Texas Wesleyan Law Review

Volume 17 | Issue 4 Article 2

7-1-2011

Revising Harmless Error: Making Innocence Relevant to Direct Appeals

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ARTICLES

REVISING HARMLESS ERROR: MAKING INNOCENCE RELEVANT TO DIRECT APPEALS

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I. INTRODUCTION

In most jurisdictions, convicted defendants have the right to an appeal at public expense, and to the assistance of counsel with that appeal. But the direct appeal is almost never concerned with actual innocence. On direct appeal, courts will look at claims of trial error, and evaluate those claims and their "harmlessness" based only on the trial record. Thus, the chances of a reversal on direct appeal bear no relation to the chances that the wrong person has been convicted. While the current appeal system may encourage proper trial procedures,[1] it does not provide a check against wrongful conviction. The disconnect between appeals and actual innocence is ironic, since most jurisdictions provide funding for direct appeals, but not for collateral attacks where claims of actual innocence can be litigated.[2]

Standards of review further obscure and avoid the question of actual innocence. Our current system of criminal appellate review is geared to avoid factual issues. It is extremely difficult—if not impossible—to get an appellate court to take seriously a claim of factual error such as the claim that a witness lied or was mistaken. Thus, a study of 200 persons exonerated through post-conviction DNA evidence showed that few of those persons had raised claims on appeal related

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1. Such encouragement is debatable, given the frequency with which harmless error is invoked to eliminate any consequences from trial error. *See* note 33, *infra*.

2. Douglas v. California, 372 U.S. 353 (1963) (holding indigent defendant entitled to counsel on appeal). On collateral attack, where there is no right to counsel, convicted persons can introduce new evidence, which is usually necessary to prove innocence after conviction. *See* Keith A. Findley, *Innocence Protection in the Appellate Process*, 93 MARQ. L. REV. 591, 605 (2010) (discussing why new evidence can only be introduced on collateral attack, but not on appeal).

DOI: https://doi.org/10.37419/TWLR.V17.I4.1

to their factual innocence, and very few of those claims met with success.[3] Instead, the system seems to privilege procedural claims.[4]

Scholars and others have suggested reforms that might make the appeal more meaningful to innocence.[5] This article will focus on just one aspect of appellate review that could be made more likely to provide relief to the innocent through more reliable fact-finding: the harmless error analysis. It is in assessing whether an error was harmless that the courts come closest to thinking about innocence on appeal.[6] Although the focus of such inquiries was originally on whether the error contributed to the verdict, in time courts have come to see it more as whether the defendant is guilty: an evolution from what some have called an "effect-on-the-verdict" to a "guilt-based" approach.[7] Yet even in reviewing the evidence of guilt under various harmless error standards, appellate courts do not adequately consider what we have learned about evidence of guilt from DNA exonerations.

According to the Innocence Project, the leading cause of wrongful convictions is eyewitness misidentification, followed by "unvalidated/improper forensics," false confessions, and informants.[8] Current harmless error standards run contrary to these findings, both in the standard of harmlessness required for different errors and in the application of those standards. For example, most asserted errors implicating these likely causes of wrongful conviction will be evidentiary errors subject to a looser review for harmlessness than constitutional errors. And when courts review the record for "overwhelming" evidence of guilt under some harmless error standards, they often give undue weight to unchallenged confessions, stranger eyewitness identifications, and dubious forensic evidence.

The first part of this essay examines the development of harmless error law and its application to cases involving evidence of the type implicated in wrongful convictions. The second part will look at how harmless error analysis can be reinvigorated to take into account the

3. Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55 (2008).

4. Garrett, *supra* note 3, at 126 (citing William J. Stuntz, *The Uneasy Relationship between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1 (1997). Stuntz argues that more procedural claims are raised because of "their greater likelihood of success and ease of litigation . . . ."

5. *See, e.g.*, Garrett, *supra* note 3, at 127 (discussing state "innocence commissions); Chad M. Oldfather, *Appellate Courts, Historical Facts, and the Civil-Criminal Distinction*, 57 VAND. L. REV. 435 (2004) (discussing the expansion of factual review on appeal). *See* Giovanna Shay, *What We Can learn About Appeals From Mr. Tillman's Case: More Lessons From Another DNA Exoneration,* 77 U. CIN. L. REV. 1499, 1537 n.257 (2009) (discussing the movement away from a purely adversary system).

