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POLICING PROCEDURAL ERROR IN THE LOWER CRIMINAL COURTS

*Justin Murray**

The criminal justice system depends on reviewing courts to formulate norms of procedural law and to make sure those norms are actually followed in the lower courts. Yet reviewing courts are not performing either of these functions very well. No single factor can fully explain why this is the case, for there is plenty of blame to go around. But the harmless error rule is a major culprit. The conventional approach to harmless error review prohibits reversal of a defendant's conviction or sentence, even when the law was violated during proceedings in the lower court, unless that violation influenced the outcome below. This limitation impedes effective oversight of the lower courts in two significant ways. First, it enables trial judges, prosecutors, and other relevant entities (such as a district attorney's office, to name one example) to persistently evade accountability for procedural errors, diminishing their incentives to comply with legal norms. And second, it provides reviewing courts with a handy tool to avoid resolving legal claims on their merits. Instead of holding that an error did or did not occur, thereby helping trial judges, prosecutors, and others learn what the law requires going forward, reviewing courts can—and often do—affirm on fact-bound harmless error grounds without ever adjudicating the legality of the challenged conduct.

These failings call for a major shift in how courts review procedural error. This Article proposes that, in addition to examining whether an error affected the outcome, as current law directs, a reviewing court should also consider whether: (1) reversal would substantially help to prevent future errors; (2) the error caused substantial harm to a legally protected interest unrelated to the outcome; and (3) the benefits of reversal, as tabulated in the previous

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steps, outweigh its costs. After making the case for this framework and discussing how to operationalize each of its components, this Article then explores, a bit more tentatively, whether the same set of ideas could help stimulate much-needed rethinking of other controversial rules that further obstruct the policing of procedural error in the lower criminal courts.

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INTRODUCTION

It was an open secret for many years that trial judges across the state of Washington allowed sheriffs to foist shackles upon in-custody adult criminal defendants during judicial proceedings as a matter of routine, without any case-specific finding that the restraints were necessary.¹ Washington’s appellate courts intermittently chastised the state’s trial courts about this practice, admonishing that shackles are inhibiting, degrading, damaging to

1. See *State v. Jackson (Jackson I)*, 447 P.3d 633, 636 (Wash. Ct. App. 2019), *aff’d in part and rev’d in part*, 467 P.3d 97 (Wash. 2020); see also *id.* at 641–42, 641 n.4 (Melnick, J., concurring).

the presumption of innocence, and thus unlawful absent “extraordinary circumstances.”² Yet in almost every recent decision condemning the erroneous imposition of shackles, the appellate court affirmed the trial court’s judgment on the theory that the errors were harmless.³ This long-standing pattern of lower court error and appellate rubber-stamping makes it fair to wonder whether “application of the harmless error test in th[is] area . . . has resulted in a constitutional violation without a remedy,” as one Washington appellate judge recently suggested.⁴

The criminal justice system depends on reviewing courts⁵ to formulate norms of procedural law and to make sure those norms are actually followed in the lower courts.⁶ Yet reviewing courts are not performing either of these functions very well. No single factor can fully explain why this is the case, for there is plenty of blame to go around. But as the string of recent cases from Washington involving unlawful shackling suggests, the harmless error rule—which is “probably the most cited rule in modern criminal appeals”⁷—is a major culprit. The conventional approach to harmless error review prohibits reversal⁸ of a defendant’s conviction or sentence, even when the law was violated during proceedings in the lower court, unless the violation influenced the outcome below.⁹

2. *E.g.*, *State v. Finch*, 975 P.2d 967, 997–1005 (Wash. 1999).

3. *See, e.g.*, *State v. Clark*, 24 P.3d 1006, 1028–29 (Wash. 2001). In a case handed down after this Article was written, the Washington State Supreme Court reversed a conviction due to the trial court’s routinized and illegal resort to shackles, concluding that the error was not harmless. *See State v. Jackson (Jackson II)*, 467 P.3d 97, 105 (Wash. 2020). But according to one of the intermediate appellate court judges who decided *Jackson I*, “there [were] no fewer than 14 cases [between February 2015 and August 2019] where [Washington State] appellate courts ha[d] found a violation of a defendant’s right to be free from shackles, yet every [one of those cases had] resulted in harmless error.” *Jackson I*, 447 P.3d at 642 (Melnick, J., concurring).

4. *Jackson I*, 447 P.3d at 641 (Melnick, J., concurring). While Judge Rich Melnick joined his colleagues in finding the shackling error in *Jackson I* harmless based on decisions of the Washington State Supreme Court that he felt bound to follow, he urged the Washington State Supreme Court to revisit those decisions in light of “what appears to be a statewide, systemic violation.” *Id.* As noted earlier, the Washington State Supreme Court embraced Judge Melnick’s suggestion in a decision rendered after this Article was written. *See Jackson II*, 467 P.3d at 105.

5. As used here, “reviewing court” is an umbrella term that encompasses appellate courts, postconviction courts, and trial courts acting in a quasi-appellate capacity (as when a trial court considers a motion for a new trial).

6. For a discussion of these and other functions of appellate review, see generally, for example, Cassandra Burke Robertson, *The Right to Appeal*, 91 N.C. L. REV. 1219 (2013). For a discussion of the much-debated functions of postconviction review, specifically federal review of state court judgments, see generally, for example, Ann Woolhandler, *Demodeling Habeas*, 45 STAN. L. REV. 575 (1993).

7. William M. Landes & Richard A. Posner, *Harmless Error*, 30 J. LEGAL STUD. 161, 161 (2001); *see also infra* notes 27, 197 (discussing relevant data).

8. This Article employs the term “reversal” in an expansive and concededly imprecise sense that extends not only to the category of relief formally known as reversal but also to other remedies, such as vacatur, that function substantially the same way.

9. *See infra* Part I.A (discussing conventional harmless error rules). *But cf. infra* Part I.B (discussing unorthodox harmless error rules that deviate from this pattern).

This limitation impedes effective oversight of the lower courts in two significant ways. First, and most importantly, the harmless error doctrine as presently configured enables trial judges, prosecutors, and other relevant entities¹⁰ to persistently evade accountability for procedural errors, diminishing their incentives to comply with legal norms. Much of the existing literature on the topic of harmless error, including my own prior work, faults the dominant legal framework for denying redress to individual defendants who should, in fairness, receive it.¹¹ While this critique is on target, academic commentary has tended to overlook or even downplay the distinct concern that the prevailing approach to harmless error review impairs the ability of reviewing courts to deter procedural errors.¹² This Article foregrounds that concern and develops strategies to address it.

Second, even to the extent trial judges, prosecutors, and other relevant entities intend to abide by the law, they first need to know what the law requires from them. But here, too, the harmless error doctrine stands in the way, because it provides reviewing courts with a handy tool to avoid resolving legal claims on their merits. Instead of holding that an error did or did not occur, thereby clarifying what the law requires going forward, reviewing courts can—and often do—affirm on fact-bound harmless error grounds without ever adjudicating the legality of the challenged conduct.¹³

10. Other relevant entities may include, for example, entire courthouses, district attorneys' offices, or the state as a whole. *See, e.g., infra* Part II.A.1 (explaining that reversal can function as a collective sanction that deters at an organizational or systemic level instead of, or in addition to, directly deterring individual judges or prosecutors).

