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TO ERR IS HUMAN, BUT NOT ALWAYS HARMLESS: WHEN SHOULD LEGAL ERROR BE TOLERATED?*

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Over his thirty-year career, Harry T. Edwards has distinguished himself both as a jurist and as a legal scholar. In this Madison Lecture, Chief Judge Edwards brings both a judge's and a law professor's perspective to his analysis of the harmless-error doctrine. He explains the two ways in which a court may apply the doctrine. One approach, the "guilt-based approach," requires the reviewing court to assess the factual guilt or innocence of the defendant in light of the untainted evidence in the record. The second approach, the "effect-on-the-verdict approach," requires the reviewing court to determine whether the error at trial influenced the jury and thus contaminated its verdict. Chief Judge Edwards examines the development of the harmless-error doctrine in Supreme Court case law and argues that a variety of factors, including the limited institutional competency of appellate courts and the vital nature of the individual rights at stake, demonstrate that the effect-on-the-verdict approach is to be preferred. Chief Judge Edwards concludes that he is both "optimistic" and "skeptical" about the future of the harmless-error doctrine: optimistic because of recent Supreme Court decisions that indicate a trend toward an effect-on-the-verdict approach, but skeptical because he is unsure whether—in practice—appellate judges can ever solve the riddle of harmless error.

* See Roger J. Traynor, *The Riddle of Harmless Error* 3 (1970) ("To err is human, as a judge well knows, but to err is not always harmless.").

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Assume an appellate judge must decide the following case:

Joe Didit, who is six-feet five-inches tall, about two-hundred-and-seventy pounds, Caucasian, and bald-headed, was recently tried for the murder of a convenience-store proprietor. The indictment charged that, sometime near midnight on the evening in question, Didit entered the convenience store, with a loaded gun, intending to rob the proprietor. It was further charged that, when he faced resistance from his victim, Didit purposefully shot the proprietor in the head and face six times, and then fled the store. Two customers, who were in the store at the time of the murder, called the police and identified Didit, a well-known neighborhood thug, as the murderer. Following this lead, the police located Didit at his girlfriend's apartment, arrested him, and took him to police headquarters for interrogation. After being given his Miranda warning, Didit refused to say anything. His refusal agitated one of the police officers, who then proceeded to slap and punch Didit repeatedly. The officers then left Didit in an isolated room, telling him, "you'll stay here unless you talk to us." Two hours later, Didit summoned the officers and asked for a sandwich and coffee, which he was given. After eating, he told the officers that he wanted to talk. Then, without giving any further Miranda warning, the officers took a confession from Didit.

At trial, one of the customers testified that he was about thirty feet from the place of the murder, but could "clearly" see Didit shoot the proprietor. The other customer testified that she did not have a clear view of Didit, but she was "sure" that she recognized the defendant's voice when he threatened to kill the store owner. A third witness testified that he had seen Didit at about midnight on the night in question, running down a street about a block away from the convenience store. A fourth witness testified that he had seen Didit with what he thought was a .45-caliber pistol two days before the shooting. No gun was ever found, but police experts testified that the bullets that killed the murder victim came from a .45-caliber. All four witnesses claimed that they personally knew Didit from the neighborhood. The prosecutor also introduced a videotape recording of the murder, showing a view of the murderer from the rear; the recorded view of the murderer strongly resembled the defendant. Finally, over strong objection, the trial judge allowed Didit's confession to be introduced in evidence, along with evidence indicating that the defendant had been beaten several hours before he confessed. For the defense, Didit's girlfriend testified that he had been with her all evening; on cross-examination, however, she admitted that she was "unsure" whether he may have left the apartment once during the evening to buy some cigarettes. The jury returned a verdict of guilty within two hours after commencing deliberations. The case is now on appeal, and the defendant seeks reversal on a claim that

the trial judge committed error in admitting what amounted to a coerced confession. Government counsel responds that any error committed by the trial judge was harmless.

How should the court rule? If the conviction is reversed, the government and the trial court will be forced to undergo the time and expense of retrying a case in which there appears to be little doubt of the defendant's guilt. (And in many criminal cases, the expense and time involved are enormous.) A reversal, therefore, may run counter to "the 'principle that the central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence, and [to] promote[] public respect for the criminal process by focusing on the underlying fairness of the trial rather than on the virtually inevitable presence of immaterial error.'"¹

However, if the court decides against reversal, finding the error to be harmless, it will embrace the questionable assumption that appellate judges reliably may assess guilt on a cold record, and, in this case, on the basis of "eyewitness" testimony that is not infrequently mistaken. A failure to reverse will also diminish the constitutional proposition that a defendant in a criminal case is deprived of due process of law when his conviction is founded, in whole or in part, upon an involuntary confession. And this result will likely undermine the integrity of the criminal justice system by sending dubious messages to the police officer who brutalized the defendant and thereby gained the coerced confession, to the prosecutor who introduced the evidence at trial, and to the trial judge who erroneously admitted it.

The law can be an aggravating thing. It imposes duties and responsibilities, and it sometimes forces results that many people in society find unpalatable. For example, some might find it positively offensive to reverse Joe Didit's conviction in a case like this where there is ample evidence aside from the coerced confession to support a finding of guilt. The harmless-error doctrine² offers us a way to deal with the aggravation. Under this doctrine, when an appellate court's review of trial proceedings uncovers a legal error that might produce a

¹ *Arizona v. Fulminante*, 499 U.S. 279, 308 (1991) (quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 681 (1986)).

² The harmless-error doctrine has several sources. With respect to nonconstitutional error, Federal Rule of Criminal Procedure 52(a) states that "[a]ny error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." Fed. R. Crim. P. 52(a). See also *infra* note 11. With respect to constitutional error, the Supreme Court has held that such error may be harmless if a court is "able to declare a belief that it was harmless beyond a reasonable doubt." *Chapman v. California*, 386 U.S. 18, 24 (1967). In *Chapman*, the Court noted that Rule 52, and related statutory provisions, did not purport to distinguish between federal constitutional errors, and errors of state law or federal statutes or rules, in the application of the harmless-error doctrine. *Id.* at 22.

disfavored result (such as the retrial of a defendant who appears to be guilty), the court may simply call the error "harmless," and the potential aggravation is removed. This approach seems to work like magic. Appellate judges merely apply a "drop" of harmless error, and the coerced confession, warrantless search, erroneous jury instruction, faulty exclusion of evidence, unfair restriction on cross-examination, and a host of other errors simply vanish as though they never had occurred. And, most important, the defendant remains in prison to suffer the punishment that he or she appears to deserve.

The problem, of course, is that the solution offered by this harmless-error "tonic" can be illusory, for, although it resolves the immediate dilemma created by an error that may free a guilty defendant, it creates its own set of aggravations. And, like the sorcerer's apprentice, we have discovered that the "magic" formula we invoke creates problems that are arguably more momentous than the difficulties we sought to resolve. Put simply, each time we employ the imaginary tonic of harmless error, we erode an important legal principle. When we hold errors harmless, the rights of individuals, both constitutional and otherwise, go unenforced. Moreover, the deterrent force of a reversal remains unfelt by those who caused the error. In his seminal book on harmless error, entitled *The Riddle of Harmless Error*,³ the late Justice Roger Traynor aptly observed that "[i]n the long run there would be a closer guard against error at the trial, if appellate courts were alert to reverse, in case of doubt, for error that could have contaminated the judgment."⁴

This is not to say that harmless error has no place in our jurisprudence. Indeed, countless cases present errors that truly are harmless under any interpretation of the standard, and my colleagues and I have engaged in extensive use of the harmless-error doctrine where we have concluded that an error failed to affect the substantial rights of a defendant. The problem with harmless error arises when we as appellate judges conflate the harmlessness inquiry with our own assessment of a defendant's guilt. This approach is dangerously seductive, for our natural inclination is to view an error as harmless whenever a defendant's conviction appears well justified by the record evidence. However, the seductiveness of this approach is its chief defect, for, drawn in by its attractions, we have applied the harmless-error rule to such an extent that it is my impression that my colleagues and I are inclined to invoke it almost automatically where the proof of a defendant's guilt seems strong.

³ Roger J. Traynor, *The Riddle of Harmless Error* (1970).

⁴ *Id.* at 23.

In other words, I believe that, more often than not, we review the record to determine how we might have decided the case; the judgment as to whether an error is harmless is therefore dependent on our judgment about the factual guilt of the defendant. I call this application of harmless error the "guilt-based approach." Justice Traynor persuasively argues, however, that the role of an appellate judge should instead be limited to a determination of whether the error influenced the jury, and hence contaminated the verdict; in such an event, the appellate court has a duty to find that the appellant did not get the jury trial to which he was entitled.⁵ This alternative framework I will call the "effect-on-the-verdict approach."⁶

I have the same concerns about the guilt-based approach that Justice Traynor identified twenty-five years ago; indeed, the problems may be even worse now. As the guilt-based approach to harmless error has taken hold in our courts, the "plain-error" rule, which governs appellate review of errors to which counsel failed to object at trial, has been employed in such a way that findings of error are rare. As a result, defendants asserting violations of individual rights and liberties on appeal frequently receive a standard response: the errors to which they objected at trial were harmless; the errors to which they failed to object were not plain. One solution to this problem is to break the stranglehold of the guilt-based approach to harmless error and reconsider Traynor's alternative framework.

I enjoy thinking like a law teacher about what I do as a judge. When I do that, some of my judicial decisions look ridiculous; but then, in turn, when I try to apply some of my scholarly ideas to my work as a judge, those ideas sometimes appear inane. Judges must reach results based on legal prescriptions, and then explain their judgments to interested parties who have a lot at stake in the outcome of a case. Law teachers rarely face this pressure. Indeed, there are some in the academy who believe that a truly good law teacher is never wedded to a fixed view on anything, for that is seen to be narrow-minded or short-sighted; and law students always are taught to treasure "on the other hand" as a precious tool of discourse. These good teacher traits do not help me much as a judge, especially when struggling with an area of the law such as the harmless-error doctrine. I say all of this to caution you to hedge your bets on what I have to say: harmless error has tended to stump me in my role as a judge, and I

⁵ *Id.* at 13.

⁶ Traynor calls this approach the "effect on the judgment" test of harmless error. *Id.* at 22.

have no reason to think that my law teacher ideas on the subject will necessarily work.

Nevertheless, I am not the only one who appears to be uncomfortable with the guilt-based approach to harmless error and the erosion of rights that accompanies such an approach. This past term, in *O'Neal v. McAninch*,⁷ the Supreme Court cut back on the use of determinations about factual guilt in the harmless-error analysis. The Court held that when a federal judge in a habeas proceeding is in grave doubt about whether a trial error of federal constitutional law had a substantial and injurious effect or influence in determining the jury's verdict, that error is not harmless.⁸ Interestingly, the author of the opinion for the Court was Justice/Law Professor Breyer, who relies heavily on the principles enunciated by Justice Traynor in his book on harmless error. As I have already suggested, I am greatly enamored with the Traynor view of harmless error, and I consider the decision in *O'Neal* to be a major (and salutable) shift in the law. I remain skeptical, however, about whether Justice Breyer's approach will ultimately change the decisionmaking process in the lower federal courts.

In my ruminations here, I will aim to assess the problems presented by current use of the harmless-error rule, and consider an appropriate judicial response. I will first review the development of the rule during the past thirty years, noting the Supreme Court's dramatic expansion of the doctrine when faced with constitutional error as well as the federal appellate courts' increasingly frequent willingness to find errors harmless. I will also briefly address the plain-error rule, noting that federal courts have become less inclined to find plain error at the same time that they have expanded the use of harmless error. I will then assess the reasons underlying the expansion of harmless error and conclude that the Supreme Court (at least before *O'Neal*) spurred much of the expansion by advancing theories of harmless error that tended to encourage appellate judges to review an error principally with reference to the weight of the evidence against a defendant. In this part of my presentation, I will point out the flaws that inhere in this guilt-based approach, including its inconsistency with the constitutional role and institutional competency of appellate courts, and, most importantly, its tendency to undermine vital individual rights. Finally, I will point to what I see as a new trend in Supreme Court case law that appears to cut back on this guilt-based approach while embracing Justice Traynor's position that an error is not harmless if it is likely to have affected the jury.

⁷ 115 S. Ct. 992 (1995).

⁸ *Id.* at 994.

Although I endorse this shift in Supreme Court jurisprudence, I will conclude with skepticism, suggesting that, with the ever growing concern over violent crime in our society and the excessive caseloads in our courts, a guilt-based definition of harmless error will continue to find great support. At bottom, it is impossible for an appellate judge to consider whether an error has influenced a jury without thinking about the weight of the evidence against the defendant; and once an appellate judge lapses into this mindset, it is difficult to avoid guilt-based decisionmaking. Relying on Justice Traynor, Justice Breyer offers a solution; but in the end this solution may be more professorial than practical.

I

THE DEVELOPMENT OF CURRENT DOCTRINE REGARDING LEGAL ERROR

Former Justice Benjamin Cardozo long ago noted “[t]he tendency of a principle to expand itself to the limit of its logic.”⁹ The harmless-error principle, which allows appellate courts to disregard trial errors that do not affect the substantial rights of a defendant, amply demonstrates the truth of Justice Cardozo’s observation. Adopted by the Congress in 1919 in response to a widespread public perception that appellate courts had become “impregnable citadels of technicality”¹⁰ that overturned convictions upon finding the most trivial violation of law, the harmless-error doctrine has expanded over the intervening years to the point that today it applies to all nonconstitutional, and even a broad variety of constitutional, errors. As a result, the doctrine now stands as the inevitable last resort of government lawyers—and, too often, I think, of appellate judges—confronted with undeniable trial error in criminal cases. At the same time, judicial application of the plain-error rule has made it ever more difficult for criminal defendants to bring an objection not raised at trial. The net result is that appellate courts have deemed more errors harmless and fewer errors plain.

A. *Harmless Error*

The modern source of the harmless-error rule is Federal Rule of Criminal Procedure 52(a), which directs simply that “[a]ny error, defect, irregularity or variance which does not affect substantial rights

⁹ Benjamin N. Cardozo, *The Nature of the Judicial Process* 51 (1921).

¹⁰ *Kotteakos v. United States*, 328 U.S. 750, 759 (1946) (citation omitted).

shall be disregarded.”¹¹ Adopted in 1946, this provision traces its lineage to section 269 of the former Judicial Code,¹² which in 1919 for the first time directed appellate courts reviewing trial proceedings to ignore “technical errors, defects, or exceptions which do not affect the substantial rights of the parties.”¹³ As Justice Rutledge explained in 1946 in his detailed discussion of this provision in *Kotteakos v. United States*,¹⁴ section 269 “grew out of widespread and deep conviction over the general course of appellate review in American criminal causes.”¹⁵ In numerous decisions, appellate judges had reversed hard-won convictions because of only minor errors of procedure or form. An infamous example of this phenomenon—one noted in *Kotteakos* itself¹⁶—was the 1908 Missouri Supreme Court decision in *State v. Campbell*,¹⁷ in which the court reversed a conviction for rape on the ground that the indictment described the charged offense as “against the peace and dignity of state,” rather than “against the peace and dignity of *the* state,” as the Missouri Constitution required.¹⁸ Congress intended section 269 to stop such practices. In the words of Justice Rutledge, the provision was designed

[t]o substitute judgment for automatic application of rules; to preserve review as a check upon arbitrary action and essential unfairness in trials, but at the same time to make the process perform that function without giving men fairly convicted the multiplicity of loopholes which any highly rigid and minutely detailed scheme of errors, especially in relation to procedure, will engender and reflect in a printed record.¹⁹

Thus, the harmless-error rule represented a congressional attempt to inject reasoned judgment back into the process of appellate review.