6. Garrett, *supra* note 3, at 107. Courts also come close to considering innocence when they address an *insufficient evidence* claim—but such arguments rarely succeed. Garrett, *supra* note 3, at 112.

7. Harry T. Edwards, *To Err is Human, But Not Always Harmless: When Should Legal Error Be Tolerated*, 70 N.Y.U. L. REV. 1167, 1171 (1995).

8. Innocence Project, http://www.innocenceproject.org/understand/ (last visited Feb. 9, 2011).

Innocence Project findings. This will require more than tinkering with the standards; it may mean relying less on judicial speculation about the effect of an error. Some inquiries might require remand hearings where additional evidence can be admitted to determine the importance of an error to the verdict or the strength of the remaining untainted evidence.

Appellate courts are reluctant to find error prejudicial, and have erected barriers to such findings. But since we provide direct appeals at public expense, what better way to spend those resources than on what should matter most: determining whether the right person has been convicted? It is time for a better-informed harmless error standard that incorporates the lessons of the last three decades about the realities of criminal justice.

II. HISTORY OF HARMLESS ERROR

The idea of assessing errors for harmlessness on appeal has been with us at least since the early 1900's when states began to adopt harmless error rules in response to what was perceived as too many reversals on technicalities.[9] A federal statute that resembles the current Rule 52 (a) was enacted in 1919.[10] Both provide that a judgment shall not be reversed where an error does not "affect substantial rights" of the parties. The original common law rule placed the burden on the beneficiary of the error (in criminal law, the prosecutor) to prove that no harm resulted.[11] The states did not always place the burden on a particular party, and the Supreme Court, interpreting Rule 52 in *Kotteakos v. United States* in 1946, held that any presumptions or burdens should arise "from the nature of the error and its 'natural effect' for or against prejudice in the particular setting."[12]

Various formulations for harmlessness were advanced, including whether the finding of guilt was nevertheless the "correct result," or whether there was no "reasonable possibility" that the error contrib-

9. LaFave, et al., CRIMINAL PROCEDURE (5th ed. 2009) § 27.6, p. 1320; Richard A. Fairfax, Jr., *A Fair Trial, Not a Perfect One: The Early Twentieth Century Campaign for the Harmless Error Rule*, 93 MARQ. L. REV. 433, 436 (2010) (recounting history of harmless error rules).

10. *Id.*; *see also* 28 U.S.C.A. § 2111 (West) (providing 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" and, which was originally enacted as Act of Feb. 26, 1919, ch. 48, 40 Stat. 1181, directing appellate courts to ignore "technical errors, defects, or exceptions which do not affect the substantial rights of the parties.") This provision was originally enacted as, Act of Feb. 26, 1919, ch. 48, 40 Stat. 1181, directing appellate courts to ignore "technical errors, defects, or exceptions which do not affect the substantial rights of the parties." FED. RULE CRIM. PROC. 52(a) provides: "Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.".

11. Chapman v. California, 386 U.S. 18, 24 (1967).

12. Kotteakos v. United States, 328 U.S. 750, 764 (1946).

uted to the verdict.[13] The *Kotteakos* Court set forth the standard for federal harmless error as: "if, when all is said and done, the conviction is sure that the error did not influence the jury, or had but very slight effect, the verdict and the judgment should stand. . . . But if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected."[14] This standard has been adopted in many state courts.[15]

The federal constitutional harmless error doctrine began with *Chapman v. California*,[16] in which the U. S. Supreme Court held that the prosecutor's comments on the defendant's failure to testify (a Due Process violation) could only be harmless if the reviewing court could conclude beyond a reasonable doubt that the error did not contribute to the defendant's conviction.[17] The burden was on the prosecution to show harmlessness beyond a reasonable doubt. Although *Chapman* is remembered primarily for rejecting automatic reversal for constitutional violations, *Chapman* was in fact a tougher standard for the prosecution than the state court's rule that a violation was harmless if it did not result in a "miscarriage of justice."[18] At the time, every state already had a harmless error doctrine,[19] and *Chapman* announced a new, more rigorous standard for federal constitutional violations.

However, the *Chapman* court maintained a distinction between constitutional errors that were subject to harmless error analysis and certain fair trial rights that were so basic that harm was presumed. In the latter category were violations such as denial of counsel or judicial bias, which violations could never be harmless.[20] The *Chapman* court also included coerced confessions in the latter category, but in 1991 in *Arizona v. Fulminante*[21] the Court reversed itself and held that admission of an involuntary confession was subject to harmless error analysis. The *Fulminante* court found that the admission of a coerced confession was not harmless in that particular case, but the Arizona Supreme Court had found that it was harmless, that in fact the remaining evidence was "overwhelming." Most of the factors now identified as contributing to wrongful convictions would be classified by the courts as trial errors, and therefore subject to harmless error review.