11. *See, e.g.,* Justin Murray, *A Contextual Approach to Harmless Error Review*, 130 HARV. L. REV. 1791, 1820 (2017) (criticizing outcome-centric harmless error rules because of their potential to “systematically deprive redress [for certain kinds of harm] . . . in cases where the evidence of guilt is overwhelming”). To address this concern, I argued for a “contextual approach to harmless error review” that would “assess harm in relation to the constellation of interests served by the particular procedural rule that was infringed and would not, as under existing law, automatically confine the harmless error inquiry to estimating the error’s effect on the outcome.” *Id.* at 1791; *see also infra* Part III.B (discussing how contextual harmless error review intersects with the framework proposed in this Article).

12. Some scholars have argued that conventional harmless error rules produce adequate deterrence by requiring reversal when an error has influenced the outcome, thereby reducing any incentive to break the law for that purpose. *See, e.g.,* Kate Stith, *The Risk of Legal Error in Criminal Cases: Some Consequences of the Asymmetry in the Right to Appeal*, 57 U. CHI. L. REV. 1, 36–42 (1990). I explain the reasons for my disagreement with this view in Part II.A.2 below. Others have attacked harmless error jurisprudence on deterrence grounds, as I do, but restrict the scope of their critique (and proposed remedies) to prosecutorial errors. *See, e.g.,* Sam Kamin, *Harmless Error and the Rights/Remedies Split*, 88 VA. L. REV. 1, 73–75 (2002). This Article, by contrast, is concerned with judicial as well as prosecutorial errors and with larger structural problems that often contribute to errors of both types.

13. A number of other commentators have mentioned this phenomenon, but the only two who have examined it in depth are Thomas Healy, *The Rise of Unnecessary Constitutional Rulings*, 83 N.C. L. REV. 847 (2005), and Kamin, *supra* note 12. Healy supports the practice of using the harmless error rule (and other remedial doctrines, for that matter) to avoid novel legal questions in constitutional adjudication. *See generally* Healy, *supra*. Kamin, on the other hand, has argued that reviewing courts should not duck the merits by proceeding straight to the issue of harmlessness, at least not where constitutional errors are involved, and that courts should adopt an order-of-decision rule requiring that constitutionality be adjudicated before harmlessness. *See* Kamin, *supra* note 12, at 38–55. While I generally share Kamin’s

The question a reviewing court must answer when conducting harmless error review using the conventional method—did the alleged error affect the outcome—typically has no relevance to the legal questions trial judges and prosecutors must answer while managing proceedings in the lower courts.¹⁴ Such rulings serve only to teach judges, prosecutors, and others what they can get away with, not what they ought to do.

These failings call for a major shift in how courts review procedural errors. This Article proposes that, in addition to examining whether an error affected the outcome, as current law directs, a reviewing court should also consider whether: (1) reversal would substantially help to prevent future errors; (2) the error caused substantial harm to a legally protected interest unrelated to the outcome; and (3) the benefits of reversal, as tabulated in the previous steps, outweigh its costs. An error would thus be deemed harmful, presumptively requiring reversal,¹⁵ *either* if it affected the outcome, as the law already provides,¹⁶ *or* if the three-part inquiry sketched above indicates that reversal is justified.

The first change I propose is that reviewing courts should consider whether reversal would substantially help to prevent future errors. Because prior illegal behavior portends a greater likelihood of future wrongdoing, courts would need to assess whether an error that occurred below is part of a pattern of error within or across cases, as opposed to an isolated incident. Likewise, courts should place considerable weight on whether the conduct challenged by the defense was obviously erroneous, as opposed to plausibly lawful, at the time it occurred, since obvious errors point to a high likelihood of negligent or even intentional wrongdoing (at either an individual or systemic level). This conduct can be deterred through a credible threat of reversal more readily than can non-negligent wrongs. These factors are not meant to be comprehensive: other considerations, such as an intervening change in judicial or prosecutorial policy, might play a significant role in certain cases. But ordinarily, a court applying the first step of the proposed balancing test

skepticism of avoidance in connection with harmless error review, for reasons discussed in Part II.B.1, *infra*, the cure Kamin prescribed—a mandatory decisional sequencing rule—is likely no longer doctrinally viable in the wake of *Pearson v. Callahan*, 555 U.S. 223 (2009), as explained in Part II.B, *infra*. This Article thus explores alternative solutions that do not involve taking away courts’ discretion over how to structure their decision-making process.

14. Specifically, outcome-determinative prejudice is legally irrelevant for *most* procedural rules that trial judges and prosecutors administer but not for the subset of procedural rights that I call “outcome-centric prejudice-based rights” (“prejudice-based rights” for short), which “apply only when failing to apply them might cause prejudice by affecting the outcome.” Justin Murray, *Prejudice-Based Rights in Criminal Procedure*, 168 U. PA. L. REV. 277, 279 (2020). For more about this caveat, see *infra* note 214, and for a deeper exploration of how this Article’s analysis of harmless error review might inform ongoing controversies surrounding prejudice-based rights, see *infra* Part III.D.1.

15. I say *presumptively* because other doctrines besides the harmless error rule will sometimes foreclose reversal even though an error is harmful. See, e.g., *infra* Part III.D.2 (discussing restrictive claim forfeiture rules and whether this Article’s proposal might be extended to alleviate them).

16. See *infra* note 234 (explaining how outcome-centric harmless error rules fit within my proposed framework as one part of a multidimensional analysis).

would look primarily at whether the error fits within a larger pattern of wrongdoing and whether it was obvious.

The second step of the approach defended here involves asking whether the error caused substantial harm to a legally protected interest unrelated to the outcome. The conventional approach to harmless error review offers defendants some protection from errors that jeopardize their interest in securing a favorable outcome; indeed, that is the overriding focus of the current doctrinal setup.¹⁷ Yet criminal procedure aims to further many different kinds of interests, some of which have little if anything to do with the outcome. To revisit the example from the opening paragraph, rules that restrict shackling defendants during judicial proceedings not only safeguard the presumption of innocence—a predominantly outcome-related interest—but also a defendant’s dignity and autonomy interests, which can be impaired irrespective of any effect on the outcome.¹⁸ Harmless error analysis should account for all legally protected interests that may be harmed by procedural errors, not only to ensure adequate redress for injured parties (a point I have made in prior work and do not emphasize here¹⁹) but also to promote accountability for those who are responsible and to ensure that reviewing courts engage with and clarify the relevant legal norms rather than avoiding them.

Third and finally, reviewing courts should perform a balancing analysis to determine whether the benefits of reversal outweigh the costs. I recognize that here, as in many other situations, balancing is susceptible to inconsistent application and even subversion: reviewing court judges who undervalue criminal defendants’ procedural rights or who ascribe excessive weight to the costs of reversal may prove reluctant to grant relief absent outcome-determinative prejudice.²⁰ Even so, my sense is that some judges, guided by a different set of priorities, would make good use of the expanded authority to reverse that this Article proposes.²¹ There is no way to guarantee that reviewing courts will reverse in every case where doing so would be net beneficial, but it is still important to entrust them with the power to reverse in appropriate cases and to identify the salient considerations that ought to inform their analysis.

