VIRGINIA LAW REVIEW

VOLUME 88 MARCH 2002 NUMBER 1

ARTICLES

HARMLESS ERROR AND THE RIGHTS/REMEDIES SPLIT

Sam Kamin[*]

> The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.
>
> –*Marbury v. Madison*[1]

INTRODUCTION

IN his essay, *The Right-Remedy Gap in Constitutional Law*,[2] Professor John Jeffries argues that the development of doctrines,

---

* Assistant Professor, University of Denver College of Law. This Article was made possible by a generous summer research grant from the University of Denver. My colleagues at the law school, and in particular Alan K. Chen, gave generously of their time and support during the drafting process. Thanks also to John C. Jeffries, Jr. who provided support and guidance from the Article's conception through its fruition, and to Earl Dudley, Greg Mitchell, Robert Weisberg, and Melissa Hart for their comments during the review process. David Walker and Ric Morgan provided more than able research assistance. Only because I believe it to be a cliché will I not add that all errors and omissions remain mine alone.

[1] 5 U.S. (1 Cranch) 137, 163 (1803).

[2] John C. Jeffries, Jr., The Right-Remedy Gap in Constitutional Law, 109 Yale L.J. 87 (1999).

such as qualified immunity,[3] that limit the capacity of plaintiffs to receive a remedy for alleged constitutional violations are not as regressive as they may at first appear, and may in fact lead to the development and growth of substantive constitutional law.[4] This argument flies in the face of much of the recent analysis of constitutional remedies. Many commentators have argued that doctrines like qualified immunity—as well as non-retroactivity in criminal procedure,[5] good-faith reliance by police officers on facially valid search warrants,[6] and sovereigu immunity[7]—all have the effect of stifling the development of constitutional law because they allow courts to avoid novel questions of constitutional law.[8] Critics argue

---

[3] In *Harlow v. Fitzgerald*, 457 U.S. 800, 818–19 (1982), the Supreme Court held that state officers who violated the civil rights of plaintiffs were nonetheless not liable for damages unless the plaintiffs' rights were clearly established at the time of the officers' actions. See infra Section I.C for a discussion of the Court's qualified immunity jurisprudence.

[4] Jeffries, supra note 2, at 95–110.

[5] In *Linkletter v. Walker*, 381 U.S. 618 (1965), the Supreme Court held that newly created rules of criminal procedure need not be applied retroactively in every case. The Supreme Court has since held that a habeas petitioner is not entitled to benefit retroactively from new rules of constitutional law created after her case became final. See, e.g., Teague v. Lane, 489 U.S. 288 (1989). See infra Section I.B for a discussion of the Court's non-retroactivity jurisprudence.

[6] In *United States v. Leon*, 468 U.S. 897 (1984), the Supreme Court held that evidence obtained through officers' good-faith reliance on a warrant later found to be unconstitutional need not be suppressed at trial. See infra Section III.B.1 for a discussion of *Leon* and its parallels to harmless error.

[7] The Supreme Court has held that the adoption of the Eleventh Amendment to the United States Constitution prohibits citizens from suing their state in federal court. See, e.g., Seminole Tribe v. Florida, 517 U.S. 44 (1996).

[8] See, e.g., John M.M. Greabe, *Mirabile Dictum!*: The Case for "Unnecessary" Constitutional Rulings in Civil Rights Damages Actions, 74 Notre Dame L. Rev. 403, 410 (1999) ("The requirement that the allegedly violated right be clearly established at the time of the action in question tends, if not to 'freeze' constitutional law, then at least to retard its growth through civil rights damages actions."); see also *Leon*, 468 U.S. at 957 n.15 (Brennan, J., dissenting) ("[I]t is difficult to believe that busy courts faced with heavy dockets will take the time to render essentially advisory opinions concerning the constitutionality of the magistrate's decision before considering the officer's good faith."); Karen M. Blum, Qualified Immunity: A User's Manual, 26 Ind. L. Rev. 187, 193 (1993) (arguing that qualified immunity allows courts to avoid consideration of the merits of civil rights claims); Richard H. Fallon, Jr. & Daniel J. Meltzer, New Law, Non-Retroactivity, and Constitutional Remedies, 104 Harv. L. Rev. 1731 (1991) (making a similar argument with regard to non-retroactivity); Mark R. Brown, Weathering Constitutional Change, 2000 U. Ill. L. Rev. 1091 (arguing that sovereign immunity, along with other doctrines that separate rights from remedies, has the effect of stifling the development of constitutional law).

that because each of these doctrines allows a court to conclude that a remedy is not available before reaching the substance of the claimant's claim, these doctrines serve mainly to hamper the recovery of those who have suffered constitutional wrongs and to prevent the development of constitutional law.[9]

In the face of this criticism, Jeffries argues that the separation of rights and remedies can have a laudable effect on constitutional law because doctrines like qualified immunity lower the costs of constitutional innovation.[10] Because judges can assure themselves that qualified immunity will insulate the defendant in the present case from money damages, they know that their own constitutional innovations will not be at the financial expense of either individual officers or municipal defendants.[11] In other words, once questions of redistribution of wealth from defendants to plaintiffs are removed from consideration, judges will be more inclined to make novel law.[12] Thus, although there is no recovery available for plain-

---

[9] See, e.g., Blum, supra note 8, at 193 (observing that disposing of cases through the application of the qualified immunity doctrine results in "no resolution of the underlying constitutional claim"); Greabe, supra note 8, at 410 ("The corpus of constitutional law grows only when courts address novel constitutional question, yet a novel claim, by definition, seeks to establish a right that is not already 'clearly established.'").

[10] See Jeffries, supra note 2, at 90 ("Put simply, limiting money damages for constitutional violations fosters the development of constitutional law. Most obviously, the right-remedy gap in constitutional torts facilitates constitutional change by reducing the costs of innovation.").

[11] Although they are not entitled to qualified immunity, see Owen v. City of Independence, 445 U.S. 622 (1980), municipalities cannot be sued based on a theory of respondeat superior for the malfeasance of their employees. Monell v. N.Y. City Dep't of Soc. Servs., 436 U.S. 658 (1978). Furthermore, states are immune from most suits under a concept of sovereign immunity. See supra note 7.

[12] A number of times during this Article, I refer to the creation of "novel" constitutional law as a positive development. By advocating novelty here, I mean simply that there ought to be an understanding that constitutional law as it is construed at any particular time is imperfect, that the courts should strive to modify and minimize those imperfections whenever possible, and that doctrines that make these corrections more difficult ought to be identified and rooted out.

Obviously, this is a contested issue. See, e.g., Antonin Scalia, A Matter of Interpretation: Federal Courts and the Law 38 (1997) ("The ascendant school of constitutional interpretation affirms the existence of what is called The Living Constitution, a body of law that (unlike normal statutes) grows and changes from age to age, in order to meet the needs of a changing society. And it is the judges who determine those needs and 'find' that changing law. Seems familiar, doesn't it? Yes, it is the common law returned, but infinitely more powerful than what the old common

tiffs in a case creating novel law, subsequent plaintiffs will be entitled to relief.[13] Those state officers who will be defendants in future suits under the novel rule are given notice of it, and those without notice in early cases are found to be immune from damages.[14]

In this Article I shall engage both Jeffries and those writing on the other side of the debate over the separation of rights from remedies by introducing into that discussion a doctrine that is often overlooked when the rights/remedies split is invoked: the harmless

---

law ever pretended to be, for now it trumps even the statutes of democratic legislatures."). For Justice Scalia, the idea that the meaning of the Constitution ought to change over time is anathema; the Constitution's meaning is fixed: It means what it meant in 1789. See also Robert H. Bork, The Tempting of America: The Political Seduction of the Law 5 (1990) ("[A judge] is bound by the only thing that can be called law, the principles of the text, whether Constitution or statute, as generally understood at the enactment.").

[13] Jeffries refers to this denial of money damages to plaintiffs in novel cases coupled with the availability of such damages to plaintiffs in later cases as a sort of generational wealth transfer:

> Basically, the limitation on retrospective relief, together with the modern availability of injunctive and declaratory relief, continually shifts societal resources from the past to the future. Older claimants are disadvantaged by doctrines that deny full individual remediation for past injuries; younger ones are advantaged by the continuing evolution of constitutional law to meet new challenges.

Jeffries, supra note 2, at 105.

[14] Jeffries takes as his primary example of the power of qualified immunity to deossify constitutional law the school desegregation cases of the Warren Court, particularly *Green v. County School Board*, 391 U.S. 430 (1968), the decision in which the Court announced that "all deliberate speed" was an insufficient pace for school desegregation and commanded schools to be desegregated at once. Id. at 436. According to Jeffries:

> That the Court did not stop, but insisted that segregation be eliminated "root and branch," may have depended upon the fact that doing so did not trigger a new round of massive damages liability. Who knows what the Court would have done if announcing an "affirmative duty" to eliminate racially identifiable schools had meant huge damages judgments against Southern school districts? Would the Justices have been willing to impose such liability on districts that had complied, albeit grudgingly, with existing court orders? There is no way to be sure, but it seems entirely plausible that *Green* might have come out differently under a regime of strict money damages.

Jeffries, supra note 2, at 102–03 (footnote omitted).

Another important factor in Jeffries' analysis is the role that injunctive relief plays in the evolution of substantive constitutional law. He argues that because the only issue in *Green* and cases like it was whether the practices complained of would be enjoined (at the time, municipalities were not subject to liability under actions brought under § 1983), the Court did not have to concern itself with redistribution of wealth concerns. See Jeffries, supra note 2, at 110–14.

error doctrine of constitutional criminal procedure.[15] I will argue that even if Jeffries is correct that the separation of rights from remedies can push constitutional law forward (and recent Supreme Court cases suggest that he might well be),[16] and even if harmless error can be fairly analogized to other doctrines that sever rights from remedies, harmless error, alone among these doctrines, has the capacity to make the separation of rights from remedies permanent. Because later litigants are no better off than earlier ones, harmless error has the capacity to diminish the effectiveness of any laudable changes that it might encourage in substantive constitutional law.

This Article will proceed in three parts. Part I will recount the history of the harmless error doctrine in the United States, comparing and contrasting it to the other constitutional doctrines that separate rights and remedies—principally, qualified immunity and non-retroactivity in criminal appeals. This analysis leads to two conclusions. First, none of these doctrines can exert a positive influence on the substance of the law if treated as a threshold question. That is, unless courts look to the merits of constitutional claims first, and only after resolving those claims look to whether the prevailing party would be entitled to a remedy, these doctrines will serve to stagnate constitutional law rather than allow it to grow and develop.

Second, although each of these doctrines, if properly applied, has the capacity to influence positively the development of constitutional law, only harmless error has the capacity to permanently sever rights from remedies. Because non-retroactivity and qualified immunity place later claimants in a better position than earlier ones, the likelihood of a remedy being provided to harmed parties increases over time. By contrast, the harmless error inquiry treats each case in a vacuum; later claimants are no better off than are earlier ones, and there is less impetus for government agents to change their behaviors to conform with the law.

---

[15] Harmless error is a doctrine that permits an appellate court to conclude that although an error occurred in the defendant's trial, that error did not affect the outcome and the defendant is not entitled to have his conviction reversed. See infra Section I.A.

[16] See infra note 201 and accompanying text.

In Part II, I will point to a concrete example of harmless error's capacity to create a firewall between constitutional rights and remedies. Drawing on a database of nearly 300 California Supreme Court decisions in death penalty cases, I will show that during a ten year period, over ninety percent of death sentences imposed by trial courts were upheld on appeal even though nearly every case was found to have been tainted by constitutional error. This analysis illustrates both how malleable harmless error is in practice and how powerful a tool it can be for a court that wishes to affirm (or reverse) a decision below.

Part III will present a modest proposal for reform of harmless error doctrine in the United States. In that Part, I will draw on the conclusions reached earlier to propose two changes in the way the harmless error doctrine is applied. First, harmless error analysis should not be made a threshold question. That is, a court should never defer the merits of a defendant's claim by finding that any error that might have occurred at his trial was harmless. Rather, courts should begin their analysis by considering the merits of the constitutional claims brought by criminal defendants and should rule on the harmlessness of trial errors only once they have found that those errors in fact occurred.[17]

Second, and more fundamentally, I will argue that in order to make harmless error function more like qualified immunity and non-retroactivity, its structure must be changed in order to make it more closely resemble those doctrines. To wit, I argue that the doctrine must contain a temporal component if it is to change not only the substance of constitutional law but also the behavior of government agents; the doctrine must put later litigants in a better position vis-à-vis recovery than earlier litigants. The most effective way to do this, I will argue, is to borrow the reasonableness standard from qualified immunity. I will propose that if a prosecutor should have known that her conduct was constitutional error, the government may not seek to benefit from the harmless error rule with regard to that error. It is only if both suggestions are adopted that the desired effect can be achieved. Without the first change,

[17] This is not a particularly radical proposal, as I am simply suggesting that the Supreme Court take seriously pronouncements it has already made regarding the order of decisionmaking in harmless error cases. See, e.g., Lockhart v. Fretwell, 506 U.S. 364, 369 n.2 (1993); infra Part I.D.2.a.ii.

important questions of constitutional law will not be reached; without the second change, there will be little pressure on prosecutors to comply with the law.

Although the harmless error doctrine has generated a great deal of scholarly interest over the last several years,[18] no one has yet drawn these parallels to other doctrines that separate rights from remedies, nor advocated the adoption of the qualified immunity standard to harmless error. Similarly, the extensive literature on the separation of rights and remedies is largely silent on the question of harmless error.[19] I believe the major contribution of this Article is the melding of these two lines of analysis, leading to a reshaping of harmless error informed by an understanding of rights and remedies generally.

---

[18] See, e.g., Vilija Bilaisis, Harmless Error: Abettor of Courtroom Misconduct, 74 J. Crim. L. & Criminology 457 (1983) (arguing that in the case of intentional prosecutorial or judicial misconduct, the harmless error rule should not be applicable); Linda E. Carter, Harmless Error in the Penalty Phase of a Capital Case: A Doctrine Misunderstood and Misapplied, 28 Ga. L. Rev. 125 (1993) (criticizing the application of harmless error to the penalty phase of death penalty trials); Harry T. Edwards, To Err Is Human, But Not Always Harmless: When Should Legal Error Be Tolerated, 70 N.Y.U. L. Rev. 1167 (1995) (advocating the adoption of an "effect-on-the-verdict" test over a "guilt-based" approach); William M. Landes & Richard A. Posner, Harmless Error, 30 J. Legal Stud. 161 (2001) (creating an econometric model to impose the appropriate incentives on prosecutors); Daniel J. Meltzer, Harmless Error and Constitutional Remedies, 61 U. Chi. L. Rev. 1 (1994) (arguing that the grounds of *Chapman v. California*, establishing the harmless error standard for federal errors, must be rethought); Michael T. Fisher, Note, Harmless Error, Prosecutorial Misconduct, and Due Process: There's More to Due Process Than the Bottom Line, 88 Colum. L. Rev. 1298 (1988) (arguing that focusing on whether an error might have affected a trial outcome is the wrong test of harmlessness, as it fails to consider other due process values); Craig Goldblatt, Comment, Harmless Error as Constitutional Common Law: Congress's Power to Reverse *Arizona v. Fulminante*, 60 U. Chi. L. Rev. 985 (1993) (arguing that Congress has the power to overturn the Supreme Court's decision in *Arizona v. Fulminante* that the introduction of a coerced confession should be examined under the harmless error rule); Gregory Mitchell, Comment, Against "Overwhelming" Appellate Activism: Constraining Harmless Error Review, 82 Cal. L. Rev. 1335 (1994) (arguing that the choice of a harmless error test is currently outcome-determinative and arguing for the adoption of a uniform test for harmless error).

[19] See, e.g., Fallon & Meltzer, supra note 8 (arguing that the only way to make sense of doctrines that separate rights and remedies is to consider them under the common law principles of remedies law); Greabe, supra note 8, at 405 (arguing against what he calls "merits bypass" in the adjudication of claims of qualified immunity); Jeffries, supra note 2 (arguing that the qualified immunity doctrine has a laudable effect on the substance of constitutional law).

I. HARMLESS ERROR, NON-RETROACTIVITY, AND QUALIFIED IMMUNITY

A. A Brief History of Harmless Error

Briefly stated, the harmless error doctrine is something of a good news-bad news scenario for a criminal defendant. It allows an appellate court to validate a defendant's claim of trial error but at the same time to conclude that the defendant is not entitled to have his conviction overturned because the error likely did not affect the outcome of the trial. In other words, harmless error is a doctrine born of the belief that some errors are created more equal than others[20] and that the simple finding of error is not always a sufficient ground to justify the reversal of an otherwise valid conviction. Only when the reviewing court is convinced that the error likely made a difference in the outcome of the trial will error lead to reversal.[21]

1. Early Developments

The harmless error doctrine as it exists today is largely an invention of the second half of the twentieth century.[22] Until 1919, courts in this country generally followed the English rule that "any error of substance" required the reversal of a defendant's conviction.[23]

---

[20] See, e.g., George Orwell, Animal Farm 148 (1945). In this familiar tale of utopia gone awry, animals on an English farm, having taken control of the farm for themselves in order to gain control over their means of production and prevent the appropriation of the fruits of their labor by humans, find themselves trapped in the same web of hierarchies and inequality previously imposed on them by man. An integral part of the perversion of the animal revolution is the constant rewriting of the principles of the community in order to privilege some animals over others. The coup de grace is the perversion of the principle "All animals are equal" to read "All animals are equal but some animals are more equal than others." Id. at 149.

[21] See, e.g., Fahy v. Connecticut, 375 U.S. 85, 86–87 (1963) (holding that a conviction shall be overturned if "there is a reasonable possibility that the evidence complained of might have contributed to the conviction"). In order for a claim of error to be cognizable on appeal, that error must be preserved by timely objection at trial. See, e.g., People v. Scott, 885 P.2d 1040, 1052 (Cal. 1994).

[22] See, e.g., Yale Kamisar et al., Modern Criminal Procedure 796 (6th ed. 1986) ("Prior to the 1960s, there was reason to think that no error of constitutional dimension could ever be regarded as 'harmless.'").

[23] Chapman v. California, 386 U.S. 18, 48 (1967) (Harlan, J., dissenting) (citing Lester B. Orfield, Criminal Appeals in America 190 (1939)).

This inflexible rule applied not only to constitutional errors but to any statutory or common law violations that occurred at trial.[24] As a result, according to the Supreme Court, criminal trials were transformed from adjudications of guilt and innocence into simply opportunities "for sowing reversible error in the record."[25]

The "any error of substance" rule, which was criticized for turning the federal courts into "impregnable citadels of technicality,"[26] gave way in 1919 when Congress passed Section 269 of the revised Judicial Code. The new code provided that federal courts were to reverse lower court rulings only where the substantial rights of the parties were adversely affected at trial.[27] As Justice Wiley B. Rutledge described in *Kotteakos v. United States*,[28] Congress's intent in passing Section 269 was

> [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.[29]

Although this new flexibility applied to statutory and procedural errors, until 1967 it was generally accepted that the finding of any error of constitutional dimension was sufficient to merit the reversal of a defendant's conviction; until that time, only errors falling short of constitutional import were susceptible to the harmless error rule. The Supreme Court hinted in its 1963 decision in *Fahy v.*

---

[24] *Chapman*, 386 U.S. at 48–49 (Harlan, J., dissenting).

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

[26] Marcus A. Kavanagh, Improvement of Administration of Criminal Justice by Exercise of Judicial Power, 11 A.B.A. J. 217, 222 (1925).

[27] Judicial Code of Feb. 26, 1919, ch. 48, § 269 (codified as amended at 28 U.S.C. § 391 (1946)) (repealed 1948) ("On the hearing of any appeal, certiorari, or motion for a new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties."). The modern version of this statute is 28 U.S.C. § 2111 (1994), which states that "On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties." Id.

[28] 328 U.S. 750 (1946).

[29] Id. at 760.

Connecticut[30] that the harmless error doctrine could be applied to constitutional errors,[31] but it was not until the 1967 decision in *Chapman v. California*[32] that the Supreme Court announced for the first time that some constitutional errors could be harmless and established the standard by which harmlessness would be applied to those errors.[33]

2. Chapman v. California

Chapman was a California homicide case. Chapman and her co-defendant were tried and convicted of robbery, kidnapping and murder.[34] At the trial, the prosecutor commented extensively, as was then his right under the California Constitution, on the failure of the defendant to testify.[35] Subsequent to Chapman's trial, but before her case arrived at the California Supreme Court on appeal, the United States Supreme Court, in *Griffin v. California*,[36] decided that the provision of the California Constitution permitting prosecutorial comment on the defendant's silence violated the self-incrimination clause of the Fifth Amendment to the Federal Constitution.[37] When Chapman's case came before the California Supreme Court, therefore, the court was forced to conclude that the prosecutor's closing argument had violated her federal constitutional rights.[38] The question remained, however, whether the

---

[30] 375 U.S. 85 (1963).

[31] Id. at 86 ("On the facts of this case, it is not now necessary for us to decide whether the erroneous admission of evidence obtained by an illegal search and seizure can ever be subject to the normal rules of 'harmless error' under the federal standard of what constitutes harmless error."). The four dissenting members of the Court stated that they would apply harmless error to the introduction of evidence obtained in violation of the Fourth Amendment. Id. at 94 (Harlan, J., dissenting).

[32] 386 U.S. 18 (1967).

[33] Id. at 22–24.

[34] Id. at 19.

[35] Id. (citing Cal. Const. art. I, § 13); see also id. at 26–42 (setting forth the prosecutor's closing argument in its entirety in an appendix).

[36] 380 U.S. 609 (1965).

[37] Id. at 615.

