Principles for Application of the Harmless Error Standard

In recent years, the Supreme Court has applied two different standards of review to criminal cases in which a federal constitutional right of the defendant was violated. The Court has failed, however, to announce a coherent rationale as to which violations are to be reviewed by the strict "automatic reversal" standard and which by the more lenient "harmless error" standard. This failure has deprived the lower courts of guidance for judging types of violations not yet treated by the Supreme Court. The selection of the standard is often decisive; under the "automatic reversal" standard proof of the violation is sufficient to require reversal, while under the "harmless error" standard the appellant must demonstrate in addition that the outcome of his case was affected by the violation.

The first section of this comment will describe the pressures on the traditional, "automatic reversal" standard of review that were created by the recent expansion of constitutional protections accorded criminal defendants and led to the establishment of the harmless error standard. The second section will attempt to define and evaluate factors the Court has employed in determining which standard to apply. The final section offers a way to integrate these factors and apply them to particular constitutional protections.

1 For example, the lower federal courts have split over whether a denial of cross-examination should be judged by the harmless error standard. Compare United States v. Alston, 460 F.2d 48, 54 (5th Cir. 1972), and United States v. Long, 449 F.2d 288, 296 (8th Cir. 1971), with Phillips v. Neil, 452 F.2d 587, 594 (6th Cir. 1971).

I. THE HISTORICAL BACKGROUND

A. The Traditional Standard of Review: Automatic Reversal

Well into the twentieth century, any violation of a defendant's federal constitutional rights in state or federal proceedings led to reversal.\(^3\) The federal courts offered very little justification for this stringent doctrine,\(^4\) which was frequently criticized.\(^5\) The rule did not create any great burden, however, on the federal judiciary. Relatively few criminal cases were tried in the federal courts,\(^6\) and the rights of a defendant in state court, where most prosecutions occurred, were relatively narrow in scope.\(^7\) Constitutional violations were found in state court proceedings only if the state violated "fundamental fairness."\(^8\) Thus in both the federal and state courts, the automatic reversal standard led to few reversals. In 1919 Congress enacted a "harmless error" statute\(^9\) that

\(^3\) See authorities cited supra note 2; Note, Criminal Procedure—Self-Incrimination Harmless Error, 69 Mich. L. Rev. 941, 942 n.10 (1971) [hereinafter cited as Criminal Procedure]. See also Gibbs, Prejudicial Error: Admissions and Exclusions of Evidence in the Federal Courts, 3 Vill. L. Rev. 48, 49 (1957). It is important to note that this was prior to "incorporation" of the Bill of Rights into the fourteenth amendment, and broader federal constitutional rights were available to the defendant in federal court than in a state court. See text and notes at notes 6-8 infra. By 1967, however, automatic reversal for nonconstitutional errors had been rejected by both state and federal courts. See text and notes at notes 9-11 infra.

\(^4\) Rationales offered tended to be simplistic. For example, the Supreme Court held that the illegal admission of a statement by the defendant will result in reversible error, "since the prosecution cannot on one hand offer evidence to prove guilt ... and on the other hand for the purpose of avoiding the consequences of the error ... be heard to assert that the matter offered as a confession was not prejudicial because it did not tend to prove guilt." Brain v. United States, 168 U.S. 532, 541 (1897).

\(^5\) See, e.g., 1 J. WIGMORE, EVIDENCE § 21 (3d ed. 1940); State v. Crawford, 96 Minn. 95, 104 N.W. 822 (1905); Lipscomb v. State, 75 Miss. 559, 617, 23 So. 210, 228 (1898) (Whitfield, J., dissenting); State v. Musgrave, 43 W. Va. 672, 710, 28 S.E. 813, 828-29 (1897) (Brannon, J., dissenting).


\(^7\) The procedural guarantees embodied in the Bill of Rights were considered restrictions on federal power only. Barron v. Baltimore, 32 U.S. (7 Pet.) 243 (1833). See F. GRAHAM, supra note 6, at 26-36. The fourteenth amendment increased the scope of permissible federal regulation of the states, but was held not to embody the guarantees of the Bill of Rights. Palko v. Connecticut, 302 U.S. 319 (1937); Twining v. New Jersey, 211 U.S. 78 (1908); Slaughter House Cases, 83 U.S. (16 Wall.) 36 (1872).

\(^8\) The phrase is from Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 161 (1951) (Frankfurter J., concurring). This test has been stated in a variety of ways since the adoption of the fourteenth amendment. See, e.g., "Does it violate those "fundamental principles of liberty and justice which lie at the base of our civil and political institutions?" Palko v. Connecticut, 302 U.S. 319, 328 (1937) (Cardozo, J.). See also F. GRAHAM, supra note 6, at 33-36.

permitted the affirmance of a conviction if the error did not affect the defendant's "substantial" rights. This statute did not specify the type of error to be judged by harmless error but provided that the courts should not reverse if the error was technical and did not have great effect on the outcome of the case. The federal statute was interpreted as applying only to nonconstitutional errors, but many states adopted statutes that created a harmless error standard for both constitutional and nonconstitutional state rights.