13. LaFave, et al., *supra* note 9, at 1322.
14. *Kotteakos*, 328 U.S. at 764–65.
15. LaFave, *supra* note 9, at 1322.
16. *Chapman*, 386 U.S. 18 (1967).
17. *Id.* at 24.
18. *Id.* at 23.
19. *Id.* at 22.
20. *Id.* at 23 n.8. Edwards, *supra* note 7, at 1176.
21. Arizona v. Fulminante, 499 U.S. 279 (1991).

Even as the kind and number of errors subjected to harmless error review has grown, the Court's standard for harmless constitutional error has moved back and forth between a focus on remaining evidence of guilt and a focus on the likely effect of an error on the verdict. The *Chapman* Court's analysis focused on the effect of the error itself: "it is completely impossible for us to say that the State has demonstrated, beyond a reasonable doubt, that the prosecutor's comments and the trial judge's instruction did not contribute to petitioners' convictions."[22] The *Fulminante* Court held that the appellate court should "simply review the remainder of the evidence against the defendant to determine whether the admission of the confession was harmless beyond a reasonable doubt."[23] The *Fulminante* formulation of the harmless error test focuses on the "remainder of the evidence against the defendant," and can easily lead to the "guilt-based" approach that Judge Edwards has warned against.[24] Since then, the Court itself has at times emphasized the evidence of guilt and at other times emphasized the error's effect upon the verdict.[25]

The vast majority of criminal convictions are obtained in state courts and reviewed by state courts. These courts are bound by the United States Supreme Court harmless error precedent when evaluating federal constitutional claims, but their application of these precedents is not likely to be reviewed, let alone reversed, by another court.[26] Non-constitutional harmless error is assessed under state rules, which are often less stringent than the federal rule, at least in how they are expressed.[27] Most harmless error review—constitutional or non-constitutional—is cursory,[28] with little explanation.[29]

22. *Chapman*, 386 U.S. at 26.

23. *Fulminante*, 499 U.S. 279 (1991).

24. Edwards, *supra* note 7, at 1171.

25. LaFave at 1330; *See* Brent M. Craig, *'What Were TheyThinking?'—A Proposed Approach to Harmless Error Analysis*, 2006 FLA. COASTAL L. REV. 1, 6–12 (2006) (discussing Court's vacillation between a focus on the "overwhelming evidence" and whether the error "contributed to the verdict.").

26. A state court's factual misapplication of settled harmless error law is not likely to gain the attention of a higher court for discretionary review, and it will certainly not meet the Anti-Terrorism and Effective Death Penalty Act's requirements for habeas relief in federal court. *See* 28 U.S.C. § 2254(d).

27. For example, in California the non-constitutional harmless error standard is whether there has been a "miscarriage of justice," defined as when "after an examination of the entire cause, including the evidence," the court finds "that is it reasonably probable that a result favorable to the appealing party would have been reached in the absence of the error." People v. Watson, 46 Cal. 2d 818, 836 (1965), discussed in Meehan Rasch, *California's Dueling Harmless Error Standards: Approaches to Federal Constitutional Error in Civil Proceedings and Establishing he Proper Test for Dependency*, 35 W. ST. U. L. REV. 433, 441 (2008).

28. Brandon L. Garrett, *Innocence, Harmless Error, and Federal Wrongful Conviction Law*, 2005 WIS. L. REV. 35, 60 (2005).

29. *See, e.g.*, Garrett, *supra* note 3, at 107–09 (discussing opinions of DNA exoneree cases).

Harmless error type analysis also is embedded in other aspects of appellate review, such as the federal "plain error" rule,[30] ineffective assistance of counsel claims,[31] and prosecutorial withholding of exculpatory evidence claims.[32] In these instances, where "prejudice" or "materiality" is made part of the claim itself, the burden to show a lack of harmlessness falls on the defendant. Thus, appellate review is permeated with assessments of the entirety of the evidence and the defendant's likely guilt. Yet, this ostensible concern with the question of guilt is not rationally tied to the reliability of convictions. The rigor of the various tests is determined not by how likely the error is to have contributed to an unreliable verdict, but by the constitutional severity of the error. And in reviewing the trial record, courts rely on discredited presumptions about evidence and juries. Actual innocence seems to the courts to be extremely unlikely and therefore irrelevant.