[38] People v. Teale, 404 P.2d 209, 220 (Cal. 1965). The Court could not duck this issue, as the Supreme Court had not held *Griffin* to apply only prospectively. The court later ruled that "a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a 'clear break' with

harmless error doctrine could apply to this violation of federal constitutional rights, and if so, how the doctrine ought to be formulated when applied to those rights.

Harmless error is written into the California Constitution; the Constitution states explicitly that appellate courts are only empowered to reverse a criminal conviction if, "after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of *has resulted in a miscarriage of justice.*"[39] In 1956, the California Supreme Court had interpreted the italicized phrase to mean that a case should be reversed only if the court "is of the 'opinion' that it is *reasonably probable* that a result more favorable to the appealing party would have been reached in the absence of the error."[40] Applying that standard to the federal constitutional error that occurred in Chapman's case, the California Supreme Court was able to convince itself that the Fifth Amendment violation did not affect the result, and that therefore the conviction need not be reversed, notwithstanding the prosecutor's now clearly impermissible comment on the defendant's silence.[41]

When Chapman's case arrived before the Supreme Court, the Court was faced with two threshold questions before it could evaluate the harmless error standard the California Supreme Court had applied in the case. First, does state or federal law govern a state court's application of the harmless error rule to federal constitutional questions? Obviously, if harmless error is simply a question of state law, the federal courts have no authority to hear a challenge to the California Supreme Court's rule.[42] The Supreme Court dispatched this question in a single paragraph, finding that "[w]hether a conviction for crime should stand when a State has failed to accord federal constitutionally guaranteed rights is every bit as much of a federal question as what particular federal constitutional provisions themselves mean, what they guarantee, and

---

the past." Griffith v. Kentucky, 479 U.S. 314, 328 (1987); see also infra Section I.B.1 (describing the doctrine of retroactivity).

[39] Cal. Const. art. VI, § 13 (emphasis added).

[40] People v. Watson, 299 P.2d 243, 254 (1956) (emphasis added).

[41] *Chapman*, 386 U.S. at 20.

[42] See Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590, 631 (1874) (holding that the Supreme Court is *not* free to examine questions of state law decided by state supreme courts).

whether they have been denied."[43] The Court's reasoning on this point is fundamentally sound; it does no good for a federal court to evaluate a state's interpretation of a federal substantive rule if the state can simply deny the effect of that rule by creating a harmless error standard that will eviscerate the rule's enforcement.[44] The Court wrote that the petitioner had a constitutional right to remain silent and that this "is a federal right which, in the absence of appropriate congressional action, it is our responsibility to protect by fashioning the necessary rule."[45] In other words, the courts share responsibility with Congress for ensuring that those rights that are guaranteed to the people through the Bill of Rights and the Fourteenth Amendment are supported by sufficient procedural safeguards to ensure that they remain vital.

Once it was settled that the Court had the authority to hear the case, the question remained whether any harmless error standard could be found that would sufficiently protect defendants when errors of constitutional dimension were found to have occurred in their trials. Although the Supreme Court had never before directly addressed this question, it again disposed of the issue in a single paragraph.[46] Without citing a single case, the Court simply stated that as all of the states and the federal system had harmless error rules on their books, and, as none of these rules distinguished explicitly between constitutional and sub-constitutional violations, there was no reason for the Court to create that distinction in the present case. While this reasoning is at least plausible, the Court's handling of this issue can only strike the reader as a bit flippant, particularly in light of the very recent vintage of the harmless error rule in the United States.[47] Although it had hinted in the past that it

---

[43] *Chapman*, 386 U.S. at 21.

[44] In the extreme case, for example, a state could create a rule that errors are harmless unless the defendant can show beyond a reasonable doubt that the error affected his conviction. Such a rule would essentially make it impossible for a defendant to benefit from substantive decisions in his favor.

[45] *Chapman*, 386 U.S. at 21. For a strong critique of this analysis, see infra Section I.A.3.b (discussing Meltzer, supra note 18).

[46] *Chapman*, 386 U.S. at 21–22.

[47] Furthermore, as we will see, the Supreme Court did not follow the lead of these extant harmless error rules. The Court concluded that there ought to be a distinction between constitutional and sub-constitutional errors, despite the fact that the cases applying the harmless error rule to constitutional error made no such distinction. The

would apply the harmless error rule to federal constitutional violations, for the Court to announce such a rule with as little fanfare as it did in *Chapman* seems somewhat perfunctory.

Nonetheless, the Court found that the question of harmlessness was a federal one and therefore properly before it, and that there were some harmless error standards that could pass muster, even with regard to federal constitutional errors. The Court went on to find, however, that the California "reasonably probable" standard developed in *People v. Watson*[48] and applied in *People v. Teale*[49] (the lower court ruling that was reversed in *Chapman*) was not among them. When federal constitutional rights are at issue, the Supreme Court held, an error is presumed to merit reversal unless the court is "able to declare a belief that it was harmless *beyond a reasonable doubt.*"[50] Applying this standard to the case before him, Justice Hugo Lafayette Black, writing for the Court, was unable to conclude that the voluminous comments made regarding the defendants' silence (comments that were set forth in their entirety in an appendix to the opinion) did not affect the outcome of the trial.[51]

3. Criticism of Chapman

a. Harlan's Dissent

In his dissent in *Chapman*, Justice John Marshall Harlan argued that in imposing a uniform harmless error standard on the state courts, the Court was overstepping its constitutional authority. Although Justice Harlan acknowledged that the Court is within its authority to strike down state "laws, rules, and remedies" that do not comport with the Constitution, he argued that "[t]he Court has no power . . . to declare which of many admittedly constitutional

---

same day that it decided *Chapman*, the Court also decided *Cooper v. California*, 386 U.S. 58 (1967), in which it held that when:

> state standards alone have been violated, the State is free, without review by us, to apply its own state harmless-error rule to such errors of state law. There being no federal constitutional error here, there is no need for us to determine whether the lower court properly applied its state harmless-error rule.

Id. at 62.

[48] 299 P.2d 243, 254 (1956).

[49] 404 P.2d 209, 221 (1965), rev'd sub nom. *Chapman*, 386 U.S. 18 (1966).

[50] *Chapman*, 386 U.S. at 24 (emphasis added).

[51] Id. at 24–26.

alternatives a State may choose."[52] Justice Harlan seemed to agree with the majority that the harmless error analysis was a federal question, but he also believed that it was a sufficient remedy for the violation that occurred in *Chapman* that "California has recognized the impropriety of the trial comment here involved, and has given clear direction to state trial courts for the future."[53]

To the modern ear, Justice Harlan's critique seems almost naive. Justice Harlan fails to explain how merely informing prosecutors and trial judges of the impropriety of comment on the silence of the defendant is likely to lead to changes in behavior absent some mechanism for the enforcement of those rights.[54] In fact, as I argue below, one of the problems with the current construction of the harmless error rule is that it does little better than this, merely informing prosecutors what they may and may not do without giving them any real incentive to change their behaviors. Furthermore, the majority appeared to anticipate Justice Harlan's criticism by indicating that the Court shared with Congress the power to create rules sufficient to guarantee the enforcement of constitutionally guaranteed rights.[55] In other words, the Court was merely stating one permissible mechanism for the enforcement of these rights; Congress remained free to create other, less onerous restrictions on the state courts.[56]

---

[52] Id. at 48 (Harlan, J., dissenting).

[53] Id. at 49 (Harlan, J., dissenting).

[54] Of course, at the time that the prosecutor acted in this case, he was acting in compliance with then-existing law. It is quite possible that Justice Harlan's distaste for the Court's intrusion into the affairs of the California courts was influenced in part by the fact that the state had complied with the rules of criminal procedure set at the time of trial. In this sense, Justice Harlan can be seen as adopting a fault-based approach to harmless error not entirely dissimilar from the one I propose. See infra Part III.

[55] See *Chapman*, 386 U.S. at 21.

[56] The Warren Court couched a number of its more daring criminal procedure decisions in similar language. For example, in *Miranda v. Arizona*, 386 U.S. 436 (1966), the Court mandated the now familiar warnings that were to be given in every case of custodial interrogation. The Court went on to say, however, that these warnings were but one way of informing suspects of their rights to silence and counsel and that Congress remained free to formulate other mechanisms for making defendants aware of these rights. Id. at 467.

> It is impossible for us to foresee the potential alternatives for protecting the privilege which might be devised by Congress or the States in the exercise of their creative rule-making capacities. Therefore we cannot say that the Constitution necessarily requires adherence to any particular solution for the inherent

b. More Modern Criticisms

In a more modern critique, Professor Daniel Meltzer calls for a reexamination of the grounds for the *Chapman* decision.[57] An apparent supporter of the rule in *Chapman*,[58] Meltzer nonetheless argues that the Court's justification for imposing a particular harmless error rule on the states is murky at best, and that if the rule is to continue to enjoy the support of the current Court, its underpinnings must be shored up.[59] Most troubling in this regard is the Court's continued adherence to the position that there is no federal right to appeal in the state courts.[60] In the absence of such a right, Meltzer argues, it ought to be of no concern to the federal courts what procedures are utilized by the states in the appeals they have gratuitously chosen to afford to defendants in their courts.[61]

The solution, Meltzer argues, is to think about the decision in *Chapman* as an example of constitutional common law, "born of concern that state courts, if left free to apply their own harmless error standards, would dilute federal constitutional norms by too easily finding that constitutional errors were not prejudicial."[62] By viewing the rule in these terms, the Court could at once avoid the problems associated with the lack of a right to appeal in the state courts and at the same time justify imposing a harmless error rule on the states. While I am less troubled than Meltzer by the absence of a federal constitutional right to appeal in the state courts,[63] I find

---

> compulsions of the interrogation process as it is presently conducted. Our decision in no way creates a constitutional straitjacket which will handicap sound efforts at reform, nor is it intended to have this effect. We encourage Congress and the States to continue their laudable search for increasingly effective ways of protecting the rights of the individual while promoting efficient enforcement of our criminal laws.

Id. at 437. This analysis is called into question, however, by the Supreme Court's recent announcement that the rule enunciated in *Miranda* is one of constitutional dimension. See Dickerson v. United States, 530 U.S. 428 (2000).

[57] Meltzer, supra note 18.

[58] Id. at 5.

[59] Id.

[60] See, e.g., Pennsylvania v. Finley, 481 U.S. 551, 556–57 (1987); McKane v. Durston, 153 U.S. 684, 687–88 (1894).

[61] Meltzer, supra note 18, at 11.

[62] Id. at 5.

[63] I would argue that it does not follow from the fact that the states need not provide appellate procedures at all that they may institute whatever procedures they choose. For example, simply because a state need not provide appeals, it cannot then choose to provide appeals only to blacks, Republicans, or any other group. Meltzer seems to

much merit to his argument. Clearly, if the states were given unfettered discretion to apply whatever harmless error standards they chose, both the consistency and predictability of constitutional guarantees would suffer.

c. The Problem of Indeterminacy

Finally, it can be argued that *Chapman* creates a false sense of predictability and rigor in harmless error analysis by attempting to quantify that which remains ephemeral. For example, knowing that an error must be shown to be harmless beyond a reasonable doubt (and not merely harmless by a preponderance of the evidence, as the California Supreme Court had held in *Chapman*) is of only marginal help to an appellate judge considering a trial error and its impact on the outcome. What a rule like the one enunciated in *Chapman* does not tell a judge, and what no similar standard could, is *how* to make the determination that error is harmless beyond a reasonable doubt. In other words, how is an appellate judge to examine a trial record in order to determine whether or not the state has shown beyond a reasonable doubt that the constitutional violation that occurred at trial did not contribute to the result?

Clearly it is not enough merely to subtract the offending evidence or argument from the sum of the information supplied to a jury and then to determine whether there was sufficient evidence remaining in the record to support the jury's verdict. The Supreme Court stated this explicitly in the *Kotteakos* case: "The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error."[64] Were this the standard, the Court reasoned, there would be no disincentive to the introduction of possibly impermissible evidence at trial; if that evidence were only removed from the equation if found to be tainted, the risk to the prosecutor of introducing it would be negligible.[65] Rather, the Court reasoned in *Kotteakos*, the question to be asked when considering the impact of a trial error is "whether the error

take the same position, arguing in essence that while the states clearly cannot violate the Equal Protection Clause (and impliedly other independent constitutional provisions), their use of one generally applicable harmless error standard rather than another will generally not do so. See id. at 12–14.

[64] Kotteakos v. United States, 328 U.S. 750, 765 (1946).

[65] Id.

itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand."[66]

The problem, of course, is that even that statement is difficult for judges to operationalize. A number of commentators have attempted to identify the various methods used by the United States Supreme Court and other appellate courts to determine the harmlessness of an error.[67] In his seminal treatise, *The Riddle of Harmless Error*,[68] former California Supreme Court Justice Roger J. Traynor discusses three tests that might be used to determine harmlessness.[69] The first, the "not clearly wrong" test, asks whether the result achieved with the tainted evidence is clearly the wrong result.[70] If the answer is yes, the error is harmful; if the answer is no, the error is harmless. Justice Traynor argues, rightly I think, that the use of this standard allows too many questionable results to stand: "In sum, although a clearly wrong judgment can automatically be equated with a miscarriage of justice, it is perilous to assume that a judgment not clearly wrong, but still dubious, can be equated with justice."[71] It is not enough that judges and juries arrive at the proper results; rather, our criminal justice system demands that the way in which those results are achieved comport with some traditional understanding of fairness and regularity.

The second test examined by Justice Traynor, the "correct result" test, asks whether the jury reached the correct conclusion notwithstanding the admission of tainted evidence.[72] This question, like the "clearly wrong" standard, focuses not on the offending evidence presented but rather on the balance of the evidence ar-

---

[66] Id.

[67] See, e.g., Martha A. Field, Assessing the Harmlessness of Federal Constitutional Error—A Process in Need of a Rationale, 125 U. Pa. L. Rev. 15, 16 (1976) (identifying three distinct approaches used by the Supreme Court in demonstrating harmlessness and arguing that the approach selected in a particular case can change the outcome); C. Elliot Kessler, Death and Harmlessness: Application of the Harmless Error Rule by the Bird and Lucas Courts in Death Penalty Cases—A Comparison & Critique, 26 U.S.F. L. Rev. 41, 48–49 (1991) (identifying two methods that the Supreme Court has used in determining harmlessness and arguing that the determination itself is "[t]he most ill-defined aspect of the harmless error rule").

[68] Roger J. Traynor, The Riddle of Harmless Error (1970).

[69] Id. at 17–25.

[70] Id. at 17.

[71] Id. at 18.

[72] Id.

rayed at the trial and whether the result obtained accurately describes reality. The difference is that the question here is whether the same result would be reached at a retrial without the offending evidence being presented. Again, Justice Traynor criticizes the approach:

> Even overwhelming evidence in support of a verdict does not necessarily dispel the risk that an error may have played a substantial part in the deliberation of the jury and thus contributed to the actual verdict reached, for the jury may have reached its verdict because of the error without considering other reasons untainted by error that would have supported the same result.[73]

Finally, Justice Traynor turns his attention to what he terms the "effect on the judgment" test; if a reviewing court is satisfied that the error did not contribute to the result below, then the error should be found to be harmless.[74] Here, the focus is not on whether the jury got the case right, but rather on whether the court is convinced that the tainted evidence did not contribute to the result. The problem, obviously, is that it is often virtually impossible to determine what evidence a jury considered and what weight it gave to that evidence.

> How can anyone determine what went on in the mind of another or of twelve others who served as triers of fact? The only source of direct evidence on this point would be their own testimony. If the facts had been tried by a jury, such testimony would be precluded by the rule forbidding affidavits or evidence of any sort that tends to contradict, impeach, or defeat the jury's verdict.[75]

Nonetheless, Justice Traynor argues that this is the proper inquiry: "[I]t becomes clearer than ever that in a review of error, the crucial question is not whether there is substantial evidence to support the judgment, but whether error affected the judgment."[76] The only question left for him is how certain an appellate court must be

---

[73] Id. at 22.
[74] Id.
[75] Id. at 23.
[76] Id. at 28.

that an error did not affect the outcome,[77] and it is on this question that Justice Traynor and the California Supreme Court part company from the United States Supreme Court.

d. Common Ground—Support for the Rule in the Abstract

Notwithstanding this disagreement over the application of the harmless error rule, there is near unanimity in support of harmless error as a concept.[78] Although most would agree that there are some errors so insignificant, so trifling, so technical that they should not be allowed to upset an otherwise sound result,[79] it is quite a leap from that common ground to anything resembling unanimity regarding how that rule ought to be applied. Because

---

[77] In a 1976 article, Professor Martha Field asks a slightly more complicated question. Field, supra note 67, at 28–29. She attempts to catalogue the way in which courts actually make harmless error decisions. That is, if we agree that the proper question to ask is whether or not the error affected the outcome of the trial, how are we to make that inquiry? She looks at a number of Supreme Court cases and attempts to develop patterns of decisionmaking in harmless error cases. In her taxonomy, she describes two basic approaches that she calls the effect test and the overwhelming evidence test. Id. at 16–19. Under the effect test, the Court looks primarily at the seriousness of the trial error and asks whether the evidence erroneously admitted or excluded might have contributed to the jury's verdict. Here, the focus is on the error, its seriousness, and the likelihood that an error of that kind would have affected the outcome of the case. Id. at 16. Contrarily, under the "overwhelming evidence" test, the Court's inquiry is whether overwhelming evidence continues to support the verdict after the offending evidence has been excised. Here, the focus is on the totality of the evidence presented, not necessarily the error itself. Id. at 16–17.

[78] See, e.g., 3A Charles Alan Wright, Federal Practice and Procedure § 853, at 297 (2d ed. 1982) ("Very few would disagree with such propositions as that 'justice though due to the accused, is due to the accuser also,' or that 'a defendant is entitled to a fair trial but not a perfect one.' These propositions are at the heart of the harmless error rule.") (footnotes omitted).

[79] Justice Traynor gives one such example, from the period when any error of substance was sufficient to overturn a conviction.

> In [the California Supreme Court] there would be no forgiving an error of omission, even one that involved only spelling. The court scrutinized an indictment that charged the defendant with entry into a building with intent to commit larcey. The omission of the letter *n* in larceny left the meaning clear, but reduced the word to two syllables. In the law such a flaw was fatal. There was no such crime as the one charged, said the court; nor could larcey now be laced up with an *n*. The court would not invoke *idem sonans*, though anyone with larceny in his heart would be well-attuned to a charge of larceny. So there was a reversal, on the ground that the indictment failed to charge the defendant with the requisite specific felonious intent.

Traynor, supra note 68, at 3–4 (citing *People v. St. Clair*, 56 Cal. 406 (1880)).

harmless error asks courts to do the impossible, to unring a bell that has already rung, there is simply no way that a consensus can be found regarding the results of hard cases. What harmless error requires judges to do is to travel back in time and imagine a world that never was. Like the reader left to ponder what would happen if one could travel back in time, a jurist or commentator can only expound on what might have happened at a trial if things had gone differently, if the trial had actually been carried out free of error. As a result, the conclusions obtained can be no better than science fiction. We can argue about these conclusions—about whether a jury would have convicted the defendant without reference to the prohibited evidence—but the conclusions we come to are no more satisfying than those we arrive at when arguing over the plot of a good novel. Because we do not share a common language when we talk about these things, because courts cannot even agree on what the right approach to these questions is, these conversations are as voluble, but ultimately unsatisfying, as a discussion of time travel.[80]

---

[80] My favorite example of this is from the Ray Bradbury story "A Sound of Thunder". Ray Bradbury, A Sound of Thunder, *in* R is for Rocket 79 (1962). In that story, hunters from 2055 are taken back in time in order to hunt dinosaurs. On arriving in the past, the hunters are warned by the tour operators to stay on the paths that have been established and not to disturb anything other than the dinosaurs. Killing a single mouse, the operators argue, could change the future. When met with skepticism, one of the operators delivers the following soliloquy:

> "Well, what about the foxes that'll need those mice to survive? For want of ten mice, a fox dies. For want of ten foxes, a lion starves. For want of a lion, all manner of insects, vultures, infinite billions of life forms are thrown into chaos and destruction. Eventually it all boils down to this: fifty-nine million years later, a caveman, one of a dozen on the *entire world*, goes hunting wild boar or saber-toothed tiger for food. But you, friend, have *stepped* on all the tigers in that region. By stepping on *one* single mouse. So the caveman starves. And the caveman, please note, is not just *any* expendable man, no! He is an *entire future nation.* From his loins would have sprung ten sons. From *their* loins one hundred sons, and thus onward to a civilization. Destroy this one man, and you destroy a race, a people, an entire history of life. It is comparable to slaying some of Adam's grandchildren. The stomp of your foot, on one mouse, could start an earthquake, the effects of which could shake our earth and destinies down through Time, to their very foundations. With the death of that one caveman, a billion others yet unborn are throttled in the womb. Perhaps Rome never rises on its seven hills. Perhaps Europe is forever a dark forest, and only Asia waxes healthy and teeming. Step on a mouse and you crush the Pyramids. Step on a mouse and you leave your print, like a Grand Canyon, across Eternity. Queen Elizabeth might never be born, Washington might not cross

The analogy, of course, is to what might happen in a criminal trial if a single piece of evidence had been changed. One simply cannot know what the jury would have done had it not been for the improper statement or the wrongly admitted evidence. While we can make educated guesses, they will be nothing but that—guesses.

4. Developments Since Chapman

The most important harmless error decision of the last thirty years is the Supreme Court's decision in *Arizona v. Fulminante*,[81] in which the Court clarified those errors to which harmless error analysis could and could not be applied. In *Fulminante*, the Court was faced with a confession that had been admitted at the defendant's trial despite his protest that the use of a paid jailhouse informant to extract his statements rendered them involuntary.[82] The Arizona Supreme Court concluded that the admission of the informant's testimony was error, and it refused to apply the harmless error rule, finding that the introduction of a coerced confession was among those errors so serious that they required automatic reversal of conviction.[83] The State's appeal required the Supreme Court to clarify the line between errors that are reversible per se and those that are susceptible to the harmless error analysis set forth in *Chapman*.

