Harmless Errors Are Harming Our Courts' Integrity: Empirical Lessons from Wrongful Convictions and the Case for Reform

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Abstract

Harmless error review has long been defended as a necessary tool for preserving finality and avoiding needless retrials. Yet, its modern application cannot be understood without returning to the doctrine's origins.

This article traces the development of harmless error from its English common-law beginnings, through the technical reversals of early American appellate practice, to the Supreme Court's layered constitutional framework. It chronicles how the history steadily shifts in focus: from an inquiry concerned with the effect of an error on a verdict to one increasingly centered on judicial assessments of the defendant's guilt. At the same time, empirical lessons from exonerations demonstrate how this modern, evidence-weighing approach can obscure the very types of errors more associated with wrongful convictions such as eyewitness misidentifications, false confessions, and unreliable forensic evidence.

By aligning the history with the data, this article shows that contemporary harmless error review has drifted from its original rationale and now too often operates at cross-purposes with accuracy. Proposals for realigning harmless error with reliable, thorough review, targeted remand hearings, and procedural reforms capable of accounting for how errors shape the evidentiary landscape, illustrate that appellate courts can more faithfully serve their intended role as safeguards against injustice.

Table of Contents

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Introduction

"A wretched soul, bruised with adversity,
We bid be quiet when we hear it cry;
But were we burdened with light weight of pain,
As much or more we should ourselves complain."

—William Shakespeare[1]

Any person accused of a crime is entitled to a fair trial, even if it is not a perfect one.[2] Any person convicted of a crime may appeal their conviction as a matter of right, and has a right to effective assistance of counsel in that appeal.[3] However, direct appeals rarely address claims of actual innocence.[4] Instead, courts tend to focus on errors during the trial, assessing those errors and their "harmlessness" based solely on the trial record.[5] This means that the likelihood of a reversal on direct appeal typically has no real connection to the likelihood of wrongful conviction.[6] While the current appeals system encourages adherence to trial procedures, it fails to serve as a safeguard against convicting the innocent.[7] The irony lies in the fact that the system is designed to sidestep factual questions, so appellate review standards obscure the issue of actual innocence.[8] Convincing an appellate court to seriously consider claims of factual error—such as a witness lying or making a mistake—is exceedingly

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[1] The Comedy of Errors, act 2, sc. 1, 34–37 (Paul Negri & Susan L. Rattiner eds., Dover Publications, Inc 2002).

[2] Lutwak v. United States, 344 U.S. 604, 619 (1953).

[3] *See, e.g.*, Griffin v. Illinois, 351 U.S. 12, 18–20 (1956) (holding that a state must provide indigent defendants the basic tools for appeal as of right); Douglas v. California, 372 U.S. 353, 357–58 (1963) (recognizing the right to counsel on first appeal as of right); Evitts v. Lucey, 469 U.S. 387, 396–97 (1985) (extending that right to the effective assistance of counsel).

[4] Helen A. Anderson, *Revising Harmless Error: Making Innocence Relevant to Direct Appeals*, 17 Tex. Wesleyan L. Rev. 391, 391–92 (2011).

[5] *See, e.g.,* Chapman v. California, 386 U.S. 18, 24 (1967) (requiring courts to declare a belief that constitutional error was harmless beyond a reasonable, based on the trial record); Brecht v. Abrahamson, 507 U.S. 619, 637 (1993) (holding that habeas courts ask whether trial error had a "substantial and injurious effect or influence" on the jury's verdict); Daniel Epps, *Harmless Errors and Substantial Rights*, 131 Harv. L. Rev. 2117, 2123–25 (2018) (explaining that harmless error review assesses whether trial errors affected the verdict, relying solely on the trial record).

[6] Anderson, *supra* note 4, at 392.

[7] *Id.*

[8] *See* Herrera v. Collins, 506 U.S. 390, 400–01 (1993).

difficult, if not impossible.[9] In Professor Brandon Garrett's study of 200 exonerees whose innocence was proven through post-conviction DNA testing, very few had raised claims of factual innocence during their appeals, and fewer still found success with those claims.[10] Instead, many raised evidentiary and procedural challenges, which were subjected to harmless error review.

Some scholars have proposed reforms that would make appeals more relevant to questions of innocence.[11] This article concentrates on one potential reform to appellate review that could improve the chances of relief for innocent defendants: harmless error analysis. When courts evaluate whether an error was harmless, they come closest to considering questions of innocence on appeal. Although the original focus of harmless error review was on whether an error impacted the verdict, over time, courts have shifted to evaluating whether the defendant was actually guilty—an evolution from what some describe as an "effect-on-the-verdict" approach to a "guilt-based" approach.[12] Yet, even when reviewing the strength of the evidence under various harmless error standards, appellate courts do not adequately factor in what we've learned about wrongful convictions through DNA exonerations.

According to the Innocence Project, the leading cause of wrongful convictions is eyewitness misidentification, followed by unvalidated or improper forensic science, false confessions, and incentivized informants.[13] Unfortunately, current harmless error standards often run contrary to these findings, both in the thresholds required for determining harmlessness and in how courts apply those standards.

I. Wrongful Convictions

These individual stories are not isolated anomalies. Each illustrates a broader pattern revealed by exonerations nationwide, and each case experienced harmless error review.

This section delves into how exonerees ultimately secured DNA tests that led to their exonerations, shedding light on how these errors in justice were eventually corrected. DNA exonerations were selected as empirical data so as not to cloud the analysis with tangential disputes over the exonerees' guilt. These findings underscore that the exonerees represent only a fraction

[9] Brandon L. Garrett, *Judging Innocence*, 108 Colum. L. Rev. 55, 99–100 (2008). Garrett updated his findings through 2010 in his book. *See* Brandon L. Garrett, Convicting the Innocent: Where Criminal Prosecutions Go Wrong (Harvard Univ. Press 2011).

[10] *Id.*

[11] *See, e.g.,* Anderson, *supra* note 4, at 392; David S. Medwed, *Up the River Without a Procedure: Innocent Prisoners and Newly Discovered Non-DNA Evidence in state Courts*, 47 Ariz. L. Rev. 655, 660–61 (2005); Keith A. Findley, *Defining Innocence*, 74 Alb. L. Rev. 1157, 1165–66 (2011); Nancy J. King & Joseph L. Hoffman, *Habeas for the Twenty-First Century: Uses, Abuses, and the Future of the Great Writ* (Univ. of Chi. Press 2011).

[12] Anderson, *supra* note 4, at 392; Epps, *supra* note 5, at 2223–25.

[13] The Innocence Project, *Contributing Factors to Wrongful Convictions*, https://innocenceproject.org/the-issues/ [https://perma.cc/9Q92-GHR9] (last visited Aug. 28, 2025) (identifying eyewitness misidentification, misapplication of forensic science, false confessions, unreliable informants, and official misconduct as leading causes of wrongful convictions).

of wrongfully convicted individuals, as we are aware only of cases where DNA testing was pursued and successfully obtained. Even when DNA technology became available, legal and procedural hurdles were put in place, making it difficult to access testing, with courts often refusing to grant relief even when the results proved innocence. These cases illustrate the continued reluctance of the criminal justice system to rectify wrongful convictions.

A. DNA Exonerations as Empirical Evidence

First, DNA evidence is simply not available or useful in the majority of criminal cases. For DNA testing to demonstrate identity, there must be biological material left at the crime scene by the perpetrator, and in most cases, no such evidence exists.[14] Further, DNA testing can only be performed if such evidence was properly preserved after trial. Despite its potential to exonerate, DNA evidence is frequently not maintained.[15] Law enforcement typically only collects biological evidence in cases involving murder or rape, where it is deemed particularly relevant.[16] Furthermore, police and prosecutors have little incentive to ensure proper evidence preservation. One example: in 1989, the Supreme Court ruled in Larry Youngblood's case that he could not obtain relief because he could not show that the police had acted in bad faith when they mishandled and improperly stored biological evidence, resulting in its degradation.[17] By 2000, DNA technology had advanced enough to test this degraded evidence, which not only exonerated Youngblood but also matched another individual through a "hit."[18] Seventeen exonerees raised claims concerning the destruction of exculpatory evidence during their appeals, but none succeeded.[19] However, like Youngblood, they were later able to test degraded evidence or find other material suitable for DNA testing.

Second, even when relevant DNA evidence exists, prisoners may not always gain access to testing. The criminal justice system has long been

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[14] *See* Seth F. Kreimer, *Truth Machines and Consequences: The Light and Dark Sides of 'Accuracy' in Criminal Justice*, 60 N.Y.U. Ann. Surv. Am. L. 655, 658–59 (2005); Kayleigh E. McGlynn, *Remedying Wrongful Convictions Through DNA Testing: Expanding Post-Conviction Litigants' Access to DNA Database Searches to Prove Innocence*, 60 B.C. L. Rev. 709, 718 n.58 (2019) (citing Garrett, Convicting the Innocent, *supra* note 9); Emily West & Vanessa Meterko, *Innocence Project: DNA Exonerations 1989–2014: Review of Data and Findings from the First 25 Years*, 79 Alb. L. Rev. 717, 722 (2016).

[15] Richard A. Rosen, *Innocence and Death*, 82 N.C.L. Rev. 61, 73 (2003) ("[F]or every defendant who is exonerated because of DNA evidence, there have been certainly hundreds, maybe thousands" without any such physical evidence.). In some cases, DNA evidence has not only been used to exonerate, but also to identify the true perpetrators. *See* Cynthia E. Jones, *Evidence Destroyed, Innocence Lost*: *The Preservation of Biological Evidence Under Innocence Protection Statutes*, 42 Am. Crim. L. Rev. 1239, 1267, n.133 (2005).

[16] *See* McGlynn, *supra* note 14 at 718, n.58 (citing Garrett, Convicting the Innocent, *supra* note 9, at 12) (explaining that DNA is rarely present at most crime scenes but commonly present in rape cases); *id.* at 263 (observing that DNA testing is typically performed in rape cases); *id.* at 271 (explaining why DNA testing is generally unavailable in robbery cases).

[17] Arizona v. Youngblood, 488 U.S. 51, 57–59 (1988).

[18] *See Larry Youngblood*, The Innocence Project, https://innocenceproject.org/cases/larry-youngblood/ [https://perma.cc/8E86-5EEG] (last visited Aug. 4, 2024).

[19] Garrett, *Judging Innocence*, *supra* note 9, at 117.

resistant to postconviction claims of innocence, particularly requests for DNA testing.[20] Sixteen exonerees, for example, were initially denied motions for DNA testing (some multiple times), with courts often citing evidence of guilt as justification.[21] In one such case, involving Bruce Godschalk, the court rejected DNA testing because his conviction rested largely on his own confession, which contained details of crimes that were not publicly known.[22] While this practice is slowly changing, it is not due to a widespread reevaluation of when postconviction discovery should be granted.[23] Instead, legislative action has driven change, as forty-four jurisdictions have now passed laws granting a right to postconviction DNA testing.[24] Most of these laws were passed within the past five years, though many still impose significant obstacles to obtaining DNA testing and subsequent relief.[25] Without a specific statute or court order, securing DNA testing can often depend solely on the willingness of law enforcement to consent to it.[26]

Despite the barriers they faced, these 200 exonerees eventually secured DNA testing and had their convictions vacated.[27] To understand how DNA testing allowed these exonerees to prove their innocence, data was compiled on how they requested testing.[28] 158 exonerees (seventy-nine percent) sought DNA testing by contacting innocence projects or other postconviction attorneys.[29] While innocence projects do not pursue testing for every prisoner who reaches out, organizations like the Innocence Project pursue testing in any case where DNA evidence exists and could prove relevant.[30] Twenty-three exonerees (twelve percent) initiated the process pro se, by filing petitions in states where statutes or court decisions allowed for postconviction DNA testing, or by independently seeking legal assistance.[31]

Law enforcement also played a role in some exonerations. In twenty-two cases (twelve percent), DNA testing was initiated by police, prosecutors, or

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[20] *Compare* Herrera v. Collins, 506 U.S. 390 (1993) (holding that a claim of actual innocence based on newly discovered evidence alone is not a ground for federal *habeas corpus* relief in a non-capital case, absent an independent constitutional violation); Schlup v. Delo, 513 U.S. 298 (1995) (stating that allowing an actual innocence claim should not be used as a "gateway" to constitutional errors at trial) *with* McQuiggin v. Perkins, 569 U.S. 383 (2013) (proven claims of actual innocence can serve as an exception to the one-year statute of limitations for federal habeas petitions under the Antiterrorism and Effective Death Penalty Act).

[21] Garrett, *Judging Innocence*, *supra* note 9, at 117.

[22] Commonwealth v. Godschalk, 679 A.2d 1295, 1297 (Pa. Super. Ct. 1996).

[23] Brandon L. Garrett, *Claiming Innocence*, 92 Minn. L. Rev. 1629, 1652–60 (2008).

