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INTRODUCTION

Unfair and illegal tactics by prosecutors are more and more often labeled "harmless" (i.e., permissible) by courts in Louisiana. Despite this trend, many commentators continue to insist that the harmless error doctrine is consistent and fairly administered. Yet it is the rare prosecutor who agrees that an error was harmful. Indeed, calling an error harmless does not mislead anyone into thinking that no harm was done. The justice system is always harmed when rules are not followed. Indeed, as lawyers, we are trained to expect rules to mean something. The point is for the justice system to get it right, not make excuses. Unfortunately, as this article seeks to illustrate, the growing trend is that some rules, specifically rules which discourage prosecutorial overreaching, mean very little. In light of this trend, the criminal defense lawyer must exercise extraordinary vigilance. The rules that govern fair play, trials, and the constitution are victims of friendly fire in the war on crime. A change of approach and a honest recognition of the evolution of the harmless error doctrine can restore confidence in a judiciary that is so prosecutor-oriented that fairness is wanting.

THE HARMLESS ERROR DOCTRINE

No article could put the legal issues more in perspective than Judge Harry T. Edwards' New York University Law Review article on harmless error.¹ Judge Edwards' scholarly and insightful writing cannot be updated or improved by this writer; rather, this article seeks to point out the practical effects of the harmless error rule on criminal defendants and Louisiana's criminal justice system. Nevertheless, a short statement of the doctrine bears repeating.

The harmless error doctrine is necessary, cases say, because there is no such thing as an error-free trial. As a rule of appellate review, harmless error enables courts to uphold convictions in trials riddled with constitutional and statutory blunders. Reversals on appeal should not be granted merely because the judge, prosecution, jury, or defense counsel violated some law. Rather, in order to get a case reversed on appeal, a defendant must show (1) a violation of some law (2) "plus." That "plus" is actual harm to the defendant under the harmless error standard.

Once it is determined that the infraction is subject to harmless error analysis, a court may apply the harmless error doctrine in two ways:

One approach, the "guilt-based approach," requires the reviewing court to assess the factual guilt or innocence of the defendant in light of the untainted evidence in the record. The second approach, the "effect-on-the-verdict approach," requires the reviewing court to determine whether the error at trial influenced the jury and thus contaminated its verdict.2

Chief Judge Edwards concluded that he was both optimistic and skeptical about the future of the harmless error doctrine; he was "optimistic because of recent supreme court decisions that indicated a trend toward an effect-on-the-verdict approach, but skeptical because he was unsure whether—in practice—appellate judges would be able to solve the riddle of harmless error."3 With a twinkle in his eye, he described the doctrine as follows:

[W]hen an appellate court's review of trial proceedings uncovers a legal error that might produce a disfavored result (such as the retrial of a defendant who appears to be guilty), the court may simply call the error "harmless," and the potential aggravation is removed. This approach seems to work like magic. Appellate judges merely apply a "drop" of harmless error, and the coerced confession, warrantless search, erroneous jury instruction, faulty exclusion of evidence, unfair restriction on cross examination, and a host of other errors simply vanish as though they had never occurred. And, most important, the defendant remains in prison to suffer the punishment that he or she appears to deserve.4

As matters stand now, in many criminal cases an error is harmless as long as the appellate court remains convinced of the defendant's guilt; an error warrants reversal only when it raises doubts about the

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2. *Id.* at 1167.
3. *Id.*
4. *Id.* at 1169-70.
defendant’s culpability.\textsuperscript{5} It was Lewis G. Carroll in *Alice in Wonderland* who wrote, “No no first the verdict then the trial.” A trip through Louisiana harmless error law makes one feel a bit like Alice.

**What’s Wrong with the Judge Being the Juror?**

If the justice system means anything, it means fairness. Our commitment to a fairness is seriously compromised in reviewing the cases of those who are probably guilty. We tell jurors during voir dire that “probably” is not enough to convict; “beyond a reasonable doubt” is the standard that due process mandates. If a juror declares that, in deciding whether a person is guilty beyond a reasonable doubt, she will consider her political philosophy on crime and substitute it for the legal standard of proof, she would be disqualified for cause. Should judges be permitted to substitute their political philosophy while determining whether a defendant is guilty? The principle is that all defendants are entitled to have a jury to hear the evidence and decide the facts. Juries are to hear evidence that is admitted by law. We have confidence in the jury trial because the jury follows the rules and the judge is there to enforce the rules and make sure that only legally admissible evidence comes before the jury. Confidence in this system is eroded if we say that it is okay for the jury to have heard inadmissible evidence because the defendant is probably guilty anyway. In applying the harmless error rule, if the evidence is not admitted by law, the judge first decides whether the defendant is guilty or innocent and then decides whether the error was harmful. Fair trials are reserved for those who are not probably guilty. To put it another way, the defendant is entitled to voir dire and challenges for cause. If a judge announces that he is predisposed to allowing inadmissible evidence because the defendant is probably guilty, then he should be subject to a challenge for cause or recusal.

