framework. Because the admission of a coerced confession is, according to the Court's definition of the term, a trial error, appellate courts are able to measure its effect on members of the jury.

In reaching their conclusion, the majority conceded that erroneously admitting involuntary confessions may have a more dramatic effect than other types of trial errors.[96] However, the Court reasoned that this reality only supports the notion that such wrongful admissions will less frequently be deemed harmless; it does not require "eschewing the harmless-error test entirely."[97] There are at least two major flaws with this reasoning. First, it incorrectly assumes that appellate courts can effectively evaluate the harm caused by a Constitutional error.[98] Second, even if the effects of a Constitutional error could be accurately measured, applying harmless error analysis to such errors ignores the intangible value of Constitutional rights which transcends their evidentiary value.[99] The following section examines the distinction the Supreme Court attempts to draw

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90. *Id.*; Chapman v. California, 386 U.S. 18, 23 n.8 (1967).
91. *Chapman*, 386 U.S. at 23 n.8.
92. *Id.*
93. *Id.* at 23.
94. *Id.* at 23 n.8.
95. Arizona v. Fulminante, 499 U.S. 279, 310 (1991).
96. *Id.* at 312.
97. *Id.*
98. This problem is discussed in Part IV. B.
99. This is the subject of Part IV. C.

between trial and structural errors. It analyzes prior case law inconsistent with that distinction and concludes that the inherent value of our Constitutional rights renders them indistinguishable from one another.

III. THE COMMONALITY OF CONSTITUTIONAL ERRORS

Although the *Chapman* Court held some Constitutional errors could be subjected to harmless error analysis, it was either unable or unwilling to articulate a method of analysis for determining whether a given Constitutional error was within the scope of the harmless error doctrine. Instead, harmless error jurisprudence progressed on a case-by-case basis, sometimes with no explanation as to why a given error was subject to harmless error review.[100] As will be seen in the sections that follow, although the Supreme Court developed a means of categorizing Constitutional errors in *Fulminante*, there remains no defensible framework for determining which Constitutional errors, if any, should be subjected to harmless error analysis. Indeed, such a framework is unlikely to be developed because, for harmless error purposes, Constitutional errors are indistinguishable from one another.

In *Fulminante*, Chief Justice Rhenquist attempted to frame a test for determining what types of Constitutional errors are subject to harmless error analysis.[101] As has already been noted, the Chief Justice reasoned there are two types of Constitutional errors, trial and structural.[102] According to Chief Justice Rhenquist, because trial errors can be quantitatively measured, they are subject to harmless error analysis.[103] Conversely, because structural errors permeate every aspect of the case, they are beyond the scope of harmless error analysis.[104] This test and its underlying philosophy serve as the current guide for reviewing courts.

Chief Justice Rhenquist formulated this test by examining various harmless error cases from *Chapman* to *Fulminante* in an attempt to synthesize the results. However, the conclusion he reached was not supported by those cases. On the contrary, prior case law was inconsistent with Chief Justice Rhenquist's trial versus structural error distinction. As

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100. For example, in *Bumper v. North Carolina*, the Court, citing *Chapman*, in a single sentence indicated that the erroneous admission of evidence obtained contrary to the Fourth Amendment was not harmless error. 391 U.S. 543, 550 (1968). In doing so, the Court assumed, without stating any rationale, that violating a defendant's Fourth Amendment rights could in some circumstances be harmless error. *See also*, Coleman v. Alabama, 399 U.S. 1, 10-11 (1970) (applying the harmless error doctrine, without delineating a rationale, to the denial of counsel at the preliminary hearing).

101. This issue is discussed in greater detail in Part II. *See* Arizona v. Fulminante, 499 U.S. 279 (1991).

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

103. *Id.*

104. *Id.*

such, the distinction deviates without explanation from prior case law. Given the precedent prior to *Fulminante*, the finding of a trial versus structural error distinction was an adventure beyond, and in conflict with, prior precedent.[105]

Prior harmless error cases could not be neatly classified into trial and structural categories.[106] An example, used by Justice White in his *Fulminante* dissent, clearly demonstrates the fallacy of the trial versus structural error distinction in prior case law. Prior to *Fulminante*, the Court determined that the failure of a trial judge to instruct a jury regarding the presumption of innocence was susceptible to harmless error analysis.[107] However, the very similar error of failing to instruct the jury on the standard of proof in a criminal case being beyond a reasonable doubt could not be analyzed under the harmless error doctrine.[108] As explained by Justice White, "[t]hese cases cannot be reconciled by labeling the former 'trial error' and the latter not, for both concern the exact same stage in the trial proceedings."[109] Justice White's point is both obvious and compelling. Prior Supreme Court cases refused to extend harmless error analysis to errors clearly within the trial error category of Chief Justice Rhenquist's test.

Perhaps even more problematic in the trial versus structural error framework is the incorrect assumption that a reviewing court's only concern is whether the error can be "quantified." Indeed, the common bond shared by all Constitutional rights is their significance in our system of justice. This truth is best demonstrated in the early cases refusing to apply the harmless error rule to Constitutional errors.

In the pre-*Chapman* era, reversal was required when a conviction could have possibly rested on a Constitutionally impermissible ground, even though a valid alternative ground existed for sustaining the verdict.[110] For example, when a jury was instructed as to an erroneous presumption, the conviction had to be overturned, despite ample independent evidence sustaining the verdict.[111] Indeed, in the pre-*Chapman* era, the Supreme Court rejected the notion that erroneously admitting a coerced confession could be harmless even when there was other properly admitted evidence of the defendant's guilt.[112] These cases clearly recognize the

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105. This is a point which is addressed in greater detail in Part IV, A.

106. *Fulminante*, 499 U.S. at 291 (White, J., dissenting).

107. *Id.* (citing Kentucky v. Whorton, 441 U.S. 786 (1979)).

108. *Id.* (citing Jackson v. Virginia, 443 U.S. 307, 320 n.14 (1979)).

109. *Id.*

110. Stromberg v. California, 283 U.S. 359, 367-68 (1931); Williams v. North Carolina, 317 U.S. 287, 292 (1942).

111. Bollenbach v. United States, 326 U.S. 607, 614-15 (1946).

112. Lynumn v. Illinois, 372 U.S. 528, 537 (1963) (citing other pre-*Chapman* confession

inherent value of Constitutional rights, demonstrating that the significance of Constitutional errors extends well beyond considerations of evidentiary value.[113]

A more encompassing synthesis of prior case law reveals that a valid distinction cannot be drawn between those Constitutional errors which are currently subject to harmless error analysis and those beyond the doctrine's application. Admittedly, criminal trials need not be perfect, but, at a minimum, every criminal defendant is entitled to a fair trial.[114] As the following discussion demonstrates, allowing a Constitutional error to occur prevents the defendant from receiving a fair trial.

Advocates of applying the harmless error doctrine to Constitutional cases reason that a fair trial is possible because the error, despite being of Constitutional proportion, may nevertheless not contribute to the verdict. Even if such a proposition where theoretically true, the appellate court system is simply not equipped to accurately measure the effect of such errors, and therefore the occurrence of a Constitutional error in a criminal defendant's trial should mandate automatic reversal. Further, even if such accurate analysis were possible, reviewing courts would be ill-advised to engage in it because doing so compromises the inherent value of our Constitutional rights.

