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NOTES AND COMMENTS

HARMLESS ERROR: THE NEED FOR A UNIFORM STANDARD

INTRODUCTION

The harmless error doctrine enables an appellate court to affirm a criminal conviction despite errors committed by the trial court, provided that the defendant was not prejudiced.[1] Implicit in the doctrine is a recognition that "[a] defendant is entitled to a fair trial but not a perfect one."[2] Thus, when error is not of constitutional magnitude, it is usually deemed harmless if it does not "affect the substantial rights of the parties."[3] A more stringent standard has developed, however, for appellate review of criminal convictions tainted by violations of federal constitutional rights. In such circumstances, the Supreme Court has determined that constitutional errors may be deemed harmless only when an appellate court can declare a belief "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained."[4]

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[1] *See, e.g.*, 28 U.S.C. § 2111 (1976); CAL. CONST. art. VI, § 13: ALASKA R. CRIM. PROC. 47(a) (1968); COLO. R. CRIM. PROC. 52(a) (1977); *cf.* Ark. Stat. Ann. § 43-2725.2 (1977 Repl. Vol.) (fair trial provided); VA. CODE § 8-483 (1957 Repl. Vol.) (substantial justice attained).

[2] Bruton v. United States, 391 U.S. 123, 135 (1968) (quoting Lutwak v. United States, 344 U.S. 604, 619 (1953)); *see* Brown v. United States, 411 U.S. 223, 232 (1973). *See generally* C. MCCORMICK, EVIDENCE § 183 (2d ed. E. Cleary 1972).

[3] *See* 28 U.S.C. § 2111 (1976); N.Y. CRIM. PROC. LAW § 470.05(1) (McKinney 1971).

[4] Chapman v. California, 386 U.S. 18, 24 (1967); *see* Milton v. Wainwright, 407 U.S. 371, 372 (1972); Schneble v. Florida, 405 U.S. 427, 428 (1972); Harrington v. California, 395 U.S. 250, 251 (1969); Fontaine v. California, 390 U.S. 593, 596 (1968) (per curiam). In *Chapman*, the leading case on harmless constitutional error, the Supreme Court acknowledged that some errors "are so basic to a fair trial" that they require automatic reversal. 386 U.S. at 23 & n.8 (citing Gideon v. Wainwright, 372 U.S. 335 (1963)) (right to counsel at trial); Payne v. Arkansas, 356 U.S. 560 (1958) (coerced confessions); Tumey v. Ohio, 273 U.S. 510 (1927) (impartial judge). One commentator has argued that an automatic reversal rule would effectively control judicial and prosecutorial misconduct. It is suggested, however, that police officers probably would not be as effectively deterred, since they view their primary duty not as obtaining valid convictions, but as arresting criminals and preventing crime. Comment, *Principles for Application of the Harmless Error Standard*, 41 U. CHI. L. REV. 616, 626 (1974) [hereinafter cited as *Harmless Error Standard*]; *see* F. GRAHAM, THE DUE PROCESS REVOLUTION 130-52 (1970). *See generally* Kamisar, Betts v. Brady *Twenty Years Later: The Right to Counsel and Due Process Values*, 61 MICH. L. REV. 219, 240-42 (1962).

Although the *Chapman* opinion did not attempt to present the full range of errors which might require automatic reversal, several means have been suggested by which such errors may be identified. One proposal suggests that if an error affects the integrity of the guilt determination process, automatic reversal is warranted. Note, *Harmless Constitutional*

In attempting to fashion concrete and workable tests to implement these broad definitions of harmlessness, appellate courts have developed several methods of assessing error. First, an appellate court may evaluate the effect of the error without regard to the untainted evidence in the case. Thus, if the error in the abstract is prejudicial, reversal is required.[5] A second way for determining harmlessness is to view the error in relation to the other evidence in the case. Under this approach, the error will be found harmless if there is no "reasonable possibility that [it] . . . contributed to the conviction."[6] A third method deems an error harmless when it

Error, 20 STAN. L. REV. 83, 89 (1967) [hereinafter cited as *Harmless Constitutional Error*]. In addition to the errors listed by the *Chapman* Court, it has been argued that violations of any rights guaranteed by the Bill of Rights, with the exception of evidence seized in violation of the fourth amendment, should require automatic reversal. *Id.* at 88-95. Another commentator has suggested that automatic reversal should occur where the error is inherently prejudicial, undermines deterrence of prosecutorial misconduct, or undermines respect for the judicial system. Mause, *Harmless Constitutional Error: The Implications of Chapman v. California*, 53 MINN. L. REV. 519, 538-57 (1969). Errors which are inherently prejudicial include those involving the impartiality of jury or judge. *Id.* at 540-43. When there is racial discrimination in the selection of jurors, for example, automatic reversal is desirable, since the prejudicial impact is not readily ascertainable. Mause, *supra*, at 542. Likewise, Professor Mause argues that admission into evidence of prior convictions is inherently prejudicial. *Id.* at 545-46. He also suggests that constitutional errors caused by prosecutorial misconduct should result in automatic reversal only when the prosecutor knowingly causes the error. *Id.* at 553; *see, e.g.*, Brady v. Maryland, 373 U.S. 83 (1963) (suppression of evidence favorable to defense); Mooney v. Holohan, 294 U.S. 103 (1935) (per curiam) (knowing use of perjured testimony by prosecutor). The author concludes that, in the long run, an automatic reversal standard may be appropriate for all constitutional errors. Mause, *supra*, at 557.

A third proposal would create an automatic reversal rule when the constitutional right infringed is fundamental. *See Harmless Error Standard, supra*, at 620. Whether a right is fundamental depends upon the extent to which it is explicitly recognized by the Constitution, the importance accorded the right as indicated by statute and the judiciary's historical attitude toward the right. *Id.* at 621-25. The right-to-counsel provision of the sixth amendment provides an illustration of the author's "explicitness" requirement. In the author's view, since the right to the assistance of counsel at trial is expressly guaranteed by the Constitution, *see* Gideon v. Wainwright, 372 U.S. 335 (1963); Johnson v. Zerbst, 304 U.S. 458 (1938), a rule of automatic reversal should apply when this right is infringed. As the right to counsel has been extended to critical pretrial proceedings, *see, e.g.*, United States v. Wade, 388 U.S. 218 (1967), the right has become "less explicit" and, therefore, should not fall within an automatic reversal rule. *Harmless Error Standard, supra*, at 622. A constitutional right is also fundamental to the extent that it is reflected in congressional statutory policy. Under this approach, reversal is required if the defendant establishes a violation of a right granted by federal legislation. *Id.* at 623. *See also* Miller v. North Carolina, 583 F.2d 701 (4th Cir. 1978). It also has been suggested that the automatic reversal rule should be applied to any error which "bias[es] the machinery for bringing evidence before the jury." Note, *Harmless Constitutional Error: A Reappraisal*, 83 HARV. L. REV. 814, 820 (1970) [hereinafter cited as *Reappraisal*]. *See generally* R. TRAYNOR, THE RIDDLE OF HARMLESS ERROR (1970); Cameron & Osborn, *When Harmless Error Isn't Harmless*, 1971 L. & SOC. ORD. 23.

[5] *See* notes 113-115 and accompanying text *infra*.

[6] Fahy v. Connecticut, 375 U.S. 85, 86-87 (1963); *see* notes 116-125 and accompanying text *infra*.

is merely cumulative of other evidence in the case.[7] Finally, if overwhelming evidence of a defendant's guilt exists when the error is excised from the record, the error may be deemed harmless.[8]

This Note will review and evaluate the rules regarding constitutional error as established by the Supreme Court and implemented by the appellate courts of New York. The separate rules which govern nonconstitutional error in the federal courts and New York's state courts will be discussed in a similar manner. The Note will conclude by examining the desirability and feasibility of adopting one standard of review for all errors in criminal cases, whether constitutional or nonconstitutional in nature.

HARMLESS CONSTITUTIONAL ERROR

Development of Harmless Constitutional Error in the Supreme Court

At common law, the English "Exchequer Rule" mandated reversal for any trial error no matter how slight or insignificant.[9] This rule, widely followed by American courts,[10] was criticized because it encouraged counsel to inject error into trials and resulted in expense and delay for the parties and the courts.[11] As criminal trials

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[7] *See* notes 106-112 and accompanying text *infra.*

[8] *See* notes 95-105 and accompanying text *infra.*

[9] *See* R. TRAYNOR, *supra* note 4, at 4-12; 1 J. WIGMORE, EVIDENCE § 21, at 367 (3d ed. 1940). Prior to the Exchequer Rule, trial error was not reversible if the entire record contained sufficient evidence to support the verdict and the correct result was attained. *See* R. TRAYNOR, *supra* note 4, at 7-10; 1 J. WIGMORE, *supra,* § 21, at 365-67. When the Exchequer Rule was enunciated in Crease v. Barrett, 1 C.M.&R. 919, 149 Eng. Rep. 1353 (Ex. 1835), the Court of Exchequer noted that an automatic reversal rule would deter breaches of the rules of evidence and prevent appellate courts from impinging upon the function of the jury. *Id.* at 933, 149 Eng. Rep. at 1359. This reasoning was criticized severely by Professor Wigmore, who saw the rules of evidence as "mere instruments of investigation," which could not be justified as "an end in themselves." 1 J. WIGMORE, *supra,* § 21, at 369. Furthermore, in Professor Wigmore's view, the usurpation of the jury function was not a serious objection to the traditional rule, since appellate courts frequently weigh evidence in determining whether a verdict is supported by the facts. *Id.* § 21, at 369-70. Similarly, Justice Traynor has stated: "If the court is convinced upon review of the evidence that the error did not influence the jury, and hence sustains the verdict, *a fortiori* there is no invasion of the province of the jury." R. TRAYNOR, *supra* note 4, at 13. Professor Wigmore was persuaded that the practical effect of the Exchequer Rule was "to increase the delay and expense of litigation, to encourage defiant criminality and oppression, and to foster the spirit of litigious gambling." 1 J. WIGMORE, *supra,* § 21, at 370. For a discussion of the evolution of the harmless error rule in England, see Saltzburg, *The Harm of Harmless Error,* 59 VA. L. REV. 988, 1002 n.45 (1973).

[10] L. ORFIELD, CRIMINAL APPEALS IN AMERICA 190-97 (1939); R. TRAYNOR, *supra* note 4, at 13-14; 1 J. WIGMORE, *supra* note 9, § 21, at 367-68, 373.

[11] *See* R. TRAYNOR, *supra* note 4, at 4-12; 1 J. WIGMORE, EVIDENCE, *supra* note 9, § 21, at 367.

became "a game for sowing reversible error in the record,"[12] a reform movement was spurred by the legal profession,[13] leading to the adoption of harmless error statutes at the federal[14] and state levels.[15] These statutes were designed to eliminate reversals based solely upon "technical errors or defects which [did] not affect the substantial rights of the parties."[16] Despite the prevalence and popularity of harmless error statutes, most commentators believed that automatic reversal was required in any case involving the violation of a right guaranteed by the Federal Constitution.[17] This view seemed to be shared by the Supreme Court which, with only one exception,[18] reversed convictions without regard to whether the con-

[12] Kotteakos v. United States, 328 U.S. 750, 759 (1946).

[13] R. TRAYNOR, *supra* note 4, at 14; *see* Kotteakos v. United States, 328 U.S. at 758-59 nn.10 & 14; 1 J. WIGMORE, *supra* note 9, § 21, at 392-95; Hadley, OUTLINE OF CODE OF CRIMINAL PROCEDURE, 12 A.B.A.J. 690 (1926); Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 29 A.B.A. REP., pt. 1, 395 (1906); Wigmore, *Criminal Procedure: "Good" Reversals and "Bad" Reversals*, 4 ILL. L. REV. 352 (1909).

[14] *See* R. TRAYNOR, *supra* note 4, at 14. The federal harmless error rule for nonconstitutional error is governed by 28 U.S.C. § 2111 (1976) and FED. R. CRIM. P. 52 (a). Section 2111 states: "On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties." 28 U.S.C. § 2111 (1976); *see* Saltzburg, *supra* note 9, at 1006 n.57 (1973). The first federal harmless error statute was enacted in 1919 and re-enacted in substantially the same form in 1949; the statute has remained in force since 1949.

[15] All 50 states now have statutes or rules governing harmless error. *See* Chapman v. California, 386 U.S. 18, 22 (1967). *See also* ALI, OFFICIAL DRAFT OF THE CODE OF CRIMINAL PROCEDURE 1302-04 (1930); Sunderland, *The Problem of Appellate Review*, 5 TEX. L. REV. 126, 146-48 (1927).