If the guilt-based harmlessness approach is used, the impact of error depends on how guilty the judge perceives the defendant to be without the inadmissible evidence. If the defendant is probably guilty, virtually no error can stop the conviction from being upheld (i.e., the “So what? He’s guilty” mentality).

If the effect-on-the-verdict approach is used, i.e., if the error influenced the jury and thus contaminated the verdict, the analysis is eclipsed by the judge’s conclusion that the defendant is probably guilty. The judge would ask, regardless of this evidence, what reasonable person would think otherwise? Essentially, the judge is saying that I think the defendant is guilty, and that the evidence wouldn’t have affected me because the I think the defendant is guilty

\textsuperscript{5} Id. at 1186.
in the first place. If a juror were to say that, she would be challenged for cause. When a judge says it, it is printed in law books and entitled to respect.

When determining whether the defendant is guilty without the contested evidence, what happens to multiple errors? If the judge believes the eye witness (vigorous cross examination notwithstanding), believes the confession (the fact that the defendant was intoxicated, brain damaged and perhaps intimidated by smarter policemen notwithstanding), and believes the physical evidence (which alone does not convict but which corroborates the confession and the eye witness), then he is guilty. Or does the judge say that believing any of those things means that the rest of it does not matter? Who then who is the jury? The jury did not hear only legally admissible evidence. The judge is substituting himself for the jury.

In view of the importance that trial by jury has in our legal system, we can be sure that congress did not intend to substitute the belief of appellate judges in the guilt of an accused for the jury’s decision. Two functions have merged into one. In the process, the reviewing, impartial judge has vanished beneath the desire not to be criticized for reversing the conviction of someone who is probably guilty.

Why do we not have an article in the Code of Criminal Procedure authorizing directed verdicts of guilt at the conclusion of the state’s case, or summary judgment in criminal cases upon the filing of appropriate affidavits by the police officers? This is because such procedures would deny the defendant the right to a trial by jury. The harmless error rule also denies the right to trial by jury. The issue is not whether a jury’s verdict would have been rendered without the error or inadmissible evidence; such speculation contemplates a guilty verdict that never was rendered. The actual verdict was rendered with the error. To say that the verdict would have been rendered without the evidence is to supplant the jury and violate the jury trial guarantee. It substitutes the judge’s view of the defendant’s guilt for that of the jury, and sanctions a judge’s mystical claim of being impartiality while declaring someone so guilty that no amount of error can deprive him of a fair trial. Such an approach misses the point; innocent and guilty people are entitled to a fair trial. It is for this reason that trial courts in our system are prohibited from directing verdicts of guilt against criminal defendants, no matter how weighty

6. In the words of Justice White, “[I]n the American States, as in the federal judicial system, a general grant of jury trial for serious offenses is a fundamental right, essential for preventing miscarriages of justice and for assuring that fair trials are provided for all defendants.” Duncan v. Louisiana, 391 U.S. 145, 157–58, 88 S. Ct. 1444, 1452 (1968).
the evidence favoring such an outcome. To put it simply, "the error in such a case is that the wrong entity judged the defendant guilty." The Bill of Rights gives us a right to trial by jury, not a right to trial by a judge alone.