B. The Development of a Federal Harmless Error Standard for Constitutional Violations

The Supreme Court in the 1960s broadened both the scope of criminal defendants' constitutional rights and the application of these protections to state trials. The strains these developments placed on the automatic reversal doctrine rapidly became apparent. Attacks on state convictions inundated federal and state appellate courts, and the federal and some state courts, applying the automatic reversal rule, began to reverse a large number of state convictions. Some state appellate courts, however, applied state harmless error rules to challenges based on these "new" constitutional rights. The Supreme Court ruled on the propriety of this weaker standard in *Chapman v. California*.

The constitutional violation in *Chapman* consisted of prosecutorial comments to the jury on the defendant's failure to take the stand in his own defense. The right violated was one of the new constitutional rights that appeared in the "due process revolution" of the 1960s. The California Supreme Court, applying the state harmless error rule, held the error harmless. The United States Supreme Court stated

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10 *See note 5 supra. This situation is discussed in United States v. Lee, 489 F.2d 1242 (D.C. Cir. 1973).*
11 By 1967, all the states had adopted a harmless error rule by statute. *See Chapman v. California, 386 U.S. 18, 22 (1967).*
13 At least thirty state courts had used their harmless error rules for new constitutional violations. *See Note, Harmless Error, supra note 2, at 86 n.30.*
14 386 U.S. 18 (1967).
15 In accordance with a provision of the state constitution, CAL. CONST. art. I, § 13, the prosecutor commented extensively on the defendant's failure to take the stand.
16 *See Griffin v. California, 388 U.S. 609 (1965).*
17 This rule was a provision of the state constitution, CAL. CONST. art. VI, § 41/2, which forbade reversal unless the reviewing court was convinced "that the error complained of has resulted in a miscarriage of justice."
that a harmless error rule did apply to the review of certain constitutional violations occurring in either state or federal courts including the violation at issue, and held the error in Chapman not harmless. The standard enunciated was more stringent than that used by most states. The typical state rule allowed an appellate court to sustain a conviction if that court found that, despite the constitutional error, the record disclosed "overwhelming evidence" in support of the result. The Supreme Court had previously criticized this overwhelming evidence standard, and in Chapman the Court held that a violation could, "consistent with the Federal Constitution, be deemed harmless" only if the reviewing court could "declare the belief that it was harmless beyond a reasonable doubt." Not all errors, however, were to be treated under the harmless error standard; the Court was careful to note that "there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error . . . ”

The Chapman rule represented a compromise between the strict automatic reversal standard and the loose overwhelming evidence tests of the states. Critics attacked this compromise position for the inadequacies of its theoretical legal base, for the ambiguity left by the failure of the Court to enunciate the parameters of the rule's application, and for the practical failings of the doctrine, which was still far more stringent than the overwhelming evidence rule. In Harrington v. California, the Court responded to some of the practical problems by shifting the standard of review under the harmless error test to allow affirmance of convictions that are supported by overwhelming untainted

20 Id. at 23; see People v. Teale, 63 Cal. 2d 178, 197, 404 P.2d 209, 220, 45 Cal. Rptr. 729, 740 (1965).
22 386 U.S. 18, 24 (1967).
24 See generally Mause, supra note 2, at 527-33.
25 Mr. Justice Stewart attempted to state certain types of cases where he thought that automatic reversal was required, but expressed no particular rationale. 386 U.S. 18, 42-44 (1967) (concurring opinion). The resulting uncertainty about the status of the automatic reversal rule has been described as the "Chapman ambiguity" in Mause, supra note 2, at 26. Some commentators assumed because of the strictness of the rule that the scope of the federal harmless error rule was quite limited. See generally authorities cited supra note 2.
26 It was suggested that if the rule of Chapman were honestly applied, there would be few cases in which there would be any difference between applying it and applying the automatic reversal rule. See Thompson, Unconstitutional Search and Seizure and the Myth of Harmless Error, 43 Notre Dame Law. 457 (1967).
evidence. This new standard was essentially a return to the harmless error standard employed by the states before Chapman. The Court in Harrington reaffirmed that a harmless error standard should not be applied to all constitutional errors, but again failed to define which errors were subject to the rule. Analysis of the Court's decisions since Chapman does reveal, however, the factors the Court has employed in distinguishing the "harmless error" safeguards from the "automatic reversal" safeguards.

II. Determining the Standard of Review

The factors that suggest use of the automatic reversal standard are the fundamentality of the right in question and the deterrent value of a strict approach. The factor favoring use of the harmless error standard is the cost of retrial, including the cost of possibly freeing guilty persons.

A. Factors Supporting the Automatic Reversal Standard

Where the automatic reversal standard is applied to violations of a particular right, retrying cases that might have withstood appeal if harmless error had been applied places a heavy burden on state and federal courts. The automatic reversal rule is significantly more severe than the harmless error rule, and its application implies that the constitutional violation in question is considered so important to the fabric of justice as to require this especially burdensome rule. The Court appears to have been influenced by two factors in requiring application of this strict standard: the fundamentality of the right and the need for deterring unconstitutional behavior.