[16] N.Y. CRIM. PROC. LAW § 470.05(1) (McKinney 1971); *see* note 14 *supra*. New York's statutory treatment of harmless error is typical of the standard used in many jurisdictions. The state's first harmless error statute was applicable only to crimes which were punishable by death or life imprisonment. Ch. 337, § 3, [1855] N.Y. Laws 613. Under this statute, an appellate court was able to grant a new trial if the verdict "was against the weight of the evidence or against the law" or when "justice required a new trial." *Id.* When the Code of Criminal Procedure was enacted in 1881, it contained a harmless error section applicable to all cases without regard to the crime charged. The statute provided: "After hearing the appeal, the court must give judgment, without regard to technical errors or defects or to exceptions which do not affect the substantial rights of the parties." Ch. 4, § 542, [1881] N.Y. Laws 104 (vol. 2). *See generally* 1 J. WIGMORE, *supra* note 9, § 21, at 387-88. This standard was re-enacted in slightly modified form with the adoption of the Criminal Procedure Law which went into effect on September 1, 1971. Ch. 996, § 1, [1970] N.Y. Laws 3117.

[17] *See, e.g.*, Gibbs, *Prejudicial Error: Admissions and Exclusions of Evidence in the Federal Courts*, 3 VILL. L. REV. 48, 67 (1957); Manwaring, *California and the Fourth Amendment*, 16 STAN. L. REV. 318, 326 (1964); Note, *The Harmless Error Rule Reviewed*, 47 COLUM. L. REV. 450, 461 (1947).

[18] In Motes v. United States, 178 U.S. 458 (1900), the Court concluded that the erroneous admission of a statement in violation of the defendant's sixth amendment right to confront witnesses against him was harmless "when in effect [the defendant] stated under oath that he was guilty of the charge preferred against him." *Id.* at 476. *Motes* was the only case prior to Chapman v. California, 386 U.S. 18 (1967), in which the Supreme Court applied the harmless error doctrine to a constitutional violation.

stitutional error prejudiced the defendant.[19] Nevertheless, neither the courts nor the commentators advanced a satisfactory theory to explain why constitutional error could never be harmless.[20]

The concept of harmless constitutional error was expressly recognized by the Supreme Court in *Chapman v. California*[21] wherein

[19] The Supreme Court reversed convictions where counsel was denied at trial or at another critical stage, *e.g.*, Gideon v. Wainwright, 372 U.S. 335 (1963); Uveges v. Pennsylvania, 335 U.S. 437 (1948); House v. Mayo, 324 U.S. 42 (1945) (per curiam); Williams v. Kaiser, 323 U.S. 471 (1945), where the trial judge was not impartial, Tumey v. Ohio, 273 U.S. 510 (1927), where a defendant's coerced confession was introduced at trial, *e.g.*, Haynes v. Washington, 373 U.S. 503 (1963); Lynumn v. Illinois, 372 U.S. 528 (1963); Rogers v. Richmond, 365 U.S. 534 (1961); Payne v. Arkansas, 356 U.S. 560 (1958); Watts v. Indiana, 338 U.S. 49 (1949), where conviction was based on an unconstitutional statute, Stromberg v. California, 283 U.S. 359 (1931), where an unconstitutional presumption was included in jury instructions, Bollenbach v. United States, 326 U.S. 607, 614-15 (1946), where pretrial publicity saturated the community in which the trial was held, Rideau v. Louisiana, 373 U.S. 723 (1963); *cf.* Sheppard v. Maxwell, 384 U.S. 333 (1966) (pretrial publicity and disruptions by press at trial necessitate reversal), where the right to a speedy trial was denied, Klopfer v. North Carolina, 386 U.S. 213 (1967), where intentional discrimination occurred in selection of grand and petit jurors, Whitus v. Georgia, 385 U.S. 545 (1967); Coleman v. Alabama, 377 U.S. 129 (1964), and where the right to cross-examine the prosecution's witness was denied, Douglas v. Alabama, 380 U.S. 415 (1965); Pointer v. Texas, 380 U.S. 400 (1965). The Court, however, never unequivocally stated that automatic reversal is required in every case involving constitutional error. In Kotteakos v. United States, 328 U.S. 750 (1946), the Court noted in dictum that the harmless error rule is applicable to all errors "except perhaps where the departure is from a constitutional norm," *id.* at 764-65 (footnote omitted), and cited, as examples, cases where coerced confessions were introduced at trial or the defendant was denied the right to represent himself at trial, *id.* at 765 n.19. This dictum is not necessarily inconsistent with the harmless constitutional error doctrine enunciated in Chapman v. California, 386 U.S. 18 (1967), since forced confessions and denial of the right to counsel are constitutional errors which should be subject to automatic reversal. *Id.* at 23 & n.8.

[20] In Bram v. United States, 168 U.S. 532 (1897), the Supreme Court proferred an explanation for automatic reversal when an admission made by the defendant was erroneously allowed into evidence:

> If found to have been illegally admitted, reversible error will result, since the prosecution cannot on the one hand offer evidence to prove guilt, and which by the very offer is vouched for as tending to that end, and on the other hand for the purpose of avoiding the consequences of the error, caused by its wrongful admission, be heard to assert that the matter offered as a confession was not prejudicial because it did not tend to prove guilt.

Id. at 541.

[21] 386 U.S. 18 (1967). The defendants in *Chapman* were convicted following a trial in which both defendants refused to testify. At the time of the trial, the California Constitution allowed the prosecutor to comment upon a defendant's refusal to take the stand, and permitted the jury to infer guilt from his refusal. *Id.* at 19. Making use of this provision, the prosecutor in *Chapman* made numerous references in his summation to the defendants' silence, *id.* at 26-43 (app.), and the trial court informed the jurors that they were entitled to draw unfavorable inferences from the defendant's failure to testify. *Id.* at 19 & n.2. After the trial, the Supreme Court held in an unrelated case that the California practice violated a defendant's rights under the fifth amendment. Griffin v. California, 380 U.S. 609 (1965). Nevertheless, the California Supreme Court refused to overturn the *Chapman* defendants'

the Court stated that some constitutional errors may be so "unimportant and insignificant" within the context of a given case that they could be deemed harmless without offending constitutional principles.[22] Holding that a state's harmless error rule is inapplicable to "infractions by the States of federally guaranteed rights," the *Chapman* Court enunciated a federal standard for reviewing the effect of trial errors of constitutional magnitude.[23] The Court ruled that a constitutional violation may be deemed harmless only when the court is convinced that "it was harmless beyond a reasonable doubt."[24] Attempting to formulate more precise guidelines, the Court rejected tests that place excessive emphasis on the quantum of untainted evidence presented at trial and stated that the proper inquiry is " 'whether there is a reasonable possibility that the [tainted] evidence complained of might have contributed to the conviction.' "[25] The *Chapman* decision has been interpreted as indicating that, in evaluating constitutional error, an appellate court should focus solely on the tainted evidence.[26] Under this inter-

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conviction, finding no "miscarriage of justice" under the state's harmless error rule. People v. Teale, 63 Cal. 2d 178, 404 P.2d 209, 45 Cal. Rptr. 729 (1965).

[22] 386 U.S. at 22.

[23] *Id.* at 21. The Court noted that "in the absence of appropriate congressional action, it [is the Court's] responsibility to protect [a defendant's constitutional rights]." *Id.* Thus, the harmless constitutional error doctrine is apparently subject to change by the Congress. *See id.* at 46-47 (Harlan, J., dissenting); R. TRAYNOR, *supra* note 4, at 38; *Harmless Constitutional Error*, *supra* note 4, at 88 n.40; note 126 *infra*. The Court previously has prescribed rules binding on the states, but "encourage[d] Congress and the States to continue their laudable search for increasingly effective ways of protecting the rights of the individual while promoting efficient enforcement of . . . [the] criminal laws." Miranda v. Arizona, 384 U.S. 436, 467 (1966).

[24] 386 U.S. at 24. The terms "contribute to the conviction," "contribute to the verdict," and "affecting the jurors" possess the same meaning and are used interchangeably throughout this Note. There is no indication in the Supreme Court opinions that these phrases have different connotations. *See* Harrington v. California, 395 U.S. 250, 254 (1969); Chapman v. California, 386 U.S. 18, 24 (1967); Fahy v. Connecticut, 375 U.S. 85, 86-87 (1963); Oral Argument in Harrington v. California, 395 U.S. 250 (1969), *reprinted in* 5 CRIM. L. REP. 4033, 4035 (1969).

[25] 386 U.S. at 23 (quoting Fahy v. Connecticut, 375 U.S. 85, 86-87 (1963)). The *Chapman* Court cited Fahy v. Connecticut, 375 U.S. 85 (1963), wherein the Court reserved for future consideration the question whether constitutional error could ever be harmless. *Id.* at 86. Although the *Fahy* Court reversed a conviction apparently on the narrow ground that the Connecticut Supreme Court of Errors misapplied the state's harmless error rule, *see id.* at 91-92; *Harmless Constitutional Error*, *supra* note 4, at 86-87, the Court did state that if "there is a reasonable possibility that the evidence complained of might have contributed to the conviction," the error cannot be harmless, 375 U.S. at 86-87. Recalling this language, the *Chapman* Court stated: "There is little, if any, difference between . . . [the statement in *Fahy*] and requiring the beneficiary of a constitutional error to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." 386 U.S. at 24.

[26] Field, *Assessing the Harmlessness of Federal Constitutional Error—A Process in Need*

pretation, the tainted evidence is viewed in isolation and is not weighed against the untainted evidence in determining whether the error was harmless.[27] Thus, if the error standing alone is highly prejudicial, it can never be viewed as harmless.[28] This interpretation of *Chapman,* however, has not been borne out by later decisions.

Subsequently, in *Harrington v. California,*[29] the Court considered the effect of a denial of a defendant's sixth amendment right of confrontation under the rule established in *Bruton v. United States.*[30] While expressly reaffirming *Chapman,* Justice Douglas, writing for the majority, concluded that the direct evidence of guilt presented at Harrington's trial was so overwhelming that, unless the Court was to apply an automatic reversal rule to constitutional violations, the error must be considered harmless.[31] Although it found that the erroneously admitted material was merely cumulative of other evidence, the Court expressly rejected a test which would result in a finding of harmlessness when the error is found simply to corroborate untainted evidence in the case.[32]

Harrington is susceptible to being interpreted as a sub silentio overruling of *Chapman* and an unqualified adoption of the less de-

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of A Rationale, 125 U. PA. L. REV. 15, 26 (1976).

[27] *See id.* at 17-19.

[28] The facts in People v. Cotter, 63 Cal. 2d 386, 405 P.2d 862, 46 Cal. Rptr. 622 (1965), *vacated and remanded sub nom.* Cotter v. California, 386 U.S. 274 (1967) (per curiam), may be used to illustrate the effects of a strict interpretation of *Chapman.* In *Cotter,* a total of seven incriminating statements were introduced into evidence. The last three statements were admitted in contravention of the rules established in Escobedo v. Illinois, 378 U.S. 478 (1964). The *Cotter* court held the error harmless, since the inadmissible statements were cumulative of the other statements. 63 Cal. 2d at 398, 405 P.2d at 869, 46 Cal. Rptr. at 629. Had the court applied a strict version of the *Chapman* test, however, focusing solely on the tainted evidence, the admission of the statements in *Cotter* could not have been harmless.

[29] 395 U.S. 250 (1969).

[30] 391 U.S. 123 (1968), *discussed in* Note, *Bruton v. United States: A Belated Look at the Warren Court Concept of Criminal Justice,* 44 ST. JOHN'S L. REV. 54 (1969). The defendant in *Harrington* was tried with three codefendants for murder. During the trial, the codefendants' confessions, which implicated Harrington, were admitted into evidence. Only one codefendant, however, took the stand and submitted to cross-examination. 395 U.S. at 252. The admission of the other two confessions, therefore, denied Harrington his right of confrontation. The *Bruton* Court had held that the admission of a defendant's confession which incriminates his codefendant is a violation of the codefendant's sixth amendment right of confrontation if the confessing defendant does not take the stand. 391 U.S. at 137. The *Bruton* rule is binding on the states under Pointer v. Texas, 380 U.S. 400, 403 (1965), which held the confrontation clause applicable to the states through the fourteenth amendment.

[31] 395 U.S. at 254. The confessions of the two codefendants who did not take the stand placed Harrington at the scene of the crime, a fact which Harrington himself admitted. Additionally, the codefendant who took the stand and other witnesses placed Harrington at the scene of the crime and testified that he actively participated in the crime. *Id.* at 252-54.