THE END JUSTIFIES THE MEANS ANALYSIS

Most people close to the criminal justice process would agree that few errors are absolutely harmless. Indeed, some defense attorneys believe no error is harmless. A cynical definition of harmless error is, "He’s probably guilty, so let’s convict him anyway. After all, he’s a bad person, and how do you expect me to get re-elected if I set him free." Such a definition reflects the belief that judges bow to the public’s perception that an overturned verdict means that a guilty criminal is back on the street. But the public’s almost hysterical fear of freeing hordes of guilty people is groundless. Once a case is remanded, new trials frequently achieve the same result. What most harmless error decisions fail to candidly address are the politics of the criminal justice system. Annually, Louisiana competes to be the state with the largest percentage of its citizens serving the longest sentences, and has finished in the top ten for the last several decades. Louisiana does not mollycoddle criminals. Now, Louisiana does not even provide them fair trials. Louisiana is very tough on crime. In fact, mentioning politics and anti-crime hysteria in a brief or oral argument invites criticism if not sanctions. It is with some trepidation that this article is written by a still practicing lawyer.

Regardless of what courts say about the weight of the evidence, "Did he do it?" is the test every time. The public is focused on the end result, not the process of getting there, which is backwards. Courts should have the independence and integrity to make the process fair. The advocates on each side are worried about the end result to the extent that they frequently blur the processes in their fervor to get to the result. It is the judge’s job to make certain that the process is fair, which ensures that the end result is also fair. This balance is disturbed by campaigns for judicial office, clanging jail doors, the use of "legal technicality" as a pejorative, and promises of swifter and more severe punishments. It takes a strong person to jettison that rhetoric and be vigilant in support of the rights of the accused once the campaign is over and the black robes are worn. This is especially true considering that another campaign is six years away and plenty of crime busters are patiently waiting for their turn to demonstrate how tough they will be if given the incumbent’s robes.

7. Edwards, supra note 1, at 1193 (citing Rose v. Clark, 478 U.S. 570, 578, 106 S. Ct. 3101, 3106 (1986)).
Harmless error precipitates great disrespect for the appellate courts because of the cavalier and one-sided dismissal of facts, the tortured analysis of what the defense really was, the inconsistency, the constant rule changes, and the clear and present attitude to protect the conviction, not the law or the process. But this disrespect is considered a badge of honor by those who curry favor with the law-and-order-crowd and seek their approval.

That Prosecutors and D.A.’s may simply ignore the law if they choose to, is another definition of harmless error provided by most defense counsel. The burden of proof is a joke. By saying that the defense must prove that the error impacted the trial, the practical application is that there is no error; the only way to be to the answer is by contacting jurors and asking them if this particular piece of evidence affected them, and that avenue is prohibited by law. If the enforcement of the rules is often left to a judge who personally believes that the defendant is guilty, and the judge says so before examining the disputed evidence, a cynical view of this due process is inevitable.

PROSECUTORIAL DISCRETION TO FOLLOW THE RULES AND THE ABUSE OF THAT DISCRETION

As a culture, we should instinctively recognize the oddity of a rule of law that provides no sanction for its violation. Nevertheless, rules without sanction abound in Louisiana criminal law. Aggressive prosecutors cannot help but be aware of these legislative scarecrows. Indeed, Louisiana’s statutory enactment of the harmless error rule, specifically provides that a judgment shall not be reversed because of any error “which does not affect the substantial rights of the accused.”

8 Stated another way, the denial of a statutory right does not mandate reversal; a contrario, the denial of a statutory right does not mandate much. Accordingly, most statutory violations escape sanction on appellate review. They are rendered merely “precatory,” expressing a wish, and not mandatory.

A rule’s magical transformation from a mandate to a mere wish generally occurs through legislative or jurisprudential intervention. In its legislative form, the transformation results in schizophrenic enactments that appear to give with one hand and take away with the other. For example, Article 56.1, Louisiana’s recognition of Boykin v. Alabama, 9 states that a guilty plea is not valid unless it is intelligent and voluntary. The defendant must, on the record, expressly and knowingly waive his right to trial by jury, his right to confront his

accusers, and his privilege against compulsory self-incrimination. Paragraph E, however, contains the disclaimer: "Any variance from the procedures required by this Article which does not affect substantial rights of the accused shall not invalidate the plea." Similarly, Louisiana Code of Evidence, Article 404, provides that, generally, evidence of "other crimes" is not admissible to show the probability that an accused committed a specific offense because the accused is a bad person. Nevertheless, Article 103 renders Article 404's prohibition precatory, stating, "[e]rror may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected . . . ." In both of these examples, the legislature appears to be saying, we wish these rules will be followed in the judicial process, but if they are not, never mind.