---

the Delaware, there might never be a United States at all. So be careful. Stay on the Path. *Never* step off!"

Id. at 83–84. Of course, the hunters don't heed this warning; one of them steps from the path and kills a single butterfly. Upon returning to the present, the hunters find the world irrevocably changed. A tyrant has been elected President, the English language has evolved into incomprehensible gibberish, and "there was a thing to the air, a chemical taint so subtle, so slight, that only a faint cry of . . . subliminal senses warned . . . it was there." Id. at 92.

[81] 499 U.S. 279 (1991).

[82] Id. at 282. Fulminante was suspected of being a child killer. While he was in federal prison on a different charge, a fellow prisoner, who, unbeknownst to Fulminante, was a paid informant of the FBI, offered him protection from other inmates in exchange for the truth about the murder of the girl. Fulminante said that he had killed the girl, and this admission, as well as an admission to the informant's wife, were introduced at Fulminante's subsequent murder trial. The Arizona Supreme Court found the admission of this confession to be error, and the United States Supreme Court agreed, although for different reasons. Id. at 282–84.

[83] Id. at 282. The United States Supreme Court, while finding in *Chapman* that harmless error could be applied to constitutional errors, also decided that some errors were so fundamental that they required the automatic reversal of the defendant's conviction. See *Chapman*, 386 U.S. at 23.

In doing so, the Court began by looking back to its decision in *Chapman* and the subsequent decisions in which the harmless error rule had been applied.[84] What united these decisions, Chief Justice William H. Rehnquist wrote for the Court, was that all of them involved errors that occurred during the course of the trial itself.[85] When it had focused on errors occurring at trial, the Supreme Court had universally held that appellate courts were capable of examining the impact of those errors in the context of the other evidence properly admitted at the trial.[86] By contrast, in those cases in which the Court had refused to apply the harmless error doctrine, the errors had generally been more structural in nature.[87] Errors affecting the "framework within which the trial proceeds" made balancing impossible.[88] Because these errors either occurred outside of the courtroom or in some way shifted the jury's focus away from the evidence presented in the courtroom, the Court reasoned, balancing was simply inappropriate. Generalizing from this history, the Court announced in *Fulminante* that when the harmlessness analysis called for balancing the effect of impermissible evidence against the weight of permissible evidence, appellate courts should be permitted to do so; however, when the case required courts to decide what effect a pervasive error had on the

---

[84] The Chief Justice wrote for the Court only on the issue of whether harmless error analysis could be applied to a coerced confession. *Fulminante*, 499 U.S. at 306–12. Justice Byron Raymond White wrote for the Court on the other two issues presented by the case—whether the confession was coerced, id. at 285–88, and whether the introduction of that confession was prejudicial in this case, id. at 295–302. As I discuss below, the order of decisionmaking in this case proved crucial to the result.

[85] Id. at 307.

[86] Id. at 307–08. The Court catalogued the cases in which the court applied harmless error analysis to constitutional errors. Id. at 306–07.

[87] Id. at 309–10.

[88] Id. at 310. The Court began by noting that in *Chapman* it had explicitly considered two rights as not being subject to harmless error analysis: the right to an impartial judge, Tumey v. Ohio, 273 U.S. 510 (1927), and the right to counsel, Gideon v. Wainwright, 372 U.S. 335 (1963). See *Fulminante*, 499 U.S. at 308 (quoting *Chapman*, 386 U.S. at 23). The Court continued:

> Since our decision in *Chapman*, other cases have added to the category of constitutional errors which are not subject to harmless error the following: unlawful exclusion of members of the defendant's race from a grand jury, *Vasquez* v. *Hillery*, 474 U. S. 254 (1986); the right to self-representation at trial, *McKaskle* v. *Wiggins*, 465 U. S. 168, 177–78, n. 8 (1984); and the right to public trial, *Waller* v. *Georgia*, 467 U. S. 39, 49 n. 9 (1984).

Fulminante, 499 U.S. at 310.

jury's consideration of properly admitted evidence, the harmless error rule would not be applicable.[89]

Applying its new test—trial error versus structural error—the Court determined that the introduction of a coerced confession was of the former type rather than of the latter.[90] While the Court conceded that the improper introduction of any coerced confession is a serious error, it found that the effect of this error could be examined in light of the other evidence presented at trial. Weighing the effect of the error in the case before it, the Court concluded that the state had failed to prove the harmlessness of the confession's admission beyond a reasonable doubt, and that therefore the conviction must be overturned.[91]

5. The Power of Harmless Error

To see the power that harmless error currently exerts, consider the 1983 case of *United States v. Hasting*.[92] Kelvin Hasting was convicted in federal district court of kidnapping, transporting women across state lines for immoral purposes, and conspiracy to commit kidnapping.[93] During closing argument, the prosecutor pointed out to the jury that during the trial, the defendants had not denied the fact that the victims had been kidnapped and raped.[94] Defense counsel objected to this comment on the defendant's silence as a violation of the defendant's Fifth Amendment rights, but his objection was overruled and his motion for a mistrial was denied.[95] Following his subsequent conviction, the defendant appealed.

---

[89] Id. at 309–10.

[90] Id. at 310.

[91] Id. at 296–302. The Supreme Court's 1993 decision in *Brecht v. Abrahamson*, 507 U.S. 619 (1993), is also worthy of mention. In that case, the Court held that when federal courts examine state court convictions pursuant to habeas corpus petitions, the constitutional error should be deemed harmless unless it "'had substantial and injurious effect or influence in determining the jury's verdict.'" Id. at 623 (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)). As Daniel Meltzer has written, "[the *Brecht*] formulation is less protective than the 'harmless beyond a reasonable doubt' standard that, under *Chapman*, governs on direct review." Meltzer, supra note 18, at 4.

[92] 461 U.S. 499 (1983).

[93] Id. at 501–03.

[94] Id. at 502.

[95] Id. at 502–03.

On appeal, the defendant reiterated his claim that the prosecutor's comment on the defendant's failure to explain the events of the rape and kidnapping was error. The Court of Appeals for the Seventh Circuit, in what the Supreme Court rightly described as a terse opinion, held that the comment was in fact error and summarily reversed.[96] It did not apply the harmless error doctrine to the case, however, instead citing one of its prior cases for the proposition that its inherent supervisory powers permitted it to control prosecutorial misbehavior in the district courts, whether or not that misbehavior affected the outcome of a case.[97] Reasoning that "[d]espite the magnitude of the crimes committed *and the clear evidence of guilt*, an application of the doctrine of harmless error would impermissibly compromise the clear constitutional violation of the defendants' Fifth Amendment rights," the court of appeals reversed the conviction and remanded the case to the trial court.[98]

In reinstating the conviction, the Supreme Court held that although the court of appeals has supervisory power over the district courts and the prosecutors practicing therein, only those errors that are prejudicial to the defendant are subject to supervisory reversal.[99] Harmless error, therefore, not only provides the mechanism by which error can be disregarded by a reviewing court, it also establishes the parameters beyond which appellate courts cannot tread. Unless an appellate court determines that an error is prejudicial, the Court has no authority to remedy that error, by whatever means.[100]

---

[96] United States v. Hasting, 660 F.2d 301, 303 (7th Cir. 1981), rev'd, 461 U.S. 499 (1983).

[97] Id. (quoting *United States v. Rodriguez*, 627 F.2d 110, 113 (7th Cir. 1980)) ("The remarks, harmless or not, infringing upon such a basic and elementary constitutional underpinning of our justice system, simply should not occur.").

[98] Id. (emphasis added).

[99] *Hasting*, 461 U.S. at 506 ("Supervisory power to reverse a conviction is not needed as a remedy when the error to which it is addressed is harmless since, by definition, the conviction would have been obtained notwithstanding the asserted error.").

[100] Of course, there is something tautological in the Court's reasoning. It essentially says that the lower federal courts may use their supervisory powers to discipline prosecutorial misbehavior only in those cases where such powers need not be exercised. If the error is prejudicial, the conviction must be overturned (for reasons completely apart from supervisory powers), and there is no need for additional supervision; if the error is not prejudicial, then reversal is not permitted.

The Supreme Court thus means more when it announces that an error is non-prejudicial than simply that the error was harmless in the legal sense. It is saying not only that the defendant was not convicted in error, but also that no harm occurred at trial that any court can remedy. If the error does not reach that threshold, there was, by definition, nothing wrong with the trial. Thus, the resolution of the harmlessness question determines not only whether the doctrine will be applied; it also determines whether the result may be disturbed in any way.

I strongly disagree with the view of error revealed in the *Hasting* decision. As I explain more fully below, reviewing courts ought to deter prosecutorial misconduct by refusing to apply the harmless error rule in cases where the prosecutor should have known that her conduct was error. Although this approach may lead to reversal in some cases in which the trial errors truly did not contribute to the defendant's conviction, this is a small price to pay to ensure greater compliance with the Constitution and the rules of criminal procedure.

B. Non-retroactivity

When the Supreme Court announces a new rule of criminal procedure, it is forced to decide whether to apply that rule only prospectively (that is, to those cases that have not yet begun) or retrospectively as well (that is, to those cases that have already been fully litigated).[101] When I use the term retroactivity generically, I mean

---

[101] There are in fact a number of ways that a rule may be applied retroactively. It depends entirely on what is taken as the relevant date for the application of the rule. In his dissent in *Desist v. United States*, 394 U.S. 244 (1969), Justice Harlan described some of the meanings:

> In the four short years since we embraced the notion that our constitutional decisions in criminal cases need not be retroactively applied, *Linkletter* v. *Walker*, 381 U. S. 618 (1965), we have created an extraordinary collection of rules to govern the application of that principle. We have held that certain 'new' rules are to be applied to all cases then subject to direct review, *Linkletter* v. *Walker, supra*; *Tehan* v. *Shott*, 382 U. S. 406 (1966); certain others are to be applied to all those cases in which trials have not yet commenced, *Johnson* v. *New Jersey*, 384 U. S. 719 (1966); certain others are to be applied to all those cases in which the tainted evidence has not yet been introduced at trial, *Fuller* v. *Alaska*, 393 U. S. 80 (1968); and still others are to be applied only to the party involved in the case in which the new rule is announced and to all future cases

the application of new rules to those whose appeals were exhausted before the creation of the rule by which they are seeking to benefit. In this Section I show that more rides on the question of prospectivity or retrospectivity than simply the efficient administration of criminal procedure. Although non-retroactivity, like qualified immunity, has the capacity to push forward the substance of constitutional law, as it is currently being applied, it is failing to live up to that laudable potential.

1. The Origins of Non-retroactivity

The well-known criminal procedure decisions of the Warren Court—*Mapp v. Ohio*,[102] *Miranda v. Arizona*,[103] and *Gideon v. Wainwright*,[104] among many others—greatly expanded the substantive rights afforded to defendants on trial in both state and federal courts. The impact of those decisions for the lower courts and for the nation's prisoners, however, was not nearly as far-reaching as it could have been. One of the main reasons for the relatively limited impact of the Warren Court's criminal procedure decisions is the Court's opinion in *Linkletter v. Walker*,[105] which established that decisions creating new rules need not necessarily be applied retroactively.[106]

Linkletter arrived at the Court as a habeas corpus petition brought by a petitioner whose place of business had been searched without a warrant shortly after he was arrested at home on suspicion of burglary. Petitioner was convicted of burglary and appealed his case.[107] The Supreme Court of Louisiana upheld his conviction one year and four months before the United States Supreme Court decided in *Mapp* that the exclusionary rule established in *Weeks v. United States*[108] applied to the states.[109] After *Mapp* was decided,

---

in which the proscribed official conduct has not yet occurred. *Stovall* v. *Denno*, 388 U. S. 293 (1967); *DeStefano* v. *Woods*, 392 U. S. 631 (1968).

Id. at 256–57 (Harlan, J., dissenting).

[102] 367 U.S. 643 (1961).

[103] 384 U.S. 436 (1966).

[104] 372 U.S. 335 (1963).

[105] 381 U.S. 618 (1965).

[106] Id. at 619–20.

[107] Id. at 621.

[108] 232 U.S. 383 (1914).

[109] *Linkletter*, 381 U.S. at 621.

Linkletter immediately filed a petition for writ of habeas corpus, arguing that the *Mapp* rule ought to be applied to him as well.[110]

Prior to Linkletter's petition, the *Mapp* decision had been applied to Mapp himself as well as to those criminal defendants whose cases were still pending on direct appeal.[111] The sole question that remained for the Court to answer, therefore, was whether the case would be applied retroactively, that is, to those whose convictions were tainted by evidence that would have been excluded under *Mapp* but whose convictions were made final before *Mapp* was decided.

According to Linkletter, the Court's past decisions mandated the application of the *Mapp* rule to those in his procedural posture: "Petitioner contends that our method of resolving those prior cases demonstrates that an absolute rule of retroaction prevails in the area of constitutional adjudication. However, we believe that the Constitution neither prohibits nor requires retrospective effect."[112] Rather, the Court held, it would weigh the "merits and demerits" of retroactive application on a rule-by-rule basis.[113] Only where that balancing favored the retroactive application of new constitutional rules would the law be applied other than prospectively.[114] Applying this standard to the case before it, the Court decided that "though the error complained of might be fundamental it is not of the nature requiring us to overturn all final convictions based upon it."[115] Thus, the Court concluded that those such as Linkletter who had been convicted using evidence seized from their property without a warrant were not entitled to reversals of their convictions if their convictions had become final before the *Mapp* decision.

Linkletter is an enormously important decision because it opened the door to the non-retroactive application of criminal procedure

---

[110] Id.

[111] Id. at 622; see, e.g., Ker v. California, 374 U.S. 23, 30–34 (1963) (applying *Mapp* to cases reaching the Supreme Court on direct review).

[112] *Linkletter*, 381 U.S. at 628–29.

[113] Id. at 629 ("Once the premise is accepted that we are neither required to apply, nor prohibited from applying, a decision retrospectively, we must then weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation.").

[114] Id.

[115] Id. at 639–40.

rules. Imagine if *Linkletter* had come out differently: Every prisoner in state custody would have been given the opportunity to relitigate his case if his conviction was obtained using tainted evidence. Instead, the Court's famous and sweeping criminal procedure decisions were made much less sweeping; rather than opening the nation's prisons and creating a flood of relitigation, the decisions were generally applied only prospectively, denying to those whose cases had already been appealed the opportunity to benefit from new rules created after their appeals became final.[116] Although criminal procedure was changed forever by the Warren Court, it was largely changed only prospectively; only where the prosecutor and the trial judge had notice of the new rule and nonetheless violated it would a defendant be entitled to benefit from the rule's violation.

As a result, the costs of creating new rules went down. Would *Miranda* have been decided as it was if the cost of the decision was the granting of new trials to virtually every defendant in state and federal prison? We will never know. But there is certainly reason to suspect that the ability to create rules that would only be applied prospectively encouraged the Warren Court to engage in the reshaping of criminal procedure for which it is so well-known. Nonretroactivity allowed the Court to announce a rule that would bind state officials in the future but would not punish the state for failing to comply with the rule before it was created.

2. Justice Harlan's Criticisms

Although he joined the majority in *Linkletter*, in later cases Justice Harlan would come to criticize the Court from within, arguing that the formulation of purely forward-looking rules is more akin to legislating than it is to judging.[117] Justice Harlan reminded the Court that judges ought to focus on settling the particular dispute

---

[116] See, e.g., Johnson v. New Jersey, 384 U.S. 719, 730–34 (1966) (holding, one week after *Miranda* was decided, that neither *Miranda v. Arizona*, 384 U.S. 436 (1966), nor *Escobedo v. Illinois*, 378 U.S. 478 (1964), would be applied retroactively).

[117] See Desist v. United States, 394 U.S. 244, 258 (1969) (Harlan, J., dissenting) ("I have in the past joined in some of those [retroactivity] opinions which have, in so short a time, generated so many incompatible rules and inconsistent principles. I did so because I thought it important to limit the impact of constitutional decisions which seemed to me profoundly unsound in principle. I can no longer, however, remain content with the doctrinal confusion that has characterized our efforts to apply the basic *Linkletter* principle. 'Retroactivity' must be rethought.").

between the parties before them, leaving to legislators the task of creating general rules that will govern the conduct of unknown actors in the future.[118] When judges create rules applicable only to those whose cases will come before the Court in the future,[119] Justice Harlan argued, they look much more like the latter than the former.[120]

Justice Harlan would come to develop a broad rubric for the application of new rules of criminal procedure. In *Desist v. United States*,[121] Justice Harlan wrote in his dissent that "all 'new' rules of constitutional law must, at a minimum, be applied to all those cases which are still subject to direct review by this Court at the time the 'new' decision is handed down."[122] In order to avoid legislating, Justice Harlan argued, the Court must apply the same rules to all those appearing before it.[123] This view regarding the mandatory nature of retroactivity on direct appeal stood in stark contrast, however, to Justice Harlan's views on the retroactive application of criminal procedure rules on collateral habeas corpus petitions: "[G]iven the current broad scope of constitutional issues cognizable on habeas, it is sounder . . . generally to apply the law prevailing at the time a conviction became final than it is to seek to dispose of all these cases on the basis of intervening changes in constitutional interpretation."[124] In other words, while retroactive

---

[118] Id. at 259 ("If a 'new' constitutional doctrine is truly right, we should not reverse lower courts which have accepted it; nor should we affirm those which have rejected the very arguments we have embraced. Anything else would belie the truism that it is the task of this Court, like that of any other, to do justice to each litigant on the merits of his own case. It is only if our decisions can be justified in terms of this fundamental premise that they may properly be considered the legitimate products of a court of law, rather than the commands of a super-legislature.").

[119] The Supreme Court had indicated its perceived power to deny retrospective relief even to the party bringing the claim, as the law his case made was not available at the time his appeal was being decided. See, e.g., *Linkletter*, 381 U.S. at 621–22 (citing *England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411 (1964), and *Great Northern Railway v. Sunburst Oil & Refining Co.*, 287 U.S. 358 (1932), for the proposition that rules can be announced which need not be applied even to the parties before the court).

[120] *Desist*, 394 U.S. at 259 (Harlan, J., dissenting).

[121] 394 U.S. 244 (1969).

[122] Id. at 258 (Harlan, J., dissenting).

[123] Id. at 258–59 (Harlan, J., dissenting).

[124] Mackey v. United States, 401 U.S. 667, 688–89 (1971) (Harlan, J., concurring in part and dissenting in part).

application should be mandatory on direct review, it should be prohibited on petitions for writs of habeas corpus.[125] Because the purpose of collateral habeas review is to supervise the application of federal rules in the state courts, Justice Harlan argued, it was unnecessary to overturn their decisions based upon law that was not applicable at the time the states considered the issue.[126]

3. More Recent Developments

Justice Harlan's views, particularly his view that the application of new rules of constitutional law on collateral habeas corpus review ought to be treated differently from the application of those rules on direct appeal,[127] never controlled a majority of the Court during his service.[128] Over time, however, his views have come to hold enormous sway with the Court. In its 1987 decision of *Griffith v. Kentucky*,[129] the Supreme Court accepted the first part of Justice Harlan's retroactivity framework.[130] The Court decided in that case

---

[125] Harlan identified two exceptions to this rule, exceptions that would later be largely accepted, along with the rest of his views on habeas corpus, by a majority of the Supreme Court. See infra Section I.B.3.

[126] We see here a tension between two important strands of Justice Harlan's jurisprudence: separation of powers and federalism. His belief in the limited role of the courts encouraged him to decry the use of non-retroactivity on direct appeal. To him, it appeared too like the creation of prospective rules, the sort of thing best left to legislatures. On the other hand, his belief in federalism led him to find the retroactive application of new rules on habeas to be inconsistent with state sovereignty. It was one thing to allow the federal courts to police the state courts. It was quite another to fault the states for failing to apply federal rules that had not yet been created to their proceedings. This tension partially explains the seemingly inconsistent positions Justice Harlan took regarding retroactivity on direct and collateral appeals.

[127] The purpose of habeas petitions from the state courts, Justice Harlan argued, was to make certain that the states were following the federal law that existed at the time of the petitioner's conviction. Thus, the law that existed at the time of conviction, rather than the law at the time of appeal, was the relevant standard. See *Mackey*, 401 U.S. at 688–89 (Harlan, J., concurring in part and dissenting in part).

[128] In fact, the Court adhered strictly to the view that the retroactivity decision should be handled the same way on direct as on petition for habeas. See Stovall v. Denno, 388 U.S. 293, 300 (1967) ("[N]o distinction is justified between convictions now final . . . and convictions at various stages of trial and direct review.").

[129] 479 U.S. 314 (1987).

[130] Id. at 328 ("We therefore hold that a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exemption for cases in which the new rule constitutes a 'clear break' with the past."). Cases that were final were those "in which a judgment of conviction has been rendered, the availability of appeal exhausted, and

that new rules would always be applied to those whose cases were not yet final on appeal. Regardless of whether the rule was in effect at the time the harm complained of occurred, a defendant was entitled to benefit from that rule on his direct appeal.[131]

The question remained, however, whether the same procedural rule would be applied to those cases that were already final on appeal at the time the rule was enacted. That question did not remain unanswered for long. The second part of Justice Harlan's framework—that new rules were generally not to be applied retroactively on habeas appeal—was adopted only two years later in *Teague v. Lane*.[132]

Teague, a groundbreaking decision for a number of reasons, stated that a habeas petitioner generally may not seek to benefit from a new rule of criminal procedure that was created after his appeal became final.[133] In other words, with very limited exceptions, courts are not to apply new rules retroactively on petitions for habeas corpus. But the Court went even further, concluding that a habeas petitioner would not be permitted to seek a new rule of constitutional law on collateral appeal; because the defendant would not be able to benefit from the rule he was seeking to make, the Court reasoned, the examination of his claim would be tantamount to the issuance of a prohibited advisory opinion.[134]

Thus, under the *Teague* standard, if Linkletter had brought his habeas petition the day before *Mapp* was decided, arguing that the exclusionary rule that the Court had already created in *Weeks v. United States*[135] ought to be applied to the states as well, the Court would have been forced to dismiss his claim without considering its

---

the time for a petition for certiorari elapsed or a petition for certiorari finally denied." Id. at 321 n.6.

