Bruton v. United States: A Belated Look at the Warren Court Concept of Criminal Justice
NOTES & COMMENTS

BRUTON V. UNITED STATES: A BELATED LOOK AT THE WARREN COURT CONCEPT OF CRIMINAL JUSTICE

It is not surprising in a society pervaded by political assassinations, terror in the streets, urban guerrilla warfare, and teenage gang violence, that the Warren Court should be subjected to severe criticism for its expansion of the procedural requirements imposed upon the administration of criminal justice by the fourteenth amendment. This increasing regulation of state criminal procedure by the Court is commonly regarded by a frustrated public as encouraging a corresponding loss of respect for law and order. A majority of the Senate Judiciary Committee not only found the existence of a causal relationship between the recent procedural reforms and our escalating crime rate, but also concluded that they have impeded the efforts of law enforcement. Indeed, it has become almost fashionable to regard the guarantees of personal liberty embodied in the Bill of Rights as mere technicalities, the violation of which must be ignored if we are to successfully combat the forces of crime. Necessity would now mandate the elimination of the distinction between guilty-in-fact and guilty-in-law. Instead, we are reassured that no rational basis exists for the morbid fear that an innocent man will be convicted of a serious crime. Mr. Justice Goldberg has recognized that public frustration with the problem of crime breeds drastic and dangerous measures of reform. Indicative of the gravity of this situation was the Congressional attempt in the 1968 Omnibus Crime Bill to vitiate several judicially imposed pro-

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2 Id. at 87.
3 Id. For instance, Miranda v. Arizona, 384 U.S. 436 (1966), in which the Supreme Court held that a defendant's pretrial statements were inadmissible at his trial, unless he had been properly informed of his constitutional right to remain silent and to be represented by an attorney, has frequently been cited for its adverse effect upon efficient law enforcement. In Philadelphia, for example, it is contended that compliance with the Miranda warnings by the police caused the percentage of persons, arrested for serious offenses, who refused to make a pretrial statement, to soar from 10% in 1964 to 59% in 1967. See Inbau, Misconceptions Regarding Lawlessness and Law Enforcement, 35 Tenn. L. Rev. 571, 576 (1968).
5 Goldberg, Can We Afford Liberty, 161 N.Y.L.J. 1 (March 3, 1969).
cedural reforms. Even more ominous are the various proposals to re-adjust the Bill of Rights in order to restore law and order to our land.\(^7\) Such proposals ignore the fact that the Bill of Rights was adopted not to protect the guilty, but to ensure the basic liberties of every citizen. Nevertheless, it is a popular misconception that only the guilty are placed on trial. In any event, fundamental principles of fairness demand that a person be regarded as innocent until proven guilty at a fair and impartial trial. The Bill of Rights has effectively served as the very basis of our democratic society for almost two centuries. To alter our basic concepts of liberty at this time would not only presently endanger the autonomy of every individual, but would also provide a dangerous precedent for the future, evincing a willingness to sacrifice basic liberties in order to deal with the exigencies of a particular situation. Any solution, then, which is posed in terms of constitutional alteration, is both simplistic and illusory.

Criminal procedure must of course change as our evolving concept of “fundamental fairness” alters the definition of due process. To be reconciled with this evolutionary process, however, is the countervailing right of Americans to be free from the fear of robbery, rape and mayhem. The reconciliation of these divergent and often conflicting rights is precarious and fraught with difficulty. A panorama of the problems to be resolved was presented in the recent Supreme Court decision, *Bruton v. United States*.\(^8\)

**Bruton v. United States**

Petitioner Bruton and codefendant Evans were tried jointly and convicted of armed postal robbery. At the trial, a postal inspector testified that Evans had orally confessed that he and the petitioner had committed the robbery. Since Evans did not testify, Bruton could not cross-examine him on the accuracy of his confession.

The jury, however, was clearly instructed\(^9\) that while the confession

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\(^8\) 391 U.S. 123 (1968).

\(^9\) At the close of the government's case, the trial court judge instructed the jury that Evans' confession "if used, can only be used against the defendant Evans. It is hearsay insofar as the defendant George William Bruton is concerned, and you are not to consider it in any respect to the defendant Bruton, because insofar as he is concerned it is hearsay."

The judge again instructed the jury at the close of the trial: "A confession made outside of court by one defendant may not be considered as evidence against the other defendant, who was not present and in no way a party to the confession. Therefore . . .
was admissible against Evans, it was inadmissible and could not be considered as evidence against the petitioner. On certiorari, the Court reversed, holding that due to the substantial risk that the jury had disregarded the trial judge's instructions and considered Evans' incriminating statements as evidence against the petitioner, the admission of his confession violated the petitioner's right of cross-examination secured by the confrontation clause of the sixth amendment.

It has long been recognized that a defendant's extrajudicial statements, if made after the conspiracy has terminated, constituted inadmissible hearsay against his codefendant. However, the Supreme Court had previously held in *Delli Paoli v. United States* that the use of limiting instructions in a joint trial would enable the jury to disregard a confessor's extrajudicial assertion that the codefendant was his criminal accomplice. *Delli Paoli* was itself a modification of an earlier test formulated by the Court in *Blumenthal v. United States*, in which it was held that the instructions to the jury allowed "no room for doubt that the admissions were adequately excluded. . ." The *Delli Paoli* Court accepted this proposition, but also required that the instructions be given in circumstances under which it would be reasonably possible for the jury to comply with them.

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10 Evans' extrajudicial statements were admissible against him under the admissions exception to the hearsay rule. See C. McCormick, Evidence § 239 (1954) (hereinafter *McCormick*).

11 Evans' conviction had been reversed by the Eighth Circuit, since his confession had been obtained in violation of *Westover v. United States*, 384 U.S. 436, 494-97 (1966), and, hence, was inadmissible. He was subsequently acquitted after retrial. *Bruton v. United States*, 352 U.S. 263 (1957). See *Evans v. United States*, 375 F.2d 355 (8th Cir. 1967).

12 Extrajudicial statements made by one conspirator in furtherance of, and prior to the termination of the conspiracy are admissible against all his co-conspirators under the co-conspirator exception to the hearsay rule. See, e.g., *Krulewitch v. United States*, 336 U.S. 440 (1949); *Fiswick v. United States*, 329 U.S. 211 (1946); *Logan v. United States*, 144 U.S. 263 (1892). See generally *McCormick* § 239 (1954); 4 J. Wigmore, Evidence §§ 1048-49 (3d ed. 1940) (hereinafter *Wigmore*).


15 Id. at 551-52.

16 352 U.S. at 239 (1957). *Delli Paoli* involved a joint trial of five defendants, during which Delli Paoli was inculpated by the confession of his codefendant. The Supreme Court found that prejudice to Delli Paoli was avoided, since the instructions to regard the confession as evidence only against the confessor were sufficiently clear. It was presumed that the jury was capable of following the instructions because each defendant's role was easily understood, the confession merely corroborated what the prosecution had previously established, the rights of each individual codefendant were emphasized at the trial, the confession was not introduced until the end of the government's case, and there was no evidence of jury confusion. Id. at 238, 241-42.
Once the ability of the jury to disregard inadmissible incriminating evidence was accepted, *Delli Paoli* assumed that no violation of the right of confrontation was involved. The *Bruton* Court observed, however, that this basic premise had been repudiated in *Jackson v. Denno*.[17] More specifically, the *Jackson* Court rejected the proposition that a jury, when determining the confessor's guilt, could be relied upon to ignore his confession should it find it to be involuntary. Thus, the Court held that a defendant possesses a constitutional right to have the trial court judge determine if his confession was voluntary, before its submission to the jury. Especially significant in *Jackson* was the Court's reliance upon Mr. Justice Frankfurter's dissenting opinion in *Delli Paoli*. That dissent had characterized limiting instructions as "intrinsically ineffective,"[18] and as a "futile collocation of words . . . [which] fails of its purpose as a legal protection to defendants against whom such a declaration should not tell."[19] Similarly, in *Bruton*, the Court determined that it could not reasonably be supposed that the jury considered Evans' confession as indicative of his own guilt, while disregarding it as to Bruton, whom it also inculpated.

The dissenting opinion in *Bruton* was written by Mr. Justice White, who also authored the majority opinion in *Jackson*. He attempted to distinguish *Jackson* on two grounds. Characterizing a defendant's confession as having a profound impact upon the jury, he viewed the accusations of a codefendant as being naturally suspect as an attempt to exonerate himself. He further reasoned that the exclusion of a coerced confession was based on subtle constitutional issues which the jury might well reject, while the policy reasons prohibiting the admission of statements made by a codefendant who is not subject to cross-examination are easily understandable. As a result, while continuing to adhere to his original opinion in *Jackson*, he re-

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[19] *Id.*

[20] The majority fully conceded that the credibility of such statements is inevitably suspect. However, this unreliability is merely compounded when the codefendant does not testify and cannot be cross-examined at the trial. 391 U.S. at 136.

[21] On the other hand, the *Bruton* majority contended that the jury's task at the joint trial, of considering the defendant's confession as evidence against only him, may be even more difficult than ignoring an involuntary confession, since in the former situation, the confession must be both used and ignored. The Court cited Judge Traynor's contention that the jury "cannot determine that a confession is true insofar as it admits that A has committed criminal acts with B and at the same time effectively ignore the inevitable conclusion that B has committed those same criminal acts with A." 391 U.S. at 130-31, citing People v. Aranda, 63 Cal. 2d 518, 529, 407 P.2d 265, 271-72, 47 Cal. Rptr. 353, 360 (1965).
jected the majority's contention that the instructions to disregard the codefendant's statements amounted to "an empty gesture."

It is interesting to note that it was not necessary for the Bruton Court to base its decision upon sixth amendment grounds. By utilizing a due process-general fairness approach, the Court could have balanced the state's interest in the introduction of the hearsay evidence at the joint trial of the defendants, against the right of the defendant to a fair and impartial trial. In certain circumstances, when the risk of prejudice is minimal and the state's interest is a valid one, it is permissible for the state to utilize a procedure which imposes such a risk of prejudice without violating the defendant's right to due process. However, once it was recognized that limiting instructions were wholly insufficient to avoid the prejudicial effect of the inadmissible hearsay, it is doubtful that the state's interest in the procedure, despite the fact that it was certainly a substantial one, would have justified its approval by the Court.