IV. THE PROBLEMS WITH APPLYING HARMLESS ERROR ANALYSIS TO CONSTITUTIONAL ERRORS

This section addresses the problems with the current harmless error rule, beginning with a critical analysis of how harmless error was initially applied to Constitutional errors, thus violating the doctrine of stare decisis. Next, it explores the impossibility of an appellate court truly being able to measure the impact of a Constitutional error upon a jury. And finally, it illustrates that even if such analysis were theoretically possible, it should not be performed because doing so would diminish the inherent value of our Constitutional rights.

A. Subjecting Constitutional Errors to The Harmless Error Doctrine Violates The Principle of Stare Decisis

Applying the harmless error doctrine to Constitutional errors often required violating the principle of stare decisis.[115] Stare decisis "promotes

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cases).

113. This topic is the subject of Part IV. C.

114. "As we have stressed on more than one occasion, the constitution entitles a criminal defendants to a fair trial, not a perfect one." Deleware v. Van Arsdall, 475 U.S. 673, 681 (1986).

115. Stare decisis means to "abide by, or adhere to, decided cases." BLACK'S LAW DICTIONARY 1406 (6th Ed. 1990).

the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process."[116] "[E]ven in [C]onstitutional cases, the doctrine carries such persuasive force that we have always required a departure from precedent to be supported by some 'special justification.'"[117] Such "special justifications" include the unworkability of the precedent or a determination that the precedent was badly reasoned.[118] Neither of these justifications was applied or discussed in decisions where the Court departed from prior holdings by allowing a Constitutional error to be subject to the harmless error rule. By departing from precedent without justification, the Court failed to promote the consistent development of legal principles, and undermined the actual and perceived integrity of the judicial process.

As already noted in Part II, the Supreme Court in Chapman approached the application of the harmless error doctrine to a Constitutional error as a matter of first impression.[119] In doing so, the majority examined the express language of the harmless error rule[120] and determined that the rule made no facial distinction between Constitutional and other types of errors.[121] Because the harmless error rule failed to distinguish between types of errors, the Court held the rule applicable to Constitutional errors.[122]

Treating the issue as a question of first impression gave the majority's opinion the appearance of being soundly grounded in statutory interpretation. However, as Justice Stewart explained in his concurrence, the issue was not truly one of first impression.[123] On the contrary, precedent indicated the harmless error doctrine was not applicable to Constitutional errors.[124] In a long line of cases prior to *Chapman* involving a variety of

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116. United States v. International Bus. Mach. Corp., 116 S. Ct. 1793, 1801 (1996) (citing Payne v. Tennessee, 501 U.S. 808, 828 (1991)).

117. *Id.* (citing *Payne*, 501 U.S. at 842 (Souter, J., concurring) (quoting Arizona v. Rumsey, 467 U.S. 203, 212 (1984))).

118. *Id.* (citing *Payne*, 501 U.S. at 827 (1991)); *See* Smith v. Allwright, 321 U.S. 649, 665 (1944).

119. Chapman v. California, 386 U.S. 18, 42 (1967) (Stewart, J., concurring).

120. The majority examined both sources of the harmless error doctrine, 28 U.S.C. § 2111 and Federal Rule of Criminal Procedure 52(a), and found that neither of the rules made a distinction between federal Constitutional errors and errors of state law or federal statutes and rules. *Chapman*, 386 U.S. at 22 (1967). 28 U.S.C. § 2111 (1996) provided "[o]n the hearing of any appeal writ or certiori in any case, the court shall give judgement after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties." The Federal Rules of Criminal Procedure provided "[a]ny error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." FED R. CRIM. P. 52(a).

121. *Chapman*, 386 U.S. at 22.

122. *Id.*

123. *Id.* at 42 (Stewart, J., concurring).

124. *Id.*

Constitutional claims reaching the Supreme Court from both federal and state prosecutions, the Court "steadfastly rejected any notion that constitutional violations might be disregarded on the ground that they were 'harmless.' "[125]

By treating the issue as a matter of first impression, the *Chapman* majority circumvented the need to find a special justification for departing from established precedent. While the *Chapman* decision represented the first time the Supreme Court violated the doctrine of stare decisis in the harmless error context,[126] it was by no means the last.This practice of deviating precedent continued as the scope of harmless error application expanded.

In what is perhaps the most apparent instance of deviating from precedent, Chief Justice Rhenquist, writing for the majority in *Fulminante*, held that even the erroneous admission of a coerced confession was susceptible to harmless error analysis.[127] However, unlike the Court in *Chambers*, Chief Justice Rhenquist did not avoid the issue of stare decisis. Instead, he denied that the precedent mandated a rule of automatic reversal.[128]

Chief Justice Rhenquist claimed that the *Chapman* decision did not stand for the proposition that a coerced confession was subject to automatic reversal. He reasoned that the language, "[a]lthough our prior cases have indicated," combined with the fact that the cases were included in a footnote rather than the text of the opinion, was more appropriately regarded as a historical reference to the holdings of the cited cases than a mandate that they be excluded from the newly articulated rule of harmless error application.[129] As additional support for the position, the Chief Justice reasoned that his opinion in *Payne v. Arkansas*,[130] holding coerced confessions were not subject to harmless error analysis, involved a more lenient version of the harmless error rule than the one analyzed in *Chapman*. The test considered in *Payne* allowed the affirmation of a conviction if the properly admitted evidence, independent of the involuntary confession, was sufficient to sustain the verdict.[131]

Viewed objectively, neither *Payne* nor *Chapman* support the *Fulminante* majority's distinction. First, the majority in *Chapman* made no mention of the more strict beyond a reasonable doubt standard in ex-

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125. *Id.*

126. However, the Court had previously considered the possibility. *See* Fahy v. Connecticut, 375 U.S. 85 (1963).

127. Arizona v. Fulminante, 499 U.S. 279, 312 (1991).

128. *Id.* at 308-09.

129. *Id.* at 308.

130. 365 U.S. 560 (1958).

131. *Fulminante*, 499 U.S. at 309.

panding the harmless error doctrine to Constitutional errors.[132] The expansion of the rule was premised upon the question being one of first impression and therefore resolvable as a matter of statutory interpretation.[133]

Second, Justice Stewart's concurrence clearly articulates the rationale of the earlier cases refusing to extend the harmless error doctrine to cases involving the erroneous admission of coerced confessions. Prior to *Fulminante*, when an involuntary confession was introduced at trial, the Court consistently reversed the conviction regardless of any other evidence of guilt.[134] In those earlier cases, the argument that erroneously admitting a coerced confession could amount to a harmless error was rejected as "an impermissible doctrine."[135] This conclusion was not limited to one narrowly decided case. In fact, the Supreme Court had consistently recognized the principle.[136] Most significantly, the Court had previously held that even when a confession is completely "unnecessary" to a conviction, the defendant is entitled to "a new trial free of constitutional infirmity."[137]

Chief Justice Rhenquist's distinction of *Payne v. Arkansas* on the grounds that it addressed a different harmless error standard is simply not supported by the *Payne* Court's reasoning. The *Payne* Court evaluated a confession which it determined had been coerced in reprehensible fashion.[138] In response, Arkansas argued that the conviction need not be reversed due to adequate evidence independent of the confession and supporting the verdict.[139] The Court found Arkansas' argument without merit, reasoning that where a coerced confession was admitted into evidence in a jury trial, "no one can say what credit and weight the jury gave to the confession."[140] Therefore, the mere fact that the coerced confession

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132. *See* Chapman v. California, 386 U.S. 18, 21-26 (1967).

133. *Id.* at 21-24.

134. *Id.*

135. *Id.* (citing Lynumn v. Illinois, 372 U.S. 528, 537 (1963)).