[32] *Id.* at 254.

manding "overwhelming evidence" test.[33] Upon a closer reading, however, the decisions may be reconciled. In *Chapman,* the only evidence proving the defendant's guilt was circumstantial.[34] On the other hand, in *Harrington,* there was direct untainted evidence, including the defendant's own statements, which established the same facts as did the erroneously admitted confessions.[35] Thus, the *Harrington* Court was not required to speculate on the inferences drawn by the jury in reaching its verdict and could readily conclude that the error played an insignificant part in the prosecution's case. As implied by *Chapman* and *Harrington,* the courts should distinguish between direct and circumstantial evidence, since the type of untainted evidence presented is relevant to a consideration of its probative value.[36]

Like *Chapman, Harrington* suggests that overwhelming evidence should not be overemphasized in determining harmlessness. The presence of overwhelming evidence is significant, however,

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[33] *See id.* at 255 (Brennan, J., dissenting). In his dissenting opinion in *Harrington,* Justice Brennan argued vigorously that the majority had shifted the focus of the Court's inquiry from an assessment of the error's impact on the jury to an evaluation of the amount of untainted evidence in the case. *Id.* (Brennan, J., dissenting). Justice Brennan was concerned that the adoption of an overwhelming evidence test, *see* notes 95-105 and accompanying text *infra,* would significantly undermine the deterrent effect of such decisions as Mapp v. Ohio, 367 U.S. 643 (1961) (excluding evidence obtained through illegal search and seizure), Griffin v. California, 380 U.S. 609 (1965) (prohibiting comments regarding defendant's silence), Miranda v. Arizona, 384 U.S. 436 (1966) (excluding statements elicited prior to notice of rights), United States v. Wade, 388 U.S. 218 (1967) (excluding in-court identification of defendant when based on lineup or showup without counsel present), and Bruton v. United States, 391 U.S. 123 (1968) (prohibiting admission of codefendant's confession where codefendant does not testify). 395 U.S. at 255 (Brennan, J., dissenting). Additionally, the dissent maintained that an overwhelming evidence test would, in effect, leave enforcement of important constitutional rights in the hands of the trial courts. *Id.* at 256 (Brennan, J., dissenting).

[34] 386 U.S. at 25. In examining the facts in *Chapman,* the Court observed that although there was "a reasonably strong 'circumstantial web of evidence,' . . . it was also a case in which, absent the constitutionally forbidden comments, honest, fair-minded jurors might very well have brought in not-guilty verdicts." *Id.* at 25-26 (citation omitted) (quoting People v. Teale, 63 Cal. 2d 178, 197, 404 P.2d 209, 220, 45 Cal. Rptr. 729, 740 (1965), *rev'd sub nom.* Chapman v. California, 386 U.S. 18 (1967)).

[35] 395 U.S. at 252-54. The *Harrington* Court stated that "[t]he case . . . was not woven from circumstantial evidence. [The evidence] is so overwhelming that . . . we must leave this state conviction undisturbed." *Id.* at 254.

[36] *See* Fontaine v. California, 390 U.S. 593, 596 (1968) (per curiam); United States v. Gonzalez, 555 F.2d 308, 317 (2d Cir. 1977); Chase v. Crisp, 523 F.2d 595, 599 (10th Cir. 1975), *cert. denied,* 424 U.S. 947 (1976); United States v. Mancino, 468 F.2d 1350, 1353-55 (8th Cir. 1972). *See also* United States v. Brown, 551 F.2d 639, 644 (5th Cir. 1977); United States v. Anderson, 523 F.2d 1192, 1196-97 (5th Cir. 1975). Regarding the differences between direct and circumstantial evidence at the trial level, Professor Wigmore has stated that it is impossible "to make a general assertion ascribing greater weight to one class or the other." 1 J. WIGMORE, *supra* note 9, § 26, at 401.

since the greater the evidence of guilt, the less likely it is that the error influenced the jury's decision.[37] Significantly, in *Harrington,* both the majority and the dissent believed that the quantum of untainted evidence should be a factor in determining whether constitutional error is harmless.[38] The majority appeared to place great emphasis on overwhelming evidence of guilt, while the dissenters expressed concern that the amount of untainted evidence would become the decisive factor in determining harmlessness.[39] Thus, their disagreement apparently was related to the degree of emphasis to be placed on the untainted evidence.

Unfortunately, the last major harmless constitutional error case decided by the Supreme Court, *Milton v. Wainwright,*[40] did not serve to clarify the problems posed by *Chapman* and *Harrington.* The *Milton* Court was asked to decide whether statements elicited by a police officer who had been planted in the defendant's jail cell after his attorney had instructed him to remain silent were properly obtained.[41] Avoiding the constitutional question,[42] the Court examined the record, which included three untainted confessions and other "highly damaging" evidence.[43] On the basis of this

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[37] *See* notes 118-119 and accompanying text *infra.*

[38] 395 U.S. at 254; *id.* at 256 (Brennan, J., dissenting). The *Harrington* majority noted that the "weight of the evidence" is significant, *id.* at 254, while the dissent observed that "[t]he focus of appellate inquiry should be on the character and quality of the tainted evidence as it relates to the untainted evidence and not just on the amount of untainted evidence." *Id.* at 256 (Brennan, J., dissenting).

[39] *Id.* at 256 (Brennan, J., dissenting).

[40] 407 U.S. 371 (1972).

[41] Several days after the defendant in *Milton* was arrested he confessed to the crime. In the days that followed he clarified and added to his statement. In total, he made three complete confessions. Thereafter, he obtained the assistance of an attorney and was advised not to discuss his case with anyone. *Id.* at 373-75. While the defendant was in jail awaiting trial, the state planted a police officer in his cell. Posing as a fellow prisoner, the officer obtained additional incriminating statements from Milton. At trial, the officer testifed to these statements. *Id.* at 375-76.

[42] *Id.* at 372. The dissent in *Milton* strenously objected to the majority's refusal to consider the right-to-counsel issue and argued that the manner in which the confession was procured was a clear violation of the defendant's rights under Powell v. Alabama, 287 U.S. 45 (1932), and Massiah v. United States, 377 U.S. 201 (1964). 395 U.S. at 380-82 (Stewart, J., dissenting). The dissent's position, it is submitted, is well taken. If the harmless error doctrine is routinely invoked to avoid constitutional issues, the development of the case law concerning substantive issues will be inhibited. The result could be inconsistency and increased error at the trial level, since trial judges would be left without guidance on important substantive questions. *See* Note, *Application of the Harmless Error Doctrine to Violations of* Miranda: *The California Experience,* 69 MICH. L. REV. 941, 951 (1971).

[43] 407 U.S. at 376. In addition to the confessions, there was a substantial amount of circumstantial evidence, including the fact that the defendant was the beneficiary of the victim's life insurance policies, testimony that the defendant told others he was interested

record, the Court held that even if the admission of the illegally obtained statement was error, it was harmless beyond a reasonable doubt.[44] With such overwhelming evidence of guilt, there was "no reasonable doubt that the jury . . . would have reached the same verdict without hearing [the officer's] testimony."[45]

Although *Milton* professed adherence to the harmless beyond a reasonable doubt standard, a conflict with earlier decisions arises from the Court's conclusion that the jury would have convicted the defendant without having heard the tainted evidence.[46] This approach differs markedly from that suggested in *Harrington* where the majority stated that an appellate court should determine "the probable impact of the [error] on the minds of the average jury."[47] Since the emphasis is on the impact of the tainted evidence, this approach is consistent with the reasonable possibility test. In contrast, the *Milton* Court focused on whether the jury would have convicted without the tainted evidence, which appears similar to an overwhelming evidence test.[48]

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only in the victim's money, and evidence that the doors of the car in which the victim drowned were locked and could not have been locked accidentally. *Id.*

[44] The dissenters in *Milton* took a different view of the evidence. Finding the circumstances under which the defendant's other confessions were obtained somewhat questionable, the dissent challenged the majority's estimation of the weight given to these confessions by the jury. Since the jury rationally might have discounted the reliability of the "untainted" statements, the dissent concluded that there was at least a reasonable possibility that the "tainted" statement had a corroborative effect and contributed to the conviction. *Id.* at 383-84 (Stewart, J., dissenting).

The problem hinted at by the *Milton* dissent was illustrated in Schneble v. Florida, 405 U.S. 427 (1972), which was decided only a few months before *Milton*. The *Schneble* Court found a violation of *Bruton*, *see* note 30 *supra*, harmless beyond a reasonable doubt, although the evidence against Schneble, in addition to his codefendant's statement, consisted primarily of his confession. 405 U.S. at 428-31. The trial court determined in the first instance that the confession was voluntary, *see* Jackson v. Denno, 378 U.S. 368 (1964), and instructed the jury to disregard any part of the statement it believed to have been made involuntarily. 405 U.S. at 434 (Marshall, J., dissenting). While the majority viewed the inadmissible statements as largely corroborative of Schneble's confession, it noted that the jury must have viewed the confession as voluntary, since, aside from the confession, there was insufficient proof of guilt. *Id.* at 431.

[45] 407 U.S. at 377.

[46] *See id.* at 377. *Milton* reached the Court on a petition of habeas corpus. The test adopted by the Court which, in contrast to other tests, is likely to result in a finding of harmlessness, may reflect a tendency to apply a more lenient standard when a harmless error question comes before the Court on a habeas corpus petition than when error is reviewed on direct appeal. Judge Friendly also favors an approach which utilizes different standards for assessing error depending upon whether the appeal is direct or collateral. *See* Friendly, *Is Innocence Irrelevant?—Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142, 157 n.81 (1970). *See also* Henderson v. Kibbe, 431 U.S. 145, 153-57 (1977); Stone v. Powell, 428 U.S. 465 (1976).

[47] 395 U.S. at 254.

[48] *See, e.g.*, United States v. Williams, 523 F.2d 407, 409-10 & n.2 (2d Cir. 1975); Null v.

Notwithstanding the uncertainty generated by the *Chapman, Harrington* and *Milton* decisions, it remains clear that the "harmlessness" of a trial error of constitutional magnitude must be demonstrated beyond a reasonable doubt.[49] The apparent contradictions in the Supreme Court's decisions may reflect the Court's attempt to find a standard for measuring harmlessness which would lead to consistent results.[50] While it may be argued that the test for harmlessness has changed,[51] it is also possible to conclude that the decisions are an indication of the Court's reluctance to establish a mechanical rule.[52]

Wainwright, 508 F.2d 340, 343 (5th Cir.), *cert. denied,* 421 U.S. 970 (1975). *See also* Bates v. Nelson, 485 F.2d 90, 93-94 (9th Cir. 1973), *cert. denied,* 415 U.S. 960 (1974); *Reappraisal, supra* note 4. Despite the many inconsistencies, the result in *Milton* may be reconciled with those reached in *Harrington* and *Chapman,* since the case against Milton did not derive entirely from circumstantial evidence, and the direct evidence of guilt arising from the untainted confessions was highly damaging. *See* notes 34-36 and accompanying text *supra.*

[49] *See, e.g.,* Milton v. Wainwright, 407 U.S. 371, 372 (1972); Harrington v. California, 395 U.S. 250, 251 (1969); Chapman v. California, 386 U.S. 18, 24 (1967).

[50] *Chapman* was criticized for not establishing a clear and practical standard. *See, e.g.,* Mause, *supra* note 4, at 538-40; Thompson, *Unconstitutional Search and Seizure and the Myth of Harmless Error,* 42 NOTRE DAME LAW. 457, 464 (1967); *Reappraisal, supra* note 4, at 815-17; Oral Argument in Harrington v. California, 395 U.S. 250 (1969), *reprinted in* 5 CRIM. L. REP. 4033 (1969). Decisions in the lower federal courts support the contention that the Court's opinions on harmless constitutional error have not produced a test capable of yielding consistent results. *Compare* United States v. Hunt, 548 F.2d 268, 268 n.1 (9th Cir. 1977), *and* United States v. Shuey, 541 F.2d 845, 850 (9th Cir. 1976), *cert. denied,* 429 U.S. 1092 (1977), *with* United States v. Gonzalez, 555 F.2d 308, 316 (2d Cir. 1977), *and* United States v. Hunt, 548 F.2d 268, 268-71 (9th Cir. 1977) (Sneed, J., dissenting). *See generally* Field, *supra* note 26, at 15-36.

[51] The inconsistencies in the *Chapman, Harrington,* and *Milton* decisions may be attributable to changes in the composition of the Court. In Chapman v. California, 386 U.S. 18 (1967), the majority consisted of Chief Justice Warren and Justices Black, Douglas, Clark, Brennan, White and Fortas with Justices Stewart concurring and Harlan dissenting. The majority in Harrington v. California, 395 U.S. 250 (1969), was comprised of Justices Black, Douglas, Harlan, Stewart and White. The Chief Justice and Justices Brennan and Marshall dissented. By the time Milton v. Wainwright, 407 U.S. 371 (1972), was decided, there were four new justices on the Court. Chief Justice Burger and Justices Blackmun, Powell and Rehnquist comprised the majority in *Milton* along with Justice White. The dissenters were Justices Douglas, Brennan, Stewart and Marshall. Thus, it is conceivable that this change of the Court's membership may have influenced the *Milton* Court's apparent preference for the "overwhelming evidence" test. The change in the Court's composition, however, does not explain the seemingly contradictory positions taken by Justices Black, Douglas and Stewart in *Chapman* and *Harrington.* Nor does it account for the apparent inconsistency in Justice White's position in all three major harmless constitutional error decisions.

[52] *Cf.* People v. Pinzon, 44 N.Y.2d 458, 464, 377 N.E.2d 721, 724, 406 N.Y.S.2d 268, 271 (1978) (refusal to apply mechanical and arbitrary standards to determine time at which right to counsel attaches).