17. There are serious reasons to suspect, however, that reviewing courts are not well equipped to detect outcome-determinative prejudice. This is one reason why I contend that conventional harmless error rules produce a deficient level of deterrence. *See infra* notes 168–76 and accompanying text.

18. *See supra* note 2 and accompanying text (discussing the reasons behind rules that restrict in-court shackling).

19. *See supra* note 11.

20. Although this is certainly a limitation of my proposal, it is not a reason to reject it: current law requires affirmance in virtually *every* case unless an error has caused outcome-determinative prejudice, whereas some subset of those cases would rightly lead to reversal if the approach I advocate were adopted.

21. While judges might occasionally misapply this Article’s balancing test in the opposite direction by reversing in cases where they ought to affirm, I suspect this will not happen very often. *See infra* text accompanying note 300.

Part I introduces the relevant doctrinal landscape. Part II explains why the conventional approach to harmless error review damages accountability and facilitates legal avoidance, increasing the incidence of procedural violations. Part III outlines my proposal for reforming the harmless error doctrine and then explores, a bit more tentatively, whether a similar strategy might be used to help rethink other controversial rules—relating to so-called prejudice-based rights²² and claim forfeiture²³—that further obstruct the policing of procedural error in the lower criminal courts.

I. THE HARMLESS ERROR DOCTRINE

This part describes the layout of the harmless error doctrine, which plays a pivotal role in determining which violations of procedural law will lead to a penalty in the form of reversal and which will prompt no systemic response. I begin this part by discussing the conventional harmless error rules that come under attack in Part II—rules that measure harmless error solely by reference to an alleged error’s probable effect on the outcome below. Then, I introduce several unorthodox variants of the harmless error rule that contain important features of the alternative framework I ultimately defend in Part III. Finally, I wrap up Part I by examining two pathways to reversal for procedural error—automatic reversal rules and reversals predicated on reviewing courts’ inherent supervisory power—that do not involve harmless error review of any kind, conventional or otherwise. As we shall see, those pathways are exceedingly narrow. In the vast majority of situations, defendants who seek reversal based on procedural errors must work within the parameters of the applicable harmless error rule—in all likelihood, a conventional, outcome-centric harmless error rule—if they are to prevail.

A. *Conventional Harmless Error Rules*

The harmless error rule is premised on the idea that some legal errors are more serious than others and that not all errors are sufficiently important to justify disturbing a lower court’s judgment.²⁴ “Errors are the insects in the world of law, traveling through it in swarms,” declared California Chief Justice Roger Traynor in the opening words of his influential monograph concerning harmless error.²⁵ He continued: “Many are plainly harmless; some appear ominously harmful The well-being of the law encompasses a tolerance for harmless errors adrift in an imperfect world.”²⁶ Reviewing courts in our time apparently share Traynor’s belief that many of the errors they encounter are harmless, for they rely on the harmless error

22. For a definition of prejudice-based rights, see *supra* note 14. For further discussion, see *infra* Part III.D.1.

23. See *infra* Part III.D.2.

24. See, e.g., *Kotteakos v. United States*, 328 U.S. 750, 759–60 (1946).

25. ROGER J. TRAYNOR, *THE RIDDLE OF HARMLESS ERROR* ix (1970).

26. *Id.*

rule to uphold lower court judgments with remarkable frequency in criminal cases.²⁷

For the sake of convenience, this Article sometimes discusses “the harmless error rule” as though it were a single legal construct. In reality, the “rule” has a more complex structure than this nomenclature suggests. Every jurisdiction has its own version of the harmless error rule—several of them, in fact.²⁸ Even so, nearly all variations of the harmless error rule in use today share this key feature: they measure harmless error solely by reference to an alleged error’s probable effect on the outcome below.²⁹ There are some outliers that defy this generalization, as I explain in the next section.³⁰ But the overall pattern, documented in this section, is quite clear.

The most widely used test for harmless error derives from the U.S. Supreme Court’s decision in *Chapman v. California*.³¹ *Chapman* held that some kinds of constitutional error do not require automatic reversal and instead are subject to harmless error review.³² The Court also devised a formula for assessing harmless error in relation to constitutional errors: such errors are not harmless unless the prosecution can “prove beyond a reasonable doubt that the error . . . did not contribute to the verdict.”³³ Case law since *Chapman* has narrowed its reach. As will be discussed below, forfeited constitutional claims are now covered by a different standard, and

27. See, e.g., Stith, *supra* note 12, at 44 n.113 (noting that in a sample of 127 Second Circuit criminal law rulings, “the appellate court found trial court error in 12 percent of the issues; yet the court also found over 60 percent of these errors to be ‘harmless’”); see also *infra* note 197 (discussing results from a more recent sample of federal criminal cases). Reviewing courts’ willingness to use the harmless error rule in criminal cases has been steadily rising over the past half century or so. See, e.g., Christopher Slobogin, *The Case for a Federal Criminal Court System (and Sentencing Reform)*, 108 CALIF. L. REV. 941, 951 (2020) (“A survey of federal cases since the 1960s indicates that judicial discussions of harmless error in criminal cases increased over tenfold from the ten-year period leading up to 1975 to the ten-year period leading up to 2019, an increase that amounts to more than three times the pace of new federal criminal filings.”). In civil cases and cases arising under the Administrative Procedure Act, however, the harmless error rule has played a comparatively modest role. See, e.g., Nicholas Bagley, *Remedial Restraint in Administrative Law*, 117 COLUM. L. REV. 253, 259 (2017) (arguing that “the rule of prejudicial error [in the Administrative Procedure Act] has been all but forgotten”).

28. See *infra* notes 31–49.

29. My claim in this section has to do with modern harmless error tests, not their precursors from earlier periods. For background regarding the history of harmless error review in the United States, see, for example, Roger 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 (2009).

30. See *infra* Part I.B.

31. 386 U.S. 18 (1967).

32. See *id.* at 22–23. The constitutional error in *Chapman*, which the Court deemed amenable to harmless error analysis, stemmed from comments by the prosecutor and instructions by the judge inviting the jury to hold the nontestifying defendants’ silence against them in violation of the Fifth Amendment. See *id.* at 19–20 (citing *Griffin v. California*, 380 U.S. 609 (1965)). Subsequent decisions have established that harmless error review applies to most types of constitutional (and nonconstitutional) error, not just a few select categories, such as violations of *Griffin v. California*, 380 U.S. 609 (1965). See *infra* notes 103–04 and accompanying text.