[24] *Id.* at 1655.

[25] *See* Kathy Swedlow, *Don't Believe Everything You Read: A Review of Modern "Post-Conviction" DNA Testing Statutes*, 38 Cal. W. L. Rev. 355 (2002).

[26] Seth F. Kreimer & David Rudovsky, *Double Helix, Double Bind: Factual Innocence and Postconviction DNA Testing*, 151 U. Pa. L. Rev. 547, 554 (2002).

[27] *See* Barry Scheck & Peter Neufeld, *200 Exonerated: Too Many Wrongfully Convicted* 1, The Innocence Project (Jul. 7, 2007), http://www.innocenceproject.org/wp-content/uploads/2016/10/ip_200.pdf [https://perma.cc/RK9V-WZ8A] (last visited Apr. 8, 2026) (citing calculations of various wrongful conviction experts).

[28] Garrett, *Judging Innocence*, *supra* note 9, at 78.

[29] *Id.*

[30] *See About*, The Innocence Project, https://innocenceproject.org/about [https://perma.cc/YCL6-37PG] (last visited Aug. 20, 2024).

[31] Garrett, *Judging Innocence*, *supra* note 9, at 118.

the FBI.[32] This occurred either through projects aimed at testing backlogged evidence, programs to retest cases involving misconduct by forensic scientists, during unrelated criminal investigations, or, in one instance, based on an anonymous tip. In these cases, the state informed the exoneree that DNA testing had exonerated them.

A significant benefit of these DNA exonerations is that seventy-four of them (thirty-seven percent) also led to the identification of the true perpetrator, demonstrating a substantial public safety benefit.[33] This aspect of DNA exonerations is often underappreciated, but it should weigh heavily in cost-benefit analyses regarding resources for preventing wrongful convictions.[34] In forty-nine cases, the real perpetrator was identified through a "cold hit" in a DNA database.[35] In two other cases, the true perpetrator was found through other means, such as the actual perpetrator coming forward and being tested. Still, in the remaining 126 cases, the true culprit remains unidentified.[36]

Contrary to what some may believe, not all of these exonerees aggressively pursued their innocence from the start. Many exonerees waited years before seeking DNA testing, serving an average of twelve years before being exonerated, with a combined total of 2,475 years served.[37] Most of the 200 exonerees were freed long after DNA testing was available.[38]

The reason for the delays varies. Many exonerees struggled to obtain access to DNA testing without the cooperation of law enforcement. In seventy-one of the 200 exonerations (thirty-six percent), the exoneree had to apply for a court order to access testing.[39] In twenty-four of these instances, testing was granted pursuant to a state statute providing for postconviction DNA testing, as states have increasingly enacted such laws.[40] Most notably, in 119 of the cases (sixty percent), the exoneree obtained DNA testing through the consent of law enforcement or prosecutors. This highlights the important role law enforcement has played in helping to correct wrongful convictions. However, in some instances, access to testing came only after a court reversed the conviction or was planning to order testing. In around half of the cases, law enforcement initially refused to cooperate, and the exonerees had to rely on other avenues to secure DNA testing. These findings underscore the need for more expansive access to postconviction DNA testing.

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[32] *Id.*

[33] *Id.* at 119.

[34] *See* Jones, *supra* note 15, at 1267.

[35] Law enforcement can use the Combined DNA Index System (CODIS) to search for a DNA match, often referred to as a "cold hit." This system combines DNA databases from all 50 states with a federal database established by the FBI in 1990. CODIS allows for the comparison of DNA samples across a vast pool of data to help identify suspects. For more details about the program, see the FBI's CODIS Mission Statement and background, as well as information about participating states.

[36] *See* Scheck & Neufeld, *supra* note 27, at 40–41.

[37] *See id.* at 2–41.

[38] *See id.*

[39] *Id.* At a minimum, the figure is seventy-one exonerees. This is because information on how DNA testing was acquired was unavailable in the media for all of the 200 documented exonerees.

[40] Garrett, *Judging Innocence*, *supra* note 9, at 119.

Once DNA test results were obtained, the incarcerated exonerees were finally released. Nevertheless, for reasons unknown, some exonerees experienced further delays before their release. Twelve exonerees were convicted at trial despite the existence of DNA evidence at the time of trial that excluded them; they were later exonerated after further DNA testing identified another person.[41] Others obtained DNA testing during their appeals but lacked a judicial forum to argue that actual innocence should be grounds for vacating their convictions. In one example, at least twelve exonerees were denied relief by courts even though preliminary DNA test results excluded them; each was eventually exonerated through an executive or higher court granting relief.[42] Forty-one exonerees (twenty-one percent) received a pardon from their state's executive, often due to the lack of available judicial relief.[43] Only two exonerees received DNA testing and vacatur through federal habeas corpus. The majority received vacatur in state courts, typically based on newly discovered evidence of innocence. For some, even when DNA evidence proved their innocence, the judicial system was either unwilling or unable to provide an immediate remedy.[44]

B. Case Studies

A ruling of harmless error may involve a conclusion that the error had no effect on the jury due to the strength of other evidence, though the Court has explicitly warned against applying harmless error analysis in this incorrect manner.[45] Among exonerees with written decisions, thirty-two percent had courts rule an error harmless, and sixteen percent had claims acknowledged as valid, yet relief still denied based on harmless error.[46] This applied to about one-third of the sixty cases where the court found merit in the claim.

For the 200 exonerees documented by the Innocence Project, fewer saw such rulings on appeal: twenty-six percent had courts deem errors harmless,

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[41] An illustrative case is that of Leonard McSherry, who presented DNA test results in 1988 prior to sentencing, which excluded him as a match, but the trial court denied his motion for a new trial. In 1991, more advanced PCR testing—which was unavailable in 1988—also excluded McSherry, but the California appellate court still deemed the evidence of guilt to be "overwhelming." People v. McSherry, 14 Cal. Rptr. 2d 630, 633–36 (Ct. App. 1992). The court stressed the victim's identification and detailed descriptions of the perpetrator's house, which matched McSherry's. It concluded that the scientific test showing he was not the source of the semen on the victim's panties did not entirely discredit the prosecution's case or definitively prove innocence. *Id.* at 636. McSherry was eventually released in 2001 after another round of DNA testing excluded him and matched a convict from the DNA database through a "cold hit." *See also* Daniel Hernandez & Monte Morin, *Man is Cleared in 1 Case, but Jailed in another*, L.A. Times, (May 1, 2003).

[42] These include J. Watkins, J. Restivo, L. McSherry, J. Kogut, D. Hunt, L. Holdren, A. Hicks, D. Halstead, C. Elkins, W. Dedge, R. Criner, and S. Avery. Garrett, *Judging Innocence*, *supra* note 9, at 120 n.51.

[43] Garrett, *Judging Innocence*, *supra* note 9, at 120.

[44] Garrett, *supra* note 23, at 1674.

[45] The predominant application of harmless error doctrine requires the state to demonstrate that the trial error did not affect the outcome. *See* Jason M. Solomon, *Causing Constitutional Harm: How Tort Law Can Help Determine Harmless Error in Criminal Trials*, 99 Nw. U. L. Rev. 1053, 1085–98 (2005).

[46] Garrett, *Judging Innocence*, *supra* note 9, at 108.

eleven percent had courts agree the claim had merit but still find the error harmless, and nine percent saw courts conclude both that the claim lacked merit and that any error was harmless.[47] Moreover, eight percent had courts describe the evidence against them as "overwhelming."[48] A close look at these cases reveals the damage caused by harmless error review in dismissing defendants' claims.

1. Ron Williamson

Ron Williamson was convicted in 1988 for the murder of Debra Sue Carter, which occurred in 1982.[49] The prosecution's case against Williamson relied on forensic evidence, informant testimony, and statements made by Williamson, including an account that prosecutors characterized as a confession in the form of a dream.[50] Williamson was sentenced to death and spent eleven years on death row.[51] His conviction was vacated in 1999 after DNA testing conclusively proved that neither Williamson nor his co-defendant, Dennis Fritz, had been involved in the crime. The DNA results instead identified Glenn Gore, a key prosecution witness at the original trial, as the actual perpetrator.[52]

In *Williamson v. State*, the Court of Criminal Appeals of Oklahoma addressed multiple legal issues raised on appeal, including the admission of hair comparison evidence and the application of the harmless error doctrine.[53] The court found that while certain errors occurred at trial—most notably, the reliance on forensic techniques later deemed unreliable—these errors did not rise to the level of prejudicial error under the law as it stood at the time.[54] Specifically, the court reasoned that the errors were outweighed by what it viewed as corroborative evidence, such as Williamson's purported confession and other circumstantial evidence presented by the State.[55] As a result, the court concluded that the errors were harmless and did not undermine the validity of the conviction.[56]

The later exoneration of Williamson through DNA evidence ultimately demonstrated that the harmless error analysis employed by the court failed to account for critical flaws in the State's case. Even more significant, the subsequent identification of the actual perpetrator underscores the importance of continually revisiting the reliability of convictions in light of advancements in forensic science and the evolving understanding of evidentiary standards.

[47] *Id.* at 109.
[48] *Id.*
[49] *Ron Williamson*, The Innocence Project https://innocenceproject.org/cases/ron-williamson/ [https://perma.cc/7B9V-XURE] (last visited Aug. 3, 2024).
[50] *Id.*
[51] *Id.*
[52] *Id.*
[53] Williamson v. State, 812 P.2d 384, 391 (Okla. Crim. App. 1991).
[54] *Id.* at 391–92.
[55] *Id.* at 397.
[56] *Id.*

2. *James Tillman*

James Tillman was convicted in 1989 for the January 1988 kidnapping, robbery, sexual assault, and assault of a woman in Hartford, Connecticut.[57] The conviction was based largely on the victim's eyewitness identification and on flawed forensic serological evidence.[58] The victim, who was white, identified Tillman, an African-American man, as her assailant.[59] Serological testing at trial suggested that Tillman could have been a contributor to the biological material found on the victim's clothing, but the analyst did not account for the possibility of degradation, which could have affected the results.[60] DNA testing was not available at the time to conclusively exclude or confirm Tillman's involvement.[61]

In 2006, with the assistance of the Connecticut Innocence Project, advanced DNA testing conclusively excluded Tillman as the source of the semen found on the victim's clothing.[62] This testing, conducted on biological evidence that had been preserved for nearly two decades, led to the vacatur of Tillman's conviction in June 2006.[63] Further testing confirmed that the semen on the victim's clothing came from a single source, but not from Tillman. On July 11, 2006, all charges against Tillman were dropped, and he was fully exonerated after serving sixteen years in prison.[64]

In *State v. Tillman*, the Connecticut Supreme Court addressed several issues on appeal, including jury selection and jury instructions.[65] Tillman contended that the *venire* from which his jurors were selected was unconstitutionally discriminatory, claiming that the selection process underrepresented black males and Hartford residents.[66] The trial court rejected these claims, and the appellate court affirmed, holding that Tillman had not presented sufficient evidence to demonstrate systematic exclusion.[67]

Tillman also challenged the trial court's jury instructions regarding the victim's identification of him as the perpetrator.[68] While acknowledging that the victim had been under significant stress during the assault, the court concluded that the trial court's instructions were adequate and did not prejudice the defendant.[69] The court applied the harmless error doctrine, determining

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57 *James Tillman*, The Innocence Project, https://innocenceproject.org/cases/james-tillman/ [https://perma.cc/JY6B-W2H2] (last visited Aug. 3, 2024).

58 *Id.*

59 *Id.*

60 *Id.*

61 *Id.* The use of DNA evidence in criminal trials first emerged in the late 1980s but did not become prevalent in criminal cases until the early 1990s. *See* Richard A. Nakashima, *DNA Evidence in Criminal Trials: A Defense Attorney's Primer*, 74 Neb. L. Rev. 444, 444 (1995).

62 *Connecticut Innocence Project*, Conn.'s Off. State Website, https://portal.ct.gov/ocpd/innocence-project/connecticut-innocence-project [https://perma.cc/RW9P-AXUW] (last visited Aug. 4, 2024).

63 *Id.*

64 *Id.*

65 State v. Tillman, 600 A.2d 738, 740–41 (Conn. 1991).

66 *Id.*

67 *Id.* at 742.

68 *Id.* at 749.