Prior to Bruton's rejection of jury instructions as "an empty gesture," courts frequently employed this due process test to decide whether extrajudicial statements were admissible in the circumstances of a particular case. For example, in United States ex rel. Floyd v. Wilkins, the Second Circuit reversed a conviction despite the proper utilization of limiting instructions, when the evidence properly admissible against the declarant-defendant was only slight, and deletion of that portion of the extrajudicial confession inculpating the codefendant was possible. In both Greenwell v. United States and Jones v. United States, the extrajudicial confessions were also inadmissible against their respective declarants. Thus, no adequate state interest was present in either case to balance against the possible prejudice to the defendant. Similarly, in United States v. Gordon, where the extrajudicial statements of the codefendant exculpated him while inculpating the defendant, no adequate state interest was present since the statements

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22 This consideration of competing state interests is permitted only when the state procedure does not violate any of the defendant's specific constitutional rights. Thus, if illegally seized evidence, Fahy v. Connecticut, 375 U.S. 85 (1963), or a coerced confession, Payne v. Arkansas, 356 U.S. 560 (1958), was introduced at the trial, and the error possibly influenced the defendant adversely, the conviction must be reversed. Chapman v. California, 386 U.S. 18 (1967), Compare Spencer v. Texas, 385 U.S. 554 (1967), with Burgett v. Texas, 389 U.S. 109 (1967).

23 367 F.2d 990 (2d Cir. 1965). Accord, Oliver v. United States, 335 F.2d 724 (D.C. Cir. 1964), wherein the court stated that the risk of prejudice to the inculpated defendant must be reduced to the minimum.

24 336 F.2d 962 (D.C. Cir. 1964).


26 253 F.2d 177 (7th Cir. 1958).
were not of any material aid to the government’s case against the declarant-codefendant. Finally, in *United States v. Bozza*,27 the Second Circuit stated that the codefendant’s “confession furnished devastating corroboration of the heavily attacked testimony of an accomplice upon which the prosecution almost entirely depended for proof of guilt.”28

Instead of justifying its decision by means of a due process rationale, the Court, analogizing to its decision in *Douglas v. Alabama*,29 held that the Bruton procedure violated the petitioner’s right to confront and cross-examine his accusers. In *Douglas* the petitioner and one Loyd were accused of assault with intent to commit murder. Loyd was tried separately, but was called by the state as a witness during the petitioner’s trial. Although Loyd, whose case was pending on appeal, invoked the privilege against self-incrimination, the prosecutor was permitted to read statements implicating the petitioner from his confession in order to “refresh” his memory. The Court reversed the conviction, holding that Douglas’ inability to cross-examine Loyd violated his right of confrontation. Although the recital of the codefendant’s confession by the prosecutor and his refusal to answer were not testimony in the technical sense, the *Douglas* Court reasoned that the circumstances were such that the jury might infer that the confession had been made and that it was true. Hence, the *Bruton* Court observed that since Evans’ confession, as related by the postal inspector, was actually testimony, even less protection was afforded petitioner Bruton.

**Joint Trials**

The practice of trying two or more defendants at a joint trial is peculiar to our jurisprudential tradition.30 This procedure has traditionally been justified by the qualities of efficiency and expediency which it provides.31 The burden upon trial dockets and overworked prosecutors would be severely increased if each defendant were to be afforded a separate trial. The subsequent delays in bringing the accused to trial is an especially critical consideration; speedy disposition of criminal cases is imperative if the criminal sanction is to retain its

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27 365 F.2d 206 (2d Cir. 1966).
28 Id. at 216.
29 380 U.S. 415 (1965). *Pointer v. Texas*, 380 U.S. 400 (1965) had previously confirmed that the sixth amendment right of confrontation included the right of cross-examination, and applied the right of confrontation to the states.
deterrent effect. Severance may also have a detrimental effect upon the just disposition of cases. Witnesses may be more reluctant to testify when they are confronted with the necessity of repeating the procedure two or more times. Even more objectionable is the prospect of varying verdicts for legally indistinguishable defendants. There is, of course, always the possibility that two juries will reach inconsistent verdicts on the basis of the same evidence. However, in this particular context, there is the supplemental danger of permitting one defendant to glimpse the tactics of the prosecutor in the trial of his codefendant.\(^3\)

Despite the practical difficulties of conducting separate trials, it has long been recognized that the joint trial may be inherently prejudicial.\(^3\) The principal danger is that the jury will infer guilt by association whenever the evidence is substantial against one defendant but insufficient to convict the other. Mr. Justice Jackson recognized this potential unfairness in *Krulewitch v. United States*:\(^3\)

> A co-defendant in a conspiracy trial occupies an uneasy seat. There generally will be evidence of wrongdoing by somebody. It is difficult for the individual to make his own case stand on its own merits in the minds of jurors who are ready to believe that birds of a feather are flocked together. If he is silent, he is taken to admit it and if, as often happens, co-defendants can be prodded into accusing or contradicting each other, they convict each other.

As a result, the Supreme Court has traditionally demanded the utilization of all available legal procedures "to individualize each defendant in his relation to the mass."\(^3\) *Bruton* merely represents an extension of this principle. The Court has made it explicitly clear that the justification of efficiency and expedition will no longer be regarded as controlling in the particular situation presented in *Bruton*.\(^3\)

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\(^{32}\) Mr. Justice White noted "the common prosecutorial experience of seeing co-defendants who are tried separately strenuously jockeying for position with regard to who should be the first to be tried." 391 U.S. at 143.

\(^{33}\) See, e.g., United States v. Liss, 137 F.2d 995, 1004 (2d Cir.), cert. denied, 320 U.S. 773 (1943), wherein the dissent urged that "[e]xpedition' and 'efficiency' . . . ought not be purchased at the expense of justice."

Joinder of defendants is governed by Rules 8(b) and 14 of the Federal Rules of Criminal Procedure. Rule 14 authorizes severance whenever it appears that the defendant will be prejudiced by a joint trial. "The rules are designed to promote economy and efficiency and to avoid a multiplicity of trials, where those objectives can be achieved without substantial prejudice to the right of the defendants to a fair trial." Daley v. United States, 231 F.2d 123, 125 (1st Cir. 1956).

For courtroom techniques utilized at joint trials, see O'Dougherty, *Prosecution and Defense Under Conspiracy Indictments*, 9 Brooklyn L. Rev. 263 (1940).

\(^{34}\) 336 U.S. 440, 454 (1949) (concurring opinion).

\(^{35}\) Kotteakos v. United States, 328 U.S. 750, 773 (1946).

\(^{36}\) "We secure greater speed, economy and convenience in the administration of the law at the price of fundamental principles of constitutional liberty. That price is too high." 391 U.S. at 135, citing People v. Fisher, 249 N.Y. 419, 432, 164 N.E. 336, 341 (1928) (dissenting opinion of Judge Lehman).
The majority failed to discuss in detail, however, the specific alternative procedures available to prosecutors who are confronted with the problem of reconciling the procedural advantages of the joint trial, with the use of a codefendant's extrajudicial confession.37 Nevertheless, it is clear that only three alternatives do exist — severance of the trials, exclusion of the extrajudicial confession from the joint trial, or use of the confession at the joint trial after all incriminating reference to the non-confessing codefendant has been expunged. If the prosecutor suspects that the admission of the confession will be necessary to convict the confessor, he must then choose between severance and using the modified version of the extrajudicial confession at a joint trial. Modification, however, whether it be by redaction or deletion, is an extremely difficult procedure, and whenever it is attempted, reversal must be regarded as a distinct possibility.38 For instance, redaction, the substitution of “Mr. X” or a similar term for the non-confessing defendant, often amounts to a mere formality since no juror can fail to link “Mr. X” with the non-confessing codefendant.39 This is especially true when only one other codefendant is involved. Deletion does provide more protection for the non-confessor, but the circumstances in which it can be accomplished effectively are exceedingly rare. Deletion requires not only the elimination of all direct and indirect inculpations of codefendants, but also of any statements that could be employed against them once their identity is otherwise established.40 Yet, the deletion cannot be such that the statements are distorted to the prejudice of the declarant.41 In addition, such comprehensive deletion, while protecting the non-confessing codefendant, often “casts confusion and saps the confession of probative value so as to prejudice the prosecutor’s case.”42

37 The Court, affording brief footnote treatment to the possible alternatives to the Bruton procedure, 391 U.S. at 134 n.10, did refer to the formula suggested by the dissenting Judge Frank in Delli Paoli v. United States, 229 F.2d 319, 324 (2d Cir. 1956), rev’d., 352 U.S. 232 (1957). Unless all references to codefendants are effectively deleted from the confession, Judge Frank would either refuse to admit it or sever the trials of the incriminated codefendants.


The effect of this device may be to increase the jury’s reliance upon the confession in their determination of the guilt of the non-confessing defendant. See Comment, Co-defendant’s Confessions, 22 Colum. J. of L. & Soc. Prob. 80, 88 (1967).


When the extrajudicial confession is offered into evidence through oral testimony, elimination of those statements which inculpate the non-confessing codefendant is patently impossible. In addition to the inherent weaknesses in redaction and deletion, there is the additional risk that the witness will inadvertently inculpate the non-confessor. Once the identity of the codefendant is revealed, it is not likely that the error could be remedied by the use of limiting instructions. In reality then, when the extrajudicial confession is an oral one, the prosecutor's alternatives are limited to severance or to the complete exclusion of the confession at the joint trial. As noted previously, however, even when the extrajudicial confession is in written form, effective deletion or redaction is not usually possible.

While Rule 14 of the Federal Rules of Criminal Procedure has long authorized a severance whenever it appeared that a defendant might be prejudiced by a joint trial, it has seldom been granted. On a motion for severance by a defendant, the Rule authorizes the court to "order the attorney for the government to deliver to the court for inspection in camera any statements or confessions made by the defendants which the government intends to introduce in evidence at the trial." This in camera inspection will provide the court with an opportunity to determine if deletion or redaction would effectively prevent prejudice to the non-confessing codefendant, and if not, to require the prosecutor to choose between severance and exclusion of the confession. However, when the defendant does not move for severance, the situation becomes more complex. It is not yet clear whether Rule 14 specifically requires a motion for severance, or whether it imposes a "continuing duty... on the part of the court to avoid prejudice as a result of a joinder." If the latter interpretation is the correct one, it would almost compel an adoption of Mr. Justice White's suggestion in his Bruton dissent:

42 Id. at 88.
43 Id.
To save time, money, and effort, the Government might best seek a ruling at the earliest possible stage of the trial proceedings as to whether the confession is admissible once offending portions are deleted. The failure of the Government to adopt and follow proper procedures for insuring that the inadmissible portions of confessions are excluded will be relevant to the question of whether it was harmless error for them to have gotten before the jury.49

THE HEARSAY RULE

The hearsay statement inculpating the petitioner in Bruton was clearly inadmissible against him under traditional hearsay rules.50 The difficulty arose only in the context of the joint trial, during which the statement was admitted against his confessing codefendant. By basing its rejection of the Bruton procedure upon constitutional grounds however, the Court raised several important questions concerning the relationship between the traditional common-law hearsay rules and the sixth amendment's right of confrontation.51

Hearsay consists of extrajudicial statements which are offered at trial to prove the truth of the matter asserted.52 Such statements are considered objectionable since they are offered into evidence without the element of reliability present when the defendant is afforded an opportunity to cross-examine the declarant.53 However, certain types of hearsay evidence are admissible as exceptions to the rule. These exceptions are usually justified in terms of necessity, or as occurring in circumstances which are deemed to assure the truthfulness of the contents.54

Admission of an extrajudicial statement as a hearsay exception was not deemed a violation of the sixth amendment's right of confrontation, since that clause was merely regarded as the constitutional

49 391 U.S. at 144.