Thus, we have an appellate system that discourages factual claims, yet rejects procedural claims based on unreliable appellate factual evaluations of the record. Before the wave of DNA exonerations, however, the primary critique of harmless error analysis was not that it maintained wrongful convictions, but that it rendered procedural rights meaningless.[33] Even the critics of excessive harmless error seemed to assume the guilt of the convicted. With the number of DNA exxonerees at 272,[34] it is no longer possible to ignore the possibility of wrongful convictions, especially in certain kinds of cases.

III. HARMLESS ERROR AND THE LIKELY CAUSES OF WRONGFUL CONVICTION

The major contributors to wrongful conviction are eyewitness misidentification, followed by "unvalidated/improper forensics," false confessions, and informants. It is difficult to challenge these kinds of errors as constitutional violations.[35] The ostensible rigor of the harmless error standard applied to claims related to these factors depends on whether it is a constitutional claim or merely a state evidentiary claim. However, there is significant confusion of standards, not only in the Supreme Court, but also in the federal and state appellate

30. See, e.g., United States v. Marcus, 130 S. Ct. 2159 (2010) (discussing defendant's obligation under plain error rule, FED. R. CRIM. PROC. 52, to show, among other things, that unpreserved error was not harmless).

31. Strickland v. Washington, 466 U.S. 668, 694 (1984) (requiring, as part of an ineffective assistance of counsel claim, that defendant show a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.").

32. Brady v. Maryland, 373 U.S. 83 (1963) (requiring a showing that improperly withheld evidence was material). The materiality aspect of a *Brady* claim is essentially a harmless error analysis.

33. *See, e.g.,* Edwards, *supra* note 7, at 1197–99; Roger J. Traynor, THE RIDDLE OF HARMLESS ERROR (1970).

34. http://www.innocenceproject.org/know/ (last visited Jul. 25, 2011).

35. Garrett, *supra* note 3, at 76–77, n.80.

courts.[36] In practice, observers see little difference in the standards as applied.[37]

Eyewitness misidentification: A defendant might challenge an eyewitness identification on federal constitutional grounds by claiming the police obtained the identification using impermissibly suggestive methods. Such a claim is based on the Due Process clause,[38] and is difficult to win.[39] However, the state usually will not need to prove that an unduly suggestive identification was harmless beyond a reasonable doubt, because the Court has held that no violation occurs where an unduly suggestive identification is "otherwise reliable,"[40] a kind of preliminary harmless error test built into the assessment of the claim. The Court has given several factors for assessing reliability, including the witnesses' opportunity to view the suspect, the witnesses' level of certainty, and the time elapsed between the observation and the eyewitness identification procedure.[41] Scientific research has discredited this list, especially the "degree of certainty," and DNA exonerations have shown just how unrelated to reliability they are—or at least how loosely they are applied to uphold convictions.[42] Thus the reliability standard for claims related to erroneous eyewitness identification is itself unreliable and unlikely to assist in uncovering wrongful convictions. Several scholars have written extensively on this phenomenon.[43] Of the wrongfully convicted persons in Garrett's study who challenged the eyewitness identifications, none prevailed in appellate courts on this claim.[44]

Even if an appellate court does find an identification unduly suggestive and unreliable, it will then review the remaining evidence for harmlessness. Here, courts often fail to consider the corrupting effect of a suggestive identification on the remaining evidence, including subsequent identifications, and even confessions: the erroneous identi-

36. *See* Michael H. Graham, *Abuse of Discretion, Reversible Error, Harmless Error, Plain Error, Structural Error;* a New Paradigm for Criminal Cases, 43 CRIM. L. BULL. 6 (2007); Meehan Rasch, California's Dueling Harmless Error Standards: Approaches to Federal Constitutional Error in Civil Proceedings and Establishing he Proper Test for Dependency, 35 W. ST. U. LAW REV. 433,437 (2008)(discussing confusion in harmless error standards).

37. Edwards, *supra* note 7, at 1179.

38. *See* Manson v. Brathwaite, 432 U.S. 98, 99 (1977).