1. The Fundamentality of the Right. The fundamentality of a right depends upon its importance in the system of justice. Some commenta-

28 Id. at 254.
30 The constitutional guarantees that are the concern of this question are those which in the past decade have been imposed by the Supreme Court as necessary procedural safeguards. They concern almost all stages of the criminal process and include protection from unreasonable search and seizure, the guarantee against double jeopardy, and protection from introduction at trial of coerced confessions and from generally coercive police conduct. A defendant is guaranteed an impartial trier of fact and an impartially selected jury, counsel at certain trials and at all important stages of the criminal process, confrontation of witnesses and the right to cross-examine, and a speedy trial. The constitutionally required burden of proof is proof beyond a reasonable doubt.
tors have suggested that application of the automatic reversal rule should depend on whether the violation taints the basic accuracy of the trial process.\(^{31}\) Almost all constitutional safeguards, however, may be considered desirable for accurate adjudication,\(^ {32}\) and this test is therefore not very useful.\(^ {33}\) In determining whether a right is fundamental, the Court has focused more on factors that indicate a general societal belief in its importance to the system of criminal justice: the extent to which the guarantee is explicitly provided by the constitution, statutory provisions that indicate the importance of the right, and the history of judicial attitudes towards the right.

a. **Explicitness of the Constitutional Guarantee.** The Court appears to be disinclined to dilute a right plainly set forth in language of the Constitution. The ease of identification, the minimal need for judicial construction, and the clarity of the boundaries of the protection characterize this class of rights. The guarantee against double jeopardy\(^ {34}\) is an example of a highly explicit safeguard. In *Price v. Georgia*\(^ {35}\) the Court rejected a claim that a violation of this safeguard was harmless error. The defendant in *Price* had been tried for murder and was convicted of the lesser-included-offense of manslaughter. After a reversal of that conviction, the defendant was retried for murder and was again found guilty of manslaughter. Georgia claimed that the retrial for murder, although double jeopardy, was harmless error under *Chapman* because the defendant was convicted of the lesser crime and thus suffered no greater punishment at his second trial.

Speaking for a unanimous Court, Chief Justice Burger stressed the explicit nature of the right and strongly asserted that a violation of this right—"cast in terms of the risk or hazard of trial conviction, not of the ultimate consequences of the verdict"\(^ {36}\)—could never be harmless.

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31 See Note, *A Reappraisal*, supra note 2. Mause similarly suggests automatic reversal for those errors that have an inherent tendency to undermine the reliability of the guilt-determination process. See *Mause*, *supra* note 2.

32 Examples of constitutional safeguards that have little bearing on the accuracy of the trial include the right to reasonable bail, the protection from unreasonable search and seizure, the protection from double jeopardy, and the requirements of the *Miranda* warnings.

33 Commentators have argued that the extent to which the error is likely to taint the accuracy of the fact determination should be the basis of the determination of which standard to use. See, e.g., *Mause*, *supra* note 2; Note, *Harmless Error*, *supra* note 2. In the analysis presented in this comment, this factor appears as an element of the historical role of the protection, see text and notes at notes 54–60 *infra*, and a factor influencing the desirability of using the harmless error standard to conserve judicial resources, see text and notes at notes 69–79 *infra*.

34 U.S. Const. amend. V: "No person shall . . . be subject for the same offense to be twice put in jeopardy of life or limb . . . ."


36 Id. at 331. Much the same thing could be said for protection from unreasonable
The Court noted that the Georgia Supreme Court had refused direct review of the second conviction and had transferred the case to the Georgia Court of Appeals with the statement that "[o]nly questions as to the application of plain and unambiguous provisions of the Constitution of the United States . . . [were] involved," and that direct review by the Georgia Supreme Court was reserved for cases requiring construction of the Constitution.

The effect of explicitness is also demonstrated by the standard used to review a denial of the defendant's right "to have the Assistance of Counsel for his defence" in "all criminal prosecutions." At a minimum it is clear that the defendant is entitled to counsel at trial; to this extent the safeguard is relatively explicit. Violation of this basic part of the safeguard is thus worthy of automatic reversal. The right to counsel, however, has been expanded to include the right to the assistance of counsel at preliminary police proceedings. Requiring counsel at each significant step in the criminal process reduces the explicitness of the right. "Defense" becomes an expanded concept that includes far more than advocacy in the courtroom. However supportable as a matter of policy, this aspect of the right to counsel is not highly explicit. For violations of the extensions of the right to counsel, arising out of but not explicitly found in the sixth amendment, harmless error is the appropriate standard of review. The right to counsel thus presents a relatively explicit core right subject to the automatic reversal standard and a set of expanded rights of lesser explicitness subject to the harmless error standard.