Severance would not be required if it could be firmly established that the inculpated defendant would not be denied his right to confront and cross-examine his confessing co-defendant at the joint trial. For an extensive treatment of the problems to be resolved before such certitude can be established, see Note, Trial by Jury in Criminal Cases, 69 COLUM. L. REV. 419, 453-57 (1969).

50 See Krulewitch v. United States, 336 U.S. 440 (1949); Fiswick v. United States, 329 U.S. 211 (1946); Morgan, Admissions as an Exception to the Hearsay Rule, 30 YALE L.J. 355 (1921).

51 The Court emphasized that no exception to the hearsay rule was involved in Bruton, and explicitly stated that it intimated "no view whatsoever that such exceptions necessarily raise questions under the Confrontation Clause." 391 U.S. at 128 n.3. Yet, in another passage, the Court emphasized that "[the reason for excluding . . . [Evans' extrajudicial inculpation of Bruton] as an evidentiary matter also requires its exclusion as a constitutional matter." Id. at 136 n.12 (original emphasis).

52 McCORMICK § 230.

53 McCORMICK §§ 224-25; 5 WIGMORE § 1365.

recognition of the established common-law right of cross-examination. The right of cross-examination was not absolute; rather, several exceptions relating to hearsay had evolved in the common-law. Indeed, the right to subject opposing testimony to cross-examination has been defined as the right to have the hearsay rule enforced. Once confrontation and cross-examination were regarded as identical concepts then, an exception to the hearsay rule was also regarded as co-extensive with the right of confrontation. It is submitted, however, that this proposition no longer retains its original validity. The concept of confrontation, like most constitutional standards, has developed and grown as our concepts of justice and due process have become more sophisticated.

However, hearsay rules have not progressed at an equivalent rate of development. In Pointer v. Texas, for example, a witness who had inculpated the defendants at a preliminary hearing was no longer in the state when the defendants were tried. All of the defendants were present at the hearing, and although not represented by counsel, one of the defendants had cross-examined the witness at the hearing. The prosecutor, utilizing a prior testimony exception to the hearsay rule, introduced the transcript of the witness' testimony into evidence at the trial of the defendants. The Supreme Court reversed their convictions, holding that the defendants were denied their right to cross-examine and confront their accuser, since confrontation without counsel would be ineffective and without any substantial constitutional meaning.

While Pointer failed to delineate the permissible constitutional limits of the hearsay rule, the Court did characterize the right of confrontation as "a fundamental right essential to a fair trial in a criminal prosecution." In spite of this effusive language, the Fifth

55 See, e.g., Salinger v. United States, 272 U.S. 542, 548 (1926); Mattox v. United States, 156 U.S. 237, 243 (1895); 5 Wigmore § 1397.
56 See, e.g., Salinger v. United States, 272 U.S. 542, 548 (1926); Kirby v. United States, 174 U.S. 47, 61 (1899); 5 Wigmore § 1362.
57 See 5 Wigmore § 1362.
58 Id. at § 1397. See, e.g., Dowdell v. United States, 221 U.S. 325, 330 (1911); Tomlin v. Beto, 377 F.2d 276, 277 (5th Cir. 1967); United States v. Kelly, 349 F.2d 720, 770 (2d Cir. 1965).
59 In Evans v. Dutton, 400 F.2d 826 (5th Cir. 1968), the court noted that "the fact that the framers of the Constitution did not intend to exclude hearsay evidence appears to have been viewed as having ossified the rule as then developed." Id. at 828-29.
60 See Evans v. Dutton, 400 F.2d 826, 829 (5th Cir. 1968).
61 830 U.S. 400 (1965).
62 404. See Comment, Federal Confrontation: A Not Very Clear Say On Hearsay, 13 U.C.L.A.L. Rev. 566, 372 (1966), in which it is contended that Pointer raised the hearsay rule to a constitutional level.
Circuit, in *Evans v. Dutton*, recently stated in *dicta* that a violation of the confrontation clause would not occur merely because the defendant was not afforded an opportunity to confront the witnesses against him. While admitting that the "*[g]enerally recognized exceptions to the hearsay rule have developed from a powerful process of rationalizing the denial . . ." of the right of confrontation, the court reasoned that when rational substitutes for the right of confrontation exist, some evidence is better than none at all. However, the evidentiary value of hearsay evidence is open to serious challenge. The meaning of a statement may be slanted or distorted by word substitution, whether it be conscious or unconscious. The fact that words rarely have fixed meanings complicates this problem. One commentator has described its dimensions:

One who hears the words of another person necessarily must interpret those words for the several messages they necessarily imply. The interpretation involves inference. But the listener-interpreter is not usually conscious that he's inferring and interpreting, and he naturally accepts his interpretations as what was said by the speaker.

Interpretation is further complicated by non-verbal communication techniques. The manner in which a person speaks may express doubt or certainty, opinion or fact. A pause, a smile, a nod of the head may completely alter the meaning of a statement. Extrajudicial statements are also offered in different situational contexts which are lost when they are repeated at trial. A high degree of subjectivity already exists in the interpretation of a declarant's remarks by the twelve members of the jury. To increase this burden by permitting the introduction of *any* hearsay into evidence would seriously endanger the reliability of the fact-finding process.

The *Evans* rationale also overlooks the fact that a rule, useful for evidentiary purposes, may exceed permissible constitutional standards. Assuming that the exceptions to the hearsay rule may provide the reliability lacking in ordinary hearsay statements, confrontation

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62 400 F.2d 826, 829 (5th Cir. 1968).
63 Id. at 830. See 5 WIGMORE §§ 1420-27.
65 Id. at 595.
66 Id. at 596-98.
67 Id. at 597-600.
68 For instance, in the *Bruton* situation, the confessor's statements, made to a third party and incriminating his codefendant, are regarded as hearsay when they are recalled by the third party since there is no way to verify the veracity of the confessor in his statement to the third party, the confessor's memory of the event, the confessor's accuracy of observation, judgment or perception, or effectiveness with which he recounted the story to the third party. Note, *Trial By Jury in Criminal Cases*, 69 COLUM. L. REV. 419, 453 n.196 (1969).
does more than ensure reliability. It ensures a certain element of fairness by providing the accused with

an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.69

It is this then—the element of fairness—which has replaced reliability as the criterion in determining whether the right to confrontation has been satisfied.

In Barber v. Page,70 a witness whose testimony at a preliminary hearing inculpated the defendant, was in federal prison at the time of the trial. The defendant was represented at the hearing by counsel, who was afforded an opportunity to cross-examine the witness. The prosecutor introduced the testimony of this witness at the trial under the prior testimony exception to the hearsay rule. The Supreme Court reversed the defendant's conviction, holding that his right of confrontation was violated by the failure of the state to make a good faith effort to secure the presence of the witness at the trial. While the Court appeared to assume that had the good faith efforts of the state to secure his presence failed, the prior testimony of the witness would have been admissible at the trial of the defendant, it did not explicitly consider the validity of this exception to the hearsay rule.71 Once again, however, the Court did emphasize the constitutional right of the defendant to confront his accusers in the presence of the jury. Similarly, in Berger v. California,72 in which Barber was applied retroactively, the Court again indicated that one of the important objectives of confrontation was to guarantee that the fact-finder be afforded an adequate opportunity to assess the credibility of witnesses.

At the very least, the Bruton, Barber, and Berger emphasis upon the constitutional right of confrontation reflects the Court's readiness to scrutinize and re-evaluate the rationales underlying the various exceptions to the hearsay rule, demanding the existence of salient, cogent reasons before denying a defendant his right of confrontation.73

70 390 U.S. 719 (1968).
71 See The Supreme Court, 1967 Term, 82 HARV. L. REV. 65, 237 n.35 (1968). The Barber Court did note that the prior testimony exception to the hearsay rule has traditionally "been explained as arising from necessity and justified on the ground that the right of cross-examination initially afforded provides substantial compliance with the purposes behind the confrontation requirement." 390 U.S. at 722.
73 See Evans v. Dutton, 400 F.2d 826, 830 (5th Cir. 1968). The court also stated that
It is interesting to examine the co-conspirator exception to the hearsay rule in light of this development. This exception, justified on agency principles,\(^4\) permits the introduction of statements made by one conspirator, in furtherance of an existing criminal conspiracy, as evidence against all conspirators. Once the objectives of the conspiracy have failed or have been achieved, the agency relationship ceases, and the statements are no longer admissible.\(^5\) Thus in *Fiswick v. United States*,\(^6\) the Supreme Court held that statements made by a conspirator following apprehension, cannot be characterized as being in furtherance of the criminal conspiracy. Similarly, in *Krulewitch v. United States*,\(^7\) the Court rejected the contention that even after the principal objectives of the conspiracy have succeeded or failed, an implicit subsidiary phase of the conspiracy continues to exist — the phase which has concealment as its objective. Yet, in *Evans*, statements made by one conspirator a year after the crime had been committed, at a time when all the conspirators were in prison for unrelated crimes, were admitted against the defendant.\(^8\) The Fifth Circuit, citing *Fiswick*, reversed the conviction.\(^9\)

Since the circumstances far exceeded the traditional exception to the rule, the *Evans* court did not re-examine the constitutional validity of that exception. However, the court, citing *Douglas*, did characterize the admission of the statements as occurring in circumstances which offered no rational substitute for confrontation.\(^10\) Even the *Krulewitch* Court had admitted the existence of many logical and practical reasons against the co-conspirator exception.\(^11\) At that time the majority of the Court dismissed those objections, stating

\[\text{"[a] criminal defendant cannot, consistent with the confrontation clause, be convicted upon the testimony of phantom witnesses whose credibility is unknown and unknowable by the trier of fact." Id.}\]

\(^4\) See 4 Wigmore § 1079.


\(^6\) 329 U.S. 211 (1946).

\(^7\) 336 U.S. 440 (1949).

\(^8\) The Georgia statute provides: "After the fact of conspiracy shall be proved, the declarations by any one of the conspirators during the pendency of the criminal project shall be admissible against all." GA. CODE ANN. § 38-306 (1954 rev.). The Georgia Supreme Court construed the statute to apply to Evans and his co-conspirator, since at the time the statement was made, they were still concealing their identity and involvement in the crime. *Evans v. State*, 22 Ga. 392, 400, 150 S.E.2d 240, 248 (1966).

\(^9\) *The Fifth Circuit held that the Georgia statute, as construed by the Georgia Supreme Court, violated the defendant’s sixth amendment right of confrontation. Evans v. Dutton, 400 F.2d 826, 831-32 (1968).*

\(^10\) Id. at 830-31.