136. *See* Jackson v. Denno, 378 U.S. 368, 376-77 (1964); Haynes v. Washington, 373 U.S. 503, 518-19 (1963); Spano v. New York, 360 U.S. 315, 324 (1959); Payne v. Arkansas, 365 U.S. 560, 568 (1958); Malinski v. New York, 324 U.S. 401, 404 (1945).

137. *Haynes*, 373 U.S. at 518-19.

138. The defendant, "a mentally dull 19-year-old [African American] youth" was (1) arrested without a warrant, (2) denied a hearing before a magistrate at which he would have been advised of his right to remain silent and his right to counsel, as required by Arkansas statutes, (3) not advised of his right to remain silent or of his right to counsel, (4) held incommunicado for three days, without counsel, advisor or friend, and though members of his family tried to see him they were turned away, (5) refused permission to make even one telephone call, (6) denied food for long periods and, finally, (7) was told by the chief of police "that there would be 30 or 40 people there in a few minutes that wanted to get him." *Payne*, 356 U.S. at 567.

139. *Id.*

140. *Id.* at 568.

was admitted into evidence was sufficient to warrant reversal.[141] No further analysis was necessary.[142]

Similarly, in *Lynumn v. Illinois*, the Court heard argument for the state of Illinois which it interpreted as suggesting that the erroneous admission of a coerced confession could be rendered harmless in light of the other evidence of Lynumn's guilt.[143] The Court, quoting *Payne v. Arkansas*, found such a suggestion to be an "impermissible doctrine."[144] The *Lynumn* Court relied not upon the standard of proof required by the harmless error rule in question, but upon the notion that even if there is sufficient evidence independent of the coerced confession, admitting a coerced confession into evidence, over the objections of the defendant, "vitiates the judgment because it violates the Due Process Clause of the Fourteenth Amendment."[145]

Likewise, in *Haynes v. Washington*, the Court reversed Haynes' conviction despite the "substantial independent evidence" indicating Haynes was guilty.[146] Although the Supreme Court was "mindful" of the independent evidence, it did not affect the decision to reverse.[147] Once again, the Court refused to evaluate what effect the error may have had on the jury's deliberations.[148] Instead, the mere admission of the coerced confession sufficiently poisoned the process and warranted a reversal of the conviction.[149]

The Supreme Court's earlier refusal to apply the harmless error doctrine to coerced confessions is also consistent with the Court's pre-*Chapman* treatment of other Constitutional errors.[150] The rationale underlying

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141. *Id.*

142. *Id.*

143. 372 U.S. 528, 537 (1963).

144. *Id.*

145. *Id.* (quoting *Payne*, 365 U.S. at 568); *See* Spano v. New York, 360 U.S. 315, 324 (1959).

146. 373 U.S. 503, 518 (1963). Haynes had been charged with robbing a gasoline service station. *Id.* at 505. He was arrested within close proximity to the service station within one half hour of the crimes commission. *Id.* He had also been identified by witnesses in a police line-up as one of the robbers. *Id.*

147. *Id.* at 518.

148. *See Id.* at 518-19. In *Haynes* the Court noted that many convictions warranting reversal under the Due Process Clause involve the use of confessions obtained impermissibly though independent evidence corroborated the accuracy of the coerced confession. *Id.* (quoting Rogers v. Richmond, 365 U.S. 534, 541 (1961)). However, the independent evidence does not affect the conclusion that the confession was improperly induced. *Id.*

Adopting the language of *Rogers v. Richmond*, the Court refused to express an opinion as to the guilt or innocence of Haynes because that issue was up to the jury to decide in a trial free of Constitutional infirmity. *Id.*

149. *Id.*

150. In addition to the involuntary confession issue, Justice Stewart cited several other areas in which the Court had previously refused to engage in harmless error analysis. Chapman v. California, 386 U.S. 18, 43 (1967) (Stewart, J., concurring).

each decision was that Constitutional rights are "too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from [their] denial."[151] For example, prior to *Chapman*, denying a defendant counsel at a critical stage of the case required automatic reversal.[152] Conducting a trial wherein the trial judge's remuneration was based on a pecuniary interest in the outcome of the case required reversal and a new trial even if the defendant failed to show any prejudice and where the proof of guilt was clear.[153] Trying a defendant in a community that has been exposed to publicity that is highly adverse to the defendant mandated reversal regardless of whether the information influenced the jury.[154] If a jury received an instruction containing an unconstitutional presumption, the defendant received a new trial regardless of whether there was sufficient evidence apart from the presumption supporting the conviction.[155] Likewise, a defendant was entitled to a reversal of his conviction, regardless of prejudice, if purposeful discrimination occurred during grand or petit jury selection.[156] More generally, a conviction based upon unconstitutional grounds required reversal even when a valid alternative ground for the conviction was present.[157]

The common theme through all of these early cases is that the rejection of the harmless error rule did not turn on the evidentiary impact of the error.[158] In fact, *Haynes v. Washington* specifically contradicts such a proposition.[159] In addition to the confession found inadmissible by the Court, the defendant in *Haynes* had proffered two prior confessions, both of which were admitted without dispute.[160] The prosecution also offered "substantial independent evidence" of the defendant's guilt.[161] In terms of the role the inadmissible confession played in the overall proceedings, the Court accepted the prosecution's contention that the inadmissible confession "played little if any role in the conviction."[162] The Court found the

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151. *Id.* (citing Glasser v. United States, 315 U.S. 60, 76 (1942)).

152. *Id.* (citing Hamilton v. Alabama, 368 U.S. 52, 55 (1961), and White v. Maryland, 373 U.S. 59, 60 (1963)).

153. *Id.* (citing Tumey v. Ohio, 273 U.S. 510, 535 (1927)).

154. *Id.* at 43-44 (citing Sheppard v. Maxwell, 384 U.S. 333, 351-52 (1966)); *See also* Estes v. Texas, 381 U.S. 532, 542-44 (1965) (Warren, C.J., concurring); *Id.* at 593-94 (Harlan, J., concurring); *cf.* Rideau v. Louisiana, 373 U.S. 723, 727 (1963).

155. *Chapman*, 386 U.S. at 44 (citing Bollenbach v. United States, 326 U.S. 607, 614-15 (1946)).

156. *Id.* (citing Whitus v. Georgia, 385 U.S. 545 (1967)).

157. *Id.* (citing Stromberg v. California, 283 U.S. 359, 367-68 (1931); Williams v. North Carolina, 317 U.S. 287, 292 (1942)).

158. *Id.* at 43 n.1.

159. 373 U.S. 503 (1963).

160. *Id.* at 518-19.