¹¹ Fed. R. Crim. P. 52(a). A separate statutory provision, 28 U.S.C. § 2111 (1994), applies the harmless-error rule to the federal appellate courts, stating, “[o]n the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties.” *Id.* This statutory provision appears to be unnecessary, however, because Federal Rule of Criminal Procedure 54(a) makes clear that all of the Federal Rules “apply to all criminal proceedings . . . in the United States Courts of Appeals.” Fed. R. Crim. P. 54(a); see 3A Charles A. Wright, *Federal Practice and Procedure* § 852, at 296 (2d ed. 1982) (stating that § 2111 was enacted “apparently on the mistaken belief that [the criminal harmless-error rule and its civil counterpart] apply only to the district courts”).

¹² Act of Feb. 26, 1919, ch. 48, 40 Stat. 1181 (repealed 1948).

¹³ *Id.*

¹⁴ 328 U.S. 750 (1946).

¹⁵ *Id.* at 759.

¹⁶ *Id.* at 760 n.14.

¹⁷ 109 S.W. 706 (Mo. 1908).

¹⁸ *Id.* at 711-13 (emphasis added).

¹⁹ *Kotteakos*, 328 U.S. at 760.

However, the broad language of the rule, referring only to errors that do not affect "substantial rights," offered little guidance to appellate judges confronted with the question of whether an error in any particular case required reversal. Accordingly, one of the prevailing tests for application of the harmless-error rule comes not from the rule itself but from Justice Rutledge's explanation of the rule in *Kotteakos*—an explanation that, although intentionally leaving much to the judgment of each jurist, for many years constituted the Court's most thorough treatment of the concept of harmless error:

If, when all is said and done, the conviction is sure that the error did not influence the jury, or had but very slight effect, the verdict and the judgment should stand, except perhaps where the departure is from a constitutional norm or a specific command of Congress. But if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand.²⁰

Although unfortunately phrased in the triple negative, Justice Rutledge's direction set forth a seemingly simple rule to guide appellate review of errors in criminal trials: such errors are to be disregarded only if the reviewing court can say with fair assurance that the error had no substantial effect upon the verdict that was rendered.

As the discussion in *Kotteakos* suggests, departures from "constitutional norms" originally received different treatment under the harmless-error rule. Indeed, for twenty years following *Kotteakos*, lawyers, courts, and commentators widely assumed that there could be no harmless constitutional error,²¹ and numerous Supreme Court opinions supported this assumption.²² However, in the 1967 case of

²⁰ Id. at 764-65 (citation and footnote omitted).

²¹ See Philip J. Mause, Harmless Constitutional Error: The Implications of *Chapman v. California*, 53 Minn. L. Rev. 519, 520 (1969) (noting that, until *Chapman*, "there was some suggestion that federal constitutional errors could never be held to be harmless, and that the automatic reversal of any criminal conviction based on such error was required").

²² See *Chapman v. California*, 386 U.S. 18, 42 (1967) (Stewart, J., concurring in the result) ("[I]n a long line of cases, involving a variety of constitutional claims in both state and federal prosecutions, this Court has steadfastly rejected any notion that constitutional violations might be disregarded on the ground that they were 'harmless.' Illustrations of the principle are legion.")

The sole case in which the Supreme Court even arguably applied the harmless-error rule to a constitutional violation prior to 1967 was *Motes v. United States*, 178 U.S. 458 (1900). In *Motes*, the Court held that a violation of the Sixth Amendment's Confrontation

Chapman v. California,²³ the Supreme Court for the first time announced that even constitutional errors may, in some circumstances, be "so unimportant and insignificant" as to be deemed harmless.²⁴ Nevertheless, as the *Chapman* Court made clear, a more demanding formulation of the harmless-error test should apply where a constitutional violation has occurred. For a constitutional error to be harmless, "the court must be able to declare a belief that it was harmless beyond a reasonable doubt."²⁵

With respect to the number of constitutional rights whose violation is subject to harmless-error review, the *Chapman* opinion left much unresolved. *Chapman* itself established that violations of the rule of *Griffin v. California*,²⁶ prohibiting comment by the court or counsel on a defendant's failure to testify at trial, were subject to harmless-error analysis,²⁷ but the *Chapman* Court did not attempt to define the entire class of constitutional errors subject to the rule. The opinion did suggest, however, that violations of some constitutional rights—an apparently nonexclusive list that included the right against admission of a coerced confession, the right to counsel, and the right to trial before an impartial judge—were "so basic to a fair trial that their infraction can never be treated as harmless error."²⁸

Since *Chapman*, however, the Court has dramatically expanded the list of constitutional violations that are subject to harmless-error analysis, while adding few to (and, indeed, subtracting one from) the list of violations that are per se reversible. Errors that may be harmless under the *Chapman* standard now include violations of the Fourth Amendment right against unreasonable searches and seizures;²⁹ the Sixth Amendment rights against admission of the out-of-court statement of a nontestifying codefendant,³⁰ against interrogation by government agents after the right to counsel has attached,³¹ and to cross-

Clause was harmless where the defendant's own testimony provided conclusive proof of his guilt. *Id.* at 475-76. Although the Court did not explicitly phrase its holding in terms of harmless error, it stated that "[i]t would be trifling with the administration of the criminal law to award [Motes] a new trial because of a particular error committed by the trial court, when in effect he has stated under oath that he was guilty of the charge preferred against him." *Id.* at 476.

²³ 386 U.S. 18 (1967).

²⁴ *Id.* at 22.

²⁵ *Id.* at 24.

²⁶ 380 U.S. 609, 615 (1965).

²⁷ See *Chapman*, 386 U.S. at 24-26.

²⁸ *Id.* at 23.

²⁹ See *Chambers v. Maroney*, 399 U.S. 42, 52-53 (1970); *Bumper v. North Carolina*, 391 U.S. 543, 550 (1968).

³⁰ See *Brown v. United States*, 411 U.S. 223, 230-32 (1973); *Harrington v. California*, 395 U.S. 250, 254 (1969).

³¹ See *Milton v. Wainwright*, 407 U.S. 371, 377-78 (1972).

examination of a witness for bias;³² and the due process right against a jury instruction that shifts the burden of proof to the defendant.³³ Recently, the Court in *Arizona v. Fulminante*³⁴ held that the admission of a coerced confession at trial may even constitute harmless error, thereby reversing the position it appeared to have taken in *Chapman*.³⁵ In a statement that accurately describes the thrust of the Supreme Court's post-*Chapman* jurisprudence, the *Fulminante* Court said flatly that "most constitutional errors can be harmless."³⁶

³² See *Delaware v. Van Arsdall*, 475 U.S. 673, 681-84 (1986).

³³ See *Rose v. Clark*, 478 U.S. 570, 579-82 (1986). Violations of numerous other constitutional rights also are subject to harmless-error analysis. See, e.g., *Brecht v. Abrahamson*, 113 S. Ct. 1710, 1716-17 (1993) (violation of due process right against use at trial of defendant's silence after arrest and after receiving *Miranda* warnings); *Clemons v. Mississippi*, 494 U.S. 738, 752-54 (1990) (inclusion of constitutionally invalid aggravating circumstance in jury instruction at sentencing stage of capital case); *Carella v. California*, 491 U.S. 263, 266-67 (1989) (violation of due process by inclusion of mandatory conclusive presumption in jury instruction); *Coy v. Iowa*, 487 U.S. 1012, 1020-21 (1988) (violation of Sixth Amendment Confrontation Clause by denial of face-to-face confrontation); *Satterwhite v. Texas*, 486 U.S. 249, 256-58 (1988) (admission at trial of psychiatric evidence gathered in violation of defendant's Sixth Amendment right to counsel at sentencing stage of capital case); *Pope v. Illinois*, 481 U.S. 497, 501-04 (1987) (violation of First Amendment by use of jury instruction misstating element of offense of distributing obscene materials); *Crane v. Kentucky*, 476 U.S. 683, 691 (1986) (violation of constitutional right to present defense by exclusion of evidence regarding circumstances surrounding confession); *Rushen v. Spain*, 464 U.S. 114, 118 n.2 (1983) (violation of constitutional right to be present at all critical stages of trial proceedings); *Hopper v. Evans*, 456 U.S. 605, 613-14 (1982) (violation of Due Process Clause by use of jury instruction in capital case precluding jury from convicting on lesser included offense); *Moore v. Illinois*, 434 U.S. 220, 232 (1977) (violation of Sixth Amendment right to counsel at pretrial identification); *Coleman v. Alabama*, 399 U.S. 1, 10-11 (1970) (violation of Sixth Amendment right to counsel at preliminary hearing).

³⁴ 499 U.S. 279 (1991).

³⁵ See *id.* at 309-12.

³⁶ *Id.* at 306; accord *United States v. Hasting*, 461 U.S. 499, 509 (1983) ("Since *Chapman*, the Court has consistently made clear that it is the duty of a reviewing court to consider the trial record as a whole and to ignore errors that are harmless, including most constitutional violations." (emphasis added)); see also *Sullivan v. Louisiana*, 113 S. Ct. 2078, 2083 (1993) (Rehnquist, C.J., concurring) ("[I]t is the rare case in which a constitutional violation will not be subject to harmless-error analysis."); *Brecht*, 113 S. Ct. at 1730 (O'Connor, J., dissenting) ("By now it goes without saying that harmless-error review is of almost universal application; there are few errors that may not be forgiven as harmless."); *Rose*, 478 U.S. at 579 ("[I]f the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other errors that may have occurred are subject to harmless-error analysis.").

Nevertheless, *Fulminante* makes clear that a few constitutional errors remain automatically reversible. See *Fulminante*, 499 U.S. at 309-10. These errors include the total deprivation of the right to counsel at trial, see *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963), trial by a biased judge, see *Tumey v. Ohio*, 273 U.S. 510, 522 (1927), exclusion of members of the defendant's race from a grand jury, see *Vasquez v. Hillery*, 474 U.S. 254, 264 (1986), the right to self-representation at trial, see *McKaskle v. Wiggins*, 465 U.S. 168, 174 (1984), and the right to public trial, see *Waller v. Georgia*, 467 U.S. 39, 46-47 (1984). In 1993, the Court added another entry to this list, holding that a constitutionally deficient reasonable-doubt instruction never may be harmless error. See *Sullivan*, 113 S. Ct. at 2080-83.

In addition to expanding the number of constitutional errors subject to *Chapman*-style harmless-error analysis, the Court in certain cases has gone so far as to incorporate the harmless inquiry into the determination of whether an error has even occurred. Thus, although application of the harmless-error rule normally presupposes the existence of a trial error, in these cases a defendant must make a showing of prejudice even to establish that there is a constitutional right to be asserted. For example, to prove a violation of the due process right to discovery of favorable evidence, the defendant must show that the evidence was "material either to guilt or to punishment."³⁷ Evidence is material under this standard "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different."³⁸ Thus, a defendant seeking to vindicate a constitutional right to discovery of exculpatory evidence generally must show that a challenged action was reasonably likely to have affected the actual verdict.³⁹ A similar showing is necessary to establish a violation of the Sixth Amendment right to effective assistance of counsel. A defendant asserting such a violation must establish not only that his or her counsel's work "fell below an objective standard of reasonableness,"⁴⁰ but also that the shortcomings in counsel's work prejudiced the defense, meaning "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."⁴¹ What is significant about these cases is that, unlike those governed by the *Chapman* and *Kotteakos* standards, the burden of proof in such instances falls not upon the government, but upon the defendant.⁴²

In another twist on the doctrine, the Court has held that the *Chapman* reasonable-doubt standard for constitutional errors does not apply to constitutional challenges to state-court convictions

³⁷ *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

³⁸ *United States v. Bagley*, 473 U.S. 667, 682 (1985) (plurality opinion).

³⁹ A defendant also must show prejudice to establish, inter alia, that the government has violated a defendant's due process and Sixth Amendment rights by deporting a favorable witness, see *United States v. Valenzuela-Bernal*, 458 U.S. 858, 873-74 (1982), or that the government's delay in bringing an indictment has violated the defendant's due process rights, see *United States v. Marion*, 404 U.S. 307, 324 (1971).

⁴⁰ *Strickland v. Washington*, 466 U.S. 668, 688 (1984).

⁴¹ *Id.* at 694.

⁴² See *Chapman v. California*, 386 U.S. 18, 24 (1967) ("Certainly error, constitutional error, in illegally admitting highly prejudicial evidence or comments, casts on someone other than the person prejudiced by it a burden to show that it was harmless."); see also *United States v. Olano*, 113 S. Ct. 1770, 1776-78 (1993) (ruling that, where harmless-error review applies, burden of persuasion with regard to prejudice is on government); *O'Neal v. McAninch*, 115 S. Ct. 992, 995-96 (1995) (explaining why government bears burden of showing absence of prejudice).

brought pursuant to the federal courts' habeas corpus jurisdiction. In the recent case of *Brecht v. Abrahamson*,⁴³ the Court, motivated by concerns with finality, comity, and federalism, held that, instead, the less stringent harmless-error rule articulated in *Kotteakos*—inquiring whether an error substantially influenced a jury's verdict—applies on collateral review of constitutional error in state-court criminal trials.⁴⁴ The Court reasoned that “[o]verturning final and presumptively correct convictions on collateral review because the State cannot prove that an error is harmless under *Chapman* undermines the States' interest in finality and infringes upon their sovereignty over criminal matters.”⁴⁵

By applying *Kotteakos* rather than *Chapman* in habeas review, the Court's decision in *Brecht* gives the appearance of being an important change in the law. However, if the truth be told, it is hard to discern any material differences in the two standards. As Justice Stevens notes in his concurring opinion in *Brecht*,

[the *Kotteakos*] standard accords with the statutory rule for reviewing other trial errors that affect substantial rights; places the burden on prosecutors to explain why those errors were harmless; requires a . . . court to review the entire record *de novo* in determining whether the error influenced the jury's deliberations; and leaves considerable latitude for the exercise of judgment by federal courts

The *Kotteakos* standard that will now apply on collateral review is less stringent than the *Chapman v. California* standard applied on direct review. Given the critical importance of the faculty of judgment in administering either standard, however, that difference is less significant than it might seem—a point well illustrated by the differing opinions expressed by THE CHIEF JUSTICE and by Justice KENNEDY in *Arizona v. Fulminante*. While THE CHIEF JUSTICE considered the admission of the defendant's confession harmless error under *Chapman*, Justice KENNEDY's cogent analysis demonstrated that the error could not reasonably have been viewed as harmless under a standard even more relaxed than the one we announce today. In the end, the way we phrase the gov-

⁴³ 113 S. Ct. 1710 (1993).

⁴⁴ *Id.* at 1718-22.

⁴⁵ *Id.* at 1721. The *Brecht* majority left open “the possibility that in an unusual case, a deliberate and especially egregious error of the trial type, or one that is combined with a pattern of prosecutorial misconduct, might so infect the integrity of the proceeding as to warrant the grant of habeas relief, even if it did not substantially influence the jury's verdict.” *Id.* at 1722 n.9. However, as Justice O'Connor noted in her dissent, this potential exception appears to be “exceedingly narrow.” *Id.* at 1731 (O'Connor, J., dissenting).

erning standard is far less important than the quality of the judgment with which it is applied.⁴⁶

Justice Stevens's comment, at least in retrospect, appears to mark a shift in the tone of the Court's decisions on harmless error, and it gives some content to what is said by Justice Breyer in the 1995 *O'Neal* decision. Nonetheless, the stated result in *Brecht* clearly is designed to broaden the harmless-error doctrine. Indeed, the opinion for the majority goes so far as to state that habeas petitioners "are not entitled to habeas relief based on trial error unless they can establish that it resulted in 'actual prejudice,'"⁴⁷ thereby appearing to relieve the government of its normal burden of showing the absence of prejudice when advancing a claim of harmless error. The *O'Neal* opinion overturns this suggestion,⁴⁸ but the dictum in *Brecht* highlights just how far the Court had gone in expanding the harmless-error doctrine during the pre-*O'Neal* years.