39. In Garrett's study of 200 exonerees, 28 % of those with written appellate decisions raised suggestive identification procedure claims—none of the claims prevailed. Garrett, *supra* note 3, at 80. Yet 78% of the exonerees were convicted at least in part by mistaken eyewitness identification. Garrett, *supra* note 3, at 76.

40. *Manson*, 432 U.S. at 106.

41. *Id.* at 114.

42. *See* Nancy K. Steblay, *Maintaining the Reliability of Eyewitness Evidence: After the Lineup*, 42 CREIGHTON L. REV. 643 (2009) (discussing scientific research on lineup identifications); *See* Garrett, *supra* note 3, at 81, n.93 (citing assessments of scientific studies of eyewitness identification).

43. Garrett, *supra* note 28, at 79; *See, e.g.*, Steblay, *supra* note 42.

44. *See supra*, note 39.

fication may lead to the false confession.[45] The identification, especially if it occurred early in the investigation, cannot be easily excised from the rest of the case. But the harmless error standard does not encourage courts to look back, behind the trial, to how the investigation unfolded.

False Confessions: False confessions are more common than generally believed.[46] A false confession may be made because of unconstitutional coercion or a Miranda violation, in which case the defendant may raise a constitutional claim subject to a constitutional harmless beyond a reasonable doubt standard.[47] However, a false confession may also be given for reasons other than improper police behavior, in which case an appellate challenge would have to be based on other evidentiary grounds, if it could be challenged at all.[48]

Here, courts often fail to consider the devastating effect of a confession upon the jury and the relationship between the confession and the development of additional evidence. For example, as in *Fulminante*, one confession may lead to a repetition, or a jailhouse informant's claim that it was repeated. While the Court in *Fulminante* held that the admission of the coerced confession was not harmless, the state court had held that the remaining evidence was "overwhelming." Before DNA exonerations in significant numbers, it may have been as difficult for reviewing judges to disregard confessions as it was for juries.[49] And researchers have documented the corrupting effect that a confession can have on identification procedures and on eyewitnesses asked to make identifications.[50]

Courts have lost the suspicion of confessions that gave rise to the *corpus delicti* rule[51]—but perhaps we need to bring it back. Since

45. Studies show that the reverse also can occur—knowledge of a confession can lead to an erroneous eyewitness identification. Steblay, *supra* note 42, at 652.

46. Alan Hirsch, *Confessions and Harmless Error: A New Argument for the Old Approach*, 12 BERKLEY J. CRIM. LAW 1, 4 (2007).

47. *See* Arizona v. Fulminante, 499 U.S. 279, 295–302 (1991) (finding that the defendant's confession was coerced and admitting his confession into evidence was not harmless beyond a reasonable doubt).

48. In the Garrett study, only 50% of those who falsely confessed challenged the confession on appeal on federal grounds, and an additional 15% raised state law claims or indirect constitutional claims. Only one prevailed, and that was through an ineffective assistance of counsel claim. Garrett, *supra* note 3, at 90.

49. Concurring in *Fuliminante*, Justice Kennedy noted the "indelible impact a full confession may have on the trier of fact." *Fulminante*, 499 U.S. at 313. Appellate judges are also affected by confessions. *See* Hirsch, *supra* note 46, at 16.

50. *See* Lisa E. Hasel & Saul M. Kassin, *On the Presumption of Evidentiary Independence: Can Confessions Corrupt Eyewitness Identifications?*, 20 PSYCHOL. SCI. 122 (2009) *reported in* Steblay, *supra* note 42, at 651–52 ("sixty-one percent of eyewitnesses who had made an identification of a lineup member two days earlier changed their earlier identification in accordance with the 'confession' of the other lineup member," and "[f]ifty percent of those eyewitnesses who had not made an identification at the first session now changed their prior non-identification decision to identification of the 'confessor'").

51. *See* Wayne R. LaFave, CRIMINAL LAW (5th ed. 2010) § 1.4(b) at 2-23.

Fulminante, courts have become very comfortable with finding the admission of coerced confessions harmless, often with little analysis, and sometimes on the basis of repetitions of the confession.[52]

Unvalidated/improper forensics: Forensic evidence can contribute to wrongful conviction when it is improperly or badly done, or when it is based on bad science.[53] Some forensic methods have been discredited in recent years: e.g., bite mark identification, blood serology, hair and fiber analysis.[54] Appellate challenges to the admission of forensic evidence will be reviewed under non-constitutional harmless error standards, unless the defendant can make out a due process violation, a very difficult task.[55] Challenges to forensic evidence will most likely be on evidentiary grounds, and such claims are subject to a deferential standard of review and harmless error standard.