The jurisprudence echoes the legislature's indifferent attitude. Thus, a defendant has a right under Louisiana Code of Criminal Procedure art. 795(B)(1) to employ backstrikes, i.e., exercise remaining peremptory challenges before a jury panel is sworn, but the erroneous denial of that right is subject to harmless error analysis. And although it is error for a trial judge not to recuse himself pursuant to Louisiana Code of Criminal Procedure art. 671(A)(2) from presiding over an evidentiary hearing in which he is called to testify, the violation is subject to harmless error analysis. Finally, despite the fact that Louisiana Code of Criminal Procedure art. 774 confines the scope of closing arguments to "evidence admitted, to the lack of evidence, to conclusions of fact that the state or defendant may draw therefrom, and to the law applicable to the case," prosecutors may still refer to a defendant's "smoke screen" tactics and call defense counsel "commie pinkos," urge "weak kneed" jurors to stare at gruesome photos in case of doubt over defendant's guilt, and misstate the law to be applied. In short, prosecutors may exceed the proper scope of closing arguments, and the defendant is without remedy. As a practical matter, therefore, Louisiana Code of Criminal Procedure art. 774, like most rules of criminal procedure, is a deceptively solid provision that is hollow at the core.

But criminal defendants should not have to guess whether any given rule means what it says. When on trial for their lives, defendants should not have to guess whether a rule appeals only to the conscience of the prosecutor. Such uncertainty affords prosecutors a whimsical, quasi-judicial power to decide which laws bind the proceedings and which do not. In the best of worlds,

prosecutors exercise discretion fairly and reasonably. Most prosecutors cut the corners square and respect their critical role in the criminal justice system. But when corners are obviously being cut for strategic advantage, the integrity and fairness of judicial proceedings suffer.

Case in point: Determined prosecutors know the boundaries of reversible error, and they know how to hug them. They have studied the *Code of Harmless Error* (a book of this writer's imagination), which sits on every prosecutor's bookshelf. The *Code of Harmless Error* describes the penumbra between harmless and reversible error. The Code restates all the rules of law which may be safely disregarded because there is no sanction for doing so. Examples from the Code of Harmless Error are readily found in the penalty phase of capital trials, where the stakes are high for both the state and the accused, and where verdicts are won or lost in the margin. When life and death are at stake, there should be no, "Oops!"

Two death-penalty prosecutions, *State v. Frost* and *State v. Wessinger* amply illustrate how the *Code of Harmless Error* works at the trial and appellate level. In *State v. Frost*, friends and neighbors of a slain hotel clerk were offered by the prosecution as "victim impact" witnesses. On direct appeal, the defense argued that victim impact testimony from persons other than family members was improper because Louisiana Code of Criminal Procedure art. 905.2(A) specifically limited the class of witnesses to "family members."

After reviewing the legislative history of Article 905, the Louisiana Supreme Court was compelled to conclude that victim impact testimony from persons other than family members of the victim was indeed improper. However, the Court went on to hold that, although erroneous, the admission of the witnesses testimony constituted harmless error. The Court stated that the harm caused by the admission of such testimony depends on whether the testimony was within the scope of *State v Bernard*, not whether the testimony was proper under Louisiana statutory law. Because the testimony of

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15. 727 So. 2d 417 (La. 1988).
16. The law was subsequently changed. In 1999 La. Acts No. 783, § 3, effective January 1, 2000, the legislature amended Louisiana Code of Criminal Procedure Article 905.2(A) to expand the persons capable of testifying at the penalty phase to include "friends and associates" of the victim. La. Code Crim. P. art. 905.2(A). This amendment was clearly intended to codify the results reached in *State v. Frost*, 727 So. 2d 417 and *State v. Wessinger*, 736 So. 2d 162 (La. 1999), and reflects the legislature's awareness of the Louisiana Supreme Court's discomfort at having to ignore the plain language of Article 905.2(A) to avoid reversal and affirm defendant's conviction and sentence of death.
17. *Frost*, 727 So. 2d 417, 430.
the victim's friends and neighbors was within the scope of Bernard, it was harmless error, despite being contrary to 905.2(A). In this manner, a new rule, the "Frost Rule," entered the Code of Harmless Error. The Frost Rule stated that Louisiana Code of Criminal Procedure art. 905.2(A) was a sanctionless rule, and could be disregarded at the prosecutor's discretion where the non-family testimony offered followed Bernard.