\(^11\) 336 U.S. at 443.
that the exception was firmly established in the law.\textsuperscript{82} However, the developing standards of the confrontation clause may now require a more persuasive rationale than that of traditional acceptance if the exception is to be justified.

As part of the larger perspective, \textit{Bruton} may well represent a movement by the Court in the direction of a literal application of the confrontation clause. Such an application would prohibit the admission into evidence of any extrajudicial statement, regardless of its reliability, unless the inculpated defendant was afforded an opportunity to confront and cross-examine the declarant in the presence of the jury.\textsuperscript{83}

\section*{LIMITING INSTRUCTIONS}

The basic skepticism with which the \textit{Bruton} Court regarded the efficacy of limiting instructions portends a dire future for this procedural device in all instances in which the inability of the jury to comply with the instructions of the trial judge may result in serious prejudice to the defendant. It has traditionally been urged that the jury system itself would not be a viable concept unless the basic premise, that the jury is capable of following the instructions of the trial judge, is accepted.\textsuperscript{84} However, the effectiveness of limiting instructions has long been subject to suspicion.\textsuperscript{85} They have been characterized as a judicial "placebo,"\textsuperscript{86} and as "a ritualistic counsel of psychologically impossible behavior."\textsuperscript{87} Recent studies of the jury system have corroborated these characterizations.\textsuperscript{88} Indeed, these studies have indicated that limiting instructions may actually produce a contrary result by increasing the jury's reliance upon the prejudicial evidence.\textsuperscript{89} In \textit{Bruton}, the Supreme Court recognized that

\begin{thebibliography}{99}
\bibitem{82} Id.
\bibitem{84} \"[T]he jury system makes little sense,\" unless it is \"[b]ased on faith that the jury will endeavor to follow the court's instructions...\" \textit{Delli Paoli v. United States}, 352 U.S. 232, 242 (1957). \textit{See also Opper v. United States}, 348 U.S. 84, 95 (1954).
\bibitem{86} \textit{United States v. Grunewald}, 233 F.2d 556, 574 (2d Cir. 1956) \textit{quoting} Judge Learned Hand in \textit{United States v. Delli Paoli}, 229 F.2d 319 (2d Cir. 1956).
\bibitem{87} \textit{United States v. Jacangelo}, 281 F.2d 574, 576 (3d Cir. 1960).
\bibitem{88} \textit{See, e.g., Broder, University Of Chicago Jury Project, 38 \textit{Neb. L. Rev.} 744 (1959)}.
\bibitem{89} One project formulated a hypothetical personal injury suit on tape and played it to thirty experimental juries. Before ten juries, the defendant revealed, without objection from plaintiff's attorney, that he had no liability insurance. The mean award of this group was 33,000 dollars. Before another ten juries the defendant revealed, without objection by the plaintiff's attorney, that he did possess liability insurance. The mean award amounted to 37,000 dollars. Before the last group of ten juries, the liability insurance of the defendant was disclosed, with subsequent objection by the defendant's attorney. The jury was then instructed to disregard the insurance by the trial judge. The mean award for this group amounted to 46,000 dollars. \textit{Id.} at 754.
\end{thebibliography}
there are some contexts in which the risk that the jury will not, or
cannot, follow instructions is so great, and the consequences of failure
so vital to the defendant, that the practical and human limitations of
the jury system cannot be ignored.\textsuperscript{90}

Such a context may be presented when limiting instructions are
utilized in an attempt to cure prejudice caused by a prosecutor's use
of the multiple relevance rule.\textsuperscript{91} By means of this rule, a prosecutor
can introduce evidence which may be admissible against the defendant
on one issue, but inadmissible on another. An even more prejudicial
context is presented when a prosecutor introduces the prior criminal
convictions of a defendant into evidence. This occurs most frequently
when the prior convictions are utilized to impeach the credibility of
the defendant.\textsuperscript{92} The use of this impeachment device may well consti-
tute a violation of the due process clause. It is prejudicial to the de-
fendant because of the distinct possibility that the jury will convict him
on the basis of his past record, rather than on the basis of the evidence
actually presented at the trial.\textsuperscript{93} This possibility is greatly enhanced
whenever the defendant has committed similar crimes in the past.
In addition, the device may have a "chilling effect" on the right of the
defendant to testify in his own defense. In many instances, a defendant
will decline to testify at his trial in order to prevent the jury from
learning of his prior convictions.\textsuperscript{94} To be balanced against the preju-
dicial effect of this device upon the defendant, is the right of the
prosecutor to impeach the credibility of the defendant's testimony.
It is well settled however, that this right is not absolute, for limitations
have traditionally been imposed upon the types of impeachment
evidence a prosecutor may employ. For example, past acts which were
not the subject of a criminal conviction are not admissible as impeach-

\textsuperscript{90} 391 U.S. at 135.
\textsuperscript{91} See McCormick § 59; 1 Wigmore § 13.
\textsuperscript{92} See McCormick § 48; Spector, Impeachment Through Past Convictions: A Time
For Reform, 18 De Paul L. Rev. 1 (1968); Note, Constitutional Problems Inherent in the
Admissibility of Prior Record Conviction Evidence for the Purpose of Impeaching the
\textsuperscript{93} See Kalvern & Zeisel, The American Jury 160 (1966). Tests have disclosed that
"jurors almost universally used defendant's record to conclude that he was a bad man and
hence was more likely than not guilty of the crime for which he was then standing trial."
Letter from Dale W. Broeder to Yale L.J., March 14, 1960, quoted in Comment, Other
Indeed, it has been suggested that many prosecutors utilize this impeachment device in
the hope that the jury will actually consider the prior convictions as evidence of the
\textsuperscript{94} In one project, defendants were divided into two sections; those with, and those
without a record of past convictions. Those with no prior convictions elected to testify
in their own defense thirty-seven percent more than those defendants with a prior convic-
ment evidence, regardless of the particular relevancy they may have to the case at hand.95

Perhaps the best solution to this problem of conflicting rights in the impeachment area was presented in Luck v. United States.96 The Luck court realized that in certain cases the prejudicial effect of impeachment would far outweigh the relevance of the prior conviction to the credibility issue. It concluded that it was the duty of the trial judge to weigh the probative value of the evidence against its prejudicial effect before a prior conviction could be utilized for impeachment purposes.97 This balancing test was elaborated upon in Gordon v. United States,98 where the court formulated several elements to be considered by the trial court in its decision to admit or exclude the prior convictions. For example, if the conviction did not relate to the veracity of the defendant, it was not admissible.99 Thus, violent crimes were excluded, while crimes such as perjury and forgery would be admissible as impeachment evidence. Realizing that the possibility of prejudice was enhanced whenever the defendant had been convicted for a similar crime in the past, the court stated that such a prior conviction should be admitted sparingly, and then, only when it related to the defendant's veracity and circumstances indicated strong reasons for disclosure.100 Another factor to be considered was the time element involved—more specifically, the number of years which have elapsed since the last conviction.101 Lastly, the trial court should balance the importance of the defendant's testimony against the necessity of the impeachment evidence.102 In certain cases, the cause of truth would be aided more by permitting the jury to hear the defendant's story than by the defendant's refusal to testify in order to avoid the prejudice generated by the disclosure of a prior conviction.

The solution posed in Luck would permit the prosecutor to

95 See, e.g., McCormick § 42 (minority view). Under the majority view, evidence of prior acts which were not the subject of criminal convictions is admissible at the court's discretion.
96 348 F.2d 763 (D.C. Cir. 1965). Luck had been convicted of housebreaking and larceny. After he testified in his own defense, the prosecution was permitted to cross-examine him concerning a past conviction for grand larceny. Although the court reversed the conviction on other grounds, it discussed the impeachment problem in detail.
97 The court interpreted the word "may" in the District of Columbia impeachment statute, 14 D.C. Code Ann. § 14-305 (1966), to permit judicial discretion in the admission of prior convictions.
98 383 F.2d 936 (D.C. Cir. 1967).
99 Id. at 940.
100 Id.
101 Id.
102 Id. at 941.
utilize prior convictions as impeachment evidence only in the proper circumstances. Utilization of the prior convictions in these limited circumstances would accomplish its avowed purpose—to test the credibility of the witness—while also eliminating, or at least severely limiting, its possible prejudicial effect upon the defendant.\textsuperscript{103} The unfortunate aspect of the Luck approach involves the procedure utilized to determine the admissibility of prior convictions: a hearing held by the trial judge out of the presence of the jury. The additional delay necessitated by these hearings merely aggravates the already crowded court docket situation. Despite this delay, important policy considerations mandate that the administration of criminal justice is better served by the flexible approach embodied in Luck and Gordon, rather than by any rule which would arbitrarily require either the admission or exclusion of such evidence.\textsuperscript{104}

In addition to their utilization as an impeachment device, prior convictions are also often considered as a factor in determining the appropriate sentence for a defendant who is a multiple offender.\textsuperscript{105} Despite the prejudice which is inherent in the presentation of a defendant's prior convictions to the jury before the issue of guilt has been resolved, the Supreme Court, in \textit{Spencer v. Texas},\textsuperscript{106} upheld the admission of a defendant's past criminal record in a joint prosecution for murder and recidivism.\textsuperscript{107} Mr. Justice Harlan, writing for the majority, held that the procedure did not violate the fourteenth amendment's due process clause since the possibility of prejudice caused by the ineffectiveness of limiting instructions, was outweighed by a valid state interest—the convenience of trying both issues, recidivism and guilt on the present charge, before the jury at the same time.

The Court again considered the Texas recidivist procedure in \textit{Burgett v. Texas}.\textsuperscript{108} The certified record of a prior conviction had

\textsuperscript{103} See Trimble v. United States, 369 F.2d 950 (D.C. Cir. 1966).
\textsuperscript{105} The enhanced punishment accorded a multiple offender can be accomplished through several different procedures. A separate hearing can be held after conviction to determine the validity of prior convictions. Or, a split indictment can be utilized, with the admission of that portion alleging the defendant's prior convictions occurring only after his conviction on the present charge. An alternative approach would permit the admission of prior convictions before the issue of guilt was resolved. See Note, \textit{Recidivist Procedure}, 40 \textit{N.Y.U.L. Rev.} 332, 333-34 nn.7, 8, 11 (1965).
\textsuperscript{108} 389 U.S. 109 (1967).
indicated that the defendant was denied his right to counsel during that proceeding. Despite the defendant's objections, the prior criminal record was introduced as evidence during his trial. The Texas Court of Criminal Appeals dismissed the defendant's appeal, stating that since the enhanced punishment authorized by the recidivist statute had not been imposed, and since the jury had been instructed to disregard the conviction in arriving at the verdict, no reversible error was presented. The Supreme Court reversed, holding that the admission of a prior conviction which is constitutionally infirm under the standards of *Gideon v. Wainwright* is inherently prejudicial.