The New York Experience Under the Harmless Constitutional Error Doctrine

Efforts by New York courts to implement the federal harmless constitutional error rule illustrate the varying interpretations to which the Supreme Court's decisions are subject. Although New York appellate courts have applied the harmless error rule to a variety of constitutional violations,[53] prior to the 1975 decision of the New York Court of Appeals in *People v. Crimmins*,[54] the standard used to measure harmlessness was unclear.[55] In what remains perhaps the most significant statement of when trial error necessitates reversal in New York, the *Crimmins* court recognized that harmlessness must be proven beyond a reasonable doubt.[56] Judge Jones, writing for the majority, stated that the threshold inquiry in any harmless error case is whether there is overwhelming evidence of the defendant's guilt.[57] In making this determination, however, the court did not distinguish between direct and circumstantial evidence. Since, with the exception of a single-sentence confession by the defendant, the "overwhelming" evidence was completely circumstantial,[58] it is suggested that the *Crimmins* majority may have

[53] Violations of the rights established in Miranda v. Arizona, 384 U.S. 436 (1966), were assessed in People v. Rivers, 64 App. Div. 2d 834, 407 N.Y.S.2d 937 (4th Dep't 1978). A harmless error test was applied to a violation of the defendant's *Bruton* rights, *see* note 30 *supra*, in People v. Baker, 26 N.Y.2d 169, 174, 257 N.E.2d 630, 633, 309 N.Y.S.2d 174, 178-79 (1970). In People v. Brown, 60 App. Div. 2d 890, 401 N.Y.S.2d 290 (2d Dep't 1978), the court applied the harmless error rule to the admission of evidence in violation of the rule set forth in United States v. Wade, 388 U.S. 218 (1967). The harmfulness of a prosecutor's comments, which raised improper inference regarding the defendant's failure to take the stand, was assessed in People v. Abdul-Malik, 61 App. Div. 2d 657, 663, 403 N.Y.S.2d 253, 256-57 (1st Dep't 1978); *see* People v. Williams, 63 App. Div. 2d 613, 411 N.Y.S.2d 630 (1st Dep't 1979). *See generally* Newman, *Harmless Error in Criminal Appeals*, N.Y.L.J., Nov. 16, 1978, at 1, col. 1.

[54] 36 N.Y.2d 230, 326 N.E.2d 787, 367 N.Y.S.2d 213 (1975).

[55] *See, e.g.*, People v. Brosnan, 32 N.Y.2d 254, 262, 298 N.E.2d 78, 82, 344 N.Y.S.2d 900, 906 (1973); People v. Stanard, 32 N.Y.2d 143, 148, 297 N.E.2d 77, 80, 344 N.Y.S.2d 331, 334 (1973); People v. Steiner, 30 N.Y.2d 762, 763-64, 284 N.E.2d 577, 578, 333 N.Y.S.2d 423, 424 (1972); People v. McKinney, 24 N.Y.2d 180, 185, 247 N.E.2d 244, 246, 299 N.Y.S.2d 401, 405-06 (1969).

[56] 36 N.Y.2d at 239, 326 N.E.2d at 792, 367 N.Y.S.2d at 219.

[57] *Id.* at 240, 326 N.E.2d at 793, 367 N.Y.S.2d at 221. The *Crimmins* court stated that overwhelmingness is shown where the untainted evidence is so "compelling" and "forceful" that reasonable jurors "would almost certainly have convicted the defendant." *Id.* at 242, 326 N.E.2d at 794, 367 N.Y.S.2d at 222.

[58] *Id.* at 242-43, 326 N.E.2d at 794, 367 N.Y.S.2d at 222-23. The defendant in *Crimmins* remarked to her paramour: "'[F]orgive me, I killed her.'" *Id.*, 326 N.E.2d at 794, 367 N.Y.S.2d at 223. Under New York law, a confession is treated as direct evidence of guilt; an admission, on the other hand, is circumstantial evidence. People v. Bretagna, 298 N.Y. 323, 83 N.E. 537, *cert. denied*, 336 U.S. 919 (1949); W. RICHARDSON, EVIDENCE §§ 145, 150 (10th ed. J. Prince 1973); *see* People v. Eisenman, 39 N.Y.2d 810, 811, 351 N.E.2d 429, 430, 385 N.Y.S.2d 762, 763 (1976).

overlooked an important qualification on the use of the "overwhelming evidence" test implicitly recognized in *Chapman*.[59] While excessive emphasis appears to have been placed on the finding that the evidence of guilt was overwhelming, the court explicitly stated that the critical inquiry under *Chapman* is whether a "reasonable possibility" exists that the error "contributed to the conviction."[60]

The next case decided by the court of appeals was *People v. Almestica*,[61] which involved the erroneous use of evidence seized in an illegal search.[62] In finding that there was no reasonable possibility that this evidence contributed to the conviction, the court relied heavily on the uncontradicted testimony of the victim, which, it stressed, was entirely independent of and not derived from the tainted evidence.[63] Finding that the other evidence introduced at trial was "compelling and convincing,"[64] the court viewed the tainted evidence as "additional conclusive evidence" which was of "negligible significance."[65]

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[59] *See* notes 33-36 and accompanying text *supra*.

[60] 36 N.Y.2d at 240-41, 326 N.E.2d at 795, 367 N.Y.S.2d at 221. While the *Crimmins* court indicated that the causal relationship between the error and the verdict is the critical factor, its own inquiry appears to have ended once overwhelming evidence of guilt was found. *See id.* at 237, 326 N.E.2d at 791, 367 N.Y.S.2d at 218.

When discussing nonconstitutional error, the *Crimmins* court declared that "an error is prejudicial in this context if the appellate court concludes that there is a significant probability, *rather than only a rational possibility*, in the particular case that the jury would have acquitted the defendant had it not been for the error or errors which occurred." *Id.* at 242, 326 N.E.2d at 794, 367 N.Y.S.2d at 222 (emphasis added). By juxtaposing the terms "significant probability" and "rational possibility," the court may have been indicating that the question whether "the jury would have acquitted" is an appropriate inquiry in the assessment of constitutional error. If this is the method for determining whether constitutional error "contributed to the conviction," then the difference between the two tests is reduced to the degree of certainty required of an appellate court before it can deem any error harmless. This analysis of *Crimmins* is supported by the court's subsequent decision in People v. Almestica, 42 N.Y.2d 222, 366 N.E.2d 799, 397 N.Y.S.2d 709 (1977); *see* notes 66-68 and accompanying text *infra*. Accordingly, the *Crimmins* court formulation may not require a determination of whether an error had an actual impact upon the jury's decision.

[61] 42 N.Y.2d 222, 366 N.E.2d 799, 397 N.Y.S.2d 709 (1977).

[62] *Id.* at 224-26, 366 N.E.2d at 801, 397 N.Y.S.2d at 710-11. The defendants in *Almestica* were charged with robbery and burglary. At trial, the prosecution introduced the stolen goods and the weapons used in the robbery, all of which were seized when an auto the defendants were driving was illegally stopped in violation of People v. Ingle, 36 N.Y.2d 413, 330 N.E.2d 39, 369 N.Y.S.2d 67 (1975), and People v. Simone, 39 N.Y.2d 818, 351 N.E.2d 432, 385 N.Y.S.2d 765 (1976), both decided after the *Almestica* trial.

[63] 42 N.Y.2d at 226-27, 366 N.E.2d at 802, 397 N.Y.S.2d at 712. According to the *Almestica* court, it was critical that the testimony of the victim did not derive from the illegal search and seizure. *Id. But see* notes 69-71 and accompanying text *infra*.

[64] 42 N.Y.2d at 224, 366 N.E.2d at 800-01, 397 N.Y.S.2d at 710.

[65] *Id.* at 224, 226, 366 N.E.2d at 800, 802, 397 N.Y.S.2d at 710, 712.

The *Almestica* decision appears to be a departure from the reasonable possibility test suggested in *Chapman* and echoed in *Crimmins*. Since the evidence submitted to the trial judge consisted primarily of the victim's testimony and the illegally seized evidence, it is difficult to accept the conclusion that the inadmissible evidence had no effect upon the decision of the trial judge, especially when he made "extensive use of the improperly admitted testimony" in his oral decision.[66] The more likely explanation for the *Almestica* ruling is that the court focused primarily on whether the trier of fact would have found the defendant guilty in the absence of the tainted evidence.[67] Viewed in this light, *Almestica* seems to represent an application of the overwhelming evidence test, a test which approximates the New York nonconstitutional error standard.[68]

The *Almestica* court may also be questioned for its reliance on the fact that the victim's testimony was independent of the illegally obtained evidence.[69] If the victim's testimony was the fruit of the illegal seizure, it probably would have been inadmissible,[70] leaving

[66] *Id.* at 226, 366 N.E.2d at 802, 397 N.Y.S.2d at 712. Moore v. United States, 429 U.S. 20 (1976) (per curiam), also involved review of error at a nonjury trial. In response to the government's contention that the error was harmless, the Court stated that "whatever the merits of that argument as a general proposition it has a hollow ring in a case where the trial judge expressly relied upon the inadmissible evidence in finding the defendant guilty." *Id.* at 22; *see* R. TRAYNOR, *supra* note 4, at 24.

[67] *See* 42 N.Y.2d at 229, 366 N.E.2d at 804, 397 N.Y.S.2d at 714 (Cooke, J., dissenting). For a criticism of the "correct result" test apparently used in *Almestica*, see R. TRAYNOR, *supra* note 4, at 18-22.

[68] *See* 42 N.Y.2d at 229, 366 N.E.2d at 804, 397 N.Y.S.2d at 714, (Cooke, J., dissenting); notes 82-87 *infra*. Reflecting the concerns expressed by the dissenters in *Harrington* and *Milton*, *see* notes 33, 42 *supra*, the *Almestica* dissent argued that the majority based its decision on "its own conclusion as to what verdict would have been reached by a jury or . . . Trial Justice" had only the untainted evidence been presented. 42 N.Y.2d at 229, 366 N.E.2d at 804, 397 N.Y.S.2d at 714 (Cooke, J., dissenting).

[69] 42 N.Y.2d at 226-27, 366 N.E.2d at 802, 397 N.Y.S.2d at 712. In support of its analysis, the *Almestica* majority cited Fahy v. Connecticut, 375 U.S. 85 (1963), noting that the case was distinguishable on the ground that the *Fahy* defendant confessed only after he was confronted with incriminating evidence obtained through an illegal search. Among its other findings, the *Fahy* Court concluded that the defendant should have been given the opportunity to show that his confession was tainted because it was induced when the police confronted him with the illegally seized goods. *Id.* at 90-91. In *Almestica*, however, it was clear that the crucial testimony was in no way related to the illegally seized evidence. Thus, it is difficult to understand why the court believed that it was necessary to distinguish *Fahy*.

[70] *See, e.g.*, Wong Sun v. United States, 371 U.S. 471, 487-88 (1963). Under the "fruit of the poisonous tree" doctrine, evidence which "has been come at by exploitation of [illegal police action]" must be suppressed. *Id.* at 488. Only in a few rare instances could evidence derived indirectly from illegal police conduct be admitted at trial. *E.g.*, People v. Payton, 45 N.Y.2d 300, 313-14, 380 N.E.2d 224, 231, 408 N.Y.S.2d 395, 402, *prob. juris. noted*, 99 S. Ct. 718 (1978); People v. Fitzpatrick, 32 N.Y.2d 499, 506-07, 300 N.E.2d 139, 141-42, 346 N.Y.S.2d 793, 797, *cert. denied*, 414 U.S. 1050 (1973); People v. Mendez, 28 N.Y.2d 94, 100-01, 268 N.E.2d 778, 781-82, 320 N.Y.S.2d 39, 44-45, *cert. denied*, 404 U.S. 911 (1971).

no untainted evidence for the trial judge's consideration. It does not follow, however, that because the improperly admitted evidence was unrelated to the victim's testimony it was harmless. One piece of evidence, although independent of any other, may nevertheless have an extremely prejudicial effect.[71] Thus, whether the untainted evidence is independent of the tainted evidence does not seem relevant to whether the tainted evidence is harmless.

The inconsistent approach taken by the New York Court of Appeals[72] is reflected in subsequent cases decided by lower appellate courts. In one line of cases, the courts' inquiry focused not on whether the error actually influenced the verdict, but rather, on whether the defendants would have been convicted had the error not occurred.[73] This standard differs significantly from the *Crimmins*

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[71] The *Almestica* dissent noted that if the trier of fact had any doubts about the defendant's guilt from the untainted testimony alone, they were removed when the tainted evidence was presented. 42 N.Y.2d at 228, 366 N.E.2d at 803, 397 N.Y.S.2d at 713 (Cooke, J., dissenting).