The degree of explicitness is obviously an appropriate means of de-
terminating which protections are considered fundamental to the American system of criminal justice. The protections recently derived by implication are undoubtedly important, but the very fact that they are of recent development indicates that they are not regarded as part of the core of the fair administration of justice. That many of the explicit rights have only recently been applied to state proceedings does not dilute the importance of those rights; the recent application of Bill of Rights protections to the states has been due to a development in federalism, not a change in what is regarded as fundamental.

b. Congressional Will. The Court has recently demonstrated a tendency to use automatic reversal for guarantees deemed important in an expression of congressional will.\textsuperscript{45} For example, in Peters v. Kiff,\textsuperscript{46} a defendant challenged his conviction on the grounds that the grand and petty jury selection process systematically excluded Blacks. The defendant contended that this exclusion violated the equal protection and due process clauses of the fourteenth amendment and was against the policy of Congress as expressed by a criminal statute forbidding discriminatory selection of jurors. The state argued that since the defendant was white and the charge had no racial connotations, the defendant suffered no prejudice, and the error did not warrant reversal.

In a 3-3-3 decision, the Supreme Court reversed the conviction. Justice Marshall, for the Court, rested his decision entirely on his belief that the use of a discriminatorily selected jury violates traditional notions of due process. Justice White, however, in the concurrence necessary to the judgment, stressed the fact that a congressional antidiscrimination statute proved the importance of the right. He noted that the "majestic generalities of the Fourteenth Amendment" were reduced to a concrete statutory command\textsuperscript{47} and that, although the generally accepted view of due process derived from Court decisions would have compelled the rejection of petitioner's claim for lack of standing, the "better view" was to implement the "strong statutory policy . . . which reflects the central concern of the Fourteenth Amendment with racial discrimination . . . ."\textsuperscript{48} The clear implication was that once the defendant was given standing, proof of the constitutional violation was sufficient for the defendant to obtain reversal of his conviction.\textsuperscript{49}

\textsuperscript{45} This approach was suggested in Kotteakos v. United States, 328 U.S. 750, 764–65 (1946). \textit{See also} Bruno v. United States, 308 U.S. 287, 294 (1939).


\textsuperscript{48} 407 U.S. at 506 (1972).

\textsuperscript{49} The three dissenters did not argue that it was improper to make this determination on the basis of Congressional directives, but stated that reliance on the policy of this
Although the views of three concurring justices fall far short of demonstrating a conclusive Supreme Court trend, examination of congressional views is appropriate for determining whether a particular right should be viewed as fundamental to the criminal justice system. It cannot be argued that Congress could remove from the automatic reversal rule a right that otherwise should be covered by it; as the Court has noted in other areas, however, it is appropriate that Congress should be able to increase the scope of the protections of the fourteenth amendment. A federal statute is a signal, although not a command, that the right it seeks to protect should be given the strict protection afforded by the automatic reversal rule.

c. Historical Significance. Strong evidence of fundamentality is also provided where the right in question was recognized at an early date to be necessary in the federal system. This evidence is augmented in that the right was applied to the states under the concept of “fundamental fairness.” The use of the automatic reversal rule for these rights was first suggested in Chapman and has been followed in subsequent decisions.

The prohibition against coerced confessions is an example of such a protection. From an early period, the introduction into evidence of an
involuntary confession was constitutional error whether the error occurred in federal or in state court, and the error has consistently been reviewed under the automatic reversal standard.\footnote{Until 1967, with one exception, all constitutional errors were reversed without discussion of harmless error. See Note, Criminal Procedure, supra note 3, at 942 n.10.}

It is clear that the historical examples set out in \textit{Chapman} do not exhaust the rights traditionally viewed as fundamental to the system of justice. A safeguard unmentioned in \textit{Chapman} is the right to cross-examination, which was established early as a constitutional right in the federal system.\footnote{Alford v. United States, 282 U.S. 687 (1931); Nailor v. Williams, 75 U.S. (8 Wall.) 107, 109 (1868).} Although never imposed on the states as an element of fundamental fairness, the safeguard found expression in analogous provisions in many states.\footnote{See generally Note, Confrontation, Cross-Examination, and the Right to Prepare a Defense, 56 Geo. L.J. 999, 959–65 (1968). See also Snyder v. Massachusetts, 291 U.S. 97, 130 (1934) (Roberts, J., dissenting).} Before \textit{Chapman}, the Court maintained that “a denial of cross-examination without waiver . . . would be a constitutional error of the first magnitude, and no amount of showing of lack of prejudice would cure it.”\footnote{390 U.S. 129, 132 (1968).} In the post-\textit{Chapman} case of \textit{Smith v. Illinois}, the Court reaffirmed that language,\footnote{Brookhart v. Janis, 384 U.S. 1, 3 (1966). Cross-examination may be constitutionally restricted to protect the safety of the witness. United States v. Crovedi, 467 F.2d 1032 (7th Cir. 1972). Lower courts have imposed various other restrictions on the right of cross-examination. See, e.g., United States ex rel. Abbott v. Twomey, 460 F.2d 400 (7th Cir. 1972); United States v. Marti, 421 F.2d 1263 (2d Cir. 1970); United States v. Bennett, 409 F.2d 888 (2d Cir. 1969), \textit{cert. denied}; 386 U.S. 852 (1969); United States v. Lee, 413 F.2d 910 (7th Cir. 1969); United States v. Lawler, 413 F.2d 622 (7th Cir. 1969); United States v. Teller, 412 F.2d 374 (7th Cir. 1969), \textit{cert. denied}; 402 U.S. 949 (1971). A few lower courts have intimated that a denial could be harmless error. United States v. Alston, 460 F.2d 48 (5th Cir. 1972) (alternative holding; no error found but if error it would be harmless); United States v. Jordan, 466 F.2d 99 (4th Cir. 1972). Only one case seems to be willing to hold a denial of cross-examination as harmless. United States v. Long, 449 F.2d 288 (8th Cir. 1971).} noting the long history of the right\footnote{The Court said “it cannot seriously be doubted at this late date that the right of cross-examination is included in the right of an accused in a criminal case to confront the witnesses against him.” \textit{Id.} at 131, \textit{quoting} Pointer v. Texas, 380 U.S. 404 (1965). Referring to the fact that “almost 40 years ago” the safeguard was reaffirmed in the federal system, the Court found that the theory then expressed remained cogent. Smith v. Illinois, 390 U.S. 129, 132 (1968).} and explicitly following the traditional reasoning that to require a showing of prejudice would be to “deny a substantial right and withdraw one of the safeguards essential for a fair trial.”\footnote{Brookhart v. Janis, 384 U.S. 1, 3 (1966); Alford v. United States, 282 U.S. 687, 692 (1931).} 