[131] Id. at 328.

[132] 489 U.S. 288 (1989).

[133] Id. at 310 ("Unless they fall within an exception to the general rule, new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced."). For a more in-depth discussion of *Teague* and its progeny, see infra Section I.D.1.a.

[134] Id. at 316 ("If there were no other way to avoid rendering advisory opinions, we might well agree that the inequitable treatment described above is 'an insignificant cost for adherence to sound principles of decision-making.' But there is a more principled way of dealing with the problem. We can simply refuse to announce a new rule in a given case unless the rule would be applied retroactively to the defendant in the case and to all others similarly situated.") (citations omitted).

[135] 232 U.S. 383 (1914).

merits, on the grounds that he was seeking to create a new law on habeas corpus.[136] Regardless of the merits of that claim (merits the Court at the time clearly would have agreed with) the Court would not have been permitted to hear the case because Linkletter would be seeking to create a new rule on collateral appeal. Thus, by adopting a uniform policy of non-retroactivity on collateral appeal, the Supreme Court has spared the federal courts an enormous amount of constitutional adjudication; it is as if the Court crafted a rubber stamp marked: "PETITION DENIED, SEE *TEAGUE V. LANE*" that could be applied to an enormous number of habeas petitions regardless of their merits.[137]

---

[136] Recall that Linkletter's case had become final on appeal before the decision in *Mapp* and that his claim was brought as a collateral attack rather than a direct appeal. See supra text accompanying notes 107–10.

[137] Since *Teague*, the federal government has become even more deferential to state court rulings on federal law with regard to habeas appeals. Congress passed the Antiterrorism and Effective Death Penalty Act ("AEDPA") in 1996, which provides, in part, that the federal courts do not have jurisdiction to hear a petition for a writ of habeas corpus from a state prisoner unless the state court decision leading to his incarceration "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." Antiterrorism and Effective Death Penalty Act of 1996 § 104(3) (codified as amended at 28 U.S.C. § 2254(d)(1) (2001)). This language appears to insulate from reversal not only decisions that are not contrary to Supreme Court precedent but also those that are contrary to Supreme Court precedent but that are not unreasonable. Thus, state court judges, like state court officials sued for money damages, are protected so long as they act reasonably; much as the state official is entitled to qualified immunity if he violates a plaintiff's rights but could not reasonably have known that he was doing so, so the state court judge is insulated from reversal if she decides a case incorrectly but reasonably. For a discussion of the various possible readings of the 1996 statute, see Alan K. Chen, Shadow Law: Reasonable Unreasonableness, Habeas Theory, and the Nature of Legal Rules, 2 Buff. Crim. L. Rev. 535 (1999).

In any case, with regard to order of decisionmaking, it appears that the federal courts will treat the provisions of the new habeas statute in much the same way they treated the one in place at the time *Teague* was decided. For example, in late 2000 the Fourth Circuit decided that when reviewing a state court conviction under the new habeas statute, a federal court need not necessarily determine whether a petitioner's constitutional rights were violated. Rather, it is sufficient for a court to decide that the conviction did not involve a legal ruling that "was contrary to, or involved an unreasonable application of" clearly established federal law. Bell v. Jarvis, 236 F.3d 149, 157 (4th Cir. 2000) (en banc). Although the court did not say that this approach to the order of decisionmaking is mandated by *Teague* or other federal precedents, it seems a small leap from the Supreme Court's past decisions to that conclusion.

4. Summary

In summary, the non-retroactive application of the criminal procedure decisions of the Warren Court was credited by some (and derided by others) with allowing the Court to create sweeping new rules of constitutional law without at the same time sweeping open the nation's prisons. I agree that this lowering of the cost of innovation may have contributed to the scope of the Warren Court's innovation. I argue below, however, that the brand of non-retroactivity practiced by the Supreme Court cannot have this innovation-encouraging effect. Because the entitlement to a remedy has been made a threshold question, non-retroactivity has lost whatever laudable effect it ever provided.[138]

C. Qualified Immunity

The third doctrine considered in this Article by which rights and remedies are separated is qualified immunity. Qualified immunity is an affirmative defense that can be raised by government officials who have been sued for money damages for violating a plaintiff's civil rights. In short, the doctrine permits the official to defeat the suit at an early stage unless it can be shown that she violated a clearly established right of the plaintiff. As we will see, qualified immunity, like the other doctrines discussed above, has the capacity to either stifle the development of constitutional law—by allowing courts to avoid difficult questions of constitutional law—or to further it—by allowing courts to make broad changes in the law at a relatively low social cost.

1. Origins

In 1982 the Supreme Court decided *Harlow v. Fitzgerald*,[139] clarifying what showing a state or federal officer must make in order to assert qualified immunity and thereby avoid trial when sued for violating a plaintiff's civil rights. Fitzgerald accused Harlow and his co-defendants (including President Nixon) of conspiring to have him fired from his job in the Department of the Air Force in viola-

[138] See infra Section I.D.1.a.
[139] 457 U.S. 800 (1982).

tion of his constitutional rights.[140] Each of the defendants asserted both absolute and qualified immunity. The Court concluded that, with the exception of the President,[141] the defendants were not entitled to absolute immunity. The Court reasoned that a balancing of the need to protect officials absolutely from suit against the value of providing a remedy to those harmed by official action simply did not favor the provision of absolute immunity to those in the defendants' positions.[142]

Turning to whether these defendants were entitled to assert *qualified* immunity as an affirmative defense, the Court returned to first principles, reexamining the grounds for the defense.[143] The Court's arguments on these points were hardly a model of clarity, however. The Court stated that qualified immunity historically had both a subjective and an objective component and that state actors have been entitled to immunity from suit unless it could be shown that they "*knew or reasonably should have known*" that their conduct violated a right of the defendant.[144] The Court then went on to state, however, that "[t]he subjective element of the good-faith defense frequently has proved incompatible with our admonition in *Butz* [*v. Economou*[145]] that insubstantial claims should not proceed to trial."[146] Because a defendant's subjective good faith is an issue that can rarely be resolved other than by a jury, the Court reasoned, a bare allegation of bad intentions on the part of the

---

[140] Id. at 802–04.

[141] In a separate opinion, *Nixon v. Fitzgerald*, 457 U.S. 731 (1982), the Court concluded that the President of the United States is absolutely immune from suit for all acts arising out of his duties as President. Id. at 757.

[142] *Harlow*, 457 U.S. at 809–12. The Court contrasted the defendants, both subordinates within the executive branch with the President, Nixon v. Fitzgerald, 457 U.S. 731 (1982); with legislators, Eastland v. United States Servicemen's Fund, 421 U.S. 491 (1975); and with judges, Stump v. Sparkman, 435 U.S. 349 (1978); all of these groups were traditionally entitled to absolute immunity under the Court's previous decisions.

[143] Qualified immunity derives principally from the Court's decision in *Pierson v. Ray*, 386 U.S. 547 (1967), that police officers sued for making illegal arrests would not be liable if they acted in "good faith and [with] probable cause." Id. at 557. In *Wood v. Strickland*, 420 U.S. 308 (1975), the Court expanded on this holding and made clear that an official could be liable if she knew or should have known that her actions would violate the constitutional rights of the plaintiff. Id. at 321–22.

[144] *Harlow*, 457 U.S. at 815.

[145] 438 U.S. 478 (1978).

[146] *Harlow*, 457 U.S. at 815–16.

defendant is often sufficient to defeat summary judgment and force a trial, even where there is very little evidence to support the allegation of bad faith.[147] Thus, the Court held, henceforth qualified immunity would be a purely objective inquiry.[148]

The problem with the *Harlow* language, however, is that the Court was not entirely clear what it meant when it said that it was eliminating the subjective element of the qualified immunity defense. On the one hand, the Court could simply have been stating that henceforth it would not be sufficient to defeat a motion for summary judgment that a plaintiff had pled that the defendant was motivated by a desire to deprive the plaintiff of her rights.[149] On the other hand, it is possible that the Court was going even further and stating that no subjective inquiry would be made at all, and that the only question it would consider is whether the defendant *should have known* that she was violating the plaintiff's rights, not whether the defendant did in fact know.[150] In the face of this ambiguity, Justice William J. Brennan, Jr. wrote a concurrence in which Justices Thurgood Marshall and Harry A. Blackmun joined, approving of the Court's opinion to the extent that it "would not allow the official who *actually knows* that he was violating the law to escape liability for his actions, even if he could not 'reasonably have been expected' to know what he actually did know."[151] This concurrence is clearly consistent with the *former* reading of the Court's opinion, but not with the *latter*.[152]

---

[147] Id. at 816–17.

[148] Id. at 819.

[149] There is certainly text in the opinion to support this reading. See, e.g., id. at 817–18 ("Consistently with the balance at which we aimed in *Butz*, we conclude today that *bare allegations of malice* should not suffice to subject government officials either to the costs of trial or to the burdens of broad-reaching discovery.") (emphasis added).

[150] There is also text to support this reading of the opinion. In the sentence immediately following the one quoted in the previous footnote, the Court seems to be making exactly the opposite point: "We therefore hold that government officials, performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Id. at 818 (citations omitted). The clear implication of this statement is that the proper inquiry is into what a reasonable person would understand the law to be, not what this defendant in fact understood the law to be.

[151] Id. at 821 (Brennan, J., concurring) (quoting id. at 819 n.33 (opinion of the Court)).

[152] For an analysis of how *Harlow* has worked out in practice, see Kit Kinports, Qualified Immunity in Section 1983 Cases: The Unanswered Questions, 23 Ga. L.

Regardless of how *Harlow* is eventually interpreted, as it now stands, qualified immunity remains available to state officers sued under 42 U.S.C. § 1983 and to federal officers sued under the doctrine of *Bivens v. Six Unknown Agents of Federal Bureau of Narcotics*[153] unless a reasonable officer would have known that her actions violated the rights of the plaintiff. Furthermore, after *Harlow*, the key inquiry is whether the official should have known that her conduct violated the plaintiff's civil rights, and a large amount of case law and commentary has sprung up on this issue.[154] The inquiry is generally into whether the relevant case law was sufficiently well-settled that a reasonable officer would have been aware that her conduct violated the plaintiff's rights rather than into whether the officer intended to deprive the plaintiff of her rights.[155]

2. More Recent Developments

Qualified immunity remains an extraordinarily important doctrine in the litigation of civil rights claims in the state and federal courts. It arises nearly every time an officer is sued for money damages and is quite often successful in helping officers avoid liability and suit. As a result, qualified immunity has come to be widely decried as an enemy of civil rights, a way of denying recovery to those who can demonstrate a violation of their civil rights.[156]

Rev. 597, 661 (1989) (arguing that "*Harlow* and its progeny should be read to deny qualified immunity to a public official who is guilty of acting in violation of the Constitution if she actually realized that her conduct was unconstitutional, or if the reasonable public official acting under the same circumstances would have recognized the unconstitutionality of that conduct").

[153] 403 U.S. 388 (1971).

[154] See, e.g., John C. Jeffries, Jr. et al., Civil Rights Actions: Enforcing the Constitution 99–100 (2000) ("Given elimination of the subjective branch of qualified immunity, the crucial question became just how clearly established a constitutional right had to be before the defendant could be held liable for violating it, and—more importantly, at what level of specificity that inquiry should be made.").

[155] See, e.g., Saucier v. Katz, 533 U.S. __, 121 S. Ct. 2151, 2156 (2001) ("The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted.").

[156] See, e.g., Stephen J. Shapiro, Public Officials' Qualified Immunity in Section 1983 Actions Under *Harlow v. Fitzgerald* and its Progeny: A Critical Analysis, 22 U. Mich. J.L. Reform 249, 252–53 (1989) (arguing that the immunity described in *Harlow* is supported neither by the history of Section 1983 nor by valid public policy concerns).

As I mentioned at the outset, John Jeffries has argued in the face of this criticism that qualified immunity is actually a laudable development, as it lowers the cost of constitutional innovation, thereby making courts more likely to innovate. In the next Section, I engage this discussion, concluding that the resolution of this argument depends largely, if not entirely, upon the order in which the court addresses the questions presented by a qualified immunity defense.

D. Harmless Error and New Law Doctrines Compared

Until this point I have dealt with the doctrines under consideration—harmless error, non-retroactivity, and qualified immunity—entirely separately. In this Section, I attempt to synthesize them, arguing that two things are vitally important in considering these doctrines as a group. The first is the order in which courts consider the questions presented. If the ultimate availability of a remedy is made a threshold question, courts will have the capacity to duck important questions of constitutional law and the law will staguate. If, by contrast, courts are forced to consider the substance of a litigant's claim first and to address the availability of a remedy only after they have found the claim to be meritorious, constitutional law can be nudged forward.

The second finding of this Section is that novelty matters a great deal. What fundamentally separates harmless error from qualified immunity and non-retroactivity is that the latter two doctrines deal with the novelty of the law being made. For example, an officer in a case making novel law is entitled to qualified immunity because he could not reasonably have known that the courts were going to use his conduct as an opportunity to make new law. And that only seems right. Furthermore, officers in later cases will not be entitled to qualified immunity, as their actions will be informed by their imputed awareness of the rule created in the prior case. This, too, seems just. This structure, which typifies both qualified immunity and non-retroactivity, is distinctly different from that of harmless error. As we saw above, harmless error is inevitably a case-by-case determination. The evidence found to be erroneously admitted is balanced against the weight of permissible evidence in order to determine the likelihood that the wrongfully-admitted evidence contributed to the conviction. Whether the prosecutor knew, could

have known, or should have known that the evidence offered was tainted is wholly irrelevant to this determination. Thus, the temporal quality that we see in both non-retroactivity and qualified immunity is missing from harmless error, and as a result, there is very little impetus for state actors to change their behaviors over time.

1. Order Matters

In this Subsection, I discuss the importance of the order in which the Supreme Court addresses the issues presented by these doctrines. What I will demonstrate is that this small procedural point makes all of the difference in the effect these doctrines can have on the substantive constitutional law. I begin by showing that the Court's current non-retroactivity doctrine has the effect of completely eliminating any positive effect the doctrine may at one time have had on the substance of constitutional law. Next, I show how recent qualified immunity decisions have bolstered Jeffries's argument regarding the power of that doctrine to de-ossify constitutional law.[157] Finally, I turn to the muddle that is the Court's harmless error analysis, concluding that only if the harmlessness of a trial error is determined after the substance of the defendant's constitutional claim has been decided can harmless error function more like qualified immunity and less like non-retroactivity.

a. Non-retroactivity

We have seen that on direct appeal, new rules of constitutional law are now given retroactive application, applied not only to the criminal defendant bringing the claim, but to all others whose appeals were not yet complete at the time the new rule was created.[158] Thus, the Warren Court's case-by-case evaluation of whether to apply a rule retroactively[159] has been replaced by a blanket rule of retroactivity. To the extent that the non-retroactive application of new rules of criminal procedure had a laudable effect on the substance of criminal procedure, that effect has been drastically reduced. Furthermore, after the Supreme Court's decision in

[157] See supra Introduction.
[158] See supra Section I.B.3.
[159] See supra Section I.B.1.

Teague v. Lane,[160] the situation is very different for those defendants seeking to benefit from new rules by means of collateral habeas corpus petitions. On petitions for a writ of habeas corpus, petitioners can (with two narrow exceptions) neither seek to benefit from a new rule of constitutional law made after their direct appeals became final, nor seek to create new law through a habeas petition.[161]

The order of decisionmaking the Court mandated in *Teague*, however, essentially ensures that the non-retroactive application of new rules to petitioners for writs of habeas corpus will retard, rather than encourage, the development of criminal procedure. In *Teague*, the Court stated that it would "simply refuse to announce a new rule in a given case unless the rule would be applied retroactively to the defendant in the case and to all others similarly situated."[162] Under *Teague*, therefore, the court should first determine whether or not the appellant is seeking to benefit from a new rule and if so, whether she would be entitled to benefit from that rule.[163] Only if the court finds either that the appellant is not trying to create a new constitutional rule, or that she would be entitled to benefit from that rule if it were created, will the court even turn to whether the appellant is correct on the substance of her claim.[164]

---

[160] 489 U.S. 288 (1989).

[161] See supra notes 133–36 and accompanying text.

[162] *Teague*, 489 U.S. at 316 ("This Court consistently has declined to address unsettled questions regarding the scope of decisions establishing new constitutional doctrine in cases in which it holds those decisions nonretroactive. This practice is rooted in our reluctance to decide constitutional questions unnecessarily.") (citing *Bowen v. United States*, 422 U.S. 916, 920 (1975)).

[163] *Teague*, 489 U.S. at 316 ("We therefore hold that, implicit in the retroactivity approach we adopt today, is the principle that habeas corpus cannot be used as a vehicle to create new constitutional rules of criminal procedure unless those rules would be applied retroactively to *all* defendants on collateral review through one of the two exceptions we have articulated."); see also id. at 307 (holding that a petitioner seeking to benefit from a new rule of constitutional law will be permitted to do so only if she has demonstrated either that the new rule places "certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe" or "if it requires the observance of those procedures that . . . are implicit in the concept of ordered liberty") (internal quotes omitted).

[164] Needless to say, this ruling regarding the order of decisionmaking has had an enormous impact on habeas litigation in the United States. *Teague* has greatly eased the burden of a federal judiciary that has been known to complain about the size of its workload, particularly in the criminal and prisoner litigation contexts. See, e.g., Richard A. Posner, The Federal Courts: Challenge and Reform 53–86 (1996)

In *Teague*, the Court stated that this approach to the order of non-retroactivity decisionmaking was necessary because to do otherwise would be to sanction the issuance of impermissible advisory opinions.[165] Were the Court to decide the merits of the defendant's case only to later find that the defendant is not entitled to any relief, the Court reasoned, it would be deciding an issue not properly before it—namely the substance of the petitioner's claim. The question remains, however, whether this would in fact be a violation of Article III's case or controversy requirement or whether it is merely a violation of the so-called avoidance doctrine: Constitutional interpretation ought to be avoided if at all possible.[166] In favor of the latter reading, Professor James Liebman has argued that it is the Court's approach in *Teague* and not its converse that requires the issuance of advisory opinions.[167]

Whatever the constitutional merits of treating entitlement to a remedy as a threshold question (and I will demonstrate below that the Court's own decisions in the areas of qualified immunity and harmless error call these merits into question), there is no doubting the effect that order of decisionmaking has had on the impact of the non-retroactivity doctrine. While non-retroactivity served the Warren Court by lowering the cost of constitutional innovation,

---

(documenting the growing workload of the federal bench). Now a court need not resolve the substance of every habeas case that comes before it; if the court can simply determine that the rule by which the prisoner seeks to benefit was not yet established at the time his case became final on appeal, it must stop there.

[165] See, e.g., *Teague*, 489 U.S. at 316 (arguing that refusing to make new rules in cases in which they will not be applied retroactively is the most principled way "to avoid rendering advisory opinions").

[166] See, e.g., James A. Gardner, The Ambiguity of Legal Dreams: A Communitarian Defense of Judicial Restraint, 71 N.C. L. Rev. 805 (1993); Lisa A. Kloppenberg, Avoiding Constitutional Questions, 35 B.C. L. Rev. 1003 (1994); Adrian Vermeule, Saving Constructions, 85 Geo. L.J. 1945 (1997).

[167] James S. Liebman, More Than "Slightly Retro:" The Rehnquist Court's Rout of Habeas Corpus Jurisdiction in *Teague v. Lane*, 18 N.Y.U. Rev. L. & Soc. Change 537, 570 (1990–91) ("If retroactivity is treated as a 'threshold' matter, everything the court necessarily will have to say on the constitutional merits of the proposed rule in the process of resolving the retroactivity question will be hypothetical—in direct violation of the injunction that the plurality itself endorsed against 'rendering advisory opinions.'"); see also Patrick E. Higginbotham, Notes on *Teague*, 66 S. Cal. L. Rev. 2433, 2448–49 (1993) (arguing that the Supreme Court's decision in *Siegert v. Gilley*, 500 U.S. 226 (1991), indicates that it is possible to consider the merits of a case before deciding on the entitlement to a remedy); Kathleen Patchel, The New Habeas, 42 Hastings L.J. 939, 1003 (1991) ("The *Teague* threshold test . . . neither avoids treating similarly-situated defendants differently, nor avoids rendering advisory opinions.").

the doctrine now serves not only to deny relief to those claiming a constitutional violation but also to inhibit the litigation of novel theories. Because those theories cannot be brought at all by those who have already had a day in federal court, an entire class of potential litigants is simply removed from the equation.

b. Qualified Immunity

Unfortunately, the Court has not always been so careful regarding the order in which the issues that arise in qualified immunity cases ought to be addressed. Only within the last few years has the Court treated these issues with anything approaching rigor. These recent decisions, however, are of crucial importance and point the Court in what I believe is the only sensible direction regarding the order of decision in these cases.