[72] The court of appeals appeared to return to the reasonable possibility standard in People v. Evans, 43 N.Y.2d 160, 371 N.E.2d 528, 400 N.Y.S.2d 810 (1977). The defendant in *Evans* was accused of selling narcotics to an undercover agent. After the agent bought the drugs, he immediately contacted his superior, who stopped the defendant a short time later and conducted a search. Although the defendant possessed no drugs, the officer testified that he found in the defendant's pocket three ten dollar bills which allegedly were used by the undercover agent to pay for the narcotics. The *Evans* court concluded that the search of the defendant was improper. Although there was probable cause to arrest the defendant at the time of the search, he was not arrested until a month later, because the police sought to protect the identity of the undercover agent. The court held that the search could not be sustained unless there was a contemporaneous arrest. *Id.* at 163-66, 371 N.E.2d at 530-31, 400 N.Y.S.2d at 811-13. Since the police officer's testimony corroborated important aspects of the prosecutor's case and was used by the prosecutor in his summation, the court concluded that the error was not harmless beyond a reasonable doubt. *Id.* at 167, 371 N.E.2d at 532, 400 N.Y.S.2d at 814.

In another recent case, People v. Von Werne, 41 N.Y.2d 584, 362 N.E.2d 982, 394 N.Y.S.2d 183 (1977), a police officer testified that the defendant had refused to answer some questions before he was arrested. The admission of this testimony represented a violation of the defendant's right to remain silent. *Id.* at 587-88, 362 N.E.2d at 985, 394 N.Y.S.2d at 186. The effect of the error was magnified when the trial court instructed the jury that it could not infer guilt from the defendant's refusal to testify at trial, but failed to instruct it that the same rule applied to the defendant's pre-arrest silence. *Id.*, 362 N.E.2d at 985, 394 N.Y.S.2d at 187. Examining the record, the court found that there was less than overwhelming evidence of an essential element of the crime charged. *Id.* at 588, 362 N.E.2d at 985, 394 N.Y.S.2d at 187. Thus, it concluded, the error could not be harmless under the overwhelming evidence test. Additionally, since there was at least a reasonable possibility that the inadmissable statements of the police officer actually contributed to the conviction, the case also failed to meet the requirements of the reasonable possibility test.

[73] In People v. Napolitano, 62 App. Div. 2d 955, 404 N.Y.S.2d 20 (1st Dep't 1978), the defendant made admissions following his indictment. These statements were erroneously admitted at trial, but "because of the overwhelming weight of the People's evidence, . . . the admission . . . was harmless beyond a reasonable doubt." *Id.* at 955-56, 404 N.Y.S.2d at 21. In People v. Goldston, 59 App. Div. 2d 704, 398 N.Y.S.2d 289 (2d Dep't 1977), the court

test in which a finding of overwhelming evidence is merely the threshold determination in the assessment of harmlessness.[74] In a second line of cases, New York courts have applied the reasonable possibility test.[75] While the same result may be reached in a particular case regardless of which test is applied, the tests are not identical and harmlessness may be found under one test but not under the other in a number of instances.[76]

NONCONSTITUTIONAL ERROR

The seminal decision for review of nonconstitutional errors in

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held that a showup identification was not reversible error, *see* Manson v. Braithwaite, 432 U.S. 98 (1977), but noted that even if the error were reversible, the conviction should nevertheless be affirmed due to the overwhelming amount of evidence indicating guilt. 59 App. Div. 2d at 704, 398 N.Y.S.2d at 290. Finally, in People v. Caplandies, 57 App. Div. 2d 971, 394 N.Y.S.2d 96 (3d Dep't 1977), a suppressed inculpatory statement obtained in violation of *Miranda* was used to help the victim refresh her recollection of the location of the crime. Without deciding whether the victim's testimony regarding the scene of the crime was "fruit of the poisonous tree," *see* note 70 *supra*, the court found that any error was harmless since it considered the evidence against the defendant "devastating" and the location of the crime an "incidental matter." 57 App. Div. 2d at 971, 394 N.Y.S.2d at 97.

[74] People v. Crimmins, 36 N.Y.2d 230, 240-41, 326 N.E.2d 787, 793, 367 N.Y.S. 213, 221 (1975); *see* note 57 and accompanying text *supra*.

[75] In People v. Schlictcroll, 59 App. Div. 2d 545, 396 N.Y.S.2d 898 (2d Dep't 1977), the court apparently applied the reasonable possibility test to a *Bruton* violation, *see* note 30 *supra*, although no express reference was made to the test. In People v. Harding, 59 App. Div. 2d 897, 399 N.Y.S.2d 57 (2d Dep't 1977), a statement of the defendant was erroneously admitted into evidence and testimony was given regarding the defendant's silence. The court determined that the errors "may have contributed to the conviction" and reversed. *Id.* at 897, 399 N.Y.S.2d at 58. In People v. Jones, 61 App. Div. 2d 264, 402 N.Y.S.2d 28 (2d Dep't 1978), the defendant signed a written confession without being advised of his *Miranda* rights. The court held that "[w]ith the possible exception of a confession from the stand, nothing could have damned the appellant more . . . ." *Id.* at 267-68, 402 N.Y.S.2d at 30. Thus, there was at least "a reasonable doubt that the error . . . contribute[d] to [the] conviction." *Id.* In contrast, one of the dissenters argued that the overwhelming evidence alone rendered the error harmless. *Id.* at 268-69, 402 N.Y.S.2d at 31 (Suozzi, J., dissenting) (citing People v. Almestica, 42 N.Y.2d 222, 366 N.E.2d 799, 397 N.Y.S.2d 709 (1977)).

[76] *Compare* People v. Bowen, 65 App. Div. 2d 364, 369, 411 N.Y.S.2d 573, 577 (1st Dep't 1978), *with id.* at 375, 411 N.Y.S.2d at 581 (Sandler, J., dissenting). While an error may be found prejudicial under the overwhelming evidence test but harmless under the reasonable possibility test, it is more likely that the converse would be true. For example, if a matchbook which placed the defendant's vehicle at the scene of the crime was illegally seized, a finding of harmlessness would depend on whether untainted overwhelming evidence of guilt existed. Under the reasonable possibilty test, however, the amount of untainted evidence only is relevant to show the impact of error upon the jury. Thus, regardless of the quantity of other evidence, the illegal seizure of a matchbook would be harmless only if it played an insignificant part in the prosecution's case. This example is based on People v. DeGina, 39 N.Y.2d 96, 99, 346 N.E.2d 809, 810, 382 N.Y.S.2d 971, 972 (1976), wherein the court found the admission of the matchbook harmless "in view of all of the other evidence placing the vehicle at the scene of the crimes." *Id.*

federal criminal trials is *Kotteakos v. United States.*[77] The *Kotteakos* Court held that unless "the judgment was not substantially swayed" or "influenced" by the error, "it is impossible to conclude that substantial rights were not affected."[78] Under this test, which resembles the "reasonable possibility" standard, an appellate court must be convinced that the error was not a significant factor in producing the verdict.[79] Thus, although the inquiries are similar, the federal test for harmless nonconstitutional error is somewhat less demanding than the standard for harmless constitutional error.[80]

Courts at the state level are free to adopt their own standards for reviewing nonconstitutional error.[81] In New York, the leading case on the question of harmless nonconstitutional error is *People v. Crimmins.*[82] In clarifying New York's rule governing nonconstitutional error, the *Crimmins* court observed that there is a two-step process for determining whether the error is prejudicial.[83] The threshold question is whether, excluding the errors, the "quantum and nature" of the evidence against the defendant is overwhelming.[84] If overwhelming evidence does not exist, the inquiry ends and the error can never be deemed harmless.[85] If the evidence of guilt is

[77] 328 U.S. 750 (1946). *Kotteakos,* decided in 1946, was based on an interpretation of § 269 of the Judicial Code. Act of Feb. 26, 1919, ch. 48, § 269, 40 Stat. 1181; *see* 328 U.S. at 757. This section was repealed, Act of June 25, 1948, ch. 646, § 39, 62 Stat. 992, and replaced by the Act of May 24, 1949, ch. 139, § 110, 63 Stat. 105 (codified at 28 U.S.C. § 2111 (1976)). *Kotteakos,* however, remains the leading decision in this area. *See, e.g.,* United States v. Agurs, 427 U.S. 97, 112 (1976); United States v. Frank, 494 F.2d 145, 161 n.19 (2d Cir. 1974) (Friendly, J.); United States v. Birnbaum, 373 F.2d 250 (2d Cir.), *cert. denied,* 389 U.S. 837 (1967); 3 C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE §§ 853-54 (1969).

[78] 328 U.S. at 765.

[79] *Id.* The Court stated: "If . . . [an appellate court] is sure that the error did not influence the jury, or had but very slight effect, the verdict and judgment should stand . . . ." *Id.* at 764. Thus, the *Kotteakos* Court apparently rejected the overwhelming evidence test when it stated that "[t]he inquiry cannot be merely whether there was enough to support the result apart from the phase affected by the error." *Id.* at 765.

[80] *See* Harrington v. California, 395 U.S. 250, 255 (1969) (Brennan, J., dissenting); *accord,* Chapman v. California, 386 U.S. 18, 26 (1967); Fahy v. Connecticut, 375 U.S. 85, 86-87 (1963).

[81] *See* Cooper v. California, 386 U.S. 58, 62 (1967). A variety of harmless error tests have been developed in the state courts. *See, e.g.,* People v. Perry, 7 Cal. 3d 756, 499 P.2d 129, 103 Cal. Rptr. 161 (1972); State v. Trudo, 253 N.W.2d 101, (Iowa) *cert. denied,* 434 U.S. 903 (1977); Commonwealth v. Bottiglio, 357 Mass. 593, 259 N.E.2d 570 (1970); State v. White, 295 Minn. 217, 203 N.W.2d 852 (1973); Forrest v. State, 335 So. 2d 900 (Miss. 1976); Woodhull v. State, 43 Wis. 202, 168 N.W.2d 281 (1969).

[82] 36 N.Y.2d 230, 326 N.E.2d 787, 367 N.Y.S.2d 213 (1975).

[83] *Id.* at 240-41, 326 N.E.2d at 793, 367 N.Y.S.2d at 221 (quoting Fahy v. Connecticut, 375 U.S. 85, 86 (1963); citing Chapman v. California, 386 U.S. 18 (1967)).

[84] 36 N.Y.2d at 242, 326 N.E.2d at 794, 367 N.Y.S.2d at 222; *see* note 57 *supra.*

[85] 36 N.Y.2d at 240, 326 N.E.2d at 793, 367 N.Y.S.2d at 221. The *Crimmins* court rejected

overwhelming, the appellate court still cannot find harmlessness if it "concludes that there is a *significant probability* . . . that the jury would have acquitted the defendant had it not been for the error or errors which occurred."[86] Although New York requires a threshold finding of overwhelming evidence in both constitutional and nonconstitutional error cases, the difference in approach is evident in the second prong of the test. While "reasonable possibility" of impact on the jury is the key in determining the effect of constitutional error, the nonconstitutional error standard focuses on whether acquittal would have resulted had the error not occurred.[87]

A Uniform Standard in Criminal Cases

The Case for a Uniform Standard

While the tests for measuring the harmlessness of nonconstitutional error in both federal and New York State courts are less stringent than are the standards used in evaluating constitutional error,[88] the basis for this distinction has not been satisfactorily ex-

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the notion that overwhelming evidence alone can render a constitutional or nonconstitutional error harmless. *Id.* at 241-42, 326 N.E.2d at 793, 367 N.Y.S.2d at 222.

[86] *Id.* at 242, 326 N.E.2d at 794, 367 N.Y.S.2d at 222 (emphasis added). Judge, now Chief Judge, Cook criticized the majority for establishing a "trifurcated standard" for reviewing questions of harmless error. *Id.* at 244, 326 N.E.2d at 795, 367 N.Y.S.2d at 224 (Cooke, J., concurring in part and dissenting in part). Noting that there is now the "significant probability" test for nonconstitutional error, the "reasonable possibility" test for constitutional error and a test for error "of constitutional proportion, namely, the right to a fair trial," without regard to whether the error was prejudicial, *id.* at 243-45, 326 N.E.2d at 795, 367 N.Y.S.2d at 223-24 (Cooke, J., concurring in part and dissenting in part), Judge Cooke expressed concern that confusion would result when appellate courts attempt to employ the various standards. Accordingly, he contended that a single standard for assessing error should be adopted. *Id.* at 246-47, 326 N.E.2d at 797, 367 N.Y.S.2d at 226 (Cooke, J., concurring in part and dissenting in part).