161. *Id.*

162. *Chapman*, 386 U.S. at 43 n.1.

procedures of extracting the coerced confession not only impermissible, but also unwarranted because the confession was unnecessary.[163]

> Indeed, in many of the cases in which the command of the Due Process Clause has compelled us to reverse state convictions involving the use of confessions obtained by impermissible methods, independent corroborating evidence left little doubt of the truth of what the defendant had confessed. Despite such verification, confessions were found to be the product of Constitutionally impermissible methods in their inducement.[164]

In spite of all the independent corroborating evidence of the defendant's guilt, the Court nevertheless reversed the conviction. The reversal occurred not because of the erroneous confession's evidentiary weight, but because the innocence or guilt of the defendant is for the jury to decide in a trial free from Constitutional infirmity.[165]

As additional support for the proposition that Justice Rhenquist's trial versus structural error distinction violated the doctrine of stare decisis, four Justices,[166] dissenting in *Fulminante* noted that the majority's holding abandoned what had been an "axiomatic" rule of reversal.[167] As a practical matter, the majority overruled a vast body of precedent without articulating any persuasive justification.[168] In applying the harmless error doctrine to coerced confessions, the majority dislodged a "fundamental tenant" of the criminal justice system.[169]

In sum, the initial application of the harmless error doctrine to Constitutional errors[170] constituted a violation of stare decisis, creating a pattern that continued in subsequent cases.[171] In departing from settled precedent, the Court failed to articulate any special justification warranting the expansion of the harmless error doctrine to Constitutional errors. "Judges, more than most, should understand the value of adherence to settled procedures. By adopting a set of fair procedures [such as automatic reversal], and then adhering to them, courts of law ensure that justice is administered with an even hand."[172] In choosing not to follow set

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163. *Haynes*, 373 U.S. at 519.
164. *Id.* at 518 (quoting Rogers v. Richmond, 365 U.S. 534, 541 (1961)).
165. *Id.*
166. Justices White, Marshall, Blackmun and Stevens. Arizona v. Fulminante, 499 U.S. 279, 288 (1991).
167. *Id.*
168. *Id.*
169. *Id.*
170. *See* Chapman v. California, 386 U.S. 18 (1967).
171. *See e.g.*, *Fulminante*, 499 U.S. 279.
172. United States v. Leon, 468 U.S. 897, 962 (1984) (Stevens, J., dissenting in part,

tled procedures, the Supreme Court allowed the expansion of harmless error and frustrated the very goals stare decisis is designed to further.

As will be seen, the expansion of the harmless error doctrine poisoned both the actual and perceived integrity of the judicial process.[173] Applying the harmless error doctrine to Constitutional violations took appellate courts down a road better left untraveled. Not only were there no convincing reasons for such a misguided journey, but there are compelling reasons for returning to a rule of automatic reversal.

B. The Appellate Court Cannot Effectively Weigh the Impact of the Constitutional Error.

Perhaps the greatest difficulty facing an appellate tribunal in applying the harmless error doctrine to any type of error, Constitutional or otherwise, is evaluating the actual effect the error had on the lower court proceedings. Because Constitutional errors violate the core principles upon which the criminal justice system is based, their actual effect is particularly difficult to evaluate. Indeed, most rights protected by the Constitution are protected to such a high degree because they play such a crucial role in people's lives generally and in the criminal justice process in particular.[174] As the Court noted in *Glaser v. United States*, Constitutional rights are "too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from their denial."[175] Because Constitutional rights play such a central role in the criminal trial process, determining what effect a Constitutional error had on the trial's outcome is an analysis which cannot be reliably performed.

As a practical matter, asking an appellate court to use a trial transcript to determine the effect of a particular Constitutional error is asking the impossible. The appellate court cannot observe the reactions of the witnesses, the defense lawyer, the prosecutor, the judge or, most importantly, the jurors to a Constitutional violation from merely reading the trial transcript. The transcript communicates only the words spoken and the evidence presented during trial. Such transcripts do not, and cannot, communicate the manner in which the words were spoken or the way in which the evidence was presented during the trial. For example, the trial

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concurring in part).

173. *See* United States v. International Bus. Mach. Corp., 116 S. Ct. 1793, 1801 (1996) (citing Payne v. Tennessee, 501 U.S. 808, 828 (1991)).

174. Examples are both obvious and numerous. Search and seizure, the right to counsel, the right to a trial by jury, the right to an impartial judge and the right to have one's guilt proven beyond a reasonable doubt are just a few of many possible examples.

175. 315 U.S. 60, 76 (1942). Although the Court was not specifically addressing the issue of coerced confessions, the reasoning remains equally true regardless of the Constitutional right being considered.

transcript makes no distinction between testimony offered in a h
hostile or angry manner and testimony offered in a shameful, bas
reluctant manner. Despite their absence from the trial record, the i
ence of these and other details have on individual jurors and the jury as
whole can be tremendous.

The absence of this vital information makes requiring the appellate court to determine the effect of a Constitutional error based on the trial transcript similar to asking a movie critic to evaluate a movie based only on the words as written in the screenplay. A screenplay communicates only the dialogue of the movie— the words spoken by the actors. As such, the screenplay conveys only one small component of the movie. Equally important are the nonverbal communications of the actors. How something is said is often times more important than the words which are actually spoken. In fact, because many words have multiple meanings, the meaning of what the actor is saying can sometimes only be determined by observing how it is said. Without evaluating these important nonverbal considerations along with the dialogue, a complete understanding of the movie is virtually impossible. While an accomplished critic could formulate some opinion about the movie's merit from the small amount of information conveyed by the screenplay, any such opinion would be radically more speculative than one formed after watching the movie itself.

Criminal trials are no different. The words spoken into the record comprise only one component of the trial process. As is true in movies, the way something is said in the courtroom is just as important as the words that are spoken. Similar to the nonverbal messages conveyed by movie actors, the nonverbal communications of the witnesses, the lawyers and the judge go unrecorded in the trial transcript. These unrecorded messages have the potential for tremendous influence on members of the jury. Without this revealing information, a reviewing court is ill-equipped to accurately evaluate the effect a Constitutional error had on the trial process. More to the central point, without such information, the reviewing court cannot be sure, beyond a reasonable doubt, that the error did not affect the trials outcome.

To take the analogy one step further, consider an important difference between the movie critic and the reviewing court judge. Unlike the critic whose assigned task is to analyze the screenplay's affect on him or her, the reviewing court must attempt to decipher from the transcript how a Constitutional error affected other people: the members of the jury. In this regard, reviewing courts are without yet another important vital piece of information— the nonverbal reactions of the jury to the Constitutional error.

While jurors do not always react outwardly to the evidence they hear, sometimes they do. Many attorneys hire experts to monitor jurors' out-

transcript makes no distinction between testimony offered in a boisterous, hostile or angry manner and testimony offered in a shameful, bashful or reluctant manner. Despite their absence from the trial record, the influence of these and other details have on individual jurors and the jury as a whole can be tremendous.

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While jurors do not always react outwardly to the evidence they hear, sometimes they do. Many attorneys hire experts to monitor jurors' out-

ward reactions. There are occasions where the reaction of a juror clearly indicates a piece of evidence or a portion of the testimony has profoundly affected him or her. However, because the juror's reaction goes unrecorded in the trial transcript, the reviewing court cannot evaluate the juror's reactions and therefore cannot accurately determine whether or not the Constitutional error was "harmless."

The themes of the movie critic analogy have also been recognized by courts. In discussing the unique features of a criminal defendant testifying in his or her own defense, as compared to the testimony of other witnesses, one court observed, "[w]here the very point of a trial is to determine whether an individual was involved in criminal activity, the testimony of the individual himself must be considered of prime importance."[176] The court reached this conclusion because the defendant's testimony provides more than just information; it also allows the jury the opportunity to "observe his demeanor and judge his veracity firsthand."[177] Such an opportunity is important because, "[t]he facial expressions of a witness may convey much more to the trier of facts than do the spoken words."[178] There can be no discounting the possibility that a defendant may be able to persuasively tell his story to the jury.[179] The court considered the defendant's being denied the opportunity to present this "eyeball testimony" such a "miscarriage of justice" that it mandated automatic reversal.[180] There is simply no accurate means for an appellate court to accurately measure the effect of a Constitutional error.