69 *Id.* at 744–45.

that even if there had been an error in the jury instructions, it would not have changed the outcome of the trial.[70]

However, the subsequent DNA testing, which conclusively excluded Tillman as the source of the biological evidence, belied the court's harmless error analysis. The DNA evidence demonstrated that the errors made during the trial—errors that had once been deemed harmless—had in fact contributed to the conviction of an innocent man.[71]

3. *Christopher Tapp*

Christopher Tapp was convicted in 1998 for the 1996 murder and rape of Angie Dodge in Idaho Falls, Idaho.[72] Tapp's conviction was based largely on a confession obtained after several lengthy interrogations, during which he was subjected to a series of polygraph tests and provided with details of the crime by police.[73] Despite DNA evidence excluding Tapp and another suspect, Benjamin Hobbs, as the source of semen found at the crime scene, Tapp's confession led to his conviction.[74]

Tapp entered multiple immunity agreements with the prosecution, but these agreements were voided after his statements were deemed inconsistent with the evidence.[75] Over time, Tapp changed his account of the events several times, eventually implicating himself, Hobbs, and another unidentified person.[76] Later DNA testing excluded both Tapp and Hobbs as contributors to the biological evidence.[77] In 2017, Tapp's rape conviction was vacated as part of a deal that reduced his sentence to time served.[78] In 2019, after advances in genetic genealogy led to the identification and confession of the actual perpetrator, Brian Dripps, Tapp was fully exonerated.[79]

In *State v. Tapp*, the Idaho Court of Appeals addressed several issues raised on appeal, including challenges to the admissibility of Tapp's confession and the voiding of his immunity agreement.[80] Tapp argued that his confession was coerced and that his rights under *Miranda* had been violated, and the court agreed.[81] The court acknowledged that some aspects of Tapp's interrogation may have been problematic, citing "doubt that the system under which

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[70] *Id.* at 745. Connecticut's harmless error rule shifts the burden onto defendants and required Tillman to show "that it was reasonably probable" that the error impacted the outcome. State v. Shifflett, 508 A.2d 748, 766–67 (Conn. 1986).

[71] *See* The Innocence Project, *supra* note 57.

[72] *Christopher Tapp*, The Innocence Project, https://innocenceproject.org/cases/christopher-tapp [https://perma.cc/PKB5-4NX4] (last accessed Aug. 5, 2024).

[73] *Id.*

[74] *Id.*

[75] *Id.*

[76] State v. Tapp, 33 P.3d 828, 831 (Idaho Ct. App. 2001).

[77] The Innocence Project, *supra* note 72.

[78] *Id.*

[79] *Id.*

[80] *Tapp*, 33 P.3d at 832.

[81] *Id.* at 835.

Tapp was interviewed afforded the cushion from 'inherently compelling pressures' that *Miranda* and its progeny require."[82]

However, the court held that any error in admitting Tapp's confession was harmless in light of other evidence, including his repeated admissions during later interviews and the details of his involvement in the crime.[83] The court also found that the State was justified in voiding the immunity agreement due to inconsistencies between Tapp's statements and the DNA evidence.[84] Despite these rulings, the DNA evidence that eventually exonerated Tapp demonstrated that the harmless error analysis had failed to account for the coercive nature of the interrogations and the unreliability of the confession.[85]

C. Errors in Cross-Racial Eyewitness Misidentifications

Seventy-nine percent of wrongful convictions involve eyewitness misidentifications—specifically, 158 out of 200 cases.[86] Although less than one third of rape cases involve assaults committed by strangers, nearly all wrongful conviction cases based on eyewitness identifications involved strangers, with only eight cases involving misidentification by acquaintances.[87] In sixty-eight percent of cases, the identification was provided by the victim, while in seventeen percent, a non-victim eyewitness provided testimony, sometimes alongside the victim's identification.[88] In twenty-eight percent, the victim's testimony was the key evidence leading to the conviction.[89]

It is not surprising that many of these cases involve eyewitness identification errors, as the prosecution of stranger rape cases typically hinges on the victim's identification of a perpetrator they had never encountered before. Without such identification, it would be difficult to proceed, particularly in the absence of DNA evidence. In fact, of the 141 rape cases known by the Innocence Project to have resulted in wrongful convictions, eighty-nine percent involved victim identifications. Notably, 126 out of the 158 total erroneous eyewitness identifications compiled by the Innocence Project occurred in rape cases.[90]

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[82] *Id.*

[83] *Id.* at 839-40 ("Having concluded that Tapp's statements to police given on January 15, 17, 30, and 31 were taken in violation of his Fifth Amendment right to counsel, we must determine whether the erroneous admission of these statements necessitates a new trial or constitutes harmless error . . .").

[84] *Id.* at 834.

[85] *See* The Innocence Project, *supra* note 72.

[86] Garrett, *Judging Innocence*, *supra* note 9, at 78–79.

[87] Cathy Maston & Patsy Klaus, *Criminal Victimization in the United Sates, 2005 Statistical Tables*, U.S. Dep't of Just., Bureau of Just. Stat. 34(b) (2006), https://bjs.ojp.gov/content/pub/pdf/cvus05.pdf [https://perma.cc/4XGG-PXWJ].

[88] Garrett, *Judging Innocence*, *supra* note 9, at 79.

[89] *Id.*

[90] *See* Scheck & Neufeld, *supra* note 27, at 14.

II. The Evolution of Harmless Error

A. English Common Law Origins

The harmless-error doctrine has its roots in English common law, where early appellate practice wrestled with whether procedural defects should always mandate reversal or whether some errors could be excused.[91] In English appellate courts of the early nineteenth century, a prevalent rule was that any deviation from form or procedure required reversal, regardless of the substantive result.[92] Historical examinations of its evolution often begin with the 1835 decision in *Crease v. Barrett*, where the Court of the Exchequer sought to curtail the then-common practice of English appellate courts affirming judgments merely because they believed the right result had been reached.[93] Over time, *Crease* became symbolically associated an era in which English courts reversed almost any judgment tainted by error, even trivial ones.[94] Appellate review was a technical application of harmless error doctrine in both criminal and civil cases.[95]

In 1873, Parliament enacted the Judicature Act with the goal of restraining appellate courts from this technical application.[96] Reversal or vacatur would then be appropriate only when the losing party was truly wronged.[97] The Act did not change judicial behavior, and appellate courts continued to vacate judgments even for minor irregularities. [98]

In 1907, Parliament tried again, this time with the Criminal Appeal Act.[99] This law went further by instructing that criminal appeals should be dismissed if "no substantial miscarriage of justice has actually occurred."[100] English judges largely disregarded the statute too, continuing their frequent

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[91] Roger A. Fairfax Jr., *A Fair Trial, Not a Perfect One: The Early Twentieth-Century Campaign for the Harmless Error Rule*, 93 Marq. L. Rev. 433, 436–38 (2009).

[92] Roger J. Traynor, The Riddle of Harmless Error 4 (1970). Justice Traynor critiques the judiciary's use of the harmless error doctrine, cautioning against an approach that diminishes the rights of litigants under the guise of judicial efficiency. Traynor underscores the importance of substantive fairness, advocating for a judicious scrutiny of errors that may seem innocuous but could corrode public trust in the justice system. *Id.*; *see also* Amanda M. Chaves, *The Doctrine of Harmless Error in Criminal Cases in Massachusetts*, 18 Suffolk J. Trial & App. Advoc. 282, 286 (2013).

[93] Crease v. Barrett, 149 Eng. Rep. 1353, 1359 (Ex. 1835).

[94] Fairfax, *supra* note 91, at 435.

[95] *See* Traynor, *supra* note 92, at 4–8 (citing 1 J. Wigmore, Evidence § 21, at 368 (3d ed. 1940)). Justice Traynor took issue with the portrayal of *Crease* as establishing a rule of near automatic reversal. He attributed this misrepresentation not to the decision itself, but to later English rulings that failed to accurately convey what *Crease* actually held. Compounding the error, John Henry Wigmore, in his seminal treatise on evidence, accepted these flawed interpretations without question, further entrenching the misunderstanding within the legal canon. *Id.*

[96] *Id.* at 8–9 (citing Supreme Court of Judicature Act 1873, 36 & 37 Vict., c. 66, § 48 (Eng.)); *see also* Fairfax, *supra* note 91, at 435.

[97] Traynor, *supra* note 92, at 8–9.

[98] Fairfax, *supra* note 91, at 435–37; Traynor, *supra* note 92, at 9–10.

[99] Fairfax, *supra* note 91, at 435.

[100] Criminal Appeal Act 1907, 7 Edw. 7, c. 23, § 4 (Eng.) ("Provided that the court may, notwithstanding that they are of [the] opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if they consider that no substantial miscarriage of justice has actually occurred.").

reversals for technicalities.[101] This had widespread effects, given that English double jeopardy principles precluded retrial after a criminal conviction had been reversed.[102]

Across the Atlantic, in the late nineteenth and early twentieth centuries, American appellate courts mirrored their English counterparts.[103] Reversals were routine, and retrials frequent.[104] Courts were criticized for their excessive focus on technical errors, towering over criminal trials with a fixation on procedural missteps.[105] The U.S. Supreme Court, in its 1946 decision *Kotteakos v. United States*, captured the essence of the era: "So great was the threat of reversal, in many jurisdictions, that criminal trial became a game for sowing reversible error in the record, only to have repeated the same matching of wits when a new trial had been thus obtained."[106]

B. Early American Practice and Legislative Reform

This hyper-technical approach to criminal trials spurred legislative reform at both the federal and state levels, led by prominent figures within the legal profession and academic circles.[107] In 1919, following extensive debate and reflection, Congress passed a federal statute concerning harmless error, found in § 269 of the Judicial Code.[108] The statute set forth the following:

> On the hearing of any appeal, certiorari, writ of error, or motion for a new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties.[109]

By 1926, eighteen states had passed laws instructing their appellate courts to disregard errors deemed harmless, with another ten states adopting similar guidelines through judicial rulings.[110] Despite these initiatives, the reforms failed to produce the desired effect, as appellate courts in the U.S. continued to reverse and vacate judgments at a significant rate over the next twenty years.[111]

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[101] John M. Greabe, *The Riddle of Harmless Error Revisited*, 54 Hous. L. Rev. 59, 67 (2016).

[102] *Id.*

[103] *See* John M. Greabe, *Spelling Guilt Out of a Record? Harmless-Error Review of Conclusive Mandatory Presumptions and Elemental Misdescriptions*, 74 B.U. L. Rev. 819, 823 (1994).

[104] Marcus A. Kavanagh, *Improvement of Administration of Criminal Justice by Exercise of Judicial Power*, 11 A.B.A. J. 217, 222 (1925) (quoting Kotteakos v. United States, 328 U.S. 750, 759 (1946)).

[105] *Id.* at 222.

[106] Kotteakos, 328 U.S. at 759.

[107] Roger A. Fairfax, Jr., *Harmless Constitutional Error and the Institutional Significance of the Jury*, 76 Fordham L. Rev. 2027, 2038–40 (2008); *see Kotteakos*, 328 U.S. at 758–60 & nn. 10–14 (listing examples of the extent to which there were legislative efforts to reform).

[108] 28 U.S.C. § 391 (1940) (repealed 1948).

[109] *Id.*; Act of Feb. 26, 1919, ch. 48, 40 Stat. 1181, *repealed by* Act of Jun. 25, 1948, ch. 646, § 39, 62 Stat. 892, 998.

[110] *See* Greabe, *supra* note 103, at 823 n.23 (citing Wayne R. LaFave & Jerold H. Israel, Criminal Procedure § 26.6(a) (1984)).

[111] *See* Fairfax, *supra* note 107, at 2034.

In the 1940s, however, both Congress and the Supreme Court took further action to tighten the application of harmless-error review.[112] Congress facilitated this shift by approving the Federal Rules of Criminal Procedure, which included a harmless-error clause echoing the language of the 1919 federal statute, but which notably left out the term "technical" before "errors."[113] The Supreme Court, in *Kotteakos*, offered the first substantial explanation of how courts should handle harmless-error assessments under the 1919 law.[114]

C. Kotteakos *and the "Substantial and Injurious Effect Test"*

In *Kotteakos*, the petitioners had been convicted of a single conspiracy under the National Housing Act, although, as the government conceded on appeal, the evidence revealed multiple conspiracies—eight or more—centered around a common figure.[115] The issue at hand was whether this discrepancy between the single conspiracy charged in the indictment and the many conspiracies proven at trial was a mere technical error or an issue that affected substantial rights of the parties, as outlined in the harmless-error statute.[116] The Supreme Court ruled that this error did affect substantial rights of the parties, so a new trial was required.[117] The Court further clarified that the key question in such cases was whether the error had a "substantial and injurious effect or influence" on the jury's decision.[118]

For the next two decades, the Court interpreted 28 U.S.C. § 2111—the harmless-error statute passed in 1949 to replace the earlier version—as mandating a new trial whenever a constitutional error occurred during the proceedings.[119] But in 1963, in *Fahy v. Connecticut*, the Court reconsidered its stance and raised the issue of whether the wrongful admission of evidence obtained through an unconstitutional search and seizure could be subject to the same harmless-error rules that applied under federal standards.[120] The Court

[112] *Id.* (quoting Fed. R. Crim. P. 52(a)).