33. *Chapman*, 386 U.S. at 24.

so are constitutional claims asserted during postconviction review.³⁴ The *Chapman* test is applicable in both state and federal courts.³⁵

Besides *Chapman*, there are two other prominent federal harmless error tests that, while not binding on state courts, are influential and fairly representative of their state law counterparts.³⁶ One of them, originating in *Kotteakos v. United States*,³⁷ asks whether a reviewing court can “say, with fair assurance, . . . that the judgment was not substantially swayed by the error.”³⁸ Federal courts use this test, rather than “the stricter *Chapman* . . . measure of harmlessness,”³⁹ with respect to most nonconstitutional claims⁴⁰ and to constitutional claims raised during postconviction review.⁴¹ The other leading federal harmless error test, from *United States v. Olano*,⁴² applies to forfeited claims, calling for the “same kind of inquiry” as *Kotteakos* but “with one important difference,” namely that “the defendant rather than the Government . . . bears the burden of persuasion with respect to prejudice.”⁴³ Stated differently, *Olano* requires the defense to establish “a reasonable

34. See *infra* notes 41–44 and accompanying text.

35. While state courts are free to decide what the harmless error rule ought to be for errors arising under state law, *Chapman* held that the harmless error test for constitutional errors is a question of federal law. See *Chapman*, 386 U.S. at 21. The Court did not articulate a clear explanation for this aspect of its holding, and scholars have offered a range of conflicting theories. See, e.g., Daniel Epps, *Harmless Errors and Substantial Rights*, 131 HARV. L. REV. 2117, 2164–65 (2018) (defending *Chapman*’s imposition of a constitutional harmless error test on state courts by conceptualizing its holding “as part and parcel of constitutional rights, and not as part of the law of remedies”); Daniel J. Meltzer, *Harmless Error and Constitutional Remedies*, 61 U. CHI. L. REV. 1, 26 (1994) (arguing that there is “no firm basis for understanding the *Chapman* decision as a constitutional mandate” and that “understanding *Chapman* instead as constitutional common law seems to me the only plausible alternative” (citing Henry P. Monaghan, *The Supreme Court, 1974 Term—Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 20–21, 21 n.112 (1975))).

36. Compare *infra* notes 37–44 and accompanying text (discussing the main federal harmless error tests other than *Chapman*), with *People v. Lightsey*, 279 P.3d 1072, 1097 (Cal. 2012) (“Typically, a defendant who has established error under state law must demonstrate there is a reasonable probability that in the absence of the error he or she would have obtained a more favorable result.”), and *People v. Crimmins*, 326 N.E.2d 787, 793–94 (N.Y. 1975) (explaining that the harmless error test for nonconstitutional errors arising from a jury trial asks, first, whether “proof of the defendant’s guilt, without reference to the error, is overwhelming,” and second, whether “even in the face of apparently conclusive proof of the defendant’s guilt . . . there is a significant probability, rather than only a rational possibility, . . . that the jury would have acquitted the defendant had it not been for the error”).

37. 328 U.S. 750 (1946).

38. *Id.* at 765. The *Kotteakos* case construed the generally applicable federal harmless error statute, which at that time was codified at 28 U.S.C. § 391 but has since been modestly amended and recodified at 28 U.S.C. § 2111. See also FED. R. CRIM. P. 52(a).

39. *O’Neal v. McAninch*, 513 U.S. 432, 438–39 (1995) (discussing “the stricter [from the prosecution’s standpoint] *Chapman*, or the less strict *Kotteakos*, measure of harmlessness”).

40. See *id.* at 437–38.

41. See *Brecht v. Abrahamson*, 507 U.S. 619, 637–38 (1993).

42. 507 U.S. 725 (1993) (construing FED. R. CRIM. P. 52(b)).

43. *Id.* at 734. To prevail with a forfeited claim under *Olano*, a defendant must establish not only that error occurred and that the error was harmful but also that the error is “clear or obvious” and “seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.” *Puckett v. United States*, 556 U.S. 129, 135 (2009) (citing and quoting *Olano*, 507 U.S. at 736 (alteration in original)).

probability that, but for [the error claimed], the result of the proceeding would have been different.”⁴⁴

Each of these tests, and a multitude of others resembling them, reduce the concept of harm to some likelihood of an adverse outcome. Some place the burden on the prosecution to show that the error did not affect the outcome, e.g., *Chapman* and *Kotteakos*, while others shift the burden to the defense to prove otherwise, e.g., *Olano*.⁴⁵ And each one demands a somewhat different degree of probability—e.g., certainty “beyond a reasonable doubt,” as in *Chapman*; a “fair assurance,” as in *Kotteakos*; or a “reasonable probability,” as in *Olano*—regarding an error’s effect or lack of effect.⁴⁶ But they are fundamentally alike to the extent they all revolve around whether the outcome in question—whether it be a guilty plea,⁴⁷ a trial verdict,⁴⁸ or a sentence⁴⁹—is attributable to error. This feature is the hallmark of the conventional method of harmless error review.

B. Unorthodox Harmless Error Rules

There are not many harmless error tests that deviate from the outcome-centric prototype described in the last section.⁵⁰ But there are some. This

44. *United States v. Dominguez Benitez*, 542 U.S. 74, 81–82 (2004) (alteration in original) (quoting *United States v. Bagley*, 473 U.S. 667, 682 (1985) (plurality opinion)) (glossing *Olano*’s test for harmless error).

45. *See supra* notes 33, 37–38, 42–44 and accompanying text. There is some disagreement about whether it is useful or even coherent to conceptualize harmless error review in terms of burdens of production and persuasion. Compare Stephen A. Saltzburg, *The Harm of Harmless Error*, 59 VA. L. REV. 988, 1018 (1973) (“[T]he presumption confuses rather than aids analysis.”), with Anne Bowen Poulin, *Tests for Harm in Criminal Cases: A Fix for Blurred Lines*, 17 U. PA. J. CONST. L. 991, 1008, 1044–45 (2015) (arguing that assignment of the burden of proof is a “key variable” in harmless error jurisprudence since it determines who prevails when the evidence establishing harm or harmlessness is too close to call under the applicable test). Moreover, many believe that the distinctions among the various outcome-centric tests for harmless error are too subtle to accomplish much. *See, e.g.*, John M. Greabe, *The Riddle of Harmless Error Revisited*, 54 HOUS. L. REV. 59, 99–100 (2016). *But see, e.g.*, TRAYNOR, *supra* note 25, at 44–45, 49–51 (arguing that the author’s proposed test, which asks whether it is “highly probable” that the error affected the outcome, would meaningfully constrain judicial discretion).

46. *See supra* notes 33, 37–38, 44 and accompanying text.

47. *See, e.g., Dominguez Benitez*, 542 U.S. at 76 (holding that, for forfeited claims alleging violation of federal plea colloquy rules, the harmless error test is whether there is “a reasonable probability that, but for the error, [the defendant] would not have entered the plea”).

48. *See, e.g., People v. Crimmins*, 326 N.E.2d 787, 793–94 (N.Y. 1975); *see supra* note 36.

49. *See, e.g., Brooks v. State*, 969 So. 2d 238, 241–43 (Fla. 2007) (holding that, for nonconstitutional sentencing errors that were preserved below or raised within two years of the sentence becoming final, the harmless error test is whether “the record conclusively shows that the trial court would have imposed the same sentence using a correct scoresheet,” but for forfeited claims raised past the two-year deadline, the test is whether “the trial court could have imposed the same sentence using a correct scoresheet”).

50. In fact, the existing academic literature almost uniformly ignores non-outcome-centric offshoots of the harmless error rule. *See, e.g.*, 3B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 854 (4th ed. 2019) (“What Justice Rutledge wrote in *Kotteakos* may well be all that can usefully be said of the [harmless error] rule.”); *see supra* notes 37–38 and accompanying text (discussing *Kotteakos*).

section introduces two variants of the harmless error rule that broaden a reviewing court's inquiry beyond discerning an error's effect or lack of effect on the outcome below: the Supreme Court's "special harmless error test," which applies when a trial judge whose impartiality is open to question fails to recuse,⁵¹ and Michigan's generally applicable harmless error rule for preserved claims.⁵² These two examples do not exhaust the (rather small) realm of unorthodox harmless error rules, but they merit close consideration because each of them exhibits some key features of the approach I advance later in this Article.