The 1991 case of *Siegert v. Gilley*[168] marked the first time that the Court expressly addressed the order in which the issues raised by a claim of qualified immunity in a civil rights suit ought to be considered. Because the case turned crucially on the structure of the lower court opinions, the procedural history of the case must be addressed in some depth. In *Siegert*, the plaintiff alleged that his supervisor at a government hospital had defamed him to a prospective employer when asked for a reference.[169] Defendant Gilley asserted qualified immunity as an affirmative defense and filed a motion to dismiss the complaint on the ground that even if his actions were eventually found to be defamatory, he was entitled to qualified immunity as the law of defamation by supervisors was far from clearly established at the time that he spoke with Siegert's prospective employer.[170] When his motion to dismiss was denied, Gilley took an interlocutory appeal to the D.C. Circuit, which set forth in detail the complicated issues of pleading and proof raised by the case.[171]

The D.C. Circuit began by examining whether Gilley's conduct violated any clearly established rights of Siegert: in other words, whether Gilley was entitled to qualified immunity. Finding this

---

[168] 500 U.S. 226 (1991).
[169] Id. at 228.
[170] Id. at 229.
[171] Siegert v. Gilley, 895 F.2d 797 (D.C. Cir. 1990).

case to be sufficiently different from others involving defamation in the employment context (largely because the information Gilley supplied was provided in response to a request for information from Siegert's prospective employer rather than volunteered), the circuit court held that the rights Siegert claimed were not clearly established at the time that Gilley acted, and therefore that Gilley ought to be entitled to qualified immunity.[172]

But the court did not stop there. It then turned to whether the allegations of bad faith contained in the complaint were sufficient to defeat the claim of immunity, notwithstanding the fact that the right alleged to have been violated was not clearly established at the time Gilley acted. Without explicitly finding that such an allegation, without more, would elevate the defendant's alleged actions to the level of constitutional violation,[173] the circuit court found that, regardless, the plaintiff had not made such an allegation with sufficient particularity.[174] Thus, because the plaintiff asserted rights that

---

[172] Id. at 803.

[173] See id. ("We assume, *without deciding*, that such bad faith motivation would suffice to make Gilley's actions in writing the letter a violation of Siegert's constitutional rights . . . .") (emphasis added).

[174] Id. at 803–04. Here, the court of appeals had to wade through the arcana of its pleading jurisprudence. It began by noting that after *Harlow*, qualified immunity was now a purely objective inquiry; courts were not to inquire into what the defendant actually knew of the law at the time he acted, but rather into whether a reasonable officer would have known that his conduct was violative of the plaintiff's rights. Since the reason for granting government officials immunity was to immunize them not only from damages but from the expense and inconvenience of having to defend suits against them, permitting an inquiry into their actual state of mind would prevent "termination of meritless claims at the earliest possible stage of a litigation." Id. at 801.

The D.C. Circuit had previously concluded in *Martin v. D.C. Metropolitan Police Department*, 812 F.2d 1425 (D.C. Cir. 1987), however, that "when the governing precedent identifies the defendant's intent (unrelated to knowledge of the law) as an essential element of plaintiff's constitutional claim, the plaintiff must be afforded an opportunity to overcome an asserted immunity with an offer of proof of the defendant's alleged unconstitutional purpose." Id. at 1433 (citations omitted). Obviously, if the defendant's malicious intent (as opposed to his knowledge that his conduct violated the law) was required by statute to be pleaded and proved, the plaintiff would have to be entitled to make a claim that the defendant had the requisite unconstitutional purpose. The court had also decided, however, that bare allegations of malicious intent were insufficient to defeat a motion to dismiss. Instead,

> [w]here the defendant's subjective intent is an essential component of plaintiff's claim, once defendant has moved for pretrial judgment based on a showing of the objective reasonableness of his actions, then plaintiff, to avert dismissal

were not clearly established and because plaintiff had failed to plead his allegations of improper intent with sufficient particularity, the circuit court remanded the case to the district court "with instructions that the case be dismissed."[175]

The Supreme Court took the plaintiff's appeal from the D.C. Circuit "in order to clarify the analytical structure under which a claim of qualified immunity should be addressed."[176] However, if the Court's goal was clarity, it missed its mark by a great distance.[177] The Court began by stating that "petitioner in this case failed to satisfy the first inquiry in the examination of such a claim; he failed to allege the violation of a clearly established constitutional right."[178] The Court went on, finding that the court of appeals was wrong to "assume, without deciding" that an allegation of bad intent would suffice to create a constitutional cause of action. Rather, the Court wrote, the first question that ought to be asked when considering a question of qualified immunity "is the determination of whether the plaintiff has asserted a violation of a constitutional right at all."[179] By deciding this "purely legal question" at the earliest possible opportunity, the Court stated, those entitled to immunity would be spared the indignities of having to defend a meritless lawsuit.[180] The Court went on to decide this legal question in the instant case, finding that its previous decision in

---

short of trial, must come forward with something more than inferential or circumstantial support for his allegation of unconstitutional motive.

Id. at 1435. Absent such a substantiated allegation of subjective bad faith, the court concluded, the pretrial inquiry is a purely objective one, with no investigation into the defendant's state of mind required and none permitted.

[175] *Siegert*, 895 F.2d at 803–05.

[176] *Siegert*, 500 U.S. at 231.

[177] See, e.g., Greabe, supra note 8, at 412 ("[T]he Court's prescription of the correct manner in which to conduct the inquiry is unclear and, in light of the Court's rationale, ultimately incoherent.").

[178] *Siegert*, 500 U.S. at 231.

[179] Id. at 232.

[180] Id. This is a highly debatable proposition. It is unclear whether, as a general matter, a resolution of the merits or a resolution of the immunity issue will lead to an earlier termination of a civil proceeding. Furthermore, where there are factual disputes regarding what actions were taken by the government actor, it may be that neither the merits nor the immunity issue can be resolved short of trial. See Alan K. Chen, The Burdens of Qualified Immunity: Summary Judgment and the Role of Facts in Constitutional Tort Law, 47 Am. U. L. Rev. 1 (1997).

Paul v. Davis[181] precluded recovery by Siegert on the merits.[182] Because Siegert's claim, like Davis's, was based on an injury entirely reputational in nature, he would not be entitled to recovery even if he were able to show that Gilley acted in bad faith. As the Court had held that reputation alone is not a liberty or property interest for Fifth Amendment purposes, Siegert simply could not show a due process violation and his complaint ought to be dismissed on that ground alone.[183]

Thus, both the D.C. Court of Appeals and the Supreme Court came to the conclusion that Siegert's complaint should be dismissed but did so for very different reasons. While the court of appeals rejected the complaint on the basis of qualified immunity, the Supreme Court held that it was not necessary to reach that conclusion because the complaint failed to state a claim on which relief could be granted. Given the fact that the Supreme Court took the case with the stated intention of clarifying the procedure for deciding qualified immunity claims, many took the decision in *Siegert* as an announcement of a novel treatment of qualified immunity cases.[184] For these commentators, it was now clear that constitutional issues presented by a civil rights suit should be dealt with first, and only if those claims were found to be meritorious should courts even consider the defendant's qualified immunity claim. Others argued that *Siegert*, because it did not appear to address qualified immunity at all (after all, the Court did not rule on the qualified immunity question in any way), simply could not be taken as a prescription for the proper way to deal with a qualified immunity case.[185]

---

[181] 424 U.S. 693 (1976). Davis claimed that the inclusion by the police of his mugshot along with others on a list of known "Active Shoplifters" violated his rights to due process. The Court rejected his claim on the ground that one does not have an interest in one's reputation sufficient to invoke the Due Process Clause of the Fifth and Fourteenth Amendments. Id. at 697.

[182] *Siegert*, 500 U.S. at 233–34.

[183] Id. at 233–35.

[184] See, e.g., Blum, supra note 8, at 190 (describing *Siegert* as creating a "new structure of analysis" in qualified immunity cases).

[185] See, e.g., Alan K. Chen, The Ultimate Standard: Qualified Immunity in the Age of Constitutional Balancing Tests, 81 Iowa L. Rev. 261, 280 n.107 (1995) ("It is clear to me that the Court's characterization of its immunity analysis in *Siegert* is misguided, for that ordering of decisionmaking suggests that the Court is not engaged in qualified immunity analysis at all. The result in *Siegert*, for example, could have,

This confusion about the meaning of *Siegert* was not limited to commentators; the lower federal courts were unsure of how seriously to take the Court's announcement of a new approach to qualified immunity questions.[186] The reason for the reluctance of some lower court judges to embrace *Siegert* seems relatively straightforward. Deciding that a case is close, and that therefore the defendant is entitled to qualified immunity, is far easier than resolving the close question of constitutional law.[187] Thus, courts will generally be inclined to decide immunity issues before turning to the generally more complicated constitutional issues presented by civil rights litigation.

Following *Siegert*, the Supreme Court did attempt to direct the lower courts from time to time. Take, for example, the case of *County of Sacramento v. Lewis*.[188] In that case, the Court chastised the lower court for departing from the approach outlined in *Siegert*.

> The District Court granted summary judgment to Smith on the basis of qualified immunity, assuming without deciding that a substantive due process violation took place but holding that the law was not clearly established in 1990 so as to justify imposition of § 1983 liability. We do not analyze this case in a similar fashion because, as we have held, the better approach to resolving cases in which the defense of qualified immunity is raised is to determine first whether the plaintiff has alleged a deprivation of a constitutional right at all. Normally, it is only then that a court should ask whether the right allegedly implicated was clearly established at the time of the events in question.[189]

Note what the Court does not say. The Court does not say that the district court's approach to this question was wrong. It merely says that it is deciding the merits of the claim first because it is con-

---

and should have, been reached by concluding that the plaintiff's complaint failed to state a claim upon which relief could be granted.").

[186] See Christopher Johnsen & James C. Todd, Federal Immunity Law in Higher Education, 26 J.C. & U.L. 221, 235–36 (1999) (describing the Sixth, Seventh, Tenth, and part of the Eleventh Circuits as following *Siegert* while observing that the First, Second, Third, Fifth, Eighth, and part of the Sixth Circuits apply a different test).

[187] See, e.g., id. at 235 ("But the *Siegert* formulation, however lucidly articulated, has been reluctantly embraced by some lower courts, probably because it runs counter to a trial judge's preferences.").

[188] 523 U.S. 833 (1998).

[189] Id. at 841 n.5 (citing *Siegert*, 500 U.S. at 232).

vinced that its earlier decision in *Siegert* set forth "the better approach."[190]

The confusion that was caused by the Court's decision in *Siegert* was resolved, at least for the moment, by *Wilson v. Layne*[191] in 1999. *Wilson* concerned the constitutionality of so-called "media ride-alongs" in which members of the media accompany police officers executing arrest and search warrants.[192] Wilson claimed that although the officers were entitled to enter his home if they possessed a valid warrant, no legitimate state interest was served by the entrance of the media and that, as a result, he had been deprived of his Fourth Amendment rights.[193] His arguments before both the trial and appellate courts were unavailing, and his case arrived before the United States Supreme Court.[194]

Without much fanfare, the Court approached the issues presented in *Wilson* by first considering the merits of the appellant's claim and then—only after they found the case to be meritorious[195]—turning to the question of whether the plaintiff was entitled to relief.[196] On this latter question, the Court concluded that the defendant's right was not well-established at the time of the government action, and that, as a result, the defendant was entitled to qualified immunity and the plaintiff was not entitled to relief.[197]

Wilson is, thus, different from *Siegert*, *Lewis*, and the other recent qualified immunity cases in one important way. For the first

---

[190] *Lewis*, 523 U.S. at 841 n.5.

[191] 526 U.S. 603 (1999).

[192] Id. at 606–08.

[193] Id. at 608.

[194] Id.

[195] Id. at 614 ("We hold that it is a violation of the Fourth Amendment for police to bring members of the media or other third parties into a home during the execution of a warrant when the presence of the third parties in the home was not in aid of the execution of the warrant.") (footnote omitted).

[196] Id. ("Since the police action in this case violated the petitioners' Fourth Amendment right, we now must decide whether this right was clearly established at the time of the search.") (citing *Siegert*, 500 U.S. at 232–33).

[197] *Wilson*, 526 U.S. at 617–18 ("Given such an undeveloped state of the law, the officers in this case cannot have been 'expected to predict the future course of constitutional law.' Between the time of the events of this case and today's decision, a split among the Federal Circuits in fact developed on the question whether media ride-alongs that enter homes subject the police to money damages. If judges thus disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of the controversy.") (citations omitted).

time, the Court found that the plaintiff had sufficiently asserted the violation of a constitutional right, and then went on to find that the right that the plaintiff had shown to be violated was not clearly established at the time of the incident giving rise to the litigation and that therefore no recovery could be had. In other words, in *Siegert* and the cases that immediately followed it, the Court generally adhered to its assertion that the merits should be examined first but had never, until *Wilson*, confronted the situation where the evaluation of the merits ended up being irrelevant to the eventual outcome of the case. *Wilson* thus presented a tougher case than its predecessors, forcing the Court to confront whether it truly meant what it said in *Siegert* that the merits of a constitutional claim should be evaluated before any claims of immunity. Although the Court did not explicitly note the gravity of the decision, it is difficult to avoid the fact that the first half of the Court's opinion (finding a constitutional violation) is rendered moot—at least as to this case—by the second half of the opinion (finding no liability on the part of this defendant).[198]

Thus, one could argue that with *Wilson* the Court issued exactly the sort of advisory opinion about which it had professed such concern in *Teague* and its progeny. In *Teague*, the Court worried that by evaluating the merits of a case, only to find that the claimant would not be entitled to relief, the Court ran the risk of issuing an advisory opinion and therefore ought to studiously avoid the practice. Yet, in the qualified immunity context, the Court has essentially mandated this approach, stating—without a clear explanation—that merits ought to be considered before defenses.[199] The Court makes no mention of this apparent contradiction in any of its

[198] An empirical question is presented by the decision in *Wilson v. Layne*: Are lower courts in fact embracing *Wilson* with any more enthusiasm than they did *Siegert*? In other words, now that the Court has made relatively clear that merits are to be evaluated before entitlement to a remedy in qualified immunity cases, have lower courts decided cases in this way? I hope to investigate that question in a later article.

[199] Absent from the Court's analysis, however, is any sense that the Court is requiring merits adjudication first in order to prevent the ossification of constitutional law. Rather, the Court sounds in efficiency, stating that the adjudication of constitutional claims at the earliest possible moment will allow official defendants to be released from cases at the earliest possible moment. For the reasons set forth above, I am very dubious about that assertion.

opinions; if there are principled grounds for distinguishing between the two doctrines, the Court has yet to share those with us.[200]

Note here how important the *Wilson* decision is for those who argue, along with Jeffries, that qualified immunity has the power to de-ossify constitutional law.[201] It is only if we take *Wilson* seriously that this argument can succeed; if the Court had followed its pre-*Siegert* practice of permitting qualified immunity to be used as a threshold question in constitutional tort cases, courts simply would not have to answer difficult questions of constitutional law in any case in which they upheld the defense.

Furthermore, if the entitlement to qualified immunity were determined before the merits of the underlying case, difficult issues and close cases would almost never be decided on the merits in damages actions.[202] To say that a case is close is to say that the law is not well established; to say that the law is not well-established is to say that the defendant is entitled to qualified immunity; to say that the defendant is entitled to qualified immunity is to say that the Court need not resolve the merits of the close case. This nearly circular analysis could serve to stagnate the substance of constitutional law almost indefinitely.[203] It is only when the Court first looks at the substance of each constitutional claim brought before it and then looks to whether the plaintiff will be entitled to benefit that qualified immunity can have the progressive influence on the law that Jeffries and others ascribe to it.[204]

---

[200] In a later article I will focus on this contradiction, examining if there is any way to reconcile this seeming inconsistency between the Court's habeas jurisprudence and its qualified immunity jurisprudence.

[201] See supra Introduction.

[202] Qualified immunity is not available in actions seeking only injunctive relief, because it exists to insulate individual officers from suit. Thus, the availability or unavailability of qualified immunity will not affect the merits determination when plaintiffs seek only injunctive relief. The availability of damages, however, makes litigation considerably more attractive for potential plaintiffs and their attorneys.

[203] See, e.g., Greabe, supra note 8, at 408–11 (arguing that what he refers to as "merits bypass" has the effect of freezing constitutional law).

[204] Despite the centrality of the decisionmaking order to Jeffries's article, he is largely silent about the issue in his article. Written between *Siegert* and *Wilson*, the article seems to take for granted the fact that merits consideration will precede any analysis of a qualified immunity claim. However, at the time Jeffries wrote the article, the Court had never actually upheld a constitutional claim only to refuse to grant the plaintiff relief on the grounds of defendant's qualified immunity defense, and its *Teague* analysis seemed to preclude such a result.

Just last term, in *Saucier v. Katz*,[205] the Supreme Court reaffirmed the *Siegert* decision, giving the order of decisionmaking first laid out in that case its strongest endorsement yet.

> A court required to rule upon the qualified immunity issue must consider . . . this threshold question: Taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right? This must be the initial inquiry. In the course of determining whether a constitutional right was violated on the premises alleged, a court might find it necessary to set forth principles which will become the basis for a holding that a right is clearly established. *This is the process for the law's elaboration from case to case, and it is one reason for our insisting upon turning to the existence or nonexistence of a constitutional right as the first inquiry.* The law might be deprived of this explanation were a court simply to skip ahead to the question whether the law clearly established that the officer's conduct was unlawful in the circumstances of the case.[206]

This language is revealing, not simply because it demonstrates the Court's commitment to this order of decisionmaking in qualified immunity cases, but also because it explicates for the first time the rationale underlying both *Siegert* and *Wilson*: The merits must be resolved prior to any inquiry into the defendants' entitlement to qualified immunity in order to ensure that the Court is able to explain the contours of constitutional law. What is more, that rationale is entirely consistent with my thesis, namely that if the question of the entitlement to qualified immunity is addressed before the substance of a plaintiff's claim, the contours of the law will never become well-defined, and the entitlement of defendants to qualified immunity will continue in perpetuity.

c. Harmless Error

The structure of harmless error adjudication in criminal cases is actually quite similar to that of qualified immunity in civil rights litigation. As with qualified immunity, there are essentially two ways to approach the questions presented. On the one hand, courts

---

[205] 533 U.S. __, 121 S. Ct. 2151 (2001).

[206] Id. at 2156 (emphasis added) (citation omitted).

can evaluate the substantive claim of error and then, if the claim is found to be meritorious, they can determine whether or not the defendant is entitled to relief. That is, courts can look at whether error occurred in the defendant's trial and only turn to an evaluation of the impact of that error after determining that it occurred. On the other hand, courts can choose to determine first whether the error complained of could have made a difference in the defendant's trial and turn to the substance of the defendant's claim only if the error might have made a difference at trial.

As with the two approaches to qualified immunity questions, there are strong arguments to be made in favor of each. The first approach can be justified by the argument that the purpose of a reviewing court is not merely to decide the case in front of it but to provide litigants and the lower courts with guidance and direction. By resolving key issues of constitutional law, even those not necessary to the outcome of the instant case, appellate courts can avoid unnecessary appeals by clarifying the state of the law for the lower courts. The second approach, by contrast, has the advantage of efficiency. An appellate court overburdened with work can decide only those parts of cases that absolutely require adjudication by refusing to entertain those claims that could not lead to recovery even were they resolved in the claimant's favor.

Although harmless error closely tracks the form of qualified immunity, the Supreme Court has been much less careful in discussing the order in which the claims are to be considered when the prosecution alleges that any error that occurred at trial could not have effected the outcome below. This Subsection discusses the Court's sometimes convoluted decisions in this area.

i. The Mystery of Ineffective Assistance of Counsel

In order to understand the proper order of decisionmaking in harmless error cases, it is helpful to begin by considering the doctrine of ineffective assistance of counsel. The Supreme Court has held that counsel is ineffective, and a conviction can be overturned, only if the performance of the defendant's counsel fell below a minimum standard *and* that ineffectiveness affected the result of the trial.[207] Ineffective assistance claims, therefore, appear to incor-

[207] See Strickland v. Washington, 466 U.S. 668, 690–91 (1984).

porate harmless error analysis into the substantive standard.[208] Not all deficiencies of counsel merit redress; only in those cases where the outcome might have been affected by the ineffectiveness will a conviction be overturned.

In *Strickland v. Washington*,[209] the case establishing the federal standard to be applied to ineffective assistance claims, the United States Supreme Court held that a reviewing court was free to resolve the question of prejudice *without* first deciding the substantive question of whether the service provided fell below a minimum standard:

> Although we have discussed the performance component of an ineffectiveness claim prior to the prejudice component, there is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one. In particular, a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. The object of an ineffectiveness claim is not to grade counsel's performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed. Courts should strive to ensure that ineffectiveness claims not become so burdensome to defense counsel that the entire criminal justice system suffers as a result.[210]

---

[208] It is for this reason that Professor David McCord refers to ineffective assistance as a "camouflaged harmless error doctrine." See David McCord, Is Death "Different" for Purposes of Harmless Error Analysis? Should It Be?: An Assessment of United States and Louisiana Supreme Court Case Law, 59 La. L. Rev. 1105, 1159–62 (1999).

[209] 466 U.S. 668 (1984).

[210] Id. at 697. The Court came to the same conclusion in a different context in *United States v. Leon*, 468 U.S. 897 (1984). In that case, the Court determined that when officers act in good faith reliance on a facially valid warrant, the evidence obtained thereby need not be suppressed. Id. at 922–23. The *Leon* Court determined that a court could determine the validity of the warrant or that the officer's good faith reliance in either order.