Prosecutors wasted no time exploiting the Frost Rule six months later in State v. Wessinger.\textsuperscript{19} In Wessinger, as in Frost, non-family members (friends and co-workers of slain restaurant workers) were offered by the prosecution as victim impact witnesses in contravention of Louisiana Code of Criminal Procedure art. 905.2(A). In its brief on direct appeal, the state argued that the victim impact testimony was harmless; at the same time, the state conceded that the testimony was improperly admitted.\textsuperscript{20} Citing to Frost, the Court agreed with the state, once again holding that, although erroneous, non-family victim impact testimony was harmless as long as it did not exceed the scope of Bernard.

From the defense perspective, the effect such rulings have on the integrity and public reputation of judicial proceedings is subtly corrosive. Having conceded that trials cannot be perfect, the courts appear to have also conceded that the system cannot strive for excellence. Indeed, Louisiana Code of Criminal Procedure art. 905.2(A), the rule at issue in Frost and Wessinger, was a legislative enactment, yet the court treated it like a rule of etiquette. What motivates a court to rule in this way? Assuming the prosecutor and trial judge in Frost and Wessinger were not ignorant of Louisiana Code of Criminal Procedure art. 905.2(A), did the prosecutor in those cases disregard 905.2(A) because it would hurt the prosecution? Did the prosecutor want to waste time adding superfluous testimony to an already strong case? Any seasoned defense attorney knows the answer to these questions, which the appellate courts do not ask. The answer is that the prosecutor disregarded the rule because, where trials are won and lost in the margin, the ability to ignore a bothersome rule provides a tempting, tactical advantage. Who cares what the rule says if it may be repeatedly disregarded like a stop sign overgrown with weeds?

After consulting the Code of Harmless Error, the prosecutor knows that the benefits to be gained by disregarding the rule, particularly the jury's exposure to prohibited testimony, far outweigh the risk of sanction. At best, the potential risk is a terse harmless error review buried in an appellate opinion somewhere between A

\textsuperscript{19}  736 So. 2d 162.
\textsuperscript{20}  Id.
was convicted” and “affirmed.” At worst, the zealous prosecutor faces
a mild reprimand that the act complained of is close to reversible
error.21

Reprimands help maintain the appearance of judicial integrity, but
they are soon forgotten by the court and the offending prosecutor. In
fact, many prosecutors boast of such judicial rebukes as badges of
honor, the subject of toasts over steaks and wine while celebrating yet
another victory. We must always keep in mind that prosecutors have
a quasi-judicial responsibility to make decisions, most of which are
virtually unreviewable.

THE REAL IMPACT OF INADMISSIBLE EVIDENCE

Under guilt-based or impact-on-the-verdict harmless error analysis,
the court must review the impact of the erroneously admitted evidence.
But the analysis is shallow and never undertaken while wearing the hat
of defense lawyers, the last remaining champion of the rights of the
accused. For example, how the prosecution used the evidence is never
discussed; neither is how hard did the prosecutor try to get it into
evidence discussed. “Can you envision how the trial would have been
different” is not asked by appellate courts. The issue should be whether
there was an error, not how creative can the prosecutor be in arguing
that this error had no impact upon the trial. An appropriate question in
oral argument would be, “If this evidence was meaningless, and the
case of the state so strong, then why did you break this rule we judges
or the legislature have established, when you have been repeatedly told
about this rule?”

Trial attorneys know what hurts and what helps their case. They
come prepared and they have planned their strategy from the beginning
until the end. They know the law and they know what evidence is
legally admissible. If there is a doubt, they have litigated the issue by
a motion in limine. In a truly fair trial, both sides are given the same
flat starting ground and the same rule book. Both sides know what
evidence is coming in, thus the prosecution and the defense can address
and present their theory of the case. The purpose of pretrial motions,
discovery and motions in limine is to avoid surprise.22

21. See, e.g., Taylor, 669 So. 2d at 375 (stating that the prosecutor’s closing
argument that any verdict other than death “would be a disgrace,” “treads
dangerously close to reversible error, and [the Court] caution[s] this prosecutor to
refrain from such conduct in the future”). See also State v. Howard, 751 So. 2d
783, 817 (La. 1999) (stating that the prosecutor’s repeated references to defendant
as a “thing” during penalty phase opening statement “were unprofessional and
beneath the dignity of the forum and . . . tread[ed] dangerously close to reversible
error” but were nevertheless harmless).