In sum, the period since the Court's decision in *Kotteakos* in 1946 has seen a trend toward expansion of the scope of the harmless-error doctrine. The Court has applied harmless-error review to an ever-expanding list of constitutional violations, incorporated a harmfulness requirement into the standards for proving a violation of certain constitutional rights, and eased the harmful constitutional error standard in habeas cases. The result is that the doctrine now applies to errors far more serious than the "technicalities"⁴⁹ that prompted congressional action in the first place.

However, the application of harmless-error analysis to a larger set of violations accounts for only part of the expansion of the harmless-error doctrine. Accompanying this trend is another one involving the frequency with which the doctrine actually is invoked. Although meaningful statistics on the use of harmless error in the federal courts of appeals are hard to come by, research that I and others have conducted suggests that after the *Chapman* decision, applications of the harmless-error doctrine increased dramatically. In 1966, the year before the Supreme Court decided *Chapman*, only thirty of the 3815 reported federal appellate court cases, or 0.79%, mentioned the words "harmless error."⁵⁰ By 1969, two years after *Chapman*, the percent-

⁴⁶ *Id.* at 1723, 1724-25 (Stevens, J., concurring) (citations omitted).

⁴⁷ *Id.* at 1722.

⁴⁸ *O'Neal v. McAninch*, 115 S. Ct. 992, 995-96 (1995).

⁴⁹ See *supra* text accompanying note 13.

⁵⁰ Donald A. Winslow, Note, Harmful Use of Harmless Error in Criminal Cases, 64 *Cornell L. Rev.* 538, 545 n.36 (1979). Winslow surveyed the prevalence of harmless-error analysis in the federal courts of appeals by conducting a LEXIS computer search of all cases decided by such courts between January 1, 1960, and December 31, 1978, and then ascertaining how many of those cases employed the phrase "harmless error." *Id.* at

age of such cases using the "harmless error" phrase had more than doubled, jumping to 2.09% of all cases reported.⁵¹ The proportion of "harmless error" cases remained at approximately 2% of all cases reported until 1986, when the percentage dropped to 1.58%—a number around which it has hovered ever since.⁵²

If anything, the 1.58% figure understates the actual use of the harmless-error doctrine, because the figure does not include unpublished case dispositions by the courts of appeals, which have increased substantially in recent years. I suspect that a large number of judgments and orders without opinions include dispositions based on findings of harmless error.

Another reason for the slight decrease in the statistic measuring the invocation of the harmless-error doctrine since 1985 may be that

544 n.36. I have updated this survey by conducting an identical LEXIS search in the GENFED library and USAPP file for the period from January 1, 1979, to December 31, 1994. See *infra* note 52. As Winslow acknowledged,

[t]his sampling technique is imprecise. It is overinclusive because it retrieves all cases discussing harmless error, not merely those that hold an error harmless. It is underinclusive because it does not identify cases that hold an error harmless without using the phrase "harmless error." Therefore, this study does not measure with exactness the use of the harmless error doctrine; it only suggests that this use is on the rise.

Winslow, *supra*, at 546 n.36. The same flaws inhere in my own study. In addition, the study does not isolate the use of the phrase "harmless error" in criminal cases, which is the focus of my discussion here. Nonetheless, it provides a general benchmark by which to gauge the use of harmless-error analysis in the courts of appeals.

⁵¹ Winslow, *supra* note 50, at 545 n.36.

⁵² My own LEXIS survey generated the following statistics:

Federal Appellate Court Cases			
<u>Year</u>	<u>Total Cases</u>	<u>Harmless Error Cases</u>	<u>Harmless Error Cases as Percentage of Total Cases</u>
1994	39,070	554	1.42
1993	35,872	546	1.52
1992	34,457	528	1.53
1991	31,275	474	1.52
1990	24,206	335	1.38
1989	20,072	323	1.61
1988	18,547	286	1.54
1987	18,120	266	1.47
1986	18,073	285	1.58
1985	13,659	294	2.15
1984	13,361	250	1.87
1983	12,160	243	2.00
1982	11,189	209	1.87
1981	10,608	179	1.69
1980	10,825	180	1.66
1979	8,763	174	1.99

All percentages are rounded to the nearest hundredth. Search of LEXIS, GENFED Library, USAPP file (1995).

judges no longer need the doctrine in order to disregard errors as they did during the 1970s and 1980s. During the decade and a half between 1970 and 1985, the Supreme Court carved out numerous exceptions to criminal procedure rules mandated by the Constitution, particularly the exclusionary rule remedy for violations of the Fourth Amendment.⁵³ Thus, some of the post-1985 decline in use of the harmless-error rule may be attributable to the fact that such exceptions have reduced the likelihood of "error" in any given criminal case. My own experience suggests that appellate panels confronted with allegations of error in criminal cases sometimes simply narrow the application of the rule the defendant seeks to invoke. This is a kind of backhanded use of the harmless-error rule, which allows a court to preserve a conviction without seeming to erode an important right by declaring a breach of it to be harmless. Propriety and common sense preclude me from venturing to verify this hypothesis. My main point is that it appears that there simply are not as many errors to hold harmless today as there were in the 1970s and early 1980s. In any event, what statistics we do have suggest that courts still are resorting to harmless-error analysis at least twice as frequently as they did before *Chapman* was decided.

Another troubling aspect of this trend is judicial use of the harmless-error rule to avoid reaching a difficult issue in a case. Courts sometimes openly decline to decide whether a defendant's rights have been violated, instead evading the issue by stating that any error that might have occurred was harmless.⁵⁴ This practice leaves unresolved the question of whether an error even occurred, thus offering no guidance to trial courts. What may be an important question of trial error is therefore sidestepped by the application of a doctrine that itself presupposes the existence of such an error. Nothing suggests that the harmless-error rule was meant to serve such a purpose.⁵⁵ The flip side of this practice is the needless use of harmless error, which occurs when, upon rejecting the merits of some claim of error in an action of

⁵³ See, e.g., *United States v. Leon*, 468 U.S. 897, 913 (1984) (holding exclusionary rule inapplicable to Fourth Amendment violations where police act in good faith reliance on facially valid search warrant); *Nix v. Williams*, 467 U.S. 431, 448 (1984) (holding exclusionary rule inapplicable to Fourth Amendment violations where evidence in question inevitably would have been discovered by independent, lawful means).

⁵⁴ See, e.g., *United States v. Allen*, 960 F.2d 1055, 1059 (D.C. Cir.) (declining to reach question involving admission of alleged hearsay "because even if admission of the testimony . . . constituted error, it was undoubtedly harmless"), cert. denied, 113 S. Ct. 231 (1992).

⁵⁵ See Winslow, *supra* note 50, at 542 ("The purpose of the harmless error doctrine is to save the time and effort of retrial. It was not meant to shelter courts from difficult questions of law.").

the trial judge, the appellate court goes on to say that even if error had occurred, it would have been harmless.⁵⁶

This tendency of harmless-error analysis to creep into federal case law even when it is unnecessary is hardly surprising given the routine reliance on the harmless-error rule. It sometimes appears that harmless error has become the inevitable last resort of government lawyers arguing criminal cases. My colleagues and I occasionally joke that prosecutors defending criminal convictions on appeal never have seen an error that cannot somehow be rendered harmless. A recent case offers a notable example of the extremes to which the harmless-error doctrine may be taken. In the case I have in mind, the trial court erroneously rejected a defendant's guilty plea, and the defendant ultimately was convicted of three offenses in addition to those encompassed by the rejected plea agreement. The conviction also required the defendant to pay a criminal forfeiture of \$3500 that was not required under the rejected plea agreement. At oral argument in the case, the government's attorney contended that the defendant suffered no prejudice from the error because he was sentenced to serve the same prison term that the plea agreement would have required. When pressed by the court as to whether the \$3500 forfeiture, not to mention the collateral consequences of three additional criminal convictions, might not constitute sufficient prejudice to overcome the harmless-error rule, the government acknowledged that "rights are affected," but questioned whether such rights were "substantial enough to reverse."⁵⁷ The court did not share counsel's doubts, and remanded the case for a new guilty plea proceeding.⁵⁸ However, I harbor no illusions that our decision will prevent similar arguments in the future. And, given the frequency with which appellate courts have come to find errors harmless, one can hardly be surprised.

B. Plain Error

To complement the expansion of the harmless-error doctrine, the past two decades of federal criminal jurisprudence have also seen a general constriction of the doctrine governing appellate review of errors to which counsel failed to object during trial. Federal Rule of

⁵⁶ See, e.g., *United States v. Williams*, 980 F.2d 1463, 1466 n.1 (D.C. Cir. 1992) (finding no error in admission of expert testimony, but stating that, "[e]ven if [the expert's] testimony had violated [Federal] Rule [of Evidence] 704(b), its admission would have been a harmless error").

⁵⁷ Transcript of Oral Argument at 30, *United States v. Maddox*, 48 F.3d 555 (D.C. Cir. Jan. 19, 1995) (No. 93-3172).

⁵⁸ *United States v. Maddox*, 48 F.3d 555, 560 (D.C. Cir. 1995) (finding that "the collateral consequences of [the defendant's] additional convictions amply demonstrate the prejudice of the trial judge's error").

Criminal Procedure 52(b) provides that “[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.”⁵⁹ As the Advisory Committee’s note on the rule makes clear, its drafters intended it as “a restatement of existing law,”⁶⁰ which had provided that, “if a plain error was committed in a matter . . . absolutely vital to defendants, [the court is] at liberty to correct it.”⁶¹ The Supreme Court more fully described the doctrine now embodied in Rule 52(b) in its 1936 decision in *United States v. Atkinson*,⁶² where it stated: “In exceptional circumstances, especially in criminal cases, appellate courts, in the public interest, may, of their own motion, notice errors to which no exception has been taken, if the errors are obvious, or if they otherwise seriously affect the fairness, integrity or public reputation of judicial proceedings.”⁶³

At about the same time that it began expanding the use of harmless error, the Supreme Court appeared to tighten the standard for a finding of plain error. Instead of focusing the rule upon obvious errors, or errors affecting the integrity of the judicial process, as it had done in *Atkinson*, the Court in the 1982 case of *United States v. Frady*⁶⁴ stated that “Rule 52(b) was intended to afford a means for the prompt redress of *miscarriages of justice*,”⁶⁵ and cited approvingly several appellate cases suggesting that “the power granted . . . by Rule 52(b) is to be used sparingly.”⁶⁶ Approximately three years later, the Court reiterated the new “miscarriage of justice” plain-error standard in *United States v. Young*.⁶⁷ Although that opinion also made reference to the need to correct errors impugning the integrity of the judicial process,⁶⁸ many lower courts have seized upon its “miscarriage of justice” language when applying the rule.⁶⁹

⁵⁹ Fed. R. Crim. P. 52(b).

⁶⁰ Id. advisory committee’s note.

⁶¹ *Wiborg v. United States*, 163 U.S. 632, 658 (1896).

⁶² 297 U.S. 157 (1936).

⁶³ Id. at 160.

⁶⁴ 456 U.S. 152 (1982).

⁶⁵ Id. at 163 (emphasis added).

⁶⁶ Id. at 163 n.14.

⁶⁷ 470 U.S. 1, 15 (1985) (“[T]he plain-error exception to the contemporaneous-objection rule is to be ‘used sparingly, solely in those circumstances in which a miscarriage of justice would otherwise result.’” (quoting *Frady*, 456 U.S. at 163 n.14)).

⁶⁸ See id.

⁶⁹ See, e.g., *United States v. Neumann*, 887 F.2d 880, 882 (8th Cir. 1989), cert. denied, 495 U.S. 949 (1990); *United States v. Yamin*, 868 F.2d 130, 132 (5th Cir.), cert. denied, 492 U.S. 924 (1989); *United States v. Whaley*, 830 F.2d 1469, 1476 (7th Cir. 1987), cert. denied, 486 U.S. 1009 (1988).

It is not surprising, however, that the courts generally have been loathe to find “plain” error. When a defendant’s counsel fails to object to an alleged error at trial, it may be

Most recently, in *United States v. Olano*,⁷⁰ the Court set forth a more complete articulation of the plain-error test, explaining that Rule 52(b) encompasses unwaived legal error that “seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.”⁷¹ Notably, this formulation, although not expressly discarding the “miscarriage of justice” standard,⁷² de-emphasized that standard—a matter that I take up in the final part of this Article. The point to be made here is that, from the early 1980s until *Olano*, many federal courts applied a plain-error test concerned not so much with the standards specifically stated in Rule 52(b)—i.e., whether the error was “plain,” or one “affecting substantial rights”⁷³—but rather with a more demanding standard requiring an error to precipitate a miscarriage of justice before correction is warranted.

Thus, Supreme Court jurisprudence over the past three decades encompasses both a tightening of the standard for finding plain error and a broadening of the applicability of the doctrine of harmless error. These two trends create an obvious effect: fewer trial errors require reversal. Those errors to which counsel objected almost always face the possibility of being disregarded as harmless. Those to which counsel failed to object may not be reviewed unless they are so dramatic as to qualify under the stringent plain-error standard. These two trends share more than a common effect, however. They also share the same source: a guilt-based theory governing appellate review of trial error.

II

UNDERLYING THE DOCTRINE: A GUILT-BASED THEORY OF ERROR

In 1969, two years after the Supreme Court decided *Chapman*, the Justices once again faced a case involving a question of harmless error. The petitioner in *Harrington v. California*⁷⁴ challenged his conviction on the ground that the trial judge had admitted the confessions of three codefendants, only one of whom took the stand at their joint trial. In the previous term, the Court had made clear that admission

done to gain some tactical advantage before the jury. Appellate courts are therefore reluctant to allow a defendant to pursue on appeal an error that was consciously tolerated at trial; we generally prefer that the trial judge and prosecutor be afforded an opportunity at trial to address those matters that the defendant perceives to be error.

⁷⁰ 113 S. Ct. 1770 (1993).

⁷¹ *Id.* at 1779 (alteration in original) (quoting *Atkinson*, 297 U.S. 157, 160 (1936)).

⁷² See *id.* (“We previously have explained that the discretion conferred by Rule 52(b) should be employed in those circumstances in which a miscarriage of justice would otherwise result.” (internal quotations omitted)).

⁷³ Fed. R. Crim. P. 52(b).