> There is no need for courts to adopt the inflexible practice of always deciding whether the officers' conduct manifested objective good faith before turning to the question whether the Fourth Amendment has been violated. Defendants seeking suppression of the fruits of allegedly unconstitutional searches or seizures undoubtedly raise live controversies which Art. III empowers federal courts to adjudicate.... If the resolution of a particular Fourth Amendment

Thus, the Court embraced a flexible approach to decisionmaking in ineffective assistance claims, permitting courts to decide the issues in the manner they find most convenient.

ii. The Ambiguity of Harmlessness

While it might appear that the logic of *Strickland* would apply with equal force to harmless error analysis generally, that is not necessarily the case. For example, in *Lockhart v. Fretwell*,[211] the Court wrote that the flexible approach of *Strickland* does not apply in the realm of harmless error: "Contrary to the dissent's suggestion, today's decision does not involve or require a harmless-error inquiry. *Harmless-error analysis is triggered only after the reviewing court discovers that an error has been committed.*"[212] In other words, the flexibility the Court embraced in *Strickland* does not extend to harmless error; the error determination must be made before the prejudice determination. It is not entirely clear, however, why the Court believes that harmless error analysis is to be engaged in only once an error has been found, or in what way harmless error differs from ineffective assistance.[213]

Furthermore, it is not entirely clear that the Court meant what it said in *Fretwell*. For example, two years later, the Court decided *Kyles v. Whitley*,[214] a death penalty habeas petition that concerned, among other things, petitioner's claim that exculpatory evidence

> question is necessary to guide future action by law enforcement officers and magistrates, nothing will prevent reviewing courts from deciding that question before turning to the good-faith issue. Indeed, it frequently will be difficult to determine whether the officers acted reasonably without resolving the Fourth Amendment issue.

Id. at 924–25 (citations and footnotes omitted). Notice how different this is from the language of *Teague v. Lane*. Here, the Court talks not about the importance of avoiding unnecessary adjudication but of appellate courts' role in supervising the trial courts. The Court approves of the adjudication of issues that may not be strictly necessary to the resolution of the case before it in order to clarify law that will arise in later cases.

[211] 506 U.S. 364 (1993).

[212] Id. at 369 n.2 (emphasis added).

[213] Needless to say, McCord, supra note 208, at 1159–62, is not alone in arguing that ineffective assistance is merely another instance of the harmless error doctrine. See, e.g., William S. Geimer, A Decade of *Strickland*'s Tin Horn: Doctrinal and Practical Undermining of the Right to Counsel, 4 Wm. & Mary Bill Rts. J. 91, 131 (1995) ("In spite of the Court's recent pronouncement [in *Lockhart v. Fretwell*] that *Strickland*'s application does not involve harmless error analysis, the contrary is obviously true.").

[214] 514 U.S. 419 (1995).

had not been supplied to him by the prosecution prior to trial.[215] The Court applied the rule it had formulated in *United States v. Bagley*[216] that a defendant making such a claim was not entitled to a reversal unless it was shown that there was a likelihood that "had the evidence been disclosed to the defense, the result of the proceeding would have been different."[217] Having found that the prosecutor had withheld exculpatory evidence and that the release of that evidence might have affected the trial outcome, the Court concluded that there was no reason to do a separate analysis of whether the failure to turn the material over to the defense was harmless.[218] In reaching this conclusion, the Court cited favorably an Eighth Circuit case for the proposition that "it is unnecessary to add a separate layer of harmless-error analysis to an evaluation of whether a petitioner in a habeas case has presented a constitutionally significant claim for ineffective assistance of counsel."[219] Thus, the Court seemed to embrace the exact argument it had rejected in *Fretwell*, namely that harmless error is imbedded within the doctrine of ineffective assistance of counsel. And if it is true that in making an ineffective assistance of counsel determination a court is making a harmlessness determination, there seems no reason that the flexible approach to decisionmaking set forth in *Strickland* should not apply with equal force to harmless error.

Given this winding road of precedent, the proper order of decisioumaking in harmless error cases is currently ambiguous at best. Given both the number of cases in which the doctrine arises and the crucial importance of the order of decisionmaking, the eventual resolution of this question will have an enormous impact on the litigation of criminal appeals. Furthermore, as my discussion of non-retroactivity and qualified immunity above might indicate, I think there is much to recommend the *Fretwell* approach to harmless error. By deciding that harmlessness cannot be made a threshold question, the Court took away from the lower courts the

---

[215] Id. at 422; see, e.g., Brady v. Maryland, 373 U.S. 83, 86–87 (1963) (holding that the prosecution has an affirmative duty to turn over to the defense that exculpatory evidence of which it is aware).

[216] 473 U.S. 667 (1985).

[217] Id. at 682.

[218] *Kyles*, 514 U.S. at 435–36 ("In sum, once there has been *Bagley* error as claimed in this case, it cannot subsequently be found harmless.").

[219] Id. at 436 n.9 (quoting *Hill v. Lockhart*, 28 F.3d 832, 839 (8th Cir. 1994)).

power to duck important questions of constitutional law. Below, I will advocate that the Court take seriously its assertion in *Fretwell* that merits be decided before the entitlement to a remedy.

d. Conclusion

What we see from the comparison of these three doctrines is that the order in which courts addresses the issues raised by each doctrine matters crucially. Furthermore, we see that the Supreme Court has resolved the question of ordering quite differently in nearly all of the contexts in which it has arisen. In the context of non-retroactivity on habeas appeals, the Court has mandated that courts first determine whether or not the claimant would be entitled to the relief he seeks, and only if the answer to that question is in the affirmative, should courts proceed to the merits of the case. In the context of qualified immunity, the Court, at least recently, has taken exactly the opposite approach, mandating an adjudication of the merits before a consideration of whether the plaintiff would be entitled to relief. Finally, in the context of harmless error, the Court has been less certain, appearing unsure of the proper approach to the question.

Why the Court has taken such entirely disparate approaches to these very similar issues is a topic worthy of an article of its own.[220] For now, all that can be said with any confidence is that the disparate resolution of the problem of ordering in these three areas has taken three doctrines that are structurally quite similar and varied greatly their capacity to improve the substance of constitutional law.

2. The Importance of Novelty

In this Subsection, I discuss the importance that novelty plays in these three doctrines. I argue that because qualified immunity and non-retroactivity both involve the application of novel issues of law, they have the capacity not only to change the substance of constitutional law for the better but also to impact the behavior of the officials who apply and interpret that law.[221] By sharp contrast,

---

[220] I hope to write such an article in the future.

[221] While both non-retroactivity and qualified immunity deal with novelty, as I discussed above, the way in which non-retroactivity is currently being applied (only

harmless error does not necessarily deal with interpretations of novel questions of constitutional law. As a result, under its current formulation, harmless error lacks the capacity to change the behavior of state actors in the same way that qualified immunity and non-retroactivity can, even if it is applied in a way that encourages innovation in the substance of the law. Because later-situated litigants have no stronger an entitlement to a remedy than do earlier ones, there is little to push government agents to adapt and abide by the new rules that the doctrine may help to create.

a. Two Examples

i. Qualified Immunity and Harmless Error Compared

To understand this distinction, consider a typical qualified immunity case (based on *Wilson v. Layne*)[222] and a typical harmless error case (based on *Chapman v. California*).[223] Assume that both are decided at the end of a Supreme Court term, in late June. Following the decisions, police departments and prosecutor's offices around the country would learn of the new rulings and would attempt to understand what behaviors were now forbidden. Memoranda would be circulated in district attorney's offices informing the attorneys working therein that they could no longer comment on the silence of the defendant in their closing arguments.[224] Police officers would be briefed on the fact that they were no longer permitted to take members of the press with them when executing warrants and would be instructed to stop doing so at once.[225]

---

on collateral habeas appeals, and then only as a threshold question) greatly reduces the capacity of that doctrine to exert a positive influence on the law.

[222] 526 U.S. 603 (1999); see supra 191–201 and accompanying text.

[223] 386 U.S. 18 (1967); see supra Section I.A.2.

[224] Interview with Karen Steinhauser, Denver Assistant District Attorney, in Denver, Colo. (Nov. 11, 2000).

[225] For example, Tony Corsi, Deputy Chief of the Greenwood Village, Colorado Police Department, told me that his office is regularly briefed by the district attorney's office, receiving training on relevant Supreme Court cases and their impact on day-to-day policing. Interview with Tony Corsi, in Denver, Colo. (July 14, 2000). The inclination of a municipality to this sort of training (in addition to a good faith desire to comply with the law) is that the doctrine of respondeat superior is available against municipalities only if the municipality has a pattern and practice of encouraging the constitutional violations or if the municipality has failed to train its employees to comply with the law.

Assume now that, notwithstanding her training, a police officer then took a reporter with her in executing a warrant at a defendant's house. Assume, further, that at the subsequent criminal trial of that defendant, the prosecuting attorney pointed out to the jury that the defendant had not taken the stand to explain the events leading up to her indictment. After being convicted, the defendant would likely appeal her conviction on the ground that the prosecutor's comments on her failure to testify deprived her of her Fifth Amendment right to remain silent.

It is also likely that the defendant would also file a Section 1983 action against the police officers, alleging a violation of her Fourth Amendment rights.[226] She would ask for money damages to compensate her for the deprivation of her privacy rights in addition to an injunction against the municipality, requiring them to comply with the provisions of the recent Supreme Court decisions.[227]

To a court considering the criminal appeal, it would be certain after *Chapman* that the prosecutor's comments were error; a recent Supreme Court opinion directly on that point would make the matter abundantly clear. That would not end the matter, however. The reviewing court would then have to determine whether or not the error merits the reversal of the defendant's conviction. The resolution of this question would be based on the overall strength of the government's case, the magnitude of the prosecutor's indiscretion, and so forth.[228] The appellate court, however, would generally *not* consider either the subjective intent of the prosecutor who had committed the error or whether she should have known that her conduct was error at the time she committed it.[229] Thus, al-

---

[226] She would probably not file suit against the prosecutors for violating her right to remain silent, as prosecutors have absolute immunity for acts committed in the scope of their prosecutorial activities. See infra Section III.E.1.

[227] A court would likely abstain from hearing the civil suit during the pendency of the state court appeal under the doctrine of *Younger v. Harris*, 401 U.S. 37 (1971).

[228] See supra Sections I.A.3.c, I.A.4, I.A.5 for a discussion of the issues raised in determining whether or not error was prejudicial.

[229] See, e.g., Bennett L. Gershman, Mental Culpability and Prosecutorial Misconduct, 26 Am. J. Crim. L. 121, 125 (1998) ("Under this objective standard, the courts do not consider a prosecutor's intent to violate a trial rule. Thus, if a guilty verdict that is significantly influenced, for example, by a prosecutor's asking prejudicial questions, offering inadmissible evidence, or making improper remarks to a jury is to be reversed, it will be reversed regardless of whether the prosecutor intended to strike a foul blow.") (footnotes omitted); see also Smith v. Phillips, 455

though the prosecutor in our hypothetical case violated a clearly established rule of constitutional law and likely knew that she was doing so, the only harmlessness inquiry a court would make is whether this particular defendant was harmed by that particular misdeed. Without having more facts, it is impossible, as a logical matter, to know how this issue would be resolved by a reviewing court.

The results of the civil suit for deprivation of civil rights would be far clearer, however. As posited, the error regarding the presence of the media on the ride-along was quite clear at the time that the officer brought the media into the plaintiff's home. Thus, the officer would lose on the merits of the plaintiff's claim and, unlike the officer in *Wilson v. Layne*, would likely find herself unable to raise qualified immunity as a defense.[230] Because the law was clearly established at the time she acted, she would likely be found liable and forced to pay the plaintiff money damages.

Thus, what we see is that qualified immunity favors later claimants over earlier ones. Early litigants are unlikely to recover money damages for a violation of their rights. Even if they can show that their rights were violated, those rights were not clearly established at the time that the defendants acted, and courts will generally not impose a judgment against the officers whose actions deprived them of their rights. Once a rule has become well-established, however, it is not only easier for later plaintiffs to show a violation, it is also harder for later defendants to assert qualified immunity. As a result, plaintiffs will have a greater opportunity actually to recover for their injuries.[231]

U.S. 209, 219 (1982) ("[T]he touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor.").

[230] Note that after *Wilson*, this would be the proper order of decision for the case. See supra Section I.D.1.b. The court would, or at least should, look at the merits of the claim first.

[231] It is for this reason that Jeffries refers to qualified immunity as a way of transferring wealth from one generation to the next. See Jeffries, supra note 2, at 105 ("Limiting damages liability to cases of fault facilitates constitutional innovation by allowing courts to disregard the past injuries caused by conduct now seen as unacceptable. In general, flexibility and innovation disproportionately benefit younger generations. The result is a rolling reallocation of constitutional resources from older to younger citizens. In this way, the structure of constitutional remedies is systemically biased in favor of the future.").

By stark contrast, later criminal defendants are no more likely to receive redress for constitutional violations than are earlier ones. Because the inquiry into whether or not an error that infected the defendant's trial was harmless is a fact-focused, case-specific one, there is essentially the same likelihood of success for defendants in the first case as there is in any later case. Thus, although harmless error, like qualified immunity, may lower the costs of innovation and make courts more likely to expand the contours of constitutional law, it can exert little force on the behavior of prosecutors. Because the likelihood of a reversal does not go up over time, and because that likelihood is difficult to calculate in any particular case, the deterrent effect of a reversal on appeal is never great and does not increase over time. While the structure of qualified immunity serves to force compliance rates toward 100% by increasing the likelihood of a recovery over time, harmless error is as effective (or ineffective) in creating incentives on day one as it is on day one hundred.

ii. Non-Retroactivity and Harmless Error Compared

Like qualified immunity, non-retroactivity, at least as it was originally conceived, has the capacity to change the behavior of prosecutors as well as the substantive law. To see this, consider two defendants, *A* and *B*. Both are arrested, both are interrogated without being told of their rights to remain silent, and both confess. *A* is arrested and interrogated before the Court decides both *Miranda v. Arizona*[232] and *Johnson v. New Jersey*,[233] the case deciding that *Miranda* would not be applied retroactively.[234] *B* is arrested and interrogated thereafter. Both *A* and *B* are subsequently convicted using their confessions and evidence derived therefrom as well as evidence obtained before each was interrogated. Both appeal, claiming that the interrogations were obtained in violation of their Fifth Amendment rights.

---

[232] 386 U.S. 436 (1966).

[233] 384 U.S. 719 (1966).

[234] *Johnson* could not come out today as it did then. As discussed supra Section I.B.3, the Supreme Court has held that new rules of criminal procedure must be applied retroactively on direct appeal and, with limited exceptions, cannot be applied retroactively on collateral attack.

When *A*'s claim reaches the courts on appeal, he will likely find his *Miranda* claim unavailing, as the Court had already determined that the warnings set forth in *Miranda* would not be required for those whose interrogations took place before the rule was created.[235] The rationale for this treatment is that at the time this class of defendants was interrogated, there was no rule requiring that they be made aware of their rights to counsel and to silence.[236] To permit them to benefit from a rule created after their interrogations would be to present them with an unnecessary windfall and to essentially punish law enforcement for violating a rule that did not then exist.[237] Thus, *A*'s conviction would likely be upheld on appeal, notwithstanding the fact that he was interrogated without having been made aware of his *Miranda* rights. From a deterrence standpoint, this result makes a great deal of sense; to the extent exclusion of evidence is designed to deter police misconduct, exclusion makes no sense as there was no misconduct for the court to deter.

By contrast, *B*'s *Miranda* claim would be upheld by the courts. Because his interrogation occurred after the rule was created, he is not seeking the retroactive application of the rule; he is simply seeking the enforcement of a clearly enunciated rule to his case. Thus, his interrogation would be a violation of his Fifth Amendment right to counsel, and the confession and all evidence derived therefrom would be subject to exclusion.[238] In this way we see that non-retroactivity, like qualified immunity, favors later litigants

---

[235] See *Johnson*, 384 U.S. at 730–34.

[236] The Court's language in *Johnson* was as follows:

> Future defendants will benefit fully from our new standards governing in-custody interrogation, while past defendants may still avail themselves of the voluntariness test. Law enforcement officers and trial courts will have fair notice that statements taken in violation of these standards may not be used against an accused. Prospective application only to trials begun after the standards were announced is particularly appropriate here. Authorities attempting to protect the privilege have not been apprised heretofore of the specific safeguards which are now obligatory.

Id. at 732.

[237] Of course, as persuasive as this argument is, it would eventually lose. The Supreme Court now applies all new rules of criminal procedure retroactively to those whose cases are not yet final on appeal. See Griffith v. Kentucky, 479 U.S. 314, 328 (1987).

[238] See Mapp v. Ohio, 367 U.S. 643, 660 (1961) (applying the exclusionary rule to the states).

over earlier ones. *A* was not entitled to recovery because the officers who violated his rights did not realize they were doing so. The officers in *B*'s case, however, had notice of the rule, and as a result, the evidence they improperly obtained may not be used as evidence against him.

The decision that *Miranda* applies to *B*'s case and that as a result evidence derived from the interrogation must be suppressed would not end the matter, however. Just like the appellant in the qualified immunity hypothetical, *B* would have to show not only that his rights had been violated but also that the violation had affected the outcome of his case. In other words, having shown that the error had occurred, the court would still have to determine whether or not the error was harmless.

As discussed above, this analysis would focus on the evidence presented at trial, the grievousness of the prosecutor's error, and so on. It would not, however, turn on whether the police should have known that the defendant was entitled to *Miranda* warnings or whether the prosecutor knew that she was presenting evidence obtained in violation of the defendant's rights. This is true whether *B*'s interrogation took place the day after *Miranda* was decided or thirty years later.

b. Conclusion

Thus, while both qualified immunity and non-retroactivity disenfranchise early claimants in favor of later ones, harmless error functions very differently. Like the other two doctrines, it lowers the cost of innovation, at least if merits may be decided before the question of entitlement to a remedy.[239] Unlike these other doctrines, however, harmless error does not have the capacity to change behaviors over time, because it does not contain a temporal element. An error that is harmless in case one will likely be harmless in later cases; while both qualified immunity and non-retroactivity ratchet up the pressure on state officers, harmless error does not. In the next Part, I demonstrate the way this plays out in practice. In the Article's final Part, I propose a solution to what I see as the problem with the present harmless error rule, suggesting

[239] See supra Section I.D.1.c.ii.

the incorporation of a temporal element into the harmless error doctrine.

II. An Empirical Test—The Death Penalty Decisions of the Bird and Lucas California Supreme Courts

A. Introduction

This Part provides an empirical examination of a point I have endeavored to make throughout—that harmless error, unlike other similar doctrines, can permanently sever rights from remedies. Using a database of California Supreme Court decisions, I demonstrate both how malleable the harmless error doctrine is in practice and how much turns on the harmlessness determination.

I compiled the database used in this Part in an earlier study examining the death penalty decisions of the California Supreme Court between 1976 and 1996.[240] I selected this time period for study because of a stark discontinuity that occurred on the court in 1986. In that year, Chief Justice Rose Bird and two of her colleagues were voted off the court in a retention election, becoming the first appellate judges ever removed under California's constitutional provision calling for the accountability of judges.[241]

Almost immediately after the appointment of Malcolm Lucas to replace Bird as Chief Justice, the death penalty reversal rate of the California Supreme Court changed dramatically. A court that had ranked among the most likely in the nation to reverse a death sentence became the court most likely to uphold a death sentence, as the reversal rate in capital cases dropped from 94% to 14%.[242] I argue that this disjunction in death penalty outcomes is one of the sharpest constitutional discontinuities ever experienced by a court in this country and is not explainable by factors extrinsic to the court: The governing federal law remained essentially unchanged, the state's homicide and death penalty provisions were not altered,

---

[240] See Sam Kamin, The Death Penalty and the California Supreme Courts: Politics, Judging and Death (2000) (unpublished Ph.D. dissertation, University of California, Berkeley) (on file with the Virginia Law Review Association).

[241] Id. at 37–38.

[242] Id. at 42–46.

and the way in which capital cases reached the court did not change within this time period.[243]

The subject of my previous study was how the Lucas court was able to achieve this remarkable turnaround in death penalty outcomes. I found that the disjunction in outcomes occurred without a corresponding disjunction in precedents. As Gerald Uelmen has written on this point:

> Reading a death penalty opinion of the Bird court, then a death penalty opinion of the Lucas court, one often sees the same precedents cited and the same legal principles exalted. The remarkable transformation of results occurred with very few opinions of the Bird court being overtly overruled or limited by the Lucas court. But in reading the collective whole, one is haunted by the sensation that two remarkably different institutions are at work, aud the animus driving these two institutions is as different as night and day.[244]

Rather, what I found accounted for nearly all of the difference in death penalty outcomes between the two courts was their differential use of the harmless error doctrine, a conclusion to which I will turn shortly.

Before I turn to the harmless error database, however, a few words are in order about what occurred on the California Supreme Court. There are two crucial outcomes in each death penalty case: The decision on guilt or innocence and the decision on punishment. As a result, in comparing the death penalty decisions of the Bird and Lucas courts, I focused on two areas: how likely each court was to overturn a conviction in a death case and how likely each court was to overturn a death sentence.[245] The results of the death pen-

---

[243] In California, death penalty cases are appealed directly from the trial court to the Supreme Court, eliminating the possibility that changes in personnel on lower appellate courts contributed to the change in outcomes at the Supreme Court. See Cal. Const. art. VI, § 11 ("(a) The Supreme Court has appellate jurisdiction when judgment of death has been pronounced. With that exception courts of appeal have appellate jurisdiction when superior courts have original jurisdiction in causes of a type within the appellate jurisdiction of the courts of appeal on June 30, 1995, and in other causes prescribed by statute.").

[244] Gerald F. Uelmen, Review of Death Penalty Judgments by the Supreme Courts of California: A Tale of Two Courts, 23 Loy. L.A. L. Rev. 237, 238 (1989).

[245] Others have measured things slightly differently. For example, in his study of the court, Gerald Uelmen focused on three critical points: the finding of guilt or

alty cases that came before the court are summarized in Figure 1. What we see is that of the sixty-six death penalty cases that came before the Bird court, only four death sentences (6% of the total) were affirmed. By sharp contrast, the Lucas court affirmed 184 of the 215 (86%) death cases it considered. At the other end of the spectrum, the contrast is just as sharp. Only eight of the 215 (4%) death penalty cases that came before the Lucas court led to reversal of the underlying conviction, while a Bird court defendant was more than ten times as likely to have his conviction reversed (twenty-seven of sixty-six cases for 41%).