Skeptics of the movie critic analogy would say that the inability to accurately measure the effects of a trial error during appellate review is a danger inherent to all errors, Constitutional or otherwise. While the criticism is true, and evaluating the effect of any error is problematic, the critical distinction is the importance of the error being considered. Evaluating the effect of a coerced confession upon the jury is radically different

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176. United States v. Butts, 630 F. Supp. 1145, 1147 (D. Me. 1986) (quoting United States v. Walker, 772 F.2d 1172 (5th Cir. 1985)).

177. *Id.* The appellant in the case was claiming that he was denied the effective assistance of counsel because, in part, his trial counsel did not call him as a witness to testify in his own defense. The reviewing court found this allegation to be true. *Id.* at 1146, 1147.

178. *Id.* at 1148 (quoting United States v. Irvin, 450 F.2d 968, 971 (9th Cir. 1971) (Kilkenny, J., dissenting)).

179. *Id.* at 1146, 1147.

180. *Id.*

> This court considers a defendant's right to testify in a criminal proceeding against him so basic to a fair trial that its infraction can never be treated as harmless error, which is in essence the inquiry required to be made by the second prong [of the ineffective assistance of counsel test].

Id. at 1148. However, three other courts considering the question have reached the opposite result. *See* Wright v. Estelle, 549 F.2d 971, 974 (5th Cir. 1977); Ortega v. O'Leary, 843 F.2d 258, 262 (7th Cir. 1988); Payne v. United States, 78 F.3d 343, 346 (8th Cir. 1996).

from determining the effect of a charging indictment reading "against the peace and dignity of state" as opposed to "against the peace and dignity of *the* state."[181] The former relegates to appellate court judges the impossible task of gleaning the full effect of a Constitutional error from the mere words spoken and evidence adduced at trial, while the latter merely requires a calculus of the role the written indictment or information played in the jury's determination of the defendant's guilt. Admittedly, determining the effect of a flawed indictment cannot be done with absolute certainty. But practically speaking, such an error is less likely to have influenced the jury. On a theoretical level, the nature of the right violated is lower than one of Constitutional proportion. As such, allowing appellate courts to review such errors is permissible and in accordance with the goals for which the harmless error rule was originally designed.

Constitutional errors, however, lie well beyond the scope of problems which the original harmless error rule attempted to address.[182] In situations where minor errors, such as misworded indictments, have occurred, the reviewing judges can make a reliable determination as to whether they are convinced beyond a reasonable doubt that the error had no effect on the outcome of the case. This conclusion follows from the fact that the error was truly minor. Even then, we cannot be absolutely certain the error had no effect on the verdict. Absolute certainty, however, is not the governing standard. We need only be convinced beyond a reasonable doubt that the error did not taint the verdict. For technical errors, an analysis can be performed with sufficiently reliable accuracy.

Conversely, where the error is of Constitutional proportion, the opposite conclusion is required. Unlike truly technical issues and rules, Constitutional rights reflect the complex principles and values upon which our society and system of justice are based.[183] As such, their deprivation can never be easily evaluated. Appellate courts are simply ill-equipped to weigh the effect Constitutional errors have upon the minds of the jurors and determine with sufficient certainty (beyond a reasonable doubt) that the error played no role in the jury's decision. Therefore, a rule of automatic reversal is mandated for Constitutional errors.

The notion that reviewing courts cannot and should not attempt to weigh Constitutional errors is by no means new. In 1958, the Supreme Court admitted that, when a coerced confession is admitted into evidence, "no one can say what credit and weight the jury gave to the confession."[184] As has already been discussed in the early cases exempting Con-

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181. State v. Campell, 109 S.W. 706, 709 (Mo. 1908) (emphasis added).
182. This is a topic discussed in greater detail in Part IV. A.
183. Haynes v. Washington, 373 U.S. 503, 519 (1963).
184. Payne v. Arkansas, 356 U.S. 560, 568 (1958).

stitutional errors from the harmless error rule, the Court did not weigh the evidentiary value of the Constitutional error at all.[185] Rather, even in cases such as *Haynes* where the confession was completely unnecessary to the conviction, the defendant was entitled to a new trial conducted without the violation of his or her Constitutional rights.[186] As is discussed in the next section, to do anything less lowers the inherent value of our Constitutional rights.

C. Subjecting Constitutional Rights to Harmless Error Analysis Lowers the Value of Constitutional Rights

Beyond the legal inconsistences associated with applying the harmless error doctrine to violations of a criminal defendant's Constitutional rights, fairness and common sense mandate a return to the rule of automatic reversal. The value of a Constitutional right cannot be overstated. In the words of Justice Jackson, Constitutional rights are "indispensable freedoms."[187]

Under the current rule, the value of a Constitutional right is significantly diminished at best, and in some cases completely worthless. To those victimized by Constitutional errors during their trial, the current rule sends the message that such a violation may be deemed harmless and, therefore, of no significance. In other words, the basic rights upon which our country was founded are, at least sometimes, worthless.

Throughout our nation's history, the Supreme Court has undertaken the never-ending task of interpreting what our Constitution means. In doing so, the Court defines what the Constitution means to all of us, including criminal defendants. As the Court stated in *Marbury v. Madison*, "[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury."[188] Ironically, it seems that during the late 1960s and early 1970s, a period where the Court actively engaged in developing the meaning of individual rights, it also held that in some instances those same rights were worthless. Each time it did so, the Court diminished the value of the Constitutional right itself.

In order to understand this conclusion, one must first realize the message conveyed by applying the harmless error doctrine to a Constitutional error. When an appellate court subjects the violation of a defendant's Constitutional rights to harmless error analysis, the court is saying that

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185. Chapman v. California, 386 U.S. 18, 43 n.1 (1967).
186. *Id.* at 43 (citing Haynes v. Washington, 373 U.S. 503, 518-19 (1963)).
187. Brinegar v. United States, 338 U.S. 160, 180 (1949) (Jackson, J., dissenting).
188. 5 U.S. (1 Cranch) 137, 163, (1803).

this defendant's Constitutional right *may have been* worthless. Even worse, if an appellate court then concludes that a Constitutional error was in fact harmless, that court is saying that the defendant's Constitutional right *was* worthless.

In *Haynes*, an early case refusing to subject the admission of a coerced confession to harmless error analysis despite clear independent evidence of guilt, the Court noted that the state had incurred the "substantial additional expense" of prosecuting the case through the appellate court system.[189] The Court was also aware of the even greater expenditure the state would incur during a retrial of the case.[190] Nevertheless, the Court reversed the conviction because "it is the deprivation of the protected rights themselves which is fundamental and most regrettable, not only because of the effect on the individual defendant, but because of the effect on our system of law and justice."[191]

Currently, when appellate courts review Constitutional errors in terms of whether they are harmless, the only necessary consideration is what effect, if any, the error had on the defendant's trial. This approach reduces the Constitutional error to a component in a decision-making process based solely on "evidentiary approximation." In other words, a convicted defendant's Constitutional rights are unenforceable unless being deprived of those rights played an important enough role in his or her trial. This misguided belief marks the most serious flaw in the rationale underlying the current harmless error rule. In truth, the value of a Constitutional right extends well beyond its evidentiary impact.

"The search for the truth is indeed central to our system of justice, but 'certain Constitutional rights are not, and should not be, subject to harmless-error analysis because those rights protect important values that are unrelated to the truth-seeking function of the trial.'"[192] As has already been discussed in pre-*Chapman* cases, the quality and quantity of evidence introduced independent of the Constitutional violation was not a relevant concern.[193] The mere fact that a defendant suffered a Constitutional injury during the adjudication of the case was sufficient to mandate reversal because "it is the deprivation of the protected rights themselves which is fundamental and the most regrettable . . . ."[194] After the Court

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189. *Haynes*, 373 U.S. at 519.