Historical tradition would be an inappropriate factor if it were followed merely for its own sake. In the treatment of constitutional errors,
however, tradition serves the important function of isolating those rights that have been considered fundamental to the concept of justice.

2. Deterrence of Unconstitutional Behavior. A major goal of the strict automatic reversal rule is to deter unconstitutional judicial, prosecutorial, or police conduct by voiding any conviction where the prohibited behavior has occurred. Although many consider the social cost of this policy too high,\textsuperscript{61} automatic reversal remains an accepted deterrent.\textsuperscript{62} The effectiveness of the automatic reversal standard may depend largely on the group it is to deter. The deterrent is generally considered most effective when directed at prosecutorial or judicial conduct, which is easy to channel and review, and less effective when aimed at police behavior.\textsuperscript{63} Both judges and prosecutors can be expected to understand the significance of the automatic reversal standard. Thus, for example, deterrence would be highly effective in preserving rights such as the double jeopardy protection, the guarantee of counsel, the right to a speedy trial, and the right to cross-examination. Police are more likely to view their main duty as preventing crime and arresting criminals, rather than obtaining a valid conviction.\textsuperscript{64} Using the automatic reversal standard instead of the harmless error standard may therefore have little deterrent effect on errant police.

Most commentary on the harmless error rule has assumed that the desire to control police behavior would be a factor pulling the Court toward the automatic reversal standard.\textsuperscript{65} Recent opinions indicate that at least some members of the Court may be rejecting the use of appellate review as a deterrent device. In \textit{Bivens v. Six Unknown, Named Narcotics Agents},\textsuperscript{66} for example, Chief Justice Burger made a scathing attack on the inadequacies of the exclusionary rule as a deterrent device,\textsuperscript{67} noting the high social cost and limited effectiveness of excluding reliable evidence.\textsuperscript{68} A similar reaction might be expected to the automatic reversal rule as a deterrent of police behavior. To the extent that it controls prosecutorial and judicial behavior, however, the deterrent effect of appellate review should continue to be a factor.

\textsuperscript{61} In that it frees the guilty because the law officers have made a mistake. \textit{See generally} authorities and cases cited \textit{supra} note 5.

\textsuperscript{62} \textit{See generally} authorities cited \textit{supra} note 2.


\textsuperscript{64} \textit{See} F. \textit{GRAHAM}, \textit{supra} note 6, at 130–52.

\textsuperscript{65} \textit{See} Note, \textit{Criminal Procedure}, \textit{supra} note 3, at 954–57.

\textsuperscript{66} 403 U.S. 388 (1971).

\textsuperscript{67} \textit{Id.} at 411–27 (Burger, C.J., dissenting).

\textsuperscript{68} \textit{See} text and notes at notes 74–75 \textit{infra}. The same sort of argument could be made in regard to the effectiveness of the \textit{Miranda} requirements. \textit{See} F. \textit{GRAHAM}, \textit{supra} note 6, at 280–81.
Application for Harmless Error

B. Factors Favoring the Harmless Error Standard

The Court has recognized that society cannot ensure perfection, even in the application of constitutional guarantees: "[a] defendant is entitled to a fair trial, but not a perfect one." This approach becomes particularly important when the imperfection is one that can be caused even by well-intentioned officials, but does not inherently compromise the accuracy of the trial process. In such a situation, a strict approach to constitutional violations imposes intolerable costs on society. Reversal entails both the direct expense of a retrial and the social cost of freeing guilty men because of the difficulty of reconstructing a stale case. If the overwhelming evidence below supports a conviction, and the violation did not taint the accuracy or impartiality of the trier of fact's decision, a strong argument can be made that the defendant was given a fair trial.