[113] Fed. R. Crim. P. 52(a). A separate statutory provision, 28 U.S.C. § 2111 applies the harmless error rule to the federal appellate courts, stating, "[o]n the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties." 28 U.S.C. § 2111 (1994). This statutory provision is unnecessary, however, because Rule 1 makes it clear that all of the Federal Rules "apply to all criminal proceedings . . . in the United States Courts of Appeals." Fed. R. Crim. P. 1; *see* Charles A. Wright, Federal Practice and Procedures § 852, at 296 (2d ed. 1982) (stating that § 2111 was enacted "apparently on the mistaken belief that [the criminal harmless-error rules and its civil counterpart] apply only to the district courts").

[114] *Kotteakos*, 328 U.S. at 751.

[115] *Id.* at 751–52.

[116] *See id.* at 757–58.

[117] *See id.* at 776.

[118] *Id.* at 776.

[119] *See* Charles J. Ogletree, Jr., Comment, *Arizona v. Fulminante: The Harm of Applying Harmless Error to Coerced Confessions*, 105 Harv. L. Rev. 152, 154 (1991) (criticizing the concern of accuracy of convictions inherent in criminal trials); *see also*, *e.g.*, Michael Coenen, *Spillover Across Remedies*, 98 Minn. L. Rev. 1211, 1235–39 (2014).

[120] Fahy v. Connecticut, 375 U.S. 85 (1963).

ultimately did not resolve this question, ruling instead that the evidence's admission had been "prejudicial," explaining that there was a "reasonable possibility" that the evidence influenced the conviction.[121]

D. Chapman *and the Rise of Constitutional Harmless Error*

During this period, the Warren Court was expanding federal constitutional protections for criminal defendants, fundamentally reshaping the landscape of criminal procedure.[122] By the time *Chapman v. California* reached the Supreme Court in 1967, the area of constitutional criminal procedure was ready for refinement.[123] As Justice Cardozo described, this "taming" process took sweeping legal principles and distilled them into clearer, more objective rules that posed less of a threat to established legal structures.[124] *Chapman* and its subsequent cases have played a significant role in this process.[125]

Chapman came to the Supreme Court from California, where a prosecutor had commented on the defendant's silence during the trial—a practice deemed unconstitutional by the Court in *Griffin v. California* two years earlier.[126] The California Supreme Court applied its harmless-error rule, instructing courts to disregard errors that did not result in a miscarriage of justice, and upheld the convictions.[127] The U.S. Supreme Court, however, reversed this decision, finding that the error was not harmless.[128] Crucially, *Chapman*, in an opinion authored by Justice Black, marked the first time the Court explicitly recognized that some constitutional errors might, in certain circumstances, be so trivial that they could be considered harmless.[129]

The Court began by noting that "[w]hether a conviction for [a] crime should stand when a State has failed to accord federal constitutionally guaranteed rights is every bit as much of a federal question as what particular federal

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[121] *Id.* at 86.

[122] Tracey L. Meares, *Everything Old Is New Again: Fundamental Fairness and the Legitimacy of Criminal Justice*, 3 Ohio St. J. Crim. L. 105, 105–06 (2005) ("Under Chief Justice Earl Warren's leadership the Supreme Court rewrote the corpus of constitutional law-especially in the criminal procedure arena.").

[123] Sanjay K. Chablani, *Chapman v. California: Harmless Error and the Warren Court's Progressive Legacy*, 49 Stetson L. Rev. 375, 375–76 (2020); Chapman v. California, 386 U.S. 18 (1967).

[124] Benjamin N. Cardozo, The Nature of the Judicial Process 51 (1921); Craig Goldblatt, Comment, *Disentangling* Webb*: Governmental Intimidation of Defense Witnesses and Harmless Error Analysis*, 59 U. Chi. L. Rev. 1239, 1243 n.25 (1992).

[125] Ogletree, *supra* note 119, at 158 (explaining that the harmless error, as outlined in *Chapman*, has diluted many of the protections outlined by the Warren Court).

[126] *Chapman*, 386 U.S. at 19; Griffin v. California, 380 U.S. 609, 613 (1965) (holding that comment on a defendant's decision not to testify violates the Fifth Amendment).

[127] *Chapman*, 386 U.S at 19–20; *see also* Cal. Const. art. VI, § 13 ("No judgment shall be set aside, or a new trial granted . . . for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice.").

[128] *Chapman*, 386 U.S at 24–26.

[129] *Id.* at 22 (observing "there may be some constitutional errors which in the setting of a particular case are so unimportant and insignificant that they may . . . be deemed harmless.").

constitutional provisions themselves mean, what they guarantee, and whether they have been denied."[130] From there, the Court went on to state:

> With faithfulness to the constitutional union of the States, we cannot leave to the States the formulation of the authoritative laws, rules, and remedies designed to protect people from infractions by the States of federally guaranteed rights. We have no hesitation in saying that the right of these petitioners not to be punished for exercising their Fifth and Fourteenth Amendment right to be silent—expressly created by the Federal Constitution itself—is a federal right which, in the absence of appropriate congressional action, it is our responsibility to protect by fashioning the necessary rule.[131]

Justice Stewart concurred in the judgment but opted to sidestep the question of harmless error.[132] His view was that a prosecutor's violation of the rule established in *Griffin should* automatically result in reversal.[133] Justice Harlan, on the other hand, dissented, asserting that "a state appellate court's reasonable application of a constitutionally proper state harmless-error rule to sustain a state conviction constitutes an independent and adequate state ground of judgment."[134]

In moving toward crafting a harmless-error rule for federal constitutional violations, Justice Black, speaking for the majority, expressed a preference for the approach set out in *Fahy*—whether there is a reasonable possibility that the problematic evidence contributed to the outcome—over California's miscarriage-of-justice standard.[135] Justice Black equated *Fahy* with the principle for which *Chapman* is now known and stated the Court's holding: "We, therefore, do no more than adhere to the meaning of [*Fahy*] when we hold, as we now do, that before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt."[136]

While formulating this new standard for reviewing constitutional errors, the *Chapman* majority did not reference 28 U.S.C. § 2111, nor did it refer to the harmless-error analysis used in *Kotteakos*, which, as previously discussed, was an interpretation of the statute's predecessor. However, in later rulings, the Court clarified that the *Kotteakos* standard—whether the error had a "substantial and injurious effect or influence" on the jury's verdict—should be applied to nonconstitutional errors, while the *Chapman* rule is reserved for

[130] *Id.* at 21.
[131] *Id.*
[132] *See id.* at 45 (Stewart, J., concurring).
[133] *Id.*
[134] *Id.* at 46 (Harlan, J., dissenting).
[135] *Id.* at 23–24 (quoting Fahy v. Connecticut, 375 U.S. 85, 86–87 (1963)).
[136] *Chapman*, 386 U.S. at 24.

constitutional errors.[137] The Court also emphasized that the *Kotteakos* analysis is considered more lenient than the *Chapman* standard.[138]

In the years following *Chapman*, the Supreme Court considered several methods for determining whether an error is harmless beyond a reasonable doubt.[139] The first, suggested by *Chapman* itself, focused solely on the extent to which the improperly admitted evidence was incriminating, without considering the untainted evidence.[140] The second method evaluated whether the error was "cumulative," meaning it duplicated untainted evidence that supported the same facts established by the disputed evidence.[141] The third approach examined whether, given the entire record, the jury likely gave significant weight to the erroneously admitted material.[142] The Court seems to have ultimately settled on this third approach for reviewing courts to follow.[143]

In holding that constitutional errors should be disregarded if proven to be harmless beyond a reasonable doubt, the *Chapman* majority acknowledged, but did not retreat from, earlier decisions indicating that there are certain constitutional rights so fundamental to a fair trial that their violation can never be treated as harmless error.[144] The Court highlighted three such rights—the right against the admission of a coerced confession, the right to counsel, and the right to an impartial judge—implying that the list may not be exhaustive.[145]

E. Different Buckets of Standards of Error

Over the following twenty-five years, the Court expanded this list on a case-by-case basis, but it did not clarify how to determine whether a specific constitutional error could be subject to harmless-error review until its decision

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[137] Kotteakos v. United States, 328 U.S. 750, 776 (1946); *see also* United States v. Lane, 474 U.S. 438, 445–49 (1986).

[138] *See*, *e.g.*, Fry v. Pliler, 551 U.S. 112, 116 (2007); Brecht v. Abrahamson, 507 U.S. 619, 621 (1993) (noting that harmless error on collateral attacks raising constitutional errors should be assessed using *Kotteakos*, which the Court described as "less onerous" than that of *Chapman*).

[139] *See* Sullivan v. Louisiana, 508 U.S. 275, 279–80 (1993); *Brecht*, 507 U.S. at 620–21; Martha A. Field, *Assessing the Harmlessness of Federal Constitutional Error—A Process in Need of a Rationale*, 125 U. Pa. L. Rev. 15, 16 (1976).

[140] *Chapman*, 386 U.S. at 24–26; LaFave & Israel, *supra* note 110, at 257.

[141] *See, e.g.*, Harrington v. California, 395 U.S. 250, 254 (1969); Field, *supra* note 139, at 21–22.

[142] Field, *supra* note 139, at 21–22; *see* Yates v. United States, 500 U.S. 391, 403–04 (1991).

[143] Greabe, *supra* note 103, at 829 (citing *Yates*, 500 U.S. at 403–04; LaFave & Israel, *supra* note 110, at 279, 281 n.5); *see* Sullivan v. Louisiana, 508 U.S. 275, 279–80 (1993) (reaffirming and applying the *Yates* analysis). However, the Court has occasionally implied, in other settings, that overwhelming evidence of guilt can render an error harmless. *See* Greabe, *supra* note 103, at 829 n.67 (citing United States v. Hasting, 461 U.S. 499, 510–11 (1983) ("The question a reviewing court must ask is this: absent [the improperly admitted material], is it clear beyond a reasonable doubt that the jury would have returned a verdict of guilty?"); Milton v. Wainwright, 407 U.S. 371, 372–73 (1972); Schneble v. Florida, 405 U.S. 427, 431–32 (1972). Still, such statements bear resemblance to a "correct result" test—the very standard rejected in *Chapman*—and thus should not be seen as a proper statement of the harmless-error doctrine. Greabe, *supra* note 110, at 829 n.67; Anne Bowen Poulin, *Tests for Harm in Criminal Cases: A Fix for Blurred Lines*, 17 U. Pa. J. Const. L. 991, 992–93 (2015) (noting the lack of clear Supreme Court guidance on a uniform harmless-error review approach).

[144] *Chapman*, 386 U.S. at 24.

[145] *Id.* at 23 n.8.

in *Fulminante* in 1991.[146] In *Fulminante*, the Court, which was deeply divided, revisited the question of whether admitting a coerced confession should be assessed under *Chapman*'s harmless-error standard.[147] In concluding that it should, the Court established a framework for analyzing whether other constitutional errors should undergo *Chapman* review.[148] It divided constitutional errors into two categories. Most errors fell under the category of "trial" errors, which occur during the presentation of the case to the jury and can be weighed against the other evidence to determine if the error was harmless.[149] The second category encompassed "structural defects"—fundamental flaws in the trial mechanism that cannot be analyzed using the harmless-error framework.[150]

In 2006, in *United States v. Gonzalez-Lopez*, the Court elaborated that structural defects "bear directly on the framework within which the trial proceeds."[151] The Court then listed several examples of errors that cause such structural defects: denial of the right to counsel, denial of the right to self-representation, denial of a public trial, and failure to provide a proper reasonable-doubt instruction.[152] Additionally, the Court included any procedural errors that result in the denial of the right to counsel of one's choice.[153]

From 1967 to 1993, the Court maintained the *Chapman* standard when reviewing constitutional errors that could be analyzed under harmless error, regardless of whether the case came from a state court judgment,[154] a federal court decision,[155] or collateral review of a state court conviction.[156] However, in 1993, *Brecht v. Abrahamson* redefined the approach for federal courts reviewing state convictions marred by constitutional errors during habeas proceedings.[157] In doing so, the Court pivoted away from the stringent *Chapman* standard, opting instead for the *Kotteakos* rule, originally applied to non-constitutional errors in federal criminal trials.[158] Under this new framework, federal courts were directed to leave convictions intact unless it was clear that the error had a "substantial and injurious effect or influence" on the jury's verdict, a threshold requiring a showing beyond a mere "reasonable possibility" of the error

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[146] Arizona v. Fulminante, 499 U.S. 279 (1991); *see, e.g.,* McKaskle v. Wiggins, 465 U.S. 168, 177 n.8 (1984) (right to represent self); Waller v. Georgia, 467 U.S. 39, 49 n.9 (1984) (right to public trial).

[147] *Fulminante*, 499 U.S. at 306–12 (Rehnquist, J., dissenting).

[148] *See id.* at 288, 309 (rejecting a proposal alternative in *Chapman* and *Payne v. Arkansas*); *Chapman*, 386 U.S. at 23; Payne v. Arkansas, 356 U.S. 560, 567–68 (1958).