In discussing the ineffectiveness of limiting instructions, the *Burgett* Court stated:

> What Mr. Justice Jackson said in *Krulewitch v. United States* ... in the sensitive area of conspiracy is equally applicable in this sensitive area of repetitive crimes, "The naive assumption that prejudicial effects can be overcome by instructions to the jury ... all practicing lawyers know to be unmitigated fiction." Thus, while the Court again acknowledged that the prior conviction may have been considered by the jury in arriving at the guilt of the defendant, it attempted to distinguish *Spencer* by stating that reliance in that case rested upon a due process-general fairness approach, rather than upon the denial of any specific federal right. It is certainly true that where a procedural error violates a specific constitutional right, no amount of prejudice is permissible. On the other hand, when no specific constitutional right is violated, and the inquiry settles instead upon the more general right of the defendant to a fair trial, a balancing test may be employed to consider the competing state interest in a particular procedure. The *Burgett* attempt to distinguish *Spencer* however, appears to be of rather questionable validity. Chief Justice Warren recognized this in his concurring opinion in *Burgett*:

> This case is the frightful progeny of *Spencer* and of that decision's unjustified deviation from settled principles of fairness. Today we have placed a needed limitation on the *Spencer* rule, but nothing except an outright rejection would truly serve the cause of justice.

The majority opinion in *Spencer* and the minority opinion in

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111 *389 U.S. 109, 115 n.7* (1967).
112 *Id.* at 115-16.
113 *Id.* at 120 (concurring opinion).
Burgett, both written by Mr. Justice Harlan interestingly enough, displayed a marked reluctance to interfere with state procedural rules. Despite their refusal to sit as a "rule-making organ for the promulgation of state rules of criminal procedure," the Court has frequently acted to correct state procedures which denied a defendant's right to a fair and impartial trial. The countervailing state interests considered by the Spencer Court were woefully insufficient to justify the introduction of the defendant's prior convictions before the issue of guilt was decided. It is, at best, debatable whether a two-stage proceeding would severely hamper the administration of criminal justice, since the existence of a prior conviction would rarely be controverted.

The majority opinion also expressed concern that a condemnation of the recidivist procedure in Spencer would by implication cast doubt upon the validity of joint trials for codefendants. In this respect, it is interesting to note that the future of the joint trial was ignored by the Bruton Court. The time and expense required to try each codefendant separately vastly overshadows the inconvenience of providing a two-stage proceeding in recidivist cases. Even if the state's interest in the Spencer procedure is substantial, once the pervasive prejudicial effect which this single-stage recidivist procedure has upon the integrity of the fact-finding process is recognized, the better rule would mandate the exclusion of such evidence until the issue of guilt has been decided.

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114 385 U.S. at 564.
115 See, e.g., Parker v. Gladden, 385 U.S. 363 (1966) (court bailiff remarked on defendant's guilt in presence of jury); Sheppard v. Maxwell, 384 U.S. 333 (1966) (inflammatory news coverage and disruptive courtroom procedures); Tumey v. Ohio, 273 U.S. 510 (1927) (state procedure whereby criminal court judge was paid only if defendant was convicted).
116 Spencer's request to stipulate his prior convictions had been denied by the trial court. This stipulation would have resolved all factual issues concerning their existence. Once a prior conviction for murder with malice was proved, the jury was authorized to sentence Spencer to either death or life imprisonment. Tex. Pen. Code art. 64 (1948), as amended, Tex. Code Crim. Proc. arts. 36.01, 37.07 (1966). However, knowledge of the prior conviction, and sentencing on the recidivist count could have been postponed until after the guilty verdict had been rendered. Instead, over Spencer's objections, evidence relating to his prior convictions was presented at the trial, with reliance upon limiting instructions to preclude the jury from considering those convictions in determining his guilt. It was not contended that the prior convictions were necessary to impeach the defendant's testimony or to prove any elements of the crime.

117 Indeed, there may actually be a net conservation of judicial resources when a two-stage proceeding is utilized; the recidivist issue would be eliminated whenever the defendant was acquitted. This two-stage proceeding predominates in most states. See Note, Recidivist Procedures, 40 N.Y.U.L. Rev. 332, 333 n.8 (1965). Texas has amended its procedure and adopted this two-stage proceeding in all but capital cases. Tex. Code Crim. Proc. art. 36.01 (1965).
118 It must be remembered, however, that Bruton involved the specific constitutional right of confrontation; the due process-balancing test would therefore be inapplicable.
procedure accords a man charged with a crime due process is beyond belief.”

The doubt cast upon the co-conspirator exception to the hearsay rule by its emphasis upon the right of confrontation is aggravated by the Bruton Court's characterization of jury instructions as "an empty gesture." Theoretically, the prosecutor should first establish the existence of a conspiracy and identify the conspirators, after which the extra-judicial statements of each, made in the course of its execution, are admissible against all. As a practical matter however, evidence relating both to the existence of the conspiracy, and to the guilt of the individual defendants is introduced contemporaneously. As a result, due to the jury's failure to follow limiting instructions directing them to compartmentalize the evidence, and to consider the evidence relating to the existence of the conspiracy only for that purpose, "a conspiracy often is proved by evidence that is admissible only upon [the] assumption that [a] conspiracy existed". Moreover, in the event that the prosecution fails to prove the existence of a conspiracy, limiting instructions are relied upon to preclude juror consideration of the extrajudicial statements of non-testifying codefendants admitted erroneously under the co-conspirator exception. It is certain that jury instructions under these circumstances will not be sufficient to cure the violation of the right of confrontation.

Retroactivity: Roberts v. Russell

The conflict between the right of the individual to a fair and impartial trial and the right of society to be free from criminal attack is accentuated by a decision's retroactive effect. Retroactive application of a newly defined constitutional right often places an impossible burden upon an already overburdened administration of criminal law. Retroactivity compounds this caseload problem by casting

119 389 U.S. at 119 (concurring opinion).
120 See notes 73-84 and accompanying text supra.
121 See Krulewitch v. United States, 336 U.S. 440, 453 (1949) (concurring opinion of Mr. Justice Jackson).
122 Id.
123 In Krulewitch, Mr. Justice Jackson had stated "[t]he naive assumption that prejudicial effects can be overcome by instructions to the jury... all practicing lawyers know to be unmitigated fiction." 336 U.S. at 453. The Bruton Court cited this characterization of limiting instructions with approval. 391 U.S. at 129.
124 Everywhere in the United States local courts and prosecutors are today having to cope with a steadily mounting increase in criminal cases, each one of which requires two or three times more court time than was the case a few years ago. Counsel is usually assigned at the beginning of the case, at least as early as the arraignment. Thereafter preliminary hearings are held on search and seizure, the admissibility of
doubt and permitting collateral attack upon every conviction procured by means of the invalid procedure. Post-conviction hearings are necessary to examine the validity of the petitioning convict’s allegations, and when the petitioner’s rights have in fact been violated, a retrial also becomes necessary.

Beyond expense and time-consumption, retrial often proves to be an exercise in futility. Vital evidence may have been destroyed or misplaced since the first trial. Similarly, an important witness may no longer be available, or if presently available, may be either unwilling to cooperate or unable to recall the pertinent facts in any trustworthy fashion. Indeed, the cases of those criminals whose sentences were imposed long ago would offer the least likelihood of successful retrial. Under these circumstances, criminals of undoubted guilt, although afforded due process of law as it was defined at the time of their trial, would, of necessity, be released from prison. It is here that community security is most seriously threatened.

Despite this, the Supreme Court had traditionally accorded retroactive effect to decisions promulgating new constitutional standards. This procedure was entirely in accord with Blackstone’s concept of “declaratory law,” i.e., that courts simply find or declare pre-existing law, rather than exercising a creative function. Newly declared constitutional rights were regarded then, not as newly conceived, but as fundamental principles of our legal system; principles implicit in our concept of ordered liberty. A trial conducted in a manner inconsistent with these principles was regarded as invalid. However, the sweeping reforms initiated by the Warren Court in the area of criminal procedure necessitated a reappraisal, and the eventual rejection of this approach.

In Linkletter v. Walker, the Court denied habeas corpus relief from a state conviction which, although based upon unconstitutionally obtained evidence, had become final, i.e., beyond direct review, before Mapp v. Ohio was decided. Mapp, in overruling

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127 381 U.S. 618 (1965).
Wolf v. Colorado\textsuperscript{129} and requiring the exclusion of evidence seized in violation of the fourth and fourteenth amendments, had cast grave doubts upon all convictions which rested upon Wolf. As a result, the Linkletter Court attempted to reconcile its expansion of the concept of a fair trial with the need to avoid excessive burdens upon the administration of criminal justice. Although the Court enumerated three different bases for its refusal to apply Mapp retroactively, it emphasized that retroactivity would not effectuate the basic purposes behind the exclusionary rule.\textsuperscript{130} The deterrent effect of the rule would not be served by applying Mapp to police misconduct occurring prior to the enunciation of the rule.\textsuperscript{131} Prior decisions granting retroactivity\textsuperscript{132} were distinguished as the principles involved did in fact relate to the “fairness of the trial — the very integrity of the fact-finding process.”\textsuperscript{133} If an indigent defendant is denied counsel\textsuperscript{134} or a coerced confession is utilized at the trial,\textsuperscript{135} doubt arising as to the validity of the jury’s determination of guilt is sufficient to justify retroactivity. However, a violation of the exclusionary rule did not render the fact-finding process unreliable, since the evidence, although illegally seized, was indisputably trustworthy. Thus the Court referred to those prisoners convicted in reliance upon Wolf as “guilty victims.”\textsuperscript{136} In addition, the Linkletter Court considered in detail the extent of reliance by law enforcement officials upon Wolf, and the degree to which retroactive application of Mapp would burden criminal law administration. In view of the probative value of the illegally seized evidence and the deterrent purposes of the Mapp rule, the Court was unwilling to regard Mapp as requiring retroactive application.