Misapplication of the exclusionary rule fits the paradigm of an error that, although common, has little impact on the correctness of the trial result. The exclusionary rule has a long tradition in the federal system and error in its application requires reversal even if the evidence underlying the conviction is unquestionably reliable. This aspect of the rule has drawn immense criticism, which intensified after the rule was extended to the states. Many courts have echoed Cardozo's dissatisfaction with the idea that, although the untainted evi-

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70 The countervailing point, of course, is that in determining whether an error is harmless, appellate courts may make mistakes and send innocent men to jail. The use of the overwhelming evidence standard, and the limiting of the harmless error rule to rights not yielded as fundamental to the basic accuracy and fairness of the judicial process, however, limit this objection.


72 It was devised and applied to the federal courts in Weeks v. United States, 232 U.S. 383 (1914).


dence supports the conviction, "the criminal is to go free because the constable has blundered."76

In Chapman, Justice Stewart noted that there was a long tradition of no harmless constitutional error but suggested that in the case of the exclusionary rule the "interests of judicial economy might well dictate a harmless-error rule for such violations."77 Many lower courts had reviewed the violation by the harmless error rule78 before Chapman, and the Court has apparently agreed that harmless error is the proper standard.79

Occasionally judicial concern with preventing unnecessary retrials competes with other aspects of judicial economy. For example, one of the rationales of the Miranda warnings was to expedite judicial administration by precluding lengthy investigations into the voluntariness of statements given to the police. If Miranda violations were treated as coerced confessions and met with automatic reversal, this shortcut would be realized. Opportunities for Miranda violations are present, however, in nearly every criminal case, and can easily occur even when the statements given are completely voluntary. Lower courts have favored avoidance of retrials over the certainty provided by the use of automatic reversal in reviewing violations of the Miranda rule.80 Although it is premature to conclude that Miranda warnings use the harmless error rule, the Supreme Court will probably follow the lower courts’ lead.81

The problem of frequently recurring technical violations is especially acute when a newly announced protection is applied retroactively. When prior convictions are used at a subsequent trial and are then retroactively held unconstitutional, their use becomes a violation be-

77 386 U.S. 18, 44 n.2 (1967).
79 Chambers v. Maroney, 399 U.S. 42, 52-53 (1970). The Court said that if the admission of evidence seized from defendant’s house was error, it was harmless under Har- rington.
82 See Milton v. Wainwright, 407 U.S. 371 (1972). In that case the Supreme Court did not decide whether statements made to a police spy in defendant’s cell were taken in violation of Miranda, on the ground that even if a violation had occurred, it would have been harmless. At least one court of appeals has read the decision to mean that Miranda warnings use the harmless error rule. United States v. Faulkenbery, 472 F.2d 879 (9th Cir.), cert. denied, 411 U.S. 970 (1973).
cause of their prior invalidity.\textsuperscript{88} The Court in \textit{United States v. Tucker}\textsuperscript{84} faced a case where a prior conviction, only later held unconstitutional, had been used (when still valid) to increase a punishment. The Court did not require automatic reversal and found the error not harmless; the dissenters wished to find the error harmless on the grounds that other evidence in the record was sufficient to support the sentence imposed.\textsuperscript{85}

III. A Test for Automatic Reversal

A. Formulation of a Test

For a guarantee to be considered appropriate for the automatic reversal standard of review, it must be substantially fundamental, as manifested by the three indicia already discussed. Otherwise no amount of deterrent value could justify the social cost of retrial and inaccurate results, and the harmless error standard would be appropriate. If the right is substantially fundamental, the deterrent value of automatic reversal must be weighed against its social cost. Violations of a fundamental right should be reviewed under the harmless error standard only if this assessment suggests that automatic reversal would be extremely costly compared to a marginal deterrent value. Because of the long tradition of automatically reversing all constitutional errors, there is a presumption against the harmless error standard, and a strong case must be made for invoking it.

B. Applications of the Test

1. Impartial Trier of Fact. A defendant is constitutionally entitled to an impartial trier of fact. This guarantee has two components, an impartial judge in a bench trial and an impartial jury in a jury trial, which must be analyzed separately.

   The guarantee of an impartial judge is not explicit, although it might be implied from Article III. The right has, however, been guaranteed in the federal courts by statute since 1911,\textsuperscript{86} and in 1927 was held to be an essential element of fundamental fairness.\textsuperscript{87} The expres-

\textsuperscript{84} 404 U.S. 443 (1972).
\textsuperscript{85} Similarly, the use of an invalid prior conviction to impeach a witness has been held a violation of due process. Loper v. Beto, 405 U.S. 473 (1972). It is judged by the harmless error rule and is harmless when the witness is sufficiently impeached by other evidence. United States v. Faulkenbery, 472 F.2d 879 (9th Cir.), cert. denied, 411 U.S. 970 (1973).
\textsuperscript{86} 28 U.S.C. § 24 (1940), now, 28 U.S.C. § 455 (1970). Prior to 1948, the statute applied only to federal judges, and was then amended to include Supreme Court justices. See Evans v. Gore, 253 U.S. 245, 247–48 (1920), for a qualification of the judicial impartiality problem when there is only one proper tribunal and it has an interest.
\textsuperscript{87} Tumey v. Ohio, 273 U.S. 510 (1927).
sion of congressional intent and the historical tradition of this right strongly suggest its fundamentality. The deterrent value of the protection is also strong, because the behavior to be controlled is the behavior of trial judges, who are easily monitored by appellate courts, sensitive to reversal for error, and expected to understand the criteria established as constitutional requirements.