[149] *Fulminante*, 499 U.S. at 307–09.

[150] *Id.* at 309–310.

[151] United States v. Gonzalez-Lopez, 548 U.S. 140, 148, 150 (2006).

[152] *See id.* at 149–50 (citing Gideon v. Wainwright, 372 U.S. 335, 344–45 (1963); McKaskle v. Wiggins, 465 U.S. 168, 177–78, n.8 (1984); Waller v. Georgia, 467 U.S. 39, 49 n.9 (1984); Sullivan v. Louisiana, 508 U.S. 275 (1993)).

[153] *Id.* at 150 ("Harmless-error analysis in such a context would be a speculative inquiry into what might have occurred in an alternate universe.").

[154] *See* Chapman v. California, 386 U.S. 18, 24–26 (1967).

[155] *See* United States v. Hasting, 461 U.S. 499, 510–11 (1983).

[156] *See* Yates v. Evatt, 500 U.S. 391, 402 (1991); Rose v. Clark, 478 U.S. 570, 579–80 (1986); Milton v. Wainwright, 407 U.S. 371, 372–73 (1972); Anderson v. Nelson, 390 U.S. 523, 523–24 (1968).

[157] Brecht v. Abrahamson, 507 U.S. 619, 631–33 (1993).

[158] *See id.*

contributing to the outcome, and resulting in what the Court deemed "actual prejudice."[159]

The issue in *Brecht* arose from a prosecutor improperly using the defendant's post-*Miranda*[160] silence against him during the defendant's trial testimony.[161] Categorizing this as a "trial error," the Court deliberated over whether to apply the "stringent" *Chapman* test[162] or the more lenient *Kotteakos* standard.[163] Ultimately, it settled on the latter, invoking several policy reasons: respect for state convictions that had endured direct review, the principles of comity and federalism, the importance of finality in judgments, and the significant challenges of retrying cases after the passage of time.[164] Applying the *Kotteakos* test, the Court concluded that the error in *Brecht* did not materially affect the jury's decision since the prosecutor's improper comments were limited and the evidence of the defendant's guilt was compelling, if not overwhelming.[165]

This evolution continued when Congress passed the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA),[166] which imposed further restrictions on federal courts' ability to grant habeas petitions unless the state court's decision was found to be "contrary to, or involved an unreasonable application of, clearly established Federal law."[167] In *Mitchell v. Esparza*, the Court ruled that the AEDPA standard applied even to state appellate decisions finding constitutional violations harmless under Chapman, barring relief unless the state court's application of Chapman was unreasonable.[168] This interplay between Brecht and AEDPA was affirmed in *Fry v. Pliler*, where the Court rejected the notion that AEDPA eliminated the need for petitioners to meet the *Brecht*/*Kotteakos* threshold, instead holding that *Brecht* remained a necessary precondition for habeas relief.[169] The Court reasoned that Congress, in enacting AEDPA, intended to restrict habeas relief, not broaden it.[170] Requiring formal application of both tests was deemed unnecessary because *Brecht* effectively encompassed the AEDPA/*Chapman* standard.[171]

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[159] *Id.* at 637–38 (quoting *Chapman*, 386 U.S. at 24; Kotteakos v. United States, 328 U.S 750, 776 (1946)) (rejecting *Chapman*'s approach and adopting *Kotteakos*'s requirement that an error have a substantial and injurious effect on the verdict; also explaining that habeas relief requires a showing of "actual prejudice").

[160] Miranda v. Arizona, 384 U.S. 436, 444 (1966).

[161] *See Brecht*, 507 U.S. at 629–30, 632.

[162] *Id.* at 632; *see also*, Doyle v. Ohio, 426 U.S. 610, 618 (1976).

[163] *Brecht*, 507 U.S. at 637.

[164] *See id.* at 635–37.

[165] *See id.* at 638–39.

[166] 28 U.S.C. § 2254(d) (2012). The relevant portion provides: "An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim–(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." *Id.*

[167] *See id.*

[168] Mitchell v. Esparza, 540 U.S. 12, 17–18 (2003) (per curiam).

[169] Fry v. Pliler, 551 U.S. 112, 119–20 (2007).

[170] *Id.*

[171] *Id.* at 120.

Yet, the Court complicated this framework in *Davis v. Ayala* by criticizing the Ninth Circuit's interpretation of *Fry*.[172] While *Fry* did not require formal application of both tests, *Davis* clarified that the state court's harmlessness determination still held relevance under *Brecht*.[173] The Ninth Circuit had misinterpreted Fry to suggest that *Brecht* could subsume AEDPA/*Chapman*, but *Davis* emphasized that a state appellate court's Chapman analysis could not be dismissed without evaluating its reasonableness under AEDPA.[174] Therefore, for a habeas court to find that a state court's harmless-error determination was unreasonable, it would need to show that no fair-minded jurist could support the state court's conclusion, a high bar under federal law.[175]

This multi-layered approach to harmless error now delineates four distinct categories: (1) constitutional "structural" errors that elude harmless-error review; (2) constitutional "trial" errors, scrutinized on direct review using the *Chapman* standard; (3) nonconstitutional trial errors, which are reviewed for harmlessness under the *Kotteakos* test; and (4) constitutional trial errors reviewed on collateral appeal, subject to the *Brecht*/*Kotteakos* framework. Additionally, federal law has incorporated a separate "plain error" rule, applicable when appellate rights have not been preserved.[176] In such cases, even structural errors must meet the plain-error criteria, which demands that the error be evident at the time of its occurrence, that it affects the claiming party's substantial rights, and that it significantly undermines the integrity, fairness, or reputation of the judicial proceedings.[177] Beyond this, when federal courts review harmless errors found by state appellate courts, the complexity of the analysis multiplies.[178] As a result, the contours of harmless-error review within the federal system have become exceedingly intricate.[179]

The *Chapman* decision was framed as addressing a federal question,[180] yet its nature—alongside *Fulminante* and *Brecht*—has puzzled scholars. Three years after *Chapman*, Justice Traynor, in his work *The Riddle of Harmless Error*,[181] defended *Chapman*'s handling of federal questions while challenging Justice Harlan's dissent.[182] Harlan had argued that when a state court reasonably applied its own harmless-error rule, that should constitute an independent and adequate state ground, shielding the judgment from federal review.[183] Traynor, however, expressed confusion over why the *Chapman* Court had failed to acknowledge that federal statutes—28 U.S.C. § 2111 and Federal Rule of Criminal Procedure 52(a)—already governed harmless-error analysis.[184]

[172] Davis v. Ayala, 576 U.S. 257, 268 (2015).
[173] *See id.*
[174] *See id.*
[175] *Id.* at 269–70.
[176] *See* United States v. Olano, 507 U.S. 725, 732 (1993); *see also* Fed. R. Crim. P. 52(b).
[177] *See* Johnson v. United States, 520 U.S. 461, 466 (1997) (evidentiary errors are not automatically reversible).
[178] *See* Greabe, *supra* note 101, at 828–29; Kavanagh, *supra* note 104 at 222.
[179] *See* Poulin, *supra* note 143, at 1007–13.
[180] Chapman v. California, 386 U.S. 18, 21 (1967).
[181] *See* Traynor, *supra* note 92, at 37–41.
[182] *Chapman*, 386 U.S. at 46 (Harlan, J., dissenting).
[183] *Id.*
[184] *See* Traynor, *supra* note 92, at 41.

He contended that the Court should recalibrate harmless-error doctrine within the confines of § 2111.[185] Other commentators have suggested that *Chapman*'s reasoning is inherently constitutional in nature.[186]

One such commentator, Professor Daniel J. Meltzer, offers perhaps the most comprehensive examination of *Chapman*'s doctrinal foundation.[187] Disagreeing with Traynor's statutory approach, Meltzer points out that Rule 52(a) has no bearing on state court cases,[188] and that § 2111 directs courts to disregard any errors that do not affect "substantial rights."[189] He further emphasizes that *Chapman* arose from a state court, and Rule 52(a) has no jurisdiction over state court proceedings or the U.S. Supreme Court's review of them.[190] Hence, *Chapman*'s harmless-error standard must rest on constitutional grounds, separate from procedural statutes.

With respect to § 2111, Meltzer notes that the statute enjoins courts to disregard errors that do not affect the parties' substantial rights.[191] He argues that harmless-error analysis in cases such as *Chapman*, which arise from state courts, cannot be grounded in this federal statute.[192] Meltzer further contends that while the Court has applied harmless error in different contexts, *Chapman*'s federal nature demands a constitutional interpretation of harmless error, rather than a statutory one rooted in § 2111.[193]

Moreover, Meltzer observes that *Chapman* stands as a procedural doctrine grounded in the federal Constitution, rather than one derived from federal statutory law.[194] This distinction is critical because it ensures that state courts are subject to federal constitutional standards when evaluating whether an error was harmless beyond a reasonable doubt.[195] Accordingly, Meltzer's analysis reinforces the idea that the *Chapman* rule, and those cases following it,

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185 *See id.* ("Once the *Chapman* case is viewed anew, the crucial question is one of statutory interpretation, the meaning of the words in § 2111, 'errors or defects which do not affect substantial rights."). Justice Traynor ultimately urged courts to abandon *Chapman*'s beyond-a-reasonable-doubt standard in favor of an analysis, rooting § 2111, that would focus on whether it was "highly probable" that the error had not affected the jury. *See id.* at 43–51.

186 *See* Greabe, *supra* note 101, at 115 (arguing that "there is no reason to privilege constitutional errors by subjecting them to a different harmless-error test"); Richard M. Re, *The Due Process Exclusionary Rule*, 127 Harv. L. Rev. 1885, 1912–18 (2014) (arguing that the harmless error standard should be constitutionalized); Steven H. Goldberg, *Harmless Error: Constitutional Sneak Thief*, 71 J. Crim. L. & Criminology 421, 424 n.31 (1980) (asserting *Chapman* as a "constitutional judgment").

187 Daniel J. Meltzer, *Harmless Error and Constitutional Remedies*, 61 U. Chi. L. Rev. 1, 19–21, 26 (1994).

188 *See id.* at 19–20.

189 *See id.* at 1–26.

190 *See id.* at 26.

191 *Id.* at 21.

192 *See id.* at 21. Meltzer also considered—and rejected—another potentially statutory argument that *Chapman* could be necessary to preserve the Court's appellate jurisdiction to review federal constitutional claims arising from state trial courts. *See id.* at 22.

193 *See* Meltzer, *supra* note 187, at 26.

194 *See id.* at 22–26.

195 *See id.* The Supreme Court has continued to state that the federal Constitution provides no right of appeal. *See* Martinez v. Ct. of Appeal of Cal., 528 U.S. 152, 160 (2000); M.L.B. v. S.L.J., 519 U.S. 102, 110 (1996); Goeke v. Branch, 514 U.S. 115, 119 (1995) (per curiam).

should be understood as exercises of constitutional authority rather than mere statutory interpretations.[196]

The *Chapman* opinion primarily focused on addressing the argument that the harmless-error rule should never apply to constitutional errors.[197] The Court found no basis, either in legal theory or precedent, for giving constitutional errors a broad exemption from this appellate review rule.[198] The Court noted that harmless-error statutes, including the federal provision, did not explicitly differentiate between federal constitutional errors and nonconstitutional ones.[199] These statutes, the Court observed, served "a very useful purpose" in preventing convictions from being overturned due to minor errors that had little chance of affecting the trial's outcome.[200] The Court declined to adopt the position that no constitutional error could ever be so insignificant as to be considered harmless under the Federal Constitution.[201]

The *Chapman* decision acknowledged that previous cases had recognized certain constitutional rights as so fundamental to a fair trial that their violation could never be treated as harmless error.[202] In a footnote, the Court referred to three illustrative examples: *Payne v. Arkansas* (reversing a conviction based on coerced confessions);[203] *Gideon v. Wainwright* (recognizing the Sixth Amendment right to counsel);[204] and *Tumey v. Ohio* (holding that due process is violated when a presiding judge is financially interested).[205] However, the Court made no attempt to explain what differentiated these constitutional violations from the *Griffin* violation it was addressing. An improper comment on the defendant's silence was viewed as a "trial error" typically subject to harmless-error analysis, and once the Court decided that some constitutional errors could be harmless, it concluded that the *Griffin* violation fell within that category.[206] Justice Stewart concurred, arguing that the recognition of harmless constitutional errors should be confined to specific constitutional requirements, like the exclusionary rule, which involves balancing deterrence against the exclusion of relevant evidence.[207]

The *Chapman* opinion faced criticism for offering "little guidance" on how to determine which errors required automatic reversal and which did not.[208] It was clear that the Court's citation of three constitutional errors necessitating automatic reversal was merely illustrative and did not exhaust the possible list of such violations.[209] As Justice Stewart pointed out, prior rulings had indicated that other constitutional violations could also belong in the