More importantly, it is difficult to mount a challenge to forensic evidence on appeal if such a challenge was not made at trial. Such a challenge usually requires a forensic expert, which may not be available to indigent defendants.[56]

Informants/snitches: Challenges to lying informant evidence are difficult to bring, since the credibility of witnesses is generally not assailable on appeal. Informant testimony can be indirectly attacked through a *Brady* challenge if the defendant can show that the prosecution withheld impeachment evidence, such as a compensation agreement.[57] Here, the defendant will first have to overcome a harmless error type hurdle in showing that the impeachment evidence was "material," meaning there is a "reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome."[58]

Brady challenges or challenges based on newly discovered impeachment evidence or recantations will most likely have to be brought in a collateral attack rather than on appeal, since these kinds of challenges

52. Hirsch, supra note 46, at 13–22 (discussing examples). Of the 16 who raised the claim of coerced confession in Garrett's study, none prevailed. Garrett, *supra* note 3, at 96.

53. Garrett, *supra* note 3, at 81–85.

54. Hirch, *supra* note 46, at 13–22. *See also* Committee on Identifying the Needs of the Forensic Sciences Community, National Research Council, *Strengthening Forensic Science in the United States: A Path Forward* 127–93 (2009) (critiquing many of the forensic identification methods used in criminal prosecutions).

55. Forensic evidence might be so improper or misleading as to violate fundamental fairness. *See* State v. Ortiz, 831 P.2d 1060, 1082 (Wash. 1992) (Smith, J., dissenting) (finding a due process violation where tracker testified that he could read nationality and other characteristics from footprints). *See* Garret, *supra* note 3, at 85, n.112 (citing *Miller v. Pate*, 386 U.S. 1, 7 (1967) (noting that forensic evidence will also violate Due Process if the defendant can show it was fabricated)).

56. Garrett, *supra* note 3, at 85.

57. *See* United States v. Bagley, 473 U.S. 667, 676–77 (1985) (holding *Brady* applies to withheld impeachment evidence).

58. *Id.* at 682.

generally involve evidence outside the trial record.[59] On direct appeal, an informant's testimony can only be challenged through issues such as those involving the scope of cross-examination allowed, or the admissibility of impeachment evidence. Such errors, difficult to show under the differential standard of review for evidentiary claims, would be subject to the evidentiary harmless error test. In Garret's study, of the 12 exonerees who challenged informant testimony on appeal, only one prevailed.[60]

Presumptions about evidence in any harmless error review. The above discussion shows how the kinds of errors that can contribute to wrongful conviction may be perpetuated through deferential harmless error analysis. In addition, presumptions about the relative strength of certain kinds of evidence, and a lack of appreciation for how evidence can be interrelated, can also prevent innocent persons from prevailing on appeal on any issue subject to harmless error analysis.

Regardless of the issue, if the court finds non-structural error, it will review the remaining evidence as part of a harmless error analysis. In doing so, the court may rely heavily on a confession—even when the defendant attacked it at trial—or on stranger cross-racial eyewitness identifications, or on questionable forensic evidence. The court may find that the cumulative effect of such evidence is "overwhelming," ignoring the fact that such evidence is interrelated and likely tainted by the error.[61] Courts may conflate the *Jackson v. Virginia*[62] standard for sufficiency of the evidence ("whether, after viewing the evidence in the light most favorable to the prosecution, any trier of fact could have found the essential elements of the crime beyond a reasonable doubt"[63]) with the harmless error standard, which requires no such deference to the state's evidence.

IV. What Is To Be Done?

In light of the rapid expansion of harmless error findings, and the confusion of standards, it seems futile to propose more stringent word-formulae for harmless error review. What is needed is an awareness of the real possibility of innocence, and respect for the right to jury trial. Courts look at one or both of two aspects of the case when assessing harmlessness. First, courts may focus on the remaining evidence introduced against the defendant and second, courts may focus on the error itself and its likely impact on the verdict. Both approaches rely on appellate imagination. One approach involves an

59. If the challenge is brought in a post-trial motion shortly after conviction, it may be consolidated with the trial appeal. Otherwise, such a challenge will come later in a collateral attack.