The basic principles upon which the Linkletter Court relied, while elaborated upon in subsequent decisions, have remained relatively constant. While emphasizing that retroactivity does not turn on the relative importance of the constitutional right involved,\textsuperscript{137}

\begin{itemize}
\item \textsuperscript{129} 338 U.S. 25 (1949). The Wolf Court held that the exclusionary rule did not preclude the use of illegally seized evidence in a state court.
\item \textsuperscript{130} “[T]he ruptured privacy of the victims’ homes and effects cannot be restored. Reparation comes too late.” 381 U.S. at 637.
\item \textsuperscript{131} 381 U.S. at 636-37. However, the dissenting Justices Black and Douglas contended that Mapp prohibited convictions based upon unconstitutional evidence. Thus, a conviction would be subject to collateral attack if it rested in part on illegally seized evidence. \textit{Id.} at 650.
\item \textsuperscript{133} 381 U.S. at 639.
\item \textsuperscript{134} Gideon v. Wainwright, 372 U.S. 335 (1963).
\item \textsuperscript{135} Jackson v. Denno, 378 U.S. 368 (1964).
\item \textsuperscript{136} 381 U.S. at 637.
\item \textsuperscript{137} “We here stress that the choice between retroactivity and non-retroactivity in no
the Court has subsequently reiterated that of paramount importance in determining retroactive application is the relation of the right violated to the truth determining process.\textsuperscript{138} Thus in Roberts v. Russell,\textsuperscript{139} the Court, again applying the Linkletter approach, held that Bruton was entitled to retroactive application. It condemned the procedure utilized in Bruton as a “serious flaw” in the fact-finding process which never assured the petitioner of a fair determination of his guilt or innocence.\textsuperscript{140} Reliance by the state and federal courts upon Delli Paoli was not regarded as significant. The Court may have believed, with some justification, that such reliance was unwarranted in view of its earlier decision in Jackson, and its liberal revision of Rule 14 in 1966.\textsuperscript{141} Chief Justice Traynor, for example, had reasoned from Jackson to a condemnation of the Bruton procedure several years before Bruton was actually decided. He stated:

If it is a denial of due process to rely on a jury’s presumed ability to disregard an involuntary confession, it may also be a denial of due process to rely on a jury’s presumed ability to disregard a co-defendant’s confession implicating another defendant when it is determining that defendant’s guilt or innocence.\textsuperscript{142}

Several other state and federal courts had similarly either rejected or severely limited Delli Paoli.\textsuperscript{143} This ignores, however, the deference traditionally accorded the Bruton procedure in the administration of criminal law. Delli Paoli itself was decided only in 1957, and while several courts have recently deviated from that decision, it is clear that the vast majority of courts have long relied upon limiting instructions to cure the Bruton defect. Nevertheless, the Court stated that even though the impact of retroactivity upon the administration of justice “may be significant, the constitutional error presents a serious risk that the issue of guilt or innocence may not have been reliably determined.”\textsuperscript{144}

\textsuperscript{139} 392 U.S. 293 (1968).
\textsuperscript{140} 392 U.S. at 294.
\textsuperscript{141} See notes 47-49 and accompanying text supra.
\textsuperscript{142} People v. Aranda, 63 Cal. 2d 518, 529, 407 P.2d 265, 271, 47 Cal. Rptr. 353, 359 (1965).
\textsuperscript{144} 392 U.S. at 295.
This retroactive application of Bruton raises several interesting and complex questions in the area of post-conviction relief.

Waiver

The Supreme Court did not explicitly indicate whether a failure to object to the Bruton procedure, either by objecting to the utilization of the inculpating confession at the joint trial or by seeking severance of the trials, would preclude post-conviction relief. An unconstitutionally incarcerated prisoner is entitled, unless he has validly waived his constitutional rights, to habeas corpus relief. A failure on the part of a defendant to make pertinent objection whenever his rights are violated may, in certain circumstances, be equivalent to such a waiver. However, the Court, confronted with a similar situation in O'Connor v. Ohio, has indicated that a defendant's failure to assert a constitutional right which, while now available by means of its retroactive application, was unavailable at the time of the trial, will not operate as a waiver. Thus, in those states in which the Bruton procedure was accepted as valid, a waiver cannot be established on the basis that no proper objection was made since the admission of the inculpating confession under limiting instructions was valid. However, a different situation is presented in those states which deviated from the Delli Paoli rationale. The availability of a procedural remedy, either as a matter of right or of judicial discretion, in the form of a motion for deletion, redaction or severance, necessitates an inquiry into the petitioner's intent. The Court established in Fay v. Noia that a state procedural default will not legitimatize the unconstitutional conduct which may underlie a conviction. The fact that a remedy was once available within the state will not preclude the federal courts from granting habeas corpus relief unless the defendant

understandingly and knowingly forwent the privilege of seeking to vindicate his federal claims in the state courts, whether for strategic, tactical, or any other reasons that can fairly be described as the deliberate by-passing of state procedure. . . .

Thus it appears that habeas corpus relief will be available to

146 Petitioner Bruton did not request severance of his trial. 375 F.2d 355, 361 (8th Cir. 1967).
146 385 U.S. 92 (1966). In O'Connor, the Supreme Court held that the failure of a defendant to object to the prosecutor's contention, under then acceptable state procedure, that an adverse inference could be drawn from the defendant's failure to testify in his own defense, would not defeat a federal appeal. See People v. Bailey, 21 N.Y.2d 588, 237 N.E.2d 205, 289 N.Y.S.2d 943 (1968).
148 Id. at 439.
every petitioner convicted under the *Bruton* procedure unless the court determines that available state remedies were intentionally and deliberately by-passed in order to gain a strategic or tactical advantage.140

**Scope of Bruton's Retroactivity**

Since the precise scope of *Bruton* remains undefined, it is equally uncertain when the retroactivity decreed by *Roberts* will be available to those seeking post-conviction relief. *Roberts* will certainly apply to those cases in which the incriminating extrajudicial statements of a non-testifying codefendant were admitted with reliance upon limiting instructions to eliminate their prejudicial effect. To restrict *Roberts*' application to the exact fact-pattern presented in *Bruton* however, would place an unwarranted restriction upon the latter's rationale. The same considerations which required a reversal whenever the *Bruton* procedure was utilized, would require a similar result whenever deletion or redaction failed to prevent inculpation.150 Question has also been raised concerning the application of the *Bruton* rationale to cases in which the confessing codefendant did in fact testify at the joint trial. For instance, in *United States v. Guajardo-Melendez*,151 the Seventh Circuit declared that reversible error was committed when a Federal Bureau of Narcotics agent was permitted to testify as to an alleged conversation with the confessing codefendant. Utilizing a due process rationale, the court noted that while this testimony added little to the government's case against the confessor, it constituted "deadly poison" as to the petitioner. The court indicated, however, that the confrontation rationale of *Bruton*, while not literally applicable, was persuasive. Although the petitioner had been afforded the opportunity to cross-examine the confessing codefendant and declined to do so, some doubt existed as to whether the petitioner could have cross-examined him concerning his extrajudicial statements. Since the confessor did not mention his conversation with the agent in direct testimony, the general rule that a witness' direct testimony governs the scope of cross-examination might have precluded cross-examination.152 Additionally, the doctrine of a partial waiver of fifth amendment rights may have enabled the confessor to refuse to answer any questions regarding his extrajudicial statements.153

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151 401 F.2d 35 (7th Cir. 1968).
152 Id. at 38 n.5.
153 Id.
A similar situation is presented when the confessing codefendant is actually cross-examined by the inculpated defendant, and claims an inability to recall either his statement or the events to which that statement relates. Alternatively, the codefendant might deny having made the extrajudicial statement or any knowledge of the underlying facts. Under these circumstances, the inculpated codefendant is effectively denied an opportunity to test the veracity and motivation of the confessor, and habeas corpus relief should be available.

It is clear, then, that no simple rule can be formulated to indicate when collateral attack based upon Bruton will be available. Rather, an examination of each past conviction obtained after a joint trial, in which the inculpating extrajudicial statements of a codefendant were admitted, will be necessary in order to determine if the inculpated defendant's right of confrontation has been violated.

**Harmless-Error Rule**

The Bruton Court failed to delineate the precise relationship subsisting between a denial of confrontation and the constitutional harmless-error rule formulated in Chapman v. California. The initial issue relates to whether the denial of confrontation may ever be regarded as harmless-error, or whether a new trial must be granted without inquiry into its effect upon the truth-determining process.

In Chapman, petitioners Chapman and Teale were convicted of robbery, kidnapping, and murder. During his summation the prosecutor commented at length upon the defendants' failure to testify, and the inferences of guilt implicit in their silence. Subsequent to the trial but prior to the petitioner's appeal to the California Supreme

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154 See note 68 supra.
155 Id. See also United States v. Bujese, 378 F.2d 719 (2d Cir. 1967), vacated and remanded, 392 U.S. 297 (1968). In Bujese, a codefendant, taking the stand to testify in his own behalf, denied committing the crime charged. However, after being confronted with his written confession on cross-examination, he admitted his guilt. The confession which was admitted into evidence inculpated the petitioner Bujese, who subsequently called his codefendant as a defense witness. The codefendant then testified that the inculpation of Bujese in his confession was incorrect, and that Bujese had, in reality, refused to participate in the crime. The Second Circuit affirmed Bujese’s conviction, relying upon the clarity of the district court’s limiting instructions on the codefendant’s confession. The Supreme Court reversed and remanded for further consideration in light of Bruton. But see United States v. Cantino, 403 F.2d 491 (2d Cir. 1968); Santoro v. United States, 402 F.2d 920 (9th Cir. 1968).
156 386 U.S. 18 (1967).
157 Article 1, § 13 of the California Constitution provided: “In any criminal case, whether the defendant testifies or not, his failure to explain or to deny by his testimony any evidence or facts in the case against him may be commented upon by the court and by counsel, and may be considered by the court or the jury.”
Court, the United States Supreme Court, in *Griffin v. California*,\(^{158}\) held that the fifth amendment as applied to the states prohibited such prosecutorial comment. Nevertheless, the California Supreme Court, applying the state's harmless-error rule,\(^{169}\) affirmed the conviction.\(^{160}\) Since a more favorable result on retrial was not probable, the court reasoned that the error did not result in a "miscarriage of justice". On certiorari, the United States Supreme Court reversed, holding that an error is not harmless where it is reasonably possible that it contributed to the conviction.\(^{161}\)

Although conceding that prior cases had indicated that the violation of a constitutional right could never be regarded as harmless-error, the majority opinion of Mr. Justice Black explicitly recognized that "there may be some constitutional errors which in the setting of a particular case are so unimportant and insignificant that they may . . . be deemed harmless. . . ."\(^{162}\) Yet the Court also indicated that some constitutional rights were so basic to our concept of a fair trial, that their infraction could never be treated as harmless error.\(^{163}\) Thus, it has been suggested that the violation of any right whose objective it is to safeguard the reliability of the guilt-determining process would mandate automatic reversal of the conviction.\(^{164}\) However, while *Roberts* established that the *Bruton* procedure presented a serious risk that the issue of guilt or innocence may not have been reliably determined, it is doubtful that the right of confrontation is "so basic to a fair trial that . . . [its] infraction can never be treated as harmless error."\(^{165}\) The *Chapman* Court clearly intended to limit automatic reversal to those cases in which the constitutional error is inherently prejudicial, such as the denial of the right to counsel,\(^{166}\) an impartial judge,\(^{167}\) or a coerced confession.\(^{168}\) In such instances, it is impossible to determine the extent to which the error prejudiced the defendant's chances for acquittal. Thus, for example, it would be impossible for any appellate

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\(^{158}\) 380 U.S. 609 (1965). In *Tehan v. United States ex rel Shott*, 382 U.S. 406 (1966), the Court subsequently held that *Griffin* would not be applied retroactively, but that cases not beyond direct review before *Griffin* was announced would be tested under *Griffin*.

\(^{159}\) CAL. CONST. art. VI § 4%. This section requires affirmation of the conviction unless "the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice."

\(^{160}\) 386 U.S. at 22-24.