⁷⁴ 395 U.S. 250 (1969).

of such a confession of a nontestifying codefendant violates a defendant's Sixth Amendment right to confront the witnesses against him.⁷⁵ In *Harrington*, however, the Court, in a terse four-page opinion by Justice Douglas, held the Sixth Amendment violation harmless beyond a reasonable doubt in light of what it described as "overwhelming" untainted evidence against the defendant.⁷⁶ While the majority stated that it was "reaffirm[ing]" *Chapman*,⁷⁷ three dissenters perceived in the Court's brief discussion nothing less than the overruling of *Chapman* itself.⁷⁸ Justice Brennan explained the dissenters' view:

Chapman . . . meant no compromise with the proposition that a conviction cannot constitutionally be based to any extent on constitutional error. The Court today by shifting the inquiry from whether the constitutional error contributed to the conviction to whether the untainted evidence provided "overwhelming" support for the conviction puts aside the firm resolve of *Chapman* and makes that compromise. As a result, the deterrent effect of such cases as *Mapp v. Ohio*, 367 U.S. 643 (1961); *Griffin v. California*, 380 U.S. 609 (1965); *Miranda v. Arizona*, 384 U.S. 436 (1966); *United States v. Wade*, 388 U.S. 218 (1967); and *Bruton v. United States*, 391 U.S. 123 (1968), on the actions of both police and prosecutors, not to speak of trial courts, will be significantly undermined.⁷⁹

Almost thirty years later, I am convinced that the *Harrington* dissenters correctly perceived the danger in the majority's approach. Their assertion that *Harrington* overruled *Chapman* was perhaps overstated, since *Chapman* had, in fact, ruled that a constitutional error may be harmless, but their observations about the dangerous ramifications of *Harrington* were entirely accurate. As I have shown, the Court's decision in *Chapman* heralded a major expansion in both the number of violations subject to harmless-error analysis and the frequency with which that analysis is employed.⁸⁰ Accompanying that expansion, and, I believe, underlying much of it, is the fact that the *Harrington* approach to harmless-error analysis—one of looking to whether the record evidence adequately demonstrates the appellant's guilt, rather than whether the error contributed to the verdict—has become standard practice for many appellate panels considering both

⁷⁵ See *Bruton v. United States*, 391 U.S. 123, 137 (1968).

⁷⁶ *Harrington*, 395 U.S. at 254.

⁷⁷ *Id.*

⁷⁸ *Id.* at 255 (Brennan, J., dissenting).

⁷⁹ *Id.*

⁸⁰ See *supra* notes 23-58 and accompanying text.

constitutional and nonconstitutional error.⁸¹ As matters now stand, in many criminal cases an error is harmless so long as the appellate court remains convinced of the defendant's guilt; an error warrants reversal only where it raises doubts about the defendant's culpability.⁸²

Even a brief survey of harmless-error case law in the D.C. Circuit and elsewhere reveals the tendency of judges to apply the doctrine by assessing whether the evidence adduced at trial, or the untainted evidence in the case of an evidentiary error, appears sufficient to support a guilty verdict.⁸³ In some cases this is as it should be, for the presence of massive evidence of a defendant's guilt surely is one factor for a court to consider in ascertaining whether it can say with fair assurance that an error substantially affected the jury's verdict (or, in the case of constitutional error, whether the error was harmless beyond a reasonable doubt). Frequently, however, the weight of the evidence against a defendant is not just one factor playing into the harmless-error analysis, but rather the sole criterion by which harmless-ness is gauged. As Justice Traynor aptly observed:

All too often an appellate court confuses review by applying the substantial evidence test to determine whether an error is harmless. Such a court considers only the evidence in support of the judgment and ignores erroneous matter. It assumes that the trier of fact, having decided against the appellant, believed all properly admitted evidence against him and disbelieved all evidence in his favor. No wonder that under such a review most errors are found harmless.⁸⁴

⁸¹ Indeed, a recent informal survey of post-1992 federal case law determined that federal courts are approximately twice as likely to use *Harrington's* "overwhelming evidence" formulation of the constitutional harmless-error test as *Chapman's* formulation, focusing on whether the error contributed to the conviction. See Gregory Mitchell, Against "Overwhelming" Appellate Activism: Constraining Harmless Error Review, 82 Cal. L. Rev. 1335, 1348 n.82 (1994). The same survey found that, of 20 cases in which courts employed the *Harrington* "overwhelming evidence" approach to harmless-error questions, all 20 resulted in a finding of harmless error. *Id.* at 1349. By contrast, only one of 17 cases employing the *Chapman* approach resulted in a harmless error finding. *Id.*

⁸² The conflict between whether to emphasize the factual guilt of the defendant or the integrity of the procedure by which the defendant is prosecuted and tried is an example of the dichotomy between what Herbert Packer has called the Crime Control and Due Process models of the criminal process. See Herbert L. Packer, *The Limits of the Criminal Sanction* 149-73 (1968).

⁸³ See, e.g., *United States v. Williams*, 980 F.2d 1463, 1466 n.1 (D.C. Cir. 1992) (stating that admission of expert testimony in violation of Federal Rule of Evidence 704(b) was harmless error due to "overwhelming evidence" of defendant's guilt); *United States v. Stock*, 948 F.2d 1299, 1302 (D.C. Cir. 1991) (stating that "core of the inquiry" in determining harmless-ness of constitutional error in curtailment of cross-examination "is the strength of the government's residual case").

⁸⁴ Traynor, *supra* note 3, at 28 (footnote omitted). Justice Marshall recognized this very problem in his dissent in *Schneble v. Florida*, 405 U.S. 427 (1972), where the majority found a violation of the *Bruton* doctrine to be harmless error based on overwhelming evidence of the petitioner's guilt, *id.* at 428. Marshall stated that "[t]he mistake the Court

That appellate courts measure harmlessness according to their own assessments of guilt is hardly surprising, because the jurisprudence of the Supreme Court for a time embraced a guilt-based theory of harmless error. While some members of the Court, particularly Justice Stevens,⁸⁵ have been firm in the view that “[h]armless-error analysis is not an excuse for overlooking error because the reviewing court is itself convinced of the defendant’s guilt,”⁸⁶ a guilt-based theory of harmless error focusing on the reliability of the trial outcome has found favor with the Court, at least until the present decade. This theory, which first sprouted in *Harrington*, bloomed fully to life in the 1972 case of *Schneble v. Florida*,⁸⁷ in which a majority found a Confrontation Clause violation to be harmless upon finding “the independent evidence of guilt . . . overwhelming.”⁸⁸ The Court’s equation of guilt and harmlessness became more explicit in the ensuing years. Thus, in a 1986 opinion holding *Chapman*-style harmless-error analysis applicable to a denial of the Sixth Amendment right to cross-examine on the subject of bias, the Court commented that “[t]he harmless-error doctrine recognizes the principle that the central purpose of a criminal trial is to decide the factual question of the defendant’s guilt or innocence.”⁸⁹ Later during the same term, the Court went so far as to declare that “[w]here a reviewing court can find that the record developed at trial establishes guilt beyond a reasonable doubt, the interest in fairness has been satisfied and the judgment should be affirmed,”⁹⁰ notwithstanding the presence of constitutional error.

Arguably, the culmination of this line of reasoning was *Fulminante*. In one of two majority opinions for the Court, Chief Jus-

makes is in assuming that the jury accepted as true all of the other evidence.” *Id.* at 436 (Marshall, J., dissenting).

⁸⁵ See, e.g., *Brecht v. Abrahamson*, 113 S. Ct. 1710, 1724 (1993) (Stevens, J., concurring) (“The habeas court cannot ask only whether it thinks the petitioner would have been convicted even if the constitutional error had not taken place.”); *United States v. Lane*, 474 U.S. 438, 476-77 & 476 n.20 (1986) (Stevens, J., concurring in part and dissenting in part) (contending that “the majority fails to appreciate the *Kotteakos* recognition that the harmless-error inquiry is entirely distinct from a sufficiency-of-the-evidence inquiry”); *United States v. Hasting*, 461 U.S. 499, 516 (1983) (Stevens, J., concurring in the judgment) (“A federal appellate court should not find harmless error merely because it believes that the other evidence is ‘overwhelming.’”).

⁸⁶ *Lane*, 474 U.S. at 465 (Brennan, J., concurring in part and dissenting in part); see also *Rose v. Clark*, 478 U.S. 570, 593 (1986) (Blackmun, J., dissenting) (“The Constitution does not allow an appellate court to arrogate to itself a function that the defendant, under the Sixth Amendment, can demand be performed by a jury.”).

⁸⁷ 405 U.S. 427 (1972).

⁸⁸ *Id.* at 431.

⁸⁹ *Delaware v. Van Arsdall*, 475 U.S. 673, 681 (1986).

⁹⁰ *Rose*, 478 U.S. at 579.

tice Rehnquist, for a five-Justice majority, sets forth an analytical framework for the assessment of all constitutional errors.⁹¹ Such errors are divided into two classes: one consisting of "trial error," meaning "error which occurred during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt,"⁹² and the other consisting of "structural defect[s] affecting the framework within which the trial proceeds," and, in the presence of which, "a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair."⁹³ All trial errors are subject to harmless-error analysis; only structural errors require automatic reversal.⁹⁴ Under the view enunciated by Chief Justice Rehnquist, it is clear that *most* constitutional errors will be subject to harmless-error review, notwithstanding anything to the contrary that might be gleaned from *Chapman*.

Chief Justice Rehnquist's framework, which expanded the harmless-error doctrine farther than ever before, is only one-half of the *Fulminante* decision, however. His opinion, after all, commanded a majority only on the question of whether a coerced confession should be *subject to* harmless-error review; on the merits, the Court ruled that the trial court's error in admitting a coerced confession was *not* harmless.⁹⁵ The majority opinion on this latter point, written by Justice White, does not embrace a guilt-based view of harmless error. Rather, the Court held that

Chapman v. California made clear that "before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." . . . [I]t must be determined whether the State has met its burden of demonstrating that the admission of the confession . . . did not contribute to *Fulminante's* conviction. Five of us are of the view that the State has not carried its burden⁹⁶

⁹¹ *Arizona v. Fulminante*, 499 U.S. 279, 306-12 (1991) (opinion of Rehnquist, C.J.).

⁹² *Id.* at 307-08.

⁹³ *Id.* at 310 (quoting *Rose*, 478 U.S. at 577-78 (citation omitted)).

⁹⁴ *Id.* at 309-10; see Charles J. Ogletree, Jr., *Arizona v. Fulminante: The Harm of Applying Harmless Error to Coerced Confessions*, 105 Harv. L. Rev. 152, 162 (1991) ("To the *Fulminante* majority, a trial error seems to be one for which we can sometimes know for sure whether it has caused inaccuracy in a trial outcome, and a structural error seems to be one for which we can never know with any certainty.").

⁹⁵ *Fulminante*, 499 U.S. at 297.

⁹⁶ *Id.* at 295-96 (opinion of White, J.) (emphasis added) (citations omitted).

Similarly, Justice Kennedy, who provided the swing vote in support of Justice White's position, looked to the likely impact of the error on the jury verdict in assessing the claim of harmless error:

I agree that harmless-error analysis should apply in the case of a coerced confession. That said, the court conducting a harmless-error inquiry must appreciate the indelible impact a full confession may have on the trier of fact, as distinguished, for instance, from the impact of an isolated statement that incriminates the defendant only when connected with other evidence. If the jury believes that a defendant has admitted the crime, it doubtless will be tempted to rest its decision on that evidence alone, without careful consideration of the other evidence in the case. Apart, perhaps, from a videotape of the crime, one would have difficulty finding evidence more damaging to a criminal defendant's plea of innocence.⁹⁷

The opinions of Justice White and Justice Kennedy adhere to a view that is much like the one advanced by Justice Traynor, and seem far removed from the guilt-based version of harmless error found in *Harrington*. *Fulminante* may be seen as marking a high point in the expansion of the harmless-error doctrine, but it also may have been a critical turning point for the Court.

The judicial application of the plain-error rule, although not as extensively developed as the harmless-error doctrine, also has been affected by the guilt-based approach. Numerous federal appellate court opinions applying the "miscarriage of justice" plain-error standard articulated in the Court's *Frady* and *Young* decisions⁹⁸ have stated that such a miscarriage of justice occurs only where the possibility exists that jurors have convicted an innocent defendant.⁹⁹ Typical of such decisions is the Seventh Circuit's opinion in *United States v. Whaley*,¹⁰⁰ where the court stated that "plain error is an error resulting in 'an actual miscarriage of justice, which implies the conviction of one who but for the error would have been acquitted.'"¹⁰¹

In some respects, the pre-*Fulminante* practice of the Supreme Court and appellate courts in applying the harmless- and plain-error standards could have been predicted. Numerous factors have driven

⁹⁷ Id. at 313 (Kennedy, J., concurring in the judgment).

⁹⁸ See supra text accompanying notes 64-69.

⁹⁹ See, e.g., *United States v. Stone*, 987 F.2d 469, 471 (7th Cir. 1993) ("[P]lain error must be of such a great magnitude that it probably changed the outcome of the trial." (internal quotation omitted)); *United States v. Caputo*, 978 F.2d 972, 974 (7th Cir. 1992) (stating that plain error is error "likely to have made a difference in the judgment, so that failure to correct it could result in a miscarriage of justice, that is, in the conviction of an innocent person or the imposition of an erroneous sentence" (internal quotation omitted)).

¹⁰⁰ 830 F.2d 1469 (7th Cir. 1987), cert. denied, 486 U.S. 1009 (1988).

¹⁰¹ Id. at 1476 (citation omitted).

and, indeed, continue to drive, judges to focus primarily on the factual guilt of the accused. For one, the nationwide problems of drug use and drug trafficking and the often-related scourge of random violence have generated intense pressure to convict defendants accused of such crimes. Many judges are undoubtedly influenced by the perceived exigencies of the government's "war on drugs" when they confront a defendant who clearly appears to be guilty of a drug-related crime, yet whose trial included a significant legal error. I have noted before the heavy toll that the war on drugs has taken upon our individual rights and liberties.¹⁰² Suffice it to say that an expanded application of harmless-error analysis appears in many cases to be yet another effect of that war.

Adding to the pressures generated by such societal problems is the increasing burden of the judicial docket. With filings in the courts of appeals increasing by 218% over the past twenty years,¹⁰³ it frequently may seem like nothing more than a wise use of judicial resources to affirm the conviction of a defendant who appears, from the record, to be guilty, despite the admission of a coerced confession, the denial of confrontation rights, the use of inadmissible evidence, or some other error. From the perspective of a judge considering a challenge to such a conviction, it often seems that little will be gained by retrial, for the conviction surely was justified. Moreover, appellate judges know that their colleagues on the district court, who also labor under a heavy case load, do not want their cases returned for additional proceedings. Indeed, several district court judges have told me, only half jokingly, that they can tolerate our reversals, so long as we do not combine them with a remand.

Finally, judges are, of course, human, and I think the development of the case law proves, if anything, the constraints of human nature. Put simply, the *Kotteakos* and *Chapman* opinions ask a reviewing court to do something that frequently cannot be done without great discipline. It is one thing to state that the harmless-error analysis looks to the effect of the error on the verdict, rather than to the sufficiency of the evidence to support the verdict. It is yet another, more difficult thing for us as appellate judges to adhere to that analytical framework when confronted with the concrete facts of a particular case in which the defendant's guilt seems well established. In such

¹⁰² See *Hartness v. Bush*, 919 F.2d 170, 174-81 (D.C. Cir. 1990) (Edwards, J., dissenting), cert. denied, 501 U.S. 1251 (1991); *United States v. Tavalacci*, 895 F.2d 1423, 1430-31 (D.C. Cir. 1990) (Edwards, J., dissenting); Harry T. Edwards, *The Judicial Function and the Elusive Goal of Principled Decisionmaking*, 1991 Wis. L. Rev. 837, 839-41.

¹⁰³ See Federal Judicial Ctr., *Structural and Other Alternatives for the Federal Courts of Appeals* 18 (1993). The number of filings rose from 13,694 in 1972 to 43,481 in 1992. *Id.*

circumstances, it is by far the simpler and more natural course to construct a jurisprudence that cares only for punishment of the guilty, and, accordingly, to discount all errors that fail to cast doubt upon our own perceptions of culpability. Only through a determined adherence to principle do we look beyond the weight of the evidence to the likely impact of an error. Often, pressed by the demands of the docket and mindful of a society wracked by crime, we simply lack such determination.