22. State v. Trahan, 576 So. 2d 1 (La. 1990); State v. Toomer, 395 So. 2d 1320
During jury selection, the jury is often advised of bad facts and asked, "Can you still be fair?". For example, if the defense is self-defense and battered woman's syndrome, the jury is asked whether they have experience with domestic violence and have formed an opinion about it. If the defendant or a witness is homosexual, the defense and prosecution want to know if that will cause a jury to look with a jaundiced eye upon testimony by or about such witnesses or defendant. Some jurors are unable to look beyond the youth of a victim and would be prone to convict anyone charged with a crime against children. An error during this portion of the process changes the ebb and flow, but it is impossible to point out whether this somehow impacted the verdict. Thus, experienced trial attorneys will frequently say that cases are won or lost during voir dire, but how is not easily explained.

Harmless error is read by judges and prosecutors all too often as, "How far can we go without risking reversal." Can anyone honestly determine the impact of the violation of a law that says the attempted murder victim is not allowed to sit at counsel table with the prosecutor but sits there anyway over vigorous defense objection? How can you analyze the impact on a death penalty jury when testimony is admitted from friends and neighbors about the impact that the death of the victim had on them? How can you determine whether this changed the earlier strategy of the defense in not attacking a family member who testified in victim impact because that would be the only witness, and because the law clearly says that no one besides family witnesses are permitted? And why did the prosecutor put on that evidence if not in an effort to sway the jury, where one person alone voting life means life?

If the state had not felt it needed the evidence, they would not have sought to introduce it. Allowing the state to later argue, "Never mind, it made no difference," encourages and rewards double speak hypocrisy. It is picking sides with the politically popular. The rule prohibiting this conduct recognizes a bad practice, and simply prohibits the acts. This is easier than a rule that permits its exceptions. No exceptions are permitted. Why? Because we know a bad prosecutor can effect the jury with sympathy, just like the defendant could if he had his mother sit at the table and hold his hand. To say either had no impact is to pick sides and say that it makes no difference. How can anyone respect such a process? What appears to be a small change in the course of the trial may in fact be a large one. Appellate judges must determine from the record how events impacted the trial. The following is a hypothetical example. The prosecutor has been practicing for thirty years and is popular.
statewide with other similarly situated prosecutors. He lectures frequently at district attorney training programs, appears before the legislature to testify about criminal justice issues, has a leadership role in district attorney associations statewide and nationally, and is frequently called upon by judges to lecture or make presentations before the judiciary. This prosecutor is convinced that the defendant is guilty of a heinous crime and seeks the death penalty. This prosecutor makes a powerful (but improper) argument which, in the opinion of the defense attorney, was responsible for turning a very close case into a death verdict. The Louisiana Supreme Court reviews the case and decides that the argument was error but harmless. Shortly thereafter, the prosecutor uses the identical argument in another death penalty prosecution and secures another death penalty. Again the Supreme Court reviews the argument, notes that it is the same that they criticized before, but again rules that the banned argument is harmless error. This process repeats itself a third time, and the third result is the same. Now, there is a new prosecutor and a new case. During the defense motion in limine to prohibit this thrice banned argument, the judge and the new prosecutor say, "It has been ruled harmless error three times and it is admissible. Let them reverse it."  

How can you determine the psychological impact of three children of the deceased standing simultaneously in the courtroom? How can you determine the impact of a policeman, who is also the attempted murder victim, sitting alongside the prosecution acting as a case agent during trial? How can you determine the impact of an inadmissable confession when the defense is insanity? How can you determine the impact of a confession if identity is the issue? And how can you do it if you start by saying, "Okay, in the case of a guilty person, can the state...?"

In United States v. Daniel, the Sixth Circuit Court of Appeals decided that the defendant’s statement was coerced, but that the confession was harmless. The officers who executed a search warrant handcuffed Daniel and his companions and forced them to lie down and cover their heads with a sheet. These officers are not reminded of the importance of the privilege against self incrimination when the admission of the confession that they so extracted is deemed harmless

23. See the following line of cases in which the same prosecutor has repeatedly been allowed to ignore the rule and ask victims whether they have sympathy for the defendant: Taylor, 669 So. 2d 364; State v. Scales, 655 So. 2d 1326 (La. 1995); State v. Williams, 708 So. 2d 703 (La. 1998); Frost, 727 So. 2d 417; Wessinger, 736 So. 2d 162. Young lawyers confused by this frequently lament: why bother even objecting if the judge/referee is going to allow the other side to do whatever it wants?