Table 1. Death Penalty Outcomes on the Bird and Lucas Courts.

Court	Bird	Lucas
Affirmed	4 (6%)	184 (86%)
Penalty Reversed	35 (53)	23 (11)
Reversed	27 (41)	8 (4)
Total	66 (100)	215 (100)

innocence, the finding of special circumstances (making the case death eligible) and the finding as to penalty. See Uelmen, supra note 244, at 298–311. While I think both methods are helpful in identifying the results in a death case, I chose my methodology because I believed it better described the situation in which a defendant found himself after the California Supreme Court had ruled on his case.

B. The Database

Table 1 quantitatively depicts the use of the harmless error doctrine by the two California Supreme Courts in these two areas. To generate this figure, I culled through all of the decisions of both courts, counting the number of cases in which the application of the harmless error doctrine was necessary to the outcome arrived at by the court. In other words, whenever the court found error in either phase of a capital trial, yet nonetheless upheld the trial court's finding as to that part of the verdict, that is counted as an invocation of the harmless error doctrine. Thus, I do not count those instances where a court either muses about the harmlessness of an error it has not found or states that the behavior complained of is either not error or harmless error without deciding which is which.[246] A case is counted as an invocation of the doctrine only when the finding of harmlessness is both explicit and necessary to the outcome.[247]

[246] This decision was motivated by the Supreme Court's pronouncement that the harmless error doctrine is not applied unless and until error has been found below. See Lockhart v. Fretwell, 506 U.S. 364, 369 n.2 (1993).

[247] Furthermore, as discussed above, there are some doctrines that appear to incorporate a calculation of prejudice into substantive legal analysis; the use of harmless error in the application of these doctrines was also not counted. For example, in determining whether it was error to exclude the defendant from a part of the trial, an appellate court must decide whether defendant was prejudiced by his absence. Similarly, a defendant is only afforded relief for ineffective assistance of counsel if he was harmed by the substandard conduct of his attorney. Both of these issues arose often in my database, and neither was treated as an application of the harmless error doctrine, although the Court was required to determine whether the defendant had been harmed. This counting scheme is in keeping with the Court's decision in *Fretwell* that ineffective assistance is not an invocation of the harmless error doctrine. See supra Part I.D.1.c. Of course, as I discussed, the Court's view on this point is hardly a model of clarity.

Figure 1. Error and Reversible Error Rates, Bird and Lucas Courts.

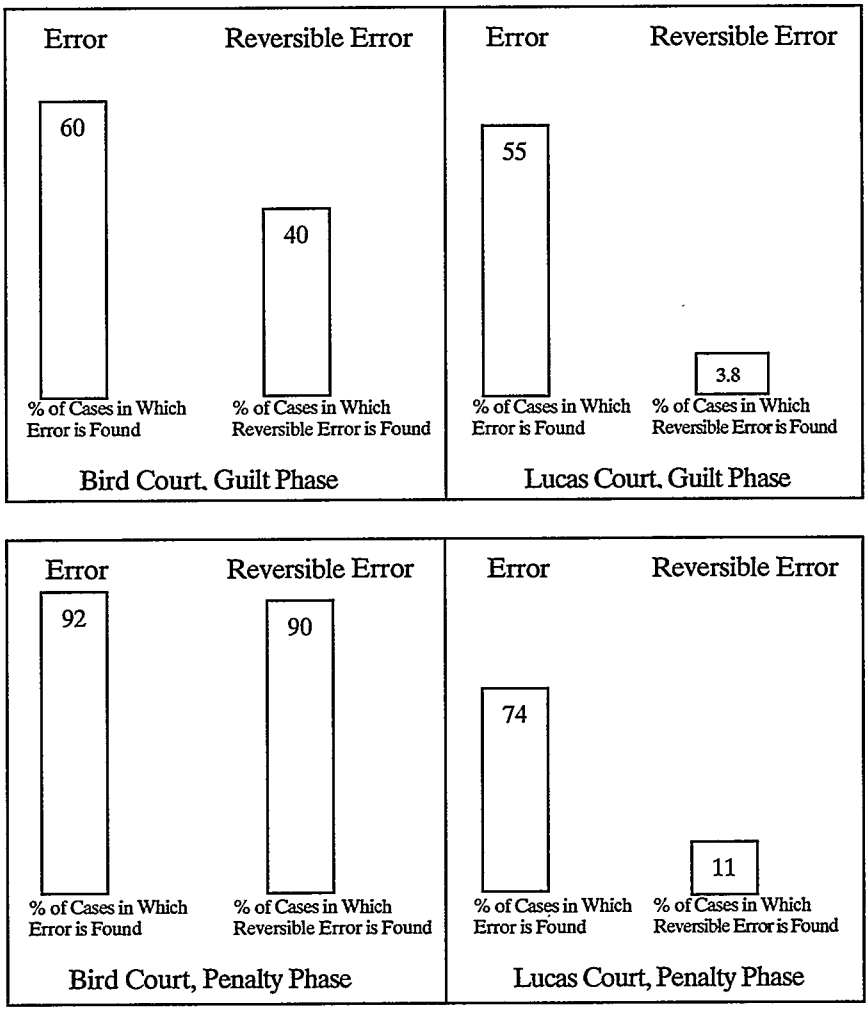

Figure 1 shows four paired bar graphs. The top two sets of graphs show the behavior of the two California Supreme Courts during the guilt phase of the capital cases each considered; the bottom two graphs depict the behavior of the two courts in the penalty phases. The Bird court is represented by the two left sets of graphs, the Lucas court by the right set. These graphs create a 2x2 matrix

allowing comparison of the two courts and the two relevant parts of a capital trial.

In each of the four quadrants, there are two bars. The left-hand bar indicates the percentage of all cases considered by the court[248] in which errors were found; the right-hand bar indicates the percentage of all cases considered leading to reversals. I deal with each of the four quadrants in order.

1. Bird Court—Guilt Phase

We learn from the upper-left pair of graphs that the Bird court found error in 60% of the cases it considered and found reversible error in 40% of the cases it considered. Given that the Bird court affirmed only four of the sixty-six death sentences it considered, it may come as a surprise to the reader (as it did to the author) that the Bird court found error in only 60% of the guilt phases and found these errors to merit reversal less than 70% of the time.[249] As a result, the defendant's conviction for first-degree murder was reversed in only four cases out of ten. Thus, it is quite clear that the Bird court did not have an absolutist position with regard to errors occurring at the guilt phase of a capital trial. It agreed with the defendant less than two-thirds of the time that error had occurred, and in just over 40% of all the cases that it considered did it find error meriting reversal of the defendant's conviction.

2. Lucas Court—Guilt Phase

When we compare these numbers with those of the Lucas court, we see for the first time the enormous impact that the harmless error law had on the decision of capital cases in California. During the Lucas court years, the court found error in 55% of the guilt phases it considered, a rate only five percentage points lower than that of the Bird court. If this were the major difference between the two courts, there would be little call for a book-length investi-

[248] For the guilt phase, this is all cases, as the Court considered the defendant's guilt claims in each of the cases before it. For the penalty phase, however, the denominator is not all cases considered, but rather the number of cases in which the Court considered the defendant's penalty phase claims. Where the Court reversed as to guilt, it did not examine the penalty phase at all.

[249] (.40)/(.60) = .67.

gation of the death penalty decisions of the two California Supreme Courts. When we compare the actual *reversal* rate of the Lucas court with that of the Bird court, however, we see both how stark the difference between the two courts was and how much of that difference is explained entirely through differential application of the harmless error doctrine. The Lucas court reversed the guilt finding in only 3.8% of the cases it considered, a reversal rate just one-tenth that of the Bird court.

This comparison shows us how much more important harmless error was in predicting outcomes than were *all changes in substantive law combined.* The rate at which the California Supreme Court found error in the guilt phase of criminal trials dropped from 60% of cases to 55% of cases between the Bird and Lucas years. Even assuming this entire drop is attributable to changes in the substantive law applied by these courts, the effect is a very small one. For example, if the Lucas court had found the same proportion of guilt phase errors to be harmless that the Bird court did, it would have reversed 37% of its cases, as compared with the Bird court's 40% of cases.[250] Instead, the Lucas court found a staggering 93% of the errors it discovered in the guilt phase to be harmless, resulting in a guilt reversal in only 3.8% of all the cases it heard.[251] While the error rates of the two courts differed by less than 10%, the reversal rates varied by a factor of ten.

It is clear, therefore, that what distinguishes these two courts is not their views on the laws of criminal procedure; the difference between them is their views on when errors in the guilt phase of a trial matter.

3. Bird Court—Penalty Phase

Turning to the Bird court's analysis of penalty phase errors, we see that the Bird court treated the penalty phase very differently than it did the guilt phase of the capital trials it considered. It found error in 92% of the penalty phases it considered and reversed the death sentence imposed in 90% of all its cases. The Bird court, in essence, adopted two related de facto "any substantial er-

---

[250] (.67)(.55) = .37.

[251] The Lucas court found trial error to be reversible only 6.9% of the time. (.038)/(.55) = .069.

ror" rules with regard to the penalty phase of capital trials. First, almost any mistake occurring at the penalty phase was deemed to be error; defendants claimed error thirty-nine times and the court agreed thirty-five times. Second, the finding of virtually any error in the penalty phase was sufficient ground to preclude the imposition of the death penalty; more than 95% of the time, an error the Bird court found in the penalty phase was deemed sufficient to foreclose the imposition of the death penalty.[252]

In contrast, the Bird court found error in "only" forty of the sixty-six guilt phases it examined,[253] and these errors were found to be prejudicial only twenty-seven times. Thus, assuming that errors were as likely to occur in the guilt and penalty phases,[254] the Bird court was both less willing to find error at the guilt phase than in the penalty phase and more willing to overlook those errors when it found them. The reason for this, I believe, is quite simple: The Bird court could be quite confident that errors in the guilt phase would not lead to executions, and it was able to maintain this confidence by mandating perfect penalty trials. In other words, the Bird court took the concept of "death is different" quite seriously when it came to the application of the harmless error doctrine; it was willing to overlook errors in capital cases so long as those errors did not lead to the imposition of the death penalty.

4. Lucas Court—Penalty Phase

Again, comparing the Lucas court's analysis of penalty phase errors with that of the Bird court reveals that the major difference between the two courts lies not in the rates at which they found legal error to have occurred at trial but in their application of the harmless error doctrine to those errors. The Lucas court found error in 74% of the penalty phases it investigated, a rate of error only eighteen percentage points less than that of the Bird court. Again,

---

[252] The Bird court reversed 97% of the cases in which it found constitutional error. (.90)/(.925) = .97.

[253] This includes the twenty-seven cases reversed by the Bird court for guilt phase errors, eleven of the thirty-six cases in which the Bird court reversed on penalty only, and two cases in which the Bird court affirmed the sentence in whole.

[254] This assumption is not necessarily a sound one. It is possible that given the rarity of death penalty cases and the unique qualities of the penalty phase of capital trials, errors are more likely to occur in the penalty phase than in the guilt phase.

finding differences of this magnitude is hardly an interesting result. When we look at how often errors lead to penalty reversals, however, we see once again that this is where the true difference between the two courts lies. In only 11% of the cases it considered did the Lucas court find errors meriting reversal of the imposition of the death sentence. This is a reversal rate less than one-eighth that of the Bird court.

The Lucas court analysis of the penalty phase of capital trials thus looks more like the Lucas court analysis of the *guilt* phase than it does the Bird court analysis of the *penalty* phase. In both the guilt and penalty phases, the Lucas court found error in a relatively large percentage of cases (55% and 74%, respectively) but found an overwhelming percentage of these errors to be harmless (93% and 85%),[255] leading to very low reversal rates (3.8% and 11%). By contrast, the Bird court moves from modest error rates to high ones (60% to 92%), from modest harmless error rates to very low ones (33% and 3%), leading to moderate and very high reversal rates (40% and 90%).

In summary, the Bird court was willing to overlook errors in the guilt but not the penalty phase while the Lucas court seemed willing to turn a blind eye to both sorts of errors. Furthermore, these differing views about the effect of errors explain nearly all of the difference in outcomes between the two courts in death penalty cases, far outweighing the combined effect of all differences in substantive law. There is reason to believe, however, that even this disparity between the Bird and Lucas courts actually understates the differences in how these two courts used the harmless error standard. Under the Bird court, the analysis of alleged error proceeded under what was clearly a two-step analysis. First, the court determined whether or not the error complained of by the defendant in fact occurred. Only after that question was answered in the affirmative did the court then turn its attention to the impact of that error, determining whether or not the defendant had been prejudiced by the error.

Although it never announced a new rule for the analysis of claims of error in death penalty cases, the Lucas court approached

[255] The Lucas court found penalty error to be reversible only 15% of the time. (.11)/(.74) = .15.

the problem of harmless error slightly differently. For the Lucas court, the question of harmlessness was conflated to a single step, that is, whether prejudicial error was committed at trial. This question can be answered in the negative in two different ways. First, as with the Bird court approach, the court could decide that no error was committed, and that therefore a prejudice inquiry was not needed. Under the Lucas approach, however, the court could also simply conclude that the complained of conduct would not be prejudicial even if it were error. Thus, the court, without reaching the substance of a defendant's complaint, could dismiss the complaint on the ground that even if the defendant were correct, the error was so minor that it could not have effected the trial outcome.[256]

D. Conclusion

I have tried to show in this Part that harmless error gives a reviewing court a nearly limitless tool for denying a defendant a remedy for a proven violation of her rights. Although the two courts I studied generally agreed on how often errors occurred at trial, they disagreed violently about how often those errors ought to matter. Not only did the Lucas court believe that nearly all errors that occurred in both the trial and penalty phases of death penalty trials were harmless, but the harmless error doctrine permitted them to so find. The doctrine's malleability makes it an ideal instrument for the denying of relief to a wide group of litigants.

The reason for this, I argue, is that the application of the harmless error doctrine is currently nothing more than a case-by-case, fact-dependent analysis. Whether an error affected the outcome of a trial depends solely on the facts of that case and not on what the prosecutor knew or should have known at the time of trial. Thus, the doctrine is more flexible than either qualified immunity or nonretroactivity; while those doctrines inevitably ratchet up the pres-

---

[256] See, e.g., People v. Cain, 892 P.2d 1224, 1259 (Cal. 1995) (considering the defendant's claim of error and noting that "the error, if any, was harmless beyond a reasonable doubt"); People v. Kelly, 800 P.2d 516, 536 (Cal. 1990) (same); People v. Coleman, 759 P.2d 1260, 1286 (Cal. 1988) ("Moreover, even if admission of the evidence was erroneous, we find it nonprejudicial under any standard.").

sure on government actors to comply with the law, harmless error is only as effective an impetus to change as the court applying it chooses to make it. In the next Part I propose changing the structure of the doctrine in order to give it some backbone and to make it more difficult for courts to use the doctrine to deny recovery for constitutional violations.

III. TWO MODEST PROPOSALS

A. Introduction

In the previous two Parts, I have come to two conclusions about the application of harmless error and other doctrines that separate rights from remedies. First, so long as these doctrines are used as threshold questions (so long as the entitlement to a remedy is decided before the substance of a claim), they will permit courts to avoid answering important questions of constitutional law. Second, what distinguishes harmless error from qualified immunity and non-retroactivity[257] is the fact that the latter doctrines, but not the former, place later claimants in a stronger position than earlier claimants. Because the harmlessness of an error is considered in a vacuum, each case stands alone and the pressure on prosecutors to change their behavior to comport with the law does not increase over time.

In this Part, I make two modest proposals to remedy this situation; given what has come before, neither of these proposals should come as a great shock to the reader. My first proposal is truly modest. I argue simply that the courts should adhere to the Supreme Court's pronouncement in *Lockhart v. Fretwell*[258] that courts ought to engage in harmless error analysis only after an error has been found. That is, I argue that the substance of a defendant's claim should be examined before a court looks to her entitlement to a remedy; the order of decisionmaking in harmless error should be construed the way qualified immunity[259] is currently analyzed, and

---

[257] When I discuss non-retroactivity in a positive light, I am referring to its use by the Warren Court as a way of reducing the impact of its sweeping criminal procedure decisions, not its current use by the Rehnquist Court as a means of avoiding new questions of constitutional law brought via petition for writ of habeas corpus.

[258] 506 U.S. 364 (1993).

[259] See, e.g., Wilson v. Layne, 526 U.S. 603 (1999); supra Section I.D.1.b.

not the way non-retroactivity[260] currently is. Because this proposal merely requires the courts to take the Supreme Court's current precedents seriously, and because I have spent a good deal of time explicating this argument above, I spend little time defending this suggestion below.

The second proposal is considerably more radical. I argue that the only way to keep harmless error from permanently severing rights from remedies is to instill in it a temporal element; later litigants must be placed in a better position vis-à-vis recovery than are earlier ones. I propose that the best way to do this is to borrow the objective standard used in qualified immunity cases: Prosecutorial violations of clearly established constitutional rights should not be susceptible to the application of the harmless error doctrine. In other words, when a prosecutor knew or should have known that her conduct at trial was an error of constitutional dimension, the state cannot seek to have the conviction upheld on the ground that the error was harmless; instead all such errors will be deemed prejudicial per se.[261]

B. Errors Not Affected by This Rule

Before explicating and justifying the rule itself, it seems worthwhile to write a few words about errors that will continue to be eligible for the application of harmless error.

1. Errors by Actors Other than Prosecutors

Here it is instructive to consider the 1984 case of *United States v. Leon*.[262] In that case, the Supreme Court was confronted with a warrant executed by federal officials that had been issued by a magistrate without probable cause.[263] The government argued both

---

[260] See, e.g., Teague v. Lane, 489 U.S. 288 (1989); supra Section I.D.1.a.

[261] I recognize that as a logical matter, the intent of the prosecutor, either subjective or objective, is irrelevant to the question of whether a defendant's conviction was impacted by an error the prosecutor committed. Rather, I argue that as a prophylactic measure, prejudice ought to be presumed where the prosecutor should have known that her behavior was misconduct.

[262] 468 U.S. 897 (1984).

[263] Id. at 900. Both the trial court and the reviewing court held that the warrant was deficient because the affidavit on which the warrant was based failed to set forth the

at trial and on appeal that suppression of the evidence seized pursuant to the warrant was an inappropriate remedy because the officers who executed the warrant did not know that it had been issued in error by the magistrate.[264] In siding with the government and creating a good-faith exception to the exclusionary rule, the Supreme Court held that the purpose of the exclusionary rule was to encourage law enforcement officers to comply with the requirements of the Fourth Amendment by making prosecutions more difficult if they did not.[265] The Court held that where, as in *Leon*, the officers were without fault in the issuance of the warrant,[266] society had no interest in suppression, because suppression is aimed at deterring the malfeasance of law enforcement officials, not that of judges.

The rule that I propose merely extends *Leon* to the courtroom.[267] Much as the exception created in *Leon* was meant to deter law enforcement officers and not magistrates, so the rule that I propose is designed to deter prosecutors and not judges from committing error at trial.[268] The prosecutor's error will be excused, and the harmless error rule will be applicable, only if the officer could not have known that her actions were error. Thus, if a prosecutor asks

---

reliability of the confidential informant from whom the information was received and because the information supplied by the informant had become "stale." Id. at 904.

[264] Id. at 904–05.

[265] Id. at 916–17 ("[T]he exclusionary rule is designed to deter police misconduct rather than to punish the errors of judges and magistrates. . . . Judges and magistrates are not adjuncts to the law enforcement team; as neutral judicial officers, they have no stake in the outcome of particular criminal prosecutions. The threat of exclusion thus cannot be expected significantly to deter them.").

[266] It was important to the Court's holding that the warrant, while invalid, appeared valid on its face. That said, it was the officers who had prepared the faulty affidavit. However, this is not the sort of behavior with which the Court was concerned. "Suppression . . . remains an appropriate remedy if the magistrate or judge in issuing a warrant was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth." Id. at 923.

[267] Of course, the analogy to *Leon*, like all analogies, is an imperfect one. In *Leon*, the officers were acting in the field, beyond the supervision of the courts. Id. at 901–02. In the case of trial error, there is generally direct judicial supervision of the misdeeds.

[268] Furthermore, the fact that the prosecutor's error was abetted by judicial error will not absolve the state. Thus, if a prosecutor asks for a forbidden jury instruction to be read, and the trial judge agrees, that error may be found harmless only if the prosecutor should not have known that her conduct was error. To decide otherwise would be to limit the deterrent power of the rule; prosecutors would have little incentive to avoid error.

for a particular jury instruction to be read and should know that the reading of that instruction is error, her misconduct is not saved by the fact that the instruction was approved by the trial judge. Much as the police officer may only claim good faith reliance if he was blameless in the errors in the warrant, so the state may only seek an application of the harmless error rule if the prosecutor was without fault in the trial error.

I have chosen this emphasis on prosecutorial conduct, regardless of whether the judge sanctions the error, for two reasons. First, the parallel to *Leon* is instructive. There, the mistakes of a magistrate were not held against the government when the government was essentially blameless in bringing about the error. To allow the harmless error doctrine to be applied whenever a judge was complicit in the error would be the equivalent of excusing the police every time a magistrate issued a faulty warrant. Much as the officers' conduct is only excused when they rely in good faith on the issuance of a warrant, so the prosecutors' conduct is only excused where they could not reasonably have known that their conduct was error. Secondly, if only those prosecutorial errors not abetted by judicial approval were included in my approach, hardly any errors would be subject to the rule of per se prejudice.