While I recognize the many temptations of a guilt-based approach to harmless error, however, I also believe that such an approach overlooks much in its myopic fixation on factual guilt. As an initial matter, this approach is inconsistent with the constitutional framework of our judicial system. The Supreme Court's many admonitions in *Kotteakos* and other early cases make clear that the question involved in harmless-error analysis is not whether the jury reached the correct verdict despite the error, but whether the verdict was substantially swayed by the error.¹⁰⁴ This rule rests on a sound premise, for our Constitution grants criminal defendants the right to have juries, not appellate courts, render judgments of guilt or innocence.¹⁰⁵ Justice Frankfurter's comments on this subject almost fifty years ago hold equally true today:

In view of the place of importance that trial by jury has in our Bill of Rights, it is not to be supposed that Congress intended to substitute the belief of appellate judges in the guilt of an accused, however justifiably engendered by the dead record, for ascertainment of guilt by a jury under appropriate judicial guidance, however cumbersome that process may be.¹⁰⁶

It is for a similar reason that trial courts in our system are prohibited from directing verdicts of guilty against criminal defendants, no mat-

¹⁰⁴ See *Kotteakos v. United States*, 328 U.S. 750, 764 (1946) ("[T]he question is, not were [jurors] right in their judgment, regardless of the error or its effect upon the verdict. It is rather what effect the error had or reasonably may be taken to have had upon the jury's decision.").

¹⁰⁵ U.S. Const. art. III, § 2, cl. 3 ("The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury . . ."); id. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . .").

¹⁰⁶ *Bollenbach v. United States*, 326 U.S. 607, 615 (1946); see also *Kotteakos*, 328 U.S. at 763-64 ("[I]t is not the appellate court's function to determine guilt or innocence. . . . Those judgments are exclusively for the jury, given always the necessary minimum evidence legally sufficient to sustain the conviction unaffected by the error." (citations omitted)); *Weiler v. United States*, 323 U.S. 606, 611 (1945) ("We are not authorized to look at the printed record, resolve conflicting evidence, and reach the conclusion that the error was harmless because we think the defendant was guilty. That would be to substitute our judgment for that of the jury and, under our system of justice, juries alone have been entrusted with that responsibility.").

ter how weighty the evidence favoring such outcomes.¹⁰⁷ Put simply, “the error in such a case is that the wrong entity judged the defendant guilty.”¹⁰⁸

I recognize that the foregoing argument can be carried too far, because the mere existence of the harmless-error doctrine (embodied by statute) contemplates that appellate judges *will* consider the evidence developed at trial. In fact, a complaining defendant may be well served when appellate judges consider the record of evidence on the question of guilt. For example, an appellate court may find that, absent some erroneously admitted evidence, the evidence is insufficient to support a finding of guilt—but this can only be done if the appellate judges carefully examine the entire record. In other words, those who glibly claim that appellate courts overstep their role in finding harmless error, overstate their case. As Justice Traynor pointed out:

If the court is convinced upon review of the evidence that the error did not influence the jury, and hence sustains the verdict, *a fortiori* there is no invasion of the province of the jury. There is likewise no invasion should it appear instead that the error did influence the jury, and hence contaminated the verdict, for the appellant then did not get the jury trial to which he was entitled. In that event, the appellate court clearly acts within its own province when it affords the appellant a right to a new trial.¹⁰⁹

Concern over the institutional competency of the appellate courts also strongly counsels against the practice of focusing solely on the question of factual guilt. The very nature of the appellate function leaves judges of the courts of appeals poorly equipped to make such guilt determinations. An appellate judge’s view of the trial is limited to the record, and, as any observer of the judicial process is aware, many events of trial pass without casting so much as a shadow upon the printed transcript. The appellate judge cannot watch the demeanor of witnesses, listen to the intonations of their voices, or engage in any of the countless other observations that inhere in an assessment of credibility.¹¹⁰ And, most importantly, an appellate

¹⁰⁷ *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 572-73 (1977) (explaining that basis of prohibition is jury’s function to stand between accused and the government).

¹⁰⁸ *Rose v. Clark*, 478 U.S. 570, 578 (1986).

¹⁰⁹ Traynor, *supra* note 3, at 13-14.

¹¹⁰ Justice Traynor has discussed in detail the defects presented by what he describes as “a quasi trial on appeal”:

The appellate court is limited to the mute record made below. Many factors may affect the probative value of testimony, such as age, sex, intelligence, experience, occupation, demeanor, or temperament of the witness. A trial court or jury before whom witnesses appear is at least in a position to take note of

panel cannot possibly know what a jury might have done if the case had been tried without error. Therefore, if there is any serious doubt on this score, the case ought to be returned to the jury.

The most serious flaw in the guilt-based approach, however, is its tendency to undermine our most important legal principles. As the *Harrington* dissenters warned, any analysis measuring the harmlessness of error according to the weight of the evidence that the prosecution stacks against a defendant erodes the individual rights and liberties that are presumed to elevate our system of justice.¹¹¹ A focus on guilt skews the judicial assessment of harmlessness. The values that underlie the individual rights guaranteed by the Constitution, federal statutes, and procedural rules often are general. Constitutional rights, in particular, often represent broad ideals of individual liberty and human dignity. By contrast, a criminal act appears vivid and almost tangible, so the need to punish the guilty is both immediate and strongly felt. A wrong, often a grievous wrong, has occurred, and the defendant, by all appearances, is responsible. It is, therefore, to be expected that the desire to punish the guilty will frequently prevail over the need to honor individual rights.¹¹²

When this happens, much is lost. Our system of justice stands above others only because it recognizes a sphere of personal liberty into which the government cannot intrude.¹¹³ Marking the boundary of this sphere are the individual rights guaranteed by our Constitution,

such factors. An appellate court has no way of doing so. It cannot know whether a witness answered some questions forthrightly but evaded others. It may find an answer convincing and truthful in written form that may have sounded unreliable at the time it was given. A well-phrased sentence in the record may have seemed rehearsed at the trial. A clumsy sentence in the record may not convey the ring of truth that attended it when the witness groped his way to its articulation. What clues are there in the cold print to indicate where the truth lies? What clues are there to indicate where the half-truth lies?

Id. at 20-21 (footnote omitted); see also Steven H. Goldberg, *Harmless Error: Constitutional Sneak Thief*, 71 *J. Crim. L. & Criminology* 421, 430 (1980) ("One of the problems with appellate factfinding is that the appellate court is likely to be wrong.").

¹¹¹ See *supra* notes 78-79 and accompanying text.

¹¹² For a discussion of how these two concerns compete throughout the criminal process, see generally Packer, *supra* note 82, at 149-246.

¹¹³ One notable example of this idea is the adage underlying much of our Fourth Amendment jurisprudence that "a man's house is his castle," *Miller v. United States*, 357 U.S. 301, 307 (1958), a principle eloquently expressed in remarks attributed to William Pitt, Earl of Chatham, as early as 1763:

"The poorest man may in his cottage bid defiance to all the forces of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter; the rain may enter; but the King of England cannot enter—all his force dares not cross the threshold of the ruined tenement!"

Id. (quoting *The Oxford Dictionary of Quotations* 379 (2d ed. 1953)).

and, to a lesser extent, by our laws. These rights, however, do not remain vital merely because they are enshrined in our most revered documents. They remain vital only if an active and alert federal judiciary stands ready to enforce them, even when their enforcement yields unpalatable results. As Justice Frankfurter put it, "it is an abuse to deal too casually and too lightly with rights guaranteed by the Federal Constitution, even though they . . . may be invoked by those morally unworthy."¹¹⁴ We commit just such an abuse when we hold errors harmless in a criminal case based solely on our own perceptions of a defendant's guilt. Such guilt-based application of the harmless-error doctrine dilutes the force of our laws and shrinks the boundaries of the sphere of individual autonomy. When evidence is not excluded, indictments are not quashed, and convictions are not overturned, we eviscerate the deterrent effect of these and other similar measures, and, consequently, infect the entire criminal process with an ambivalence toward our most fundamental liberties. We would do well to remind ourselves of what Justice Traynor described as the "cleansing effect on the trial process"¹¹⁵ created by vigorous enforcement of legal rights. After all, we can hardly expect prosecutors to respect the rights of criminal defendants whom they believe to be guilty when we as judges are unwilling to do so.¹¹⁶

An obvious example of the loss we sustain by over-reliance on the harmless-error doctrine arises from the admission of a coerced confession. Federal jurisprudence long has recognized that the extraction of a confession by physical or psychological pressure is inconsistent with the very nature of our criminal process. As the Supreme Court stated in the 1961 case of *Rogers v. Richmond*,¹¹⁷ "ours is an accusatorial and not an inquisitorial system—a system in which the State must establish guilt by evidence independently and freely secured and may not by coercion prove its charge against an accused out

¹¹⁴ *Brown v. Allen*, 344 U.S. 443, 498 (1953) (opinion of Frankfurter, J.).

¹¹⁵ Traynor, *supra* note 3, at 50 ("If appellate judges forthrightly opened the way to a new trial whenever a judgment was contaminated by error, there would be a cleansing effect on the trial process. A sharp appellate watch would in the long run deter error at the outset, thereby lessening the need of appeal and retrials.").

¹¹⁶ See *Rose v. Clark*, 478 U.S. 570, 588-89 (1986) (Stevens, J., concurring) ("An automatic application of harmless-error review in case after case, and for error after error, can only encourage prosecutors to subordinate the interest in respecting the Constitution to the ever-present and always powerful interest in obtaining a conviction in a particular case."); see also *United States v. Jackson*, 429 F.2d 1368, 1373 (7th Cir. 1970) (Clark, J., sitting by designation) ("'Harmless error' is swarming around the 7th Circuit like bees. Before someone is stung, it is suggested that the prosecutors enforce *Miranda* to the letter and that the police obey it with like diligence; otherwise the courts may have to act to correct a presently alarming situation.").

¹¹⁷ 365 U.S. 534 (1961).

of his own mouth."¹¹⁸ Accordingly, our Constitution bars the use of coerced confessions at trial.¹¹⁹ This rule

reflects the "strongly felt attitude of our society that important human values are sacrificed where an agency of the government, in the course of securing a conviction, wrings a confession out of an accused against his will," as well as "the deep-rooted feeling that the police must obey the law while enforcing the law; that in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves."¹²⁰

When we enforce this rule, we honor these societal attitudes. Conversely, when we hold that use of a coerced confession is mere harmless error, we denigrate them.¹²¹ Apparently Justice Kennedy had such a concern in mind when he provided the swing vote in *Fulminante*. Justice Kennedy did not even concur in the view that the confession in that case was coerced; but, respecting the view of the majority, he agreed that if the confession had been coerced, then the error could not have been harmless.¹²²

An apt illustration of the danger posed by an overly expansive view of harmless error is the Sixth Circuit's decision in *United States v. Daniel*.¹²³ In that case, police executing a search warrant at a house in Michigan forced its occupants to lie face down on the floor, handcuffed them, and covered their heads with a sheet¹²⁴—all without an arrest warrant or, apparently, probable cause to support such a seizure¹²⁵—while they searched the premises for what the court de-

¹¹⁸ *Id.* at 541.

¹¹⁹ *Id.* at 540-41; see also *Bram v. United States*, 168 U.S. 532, 542-43 (1897).

¹²⁰ *Arizona v. Fulminante*, 499 U.S. 279, 293 (1991) (White, J., dissenting) (quoting *Blackburn v. Alabama*, 361 U.S. 199, 206-07 (1960), and *Spano v. New York*, 360 U.S. 315, 320-21 (1959)); see also *Lego v. Twomey*, 404 U.S. 477, 485 (1972) ("The use of coerced confessions, whether true or false, is forbidden because the method used to extract them offends constitutional principles.").

¹²¹ Indeed, Justice White's *Fulminante* dissent criticized the majority for categorizing admission of a coerced confession as a "trial error" that may be weighed against other evidence to evaluate the reliability of the trial outcome. According to Justice White, the right against use of such a confession "'protect[s] important values that are unrelated to the truth-seeking function of the trial.'" 499 U.S. at 295 (quoting *Rose v. Clark*, 478 U.S. 570, 587 (1986) (Stevens, J., concurring)); see also *Ogletree*, *supra* note 94, at 162 (arguing that "the [*Fulminante*] Court's analysis . . . fail[s] by virtue of its insufficient recognition of other values in our criminal justice system").

¹²² *Fulminante*, 499 U.S. at 313 (Kennedy, J., concurring in the judgment).

¹²³ 932 F.2d 517 (6th Cir.), cert. denied, 502 U.S. 890 (1991).

¹²⁴ *Id.* at 518. The Sixth Circuit's opinion states that "[t]he police covered the suspects' heads with a sheet so that they would not see undercover agents who were among the officers searching the house." *Id.*

¹²⁵ In this regard, the Sixth Circuit observed that "[i]t is not clear why the three persons in the house were placed in custody in this manner immediately after the police entered to

scribed as "an hour or so."¹²⁶ Approximately twenty minutes into this period of detention, an officer asked the occupants whether they knew who owned a weapon found on the premises, and the defendant answered that he owned it.¹²⁷ After this statement was admitted at trial, the defendant appealed. Addressing his claim, the Sixth Circuit first assumed, without deciding, that the defendant's statement was coerced, then held that admission of the coerced statement was harmless because a later, more detailed, and voluntary confession provided the same information.¹²⁸

I do not mean to question the Sixth Circuit's decision on the application of governing case law. What I do mean to question, however, is the impact that decisions such as *Daniel* may have upon our criminal justice system. The officers who executed a search warrant by handcuffing Daniel and his companions, forcing them to lie face down, and covering their heads with a sheet are not reminded of the importance of the privilege against self-incrimination when admission of the confession they extracted is deemed harmless error, and we can expect them to behave no differently in the future. We have come a long way from the brutal beating with whips and leather straps used to extract a confession in *Brown v. Mississippi*,¹²⁹ or the thirty-six uninterrupted hours of questioning under bright lights employed in *Ashcraft v. Tennessee*,¹³⁰ but we have done so only because the reversal of a conviction was the sure penalty for these actions. While I do not expect to see a resurrection of such tactics in the law-enforcement community, I do fear that unbridled judicial infatuation with harmless error could lead to more subtle, but equally dangerous, adverse effects on the integrity of our system of justice.¹³¹

Similar concerns arise with respect to the impact that excessive application of the harmless-error rule may have upon the deterrent force of the Fourth Amendment's exclusionary rule. Our case law long has recognized that the Fourth Amendment's prohibition on unwarranted searches and seizures is the Constitution's primary protection

execute the search warrant. The defendant, however, does not raise a false arrest claim or a claim that probable cause for restraint was missing." *Id.* at 518 n.2.

¹²⁶ *Id.* at 518.

¹²⁷ *Id.* at 518-19.

¹²⁸ *Id.* at 521-22. Because the court assumed, but did not decide, that the statement was coerced, *Daniel* constitutes yet another example of judicial use of the harmless-error doctrine to avoid decision of a difficult issue. See *supra* notes 54-56 and accompanying text.

¹²⁹ 297 U.S. 278, 281-83 (1936).

¹³⁰ 322 U.S. 143, 149-50 (1944).

¹³¹ See *Spano v. New York*, 360 U.S. 315, 321 (1959) ("[A]s law enforcement officers become more responsible, and the methods used to extract confessions more sophisticated, our duty to enforce federal constitutional protections does not cease. It only becomes more difficult because of the more delicate judgments to be made.").

for "the sanctity of a man's home and the privacies of life."¹³² Since 1914, federal courts have enforced the Fourth Amendment by applying a rule excluding from use at trial all evidence seized in violation of its requirements.¹³³ As Justice Holmes put it, this rule is necessary to prevent the Fourth Amendment's guarantee against unreasonable searches and seizures from becoming no more than "a form of words."¹³⁴ According to Holmes, "[t]he essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all."¹³⁵ By applying the harmless-error rule to Fourth Amendment violations every time we as appellate judges deem a defendant to be guilty, we threaten to reduce the Fourth Amendment to the "form of words" of which Justice Holmes warned. The numerous exceptions to the exclusionary rule that the Supreme Court has developed since the Warren Court era only make this threat more immediate. Such exceptions include those allowing for admission at trial of evidence seized in violation of the Fourth Amendment if police officers who seized the evidence relied in good faith on a facially valid warrant later found to lack probable cause,¹³⁶ if the evidence also was discovered through an independent source,¹³⁷ and if the evidence inevitably would have been discovered through lawful means.¹³⁸ Given the presence of these and other exceptions, any general appellate court eagerness to invoke the harmless-error doctrine in the reduced number of cases that actually warrant application of the exclusionary rule is hard to comprehend.