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[196] *See* Meltzer, *supra* note 187, at 22–26.
[197] *See* Chapman v. California, 386 U.S. 18, 18 (1967).
[198] *Id.*
[199] *Id.*
[200] *Id.* at 22.
[201] *Id.* at 24.
[202] *Id.* at 23 n.8.
[203] Payne v. Arkansas, 356 U.S. 560 (1958).
[204] Gideon v. Wainwright, 372 U.S. 335 (1963).
[205] Tumey v. Ohio, 273 U.S. 510 (1927).
[206] *Chapman*, 386 U.S. at 23.
[207] *Id.* at 42–43 (Stewart, J., concurring).
[208] Note, *Harmless Constitutional Error: A Reappraisal*, 83 Harv. L. Rev. 814, 816 (1970).
[209] *Id.*

automatic-reversal category.[210] The *Chapman* opinion, however, only stated that "some constitutional errors," including a *Griffin* violation, could be harmless.[211] It provided no clarity on whether "some" meant "most," "many," or just a "few." This issue would be clarified through later cases, but *Chapman*, from the start, excluded two distinct types of constitutional violations.[212]

One category of constitutional violations made harmless-error analysis irrelevant due to their very nature. When the violation necessitates barring re-prosecution, reversal is automatic once the violation is confirmed.[213] For instance, a defendant who successfully proves a violation of the right to a speedy trial or the protection against double jeopardy is entitled to automatic reversal.[214]

In *Smith v. United States*, the Court explained that it recognized a violation of the Speedy Trial Clause as the "one exception" to the general rule that retrial is the appropriate remedy for prejudicial trial error.[215] The Court refused to expand this exception to include violations of the Vicinage and Venue Clauses.[216] After reviewing the text, purpose, and history of these clauses, the Court found no grounds for barring reprosecution.[217] The Court also held that double jeopardy does not preclude a retrial in the correct venue, with a jury selected from the proper geographic area.[218] The Court affirmed the lower court's decision, which found that "the remedy for improper venue is vacatur of the conviction, not acquittal or dismissal with prejudice," and concluded that the Double Jeopardy Clause was not implicated by retrial in the appropriate venue.[219]

There is another category of violations that, by their very nature, cannot be subject to *Chapman*'s harmless-error test because they inherently involve harmful consequences.[220] The *Chapman* standard requires a judicial finding that the error did not have a prejudicial impact "beyond a reasonable doubt."[221] For certain violations, however, such an inquiry would be unnecessary because the violation itself implies likely prejudice.[222] Typically, these violations require a finding that the challenged behavior had a "reasonable possibility"

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[210] *Chapman*, 386 U.S. at 43 (Stewart, J., concurring).

[211] *Id.* at 23.

[212] *Id.* at 24–26. Structural errors are fundamental errors that affect the entire framework of the trial, and thus, are not subject to harmless error analysis. *Id.* at 23 ("[T]here are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error."). Similarly, are errors that result in a denial of constitutional rights that inherently defy quantitative assessment. *Id.* at 26 (applying the "reasonable doubt" to constitutional errors).

[213] *See, e.g.*, Strunk v. United States, 412 U.S. 434 (1973); Morris v. Mathews, 475 U.S. 237 (1986); Price v. Georgia, 398 U.S. 323 (1970); *see also* Akhil Reed Amar, *Sixth Amendment First Principles*, 84 Geo. L.J. 641, 672–73 (1996) (criticism of the Court's decisions that require automatic dismissal in Sixth Amendment constitutional speedy trial violations).

[214] *Strunk*, 412 U.S. at 436.

[215] Smith v. United States, 599 U.S. 236, 242 (2023).

[216] *Id.* at 248–50.

[217] *Id.* at 253–54.

[218] *Id.*

[219] *Id.* at 241, 254.

[220] *See infra* note 227.

[221] Chapman v. California, 386 U.S. 18, 26 (1967).

[222] *Id.* at 23.

or a "reasonable probability" of affecting the outcome.[223] For example, a finding of ineffective counsel under the *Strickland* standard[224] or nondisclosure of exculpatory evidence under the *Bagley* standard[225] already involves a determination that the error likely influenced the outcome. As the Court explained in *Kyles v. Whitley*, once a court identifies a constitutional error under *Bagley*, further harmless-error analysis is unnecessary.[226] A recurring debate, dividing the Court since *Chapman*, has centered on whether certain conduct should be viewed as a constitutional violation subject to *Chapman*'s harmless-error analysis or whether the conduct should only be considered an error if it is first shown to have likely affected the trial's outcome.[227]

Excluding violations that bar recurring prosecution and those that already require a finding of prejudicial impact, the *Chapman* harmless-error analysis had the potential to apply to a wide range of constitutional violations. This potential has been fully realized over time. The Court has stated that only a "very limited class of errors" is considered structural, which requires automatic reversal.[228] Under *Chapman*, the Supreme Court has applied the harmless-error rule to a wide variety of constitutional violations, including improper comments on a defendant's failure to testify;[229] admission of evidence obtained in violation of the Fourth Amendment;[230] statements obtained in violation of the right to counsel;[231] and admission of statements violating the Confrontation Clause; [232] denial of the defendant's right to be present during trial;[233] ordering that the defendant appeared shackled in front of the

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[223] *See* Brecht v. Abrahamson, 507 U.S. 619, 637 (1993); *Chapman*, 386 U.S. at 24 (quoting Fahy v. Connecticut, 375 U.S. 85, 86 (1963)).

[224] Strickland v. Washington, 466 U.S. 668, 694 (1984).

[225] United States v. Bagley, 473 U.S. 667, 682 (1985); *see also* Brady v. Maryland, 373 U.S. 83 (1963).

[226] Kyles v. Whitley, 514 U.S. 419, 435 (1995).

[227] *Bagley*, 473 U.S. at 668–69. The Court held that a key element of a due process violation is the requirement of "materiality," which is established by showing a reasonable probability that the disclosure of exculpatory evidence would have led to a different result. *Id.* at 674–83. In his dissent, however, Justice Marshall contended that one the prosecutor's failure to disclose favorable evidence has been demonstrated, a constitutional violation was already present. Then, Marshall argued, the burden should shift to the prosecution to prove that the error was harmless, applying the *Chapman* standard. *Id.* at 704 (Marshall, J., dissenting). *See also* Fry v. Pliler, 551 U.S. 112 (2007) (The majority avoided the question of whether such errors could ever be considered harmless and the Court assumed that if the error were reviewed for harmless, the appropriate standard would be the more deferential one used for habeas review, but dissenters maintained that this type of error is inherently prejudicial by its very nature, making it impossible to be deemed "harmless" under any standard.).

[228] United States v. Davila, 569 U.S. 597, 611 (2013) ("[T]he highly exceptional category of structural errors"); *id.* at 599.

[229] *See, e.g.*, United States v. Robinson, 485 U.S. 25 (1988); Anderson v. Nelson, 390 U.S. 523 (1968).

[230] Chambers v. Maroney, 399 U.S. 42 (1970); Bumper v. North Carolina, 391 U.S. 543 (1968).

[231] Milton v. Wainwright, 407 U.S. 371 (1972) (statements); United States v. Wade, 388 U.S. 218 (1967) (lineups); *see also* Moore v. Illinois, 434 U.S. 220 (1977) (remanded for the application of harmless error based on introduction of evidence of a pretrial identification procedure made in violation of the right to counsel).

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

[233] Rushen v. Spain, 464 U.S. 114 (1983); *see* Yarborough v. Keane, 101 F.3d 894 (2d Cir. 1996) (finding that witness's testimony was of no significance, so defendant's absence from sequestration hearing was harmless).

jury;[234] submitting incorrect aggravating factors as a jury instruction;[235] and omitting necessary elements in final jury instructions, when charged to the jury.[236]

As courts have continued to refine and apply the *Chapman* standard, it has been used to review a broad array of constitutional errors in both trial and appellate proceedings. Lower courts have extended the *Chapman* standard to additional errors, such as the unjustified use of anonymous juries or the admission of perjured testimony to a grand jury.[237] Other examples include the admission of evidence in violation of *Miranda*, or a defendant's denial of the right to testify.[238] This analysis has also been applied to various instances of jury misconduct and improper dismissal of jurors during deliberations.[239]

In *Fulminante*, the majority elaborated on the "structural defects" that impact the framework of the trial, rather than simply errors within the trial process itself.[240] These structural errors, the Court explained, were fundamentally different from those subject to the *Chapman* harmless-error standard.[241] Errors in the latter category, the Court noted, shared the common trait of being "trial errors," meaning they occurred during the presentation of the case to the jury and could therefore be assessed quantitatively against the other evidence to determine whether they were harmless beyond a reasonable doubt.[242] Although the Court later moved away from a rigid division between structural and trial errors, preferring to refer to them as part of a "spectrum of constitutional errors," it continued to cite *Fulminante*'s classification as authoritative.[243] For instance, in *Greer v. United States*, the Court clarified that unlike structural defects, which affect the entire proceeding from start to finish, isolated errors

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[234] Deck v. Missouri, 544 U.S. 622, 635 (2005) ("[W]here a court, without adequate justification, orders the defendant to wear shackles visible to the jury, the defendant need not demonstrate actual prejudice to make out a due process violation. The State must prove 'beyond a reasonable doubt that the [shackling] did not contribute to the verdict obtained.'" (citing Chapman v. California, 386 U.S. 18, 24 (1967)).

[235] Brown v. Sanders, 546 U.S. 212 (2006); Stringer v. Black, 503 U.S. 222 (1992).

[236] Neder v. United States, 527 U.S. 1 (1999); *see* California v. Roy, 519 U.S. 2 (1996) (holding that failure to instruct on requisite mental state was error, albeit not structural).

[237] Major v. State, 873 N.E.2d 1120 (Ind. Ct. App. 2007); United States v. Harmon, 833 F.3d 1199 (9th Cir. 2016).

[238] *See, e.g.*, Harryman v. Estelle, 616 F.2d 870 (5th Cir. 1980); Gorham v. Franzen, 760 F.2d 786 (7th Cir. 1985); United States v. Packer, 730 F.2d 1151 (8th Cir. 1984); Correll v. Thompson, 63 F.3d 1279 (4th Cir. 1995); Wright v. Estelle, 572 F.2d 1071 (5th Cir. 1978); Ortega v. O'Leary, 843 F.2d 258 (7th Cir. 1988); State v. Nelson, 849 N.W.2d 317 (2014).

[239] *See, e.g.*, United States v. Tejeda, 481 F.3d 44 (1st Cir. 2007) (unlike judicial misconduct and bias, neither juror misconduct nor bias are structural errors); United States v. Mackey, 114 F.3d 470 (4th Cir. 1997); Pyles v. Johnson, 136 F.3d 986 (5th Cir. 1998); In re Carpenter, 889 P.2d 985 (Cal. 1995); Stokes v. Maryland, 843 A.2d 64 (Md. App. Ct. 2004) (alternate jurors impairs the integrity of jury trial); Michigan v. Miller, 759 N.W.2d 850 (Mich. 2008) (convicted felon sitting on a convicting jury was not structural and harmless error, absent evidence of felon's partiality).

[240] Arizona v. Fulminante, 499 U.S. 279, 310 (1991) (such error is a "structural defect affecting the framework within which the trial proceeds.").

[241] *See id.* at 296.

[242] *See id.* at 289.

[243] Brecht v. Abrahamson, 507 U.S. 619, 629 (1993); *see also*, Johnson v. United States, 520 U.S. 461 (1997); United States v. Gonzalez-Lopez, 548 U.S. 140 (2006). The distinction resembles that which has divided nonconstitutional violations into errors that might require reversal and those that are harmless. Wayne R. LaFave & Jerold H. Israel, Criminal Procedure § 27(6)(b) (4th ed., 2004).

in the trial process—such as the omission of a single element in jury instructions or a missed warning during a plea colloquy—are not structural, because they do not necessarily render a trial fundamentally unfair or unreliable for determining guilt.[244] The question of what types of errors impact the trial framework has been a persistent source of disagreement among the justices.