190. *Id.*

191. *Id.*

192. Arizona v. Fulminante, 499 U.S. 279, 295 (1991) (quoting Rose v. Clark, 478 U.S. 570, 587 (1986) (Stevens, J., concurring in judgement)).

193. *See, e.g.*, *Haynes*, 373 at 520 (1963) (Clark, J., dissenting) (holding the independent evidence not only supported the guilt of the defendant, but also corroborated the defendant's coerced confession).

194. *Id.* at 519.

applied the harmless error doctrine to particular Constitutional violations, the inherent value of those Constitutional rights was completely obliterated.

Proponents of applying harmless error analysis to Constitutional errors argue that the importance of judicial economy and practicality outweigh the value of having a trial free of Constitutional error. There is no question that judicial economy is a valid concern within the criminal justice system. However, while judicial economy may justify examining defectively scripted indictments and informations, judicial economy does not outweigh the inherent value of Constitutional rights.[195] Instead, the opposite is true, protecting the rights of a defendant allocated to him or her under the Constitution outweighs issues of judicial economy because their denial affects not only the individuals case, but our entire system of justice.[196]

> "[I]t is the deprivation of the protected rights [referring to Constitutional rights such as those allocated under the Fifth Amendment] themselves which is fundamental and the most regrettable, not only because of the effect on the individual defendant, but because of the effect on our system of law and justice."[197]

While a defendant may not be entitled to a perfect trial, guilt or innocence must be decided by a jury in a trial free from Constitutional infirmity.[198] Simply stated, while judicial economy is a compelling concern, it does not outweigh the necessity of conducting criminal trials free of Constitutional error. "[I]t is the very purpose of a Bill of Rights to identify values that may not be sacrificed to expediency."[199]

Allowing the harmless error doctrine either to apply, or not apply, means that the value of the Constitutional right is either recognized or ignored. The issue must be resolved either affirmatively or negatively: there is no middle ground. Concluding that a person's Constitutional rights have been violated but denying the same person a remedy is contrary to even the most basic notions of fairness. In order to restore fairness to our process system of justice, a return to a rule of automatic reversal is required.

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195. *Id.*
196. *Id.*
197. *Id.*
198. *Id.* at 518-19.
199. United States v. Leon, 468 U.S. 897, 980 (1984) (Stevens, J., dissenting in part, concurring in part).

V. THE MERITS OF A RULE OF AUTOMATIC REVERSAL

Accurately evaluating the merits of returning to a rule of automatic reversal requires analyzing the issue from the perspective of those who would be most effected. A rule of automatic reversal for Constitutional errors would directly affect courts, prosecutors, defendants and the public. As will be seen, while a rule of automatic reversal is not without negative consequences, the merits so greatly outweigh the detriments that returning to a rule of automatic reversal is warranted. The following discussion is not intended to repeat the discussions of the earlier sections. Instead, this section suggests the likely effects of applying a rule of automatic reversal in light of the Constitutional principles previously discussed.

A. The Effect on Courts

Evaluating the effect returning to a rule of automatic reversal would have upon the courts requires an understanding of the burdens trial and appellate courts carry in the criminal justice system. Both trial and appellate courts often operate under strict budget constraints. They both maintain calenders that require enormous amounts of time and effort to manage. Admittedly, a rule of automatic reversal may have a negative impact on those interests. Though the court's interest in expediency is worthy of consideration, returning to the automatic reversal rule is warranted because of the greater interest in protecting individual rights. Additionally, returning to such a rule would provide positive incentives to both trial and appellate courts. And just as the violations of individual liberty tarnish not only individual but our entire system of justice, the benefits of those positive incentives would extend beyond the bounds of individual cases.

From the trial courts' perspective, the primary concerns related to a rule of automatic reversal are time and money. Cases remanded for retrial add to what are often already cluttered court calendars. In addition to the time demands required by retrials, the trial court would also incur all of the associated additional expenses. If, as would be likely, a rule of automatic reversal caused an increase in the number of cases reversed on appeal, the calendars of trial courts would become even more difficult to manage.

Given these concerns, it appears on the surface that a rule of automatic reversal would be contrary to the interests of trial courts. However, such a conclusion cannot be reached if the inherent value of Constitutional rights is fully taken into account. It is beyond dispute that the court's interest in expediency warrants carefully considering every possible means of saving the courts' time and the taxpayers' money. But that

consideration does not mean that individual rights should be subservient to expediency. Investing in preserving the integrity of the constitution and the criminal justice system is certainly money well spent.

As noted by Justice Brennan over a decade ago: "When the public, as it quite properly has done in the past as well as in the present, demands that those in government increase their efforts to combat crime, it is all too easy for [those] government officials to seek expedient solutions."[200] It is admittedly more expedient to apply the harmless error rule to the violation of a criminal defendant's rights than to automatically require a retrial. But the Constitution requires more.

> [W]hat the framers understood [in drafting the Bill of Rights] remains true today— that the task of combating crime and convicting the guilty will in every era seem of such critical and pressing concern that we may be lured by the temptations of expediency into forsaking our commitment to [individual rights].[201]

Although consideration of the court's interest in expediency is legitimate, that interest is outweighed by the value of the Constitutional rights allocated to individuals.[202] "[I]t is the very purpose of a Bill of Rights to identify values that may not be sacrificed to expediency."[203] Applying the harmless error doctrine to Constitutional errors puts the interest of expediency directly in conflict with protecting individual rights. Because the value of individual rights outweighs the value of expediency, automatic reversal is required. This particular conflict was specifically addressed by the Supreme Court in *Haynes v. Washington*.[204] According to the Supreme Court:

> Here it has put the State to the substantial additional expense of prosecuting the case through the appellate courts and, now, will require even a greater expenditure in the event of retrial, as is likely. But it is the deprivation of the protected rights

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200. *Id.* at 959 (Brennan, J., dissenting). The expedient solution specifically addressed by Justice Brennan in his dissenting opinion was a good faith exception to the exclusionary rule. However, harmless error is analogous to the good faith exception to the extent that both rules are meant to avoid what the courts perceive as a miscarriage of justice due to innocent mistakes during the adjudication of a criminal case.

201. *Id.* at 929-30. Although this quotation by Justice Brennan comes from his dissent to the Court's finding a good faith exception to the exclusionary rule, the underlying idea is equally applicable in the context of harmless error.

202. For a thorough discussion of the inherent value of Constitutional rights see Part IV. C.

203. *Leon*, 486 U.S. at 980 (Stevens, J., dissenting in part, concurring in part).

204. 373 U.S. 503 (1963).

> themselves which is fundamental and most regrettable, not only because of the effect on the individual defendant, but because of the effect on our system of law and justice.[205]

While on the surface it may appear that the automatic reversal concept holds only negative consequences for trial courts, that is not the case. Returning to a rule of automatic reversal also provides trial courts with strong incentive to protect the defendant's rights. Although the criminal justice system offers many issues upon which reasonable minds may disagree, everyone should agree that there is no justice in violating a criminal defendant's Constitutional rights. Indeed, every effort should be made to ensure that such rights are not violated. A rule of automatic reversal serves to promote this principle. The possibility of incurring the additional cost of retrial combined with the prospect of an increasingly cluttered court calendar provides trial courts with a strong, positive incentive to prevent violations in the first place.