\(^{161}\) Id. at 22.

\(^{162}\) Id. at 23.

\(^{163}\) See, e.g., *Note, Harmless Constitutional Error*, 20 STAN. L. REV. 83 (1967).

\(^{164}\) 386 U.S. at 23.


court to classify a violation of Gideon v. Wainwright as harmless, since it would be impossible to realistically determine what the outcome would have been at the trial level if the defendant had not been denied his constitutional right to counsel. It is submitted that Bruton will not be construed as involving such an inherently prejudicial error. In any event, it becomes evident after an examination of the rigorous Chapman harmless-error standard that any distinction between the application of the harmless-error and the automatic reversal rules is neither a meaningful nor a substantial one.

The Chapman Court applied the harmless-error standard it had previously formulated in Fahy v. Connecticut. In Fahy, defendants were convicted after evidence seized in violation of Mapp was admitted at their trial. The Court reversed their conviction, stating that the admission of the illegally seized evidence was clearly not harmless.

We are not concerned here with whether there was sufficient evidence on which the petitioner could have been convicted without the evidence complained of. The question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction.

This "contribute" test has been criticized as unworkable: "A conscientious jurist harbors serious doubt about his capacity to read a cold
record and declare with confidence that a bit of unconstitutionally obtained evidence could not possibly have influenced the jurors.\textsuperscript{176} The likelihood that a particular error can be characterized as "harmless beyond a reasonable doubt" becomes even more remote after a consideration of Chapman's application of the Fahy approach. While the Chapman Court indicated that the harmless-error test required a reconsideration of the evidence apart from the constitutionally prohibited comments, it did ignore the California Supreme Court's finding that Teale, Chapman's codefendant, was "overwhelmingly guilty."\textsuperscript{178} Instead, the Court appears to regard the test primarily in terms of the likely impact which the unconstitutional procedure had upon jury. The proper standard then is not whether there exists sufficient other evidence to support the conviction, but whether the error itself "possibly influenced the jury adversely to the litigant."\textsuperscript{177}

In the Bruton situation, if the extrajudicial statements admitted at the trial do not incriminate the non-confessing codefendant,\textsuperscript{178} or in the event that they do, if the prejudice is slight and the effect on the jury is minimal in the light of other evidence presented at the trial,\textsuperscript{179} reversal may not be necessary. Thus for example, if two codefendants confessed and the confessions were inherently alike regarding every element of the crime charged, there would probably not be any reversible error.\textsuperscript{180} Under such circumstances the effect of the codefendants' statements would be minimal in light of the effect of each defendant's own confession. However, in an overwhelming percentage of cases the application of the exacting Chapman standard to the Bruton situation will result in reversal. For instance, in People v.

\textsuperscript{176} Thompson, Unconstitutional Search and Seizure and the Myth of Harmless Error, 42 Notre Dame Law. 457, 464 (1967).
\textsuperscript{177} See People v. Teale, 63 Cal. 2d 178, 197-98, 404 F.2d 209, 220-21, 45 Cal. Rptr. 729, 740-41 (1965).
\textsuperscript{178} 386 U.S. at 23.
\textsuperscript{179} See Dorsey v. United States, 405 F.2d 875 (9th Cir. 1968).
\textsuperscript{178} See Cortez v. United States, 405 F.2d 875 (9th Cir. 1968).
\textsuperscript{179} The Bruton Court referred to the extrajudicial statements of Bruton's codefendant as "powerfully incriminating." In addition, the Court, citing Lutwack v. United States, 344 U.S. 604 (1953), stated: "Not every admission of inadmissible hearsay or other evidence can be considered to be reversible error unavoidable through limiting instructions. . . ." 391 U.S. at 135. In Lutwack, a pre-Chapman case, the Court affirmed the petitioner's conviction despite the fact that certain statements were erroneously admitted against all the defendants. The Court, characterizing the record as shrieking with the guilt of the parties, held that the one inadvertent omission did not influence the jury's verdict.
\textsuperscript{180} See, e.g., People v. Devine, 157 Misc. 2d 862, 293 N.Y.S.2d 691 (Sup. Ct. Queens County 1968). Compare United States ex rel Johnson v. Yeagers, 399 F.2d 508 (3d Cir. 1968), wherein differences in the two confessions relating to the extent of participation of the codefendants in the planning and execution of the crime, and bearing on their degree of guilt, compelled the court to reverse their convictions. These differences were regarded as material to the jury's decision not to recommend life imprisonment, 399 F.2d at 510-11.
Baker, the New York Court of Appeals reviewed the first degree murder convictions of six defendants. During questioning by the prosecutor at their joint trial, two witnesses had testified that some of the non-testifying defendants had made extrajudicial statements inculpating their codefendants. Limiting instructions were utilized in an attempt to cure the prejudice caused by the admission of these statements. However, despite "overwhelming" evidence of guilt, the Court, citing Bruton, reversed:

That there is ample evidence to establish the guilt of all six beyond a reasonable doubt (only three even bother to raise this issue) is clear from the record. We are, however, constrained by principle and precedent to reverse the judgments below and order new trials as to all of the defendants because of errors committed at the trial, which deprived the defendants of a fair trial. . . .

An Alternative Solution

Theoretically, a harmless-error rule provides the courts with a vehicle to affirm convictions and avoid retrial without violating individual rights. However, the constitutional harmless-error rule formulated by the Court has often been criticized as being so exacting that any meaningful distinction between it and a rule requiring automatic reversal is vitiated. Indeed, it has been characterized as "a myth, a concept existing only in imagination and not in reality." It must be recognized, however, that once the Court deviated from prior decisional law to hold that a constitutional violation may ever be harmless, the establishment of such an exacting standard became an absolute necessity. After Chapman, the effective protection of constitutional rights depended upon the extent to which the appellate courts would scrutinize the effect of errors at the trial level. Thus, for example, the purpose underlying the fourth amendment's exclusionary rule—deterrence of illegal police searches—would be seriously undermined if the harmless-error standard was not a stringent one. Additionally, a citizen should not be deprived of his liberty on the basis of a procedure "which is this country's constitutional goal" if that procedure possibly influenced the jury adversely.

182 Id. at 317, 244 N.E.2d at 235, 296 N.Y.S.2d at 750. See People v. Cefaro, 23 N.Y.2d 283, 244 N.E.2d 42, 296 N.Y.S.2d 345 (1968).
183 See note 175 and accompanying text supra.
184 Thompson, supra note 175.
185 See The Supreme Court, 1966 Term, 81 Harv. L. Rev. 69, 207-08 (1967).
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 us of a defendant's guilt would but lead to erosion of the rule and endanger the rights of even those who are innocent.\textsuperscript{187}

It is clear, however, that when a conviction is open to collateral attack only because it rests upon a procedure which violated a retroactively declared constitutional right, the policy reasons mandating a stringent harmless-error rule are no longer controlling. Neither prosecutorial nor police misconduct will be deterred by reversing a conviction based upon previously acceptable criminal procedures. Furthermore, under these circumstances the defendant involved was fully accorded the benefits of the rule of law as it existed at the time of his trial. It may of course be contended that the retroactively declared constitutional right was not in reality newly conceived, but rather, reflected a fundamental principle in our legal system. Thus, it is argued that a conviction based upon a procedure which is irreconcilable with such a principle cannot stand. However, in an attempt to reconcile our expanding concepts of due process with the right of our populace to be free from criminal attack, the \textit{Linkletter} Court had clearly rejected this approach. It is submitted that an adoption of a less stringent harmless-error rule in the area of retroactively declared constitutional rights will further advance this reconciliation. While continuing to require automatic reversal whenever the invalid procedure was inherently unreliable, a conviction which is based upon a now unconstitutional procedure should not be reversed if there exists sufficient other evidence in the record to uphold it beyond a reasonable doubt. The test may be phrased in these terms: Absent the prejudicial effect of the unconstitutional procedure, would honest, fair-minded jurors have brought in an identical verdict? An affirmative answer would preclude reversal of the conviction. Absent the dominant policy reasons of deterrence and "fair trial," reversal and remand under such circumstances is simply an empty gesture, since retrial, conducted in the proper manner, will clearly have the same result.

The adoption of this rule would also enable the Court to liberalize the standards governing the retroactive application of decisions. The \textit{Linkletter} Court was presented with an ideal case, in that a violation of the exclusion rule did not cast any doubt whatsoever upon the

reliability of the fact-finding process. This question of reliability however has proven more difficult to resolve in subsequent cases. For example, in *Tehan v. United States ex rel. Shott*\(^{188}\) the Court refused to retroactively apply *Griffin*, in which it had previously held that neither prosecutors nor judges could comment on or draw adverse inferences from a defendant's failure to testify in his own defense. While the *Shott* Court emphasized that the privilege against self-incrimination was not an adjunct to the ascertainment of truth at the trial,\(^{189}\) the comment rule had been condemned in *Griffin* partly because it did impair the reliability of the guilt-determining process by increasing the danger of erroneous inferences from the defendant's failure to testify.\(^{190}\) It seems clear that the *Shott* Court was influenced by the burden which retroactivity would place on court dockets. Citing the difficulties inherent in retrial, the Court stated:

> To require all of those States [which had permitted prosecution comment] now to void the conviction of every person who did not testify at his trial, would have an impact upon the administration of their criminal law so devastating as to need no elaboration.\(^{191}\)

Similarly, in *Johnson v. New Jersey*\(^{192}\) the Court limited its holdings in *Escobedo v. Illinois*\(^{193}\) and *Miranda v. Arizona*\(^{194}\) to those cases in which the trials began after the decisions were announced. In *Miranda*, the Court had held that before custodial interrogation can begin, the citizen must be warned . . . that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.\(^{195}\)

The *Johnson* Court denied retroactivity to both *Miranda* and *Escobedo*, since their "prime purpose" was not to ensure the reliability of the fact-finding process but to guarantee the full implementation of the privilege against self-incrimination.\(^{196}\) Yet, it is clear that if the Court did not regard the enhancement of reliability as the "prime purpose" of those decisions, it certainly realized that they did in fact

\(^{188}\) 382 U.S. 406 (1966).
\(^{189}\) Id. at 416.
\(^{190}\) 382 U.S. at 614.
\(^{191}\) 382 U.S. at 419.
\(^{192}\) 384 U.S. 719 (1966).
\(^{194}\) 384 U.S. 436 (1966).
\(^{195}\) Id. at 479.
\(^{196}\) 384 U.S. at 729.
substantially enhance the reliability of the fact-finding processes. The *Johnson* Court itself conceded that those decisions would safeguard "against the use of unreliable statements" at trial.197 Additionally, in *Miranda*, decided one week prior to *Johnson*, the Court declared that without adequate warnings and the rights of counsel, all the careful safeguards become empty formalities.198 Thus, the *Johnson* Court, admitting that "the question whether a constitutional rule of criminal procedure does or does not enhance the reliability of the fact-finding process at trial is necessarily one of degree",199 apparently resolved the issue against retroactivity in an attempt to both forestall a hostile public reaction to *Miranda* and to prevent the wholesale release of many guilty criminals.200

Adoption of a less exacting harmless-error rule would have permitted the Court to grant retroactivity in both *Shott* and *Johnson*. Once it is recognized that a particular procedure did have a substantial effect upon the reliability of the fact-finding processes, retroactivity could be granted, with reliance upon the harmless-error rule to prevent the abuses caused whenever retrial becomes necessary. Admittedly, even if it is assumed that retrial can be avoided in most instances by utilization of this harmless-error rule, the retroactive application of *Griffin*, *Escobedo*, and *Miranda* would still increase the burden upon the criminal court dockets. Consideration of each case decided in violation of one of those decisions would be required in order to determine if sufficient other evidence to support the conviction had been presented at the trial. However, this burden would be alleviated in part by the conservation of judicial resources achieved by application of the less exacting harmless-error rule to situations in which the Court would have granted retroactivity in any event, such as in *Roberts*, where application of the *Chapman* standard would require retrial in an overwhelming percentage of the cases. Thus, the adoption of a less exacting harmless-error rule in the area of retroactively declared constitutional rights would enable the Court to expand the concept of due process by applying retroactively any decision which substantially impairs the reliability of the fact-finding process, while, at the same time, effectively prevent the release of the obviously guilty merely because of a technical defect in the procedure utilized to obtain their conviction.