60. Garrett, *supra* note 3, at 77, 86–87.

61. Garrett, *supra* note 3, at 108–09.

62. Jackson v. Virginia., 443 U.S. 307 (1979).

63. *Id.* at 319.

imaginary trial where there was no error, the other imagines the trial that actually occurred. The following proposed guidelines will help courts to recognize the possibility of innocence under either approach.

The remaining evidence. Under any standard of harmlessness, whether "beyond a reasonable doubt" or "more likely than not," courts should review the remaining evidence with the following cautions:

(1) Stranger identification should be viewed as weak, and insufficient to support a finding of harmlessness.
(2) A confession should be viewed as no more weighty than any other witness testimony.
(3) Where there is forensic evidence of the type that has been discredited (hair and fiber, for example) the court should be reluctant to find harmlessness.
(4) Informant testimony, like confessions or stranger identification, should not be presumed reliable.

The error's effect on the verdict. In reviewing the likely effect of an error on the verdict, courts should consider:

(1) The overwhelming impact of a confession on the jury
(2) The persuasive effect of eyewitness certainty, and its inverse relation to reliability
(3) The persuasive effect of scientific testimony on lay jurors

Courts may resist the first set of proposals because they can be seen as casting doubt on evidence in the case even when that evidence has not been challenged. One could argue that if the evidence was not challenged before the jury, it should not be viewed suspiciously on appeal. Given the system-wide emphasis on preservation and waiver of issues, a reluctance to question the unchallenged evidence makes sense. But if we want innocence to be relevant—even an important value—on appeal, it makes more sense to invigorate harmless error review with an awareness of the contributors to wrongful conviction.

Another related objection to these proposals is that it keeps appellate courts in the business of speculating about guilt and innocence, advocating a set of presumptions in favor of possible innocence, and pushing courts further into the much-criticized "guilt-based" approach to harmless error. True, the above proposals urge the court to be cautious about finding harmlessness for reasons that the jury may never have considered. In that sense, the appellate court would not be considering how the verdict and this particular trial may have been affected. Again, the response can only be that appellate courts should make some effort to guard against conviction of the innocent. The possibility of innocence is a good reason to allow a retrial or other remedy when the court has already determined that error occurred.

Related to these objections is a more fundamental question about whether criminal appeals should be concerned with procedural justice

(fair procedures) or a just result (the right person is convicted). Historically, liberals and those representing criminal defendants have been on the side of procedural justice while conservatives were less concerned with procedural niceties where guilt was likely. Both sides of this debate seemed to assume that most of those convicted were in fact guilty. In some senses, DNA exonerations have flipped these positions, so that the above proposals suggest that some procedural rules should be overlooked where innocence is likely.

One of the attractions of harmless error is that it avoids expensive retrials of people who are probably guilty. For this reason, it may be time to consider compromise alternatives such as remand hearings to consider the effect of an error and the strength of the remaining evidence. Such a hearing might be warranted where the remaining evidence seems strong but includes evidence of the kind implicated in wrongful convictions or where the effect of erroneously admitted evidence of that type is at issue. At such hearings, counsel should be permitted to attack evidence as unreliable and unlikely to have supported the verdict. Counsel should also be able to support a claim that erroneously admitted evidence had a determinative effect on the verdict.

One interesting proposal to sharpen harmless error review is to have jurors fill out post-verdict forms on the importance of certain evidence or an instruction that was challenged at trial.[64] One can imagine all kinds of problems and limitations to such a proposal, but it might be helpful in taking some of the imaginative aspects out of harmless error review occurring months, even years, after the verdict.

Harmless error is just one aspect of post-conviction review, and reform of harmless error alone will not prevent wrongful convictions from being affirmed. Rules of preservation and waiver of issues, as well as the difficulty of raising factual challenges on appeal, are also barriers to litigating innocence on appeal. There is also a relationship between the standard for showing error, and the ease with which courts can find error harmless—there is reason to believe that if harmless error becomes more difficult to find, courts will be reluctant to find error in the first instance. After all, harmless error developed almost hand in hand with criminal procedural rights.

Nevertheless, because harmless error analysis is where appellate courts assess the evidence against a defendant, and because it has become such an important part of any appeal, harmless error analysis should be reformed to take into account what we now know about contributors to wrongful conviction. Appeals are provided at public expense to indigent defendants. It is time to make innocence at least partly relevant to appellate decisions.

64. Craig, *supra*, note 25, at 16–23 (proposing that a hybrid between a jury poll and a special verdict form should be used to establish a record to assist the appellate courts in harmless error analysis).