What I mean to illustrate by these few examples is that we as appellate judges display a dangerous shortsightedness when, in pursuit of the goal of punishing the guilty, we trade away results in individual cases. We send a message through our criminal justice system each time we reverse or remand a conviction on the ground that the police or prosecutors have violated a defendant's individual rights. Upon receiving such a message, the criminal justice process corrects itself ac-

¹³² *Boyd v. United States*, 116 U.S. 616, 630 (1886).

¹³³ See *Weeks v. United States*, 232 U.S. 383, 393 (1914) ("If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment declaring his right to be secure against such searches and seizures is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution."); see also *Stone v. Powell*, 428 U.S. 465, 486 (1976) ("The primary justification for the exclusionary rule . . . is the deterrence of police conduct that violates Fourth Amendment rights.").

¹³⁴ *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392 (1920).

¹³⁵ *Id.*

¹³⁶ *United States v. Leon*, 468 U.S. 897, 913 (1984).

¹³⁷ *Murray v. United States*, 487 U.S. 533, 537 (1988).

¹³⁸ *Nix v. Williams*, 467 U.S. 431, 443-44 (1984).

cordingly. Thus, when we shrink from our duty to overturn convictions in individual cases, we accomplish nothing less than a subversion of the rules that we have devised to protect our shared values.

In advancing my concerns over the expansion of the harmless-error doctrine, I am quick to concede that our system of justice will not work if appellate courts are one-sided in catering to the interests of defendants at the expense of police officers, prosecutors, and trial courts. Just as appellate judges are "only human" in their efforts to apply the law, so too are police officers, prosecutors, and trial judges in their efforts to enforce and administer the law. It is the rare case indeed that is prosecuted completely free of error, so we should not expect perfection. And appellate judges cannot be self-righteous in judging the efforts of police officers, prosecutors, and trial judges; the incredible demands of their work far exceed anything that we can glean from our own daily fare of activities. My concerns over the expansion of the harmless-error doctrine pertain only to the threatened loss of *substantial rights*.¹³⁹

III

THE FUTURE: A HOPEFUL DIRECTION FROM THE SUPREME COURT?

As for the future, if it is possible to be cautiously optimistic *and* somewhat skeptical, that would be my view. I am optimistic because of a recent trend in the Supreme Court's case law toward a more constrained approach to harmless error. I am cautious, however, because it remains too early to tell whether this trend is a brief aberration or, instead, the inception of some new and meaningful development in the Court's jurisprudence. And I am skeptical, because I am not sure that in practical application we can ever solve the riddle of harmless error.

Although some judges, scholars, and practitioners may disagree with me on this, I think that any new trend in the case law began with the Court's decision in *Fulminante*. In that case, one of the two majority opinions—the one authored by Chief Justice Rehnquist—establishes a questionable dichotomy between "structural errors" affecting the trial framework (which can never be harmless), and "trial errors," which always are subject to a claim of harmless error.¹⁴⁰ The obvious design of the opinion is to limit sharply the number of "structural errors" so as to broaden the reach of the harmless-error doctrine. Nonetheless, the second majority opinion in *Fulminante*—the one

¹³⁹ Of course, which rights should qualify as substantial is often a very difficult question.

¹⁴⁰ *Arizona v. Fulminante*, 499 U.S. 279, 306-12 (1991) (opinion of Rehnquist, C.J.).

written by Justice White—applies the harmless-error test in a way that avoids guilt-based decisionmaking.¹⁴¹ Indeed, Justice Kennedy's swing vote in *Fulminante* clearly focuses on the substantiality of the right of a criminal defendant not to have a coerced confession used against him, and on the powerful effect that such erroneously admitted evidence is likely to have on the verdict regardless of other evidence against the defendant.¹⁴² In sum, the majority position on the merits of the harmless-error issue in *Fulminante* in no way relies on the guilt-based approach endorsed by the Court's *Harrington* decision.

Even if *Fulminante* is not viewed as a trend-setting decision, there can be no doubt about the importance of the Supreme Court's 1993 decision in *Sullivan v. Louisiana*.¹⁴³ Although addressed specifically to the question of whether a constitutionally deficient reasonable-doubt instruction may be harmless error, the Court's opinion includes a general discussion of harmless-error review that appears to reject the guilt-based approach. In this regard, Justice Scalia writes:

Consistent with the jury-trial guarantee, the question [*Chapman*] instructs the reviewing court to consider is not what effect the constitutional error might generally be expected to have upon a reasonable jury, but rather what effect it had upon the guilty verdict in the case at hand. Harmless-error review looks, we have said, to the basis on which the jury *actually rested* its verdict. The inquiry, in other words, is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error. That must be so, because to hypothesize a guilty verdict that was never in fact rendered—no matter how inescapable the findings to support that verdict might be—would violate the jury-trial guarantee.¹⁴⁴

Later in the opinion, in noting that a constitutionally defective reasonable-doubt instruction could not logically be deemed harmless, the Court even more emphatically rejects the guilt-based approach to harmless error, stating:

The most an appellate court can conclude is that a jury *would surely have found* petitioner guilty beyond a reasonable doubt—not that the jury's actual finding of guilty beyond a reasonable doubt *would surely not have been different* absent the constitutional error. That is not enough. The Sixth Amendment requires more than appellate speculation about a hypothetical jury's action, or else directed ver-

¹⁴¹ See *id.* at 295-302 (opinion of White, J.).

¹⁴² *Id.* at 313-14 (Kennedy, J., concurring in the judgment).

¹⁴³ 113 S. Ct. 2078 (1993).

¹⁴⁴ *Id.* at 2081-82 (citations omitted).

dicts for the State would be sustainable on appeal; it requires an actual jury finding of guilty.¹⁴⁵

By expressly rejecting the idea that an appellate court may find harmless error upon satisfying itself that a jury "would surely have found" the defendant guilty in the absence of error, *Sullivan* certainly casts doubt upon the continuing vitality of the *Harrington* Court's approach, for the conclusion that a jury "would surely have found" a defendant guilty appears to differ little from a conclusion that "overwhelming" evidence of guilt rendered any error harmless. And, in calling for an inquiry regarding "whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error," *Sullivan* seems to swing the focus of harmless-error analysis back where *Chapman* and *Kotteakos* directed it: to the effect that an error may have had upon the verdict actually rendered. Finally, in reaching its determination that constitutionally defective reasonable-doubt instructions may never be deemed harmless, the *Sullivan* Court treats the *Fulminante* structural defect/trial error dichotomy, with its emphasis on trial accuracy, not as the centerpiece of its analysis, but, rather, as an alternative method of evaluation to be considered only after the application of simple logic has already yielded a result.¹⁴⁶ In sum, then, *Sullivan*, although limited in its holding, includes language that can be read broadly to repudiate earlier cases embracing the idea that the harmlessness of an error may be gauged simply through an appellate court's own assessment of guilt. In a separate concurring opinion, Chief Justice Rehnquist reiterates his strong view that "it is the rare case in which a constitutional violation will not be subject to harmless-error analysis,"¹⁴⁷ but he does not otherwise challenge the views of Justice Scalia. Indeed, Chief Justice Rehnquist says that, in any harmless-error review, the role of the appellate court is to "determine whether it is possible to say beyond a reasonable doubt that the error did not contribute to the jury's verdict."¹⁴⁸

Only last term, the Supreme Court offered up its decision in *O'Neal v. McAninch*,¹⁴⁹ the crown jewel in the decisions moving away from guilt-based applications of the harmless-error doctrine. In *O'Neal*, the Court considered what action a federal habeas court must take when, upon review of a state-court judgment from a criminal trial, it finds itself left in "grave doubt" as to whether a constitutional

¹⁴⁵ *Id.* at 2082 (citations omitted).

¹⁴⁶ See *id.* (describing *Fulminante* framework as "[a]nother mode of analysis" that "leads to the same conclusion that harmless-error analysis does not apply").

¹⁴⁷ *Id.* at 2083 (Rehnquist, C.J., concurring).

¹⁴⁸ *Id.* at 2084.

¹⁴⁹ 115 S. Ct. 992 (1995).

error was harmless.¹⁵⁰ The Court, in an opinion by Justice Breyer, held that the appellate judge in such a case should treat the error not as harmless, but rather *as though it affected the verdict*.¹⁵¹ This conclusion, the Court stated, is consistent with the application of the *Kotteakos* standard, which applies even to constitutional errors in habeas proceedings,¹⁵² and which admonishes that “‘if [a reviewing court] is left in grave doubt [as to the harmlessness of an error], the conviction cannot stand.’”¹⁵³

O’Neal is very important, in my view, because it cites and expressly endorses critical portions of Justice Traynor’s position on the application of the harmless-error doctrine. Justice Breyer, like the majority in *Sullivan*, presents a common-sense view of harmless error, focused not on artificial categories of cases, but on notions of fundamental fairness. First, the Court makes it clear that, both under *Chapman* and *Kotteakos*, the government bears the burden of showing the absence of prejudice on any claim of harmless error.¹⁵⁴ Second, the Court holds that the “risk of doubt” always remains on the government, rejecting the statement to the contrary made only two years earlier in *Brecht v. Abrahamson*.¹⁵⁵ Third, the Court rules that the proper measure of harmlessness is whether the error “had substantial and injurious effect or influence in determining the jury’s verdict,”¹⁵⁶ not whether the record evidence is sufficient absent the error to warrant a verdict of guilt. And, finally, the Court makes an attempt to explain to appellate judges what they ought to be doing when considering claims of harmless error:

When a federal judge . . . is in grave doubt about whether a trial error of federal law had “substantial and injurious effect or influence in determining the jury’s verdict,” that error is not harmless. And, the petitioner must win.

As an initial matter, we note that we deliberately phrase the issue in this case in terms of a judge’s grave doubt, instead of in terms of “burden of proof.” . . . [W]e think it conceptually clearer for the judge to ask directly, “Do I, the judge, think that the error substantially influenced the jury’s decision?” than for the judge to

¹⁵⁰ *Id.* at 994.

¹⁵¹ *Id.*

¹⁵² See *id.* at 995-96.

¹⁵³ *Id.* at 995 (quoting *Kotteakos v. United States*, 328 U.S. 750, 765 (1946)) (emphasis omitted). The Court also reasoned that its conclusion was “consistent with the basic purposes underlying the writ of habeas corpus” because it protected persons from unconstitutional convictions, *id.* at 997, and has the “administrative virtue[]” of consistency “with the way that courts have long treated important trial errors,” *id.* at 998.

¹⁵⁴ *Id.* at 995.

¹⁵⁵ *Id.* at 995-96; see *supra* notes 47-48 and accompanying text.

¹⁵⁶ *Id.* at 994.

try to put the same question in terms of proof burdens [W]here the record is so evenly balanced that a conscientious judge is in grave doubt as to the harmlessness of an error . . . the [defendant] must win.

. . . .
 . . . [W]e are dealing here with an error of constitutional dimension—the sort that risks an unreliable trial outcome and the consequent conviction of an innocent person. We also are assuming that the judge’s conscientious answer to the question, “But did that error have a ‘substantial and injurious effect or influence’ on the jury’s decision?” is, “It is extremely difficult to say.” In such circumstances, a legal rule requiring [reversal], will, at least often, avoid a grievous wrong Such a rule thereby both protects individuals from unconstitutional convictions and helps to guarantee the integrity of the criminal process by assuring that trials are fundamentally fair. See Traynor 23¹⁵⁷ (“In the long run there would be a closer guard against error at trial, if . . . courts were alert to reverse, in case of doubt, for error that could have contaminated the judgment”).¹⁵⁸

The majority opinion in *O’Neal* is an undeniably strong statement that serves to pull the harmless-error doctrine from its broadest reaches, particularly when considered alongside of *Sullivan*. And it is of no moment that *O’Neal* arises in the context of a habeas petition, because the Court’s decision rests on *Kotteakos* itself. Given the Court’s holding in *O’Neal* (in a less-favored habeas case), it surely will require no less in more-favored cases, such as direct appeals of non-constitutional trial errors involving the application of Rule 52(a),¹⁵⁹ and in the most-favored cases, direct appeals of constitutional trial errors involving an application of *Chapman*.¹⁶⁰

With respect to the plain-error doctrine, the Supreme Court’s recent decision in *United States v. Olano*¹⁶¹ similarly provides some basis for optimism. In discussing the standard to guide an appellate court’s

¹⁵⁷ Traynor, *supra* note 3.

¹⁵⁸ *O’Neal*, 115 S. Ct. at 994-95, 997 (citation omitted).

¹⁵⁹ Fed. R. Crim. P. 52(a); see *supra* note 2.

¹⁶⁰ Indeed, in a decision issued during the same term as *O’Neal*, the Court applied a similar analysis to a *Brady* violation. In *Kyles v. Whitley*, 115 S. Ct. 1555, 1566 (1995), the Court ruled that, in determining whether the defendant has been prejudiced by a violation of *Brady*, “[t]he question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence.” The Court then went on to reject a “sufficiency of the evidence” test for determining when the government’s nondisclosure of evidence violates *Brady*. *Id.* at 1558. According to the majority, “[a] defendant need not demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict.” *Id.* at 1566. Thus, this case seems to return to *Kotteakos*’s original focus on the severity of the error rather than the cumulative weight of the untainted evidence.

¹⁶¹ 113 S. Ct. 1770 (1993).

discretionary decision to correct a plain error, the *Olano* Court acknowledged that prior decisions had stated that courts should exercise their authority under Rule 52(b) to prevent miscarriages of justice.¹⁶² The Court then noted that, as used in its habeas corpus jurisprudence, the miscarriage-of-justice standard contemplates the conviction of an innocent defendant.¹⁶³ However, the Court stated that “we have never held that a Rule 52(b) remedy is *only* warranted in cases of actual innocence.”¹⁶⁴ Under *Olano*, the correct standard to govern plain-error review is whether the error “seriously affects the fairness, integrity or public reputation of judicial proceedings,”¹⁶⁵ and the Court makes it clear that “[a]n error may seriously affect the fairness, integrity or public reputation of judicial proceedings *independent of the defendant’s innocence*.”¹⁶⁶ Just as *Sullivan* and *O’Neal* do with the harmless-error doctrine, *Olano* requires that the plain-error doctrine not be applied simply on the basis of the reviewing court’s own assessment of the defendant’s guilt.

Thus, *Fulminante*, *Sullivan*, *O’Neal*, and *Olano* may indicate a shift in the application of the harmless-error and plain-error doctrines to avoid the reaches of guilt-based decisionmaking. And it should not be doubted for a minute that, if federal appellate judges adhere to these decisions, it will make a difference in appellate decisionmaking. For example, in the hypothetical problem that I raised at the outset, an application of the *Sullivan/O’Neal* standard of harmless error will likely produce a reversal, while an application of a *Harrington*-type guilt-based test will likely result in a finding of harmless error. Most judges viewing the record in the hypothetical case will agree that, absent the erroneously admitted coerced confession, there is more than enough evidence to uphold a finding of the defendant’s guilt. A judge who relies on a guilt-based theory of harmless error will, accordingly, vote to deny the appeal on grounds of harmless error. In contrast, a judge who follows *Sullivan/O’Neal* will reverse because, at the very least, a judge should have “grave doubts” as to the harmless-ness of the error. If a judge believes what Justice Kennedy said in *Fulminante*, that almost nothing is more damaging to a defendant’s plea of innocence than a confession,¹⁶⁷ then he or she could not reasonably find that the erroneous admission of the confession could not have contaminated the judgment.