F. The Modern Multi-Layered Framework

Clarification was found in 2017 in the case of *Weaver v. Massachusetts*.[245] There, the Court identified three broad justifications for exempting an error from harmless-error review: (1) when the error's impact is too difficult to measure; (2) when the error affects a right meant to protect an interest other than the defendant's interest in a reliable outcome; or (3) when the error always results in fundamental unfairness.[246] The Court noted that more than one of these rationales might explain why a particular error is deemed structural.[247]

Many structural errors fall into the first category identified by the *Weaver* Court—those whose impact is simply too hard to quantify.[248] Some justices have referred to this as the "inherently indeterminate" nature of the error's impact on the trial's outcome.[249] Unlike most trial errors, these types of violations do not involve the introduction or evaluation of particular pieces of evidence. For example, while some errors subject to the *Chapman* standard—such as the failure to instruct on the presumption of innocence—may have a broad effect on the trial, their impact can be measured by considering other jury instructions and the final verdict.[250] In *Gonzalez-Lopez*, the Court reasoned that its conclusion that the denial of the right to counsel of choice constituted structural error was due to the difficulty of measuring the error's effect.[251] The Court in *Weaver* added that because the government would find it nearly impossible to prove such an error was harmless beyond a reasonable doubt, the costs of allowing the government to attempt such proof were unjustified.[252]

Another example of a defect not subject to harmless-error review, the Court held, is the failure of a judge to recuse when required.[253] In *Williams v. Pennsylvania*, the Court ruled that recusal was mandatory, even if the judge's

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[244] Greer v. United States, 593 U.S. 503, 510–11 (2021) (reasoning that since the omission of a single element in jury instructions is not considered structural, the exclusion of a *mens rea* element during a plea colloquy does not undermine the entire framework of the proceeding and therefore does not qualify as a structural error).

[245] Weaver v. Massachusetts, 582 U.S. 286 (2017).

[246] *Id.* at 290.

[247] *Id.*

[248] *See, e.g.*, United States v. Davila, 569 U.S. 597, 599 (2013) (observing that structural errors "undermine the fairness of a criminal proceeding as a whole").

[249] Chapman v. California, 386 U.S. 18, 52 n.7 (1967) (Harlan, J., dissenting); *Weaver*, 582 U.S. at 311 (Breyer, J., dissenting).

[250] *Chapman*, 386 U.S. at 24.

[251] United States v. Gonzalez-Lopez, 548 U.S. 140, 146 (2006).

[252] *Weaver*, 582 U.S. at 290.

[253] Williams v. Pennsylvania, 579 U.S. 1, 4 (2016).

vote was not the deciding one.[254] The fact that the judge did not cast the decisive vote only meant that the judge may have successfully persuaded the majority of the court to adopt their view, which does not lessen the unfairness to the party affected.[255] The Court explained that a multimember court's neutrality must not be compromised, as the appearance of bias damages not only the integrity of one judge, but also that of the entire institution.[256] Both the appearance and reality of impartial justice are essential to the public's trust in the courts and to the rule of law itself.[257] When a judge's bias rises to an unconstitutional level, the failure to recuse cannot be deemed harmless.

In *Sullivan v. Louisiana*, the Court ruled that a jury instruction on the reasonable doubt standard that was constitutionally flawed constituted structural error, automatically requiring reversal.[258] The Court reasoned that the violation extended beyond the due process requirement for the state to prove guilt beyond a reasonable doubt, also implicating the Sixth Amendment's guarantee of a jury verdict finding guilt beyond a reasonable doubt.[259] Since there had been no valid jury verdict in the case, applying *Chapman* would be inconsistent with its logic.[260] *Chapman* directs appellate courts to assess the basis for the jury's verdict and determine whether the verdict was clearly unaffected by the error.[261] But where no such verdict exists, the most an appellate court could conclude is that a jury likely would have found the defendant guilty beyond a reasonable doubt, an analysis *Chapman* prohibits.[262]

The Court distinguished cases involving unconstitutional jury instructions on presumptions, explaining that such errors can be reviewed by assessing how the presumption influenced the jury's verdict in light of the findings it did make.[263] However, when the error involves a misdescription of the burden of proof, it undermines all the jury's findings, making it impossible to establish the necessary link to a "beyond a reasonable doubt" finding.[264]

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[254] *Id.*
[255] *Id.* at 5.
[256] *Id.* at 5–6.
[257] *Id.*
[258] Sullivan v. Louisiana, 508 U.S. 275, 280 (1993).
[259] *Id.* at 279.
[260] *Id.* at 278–79.
[261] *Id.* (citing Delaware v. Van Arsdall, 475 U.S. 673 (1986)).
[262] *Sullivan*, 508 U.S. at 280; *see also* Chapman v. California, 386 U.S. 18, 24 (1967).
[263] *Sullivan*, 508 U.S. at 279. In their concurring opinion in *California v. Roy* Justices Scalia and Ginsburg urged that the reasoning in *Sullivan* should prevent a reviewing court from deeming harmless the omission of an element in jury instructions merely because it believes that "no reasonable jury would have found otherwise" based on the evidence. California v. Roy, 519 U.S. 2, 7 (1996). Instead, the jury must make an actual finding, which can be demonstrated in one of two ways: either the jury's existing finding effectively encompasses the missing element, or it would have been impossible for the jury to reach its verdict without also finding the missing element. *See also* United States v. Edmonds, 80 F.3d 810, 825–26 (3d Cir. 1996) (en banc) (failure to instruct the jury to make unanimous findings on certain issues was still subject to harmless error review because the jury reached unanimous findings on other facts that were "functionally equivalent").
[264] Victor v. Nebraska, 511 U.S. 1, 5 (1994) (citations omitted) ("[S]o long as the court instructs the jury on the necessity that the defendant's guilt be proved beyond a reasonable doubt, the Constitution does not require that any particular form of words be used in advising the jury of the government's burden of proof.").

Appellate courts in the U.S. initially approached harmless error legislation differently depending on the right in question.[265] When evaluating errors such as those in jury selection, courts focused on whether the mistake resulted in a "miscarriage of justice," assessing whether the error was merely technical or whether it deprived the defendant of the substance the right was intended to protect.[266] However, when the error involved the admission or evaluation of evidence, the courts shifted their inquiry.[267] They did not simply assess whether the defendant lost the benefit of an evidentiary rule, but instead evaluated whether the error created a miscarriage of justice based on its probable effect on the outcome of the case.[268] For instance, if a judge wrongly allowed hearsay, the court would not merely consider if the violation was technical—such as where a hearsay statement would have qualified under an exception but for a minor issue—but would also need to decide if the inadmissible evidence affected the overall evidentiary landscape enough to justify a reversal.[269]

Building on these early distinctions, modern American courts often apply two separate analytical methods when reviewing nonconstitutional errors under harmless error statutes.[270] The first, which considers the error's probable influence on the outcome, is used for trial errors that affect the evidence presented to the jury, including admissibility rulings and issues of joinder.[271] This method also applies to faulty pretrial decisions that impact the evidence's presentation, such as discovery rulings, and to actions by judges or prosecutors that may shape how the jury evaluates evidence, such as flawed jury instructions or prosecutorial misconduct.[272] Similarly, this outcome-focused review applies to errors in plea bargaining and plea agreements, as well as mistakes made during sentencing.[273]

For rights related more closely to the procedural structure of the trial, courts employ a different analysis. In such cases, courts determine whether the error was merely technical or whether it violated the defendant's substantive rights.[274] A breach of the core substance of these rights mandates a new trial, regardless of the strength of the evidence supporting the conviction.[275] Exam-

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[265] *See, e.g.*, People v. Moore, 221 P. 665 (Cal. Dist. Ct. App. 1923); Long v. State, 141 N.E. 691 (Ohio 1923); Reynolds v. Commonwealth, 112 S.E. 707 (Va. 1922).

[266] *See, e.g.*, Hoyt v. United States, 273 F. 792 (2d Cir. 1921) (discussed that if an unqualified juror was seated, yet the defendant could have remedied the issue by using an available peremptory challenge but chose not to, the error was considered harmless).

[267] *See, e.g.*, Williams v. United States, 265 F. 625 (8th Cir. 1920); People v. Pickens, 214 P. 1027 (1923); Walls v. State, 102 S.E. 43 (Ga. 1920).

[268] *Williams*, 265 F. at 626.

[269] *See, e.g.*, People v. Kello, 746 N.E.2d 166 (N.Y. 2001); Commonwealth v. Swann, 776 S.E.2d 265 (Va. 2015).

[270] United States v. Ince, 21 F.3d 576 (4th Cir. 1994).

[271] *Id.* at 577–78; *see* United States v. Bauer, 132 F.3d 504 (9th Cir. 1997) (infringement on the attorney-client privilege).

[272] *See, e.g.*, United States v. El-Mezain, 664 F.3d 467 (5th Cir. 2011) (prosecution's discovery obligations); United States v. Ogbuehi, 18 F.3d 807 (9th Cir. 1994); United States v. Simon, 995 F.2d 1236 (3d Cir. 1993) (jury instructions on alibi defense); United States v. Zehrbach, 47 F.3d 1252 (3d Cir. 1995); United States v. Thompson, 76 F.3d 442 (2d Cir. 1996).

[273] *See* Fed. R. Crim. P. 11(h); *see also* Little v. Nev. State Prison, 34 P.3d 540 (Nev. 2001).

[274] *See, e.g.*, People v. Miller, 759 N.W.2d 850 (Mich. 2008); Prieto v. Sussex I State Prison, 748 S.E.2d 94 (Va. 2013).

[275] Lowrey v. State, 705 So.2d 1367 (Fla. 1998).

ples of this automatic reversal approach include errors in jury selection, such as seating an unqualified juror, or improperly denying a peremptory challenge.[276] Other examples include denial of the right to have each juror polled individually after the verdict and prosecution by someone unauthorized to act as a prosecutor.[277]

In federal court, all nonconstitutional errors are reviewed under the harmless error framework set out in Federal Rule of Criminal Procedure 52(a).[278] For example, in *United States v. Lane*, the Court observed that "Rule 52(a) admits of no broad exceptions to its applicability," rejecting rigid per se rules for deciding when to apply harmless error analysis.[279] The *Lane* Court applied the harmless error standard to a case involving the misjoinder of parties in violation of Federal Rule 8(b).[280] In his concurring opinion, Justice Stevens contended that this type of error should not be subject to harmless-error analysis for two reasons.[281] First, because it is intended to guard against "guilt by association," Rule 8(b) was not intended to be subject to harmless error and instead serves an independent value beyond ensuring the reliability of the verdict,.[282] Second, Justice Stevens argued that the effect of such an error on the outcome of the case is too difficult to measure with any precision.[283] Nonetheless, the majority adhered to the traditional harmless-error standard, viewing Rule 8(b) as a mechanism for ensuring reliable verdicts by controlling the relevancy of evidence and finding that its violation was no harder to assess than other evidentiary errors.[284]

Many courts approach harmless-error analysis by comparing the potential impact of the error against the weight of the evidence presented at trial.[285] The core question they seek to answer is whether the properly admitted evidence of guilt is so convincing and the effect of the error so negligible that the court can confidently assert that the error did not play a role in influencing the jury's decision.[286] This type of comparative review often applies when the error concerns the admission or exclusion of evidence.[287] In such cases, if the prosecution's evidence overwhelmingly establishes the defendant's guilt, the court is likely to conclude that the error was harmless.[288] To overturn a

[276] *See e.g.*, State v. Mootz, 808 N.W.2d 207 (Iowa 2012); Paulley v. Commonwealth, 323 S.W.3d 715 (Ky. 2010) (citing Shane v. Commonwealth, 243 S.W.3d 336 (Ky. 2008)); People v. Hecker, 942 N.E.2d 248 (N.Y. 2010); State v. Yai Bol, 29 A.3d 1249 (Vt. 2011).

[277] State v. Wright, 852 S.E.2d 468 (S.C. Ct. App. 2020); *see* State v. Lewis, 134 Conn. App. (2012).

[278] United States v. Lane, 474 U.S. 438, 449 n.11 (1986). Rule 52(a) was enacted as a departure from the old Exchequer rule of automatic reversal followed by English courts in the nineteenth century. Fairfax, *supra* note 91, at 436; Meltzer, *supra* note 187, at 3.

[279] *Lane*, 474 U.S. at 447 n.11.

[280] *Id.* at 446.

[281] *Id.* at 466–67.

[282] *Id.* at 474–75.

[283] *Id.* at 474.

[284] *Id.* at 446.

[285] *See, e.g.*, Commonwealth v. Story, 383 A.2d 155 (Pa. 1978); *see also* United States v. Ibisevic, 675 F.3d 342, 350 (4th Cir. 2012).

[286] *Lane*, 474 U.S. at 444.

[287] Derden v. McNeel, 978 F.2d 1453, 1456 (5th Cir. 1992).