It is important to understand that the number of cases remanded to the trial court due to Constitutional errors is to some degree within the control of the trial court judge. So long as the trial judge refuses to tolerate the violation of the defendant's Constitutional rights, the trial court's calendar will remain largely unaffected by a rule of automatic reversal. In the automatic reversal context, the only cases beyond the control of the trial court judge are those in which the reviewing court finds a new type of Constitutional violation. In such cases, the trial judge would not have the benefit of relying on precedent for recognizing and protecting the defendant's Constitutional rights. In all other cases, the trial judge need only protect the established Constitutional rights of the defendant in order to avoid conducting retrials brought about from a rule of automatic reversal.

In sum, although a rule of automatic reversal would not be without costs to trial courts, the benefits outweigh those costs. A rule of automatic reversal would place incentives into the criminal trial process to uphold the Constitutional rights of the accused. By doing so, the rule would promote both greater certainty in verdicts and the integrity of the criminal justice process.

From the perspective of appellate courts, returning to a rule of automatic reversal would narrow their role significantly. Under a rule of automatic reversal, appellate courts would merely be required to determine whether a Constitutional error occurred.[206] If the reviewing court found

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205. *Id.* at 519.

206. This narrowing of issues will not likely eliminate the valid concerns of appellate courts regarding efficiency. Even so, those concerns are outweighed by the value of individual rights for

such an error, the case would be automatically reversed and remanded to the trial court. Automatic reversal also relieves the appellate court of the impossible and time consuming task of fairly evaluating whether the Constitutional error affected the jury's verdict.[207] By not attempting to engage in such impossible evaluations, the court would promote the integrity of the criminal justice process.

Returning to a rule of automatic reversal would also remedy an additional problem presented by appellate courts applying the harmless error doctrine to Constitutional errors. Under the current rule, there are some cases in which appellate courts use the harmless error doctrine as a means to avoid making decisions on difficult issues.[208] This practice is typically seen in cases where courts choose not to inquire whether an error occurred because they reason that if the alleged error occured it would have been harmless. By sidestepping the important issue of whether the error occurred under the guise of a doctrine that presupposes the existence of an error, the reviewing court frustrates the evolution of the law.[209] There is nothing to suggest that the harmless error doctrine was originally intended to serve such a purpose.[210]

If the harmless error doctrine did not apply to Constitutional errors, appellate courts would be left to deal with the substantive aspects of the defendant's appeal. By evaluating these questions, appellate courts provide trial courts with a more definite determination of what is, and what is not, error in a given context. When an appellate court holds that determining whether an error occurred is unnecessary because any such error would have been harmless, lower courts are left with no guidance as to how to resolve the issue in the future. Such practices only serve to frustrate the efficient adjudication of criminal cases. If the application of the harmless error doctrine to Constitutional issues were halted, the appellate court would be required to evaluate these substantive issues and thereby facilitate the continued definition and evolution of Constitutional law.

What was true in regards to the trial court's expense concerns is also true for appellate courts. While there may be increased costs and longer court dockets as a result of a rule of automatic reversal, the benefits of the rule make those problems worth enduring. In sum, automatic reversal for

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the same reasons discussed in the trial court context.

207. *See* Part IV. B.

208. *See, e.g.*, Wright v. Estelle, 549 F.2d 971 (5th Cir. 1977) (declining to inquire whether defendant has a fundamental right to testify in his own behalf).

209. 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).

210. Donald A. Winslow, Note, *Harmful Use of Harmless Error in Criminal Cases*, 64 CORNELL L. REV. 538, 542 (1979).

Constitutional errors is the only means of assuring individuals that, while they may not be entitled to an error-free trial, they will receive a fair one.

B. The Effect on Prosecutors

While there are strong reasons to return to the automatic reversal rule from the perspectives of other groups, there are fewer benefits from the prosecutor's perspective. Like the courts, prosecutors would probably bear increased costs and caseloads under the automatic reversal rule. But more problematically, prosecutors would once again be confronted with the difficult task of proving the defendant's guilt in a second trial.

Generally speaking, obtaining a conviction on retrial is more difficult than in the first trial. Subsequent trials occur several months or even years after the first. Witnesses are difficult to relocate and securing their willing participation may be problematic. Even where the witnesses are available and willing to testify for a second time, their memories are likely to have dulled between the first and second trials, making their testimony less credible and more vulnerable to attack. Even more worrisome for the prosecution in subsequent trials is the fact that the prosecution usually presents its strongest theory during the initial trial. Having already heard the government's theory, the defense is better able to prepare for subsequent trials. All of these considerations make subsequent trials due to automatic reversal undesirable for prosecutors.

But to some extent, these concerns provide the prosecution with an incentive to avoid violating the defendant's rights. The likelihood of having a weaker case on retrial should motivate the prosecution to obtain a conviction free of Constitutional error in the first trial. While this incentive may seem illogical on the surface, it is actually consistent with the true role the prosecutor plays in criminal cases.

"[T]he prosecutor's role transcends that of an adversary."[211] The prosecutor "is the representative not of an ordinary party to a controversy, but of a sovereignty . . . whose interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done."[212] As has already been discussed, if a trial is not conducted free from Constitutional error, it is not fair and can therefore not be considered just.[213] In short, no one has a legitimately defensible interest in violating an individuals constitutional right. A prosecutors role in the process is to not merely pursue a conviction, but instead to pursue the truth. Therefore, a prosecutor who

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211. United States v. Bagley, 473 U.S. 667, 675 n.6 (1985).

212. *Id.* (quoting Berger v. United States, 295 U.S. 78, 88 (1935); *See also* Brady v. Maryland, 373 U.S. 83, 87-88 (1963)).

213. *See* Haynes v. Washington, 373 U.S. 503, 519 (1963).

understands his or her true role in the criminal justice process cannot claim unfair injury from a rule of automatic reversal.

C. The Effect on Criminal Defendants

Returning to a rule of automatic reversal assures defendants that their Constitutional rights will be protected and respected. The rule of automatic reversal also ensures that while each criminal defendant may not receive a perfect trial, his or her trial will be free of Constitutional infirmity. By doing so, the rule increases the reliability of verdicts.

Under the current rule, a criminal defendant convicted in a trial where his or her Constitutional rights are violated receives the message that his or her Constitutional rights may not be equal to the Constitutional rights of other citizens. As a practical matter, violating a defendant's Constitutional rights during trial gains legal significance only if the reviewing court decides the error was not harmless. However, as was discussed in Part IV. B above, this is an analysis reviewing courts are ill-equipped to conduct. Apart from the evidentiary impact of the violated right, the inherent value of the right is ignored when automatic reversal is denied.

Under a rule of automatic reversal, the criminal defendant is assured that his or her Constitutional rights have just as much importance and are protected to the same degree as the rights of any other citizen. A rule of automatic reversal assures defendants that a confession given to the police as a result of outrageous coercive treatment will never be admitted into a criminal trial.[214] Automatic reversal protects defendants from the possibility of unfair convictions based upon unreasonable searches or seizures.[215] The denial of counsel at critical stages of the case would likewise never play a part in a defendant's conviction.[216] Defendants would no longer run the risk that prosecutors could improperly comment upon their refusal to waive the right to remain silent.[217] Defendants would also be assured that they would not be convicted in a trial in which the jury is not instructed that they are to be presumed innocent.[218] In sum, a rule of automatic reversal protects both the actual and inherent value of our most

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214. Under *Fulminante*, such a result is currently possible. For a description of the outrageous coercive tactics used against one defendant, *see supra*, note 138.