¹⁶² *Id.* at 1779.

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* (internal quotation and alteration omitted).

¹⁶⁶ *Id.* (internal quotation omitted) (emphasis added).

¹⁶⁷ See *supra* text accompanying note 97.

In dealing with my hypothetical case, a judge following *Sullivan/O'Neal* will also realize that, given the possible effect of the confession on the verdict, it does not matter that the evidence against the defendant otherwise looks overwhelming. To indulge this reasoning is to usurp the function of the jury, for the judge would have to assume that the jury would have been persuaded by the remaining evidence, absent the confession. But that is not an assumption that an appellate judge can make. The "eyewitness" in my hypothetical looks great on a cold record, but (by virtue of his demeanor and tone of presentation) he may have been seen by the jury to be a liar. Likewise, the jury may have entirely discounted the video recording because it did not give a front view of the killer. And the remaining evidence offered by the prosecution may have been viewed by the jury as helpful, but hardly determinative. At bottom, the jury may have relied principally on the erroneous confession to reach its result. This is why it would be a hazardous business indeed for an appellate panel to assume that evidence against the defendant, absent the confession, was enough to support a finding of harmless error.

As I said at the outset, I am optimistic but skeptical about the future. My skepticism comes from a worry that appellate judges may fail to acknowledge the force of *O'Neal*, and continue to subscribe to guilt-based decisionmaking. Indeed, in at least one post-*O'Neal* decision issued by the Fourth Circuit in August of this year,¹⁶⁸ the court cited *O'Neal* and, yet, still held that the admission of a coerced confession was harmless error primarily because the evidence against the defendant was viewed by the court to be "overwhelming."¹⁶⁹ The court was required to assess the weight of eyewitness testimony, without knowing how the jury might have assessed it absent the erroneous admission of the confession. This decision highlights the dilemma that appellate judges face: there is no way for a judge to consider the possible effect of an error on the verdict without also considering the entire record of evidence. And once the entire record has been considered, a judge faces the risk of being influenced by that evidence. In other words, it is hard for a judge to discount a strong feeling that the defendant is guilty.

There is another problem that my colleagues and I face in trying to apply the harmless-error doctrine. It is often a *very hard* assignment to distinguish between the effect of an error on the verdict and the effect of an error on one's intuition about factual guilt. Almost

¹⁶⁸ *Correll v. Thompson*, 63 F.3d 1279 (4th Cir. 1995), cert. denied, 116 S. Ct. 688 (1996).

¹⁶⁹ *Id.* at 1291-92. But see *Cooper v. Taylor*, 70 F.3d 1454, 1463-69 (4th Cir. 1995) (distinguishing *Correll* and following *O'Neal's* harmless-error analysis).

thirty years ago, the dissenting Justices in *Harrington* tried to make this distinction when they said that “[t]he focus of appellate inquiry should be on the character and quality of the tainted evidence as it relates to the untainted evidence and not just on the amount of untainted evidence.”¹⁷⁰ I think this is another way of formulating what Justice Breyer says in *O’Neal*, but it more starkly addresses the point that I have in mind. The *Harrington* dissent properly recognizes that, in considering a harmless-error claim, the error not only must be identified as one involving a substantial right, but it must also be assigned some weight in our overall scale of values and then considered in the context of the case at hand. This is no mean assignment! For example, if my hypothetical is changed so that the error is a simple failure of the police to give a *Miranda* warning (rather than a coerced confession), most judges would be more inclined to find the error harmless. But how do we explain this result?¹⁷¹ I think it is either because the *Miranda* violation would not be seen to be as significant an infringement as a coerced confession, or because it would be assumed that a coerced confession is more likely to have an influence on the verdict. Presumably, as the dissenters in *Harrington* argued, the way an appellate panel reaches a result is to consider how the “tainted evidence . . . relates to the untainted evidence.” This inquiry requires a judge to ask: Did the error involve a central issue in the case? Did the error somehow significantly undermine the untainted evidence? Did the error provide a crucial link in the government’s case? Did the error adversely affect the ability of the defendant to present his case? Did the error shift the burden of proof from the government to the defendant? These questions may seem straightforward, but they are not. In the end, it is much easier for a judge to rely on guilt-based decision-making, and for that reason I believe the current trend will be difficult to reverse.

In an effort to test some of my thinking, I used my hypothetical problem to conduct a survey among my colleagues on the D.C. Circuit, and among federal prosecutors and public defenders who practice before my court.¹⁷² The participants in the survey were asked to read the hypothetical and then, without conducting any research or conferring with anyone, vote either to “uphold the conviction, finding harmless error,” or “reverse and remand for a new trial.” Fifty-three persons participated in the survey: eleven judges, twenty-five appel-

¹⁷⁰ *Harrington v. California*, 395 U.S. 250, 256 (1969) (Brennan, J., dissenting).

¹⁷¹ For an excellent discussion of “mere *Miranda* violations,” see Yale Kamisar, On the “Fruits” of *Miranda* Violations, Coerced Confessions, and Compelled Testimony, 93 Mich. L. Rev. 929, 953, 968-75 (1995).

¹⁷² The full details of the survey appear in the Appendix to this Article.

late criminal attorneys from the U.S. Attorney's Office, six appellate criminal attorneys from the Federal Public Defender, and eleven appellate criminal attorneys from the Public Defender Service for the District of Columbia. The results were as follows: twenty-eight (53%) voted to uphold the conviction, and twenty-five (47%) voted to reverse and remand. Among the judges only two of eleven voted to reverse, equalling only 18%. In contrast, all but one of the seventeen public defenders (94%) voted to reverse, while seven of twenty-five U.S. Attorneys (28%) voted to reverse.

Interestingly, 55% of the attorneys surveyed, but only 18% of the judges, voted to reverse. In fact, a higher percentage of U.S. Attorneys (28%) than judges rejected the claim of harmless error. Probably the most interesting aspect of the survey is that, for the most part, people who voted to uphold the conviction were persuaded by the overwhelming evidence against the defendant, and people who voted to reverse tended to focus on the influence of a coerced confession on a verdict.

Obviously, because of the limitations of the survey, the results reflect nothing more than "first reactions" from a group of experts—judges, prosecutors, and defenders—who routinely deal with criminal appeals and applications of the harmless-error doctrine. Nonetheless, these "first reactions" do nothing to dispel my concerns about the dangerous effects of guilt-based decisionmaking.

An easy way to avoid the problems that I perceive is to endorse a bright-line test, such as the one followed in *Sullivan*, where the Court declared that a constitutionally deficient reasonable-doubt instruction can never be harmless error. In other words, we could return to the pre-*Chapman* practice of assuming that most constitutional errors are not amenable to harmless-error review.¹⁷³ Under this test, even the *Miranda* violation becomes easy to resolve. Because a constitutional right is at stake, the error cannot be harmless. However, now that the Court has adopted the distinction between "structural" and "trial" errors¹⁷⁴—a distinction that I find baffling and mostly unhelpful—we know that there will be no trend toward this bright-line rule. As Chief Justice Rehnquist has made clear (with no apparent disagreement from the rest of the Court), "it is the rare case in which a constitutional violation will not be subject to harmless-error analysis."¹⁷⁵

Therefore, the question for appellate judges is: Given that constitutional errors will remain subject to a harmless-error analysis, how

¹⁷³ See *supra* notes 21-22 and accompanying text.

¹⁷⁴ See *supra* notes 91-94 and accompanying text.

¹⁷⁵ *Sullivan v. Louisiana*, 113 S. Ct. 2078, 2083 (1993) (Rehnquist, C.J., concurring).

should judges actually apply *O'Neal's* "effect on the verdict" standard? One possibility, of course, is merely to import a different bright-line rule. Given Justice Breyer's pronouncements in *O'Neal* and the concerns I have articulated, it seems plausible to argue that most constitutional violations necessarily have an effect on the jury and therefore cannot ever be harmless. Such a rule would apply to *Miranda* violations no less than coerced confessions, and the weight of the incriminating evidence would be irrelevant. While this version of the harmless-error standard would certainly be simpler to apply, it does seem flatly at odds with the Chief Justice's opinion in *Fulminante*. Nevertheless, this approach may eventually find support if the Court continues down the path paved by *O'Neal*.

Absent such a bright-line approach, I think harmless error is best analyzed on a spectrum depending on the importance of the right that has been violated. For example, I consider the coerced confessions in *O'Neal* and in my hypothetical to be such egregious errors that I have no trouble finding that the confession must have had an effect on the verdict. Similarly, cases like *Kotteakos* and *Sullivan*, in which the jury may have been seriously confused by erroneous instructions that go to the heart of the case, seem relatively clear. After all, regardless of whether they are called "structural" or "trial" errors, it would be unfair for appellate judges to assume that the jurors were so well informed in the law that they could overcome erroneous instructions of such importance. Here again, the judge may believe that the result reached by the jury was ultimately correct, but it is hard to say that the error had no effect on the jury because the judge cannot know for sure what a jury might have done had it been instructed correctly.

A harder case is one like *Olano*, where the trial judge erroneously permitted alternate jurors to take part in deliberations. While the Court decided that case under its plain-error jurisprudence because there was no objection raised at trial, had an objection been raised, the harmless-error inquiry would have been complicated. On the one hand, the presence of additional people in the jury room surely had an effect on the jury. However, a defendant would never be able to prove that he or she had suffered actual prejudice as a result of the inclusion of extra people. Thus, I suspect many appellate judges would be inclined to say the error was harmless, thereby leaving a clear violation of law unattended. Such a result seems to me to contradict *O'Neal*, which firmly places the burden of proof in the harmless-error analysis on the government. Under *O'Neal*, the defendant should not be required to prove prejudice. Yet, again, I believe it will be very difficult in practice for appellate judges to banish the

question of prejudice from their minds when conducting the harmless-error inquiry.

In the end, it need not matter that very few errors are considered "structural," and therefore almost all trial defects will be subject to the harmless-error analysis. As the result in *Fulminante* shows, if the courts aim to be faithful to the approach outlined by Justice Breyer in *O'Neal*, justice will be served. Up until recently, the Court has wasted a lot of words on somewhat artificial distinctions—such as "structural" versus "trial" errors, and constitutional trial errors versus nonconstitutional trial errors, and habeas petitions versus direct appeals, and the test of *Chapman* versus the test of *Kotteakos*—none of which have usefully served to assist the lower appellate courts in their applications of harmless error. Indeed, I have always suspected that the many confusing lines that have been drawn by the Supreme Court have provided further excuses for appellate judges to opt in favor of guilt-based decisionmaking. For this reason, *O'Neal* marks a refreshing change in the direction of the law.

The mission of the appellate courts in evaluating claims of harmless error should be to address significant errors and ensure fundamental fairness. This is what Justice Traynor calls for in his book on harmless error, and this is what the Court endorses in *O'Neal*. I am not sure whether Justice Breyer's prescription is more professorial than practical, but I am sure that what he means to say is important and right.

APPENDIX

*Survey of and Responses from
Members of the U.S. Court of Appeals
for the District of Columbia Circuit
Appellate Criminal Attorneys from the
U.S. Attorney's Office Washington, D.C.
Appellate Criminal Attorneys from the Federal Public Defender
Washington, D.C.
Appellate Criminal Attorneys from the Public Defender Service
for the District of Columbia
to the hypothetical problem on harmless error.*

THE SURVEY

While working on the Article on harmless error, it occurred to me that it might be useful for me, and interesting for anyone who might read the Article, to have a survey of the views of my colleagues on the D.C. Circuit, and of federal prosecutors and public defenders who practice before my court. I did not want anything complicated, for then I would never get any responses (or, worse, I would face strong disagreements over my methodology). Rather, my idea was to create a balanced hypothetical case involving an egregious error (one normally assumed to have a good likelihood of influencing a verdict) and a very strong case for the prosecution (one that most people would think should produce a guilty verdict absent the error). Such a hypothetical, I think, starkly raises the question whether a judge ought to engage in "guilt-based" decisionmaking in applying the harmless-error doctrine.

I tested the hypothetical on some trusted judicial colleagues who are trial judges on the District of Columbia Superior Court, and who have great familiarity with felony cases. I also got very helpful advice from a close friend who is a very skilled and highly regarded federal prosecutor. All thought that the hypothetical achieved what I had in mind to do. I should add that, in creating the hypothetical, I certainly meant to say nothing about police policy or practices. (Indeed, unless and until I see otherwise, I always assume the best about law-enforcement officers, and also about attorneys who appear before the court.)

My survey group included all members of the U.S. Court of Appeals for the District of Columbia Circuit, plus appellate criminal attorneys practicing with the United States Attorney's Office, the Federal Public Defender, and the Public Defender Service, all in Washington, D.C. A total of fifty-three persons participated in the

survey. The survey question and the vote tabulations appear on the following pages.

There are some significant limitations in the methodology that I used. First, I asked individual participants not to discuss the problem with anyone else. This is not the way an appellate judge normally works—collegial exchanges can influence a vote on a case. Second, I asked the participants not to do any legal research. As a consequence, I know that a number of my colleagues had neither seen nor thought about the relevance of *O'Neal v. McAninch*, 115 S. Ct. 992 (1995), when they voted on the survey question. Finally, all participants were limited to the "facts" that I provided in the hypothetical problem, with no access to a cold record to ponder and no views from counsel as to what the record showed. These were serious limitations on the exercise, so I do not mean to suggest that the survey proves anything about how judges might actually decide the case were it ever presented to them on appeal.

What I wanted from the survey was a sense of "first reactions" from a group of experts—judges, prosecutors, and defenders—who routinely deal with criminal appeals and applications of the harmless-error doctrine. In my experience, such first reactions may have a significant effect on the decisionmaking process (one that I can only sense, but can neither define nor prove). The survey certainly gives first reactions, and they are interesting.

I will not embellish on the survey results, for that would be unfair to the participants (especially given the limitations of the undertaking). I will simply state the results and leave it to the reader to ponder the meaning. I have attached the participants' comments in my summaries, for I found them immensely interesting.

THE HYPOTHETICAL PROBLEM & SURVEY

Hypothetical on "Harmless Error"

Assume that you are one among a panel of appellate judges who must decide the following case:

Joe Dedit, who is six-feet five-inches tall, about two-hundred-and-seventy pounds, Caucasian, and bald-headed, was recently tried for the murder of a convenience-store proprietor. The indictment charged that, sometime near midnight on the evening in question, Dedit entered the convenience store, with a loaded gun, intending to rob the proprietor. It was further charged that, when he faced resistance from his victim, Dedit purposefully shot the proprietor in the head and face six times, and then fled the store. Two customers, who were in the store at the time of the murder, called the police and identified Dedit, a well-known

neighborhood thug, as the murderer. Following this lead, the police located Didit at his girlfriend's apartment, arrested him, and took him to police headquarters for interrogation. After being given his Miranda warning, Didit refused to say anything. His refusal agitated one of the police officers, who then proceeded to slap and punch Didit repeatedly. The officers then left Didit in an isolated room, telling him, "you'll stay here unless you talk to us." Two hours later, Didit summoned the officers and asked for a sandwich and coffee, which he was given. After eating, he told the officers that he wanted to talk. Then, without giving any further Miranda warning, the officers took a confession from Didit.