[288] *Id.*

verdict in these situations, the excluded or wrongly admitted evidence would need to possess such extraordinary significance that it could be seen as altering the jury's perception, despite the otherwise conclusive proof of guilt already presented by the government.[289]

However, courts are also mindful of the possibility that, in certain cases, a series of seemingly minor procedural errors might collectively influence the outcome.[290] While each individual error may not have caused prejudice on its own, their cumulative effect can still result in an unfair trial.[291] This legal principle is referred to as the doctrine of "cumulative error."[292] When courts apply this doctrine, they do not view each error in isolation but rather consider whether, taken together, the errors undermined the integrity of the trial process and contributed to the final judgment.[293] In these instances, even if the overwhelming evidence points toward guilt, the overall fairness of the proceedings is brought into question, prompting the court to conclude that the cumulative errors may have unfairly prejudiced the defendant and impacted the outcome.[294]

For instance, when multiple procedural mistakes occur during a trial, such as improper jury instructions, prosecutorial misconduct, or exclusion of relevant testimony, courts may determine that the combined weight of these errors compromised the defendant's ability to receive a fair trial.[295] This approach is critical in ensuring that the justice system does not rely solely on the strength of the prosecution's evidence but also upholds the integrity of trial procedures.[296] It underscores that, even in cases where the evidence seems overwhelming, defendants are entitled to a trial free from errors that, when viewed together, might have distorted the fact-finding process.[297]

III. Moving Forward and Away from Harmlessness

A. The Misalignment Between Harmless Error Standards and Wrongful Convictions

The Innocence Project highlights that forty-eight percent of individuals exonerated after being convicted based on eyewitness testimony had been identified by someone of a different race.[298] Research in social science has consistently

[289] *Id.*

[290] Kerry Abrams & Brandon L. Garrett, *Cumulative Constitutional Rights*, 97 B.U. L. Rev. 1309, 1313–15 (2017).

[291] *Id.*

[292] United States v. Rivera, 900 F.2d 1462 (10th Cir. 1990).

[293] McGill v. State, 357 P.3d 1140 (Wyo. 2015).

[294] *Id.* at 1148.

[295] Linney v. State, 413 S.W.3d 766, 767 (Tex. Crim. App. 2013) (Cochran, J., concurring).

[296] *See* People v. Krueger, 643 N.W.2d 223 (Mich. 2002).

[297] *See Derden*, 978 F.2d at 1456; United States v. Starks, 34 F.4th 1142 (10th Cir. 2022).

[298] Scheck & Neufeld, *supra* note 27, at 20. Of written decisions that followed direct appeals from exonerees' convictions, none identify the race of the eyewitness.

shown that cross-racial identifications are prone to higher error rates.[299] Cross-racial identifications may also contribute to the disproportionately high number of minorities among those exonerated through postconviction DNA testing.[300]

The Supreme Court has long recognized the inherent challenges of eyewitness identification, acknowledging that "the annals of criminal law are rife with instances of mistaken identification."[301] As a result, the Due Process Clause protects individuals from unduly suggestive identification procedures, such as when police encourage a witness to select a specific individual from a lineup.[302] With modern DNA testing, it is now clear that many eyewitnesses in these cases of wrongful convictions misidentified the defendants.

A total of forty-seven exonerees, or forty-five percent of those with written decisions based on eyewitness testimony, challenged the identification process.[303] Few of their claims, however, invoked constitutional grounds to challenge the reliability of the eyewitness testimony.[304] Twenty-nine exonerees argued that the police used suggestive procedures to encourage the eyewitness to identify their suspect, representing twenty-eight percent of the 104 exonerees who were convicted on the basis of eyewitness testimony, and whose cases had written decisions.[305] None of the claims regarding suggestive identifications were successful.[306] Four exonerees argued their right to have counsel present at a post-arrest lineup, as established in *United States v. Wade*, but none of these claims were successful either.[307] Overall, thirty-one of these exonerees, or thirty-percent, raised constitutional claims challenging the identification.[308] Another sixteen exonerees used state law or other constitutional claims to indirectly challenge the identification, including claims of ineffective assistance of counsel (five), newly discovered evidence of innocence (four), and faulty jury instructions (two).[309]

The accuracy of eyewitness identifications undoubtedly matters, but problematic procedures do not always render evidence inadmissible. For example, in *Manson v. Brathwaite*, the Court held that even if police engage in procedures that are so suggestive as to violate due process, the identification may still be allowed at trial if it is otherwise deemed "reliable."[310]

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[299] *See* Nat'l Rsch. Council of the Nat'l Acad., Identifying the Culprit: Assessing Eyewitness Identification 96–97 (Nat'l Acad. Press 2014); Christian A. Meissner & John C. Brigham, *Thirty Years of Investigating the Own-Race Bias in Memory for Faces: A Meta-Analytic Review*, 7 Psychol. Pub. Pol'y & L. 3, 3–5 (2001).

[300] *See* Gary L. Wells & Elizabeth A. Olson, *The Other-Race Effect in Eyewitness Identification: What Do We Do About It?*, 7 Psych. Pub. Policy. & L. 230, 230 (2001) ("Eyewitnesses are less likely to misidentify someone of their own race than they are to misidentify someone of another race.").

[301] Manson v. Brathwaite, 432 U.S. 98, 119 (1977) (Marshall, J., dissenting) (internal quotations omitted).

[302] *See id.* at 113.

[303] Garrett, *Judging Innocence*, *supra* note 9, at 76 tbl. 3.

[304] *Id.*

[305] *Id.*

[306] *Id.*

[307] *See* United States v. Wade, 388 U.S. 218, 236–37 (1967).

[308] Garrett, *Judging Innocence*, *supra* note 9, at 80.

[309] *Id.*

[310] *See* Manson v. Brathwaite, 432 U.S. 98, 106 (1977).

This reliability could be based on factors like the witness's certainty or the opportunity they had to observe the perpetrator.[311] Social scientists, however, argue that the *Manson* ruling exacerbates the problem because it allows identifications from suggestive procedures to be admitted, so long as the witness appears confident—despite the fact that such confidence may be artificially inflated by the very suggestive tactics used by the police.[312]

B. Toward Reliability-Focused Harmless Error Review

The outcomes in these cases of wrongful convictions show that most exonerees had little success challenging the erroneous identifications made against them. Courts denied all claims related to suggestive eyewitness procedures, even in cases where, with the benefit of hindsight, we now know that the identifications were not reliable, but rather mistaken. Additionally, only four exonerees were successful in indirectly challenging the faulty eyewitness identification process.

The primary causes of wrongful convictions include eyewitness misidentification, followed by the use of unvalidated or improper forensic science, false confessions, and informants. It is particularly challenging to contest these types of errors as constitutional violations.[313] The rigor applied to harmless error analysis in such cases depends on whether the claim is constitutional or simply a state evidentiary issue. However, confusion over the applicable standards persists, not only within the Supreme Court, but also in state and federal appellate courts.[314] Scholars have noted little difference in how these standards are applied in practice.[315]

Eyewitness Misidentification: Defendants may challenge an eyewitness identification on constitutional grounds by arguing that law enforcement employed unduly suggestive methods to obtain the identification. This claim is based on the Due Process Clause.[316] However, it is notoriously difficult to prevail on such claims. Courts often do not require the state to prove beyond a reasonable doubt that an unduly suggestive identification was harmless because the Supreme Court has ruled that no violation exists if the identification is otherwise "reliable."[317] This reliability assessment, in a way, serves as a built-in harmless error analysis for such claims. The Court has provided several criteria to determine reliability, including the witness's opportunity

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[311] *Id.*

[312] *See* Brandon L. Garrett, *Aggregation in Criminal Law*, 95 Calif. L. Rev. 383, 449–50 (2007).

[313] *See* Garrett, *Judging Innocence*, *supra* note 9, at 60–61.

[314] *See* Michael H. Graham, *Abuse of Discretion, Reversible Error, Harmless Error, Plain Error, Structural Error; a New Paradigm for Criminal Cases*, 43 Crim. L. Bull. 955 (2007).

[315] Harry T. Edwards, *To Err is Human But Not Always Harmless: When Should Legal Error Be Tolerated?*, 70 N.Y.U. L. Rev. 1167, 1179 (1995); Dennis J. Braithwaite, *Coerced Confessions, Harmless Error: The "Guilty as Hell" Rule in State Courts*, 36 Am. J. Trial Advoc. 233, 252 (2012).

[316] *See Manson*, 432 U.S. at 119 (Marshall, J., dissenting).

[317] *Id.* at 106.

to observe the suspect, the level of certainty displayed, and the time elapsed between the event and the identification procedure.[318]

However, scientific research has cast doubt on the reliability of these factors—especially the "level of certainty"—and DNA exonerations have shown that these criteria often fail to align with actual reliability, or are applied too loosely to uphold convictions.[319] As a result, the current reliability standard for evaluating misidentifications is itself unreliable and unlikely to prevent wrongful convictions. Numerous scholars have examined this issue in depth.[320] In Garrett's study of wrongfully convicted individuals who challenged eyewitness identifications, none succeeded on appeal with this claim.[321]

Even in cases where appellate courts find the identification unduly suggestive and unreliable, they often proceed to assess the remaining evidence for harmlessness. At this stage, courts frequently fail to account for how a suggestive identification can contaminate other evidence, such as subsequent identifications or even confessions. The identification, especially if it was made early in the investigation, can become so entangled with the rest of the evidence that it is difficult to separate. Yet the harmless error standard does not encourage courts to examine how the investigation developed, step by step, before the trial.

False Confessions: False confessions occur more often than is generally assumed.[322] When a confession is obtained through unconstitutional coercion or a violation of *Miranda* rights, the defendant can bring a constitutional challenge, which would be reviewed under the harmless error standard requiring proof beyond a reasonable doubt.[323] However, if the confession was false for reasons unrelated to improper police conduct, it becomes much harder to challenge, as the claim would need to rely on other evidentiary grounds—if it can be challenged at all.

Courts frequently overlook the profound impact a confession has on the jury and how that confession can shape the development of other evidence. In *Fulminante*, for example, one coerced confession led to repeated claims, including one from a jailhouse informant. Although the Supreme Court in *Fulminante* ruled that admitting the coerced confession was not harmless, the state court had maintained that the other evidence was "overwhelming."[324] Before the rise of DNA exonerations, it was likely as hard for judges as it was for juries to disregard the weight of a confession.[325] Moreover, studies have

[318] *See* Nancy K. Steblay, *Maintaining the Reliability of Eyewitness Evidence: After the Lineup*, 42 Creighton L. Rev. 643, 647 (2009).

[319] *Id.*

[320] Garrett, *supra* note 9, at 79.

[321] *Id.* at 61.

[322] Alan Hirsch, *Confessions and Harmless Error: A New Argument for the Old Approach*, 12 Berkley J. Crim. L. 1, 4 (2007).

[323] *See* Arizona v. Fulminante, 499 U.S. 279, 295–302 (1991).

[324] *See id.* at 297.

[325] *See id.* at 313 (Kennedy, J., concurring).

shown how confessions can bias identification procedures, influencing witnesses asked to make identifications.[326]

Over time, courts have lost the skepticism toward confessions that once led to the creation of the *corpus delicti* rule, a principle that may need to be revived. Since *Fulminante*, courts have increasingly found the admission of coerced confessions to be harmless, often with little analysis and, in some cases, on the grounds that the confession was repeated elsewhere.

Regardless of the issue, if a court determines that there was non-structural error, it will proceed to review the remaining evidence as part of a harmless error analysis. Courts may rely heavily on confessions, even when those confessions were challenged at trial, or they may turn to cross-racial identifications or questionable forensic evidence. The cumulative impact of such evidence may be deemed "overwhelming," while courts overlook how these pieces of evidence are interconnected and potentially tainted by the error. Courts may also conflate the sufficiency of the evidence standard from *Jackson v. Virginia*—which asks whether any rational fact-finder could have convicted based on the evidence—with the harmless error standard, which does not require the same level of deference to the state's case.[327]

Conclusion

One of the appeals of the harmless error doctrine is that it allows for the avoidance of costly retrials, especially in cases where the defendant is likely guilty. It may be worth exploring compromise alternatives, such as remand hearings, to evaluate the impact of an error and the strength of the remaining evidence. These hearings could be appropriate where the evidence appears solid but involves elements known to contribute to wrongful convictions, or where the erroneous admission of such evidence is in question. In such hearings, defense counsel should be permitted to challenge the reliability of the evidence and argue that it was unlikely to have supported the verdict. Additionally, they should be allowed to claim that the wrongly admitted evidence had a decisive influence on the outcome.

One intriguing suggestion for improving harmless error review is to have jurors complete post-verdict forms that assess the significance of particular pieces of evidence or instructions that were contested during the trial. Although this proposal has potential drawbacks and limitations, it could help reduce the speculative nature of harmless error analysis, which often takes place months or years after the trial.

While harmless error is only one element of post-conviction review, reforming it alone won't prevent wrongful convictions from being upheld. Other barriers exist, such as rules around issue preservation and waiver, as well as the challenges of presenting factual claims on appeal. Furthermore, there is

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[326] *See* Lisa E. Hasel & Saul M. Kassin, *On the Presumption of Evidentiary Independence: Can Confessions Corrupt Eyewitness Identifications*, 20 Psych. Sci. 122 (2009).

[327] Jackson v. Virginia, 443 U.S. 307 (1979).

an inherent relationship between the standard required to prove an error and the ease with which courts find such errors harmless—if it becomes harder to deem an error harmless, courts may become less willing to identify errors in the first place. After all, the development of harmless error has occurred in tandem with the rise of criminal procedural rights.