For this violation the factors that weigh against automatic reversal are weak. A judge who commits the error of hearing a case in which he holds a personal interest in conviction or animosity towards the defendant should not be considered capable of an objective consideration of the evidence. Reversal, therefore, would not adversely affect the policy of respecting accurate trial results whenever possible. The error is not likely to be common in the absence of a deliberate decision to hear inappropriate cases.

The guarantee of an impartial jury rests on explicit language in the Constitution, and bars from service jurors who have a direct interest in or knowledge of the case. Jurors who have knowledge of the facts and have framed an opinion as to the issue to be tried, or have some personal reason for prejudice towards the defendant have been the classic examples of jury bias requiring reversal.

The strong fundamentality of the right is complemented by the additional deterrence that automatic reversal on this error would provide. As in the case of protection against bias in bench trials, the guarantee of an impartial jury depends chiefly on the trial judge, who, for the reasons already discussed, can be expected to respond to reversal by intensifying his efforts to detect and avoid violations of the rights.

Reversal for jury bias is as necessary to accurate trial results as is reversal for judicial bias. The fact-finding process is undermined when jury prejudice perverts an objective view of the evidence. Many of the violations of the right are far from technical, for example, discriminatorily chosen venire. Insofar as violations of the right to an impartial jury are to be inferred from the judge's failure to ask certain questions on voir dire—for example, questions on possible race prej-

89 U.S. CONSTR. amend. VI. "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ."
92 Alexander v. Louisiana, 405 U.S. 625 (1972); Neal v. Delaware, 103 U.S. 370 (1881); Strauder v. West Virginia, 100 U.S. 303 (1880).
93 In Ham v. South Carolina, 409 U.S. 524 (1973), the Court held that it was a violation of due process for a judge to refuse to question jurors on voir dire as to possible racial
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udice—technical violations are possible. Nevertheless, the questions that are required are clear and easily understood by the judiciary. The right does not give rise to inadvertent violations such as may occur with regard to certain prosecutorial comments. On balance, the strong fundamentality of the right and its heavy deterrent value make a firm case for automatic reversal, and considerations of accuracy also seem to warrant that standard.

2. Prejudicial Publicity. Pervasive publicity that permeates the environment of a criminal trial with hostility towards the defendant and disturbs the "judicial serenity and calm"95 to which he is entitled has been held a denial of due process. This procedural safeguard is in effect an extension of the right to an impartial trier of fact—it protects the trier of fact from undue external influences. The constitutional protection from prejudicial publicity applies to pre-trial publicity,96 publicity during trial,97 and distracting behavior of media in the courtroom itself.98 It may be violated without a showing of actual prejudice.99

This guarantee lacks a strong showing of fundamentality. It has no explicit constitutional origin, but rather is derived from Anglo-American concepts of appropriate decorum. The historical development of constitutional safeguards shows this one to be of recent vintage. The protection from excessive publicity first appeared as a supervisory rule

94 For example, prosecutorial remarks implying that the defendant had offered to plead guilty to a lesser offense, followed by the trial court's specific disapproving instructions, have been held not to rise to the level of a constitutional violation. Donnelley v. DeChristoforo, 42 U.S.L.W. 4682 (U.S. May 13, 1974).
98 Id. at 542-44.
for federal courts in *Marshall v. United States*;\(^{100}\) and was applied to the states as a constitutional rule in *Rideau v. Louisiana*\(^{101}\) and *Estes v. Texas*.\(^{102}\)

In addition to its weak fundamentality, this guarantee casts upon the courts the burden of administering rules that are difficult to formulate and unlikely to be effective deterrents. A court's attempt to deter the media from overstepping the bounds of what the court considers legitimate comment may come into conflict with the first amendment and the defendant's right to a "public trial." The Supreme Court has stated that no court in the American constitutional system has the power "to suppress, edit or censor events which transpire in proceedings before it."\(^{103}\)