215. *See generally*, Chambers v. Maroney, 399 U.S. 42, 52-53 (1970).

216. *See* Coleman v. Alabama, 399 U.S. 1, 10-11 (1970).

217. *See* United States v. Hasting, 461 U.S. 499 (1983).

218. *See* Kentucky v. Whorton, 441 U.S. 786 (1979).

cherished liberties.[219] It provides a prophylactic effect in criminal trials by removing any incentive to violate an individual's Constitutional rights.

From the perspective of criminal defendants, the merits of the automatic reversal rule infinitely outweigh the costs. Such a rule is the only means of fairly adjudicating the charges against them. Equally important, it insures that the inherent values of their Constitutional rights are preserved. While some may speculate that the rule allocates too much freedom to criminal defendants, in truth it gives them nothing more than the assurance that their cases will be fairly resolved.

D. The Effect on the Public

The effect on the public of returning to a rule of automatic reversal is the culmination of the considerations discussed thus far. In terms of detriments, any extra costs associated with automatic reversal are ultimately paid by the taxpayers. This includes any additional expense incurred by the courts or prosecutors. If the defendant is represented by appointed counsel, those additional expenses must also be paid by the public. Similarly, the public would be forced to endure any delays brought about by increasingly cluttered court calendars. One need only watch the evening news to discover the public's discontent with how long it takes to resolve criminal cases under the current system. Any further delays are sure to be met with increased public disapproval. Even more importantly, the public deserves to have the criminal code enforced.

It is important to note at the outset that these detriments can actually serve a positive function. They give society an interest in protecting the rights of the accused. Nearly all of the additional expenses and delays are avoidable. If a criminal defendant's Constitutional rights are not infringed upon, the new rule, which in reality is nothing more than returning to the old rule, changes nothing. It is only when Constitutional rights are violated that the above detriments are incurred. As has already been discussed, no one has a legitimate interest in violating an individual's Constitutional rights. That principle extends not only to the courts and prosecutors, but to the general public as well. Thus, returning to a rule of automatic reversal provides the public with an incentive to safeguard the Constitution.

A rule of automatic reversal also benefits the public because it increases the reliability of verdicts. For example, assuming all other variables remain constant, the conviction of a criminal defendant upheld on

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219. See Part II above for a listing of many of the Constitutional violations which have been subjected to harmless error analysis. Part IV. C discusses the inherent value of Constitutional rights.

appeal free of Constitutional infirmity is much more reliable than the same conviction upheld by virtue of an appellate courts finding that the deprivation of a Constitutional right harmless. Not only are unreliable verdicts incapable of furthering any just purpose, they serve to undermine the entire jury system. By allowing criminal defendants to be convicted only in a trial free of Constitutional violations, we further the public's interest in obtaining reliable verdicts.

It cannot be denied that a rule of automatic reversal frustrates society's interest in having the criminal code enforced in cases where the defendant is ultimately found guilty in a criminal trial of the charged offense. This frustration, however, does not require abandoning the automatic reversal rule. It must be remembered that when a Constitutional error occurs, it is the defendant who is victimized, and that the court, not the defendant, is responsible for that injury. Obviously, the defendant has no interest in having his or her Constitutional rights violated. Any discontent with the injury should not be directed towards the victimized defendant, but towards the entity allowing it to occur, namely the court. Indeed, the remedy for society's frustration is to insist that the courts refuse to allow any Constitutional injury to occur, rather than to deny a remedy to the victim of such injury. Like the courts, lawyers, and defendants, society receives no benefit from a trampling of the Constitution.

There are also important policy benefits for upholding the Constitutional rights of individuals. Many people in society are faced, from time to time, with the temptation to violate the law. The motivations for violating criminal laws are numerous and well beyond the scope of this thesis. Regardless of why a person considers breaking the law, the decision to break the law becomes easier to justify when prosecutors, police, and judges, are allowed to benefit from its violation. Subjecting Constitutional errors to harmless error analysis allows those charged with enforcing the law to benefit from violating it. By preventing the government from benefiting from Constitutional errors, we promote the value of Constitutional rights and send the message that no one in the legal system benefits from breaking the law.

Finally, it is in the public's best interest to return to a rule of automatic reversal because it is the only rule that truly protects the inherent value of an individual's Constitutional rights. After all, the public is made up of nothing more than the mass grouping of individuals. If the value of Constitutional rights diminishes for a particular criminal defendant, that value diminishes for everyone. "Justice is always the same, whether it be due from one man to a million, or from a million to one man."[220]

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220. Attributed to John Jay.

VI. CONCLUSION

There is no such thing as a harmless Constitutional error. In 1919, Congress realized that criminal trials need not be perfect in order for juries to arrive at reliable verdicts. Congress and the courts realized that technical errors such as misworded indictments could occur without undermining the defendant's right to a fair trial. From those humble beginnings, the application of the harmless error doctrine has expanded to the point that we now may consider whether the admission of a confession obtained by government force or coercion is harmless; a destination better left unreached.

In the *Chapman* decision, the Court navigated the harmless error doctrine into the provinces of Constitutional rights. In order to do so, the Court violated the fundamental concept of stare decisis. The majority of the Court claimed the issue was one of first impression despite Justice Stewart's concurrence indicating that not only had the issue been previously considered but the opposite conclusion reached.

After the harmless error doctrine crossed the Constitutional rights boundary, the rule was applied somewhat arbitrarily and in some instances, without explanation. In the *Fulminante* decision, the Supreme Court attempted to map the limits of the harmless error rule within the Constitutional landscape by distinguishing between "trial" and "structural" errors. In attempting to draw the line, the Court ignored prior precedent in direct conflict with the newly articulated distinction. In some ways, *Fulminante* represents a flawed map: it does not accurately reflect the terrain. Nevertheless, it serves as the current guide for determining whether a given Constitutional violation will be subjected to harmless error analysis.

Today, the question is whether the harmless error doctrine should remain applicable to violations of Constitutional rights or retreat to the land of technical errors from which it came. This thesis demonstrates that, although there is some justification for the rule to remain, the wiser course favors retreat. Expediency is not to be discounted, but the practical and inherent values of individual freedoms outweigh expediency in the harmless error context.

In truth, an accurate map distinguishing Constitutional rights cannot be drawn because the value of all Constitutional rights are indistinguishable from one another. As a matter of practicality, appellate courts are incapable of effectively evaluating the effect a Constitutional error on a particular jury. Even if courts could make such an evaluation, they should refrain from doing so because allowing a criminal conviction to stand in

spite of a Constitutional right being violated intolerably diminishes the value of our individual freedoms.

In the final analysis, whether we should return to a rule of automatic reversal depends upon the value placed upon Constitutional rights. Indeed, our current toleration of the harmless error rule in the Constitutional context reflects poorly on the value now placed on individual rights. As this thesis demonstrates, the current rule undermines the inherent value of Constitutional rights. As a practical matter, it prohibits courts, prosecutors, defendants and the public from obtaining verdicts worthy of reliance. Although criminal trials need not be perfect, they must be conducted free of Constitutional infirmity. "That which is unjust can really profit no one; that which is just can really harm no one."[221] The time has come to return to a rule of automatic reversal.

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221. AMERICAN QUOTATIONS 306 (Gorton Carruth & Eugene Ehrlich eds., Wings Books 1992) (quoting Henry George, THE IRISH LAND QUESTION (1884)).