[87] *See* text accompanying notes 47-60 *supra.*

[88] Even when nonconstitutional error has a substantial impact upon the jury's verdict, reversal is not required. *See, e.g.,* Hamling v. United States, 418 U.S. 87, 108 (1974); United States v. Valle-Valdez, 554 F.2d 911 (9th Cir. 1977). The federal nonconstitutional error test permits affirmance "if the evidence is so 'strong' that no sensible jury, had there been no error, would conceivably have acquitted . . . ." United States v. Antonelli Fireworks Co., 155 F.2d 631, 647 (2d Cir. 1946) (Frank, J., dissenting) (footnote omitted). Likewise, under the New York rule, nonconstitutional error is harmless unless "there is a significant probability . . . that the jury would have acquitted the defendant had it not been for the error or errors which occurred." People v. Crimmins, 36 N.Y.2d 230, 242, 326 N.E.2d 787, 794, 367 N.Y.S.2d 213, 222 (1975). The burden of proving the harmlessness of error is on the party which benefitted, whether the error was constitutional, Chapman v. California, 386 U.S. 18, 24 (1967); *accord,* United States v. Lookretis, 398 F.2d 64 (7th Cir.), *vacated,* 390 U.S. 338 (1968), or nonconstitutional, Kotteakos v. United States, 328 U.S. 750, 760 (1946); *accord,* United States v. Caldwell, 543 F.2d 1333 (D.C. Cir. 1975), *cert. denied,* 423 U.S. 1087 (1976). Prejudice arising from merely technical errors, however, is to be proved by the complaining party. Kotteakos v. United States, 328 U.S. 750, 760 (1946).

plained. Although, as a general rule, constitutional violations may be more egregious than other types of errors, the circumstances of a particular case may render the nonconstitutional error far more prejudicial.[89] For example, improper jury instructions or irrelevant inflammatory evidence can be at least as prejudicial as constitutional errors.[90] Since "the effect of the evidence in the context of [a] particular case"[91] bears little relation to whether the error is constitutional or nonconstitutional, there seems to be little justification for a rule which makes the determination of harmlessness hinge on the label attached to the error.

As a practical matter, the application of a uniform standard in criminal cases would lead to clarity and consistency in appellate review of error. With one test for constitutional error, another for nonconstitutional error and, in some instances, a third to determine whether the defendant received a fair trial,[92] it is not surprising that the appellate courts' attempts to apply the various standards have resulted in confusion.[93] Resolving the subtle problems inherent in any harmless error test seems a difficult enough task for appellate courts without the additional burden of a trifurcated standard.

The Reasonable Possibility Standard

Although it is clear that constitutional error is nonprejudicial only if harmlessness is proved "beyond a reasonable doubt,"[94] the

[89] *See* People v. Crimmins, 36 N.Y.2d 230, 247, 326 N.E.2d 787, 797, 367 N.Y.S.2d 213, 226 (1975) (Cooke, J., concurring in part and dissenting in part); R. TRAYNOR, *supra* note 4, at 48-49; Saltzburg, *supra* note 9, at 1025. *See also* Kyle v. United States, 297 F.2d 507, 513-14 (2d Cir. 1961).

[90] *See* Grunewald v. United States, 353 U.S. 391, 413-15 (1957); Moody v. United States, 376 F.2d 525, 527 (9th Cir. 1967); People v. Silverman, 252 App. Div. 149, 172, 297 N.Y.S. 449, 474 (2d Dep't 1937).

[91] Fahy v. Connecticut, 375 U.S. 85, 94 (1963) (Harlan, J., dissenting); *see* People v. Crimmins, 36 N.Y.2d 230, 245-46, 326 N.E.2d 787, 796-97, 367 N.Y.S.2d 213, 225-26 (1975) (Cooke, J., concurring in part and dissenting in part); Saltzburg, *supra* note 9, at 989-99. Both Judge Cooke and Professor Saltzburg have expressed the view that the "harmless beyond a reasonable doubt" standard was adopted by the Supreme Court as a corollary to the guilt beyond a reasonable doubt standard in criminal trials. *See* 36 N.Y.2d at 245-46, 326 N.E.2d at 796-97, 367 N.Y.S.2d at 225-26 (Cooke, J., concurring in part and dissenting in part); Saltzburg, *supra* note 9, at 989-99.

[92] *See* note 86 *supra*.

[93] *See* People v. Crimmins, 36 N.Y.2d 230, 244, 326 N.E.2d 787, 795, 367 N.Y.S.2d 213, 224 (1975) (Cooke, J., concurring in part and dissenting in part); R. TRAYNOR, *supra* note 4, at 48-49. The *Crimmins* court noted that, before its decision, there was often "no explicit recognition that there is a distinction between constitutional and nonconstitutional error; citations and verbiage have frequently been indiscriminately interchanged." 36 N.Y.2d at 239, 326 N.E.2d at 792, 367 N.Y.S.2d at 219.

[94] *See* note 4 *supra*.

methods for determining whether this standard of proof is met remain uncertain. If a single test is to be adopted to assess both constitutional and nonconstitutional error, it would seem useful to evaluate the relative merits of the various approaches. One possibility is the overwhelming evidence test, under which an appellate court inquires whether, absent the erroneously admitted evidence, there was an overwhelming evidence of guilt. If the court finds that the jury almost certainly would have convicted the defendant without the untainted evidence, the beyond a reasonable doubt requirement is satisfied.[95] In effect, the focus of the court is on whether the jury reached a correct result.[96] When the court applies the overwhelming evidence test, the harmful effect of reading a "cold record" is magnified. An appellate court is unable to assess the weight that the jury may have assigned to a particular piece of evidence;[97] even with apparent overwhelming evidence of guilt, the error may have been a substantial factor in the jury's decision.[98] In addition to the possibility that a defendant may have been convicted based on erroneously admitted evidence, the greater harm in using this test is usurpation of the jury's function.[99] When an appellate court assumes the jury's function by substituting its judgment, it is, in essence, retrying the case. As a result, a criminal defendant may be

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[95] *See* Harrington v. California, 395 U.S. 250, 255-56 (1969) (Brennan, J., dissenting); People v. Almestica, 42 N.Y.2d 222, 228-29, 366 N.E.2d 799, 804, 397 N.Y.S.2d 709, 713-14 (1977) (Cooke, J., dissenting); People v. Crimmins, 36 N.Y.2d 230, 249, 326 N.E.2d 787, 798, 367 N.Y.S.2d 213, 228-29 (1975) (Cooke, J., concurring in part and dissenting in part); Field, *supra* note 26, at 16-19.

[96] *See* R. TRAYNOR, *supra* note 4, at 18-22. *See generally* People v. Nuzzo, 294 N.Y. 227, 235-36, 62 N.E.2d 47, 51 (1945).

[97] *See* United States v. Antonelli Fireworks Co., 155 F.2d 631, 650 (2d Cir. 1946) (Frank, J., dissenting); United States v. Rubenstein, 151 F.2d 915, 920-22 (2d Cir.) (Frank, J., dissenting), *cert. denied,* 326 U.S. 766 (1945). In Judge Frank's opinion, "[i]t is seldom possible with even moderate competence to conjecture solely from perusal of a written or printed record whether or not a defendant is guilty." *Id.* at 920 (Frank, J., dissenting) (footnote omitted). The danger of an appellate court erroneously affirming a conviction due to its inability to accurately perceive the truthfulness of the evidence has been noted by Justice Traynor:

> Many factors may affect the probative value of testimony, such as age, sex, intelligence, experience, occupation, demeanor, or temperament of the witness. A trial court or jury before whom witnesses appear is at least in a position to take note of such factors. An appellate court has no way of doing so.

R. TRAYNOR, *supra* note 4, at 20 (footnotes omitted).

[98] *See* Harrington v. California, 395 U.S. 250, 256 (1969) (Brennan, J., dissenting); People v. Crimmins, 36 N.Y.2d 230, 249, 326 N.E.2d 787, 798, 367 N.Y.S.2d 213, 228-29 (1975) (Cooke, J., concurring in part and dissenting in part); R. Traynor, *supra* note 4, at 21-22; Field, *supra* note 26, at 17-19, 34-35.

[99] *See* United States v. Antonelli Fireworks Co., 155 F.2d 631, 648 (2d Cir. 1946) (Frank, J., dissenting).

deprived of his constitutional right to a trial by jury.[100] Thus, while the overwhelming evidence test may provide assurance to an appellate court that the defendant is guilty in fact, it does not assure that the defendant is guilty in law.[101] Such a determination may only be made by a jury.[102] Not only is there a significant risk that a defendant will be erroneously convicted under this test, but public confidence in the belief that every individual is entitled to a fair trial will be diminished.[103]

Another unsatisfactory element of the overwhelming evidence test is its failure to deter prosecutorial misconduct. Knowing that an appellate court may find the untainted evidence overwhelming, a prosecutor may be less reluctant to insert error into the record as

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[100] *See, e.g., id.* at 650 (Frank, J., dissenting); United States v. Rubenstein, 151 F.2d 915, 922-23 (2d Cir.) (Frank, J., dissenting), *cert. denied,* 326 U.S. 766 (1945); People v. Crimmins, 36 N.Y.2d 230, 249, 326 N.E.2d 787, 798-99, 367 N.Y.S.2d 213, 228-29 (1975) (Cooke, J., concurring in part and dissenting in part); R. TRAYNOR, *supra* note 4, at 18-22; Field, *supra* note 26, at 32-36. Justice Traynor maintains that the mere fact that the trial court reached the correct result on the question of guilt or innocence, does not necessarily render the result a just one. According to Justice Traynor, inquiring whether the correct result was reached or would have been reached without the error, deprives the defendant of his right to confront witnesses against him and his right to trial by jury in a criminal case. R. TRAYNOR, *supra* note 4, at 21. Similarly, if the inquiry is whether overwhelming evidence supports the verdict, the conviction still might be based upon the error. *Id.* at 22. Justice Traynor argues that the critical inquiry should be whether error may have affected the judgment, *id.* at 13, and favors a standard which requires a high probability that the error not influence the verdict. *Id.* at 35. "A less stringent test may fail to deter an appellate judge from focusing his inquiry on the correctness of the result and then holding the error harmless whenever he equated the result with his own predilections." *Id. See also* note 101 *infra.*

[101] *See* Kotteakos v. United States, 328 U.S. 750, 763-64 (1946). The *Kotteakos* Court noted that

> [i]t is not the appellate court's function to determine guilt or innocence. Nor is it to speculate upon probable reconviction and decide according to how the speculation comes out. Appellate judges cannot escape such impressions. But they may not make them sole criteria for reversal or affirmance. Those judgments are exclusively for the jury, given always the necessary minimum evidence legally sufficient to sustain the conviction unaffected by the error. . . . *This is different, or may be, from guilt in fact. It is guilt in law, established by the judgment of laymen.* And the question is, not were they right in their judgment, regardless of the error or its effect upon the verdict. It is rather what effect the error had or reasonably may be taken to have had upon the jury's decision. The crucial thing is the impact of the thing done wrong on the minds of other men, not on one's own, in the total setting.

Id. (emphasis added) (citations and footnote omitted).

[102] U.S. CONST. amend. VI; *see* note 101 *supra.*

[103] *See* United States v. Antonelli Fireworks Co., 155 F.2d 631, 662-64 (2d Cir. 1946) (Frank, J., dissenting); R. TRAYNOR, *supra* note 4, at 22, 80-81; Mause, *supra* note 4, at 554-56. An additional difficulty inherent in the overwhelming evidence test is its failure to account for the effect of the order in which the evidence was presented at trial, although the temporal sequence of admission of illegally obtained evidence may significantly affect the defense's trial tactics. *See generally* Field, *supra* note 26, at 44-45, 54-55; Saltzburg, *supra* note 9, at 990.

an added assurance that the jury will find the defendant guilty.[104] Assuming that the prosecutor makes a rational decision regarding his actions, only a more stringent standard of harmless error would minimize this possibility by increasing the risk of reversal.[105]

A second possible test for determining whether error is harmless is the cumulative evidence test. Under this test, harmlessness is established when the erroneously admitted evidence is merely duplicative or cumulative of untainted evidence, since the error adds nothing material to the case.[106] Different results may be attained,

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[104] *See* United States v. Antonelli Fireworks Co., 155 F.2d 631, 656-58 (2d Cir. 1946) (Frank, J., dissenting); People v. Almestica, 42 N.Y.2d 222, 228-29, 366 N.E.2d 799, 804, 397 N.Y.S.2d 709, 713-14 (1977) (Cooke, J., dissenting); People v. Catalanotte, 36 N.Y.2d 192, 198, 325 N.E.2d 866, 869, 366 N.Y.S.2d 403, 407-08 (1975) (Cooke, J., dissenting). *See also* Berger v. United States, 295 U.S. 78, 84-89 (1935); R. TRAYNOR, *supra* note 4, at 58; Kamisar, Betts v. Brady *Twenty Years Later: The Right to Counsel and Due Process Values*, 61 MICH. L. REV. 219, 236-44 (1962); Mause, *supra* note 4, at 522-54; *Reappraisal*, *supra* note 4, at 817-18. In his dissenting opinion in People v. Catalanotte, 36 N.Y.2d 192, 325 N.E.2d 866, 366 N.Y.S.2d 403 (1975), Judge Cooke observed:

> Excessive reliance on the existence of other proof of guilt, in the face of clearly prejudicial error, could lead to harm for it would seem to encourage an overly zealous prosecutor with a strong case to gratuitously prejudice defendant's rights by unfair tactics in an attempt to insure conviction. It is important to the proper administration of justice that appellate sanctions remain an ever-present deterrent . . . . Applying the "harmless error" doctrine with too broad a sweep would remove one of the chief deterrents to overreaching by a prosecutor.