Thus the factors for automatic reversal status are weak. Moreover, the effect on the policy of preserving accurate trial results is substantial. Any case that is even locally "notorious" is susceptible to an intense media saturation, and therefore claims of violation would very likely be common. The defendant need not show any actual prejudice; thus if this guarantee were given automatic reversal status it could soon come to overturn an excessive number of convictions. The social cost would be augmented by the possibility of excessive restrictions on the press, and judicial concern with conservation of resources would be aroused by the possibility that, in a case of legitimately great public interest, on retrial the same media activity might occur. The more socially significant a case, the more "untriable" it would become. Against all of these cost factors, the only consideration that might weigh for automatic reversal is concern that the publicity did impermissibly influence the trier of fact. If the defendant can show actual prejudice\(^{104}\) on the part of the trier of fact, however, he can claim that his right to impartiality was violated and void the conviction under the automatic reversal standard.\(^{105}\) The publicity safeguard operates when no claim of actual prejudice can be made, and when the evidence is overwhelming for guilt, it can be assumed that the publicity is not likely to have swayed the jury. If the evidence in a case is unclear, the harmless error rule would, of course, require reversal. In light of this comparison of

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\(^{100}\) 360 U.S. 310, 313 (1959).

\(^{101}\) 373 U.S. 723 (1963).

\(^{102}\) 381 U.S. 552 (1965).

\(^{103}\) Craig v. Harney, 331 U.S. 367, 374 (1947) (Douglas, J.). Mr. Justice Black, because of his great concern for an absolute first amendment, often dissented in the publicity cases. See *The 1965 Term*, supra note 96, at 182-85.

\(^{104}\) E.g., in *Irvin v. Dowd*, 366 U.S. 717 (1961), two-thirds of the jurors on voir dire expressed belief in defendant's guilt. See also text and note at note 99 supra.

\(^{105}\) See text and notes at notes 89-95 supra.
factors, the harmless error standard ought to apply in cases in which there is no proof of a prejudiced trier of fact.\footnote{The Sixth Circuit seems to be the only circuit to have spoken on the question and it has applied the harmless error standard. United States v. Cimini, 427 F.2d 129, 130 (6th Cir. 1970); United States v. Barnes, 383 F.2d 287, 295 (6th Cir.), cert. denied, 389 U.S. 1040 (1967). In a related question, circuit courts have declared that it may be a violation of due process to try a defendant in prison garb. Bentley v. Crist, 469 F.2d 854 (9th Cir. 1972); Watt v. Page, 452 F.2d 1174 (10th Cir.), cert. denied, 405 U.S. 1070 (1972); Hernandez v. Beto, 443 F.2d 634 (5th Cir.), cert. denied, 404 U.S. 897 (1971). So far the courts of appeals have judged this violation by the harmless error rule, using the opportunity to lecture the lower court but affirming the convictions. See, e.g., Thomas v. Beto, 474 F.2d 981 (5th Cir. 1973); United States v. Moye, 487 F.2d 1399 (4th Cir. 1973) (decision without published opinion), Nos. 73-1489, 4th Cir., Nov. 28, 1973).}

3. *Statements by a Co-Defendant.* It is a constitutional violation for the state to introduce, in a joint trial, a statement by one defendant that implicates a co-defendant if the co-defendant refuses to take the stand and be subjected to cross-examination. This rule is a derivative safeguard inferred from the confrontation clause and thus is not very explicit. Traditionally the Court has not viewed the right as fundamental. Until the Court held this error incurable in 1968,\footnote{Bruton v. United States, 391 U.S. 123 (1968).} a cautionary jury instruction to disregard the statement as it applied to the defendant was sufficient to cure the error.\footnote{Delli Paoli v. United States, 352 U.S. 282 (1957).} Congress has not spoken on the subject except insofar as it continues to provide for joint trials. Thus the fundamentality of the right is not strong. Occasionally the revelation of the co-defendant's statement is spontaneous on the part of the testifying witness, and in such cases the futility of deterrence and the importance of conserving judicial resources warrant application of the harmless error rule. On the other hand, introduction of the co-defendant's implicating statement—whether by testimonial or documentary evidence—is usually deliberate and thus could be deterred. In no case, however, can the prosecutor foresee whether the co-defendant will take the stand. The automatic reversal standard would force the prosecutor to choose between foregoing joint trials or running a significant risk of reversal for an inadvertent error that, if there is overwhelming evidence of the defendant's guilt, is unlikely to affect the accurate measurement of the other evidence sufficiently to cause an incorrect result.

The right to have a trial free from incriminating statements of a co-defendant who is not available for cross-examination thus is of weak fundamentality, and the factors favoring the use of the harmless error standard are strong, suggesting that harmless error is the appropriate
standard. This has, indeed, been the standard used by the courts to review violations of this right.¹⁰⁹

CONCLUSION

The harmless error rule is a judicial attempt to harmonize the often conflicting policies that underlie criminal laws and constitutional safeguards in the trial process. The advantages of this less rigid posture will be wasted, however, unless the lower courts are able to find guidance for the choice of which standard to apply. This comment has suggested some guiding principles that seem both appropriate and implicit in the Supreme Court's present approach. The courts should analyze the fundamentality of the safeguards by examining their explicit constitutional support, legislative reinforcement, and historical weight. If this inquiry suggests that a right is fundamental, automatic reversal is appropriate unless the balancing of factors shows that automatic reversal would place an extremely high price on a minimal increase in constitutional protection.

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