24. 932 F.2d 517 (6th Cir. 1991).
error. Have we abandoned the notion that we expect to deter their future behavior? Do we now have such confidence in law enforcement that we may blind the eye of their judicial watchdog? Has the judicial branch declared peace with the executive branch, or have they just surrendered because law enforcement is so popular and rebuking them is so unpopular? While we have come a long way from beating with whips and leather straps (as in Brown vs. Mississippi) or thirty-six hours of uninterrupted questions under bright lights (as in Ashcraft v. Tennessee), we have only done so because the reversal of convictions was the sure penalty for these actions. If you spend thirty minutes riding around with a police officer you will find that beatings, bright lights, and uninterrupted questions would be an acceptable method of "getting the guy to come clean," and probably more efficient than heeding pesky Miranda warnings and other rights of the guilty. But, but they cannot do it because the courts will not let them. Should we be thankful the word has not filtered down to every cop that if the defendant is guilty enough, then anything is permissible in order to get the evidence?

INTEGRITY, POLITICS, AND THE JUDICIARY

The old rule was simple: if you break the rules, the accused receives a new trial. The new rule is equally simple: the state may break the rules as often as it likes as long as the defendant is probably guilty. With the increasing concern over violent crime in our society and the excessive case loads in our courts, a guilt based definition of harmless error will continue to find great support.\(^{25}\) For one, the nationwide problem of drug use and drug trafficking and the often related scourge of random violence have generated intense pressure to convict defendants accused of such crimes. Many judges are influenced by the urgency of the government’s war on drugs when they confront a defendant who clearly appears to be guilty of a drug related crime, yet whose trial included significant legal error.\(^{26}\)

Louisiana’s judiciary is conservative. Predictably, many assistant district attorneys become judges in criminal court. Almost everyone runs on a “tough on crime” campaign platform. Even former public defenders state in their campaigns that they will not be fooled by defense trickery now that they are judges.

Criminal defense lawyers always rankle the public. Few monuments are erected honoring the public defender. The most successful criminal defenders are frequently the most vilified. But

\(^{25}\) Edwards, supra note 1, at 1173.

\(^{26}\) Edwards, supra note 1, at 1190.
even Attorney General Reno, no friend of the criminal defense bar, says a public defender is an essential element of the criminal justice process.\textsuperscript{27}

But in view of a rash of reversals for Brady violations, it is indisputable that many prosecutors are not following the rules. Take, for example, \textit{Kyles v. Whitley},\textsuperscript{28} \textit{State v. Cousin},\textsuperscript{29} and \textit{State v. Knapper},\textsuperscript{30} all murder convictions that were overturned after defense attorneys discovered that prosecutors failed to turn over Brady evidence. All defendants were ultimately acquitted. The reason Brady violations are troubling is because it besmirches the integrity of the system for the government to withhold evidence favorable to the defense in order to secure a conviction. Regrettably, even some Brady violations are overlooked by Louisiana courts. Innocent people must look to federal courts to enforce their rights. Louisiana courts are not currently prone to enforce rights for innocent people deemed probably guilty.

However, when judges agree with the defense they are severely criticized on many fronts, especially if a reversal occurs. Former Chief Justice Dixon was forced to endure a campaign of commercials which featured bloody dripping knives held by defendants who were allegedly released on technicalities by the Chief Justice of the Louisiana Supreme Court. Incumbent Chief Justice Pascal Calogero faced campaign commercials labeling him as soft on crime because he dissented in a writ decision\textsuperscript{31} and opined that the defendant’s inculpatory statement was involuntary and should be suppressed under the Fifth Amendment. Anti-crime politics dominate judicial campaigns; an explanation of the rules and of the reason for such rules is greeted by catcalls and invites histrionics from opponents. In short, honesty is not held in high regard by all people seeking to serve on the judicial bench.

The harmless error rule encourages district attorneys and judges to either get around the rules or ignore them to get their man. There is no political downside to this strategy—no fifteen second spots of child molesters released by judge on legal technicalities—the bane of judicial political candidates. The survey of criminal defense lawyers almost unanimously noted that judges running for public office run on the “tough on crime, no release on technicalities” dogma.