Id. at 198, 325 N.E.2d at 869, 366 N.Y.S.2d at 407 (Cooke, J., dissenting); *see* People v. Almestica, 42 N.Y.2d 222, 228-29, 366 N.E.2d 799, 804, 397 N.Y.S.2d 709, 713-14 (1977) (Cooke, J., dissenting). *See generally* United States *ex rel.* Macon v. Yeager, 476 F.2d 613, 616-17 (3d Cir.), *cert. denied*, 414 U.S. 855 (1973). A harmless error rule which takes into account deterrence of prosecutorial misconduct would not, of course, discourage intentional errors in circumstances such as *Harrington* and *Chapman* where a decision handed down after the trial renders the use of particular evidence improper.

[105] An automatic reversal standard has been suggested for cases in which the prosecutor knowingly violates a defendant's constitutional rights. *See* Mause, *supra* note 4, at 553. For example, where perjured testimony is knowingly used, or evidence favorable to the defense is intentionally suppressed, automatic reversal would be warranted. Mause, *supra* note 4, at 553.

In cases where the defense learns after trial that the prosecution knowingly used false testimony or failed to disclose evidence favorable to the defense, the Supreme Court has developed a standard which differs from, but is analogous to, a harmless error rule. When the prosecutor's case included perjured testimony, and the prosecutor knew or should have known that the testimony was untrue, the conviction must be reversed "if there [was] any reasonable likelihood that the false testimony could have affected the judgment of the jury." United States v. Agurs, 427 U.S. 97, 103 (1976) (footnote omitted); *see* Mooney v. Holohan, 294 U.S. 103 (1935) (per curiam). *See also* Napue v. Illinois, 360 U.S. 264 (1959). The perjured testimony is deemed to have affected the jury's judgment if it is "material." 427 U.S. at 104.

[106] For examples of cases where cumulative evidence has been a crucial factor, see Brown v. United States, 411 U.S. 223, 230-32 (1973); Osborne v. United States, 542 F.2d 1015, 1018 (8th Cir. 1976); United States v. Joseph, 533 F.2d 282, 286-87 (5th Cir. 1976), *cert. denied*, 431 U.S. 905 (1977); United States v. Burrell, 505 F.2d 904, 909 (5th Cir. 1974). *Cf.* Harrington

however, according to how "cumulativeness" is defined. Under the broadest definition, the untainted evidence need only establish the same ultimate fact as the tainted evidence — the defendant's guilt.[107] This test, however, can be narrowly circumscribed by requiring that the untainted evidence be of the same type as the tainted evidence and that each have the same damaging effect, as, for example, when an inadmissible confession is corroborated by a properly admitted confession.[108] As an added safeguard, it has been suggested that the courts require the untainted evidence to be uncontroverted.[109]

The cumulative evidence test, rejected by the Supreme Court in *Harrington,* is subject to many of the same criticisms as the overwhelming evidence test. Since the tainted evidence, although cumulative, may very well have contributed to the jury's verdict, an appellate court, in effect, may still be deciding the guilt of the defendant.[110] Moreover, since the appellate court's inquiry is complete upon a finding of cumulativeness, the test does not adequately consider the possibility that the jury may not have been persuaded of the defendant's guilt had it not been presented with the tainted evidence.[111] Finally, where a narrow definition of cumulativeness is used, this test would find clearly harmless error to be prejudicial, merely because it is not corroborative.[112]

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v. California, 395 U.S. 250, 253-54 (1969) (error supplied same evidence as other evidence in case). For an interesting and extensive discussion of the cumulative evidence test, see Field, *supra* note 26, at 37-58.

[107] Field, *supra* note 26, at 41. As an example of a broadly defined cumulative evidence test, Professor Field cites Brown v. United States, 411 U.S. 223 (1973). Field, *supra* note 26, at 41. In *Brown,* the codefendants' incriminating statements were introduced at trial in violation of Bruton v. United States, 391 U.S. 123 (1968). 411 U.S. at 230. Among other evidence, the police observed and photographed the defendants during the robbery. *Id.* at 226. The Court held the inadmissible *Bruton* statements were "merely cumulative" of other evidence in the case and therefore harmless. *Id.* at 231.

[108] *See* Field, *supra* note 26, at 41-43, 48. Under a broadly defined test, different types of evidence proving the same ultimate factor may be deemed cumulative although each may have a significantly different impact. *See, e.g.,* People v. Jacobson, 63 Cal. 2d 319, 405 P.2d 555, 46 Cal. Rptr. 515 (1965); R. TRAYNOR, *supra* note 4, at 69-71; Field, *supra* note 40, 41-42. For example, a tape recording of the defendant, played at the sentencing part of the trial in *Jacobson,* indicated that the defendant had no remorse after killing his child. This evidence may have been significantly more influential than witnesses providing the same evidence through testimony. 63 Cal. 2d at 330, 405 P.2d at 563-64, 46 Cal. Rptr. at 523-24. *See also* People v. Kitchen, 55 App. Div. 2d 575, 390 N.Y.S.2d 83 (1st Dep't 1976).

[109] *See* Field, *supra* note 26, at 44-54.

[110] *See id.* at 52.

[111] *Id.*

[112] If a narrow definition of cumulativeness was used, the errors in Brown v. United States, 411 U.S. 223 (1973), Grieco v. Meachum, 533 F.2d 713, 716-17 (1st Cir.), *cert. denied,*

A third test for measuring harmlessness would require the court to assess the constitutional violation in isolation. Under this test, an appellate court disregards the untainted evidence and inquires whether the error is prejudicial.[113] If the error is of a type that is likely to have influenced the jury, reversal is warranted. While this standard eliminates the problems inherent in the overwhelming evidence and cumulative evidence tests, it is objectionable because it requires the court to assess the effect of the error without regard to the facts and circumstances of a particular case.[114] The per se rules which would result from the application of this test are undesirable, because the identical error committed in the context of two cases may have a significant impact upon the jury in one case and a trivial effect in another.[115]

The preferable standard for assessing harmlessness is the reasonable possibility test,[116] which requires reversal if there is a reasonable possibility that the error contributed to the conviction.[117] The primary advantage offered by this test is that it permits the court to analyze the impact of the tainted evidence in the context of the other evidence in the record. Although overwhelming evidence should not be the basis of finding harmlessness, the quantum and nature of the untainted evidence is relevant to whether the error was a substantial factor at trial.[118] Thus, as the quantum and proba-

429 U.S. 858 (1976), and People v. DeGina, 39 N.Y.2d 96, 346 N.E.2d 809, 382 N.Y.S.2d 971 (1976), would be considered prejudicial.

[113] Field, *supra* note 26, at 16-19, 23-32; *see* notes 26-28 and accompanying text *supra*.

[114] *See* R. TRAYNOR, *supra* note 4, at 36; Field, *supra* note 26, at 17.

[115] The facts in United States v. Gramlich, 551 F.2d 1359 (5th Cir. 1977), *cert. denied*, 434 U.S. 866 (1978), provide an illustration of the problems inherent in the application of this test. The defendant was convicted of importation of marijuana. He was arrested while unloading marijuana from a Colombian freighter to a beachhead. 551 F.2d at 1363-64. An illegally seized passport and airplane ticket to Colombia were admitted into evidence at trial and the defendant was convicted. Had the conviction been based solely on circumstantial evidence, the improper use of the passport and airplane ticket would have been highly prejudicial. Given the nature and quantum of the other evidence in the case, however, there was no reasonable possibility that the error had a prejudicial impact. On the other hand, if the appellate court had been confined to focusing solely on the tainted evidence it is suggested that it could not have adequately evaluated the possibility of prejudice. *See also* United States v. Savell, 546 F.2d 43 (5th Cir. 1977).

[116] The *Chapman* Court noted that the reasonable possibility standard is equivalent to the beyond a reasonable doubt standard. 386 U.S. at 24; *see* note 25 *supra*.

[117] *See* Chapman v. California, 386 U.S. 18, 24 (1967); Fahy v. Connecticut, 375 U.S. 85, 86-87 (1963); notes 22-25 and accompanying text *supra*. *See also* United States v. Bosch, 584 F.2d 1113, 1123 (1st Cir. 1978).

[118] Harrington v. California, 395 U.S. 250, 256 (1969) (Brennan, J., dissenting); People v. Crimmins, 36 N.Y.2d 230, 240, 326 N.E.2d 787, 793, 367 N.Y.S.2d 213, 221 (1975); R. TRAYNOR, *supra* note 4, at 22, 36. Overwhelming evidence, of course, may make the error

tive value of untainted evidence increases, it is more likely that the error did not contribute to the conviction.[119] While it is not possible to learn what evidence actually swayed the jury,[120] it may be assumed that an error contributed to the verdict if, upon a review of the entire record, "it appears that [the error] was a substantial part of the prosecution's case . . . ."[121] With the exception of an automatic reversal rule, this is perhaps the strictest standard for

harmless by rendering the impact of the error insignificant. R. TRAYNOR, *supra* note 4, at 22; *see* Milton v. Wainwright, 407 U.S. 371 (1972); Schneble v. Florida, 405 U.S. 427 (1972).

[119] *See, e.g.*, United States v. Anderson, 500 F.2d 1311 (5th Cir. 1974). Similarly, the quantum and nature of the erroneously admitted evidence is a relevant consideration since certain types of evidence have greater prejudicial effect than others. For example, confessions before or at trial are extremely prejudicial. *See* Payne v. Arkansas, 356 U.S. 560 (1958). Eyewitness testimony and photographs of the crime usually are exceedingly damaging. *See, e.g.*, Brown v. United States, 411 U.S. 223, 226 (1973). Likewise, fruits of the crime are highly incriminating. *See, e.g.*, United States v. Young, 553 F.2d 1132 (8th Cir.), *cert. denied*, 431 U.S. 959 (1977). *See generally* text accompanyng accompanying notes 37-39 *supra*.

[120] *See, e.g.*, United States v. Matos, 444 F.2d 1071, 1074-75 (7th Cir. 1971) (Pell, J., concurring). Unlike civil cases where statutes allow other than general verdicts, *see, e.g.*, FED. R. CIV. P. 49; N.Y. CIV. PRAC. L. § 4111 (McKinney 1963 & Supp. 1978-1979), special verdicts and answers to interrogatories generally are prohibited in criminal cases. United States v. Spock, 416 F.2d 165, 180-83 (1st Cir. 1969); G. CLEMENTSON, SPECIAL VERDICTS AND SPECIAL FINDINGS BY JURIES 49 (1905); *accord*, United States v. Gernie, 252 F.2d 664 (2d Cir.), *cert. denied*, 356 U.S. 968 (1958); Skidmore v. Baltimore & O. Ry., 167 F.2d 54, 70 (2d Cir.) (Hand, J., concurring), *cert. denied*, 335 U.S. 816 (1948); United States v. Ogull, 149 F. Supp. 272, 275-76 (S.D.N.Y. 1957), *aff'd sub nom.* United States v. Gernie, 252 F.2d 664 (2d Cir.), *cert. denied*, 356 U.S. 968 (1958). Special verdicts are used in only two situations in criminal cases: sentencing proceedings, *see, e.g.*, Gregg v. Georgia, 428 U.S. 153 (1976), and treason cases, where a special finding of an overt act is required by the constitution. U.S. CONST. art. III, § 3; *see, e.g.*, Kawakita v. United States, 343 U.S. 717 (1952).

[121] People v. Ross, 67 Cal. 2d 64, 84, 429 P.2d 606, 621, 60 Cal. Rptr. 254, 269 (1967) (Traynor, C.J., dissenting), *rev'd sub nom.* Ross v. California, 391 U.S. 470 (1968) (per curiam). Finding harmless error, the state appellate court in *Ross* interpreted the reasonable possibility test articulated in *Chapman* to require that there be no "reasonable possibility that [the] jury could have reached any verdict other than one of guilt absent the prosecutor's comments." *Id.* at 77, 429 P.2d at 614, 60 Cal. Rptr. at 262. Chief Justice Traynor dissented, however, arguing that *Chapman* was "susceptible of two interpretations." First, the majority's interpretation focuses on whether the verdict would have been the same or whether there was overwhelming evidence of guilt. *Id.* at 84-86, 429 P.2d at 620-21, 60 Cal. Rptr. at 268-69 (Traynor, C.J., dissenting). The other and more likely interpretation, in his view, was whether "an error that constituted a substantial part of the prosecution's case may have played a substantial part in the jury's deliberation and thus contributed to the actual verdict reached . . . ." *Id.* at 86, 429 P.2d at 621, 60 Cal. Rptr. at 269 (Traynor, C.J., dissenting). *See also* United States v. D'Andrea, 585 F.2d 1351, 1357 (7th Cir. 1978). The Supreme Court's subsequent reversal of the *Ross* conviction, *see* Ross v. California, 391 U.S. 470 (1968) (per curiam), seems to lend support to Chief Justice Traynor's assessment of the *Chapman* standard. In *Chapman*, the Court stated that since the jurors may have acquitted had the unconstitutional comments not been made, it was "completely impossible" that the error did not, beyond a reasonable doubt, contribute to the conviction. 386 U.S. at 26. Accordingly, an error is not harmless merely because a jury may have convicted had the error not occurred.

appraising the harmlessness of error.[122]

A separate argument in favor of the reasonable possibility standard is that it does not infringe on the defendant's sixth amendment right to trial by jury.[123] A defendant is afforded his full right to a jury trial only when an appellate court can state that any errors committed at trial were not substantial factors in the conviction.[124] The requirement that the court must find it not reasonably possible that the error infected the verdict reduces the risk that the error contributed to the conviction, and ensures a defendant of his right to a trial by jury.