2. Sub-constitutional Errors

Errors that do not rise to a constitutional level will continue to be susceptible to harmless error analysis, even where the prosecutor knew or should have known that her conduct was error. The goal of my Article is not to return the courts of the United States to the "any error of substance" doctrine, where defense attorneys were able to reduce criminal trials into mere exercises in sowing error for appeal.[269] Rather, my goal is to see to it that constitutional rights are vindicated and expanded, a goal I argue our current system of harmless error analysis fails adequately to achieve.

No doubt many federal procedural and evidentiary rules merit inclusion within this rule as well. The violation of these rules by prosecutors also prejudices defendants, and the deterrent effect of the current harmless error rule is no more effective with regard to these errors than it is with regard to constitutional errors. I feel

[269] See supra Section I.A.1.

that a bright-line rule has advantages, however, that overcome the flexibility of a case-by-case evaluation of whether a particular rule is sufficiently important to merit the application of the per se prejudice approach. Rather than adopting a rule that applies to all federal errors except those found to be de minimis, I have chosen a rule of narrower but clearer application. There is historical precedent, as well, for the differential treatment of constitutional rules. It should be borne in mind that the application of harmless error to constitutional rules is a practice of very recent vintage; for most of the twentieth century it was presumed that no constitutional error could be seen as harmless.[270] Given that history, the application of harmless error to constitutional rules under only some circumstances seems considerably less radical.

In addition to applicability and history, there is another reason to limit the per se prejudice rule to federal constitutional errors. Simply put, no federal court can tell a state how it ought to deal with errors of state law.[271] Thus, while the Supreme Court would have the power to impose the rule that I have herein proposed on the state courts with regard to federal rules,[272] it would not have the authority to require that the states apply the rule to all errors that occur in their courts.[273] While states would remain free to expand the rule to errors of state constitutional and statutory rights, as a matter of federalism, that rule cannot be imposed upon them from above. States should remain free, however, to attempt to strike a balance between the efficient administration of criminal justice and their concern that procedural rules are not being strictly followed by prosecutors.

---

[270] See supra Section I.A.1.

[271] Of course, in extreme cases, a state's appellate processes might run afoul of the Due Process or Equal Protection Clauses of the Federal Constitution.

[272] The Supreme Court has suggested that it shares with Congress the power to impose on the states procedural rules to guarantee the enforcement of federal rights. See Chapman v. California, 386 U.S. 18, 21 (1967).

[273] Furthermore, most federal procedural and evidentiary rules are inapplicable in state court proceedings while, obviously, federal constitutional rules apply in every case.

C. An Article III Problem?

It could be argued that my proposed per se prejudice rule creates an Article III problem. This rule permits a federal court to reverse a decision below (whether by a state court or a federal one) because of an error that quite possibly did not effect the outcome of the case. While it is true that this rule would require a change in federal law on this point, I do not believe that the Constitution would be implicated.

Consider this: For much of our nation's history, there was *no* harmless error rule. Any error of substance was sufficient to merit the reversal of a decision by a lower court.[274] This rule was changed not because it was found to be unconstitutional by the Supreme Court but rather because Congress wished to constrain the scope of federal jurisdiction to those instances where the error of federal law was likely to have affected the outcome of a case. Prior to that time, the Supreme Court (or any other federal court for that matter) could reverse a case and remand it to a lower court simply on a finding that an error of federal law had occurred.

I do not believe the system that existed prior to 1919 was a constitutionally deficient one. While it was inefficient for a federal court to order a retrial every time it detected an error of federal law, it is difficult to see why these reversals violate notions of separation of powers or federalism. If the Court meant what it said in *Martin v. Hunter's Lessee*,[275] that appellate jurisdiction over the state courts on matters of federal law was necessary in order to ensure that the content of federal law does not depend on the state in which one finds herself, then the Court must have the authority to set the law right in any case in which a case or controversy with respect to that law exists.[276]

The major hurdle to my proposed standard, therefore, is not the Constitution. Rather, it is the Supreme Court's decision in *United States v. Hasting*.[277] In that case, the Court held that the supervisory power of the federal courts is limited to those cases in which the er-

---

[274] See supra Section I.A.1.

[275] 14 U.S. (1 Wheat.) 304 (1816).

[276] Id. at 348 ("If there were no revising authority to control these jarring and discordant judgments, and harmonize them into uniformity, the laws, the treaties, and the constitution of the United States would be different in different states.").

[277] 461 U.S. 499 (1983); see supra Section I.A.5.

ror being corrected is prejudicial.[278] As I argue above, this holding essentially eliminates the supervisory power by permitting its exercise only in those cases in which it is not needed. I would extend that power to cover those instances where other doctrines, in this case harmless error, are unlikely to encourage changes in official behavior.[279] Thus, *Hasting* must be overturned before a per se reversal rule like the one I proposed is possible.

D. Why an Objective Standard?

Others have suggested that an inquiry into the subjective state of mind of the prosecutor should be made in determining whether or not error was prejudicial. For example, in his article, *Mental Culpability and Prosecutorial Misconduct*, Professor Bennett L. Gershman argues that exactly such a standard should be employed.

> Courts, when the trial record permits the inference, should explicitly identify a prosecutor's mental culpability in determining whether the conduct was improper, and should expressly include in the determination of harmless error or plain error a prosecutor's subjective intent to cause harm. The judiciary's consistent recognition of a prosecutor's mental culpability, when such finding is available, would provide much stronger disincentives to prosecutorial violations, and likely result in a reduction in the incidence of violations.[280]

I elected not to take my argument that far; rather, I chose an objective standard for prosecutorial misconduct, and did so for several reasons. First, the objective test neatly parallels the now purely objective test employed in qualified immunity cases. As discussed above,[281] the Supreme Court has determined that inquiry

---

[278] It is important to note that the Supreme Court's opinion in *Hasting* did not rely on Article III in thus limiting the supervisory power.

[279] See supra Section I.D.2 (arguing that harmless error, unlike qualified immunity, lacks the capacity to encourage changes in official behaviors).

[280] Gershman, supra note 229, at 164; see also Bilaisis, supra note 18, at 459 ("This Comment contends that deliberate violations of rules which regulate the conduct of prosecutors and judges at trial should not be measured by a harmless error standard, but should result in automatic reversals of convictions. Automatic reversals of this class of error would create a most effective deterrent against the erosion of defendants' due process rights and would preserve the integrity of our criminal justice system.") (footnote omitted).

[281] See supra Section I.C.1.

into whether a state officer intended to violate the rights of the plaintiff or knew that she was violating the rights of the plaintiff permitted excessive inquiry into the actor's state of mind, would likely have a chilling effect on state officers, and allowed possibly meritless suits to survive summary judgment and proceed to trial. Similarly, inquiry into whether a prosecutor intended to deprive a criminal defendant of her constitutional rights would likely have all of the same adverse effects.[282] The decisions of the prosecutor are among the least public and most insulated in the criminal justice system, and courts have jealously protected the rights of prosecutors to use their discretion in the bringing and prosecuting of criminal cases.[283]

Secondly, courts have extensive experience applying reasonable person standards, which have spread throughout the common law. For years, courts have been applying the test not only in the qualified immunity context, but also with regard to negligence in torts, self-defense in criminal law, reasonable expectations of the insured in insurance coverage, among many, many others. I believe that this extensive experience with the reasonable person concept will make courts far more willing to accept and apply the standard with regard to prosecutorial errors.

E. The Alternatives to the Rule

In order to convince the reader of the propriety of this proposed rule, I feel compelled to demonstrate not only that the per se prejudice rule is a good idea but also that it is better than the alternative means available for dealing with prosecutorial misconduct in the courtroom. The truth about prosecutorial misconduct, however, is that nearly all of the other conceivable means by which it could be dealt with—civil sanctions, criminal sanctions, disciplinary

---

[282] I do not answer the question of whether an officer is entitled to qualified immunity if he knew that he was violating the defendant's rights, but could not reasonably be expected to know so. This concept—the exceptionally well-trained officer—is one which has confounded legal scholars for years. See, e.g., Kinports, supra note 152.

[283] See, e.g., President's Comm'n on Law Enforcement & the Admin. of Justice, The Challenge of Crime in a Free Society 11 (1967) ("The prosecutor wields almost undisputed sway over the pretrial progress of most cases. He decides whether to press a case or drop it. He determines the specific charge against a defendant.").

actions, and contempt proceedings—are already in place. Together with harmless error, all of these disciplinary alternatives either currently exist to deter prosecutorial misconduct or have been determined by the courts to be unavailable. The problem, as I hope to show, is that the available doctrines are rarely used and are each flawed in a way that precludes quick fixes.

1. Civil Suits—Foreclosed by the Supreme Court

Section 1983 of Title 42 of the United States Code provides for a cause of action against state officials who violate a plaintiff's constitutional rights.[284] In the case of *Bivens v. Six Unknown Agents of Federal Bureau of Narcotics*,[285] the Supreme Court recognized a similar cause of action against federal officers.[286] Although both of these doctrines could be read to cover constitutional violations that occur in the courtroom, in the 1975 case of *Imbler v. Pachtman*,[287] the Supreme Court held prosecutors to be absolutely immune from suits arising out of the exercise of their prosecutorial powers.[288] In *Imbler*, the Court ruled that the enactment of Section 1983 did not abrogate the absolute immunity that those engaged in the prosecution of criminal cases had enjoyed since early common law. Although the Court acknowledged that this immunity would leave many injured parties without a civil remedy, it concluded that only absolute immunity would adequately protect prosecutors from the chilling effect of subsequent civil litigation.[289] Thus, after *Imbler*,

---

[284] 42 U.S.C. § 1983 (2001).

[285] 403 U.S. 388 (1971).

[286] Id. at 394–95.

[287] 424 U.S. 409 (1976).

[288] Id. at 427 ("We conclude that the considerations outlined above dictate the same absolute immunity under § 1983 that the prosecutor enjoys at common law."). By contrast, prosecutors remain as liable for those acts undertaken in the investigation of crimes as are other law enforcement agents. Id. at 430–31.

[289] See id. at 427–28:

> To be sure, this immunity does leave the genuinely wronged defendant without civil redress against a prosecutor whose malicious or dishonest action deprives him of liberty. But the alternative of qualifying a prosecutor's immunity would disserve the broader public interest. It would prevent the vigorous and fearless performance of the prosecutor's duty that is essential to the proper functioning of the criminal justice system. Moreover, it often would prejudice defendants in criminal cases by skewing post-conviction judicial decisions that should be made with the sole purpose of insuring justice.

Id. (footnote omitted).

civil suits against prosecutors, at least those based upon acts that fall within the prosecutorial part of the district attorney's job description, are entirely barred.

The *Imbler* Court said that it did not intend to leave the injured without a remedy, however. Two possibilities remained after *Imbler*:

> This Court has never suggested that the policy considerations which compel civil immunity for certain governmental officials also place them beyond the reach of the criminal law. Even judges, cloaked with absolute civil immunity for centuries, could be punished criminally for willful deprivations of constitutional rights on the strength of 18 U.S.C. § 242, the criminal analog of § 1983. The prosecutor would fare no better for his willful acts. Moreover, a prosecutor stands perhaps unique, among officials whose acts could deprive persons of constitutional rights, in his amenability to professional discipline by an association of his peers.[290]

It is to those alternatives—criminal prosecutions and professional disciplinary proceedings—that I now turn.

2. *Criminal Prosecution*

Although the availability of criminal sanctions against prosecutors was apparently important to the *Imbler* Court, this avenue of enforcement remains largely symbolic. There are very few reported instances of a prosecution under Sections 241 and 242 that involved the actions of a prosecutor during a criminal trial. Furthermore, those who have written about the regulation of prosecutorial misbehavior rarely even mention criminal sanctions as a realistic option.[291]

---

[290] Id. at 429 (citations and footnotes omitted).

[291] In his seminal 1972 article on the topic of courtroom misconduct, Professor Albert W. Alschuler barely mentions criminal sanctions as a check on prosecutorial misbehavior. Although listing possible remedies such as appellate reversal, civil actions for damages, discipline by the legal community, and contempt of court, criminal sanctions are largely excluded. Albert W. Alschuler, Courtroom Misconduct by Prosecutors and Trial Judges, 50 Tex. L. Rev. 629, 644–77 (1972); see also Richard A. Rosen, Disciplinary Sanctions Against Prosecutors for *Brady* Violations: A Paper Tiger, 65 N.C. L. Rev. 693 (1987). After discussing *Imbler*, Professor Rosen writes: "Therefore, besides disciplinary sanctions, the only potential deterrent to *Brady*-type misconduct is the prospect that the conviction of the defendant will be reversed." Id.

It is not difficult to understand why such prosecutions arise so infrequently. First, in a criminal prosecution of a district attorney, the state must prove not only that the prosecutor violated the defendant's rights but that she did so knowing that her actions would deprive the defendants of these rights.[292] Furthermore, regardless of the merits, one can imagine that, in all but the most extreme cases, juries are fairly reluctant to send prosecutors to prison for what appear to be technical violations of a criminal's rights. Finally, many violations of a defendant's trial rights *are* largely technical; while some misconduct is truly serious—the withholding of exculpatory material, the suborning of perjured testimony, the falsification or destruction of evidence—for much of courtroom misconduct, criminal sanctions truly are overkill.[293]

3. Disciplinary Proceedings

Prosecutorial misconduct occurring at trial may also be dealt with through the use of professional discipline. Prosecutors are licensed in the states in which they practice and are generally subject to the same rules of discipline as are other attorneys.[294] Because this

---

at 705. The reason he can be so confident is that his search of reported cases revealed only one incident of a prosecutor being charged criminally for a *Brady* violation. As I mention below, *Brady* violations are among the most serious forms of misconduct; if convictions are rare for *Brady* violations, they are unlikely to be more numerous elsewhere. See also Maurice Possley & Ken Armstrong, Prosecution on Trial in DuPage, Chi. Trib., Jan. 12, 1999, at 1 (finding that of 381 cases in the previous thirty-six years in which a case was reversed because a prosecutor withheld or falsified evidence, only two had led to criminal prosecutions of the district attorneys and in both cases, the charges were dismissed prior to trial, and concluding that only six prosecutors had been convicted in the twentieth century for their courtroom misconduct).

[292] See 18 U.S.C. § 242 (2000) ("Whoever, under color of any law, statute, ordinance, regulation, or custom, *willfully* subjects any person . . . to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States . . . shall be fined under this title or imprisoned not more than one year, or both.") (emphasis added).

[293] Furthermore, not all error is even theoretically amenable to criminal prosecution. See, e.g., Lesley E. Williams, The Civil Regulation of Prosecutors, 67 Fordham L. Rev. 3441, 3464 (1999) ("As this section demonstrates, some of the alleged behavior of which plaintiffs complained in the civil suits in part III is unconstitutional and actionable under § 1983 and *Bivens*, but it is neither unethical nor illegal.").

[294] The capacity of federal prosecutors to be bound by the disciplinary rules of the states in which they practice remains a complicated question. For example, in 1989 then-Attorney General Richard Thornburgh indicated that "the DOJ would resist on 'Supremacy Clause grounds' any disciplinary action against federal prosecutors by

method of dealing with prosecutor misbehavior—like criminal prosecution—is currently available and endorsed by the Supreme Court, we should be able to discover how often it is being used.

One study of the use of disciplinary proceedings to punish and deter a particular kind of prosecutorial misconduct found that the rules in place for that purpose went almost totally unused. Professor Richard Rosen's 1987 study, *Disciplinary Sanctions Against Prosecutors for* Brady *Violations*,[295] investigated misconduct that ranks among the most serious—violations running afoul of the Supreme Court's edict in *Brady v. Maryland*[296] that exculpatory material of which prosecutors are aware must be turned over to the defense prior to trial.[297] These errors are more serious than all but a handful of courtroom errors, as they involve withholding from defendants and from the courts evidence that could lead to acquittal. Nonetheless, after studying the applicability of state disciplinary tools to prosecutors who violated *Brady*, Rosen was not sanguine about the usefulness of these tools to stop even these egregious examples of misconduct.

> The results of this research demonstrate that despite the universal adoption by the states of Disciplinary Rules prohibiting prosecutorial suppression of exculpatory evidence and falsification of evidence, and despite numerous reported cases showing violations of these rules, disciplinary charges have been brought infrequently and meaningful sanctions rarely applied. The result is a disciplinary system that, on its face, appears to be a deterrent to prosecutorial misconduct, but which has had its salutary impact seriously weakened by a failure of enforcement.[298]

Rosen goes on to note that because the other means for controlling prosecutorial misconduct are similarly ineffective, "at present insufficient incentive exists for a prosecutor to refrain from . . . misconduct."[299]

---

state authorities for violation of ethics rules that interfered with 'legitimate federal law enforcement techniques.'" Note, Federal Prosecutors, State Ethics Regulations, and the McDade Amendment, 113 Harv. L. Rev. 2080, 2085 (2000).

[295] Rosen, supra note 291.

[296] 373 U.S. 83 (1963).

[297] Id. at 87.

[298] Rosen, supra note 291, at 697.

[299] Id.

4. Contempt Proceedings

Nearly three decades ago, Professor Albert Alschuler, in his study of courtroom misconduct wrote the following: "In preparing this article, I surveyed the reported decisions for the past twenty-five years. Although I uncovered a large number of cases in which defense attorneys had been punished for contemptuous courtroom behavior, I did not find a single case in which a prosecutor had been so disciplined."[300] It is not entirely clear that the use of contempt proceedings has increased considerably in the time since then.[301] Although much of the misconduct that prejudices defendants is amenable to the imposition of sanctions, judges seem surprisingly unwilling to do so.

5. Summary

In sum, many of the alternatives to my proposed strengthening of the harmless error rule are currently in place but languish unused. By contrast, the system that I advocate is modeled on one already working to regulate the behavior of law enforcement officials. Just as the exclusionary rule operates to deter police misconduct by depriving the state of the fruits of official misdeeds, so my proposal would deter prosecutorial malfeasance by ratchetting up the pressure on prosecutors to comply with the law. Just as the state is not penalized for errors of police officers that are made in good faith, so the state would not be penalized for errors made in good faith by prosecutors.

CONCLUSION

In their recent article on harmless error, Professor William M. Landes and Judge Richard A. Posner utilize an econometric analysis of prosecutorial misconduct. According to their quite intuitive model:

---

[300] Alschuler, supra note 291, at 674.

[301] If anything, there is reason to believe that the power of state and federal judges to hold prosecutors in contempt has actually diminished over time. In *The Civil Regulation of Prosecutors*, Williams, supra note 293, Lesley E. Williams argues that, in recent years, a number of Supreme Court cases have limited the grounds on which prosecutors may be held in contempt.

> The prosecutor's incentive to induce or avoid errors at the trial that make it more likely that the defendant will be convicted depends on the sanctions the appellate court imposes on him if he commits an error. If the appellate court reverses a conviction when error occurs, a prosecutor will have a greater incentive both to refrain from committing intentional and deliberate errors and to invest resources in preventing inadvertent errors from occurring than if the court, invoking the harmless error rule, declines to reverse.[302]

I could not agree more with the conclusion that prosecutors, like other actors throughout the criminal justice system, respond to the system of rewards and penalties applicable to them. I argue further that the current system of harmless error does not provide prosecutors with sufficient incentives either to educate themselves regarding the applicable law or to shy away from intentional or knowing misconduct.

While many may be skeptical of the deterrent power of the per se prejudice rule I suggest, it should be borne in mind the role that deterrence currently plays, or is expected to play, in our criminal justice system, generally. With faith in the capacity of our prisons and jails to rehabilitate offenders diminishing, deterrence has come to be one of the leading justifications for the imposition of criminal sanction.[303] Needless to say, many have argued against the deterrent effect, questioning the extent to which offenders, particularly those engaged in crimes of passion, rationalize questions of crime and punishment.[304] While there is a great deal of power to those arguments, one would expect prosecutors, who have much to lose in terms of pride, prestige, and social standing, to be more contempla-

---

[302] Landes & Posner, supra note 18, at 176.

[303] See, e.g., Franklin E. Zimring & Gordon Hawkins, Incapacitation: Penal Confinement and the Restraint of Crime 21–22 (1995) (arguing that until very recently, deterrence stood alongside rehabilitation as the leading justification for incarceration).

[304] A number of studies have called the power of deterrence into question. See, e.g., Deterrence and Incapacitation: Estimating the Effects of Criminal Sanctions on Crime Rates 8 (Alfred Blumstein et al. eds., 1978) (reviewing the evidence for a deterrent effect and finding that on the whole that there are significant flaws in current studies such that "no general conclusions can be drawn"); Jack P. Gibbs, Norms, Deviance, and Social Control 143 (1981) (concluding that the evidence of a deterrent effect was so muddled that only a true partisan could find it compelling in one direction or the other).

tive than their criminal counterparts and thus more amenable to correction through the imposition of greater or more certain sanctions.[305]

That I advocate a rule that will result in a greater deterrent effect on prosecutors is not to imply that I believe all prosecutors are venal, careless, or incompetent. My beliefs are quite the contrary. Prosecutors, however, like the rest of us, are influenced, at least to some degree, by the costs and benefits society imposes on us. Not everyone would become a murderer if the state's prohibition on murder were done away with, but we have a prohibition on murder at least in part because we believe that fewer people will kill if we do. Thus, although I do not believe that most prosecutors misbehave as much as they believe they can get away with it, I do believe that if the likelihood of reversal were increased, they would engage in misconduct less often.

[305] One of the things we do know about deterrence is that it increases more with the likelihood of sanction than with the severity of it. See, e.g., Sanford H. Kadish & Stephen J. Schulhofer, Criminal Law and Its Processes 117 (6th ed. 1995) (arguing that although the evidence for either is relatively thin, certainty has more to recommend it as a deterrent than does severity); see also Franklin E. Zimring & Gordon J. Hawkins, Deterrence: The Legal Threat in Crime Control 158–72 (1973) (making a similar argument).