It is common for a judge to say in chambers that this is a close call, and it’s very close to election and the case has a lot of public

\textsuperscript{28} 514 U.S. 419, 115 S. Ct. 1555 (1995).
\textsuperscript{29} 710 So. 2d 1065 (La. 1998).
\textsuperscript{30} 579 So. 2d 956 (La. 1991).
\textsuperscript{31} See State v. Edmondson, 714 So. 2d 1233 (La. 1998).
attention. If I am wrong, this is either harmless error or another court will fix the problem, and I won't have to take the heat. Unfortunately, there is no guarantee that the appellate judge is not from the same school of thought. The real question is whether the harmless error rule is politically motivated rather than motivated by a desire for consistent, fair application of the law. Even Diogenes would have trouble finding an elected judge who would admit that political pressures affect his decision making. Nonetheless, in private many judges will admit what they would publicly avoid answering. Justice should not depend upon when the next election is scheduled or whether the person writing about justice expects opposition in her race. But justice is now too often dependant upon the timing of the next election.

The new political attitude held by the public is that it is better for ten innocents to be convicted than one guilty man to go free. This is the attitude until a neighbor, child, or friend is accused of a crime. Then, the public wonders what happened to the rules. The rules still exist, but they are only applicable to folks that judges think may be innocent.

The harmless error doctrine is a sound concept, but it can be manipulated by those with an agenda greater than the particular case under review. If the agenda is personal, that spells trouble. An honest approach would be for judges to say that we think he did it, but rules are rules. Serious rules were broken which may have made the trial unfair. We must grant a new trial even though we think the defendant is probably guilty. By the way, this doesn't happen very often, and when it does, the prosecutors sensationalize it and my political opponent will use it against me. I know that you the public and the reader of this decision are smart enough to appreciate that rules are for everyone to follow. That's what sets us apart from the bad guys; we play by the rules. If you don't play by the rules, you must do it again because we do not believe that anyone should benefit by breaking the rules. And if you keep breaking the rules you will keep getting in trouble. The more you break the rules the less likely it is that we will be convinced that you should have the job of enforcing the rules. Law enforcement must enforce all laws, not just the convenient laws.

On the other hand, some errors truly are harmless and common sense must be used. If it is impossible for the error to have injured the defendant, it should not cause the trial to be conducted again; there are legions of examples of such errors.

It is one thing to state that the harmless error analysis looks to the effect of the error on the verdict, rather than to the sufficiency of evidence to support the verdict. It is another thing for appellate
judges to adhere to that analytical framework when confronted with bad facts in which the defendant’s guilt seems to be well established. In such circumstances it is by far the simpler and perhaps natural course to construct a jurisprudence that cares only for punishment of the guilty, and, accordingly, to discount all errors that fail to cast doubt upon the judge’s own perception of culpability. Only through a determined adherence to principle can judges look beyond the weight of the evidence to the likely impact of an error.  

This is particularly difficult when one has run a campaign for office touting a belief that people should not be released on technicalities or that jury verdicts in first degree murder cases should not be disturbed. Perhaps the reader has seen a political commercial by a judge expressing a firm desire to carefully review all first degree murder cases, and reverse the verdicts if the process is not fair. If such an ad exists, please send it to me.

**CONCLUSION**

Judges writing about harmless error should picture themselves in front of a law school classroom of idealistic young students eager to learn the rules of law. Should you tell them a prosecutor may do whatever she chooses if she has a strong enough case because we, the appellate courts, will determine whether the defendant was guilty and then decide whether the failure to follow the law really matters? Would you give your children a rule like, “Don’t drink and drive,” or “Be in by midnight,” and then say “But if you break the rule, do not worry, we will ignore it if you were not actually hurt because you broke the rule. We love you too much to apply the rules to you”?  

Should you start your lecture at the law school by saying, “the law will be ignored if the defendant is guilty”? Courts should not be lawless as they pursue the lawless. Courts should say, “this law makes sense, we are not ashamed of it, and if he is guilty, as we think he is, then a fair trial in a fair system with a fair prosecutor and a fair judge will convict him and he will get his just desserts.” We should not fear fair trials; we should fear unfair trials. We should show respect for the law, and reverse criminal cases and send them back for new trials because we do not fear that the innocent will be convicted or that the guilty will escape justice in a fair trial. But never try to explain harmless error to young people who are not yet cynics as they will view as malarkey this Alice in Wonderland approach of first the verdict then the trial.