At trial, one of the customers testified that he was about thirty feet from the place of the murder, but could "clearly" see Didit shoot the proprietor. The other customer testified that she did not have a clear view of Didit, but she was "sure" that she recognized the defendant's voice when he threatened to kill the store owner. A third witness testified that he had seen Didit at about midnight on the night in question, running down a street about a block away from the convenience store. A fourth witness testified that he had seen Didit with what he thought was a .45-caliber pistol two days before the shooting. No gun was ever found, but police experts testified that the bullets that killed the murder victim came from a .45-caliber. All four witnesses claimed that they personally knew Didit from the neighborhood. The prosecutor also introduced a videotape recording of the murder, showing a view of the murderer from the rear; the recorded view of the murderer strongly resembled the defendant. Finally, over strong objection, the trial judge allowed Didit's confession to be introduced in evidence, along with evidence indicating that the defendant had been beaten several hours before he confessed. For the defense, Didit's girlfriend testified that he had been with her all evening; on cross-examination, however, she admitted that she was "unsure" whether he may have left the apartment once during the evening to buy some cigarettes. The jury returned a verdict of guilty within two hours after commencing deliberations. The case is now on appeal, and the defendant seeks reversal on a claim that the trial judge committed error in admitting what amounted to a coerced confession. Government counsel responds that any error committed by the trial judge was harmless.

Would you uphold the conviction, finding harmless error? Or would you reverse and remand for a new trial? (Under *Arizona v. Fulminante*, 499 U.S. 279, 295 (1991), a coerced confession may be harmless if a court is able to "declare a belief that it was harmless beyond a reasonable doubt.") Please do not discuss the case with any-

one. Rather, relying on the facts given, and doing no further research on the subject, indicate how you would vote:

_____ *Uphold the conviction, finding harmless error.*

_____ *Reverse and remand for a new trial.*

Indicate briefly the critical factor (or factors) prompting your decision:

For your information, this survey is being conducted in conjunction with a paper on "harmless error" that I am preparing for the *Madison Lecture* at NYU School of Law. As I have thought about the subject, it occurred to me that it would be helpful for me, and interesting for my audience, to have a survey of views from my colleagues, and from members of the bar who specialize in criminal appellate practice. Thank you for assisting me in this project.

Thank you,
H.T. Edwards
September 12, 1995

RESULTS OF THE SURVEY (TOTAL GROUP)

PARTICIPANT CATEGORY	UPHOLD CONVICTION	REVERSE AND REMAND
Judges	9 (82%)	2 (18%)
U.S. Attorneys	18 (72%)	7 (28%)
Federal Defenders	0 (0%)	6 (100%)
Public Defenders	1 (9%)	10 (91%)
TOTALS	28 (53%)	25 (47%)

VOTES BY APPELLATE CRIMINAL ATTORNEYS

PARTICIPANT CATEGORY	UPHOLD CONVICTION	REVERSE AND REMAND
U.S. Attorneys (60%)	18	7
Federal Defenders (14%)	0	6
Public Defenders (26%)	1	10
TOTALS	19 (45%)	23 (55%)

VOTES OF JUDGES AND APPELLATE CRIMINAL ATTORNEYS COMPARED

PARTICIPANT CATEGORY	UPHOLD CONVICTION	REVERSE AND REMAND
Judges	9 (82%)	2 (18%)
All Appellate Attorneys	19 (45%)	23 (55%)
U.S. Attorneys	18 (72%)	7 (28%)

VOTES WITH COMMENTS ON HYPOTHETICAL CASE

PARTICIPANT CATEGORY	UPHELD CONVICTION, FINDING HARMLESS ERROR	REVERSED AND REMANDED FOR A NEW TRIAL	PARTICIPANT COMMENTS
Judge		X	"O'Neal controls, I think. There is no physical evidence against the defendant. A confession is presumed to have a powerful effect on jury. At a minimum, 'grave doubt' warrants reversal."
Judge		X	"For me to find a coerced confession harmless beyond a reasonable doubt would require considerable objective evidence, not merely the slippery recollections of witnesses."
Judge	X		"Rare to find 3 on-the-scene witnesses (plus a corroborative fourth); a weak alibi. Prosecution should not have even introduced confession."
Judge	X		"The video tape—even from the back is a clincher for someone 6' 5" and bald."

VOTES WITH COMMENTS (continued)

Judge	X	“Primarily the eyewitness account, which was reinforced by the other non-confession evidence.”
Judge	X*	“The customer witnesses appear (1) free of evident bias or other reason to lie, and (2) because of prior knowledge of Dedit, unlikely to be confused. My * is because I would consider going the other way if cross or other evidence undermined those assumptions. See, e.g., <i>US v. Pryce</i> , 938 F.2d 1343, 1349 (D.C. Cir. 1991).”
Judge	X	“Defendant’s distinctive appearance makes testimony of 1st and 3d witnesses particularly compelling, virtually assuring conviction in a trial untainted by the confession.”
Judge	X	“Overwhelming evidence of guilt <i>alunde</i> this confession; jury’s knowledge of circumstances of confession.”
Judge	X	“Eyewitness testimony of persons who knew Dedit & the videotape render the confession admission harmless. Besides, the testimony re the beating Dedit suffered tempered the effect of the confession.”

VOTES WITH COMMENTS (continued)

Judge	X		“Harmless, in view of Supreme Court’s refining of harmless error doctrine and strength of Govt’s case.”
Judge	X		“I can’t find a way around <i>Arizona</i> [<i>v. Fulminante</i>], which I think is wrong.”
U.S. Attorney		X	“Conviction might survive under <i>Kotteakos</i> , but eye-witnesses’ IDs each too tenuous to meet <i>Chapman</i> standard.”
U.S. Attorney		X	“Strong gov’t case, but only one eyewitness ID; because confession is very powerful evidence, harder to find harmless beyond reasonable doubt.”
U.S. Attorney		X	“I am deeply disturbed by your hypothetical because it may suggest that police brutality is commonplace, whereas my experience is just the opposite. I also am surprised by the gratuitous reference to the suspect’s race. I would vote to reverse, however, in order to send a strong signal that brutality would not be tolerated. But for the need to send such a signal, however, I would conclude the error was harmless due to the IDs, which were certain & confirmed by the video.”

VOTES WITH COMMENTS (continued)

U.S. Attorney		X	“Although the government’s case is sufficiently strong that I do not think it at all likely that the outcome would be different on retrial, the error (and the underlying police conduct) are so egregious that I do not think that the defendant can be said to have received a fair trial.”
U.S. Attorney		X	“Weakness of witnesses, coercive tactics of police, no renewal of <i>Miranda</i> warnings.”
U.S. Attorney		X	“Can’t allow cops to beat defendants. [<i>Prima facie</i>] case is probably strong enough without confession.”
U.S. Attorney		X	“Initial refusal to talk after <i>Miranda</i> , police statements re ‘won’t get out until talk’; police beating; no second <i>Miranda</i> .”
U.S. Attorney	X		“Confession not product of police activity intended to be coercive. Jury presumably found confession reliable although it heard evidence of beating. Strong independent evidence of guilt.”
U.S. Attorney	X		“Eyewitness evidence; the videotape; the jury knew Dedit was beaten prior to confession.”

VOTES WITH COMMENTS (continued)

<p>U.S. Attorney</p>	<p>X</p>		<p>"1. Evidence overwhelming, 2. jury aware of beating & circumstances surrounding confession, 3. time interval between beating & defendant calling for police, 4. if reversed & remanded, evidence so compelling would most probably result in conviction even w/o confession."</p>
<p>U.S. Attorney</p>	<p>X</p>		<p>"Eyewitness identification; eyewitness who <u>knew</u> defendant; video. Were confession not admitted, jury would have been able to find guilt beyond a reasonable doubt."</p>
<p>U.S. Attorney</p>	<p>X</p>		<p>"The witness with a clear view of appellant, the witness who knew appellant well & recognized his voice, the videotape, the jury was privy to the circumstances surrounding the confession."</p>
<p>U.S. Attorney</p>	<p>X</p>		<p>"Lapse of time between beating and confession is determining factor. Defendant voluntarily initiates conversation leading to confession, and does so under conditions which are not coercive or onerous, particularly since his request for a meal was complied with without further intimidation."</p>

VOTES WITH COMMENTS (continued)

U.S. Attorney	X		“1) Government’s case was very strong; 2) confession not vital to defendant’s guilt; 3) evidence of beating gives confession proper weight to jury.”
U.S. Attorney	X		“Compelling nature of other evidence of guilt; ‘undue’ prejudice mitigated somewhat by indicia of reliability of confession (passage of two hours between beating and confession; providing food and coffee).”
U.S. Attorney	X		“(1) Identification testimony strong because witnesses know defendant personally & good corroboration by witnesses 3 & 4 & video (2) the value of the confession to the government was undermined by the evidence of coercion.”
U.S. Attorney	X		“The eyewitness testimony was very strong and was significantly corroborated by other testimony.”

VOTES WITH COMMENTS (continued)

<p>U.S. Attorney</p>	<p>X</p>		<p>“(1) One witness saw Didit actually shoot victim (2) another witness recognized his voice (3) a third saw him flee the scene (1 block from murder at time it occurred) (4) all witnesses knew Didit prior to shooting (therefore I.D. not an issue) (5) Didit had been seen with same caliber gun used in murder (6) murder was filmed on videotape & murderer strongly resembled Didit (7) jury considered fact that Didit only confessed after being beaten (8) Didit’s alibi witness could not account for his presence over the entire night. Government’s evidence extremely strong & admission of confession harmless.”</p>
<p>U.S. Attorney</p>	<p>X</p>		<p>“—Overwhelming evidence (eyewitness and circumstantial) of guilt —Jury had evidence of police misconduct and could discount value of confession.”</p>
<p>U.S. Attorney</p>	<p>X</p>		<p>“Eyewitness testimony from several people who know defendant. Also, fact that trial judge let jury know confession was coerced (this is important to me although maybe not legally relevant).”</p>
<p>U.S. Attorney</p>	<p>X</p>		<p>“Strength of the eyewitness testimony; videotape.”</p>

VOTES WITH COMMENTS (continued)

U.S. Attorney	X	<p>"The testimony of the 4 witnesses made any error harmless. All of the witnesses personally knew the defendant. One witness testified that he clearly saw defendant shoot victim, another witness testified he recognized defendant's voice, a third witness saw defendant fleeing the store around the time of the murder and the fourth saw defendant with a .45."</p>
U.S. Attorney	X	<p>"Even without the confession, there was overwhelming evidence of guilt, both physical and testimonial."</p>
U.S. Attorney	X	<p>"Defendant's opportunity to commit crime; his having access to a weapon of the sort used; the videotape; the assertion in the alibi that he may have gone to get cigarettes; the sighting a block away (all of which I view as strong circumstantial evidence) coupled with the two eye/ear witness identifications lead me to conclude that the defendant was properly convicted even without the confession and renders the confession harmless beyond a reasonable doubt."</p>
U.S. Attorney	X	<p>"Strength of government's case."</p>

VOTES WITH COMMENTS (continued)

Fed. Pub. Def.		X	“(1) Significant impact of confession on jury, (2) lack of reliable forensic evidence, (3) defense alibi testimony.”
Fed. Pub. Def.		X	“While one eyewitness identification certainly is sufficient, it doesn’t render a coerced confession harmless beyond a reasonable doubt especially where the eyewitness is predisposed to believe the defendant to be a ‘thug.’ And, although the girlfriend’s testimony on cross-examination left open some possibility that D didit left during the evening, her testimony must have given the jury food for thought—they considered <i>something</i> for two hours.”
Fed. Pub. Def.		X	“No testimony is as compelling as a confession; the eyewitnesses were: (1) 30’ away; or (2) relying on voice ID. Other witnesses linked defendant to slaying only circumstantially.”

VOTES WITH COMMENTS (continued)

<p>Fed. Pub. Def.</p>		<p>X</p>	<p>“Joe’s confession was clearly coerced, therefore not just ‘technically’ inadmissible but unreliable; there was only one claimed eyewitness to the actual shooting; given the alibi testimony (even slightly uncertain), it cannot be concluded beyond reasonable doubt that quick verdict was uninfluenced by improperly admitted confession.”</p>
<p>Fed. Pub. Def.</p>		<p>X</p>	<p>“A confession is dynamite to a jury—qualitatively different than the other evidence in the case. We didn’t see the witnesses’ live testimony (all 5 of whom knew D and had possible bias). How can we be sure beyond a reasonable doubt that, absent the confession, the girlfriend’s testimony wouldn’t have raised a reasonable doubt in at least one juror’s mind?”</p>

VOTES WITH COMMENTS (continued)

<p>Fed. Pub. Def.</p>		<p>X</p>	<p>"A 'confession' is the most powerful evidence I think a jury ever hears. Jurors don't really believe people falsely confess. Eyewitness identification is notoriously unreliable, although also convincing to a juror. Had the video been a front view or had there been corroborating physical or forensic evidence, I might have said harmless, but with the lack of that and the alibi, however weak, I can't say the confession was harmless."</p>
<p>PDS</p>	<p>X</p>		<p>"Overwhelming evidence of guilt."</p>
<p>PDS</p>		<p>X</p>	<p>"Confession is a devastating form of incriminating evidence; no question a confession is practically dispositive of guilt. Can't affirm unless other evidence was unimpeached and amazingly powerful—not here; thirty feet away/voice identification witness, gun evidence inconclusive; moreover, all other evidence relied on credibility of witnesses who were presumably impeached. May have different result if you had DNA or other strong physical evidence."</p>

VOTES WITH COMMENTS (continued)

PDS	X	<p>“The four witnesses to the murder are not solid witnesses because they have bias as to Didit being ‘neighborhood thug.’ The videotape shot does not give a frontal view of Didit, therefore not reliable. So the confession was a crucial piece of evidence that could have swayed the jury.”</p>
PDS	X	<p>“The ‘eyewitness’ testimony is by no means conclusive. The video seems more problematic, but also inconclusive. Harmless beyond a reasonable doubt is a tough standard. A statement/confession is extremely persuasive to a jury.”</p>
PDS	X	<p>“Witnesses inclined to believe they saw Didit because they knew him as neighborhood thug. (E.g., how ‘sure’ can you be re voice you ‘know’ from neighborhood.) Compelling evidence required; series of suggestions doesn’t do it. And coercion suggests police knew they needed more.”</p>

VOTES WITH COMMENTS (continued)

PDS		X	<p>“Customers could have numerous motives for naming well-known thug; corroboration is weak; defendant had alibi; & nearly impossible for jury not to be substantially swayed by confession that jury might think is true because it was coerced.”</p>
PDS		X	<p>“A confession by the defendant himself (albeit ‘coerced’) is so damning to the defense case as to leave the jurors little room for doubt. Without the defendant’s coerced confession, the jurors may feel more free to discredit observations of the eyewitnesses.”</p>
PDS		X	<p>“Of the 4 witnesses only 1, from 30 ft. claimed to see defendant. Voice ID is unreliable, possession of .45 2 days before adds little.”</p>
PDS		X	<p>“Reasonable doubt w/o confession because with exception of one witness no one got clear view of assailant. 1st witness attack under bias. Videotape theory could be attacked for same reason. Alibi could have created doubt.”</p>

VOTES WITH COMMENTS (continued)

PDS	X	<p>“The identification evidence was far from strong—really was rather marginal. The confession should not have been admitted & given the other evidence in the case, cannot be considered harmless. It was the only compelling evidence admitted at trial.”</p>
PDS	X	<p>“Beyond a reasonable doubt is (obviously) an extremely high standard. There is nothing more persuasive to a jury than a confession from the defendant.”</p>