1. *Liljeberg's* Harmless Error Test for Recusal Errors Implicating the Appearance of Judicial Impartiality

The Supreme Court's decision in *Liljeberg v. Health Services Acquisition Corp.*⁵³ furnishes the harmless error test that federal courts look to when reviewing violations of 28 U.S.C. § 455(a), which requires a federal judge to "disqualify himself in any proceeding in which his impartiality might reasonably be questioned."⁵⁴ (Many state and territorial courts have also adopted *Liljeberg's* test with respect to comparable errors arising under their own laws.)⁵⁵ After finding that the trial judge ran afoul of § 455(a) by failing to recuse himself despite having a conflict of interest,⁵⁶ the Court examined whether the plaintiff was entitled to a remedy under the Federal Rules of Civil Procedure.⁵⁷ The Court commenced its analysis of that question by

51. *Scott v. United States*, 559 A.2d 745, 747 (D.C. 1989) (en banc) (adopting the test set forth in *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847 (1988)); *see also infra* Part I.B.1.

52. *See infra* Part I.B.2.

53. 486 U.S. 847 (1988).

54. 28 U.S.C. § 455(a). *See generally* Murray, *supra* note 11, at 1820–23 (discussing *Liljeberg*).

55. *See* Heber v. Heber, 330 P.3d 926, 930 (Alaska 2014); *State v. Salazar*, 898 P.2d 982, 987 (Ariz. Ct. App. 1995); *Stevenson v. State*, 782 A.2d 249, 258 (Del. 2001); *Scott*, 559 A.2d at 747 (District of Columbia); *Petzold v. Kessler Homes, Inc.*, 303 S.W.3d 467, 474 (Ky. 2010); *Tierney v. Four H Land Co.*, 798 N.W.2d 586, 596 (Neb. 2011); *State v. Shelton*, 901 N.W.2d 741, 746 (S.D. 2017); *Mosley v. State*, 141 S.W.3d 816, 837 (Tex. Crim. App. 2004); *Velardo v. Ovitt*, 933 A.2d 227, 237 (Vt. 2007); *Hodge v. McGowan*, 50 V.I. 296, 311–12 (2008); *Tatham v. Rogers*, 283 P.3d 583, 598 (Wash. Ct. App. 2012); *cf.* *State v. Finch*, 865 N.W.2d 696, 705 (Minn. 2015) (noting that it is ambiguous whether and to what extent Minnesota has adopted the *Liljeberg* test). *But see* *Blaisdell v. City of Rochester*, 609 A.2d 388, 391 (N.H. 1992) (rejecting *Liljeberg* and requiring automatic reversal for recusal errors implicating the appearance of judicial impartiality). Other jurisdictions have yet to weigh in.

56. *See Liljeberg*, 486 U.S. at 858–61. The conflict of interest had to do with the trial judge's membership on the board of trustees of Loyola University New Orleans, which was negotiating a real estate transaction with John Liljeberg Jr., the defendant, while trial court proceedings were in progress. *See id.* at 850. According to the Court, "[t]he success and benefit to Loyola of these negotiations turned, in large part, on Liljeberg prevailing in the litigation." *Id.*

57. Specifically, the plaintiff sought relief under Rule 60(b)(6), which, at the time, provided that "the court may relieve a party . . . from a final judgment, order, or proceeding for the following reasons: . . . (6) any other reason justifying relief from the operation of the judgment." *Id.* at 863 n.10 (quoting FED. R. CIV. P. 60(b)(6)). Rule 60(b)(6) "grants federal courts broad authority to relieve a party from a final judgment," though the Supreme Court

stating, “As in other areas of the law, there is surely room for harmless error committed by busy judges who inadvertently overlook a disqualifying circumstance. There need not be a draconian remedy for every violation of § 455(a).”⁵⁸ It went on to announce the following test:

[I]n determining whether a judgment should be vacated for a violation of § 455(a), it is appropriate to consider [1] the risk of injustice to the parties in the particular case, [2] the risk that the denial of relief will produce injustice in other cases, and [3] the risk of undermining the public’s confidence in the judicial process.⁵⁹

The Court then analyzed each factor in reverse order. Beginning with the third factor, the Court discussed a number of “facts that might reasonably cause an objective observer to question [the judge’s] impartiality,” ultimately concluding that “[t]he violation [of § 455(a)] is neither insubstantial nor excusable.”⁶⁰ As to the second factor, the Court stated that a “willingness to enforce § 455 may prevent a substantive injustice in some future case by encouraging a judge or litigant to more carefully examine possible grounds for disqualification and to promptly disclose them when discovered.”⁶¹ Looping back to the first factor, the Court suggested that the trial court’s disposition might well have been wrong on the merits,⁶² and, moreover, that “neither Liljeberg nor Loyola University,” a third party with a stake in the outcome, “has made a showing of special hardship by reason of their reliance on the original judgment.”⁶³ The Court thus concluded that the § 455(a) violation warranted vacatur of the trial court’s judgment.⁶⁴

Liljeberg’s tripartite test, which courts widely use in connection with § 455(a) violations and certain other recusal errors in both criminal and civil cases,⁶⁵ diverges from conventional harmless error review in several key

has “caution[ed] that it should only be applied in ‘extraordinary circumstances.’” *Id.* at 863–64 (quoting *Ackermann v. United States*, 340 U.S. 193, 199–200 (1950)).

58. *Id.* at 862 (footnote omitted). The Court hastened to add: “It would be equally wrong, however, to adopt an absolute prohibition against any relief in cases involving forgetful judges.” *Id.*

59. *Id.* at 864.

60. *Id.* at 865–68.

61. *Id.* at 868.

62. The Court indicated that “a careful study of Judge Rubin’s analysis of the merits of the underlying litigation suggests that there is a greater risk of unfairness in upholding the judgment in favor of Liljeberg than there is in allowing a new judge to take a fresh look at the issues.” *Id.* at 868. In a previous appeal, before the trial judge’s conflict of interest came to light, the Fifth Circuit had held that the judge’s factual findings were not clearly erroneous, but Judge Alvin Rubin dissented because in his view the facts plainly showed that “‘Liljeberg’s chicanery’ gave rise to an estoppel as a matter of law.” *Id.* at 868 n.16 (quoting *Health Serv. Acquisition v. Liljeberg*, 747 F.2d 1463 (5th Cir. 1984) (unpublished table decision) (Rubin, J., dissenting)).

63. *Id.* at 868–69. The Court also noted, apparently in connection with the first factor, that “although a delay of 10 months after the affirmance by the Court of Appeals would normally foreclose relief based on a violation of § 455(a), in this case the entire delay is attributable to [the trial judge’s] inexcusable failure to disqualify himself.” *Id.* at 869.

64. *Id.* at 870.