197 *Id.* at 790.
198 384 U.S. at 466.
199 384 U.S. at 728-29.
CONCLUSION

Law enforcement . . . in defeating the criminal, must maintain inviolate the historic liberties of the individual. To turn back the criminal, yet, by so doing destroy the dignity of the individual, would be a hollow victory.201

Despite recent vitriolic attacks upon the Supreme Court,202 Bruton has reaffirmed a commitment to the development of minimal constitutional standards co-extensive with our evolving concepts of "fundamental fairness." The objective sought is the prevention of governmental abuse of individual dignity in the administration of criminal justice. This judicial quest, however, is often regarded by an uninformed public as encouraging a concomitant loss of respect for law and order.203 These critics would seem to proffer lawlessness as the very basis of law and order. Indeed, they view basic constitutional rights as impediments to the effective administration of criminal law, thus advocating the accommodation of "fundamental rights" in their efforts to preserve the "rule of law."

Such naivete saps the vitality of constitutionalism. Indeed, only constitutional omnipresence preserves inviolate that concept of "ordered liberty" basic to a nation of free men; and only punctilious adherence to, rather than pragmatic deviation from its spirit can ensure domestic tranquility.

Furthermore, the Court's decisions have not significantly affected the escalating crime rate.204 Instead, the responsibility for this phenomenon may be properly placed upon a patently inadequate system of criminal justice and correction. Since the great majority of criminal defendants plead guilty,205 the critical area does not involve the guarantees of individual liberty imposed upon the adjudicating process of the criminal trial. Attention must focus instead upon the administrative process of sentencing. Unfortunately, the sentence often fails to reflect a thoughtful and informed judgment as to the defendant's future. It is at this stage in criminal procedure that a lethargic society has forfeited its most appropriate opportunity to reduce crime. Additionally, the anachronisms of retribution and reformation must be

201 Hoover, Civil Liberties and Law Enforcement: The Role of the F.B.I., 37 Iowa L. Rev. 175, 177 (1952).
202 See nn.1-10 and accompanying text supra.
203 Id.
204 Vorenberg, Is the Court Handcuffing the Cops?, N.Y. Times, May 11, 1969, § 6 (Magazine), at 32.
205 Id. at 134. It has been estimated that less than one percent of all criminal cases are tried by a jury. Id.
abandoned in favor of more positive, non-punitive attempts at rehabilitation and crime prevention.\textsuperscript{206}

The Court's recent procedural reforms have evidenced this shift in emphasis from crime detection to crime prevention.\textsuperscript{207} "It is increasingly clear that the police, the courts, the prisons and the correctional services generally are engaged in what, at best, is a holding action."\textsuperscript{208} Any major reduction in predatory crime depends upon a redefinition of contemporary social values, with proper emphasis upon the relief of the frustration and despair subsisting among the lower economic levels of society.\textsuperscript{209}

The best hope of crime control lies not in better police, more convictions, longer sentences, better prisons. It lies in job training, jobs and the assurance of adequate income; schools that respond to the needs of their students; the resources . . . to plan a family. . . ; a decent place to live, and the opportunity to guide one's own life and to participate in guiding the life of the community.\textsuperscript{210}

Provisions long ignored when proposed in the name of social justice must now be adopted in the name of crime control. If such a national commitment is not forthcoming, and reliance is placed instead upon repressive measures and constitutional alteration to curb lawlessness, it is safe to assume that in the future, crime will become "an even more menacing part of the life of the nation. . . ."\textsuperscript{211}

\textbf{APPENDIX}

Subsequent to the preparation of this article, the United States Supreme Court rendered a decision which has magnified the ambiguities pervading the harmless-error doctrine.

In Harrington v. California,\textsuperscript{212} the petitioner and three codefend-
dants were jointly tried and convicted of attempted robbery and felony murder. The confessions of each were introduced at the trial, and the jury was instructed to consider each confession only against the confessor. The confessions of the two non-testifying codefendants characterized Harrington as an active participant, present at the scene of the crime. The testifying codefendant, who was cross-examined by the petitioner, concurred in this characterization, and alleged additionally that the petitioner was in possession of a gun. As the Court noted, the confessions of the non-testifying codefendants added nothing, but merely corroborated the testifying codefendant's confession. The petitioner himself, admitted driving to the scene with the codefendants, but further alleged that he had remained in the car until he decided to follow them in order to purchase cigarettes. He admitted, however, being present at the scene at the time of the murder, fleeing with his codefendants, and thereafter dying his hair. The victims of the robbery had identified him, nevertheless, and testified that he had drawn a gun. Other witnesses related seeing the four defendants acting in concert before, during and after the crime. Against such an evidential background, the majority's inability to impute reversible weight to the confessions of the non-testifying codefendants is not surprising. As the Court observed:

Our decision is based on the evidence in this record. The case against Harrington was not woven from circumstantial evidence. It is so overwhelming that unless we say that no violation of Bruton can constitute harmless error, we must leave this state conviction undisturbed.

The minority opinion, authored by Mr. Justice Brennan, viewed the majority position as an effective repudiation of Chapman; the very case it purported to apply. It considered the majority opinion as "shift-

213 The trial court initially required the confessions to be edited. However, one defense counsel accused the court of increasing the prejudicial effect of the statements, since it was then impossible for the jury to determine the roles of each party. The trial court reversed itself, and permitted the confessions to be introduced as given. People v. Bosby, 256 Cal. App. 2d 209, 217, n.3, 64 Cal. Rptr. 159, 164 n.3 (1967).

214 The confessions of the non-testifying codefendants did not mention Harrington by name, but rather, referred to him as "the White guy" or "the Patty". The petitioner contended that "reference to 'the White guy' made it as clear as pointing and shouting that the person referred to was the white man in the dock with the three Negroes."

215 U.S. at ______. The Supreme Court made the same assumption. Id. See nn. 37-42 and accompanying text supra.


217 Id. at 217, 64 Cal. Rptr. at 164.

218 Id. at 213, 64 Cal. Rptr. at 162.

ing the inquiry from whether constitutional error contributed to the conviction to whether the untainted evidence provided 'overwhelming' support for the conviction."\textsuperscript{220} If this contention is accurate, the deterrent effect of prior procedural reforms will be seriously undermined.\textsuperscript{221} More importantly, however, the possibility of an inquiry relating solely to the substantiality of untainted evidence, ignoring the impact of the tainted evidence upon the jury's decision, may preclude the reversal of convictions resulting from constitutional error. As indicated earlier,\textsuperscript{222} once the \textit{Chapman} Court deviated from prior decisional law to hold that a constitutional violation may be harmless, the adoption of a stringent harmless-error rule became an absolute necessity. Thus, after \textit{Chapman}, the effective protection of constitutional rights depended upon the extent to which appellate courts would scrutinize the impact of errors at the trial level. However, since the scope of appellate review relating to substantiality of evidence is extremely limited, the rule of the majority opinion would often "effectively leave the vindication of constitutional rights solely in the hands of trial judges."\textsuperscript{223} As a result, Mr. Justice Brennan concluded that appellate review should focus upon "the character and quality of the untainted evidence,"\textsuperscript{224} and not merely upon the amount of untainted evidence.

A detailed analysis of the majority opinion indicates that Mr. Justice Brennan's fears concerning the former's rejection of \textit{Chapman} may be unfounded. The majority clearly based its judgment upon an examination of the probable impact of the confessions of the two non-testifying codefendants on the minds of an average jury. Indeed, at one point the Court remarked: "We do not depart from Chapman; nor do we dilute it by reference. We reaffirm it."\textsuperscript{225} Nor does it appear that the Court has now adopted "overwhelming" untainted evidence as a new harmless-error standard. The \textit{Chapman} Court had admonished against the exaggeration of "overwhelming evidence" of guilt, stating that constitutional errors affecting the substantial rights of a defendant could not be considered harmless.\textsuperscript{226} The \textit{Harrington} majority recalled this admonition, stating "[b]y that test we cannot impute reversible weight to the other two confessions."\textsuperscript{227} Thus, it appears that rather than diluting or rejecting the \textit{Chapman} standard, the majority applied

\begin{footnotesize}
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\item \textsuperscript{220} Id. at \textsuperscript{---}.
\item \textsuperscript{221} Id. at \textsuperscript{---}.
\item \textsuperscript{222} See \textit{supra} nn.183-84 and accompanying text.
\item \textsuperscript{223} --- U.S. ---, --- (1969).
\item \textsuperscript{224} Id. at \textsuperscript{---}.
\item \textsuperscript{225} Id. at \textsuperscript{---}.
\item \textsuperscript{226} Chapman v. California, 386 U.S. 18, 23 (1967).
\item \textsuperscript{227} --- U.S. at \textsuperscript{---}.
\end{itemize}
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it, and concluded that on the "special facts" presented, the Bruton violation was clearly harmless-error. 228

Harrington has established that Chapman does not mandate reversal because of gossamer possibilities of prejudice to a defendant. 229 The danger exists, however, that this sound principle will be carried to an extreme. Judges, "swept along by pitiless and seemingly ineluctable logic . . .", 230 may liberally interpret Harrington to affirm convictions tainted by constitutional error, on the basis of "overwhelming evidence." Thus, if the harmless-error standard is to remain a viable one, the Court must quickly and firmly establish that it has not shifted "the inquiry from whether the constitutional error contributed to the conviction to whether the untainted evidence provided 'overwhelming' support for the conviction." 231

228 Id. at —.  
229 See nn.178-80 and accompanying text supra.  
231 — U.S. at —.