The aim of any test for harmlessness must be to prevent a conviction based in any way upon error. As stated by the New York Court of Appeals:

> The worst criminal, the most culpable individual, is as much entitled to the benefit of a rule of law as the most blameless member of society. To disregard violation of the rule because there is proof in the record to persuade [the court] of a defendant's guilt would but lead to erosion of the rule and endanger the rights of even those who are innocent.[125]

It is submitted that only a test which requires a finding that the error had no effect upon the jury's determination, and which is equally applicable in cases involving constitutional and nonconstitutional error, adequately protects the rights of both the guilty and the innocent.

The Constitutional Basis for Applying a Uniform Standard

In holding that errors of constitutional significance are governed by federal law, the *Chapman* Court relied not on the due process clause or any other constitutional provision, but rather on the Court's inherent authority to formulate rules for enforcing fed-

[122] *See* People v. Crimmins, 36 N.Y.2d 230, 240-41, 326 N.E.2d 787, 793, 367 N.Y.S.2d 213, 221 (1975); R. TRAYNOR, *supra* note 4, at 35.

[123] The rule established in Duncan v. Louisiana, 391 U.S. 145, 158 (1968), requires the states to provide a trial by jury for all crimes having a potential punishment of six months or more, and for crimes where the potential punishment is less than six months if the crime is not a petty offense. In some instances, a defendant may be tried by the court, provided he has the right to a *de novo* trial by jury at the appellate level. *See* Ludwig v. Massachusetts, 427 U.S. 618 (1976). *But cf.* Callan v. Wilson, 127 U.S. 540 (1888) (article three of the Constitution requires jury trial at trial level).

[124] Even if a defendant waived his right to trial by jury, the other reasons for using the reasonable possibility test, *see* notes 116-122 and accompanying text *supra*, appear persuasive. *See generally* Saltzburg, *supra* note 9, at 1028 n.146.

[125] People v. Donovan, 13 N.Y.2d 148, 154, 193 N.E.2d 628, 631, 243 N.Y.S.2d 841, 845 (1963); *see* Chapman v. United States, 547 F.2d 1240, 1250 (5th Cir. 1977).

eral constitutional guarantees.[126] Under the *Chapman* reasoning, the power of the states to apply their own rules to nonconstitutional errors remains intact, even in criminal appeals.[127] Since it appears unlikely that the state courts voluntarily will adopt the generally more demanding standard applicable to constitutional errors,[128] the only practical method for ensuring a uniform harmless error standard in criminal cases would be for the Supreme Court to establish such a rule as a matter of constitutional necessity. The Court has never held that a criminal defendant has a constitutional right to appeal,[129] probably because every state grants appellate review in criminal cases.[130] Once a state establishes a legal structure, however,

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[126] 386 U.S. at 21. The *Chapman* majority stated:

> Whether a conviction for 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 constitutional provisions themselves mean, what they guarantee, and whether they have been denied. With faithfulness to the constitutional union of the States, we cannot leave to the States the formulation of authoritative laws, rules, and remedies designed to protect people from infractions by the States of federally guaranteed rights.

Id.; *see* note 23 *supra.*

[127] 386 U.S. at 21; *see* Cooper v. California, 386 U.S. 58, 62 (1967).

[128] *See, e.g.*, Wright v. State, 501 P.2d 1360 (Alaska 1972); Johnson v. State, 238 Ga. 59, 230 S.E.2d 869 (1976); Forrest v. State, 335 So. 2d 900 (Miss. 1976); People v. Crimmins, 36 N.Y.2d 230, 326 N.E.2d 787, 367 N.Y.S.2d 213 (1975). *But see* People v. Bracey, 51 Ill. 2d 514, 283 N.E.2d 685 (1972).

[129] *E.g.*, Ross v. Moffit, 417 U.S. 600, 611 (1974); Griffin v. Illinois, 351 U.S. 12, 20-21 (1956) (Frankfurter, J., concurring); McKane v. Durston, 153 U.S. 684, 678 (1894). The Court consistently has maintained that the right to appeal is granted statutorily and, apparently, is subject to statutory abrogation. *See* Abney v. United States, 431 U.S. 651, 656 (1977).

[130] *See* ABA STANDARDS, CRIMINAL APPEALS § 1.1, commentary at 17 (1970). Since the Court has never been confronted with a statutory denial of appellate review, it has had no compelling reason to declare that a constitutional right to appeal exists. Nevertheless, an analogy may be made to the issue of the level of proof required to convict in criminal cases. Prior to its decision in *In re* Winship, 397 U.S. 358 (1970), there was never a need for the Supreme Court to adopt the position that a defendant may not be declared guilty unless the government proves every element of a criminal offense "beyond a reasonable doubt." *Id.* at 361-62. When confronted with a state statute lowering the burden of proof, however, the Court held that the traditional "beyond a reasonable doubt" standard is an element of due process. *Id.* at 364. While the *Winship* Court noted that "it has long been assumed that proof . . . beyond a reasonable doubt is constitutionally required," *id.* at 362, it based its holding primarily upon the conclusion that "the reasonable-doubt standard plays a vital role in the American scheme of criminal procedure." *Id.* at 363. Significantly, the Court observed:

> The accused during a criminal prosecution has at stake interests of immense importance, both because of the possibility that he may lose his liberty . . . and because of the certainty that he would be stigmatized by the conviction. Accordingly, a society that values the good name and freedom of every individual should not condemn a man when there is a reasonable doubt about his guilt.

Id. at 363-64. Just as the reasonable doubt standard is "a prime instrument for reducing the risk of conviction resting on factual error," *id.* at 363, the right to appellate review might be viewed as essential in minimizing the risk of imprisonment resulting from errors of law.

its procedures must conform to the constraints of the fourteenth amendment.[131] Therefore, it is suggested that when appellate review is provided, it must be conducted within the confines of due process.[132] As a corollary to the reasonable doubt burden of proof standard at trial, due process may require an appellate court to declare a belief, beyond a reasonable doubt, that errors committed at trial did not contribute to the conviction.[133] The reasonable doubt standard is grounded in the belief that it reduces the risk of convicting an innocent person.[134] Likewise, the uniform use of the reasonable possibility test at the appellate level would reduce the risk that

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The American Bar Association has taken the position that "[t]he possibility of appellate review of trial court judgments should exist for every criminal conviction. It is undesirable to have any class of case in which such trial court determinations are unreviewable." ABA STANDARDS, CRIMINAL APPEALS § 1.1 (1970). Similarly, one commentator has observed: "The possibilities of error, oversight, arbitrariness and even venality in any human institution are such that subjecting decisions to review of some kind answers a felt need: it would simply go against the grain, today, to make a matter as sensitive as a criminal conviction subject to unchecked determination by a single institution." Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners,* 76 HARV. L. REV. 441, 453 (1963); *see* Commonwealth *ex rel.* Neal v. Myers, 424 Pa. 576, 579 n.3, 227 A.2d 845, 846 n.3 (1967).

[131] *See* Ham v. South Carolina, 409 U.S. 524, 527 (1973). *Ham* involved a statute empowering trial judges to conduct voir dire examinations of potential jurors. The Court held that once this procedure was established, due process mandated that the defendant be permitted to submit questions to the jurors regarding racial bias. *Id.*

[132] *See id.;* Saltzburg, *supra* note 9, at 1028-30. In Frank v. Magnum, 237 U.S. 309 (1915), the Court noted:

> [W]hile the 14th Amendment does not require that a State shall provide for an appellate review in criminal cases . . . it is perfectly obvious that where such an appeal is provided for, and the prisoner has had the benefit of it, the proceedings in the appellate tribunal are to be regarded as a part of the process of law under which he is held in custody by the State, and to be considered in determining any question of alleged deprivation of his life or liberty contrary to the 14th Amendment.

Id. at 327 (citations omitted).

[133] *See* People v. Crimmins, 36 N.Y.2d 230, 245-46, 326 N.E.2d 787, 796, 367 N.Y.S.2d 213, 225-26 (1975) (Cooke, J., concurring in part and dissenting in part); Saltzburg, *supra* note 9, at 1021-27.

[134] *In re* Winship, 397 U.S. 358, 364 (1970). In a concurring opinion, Justice Harlan stated that the fact-finding process is founded upon probabilities since the trier of fact cannot know with certainty what occurred at the time the crime was committed. *Id.* at 370 (Harlan, J., concurring). The beyond a reasonable doubt standard, although not quantifiable, indicates to the factfinder the "degree of confidence he is expected to have in the correctness of his factual conclusions." *Id.* (Harlan, J., concurring). A preponderance of the evidence is a satisfactory standard of proof in civil cases because society "view[s] it as no more serious in general for there to be an erroneous verdict in the defendant's favor than for there to be an erroneous verdict in the plaintiff's favor." *Id.* at 371 (Harlan, J., concurring). On the other hand, the reasonable doubt standard in criminal cases is based on the belief that "the social disutility of convicting an innocent man [is not] equivalent to the disutility of acquitting someone who is guilty." *Id.* at 372 (Harlan, J., concurring).

the jury may have entertained a reasonable doubt of the defendant's guilt had the error not been committed.[135]

CONCLUSION

In New York and in the federal courts, there still exists a "wayward course of harmless error."[136] While the courts recognize that constitutional error must be harmless beyond a reasonable doubt before a conviction can be affirmed, their analytical methods for determining harmlessness are not consistent.[137] The inconsistencies may be the result of ambiguous language in the Supreme Court decisions, the failure on the part of appellate courts to discriminate carefully among harmless error tests, or even the temptation not to reverse convictions when a court believes guilt is clearly established.

Application of the reasonable possibility test to constitutional and nonconstitutional errors would enhance "the respect and confidence of the community in applications of the criminal law,"[138] and provide defendants every reasonable doubt before they are deprived of life or liberty. The principle that a defendant must be tried by his peers requires that appellate courts refrain from retrying cases and judging the guilt or innocence of a defendant. As recognized in legislative enactments and judicially created tests, the concept of harmless error was intended only to prevent reversals based upon technical and trivial errors.[139] Today, however, such reversals have been virtually eliminated,[140] and a trend has developed in which errors are deemed harmless if the trial court reached the correct result.[141] The direction of the harmless error doctrine, it is

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[135] Justice Traynor advocates a "high probability" standard for constitutional and nonconstitutional error in both civil and criminal cases. R. TRAYNOR, *supra* note 4, at 26-30, 35, 48. In Justice Traynor's view the reasonable possibility test is too strict; a test less exacting than the high probability standard, however, carries "too great a risk of affirming a judgment that was influenced by error." *Id.* at 35-36.

[136] *Id.* at 13.

[137] *See* notes 96-103 *supra.*

[138] *In re* Winship, 397 U.S. 358, 364 (1970).

[139] *See* People v. Ross, 67 Cal. 2d 64, 76 & n.8, 429 P.2d 606, 618-20 & n.8, 60 Cal. Rptr. 254, 266-68 & n.8 (1967) (Traynor, C.J., dissenting), *rev'd sub nom.* Ross v. California, 391 U.S. 470 (1968) (per curiam); note 9 *supra.*

[140] When the wisdom of harmless error statutes was debated, the reformers presented examples of the types of error they considered detrimental: One court had held that reversal was required when the word 'the' was mistakenly omitted from the indictment. State v. Campbell, 210 Mo. 202, 203, 109 S.W. 706, 707 (1908); *see* People v. St. Clair, 56 Cal. 406, 406 (1880). Today, of course, such errors do not warrant reversal. *See, e.g.*, People v. Cunningham, 64 App. Div. 2d 722, 406 N.Y.S.2d 899 (3d Dep't 1978); People v. Esteves, 95 Misc. 2d 70, 406 N.Y.S.2d 674 (N.Y.C. Crim. Ct. N.Y. County 1978).

[141] *See, e.g.*, People v. Wander, 61 App. Div. 2d 1037, 403 N.Y.S.2d 111 (2d Dep't 1978).

submitted, should be shifted by the use of a precise and exacting standard. An increase in reversals seems a reasonable price to pay to ensure fair trials[142] and to preserve the integrity of the Constitution and rules governing criminal trials.

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[142] R. TRAYNOR, *supra* note 4, at 22, 80-81; *cf. In re* Winship, 397 U.S. 358, 364 (1970) (reasonable doubt standard at trial level "indispensible to command the respect and confidence of the community"). It has been suggested that use of the reasonable doubt standard at the appellate level would serve to undermine respect for the criminal justice system because it is unduly stringent. *See* 42 BROOKLYN L. REV. 373, 388-89 (1975). The reasonable possibility test, however, is applicable only to errors which affect the substantial rights of the parties. Since it is not applicable to technical errors its use would not impair the original purpose of harmless error statutes — to avoid reversals in cases involving technical errors. *See* note 139 *supra*.