65. *See supra* note 55. One judge has argued in a dissenting opinion that there is at least a “substantial question” regarding whether the *Liljeberg* test is truly a species of harmless error

respects. For one thing, it is forward-looking insofar as it directs courts to consider whether “denial of relief will produce injustice *in other cases*.”⁶⁶ Although *Liljeberg*’s discussion of this factor was admittedly a bit perfunctory,⁶⁷ subsequent cases indicate that it injects a prophylactic ingredient into the remedial calculus that is wholly missing from outcome-centric harmless error review.⁶⁸ Furthermore, the *Liljeberg* test is attentive to the possibility that illegal conduct can cause serious harm—in the case of § 455(a) errors, by “undermining the public’s confidence in the judicial process”⁶⁹—even without influencing the outcome. Indeed, numerous cases applying *Liljeberg*’s test have overturned judgments based on an *appearance* of bias that might compromise public confidence in the judiciary while assuming or even finding that the trial judge had no *actual* bias affecting the outcome.⁷⁰ And finally, *Liljeberg* implicitly calls for a balancing analysis that weighs the benefits of reversal—rectifying any injustice to the unsuccessful party, preventing injustice in future cases, and restoring public confidence—against its costs.⁷¹ While outcome-centric harmless error rules likewise reflect an effort to accommodate the competing goals of fairness and finality, such rules do not invite a case-by-case balancing of interests as *Liljeberg* does.⁷²

2. Michigan’s Two-Step Approach to Harmless Error Review

Michigan’s harmless error doctrine also has some important unconventional characteristics, at least with respect to preserved claims.⁷³ Elaborating on the state’s vaguely worded statutes and court rules relating to

review—as opposed to a construction of Federal Rules of Civil Procedure 60(b)(6)—and whether it extends to criminal cases. *See* *United States v. O’Keefe*, 169 F.3d 281, 285–89 (5th Cir. 1999) (Dennis, J., dissenting) (questioning *United States v. O’Keefe*, 128 F.3d 885, 892–93 (5th Cir. 1997), in which a previous Fifth Circuit panel had applied the *Liljeberg* rule in the same litigation). But every other court or judge to consider the issue in a published opinion has concluded that *Liljeberg*’s three-factor test constitutes a form of harmless error review that applies, if at all, in criminal cases to the same extent as in civil cases. *See, e.g.*, *United States v. Amico*, 486 F.3d 764, 777 (2d Cir. 2007).

66. *Liljeberg*, 486 U.S. at 864 (emphasis added).

67. *See supra* note 61 and accompanying text.

68. *See, e.g.*, *Scott v. United States*, 559 A.2d 745, 747 (D.C. 1989) (en banc); *see also infra* notes 239, 242 (discussing cases applying *Liljeberg*’s second prong).

69. *Liljeberg*, 486 U.S. at 864.

70. *See, e.g.*, *Belton v. United States*, 581 A.2d 1205, 1214–15 (D.C. 1990).

71. *See Liljeberg*, 486 U.S. at 864. *Liljeberg* did not expressly say that the three factors it highlighted form a balancing test, but courts have correctly recognized that “by using a risk analysis, [*Liljeberg*] allows the balancing of those objectives [favoring reversal] against the potential burdens placed on the judicial system and the parties by re-opening a final judgment.” *E.g.*, *Mosley v. State*, 141 S.W.3d 816, 837–38 (Tex. Crim. App. 2004).

72. *See infra* notes 281–83 and accompanying text.

73. For forfeited claims, Michigan follows the federal approach described in the previous section. *See People v. Carines*, 597 N.W.2d 130, 138 (Mich. 1999) (stating that the harmless error test in Michigan for forfeited claims, whether constitutional or nonconstitutional, tracks the federal *Olano* rule). As discussed elsewhere, *Olano* requires the defense to establish, among other things, a “reasonable probability” of outcome-determinative prejudice. *Supra* notes 43–44 and accompanying text.

harmless error,⁷⁴ the Michigan Supreme Court's 1972 decision in *People v. Robinson*⁷⁵ indicated that

[w]here it is claimed that error is harmless, two inquiries are pertinent. First, is the error so offensive to the maintenance of a sound judicial process that it never can be regarded as harmless? Second, if not so basic, can we declare a belief that the error was harmless beyond a reasonable doubt?⁷⁶

The second prong of this test, which underwent substantial revision in later cases,⁷⁷ is a form of traditional, outcome-centric harmless error review, so I do not discuss it further here. But *Robinson*'s first step is distinctive. "Its purpose," according to the Michigan Court of Appeals, "is to deter prosecutorial and police misconduct and to safeguard those individual rights which are so fundamental that the impact of their violation cannot be fully assessed."⁷⁸ In light of this purpose, "[a]n error may be intolerably offensive to the maintenance of a sound judicial system," warranting a new trial under the first part of the *Robinson* test, "if it was deliberately injected into the proceedings by the prosecutor" or if the prosecutor's error was "flagrantly negligent."⁷⁹

A series of Michigan Court of Appeals decisions, involving improper commentary on a defendant's silence at the time of arrest in violation of the rule laid down in *People v. Bobo*,⁸⁰ reveals the potential power of *Robinson*'s approach to harmless error.⁸¹ The first case, *People v. Swan*,⁸² found a *Bobo* error harmless largely because there was "ample evidence to destroy any reasonable doubt of the defendant's guilt."⁸³ Yet the court in *Swan* proceeded to "emphasize" that "[i]n finding the error harmless in this

74. See Elizabeth Price Foley & Robert M. Filiatrault, *The Riddle of Harmless Error in Michigan*, 46 WAYNE L. REV. 423, 428–30 (2000) (comparing the language of four Michigan harmless error rules found in statutes and court rules and concluding that "Michigan lawyers and judges . . . are left to struggle over [the rules'] diaphanous words with virtually no guidance as to their meaning").

75. 194 N.W.2d 709 (Mich. 1972).

76. *Id.* at 713 (citations omitted) (quoting *People v. Wichman*, 166 N.W.2d 298, 302 (Mich. Ct. App. 1968)). The Michigan Supreme Court drew this passage from the intermediate appellate court's decision a few years earlier in *People v. Wichman*, which appears to be the first case embracing this two-tiered approach to harmless error analysis.

77. See *infra* note 90.

78. *E.g.*, *People v. Swan*, 223 N.W.2d 346, 351 n.6 (Mich. Ct. App. 1974).

79. *People v. Gallon*, 328 N.W.2d 615, 618 (Mich. Ct. App. 1982) (citing *Swan*, 223 N.W.2d at 351). An error may also lead to reversal under *Robinson*'s first prong, even if it did not involve deliberate or grossly negligent prosecutorial misconduct, "if it deprives the defendant of a fundamental element of the adversary process, or if it is of a particularly inflammatory or persuasive kind." *Swan*, 223 N.W.2d at 351–52.

80. 212 N.W.2d 190 (Mich. 1973).

81. See *id.* at 191–92 (holding that "[w]here an accused exercises his constitutional right to remain silent at the time of arrest, . . . the use of such silence against him at trial under the doctrine of impeachment by prior inconsistent statement" generally violates the Fifth Amendment); *cf.* *People v. Cetlinski*, 460 N.W.2d 534, 542 (Mich. 1990) (narrowing *Bobo* to the extent it prohibits "the use of a defendant's prearrest, pre-*Miranda* . . . omissions" and "constru[ing] *Bobo* as being coextensive with the Fifth Amendment . . . and the due process analysis of" *Doyle v. Ohio*, 426 U.S. 610 (1976)).

82. 223 N.W.2d 346 (Mich. Ct. App. 1974).

83. *Id.* at 352–53.

case, . . . we do not condone [the prosecutor's] conduct" and "in the future . . . [d]eliberate violations of this rule may lead us to reverse convictions even where evidence might be overwhelming. The prosecutor who comments, or elicits comment, on a defendant's silence thus risks the loss of a perfectly good case for no reason."⁸⁴

These were not idle words, for in the years following *Swan*, the court often, though not unflinchingly,⁸⁵ relied on *Robinson*'s first prong to reverse in cases where it determined that the *Bobo* rule had been violated. In one such case, the court quoted *Swan*'s admonition and then reversed, explaining that "[t]he prosecutor in this case has run the risk and lost" and that "[t]he only way to stop deliberate violations of the rule in *Bobo* is to be unyielding in our application of its prohibition."⁸⁶ In another, the court highlighted the fact that the trial had taken place "a year after *Swan* and two years after *Bobo*," which, in conjunction with other circumstances, indicated that "the prosecutor's conduct was either deliberate or flagrantly negligent" and thus that "such conduct [is] intolerably offensive to the maintenance of a sound judicial process."⁸⁷ Further illustrations abound both with respect to *Bobo* errors⁸⁸ and in relation to other forms of prosecutorial misconduct.⁸⁹

For reasons that are not entirely clear, *Robinson*'s analytical framework has largely faded into the background of criminal litigation in Michigan during the last two decades.⁹⁰ The harmless error tests that Michigan courts

84. *Id.* at 353.

85. *See, e.g.*, *People v. Johnson*, 249 N.W.2d 343, 344 (Mich. Ct. App. 1976) (acknowledging that ordinarily commenting on a defendant's silence at arrest "would call for a peremptory reversal" but holding that it was harmless where, in a prosecution for carrying a concealed weapon, the defendant admitted through his testimony that he had possessed a gun at the time of his arrest).

86. *People v. Hoye*, 263 N.W.2d 343, 345 (Mich. Ct. App. 1977).

87. *People v. Norris*, 253 N.W.2d 767, 769 (Mich. Ct. App. 1977).

88. *See, e.g.*, *People v. Gallon*, 328 N.W.2d 615, 618–19 (Mich. Ct. App. 1982).

89. *See, e.g.*, *People v. Green*, 345 N.W.2d 676, 679–80 (Mich. Ct. App. 1983) (per curiam) (finding that where the prosecutor implied that the nontestifying defendant had an obligation to explain the evidence against him, a maneuver the court deemed "obviously considered and deliberate," the error was "unduly offensive to the sound maintenance of the judicial system"). The first step of *Robinson* has less bite in connection with errors attributable to the trial judge than it does for those involving prosecutorial misconduct. *See, e.g.*, *People v. Minor*, 541 N.W.2d 576, 580–81 (Mich. Ct. App. 1995) (holding that evidentiary error was not "deliberately injected into the proceedings by the prosecution" and thus did not require reversal under *Robinson*'s first prong because it "was error by the court").

90. *See People v. Mitchell*, 586 N.W.2d 119, 121 (Mich. Ct. App. 1998) (per curiam) (noting that, although "[i]t was long held that two inquiries were pertinent to the issue whether a trial court error was harmless," referencing *Robinson*, "the determination of harmless error is now governed by statute, by court rule, and by recent pronouncements by our Supreme Court"). A trilogy of cases from the 1990s—*People v. Mateo*, *People v. Gearns*, and *People v. Lukity*—appears to have played a significant role in sidelining *Robinson*. *Robinson*'s second prong—the prong not emphasized in this section, as it embodies a conventional approach to harmless error analysis—in effect extended the Supreme Court's *Chapman* test not only to constitutional errors, as *Chapman* requires, but also to nonconstitutional errors, which *Chapman* does not mandate. *See supra* notes 75–76 and accompanying text; *supra* text accompanying note 77 (discussing *Robinson* and its second prong); *supra* notes 31–35 and accompanying text (discussing *Chapman*). The Michigan Supreme Court rejected this aspect of *Robinson* in *Mateo*, 551 N.W.2d 891 (Mich. 1996), holding that *Chapman* should no longer

recite and apply in most cases nowadays are entirely outcome-centric, and in some respects, Michigan's modern harmless error doctrine is actually less protective of criminal defendants' procedural rights than the rules in force elsewhere.⁹¹ That said, Michigan's courts have not expressly rejected the principle that some errors, because of their deliberateness or flagrancy, are "so offensive to the maintenance of a sound judicial process" as to require reversal on deterrence grounds without any showing of outcome-determinative prejudice.⁹² Indeed, courts in Michigan still continue to give this concept an occasional nod.⁹³

C. Reversal Outside the Harmless Error Framework

There are some exceptional situations in which a reviewing court may reverse due to procedural error without conducting any form of harmless error review, either because an automatic reversal rule is applicable or because a court sees fit to exercise its inherent supervisory power to reverse. While these exceptions offer a small measure of respite from the rigors of harmless error review, they operate "only in a 'very limited class of cases'"⁹⁴ and have limited overall impact.

Automatic reversal rules have a categorical sweep: they exempt entire classes of procedural claims from harmless error review, at least if the claims were preserved below.⁹⁵ For instance, automatic reversal is required for total deprivation of the right to counsel, trials conducted by a potentially biased judge,⁹⁶ discrimination during selection of the grand jury or petit jury, infractions of the right to a public trial, violation of the right of self-

cover preserved nonconstitutional claims and asserting that "the articulation of the harmless-error test in *Robinson* was dicta." *Id.* at 896 & n.13. While *Mateo* left open what test should take the place of *Chapman* (i.e., *Robinson*'s second step) in the context of preserved nonconstitutional claims, the court took up that issue in *Gearns*, 577 N.W.2d 422 (Mich. 1998), *overruled by* *People v. Lukity*, 596 N.W.2d 607 (Mich. 1999), holding that a reviewing court should reverse unless "it is highly probable that the [error] did not contribute to the verdict," *id.* at 438, a relatively defense-friendly rule as far as outcome-centric harmless error rules go, albeit less so than *Chapman*. But the very next year, in *Lukity*, 596 N.W.2d 607, the court overruled *Gearns* and held that a reviewing court should affirm unless "it is more probable than not that a different outcome would have resulted without the error," *id.* at 612–13, yielding one of the *least* rights-protective harmless error standards used anywhere in the country for preserved nonconstitutional claims raised on direct appeal.

91. See *supra* note 90.

92. *People v. Robinson*, 194 N.W.2d 709, 713 (Mich. 1972) (quoting *People v. Wichman*, 166 N.W.2d 298, 302 (Mich. Ct. App. 1968)).

93. See, e.g., *People v. Shorter*, 922 N.W.2d 628, 635 n.7 (Mich. Ct. App. 2018).

94. *Neder v. United States*, 527 U.S. 1, 8 (1999) (quoting *Johnson v. United States*, 520 U.S. 461, 468 (1997)) (referring to automatic reversal rules for constitutional errors). With respect to the supervisory power, see, for example, *Kamin*, *supra* note 12, at 77–78 (explaining that the Supreme Court has "essentially eliminate[d] the supervisory power" as a basis for reversal in the federal system); see also *infra* notes 95–116 (discussing the narrowness of both types of harmless error exceptions).

95. Automatic reversal rules do not necessarily extend to forfeited claims. See, e.g., *Puckett v. United States*, 556 U.S. 129, 140–41 (2009).

96. By contrast, *Liljeberg*'s harmless error test, discussed in Part I.B.1, *supra*, applies in federal courts and some state courts when a judge's conduct creates an appearance of bias but does not evince actual bias. See, e.g., *In re Bergeron*, 636 F.3d 882, 883–84 (7th Cir. 2011).

representation, and more.⁹⁷ The reasons courts have articulated to justify automatic reversal “var[y] in a significant way from error to error,” but “[t]here appear to be at least three broad rationales”: (1) “the right at issue is not designed to protect the defendant from erroneous conviction but instead protects some other interest,” (2) “the effects of the error [on the outcome] are simply too hard to measure,” and (3) “the error always results in fundamental unfairness.”⁹⁸

Ever since the Supreme Court subjected constitutional errors to harmless error review in its 1967 *Chapman* decision,⁹⁹ scholars have been pushing courts to expand the list of errors that give rise to automatic reversal,¹⁰⁰ with some arguing that *Chapman* should be overruled altogether.¹⁰¹ Instead, courts have done just the opposite. Troubled that automatic reversal may sometimes cause “the reversal of criminal convictions obtained pursuant to a fair trial,”¹⁰² courts have embraced a “strong presumption” against making blanket exceptions to the harmless error rule.¹⁰³ And courts often circumvent what few automatic reversal rules they have recognized by narrowing the scope of the procedural rights that automatic reversal is meant to protect—holding, for instance, that certain partial or temporary courtroom closures, though improper, are “too trivial” to violate the right to a public trial and thus do not require automatic reversal.¹⁰⁴ The idea of employing automatic

97. See generally 7 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 27.6(d) (4th ed. 2015) (summarizing case law on automatic reversal).

98. *Weaver v. Massachusetts*, 137 S. Ct. 1899, 1908 (2017). In *Arizona v. Fulminante*, 499 U.S. 279 (1991), the Supreme Court attempted to rationalize its automatic reversal jurisprudence by distinguishing between “trial error[s]” and “structural defects,” suggesting that the former are covered by the harmless error rule whereas the latter are not. *Id.* at 307–10. These labels are not helpful. The Court “has endorsed several ‘different and largely inconsistent’ interpretations of the trial/structural-error dichotomy, each ambiguous in its own right and unable to explain which errors the Court has subjected to harmless error review and which it has not.” Murray, *supra* note 11, at 1807–08 (footnote omitted) (quoting David McCord, *The “Trial”/“Structural” Error Dichotomy: Erroneous, and Not Harmless*, 45 U. KAN. L. REV. 1401, 1412 (1997)).

99. See *supra* notes 31–35 and accompanying text (discussing *Chapman*).

100. See, e.g., Philip J. Mause, *Harmless Constitutional Error: The Implications of Chapman v. California*, 53 MINN. L. REV. 519, 556–57 (1969) (suggesting that “application of a rule of automatic reversal to all constitutional errors” might be ideal but that, since *Chapman* foreclosed that option, there should at least be “a general rule of automatic reversal” for constitutional errors subject to some discrete exceptions).

101. See, e.g., David R. Dow & James Rytting, *Can Constitutional Error Be Harmless?*, 2000 UTAH L. REV. 483. Other commentators have come out against automatic reversal, whether for constitutional errors or otherwise. See, e.g., Steven M. Shepard, Note, *The Case Against Automatic Reversal of Structural Errors*, 117 YALE L.J. 1180 (2008).

102. *Sherman v. Smith*, 89 F.3d 1134, 1138 (4th Cir. 1996) (en banc).

103. *Rose v. Clark*, 478 U.S. 570, 579 (1986). In what may well be the Court’s most controversial foray into the harmless error domain—aside from *Chapman* itself—*Fulminante* held that the erroneous admission of an involuntary confession is subject to harmless error review, rejecting the long-standing rule of automatic reversal that had previously applied to such errors. See *Fulminante*, 499 U.S. at 308–12. This holding has provoked extensive criticism. See, e.g., Charles J. Ogletree Jr., *Arizona v. Fulminante: The Harm of Applying Harmless Error to Coerced Confessions*, 105 HARV. L. REV. 152 (1991).

104. See, e.g., *Peterson v. Williams*, 85 F.3d 39, 42 (2d Cir. 1996). See generally Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 889

reversal as a broad-based strategy for addressing the harmless error rule's shortcomings has thus largely led to a dead end.

Even when no automatic reversal rule applies, reviewing courts sometimes invoke their inherent supervisory power to reverse outside the usual harmless error framework.¹⁰⁵ As an example, in *State v. Payne*,¹⁰⁶ the Connecticut Supreme Court considered “whether, in the exercise of our supervisory authority over the administration of justice, the defendant should be afforded a new trial because of pervasive prosecutorial misconduct.”¹⁰⁷ During his closing argument in a felony murder trial,¹⁰⁸ the prosecutor relied on facts not in evidence to vouch for one of his witnesses, accused the defendant of taking part in an uncharged robbery without any evidence, impeached the defendant's credibility by speculating about the severity of the sentence he would receive if convicted, and urged the jury to convict out of sympathy for the victim and his family.¹⁰⁹ The court found not only that these remarks were improper but also that the improprieties were “serious and deliberate” and “part of a pattern of misconduct by this prosecutor.”¹¹⁰ The court then “balance[d] society's interest in maintaining a justice system that treats all defendants fairly and *appears* to do so, against some of the difficulties that might arise in a new trial,”¹¹¹ concluding that reversal was appropriate because “the prosecutor in this case repeatedly committed serious

(1999) (arguing that “raising the ‘price’ of a constitutional violation by enhancing the remedy will, all things being equal, result in fewer violations”—a phenomenon the author calls “remedial deterrence”—and that “[t]he primary method available to courts for lowering the number of violations is to pare back the constitutional right”).

105. Courts can also exercise their supervisory power to announce automatic reversal rules, blending the two techniques for avoiding harmless error review examined in this section. *See, e.g.,* *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 809–14, 809 n.21 (1987) (plurality opinion) (invoking the Court's supervisory power to require automatic reversal where a federal court appoints a private litigant's attorney to prosecute a criminal contempt charge against that litigant's adversary). More commonly, though, the supervisory power is used to reverse on case-specific rather than categorical grounds, as occurred in *State v. Payne*, 797 A.2d 1088 (Conn. 2002), discussed below.

106. 797 A.2d 1088 (Conn. 2002).

107. *Id.* at 1090. The court explained that “an appellate court may invoke its supervisory authority to reverse a criminal conviction when the prosecutor deliberately engages in conduct that he or she knows, or ought to know, is improper” or “when there has been a pattern of misconduct across trials, not just within an individual trial.” *Id.* at 1092–93 (citing and quoting *State v. Pouncey*, 699 A.2d 901, 906, 908 (Conn. 1997)). The court added, however, that even when it finds prosecutorial misconduct, it will “generally balance the seriousness of the infraction against the difficulties that might arise in a new trial,” weighing a range of factors that include

the extent of prejudice to the defendant; the emotional trauma to the victims or others likely to result from reliving their experiences at a new trial; the practical problems of memory loss and unavailability of witnesses after much time has elapsed; and the availability of other sanctions for such misconduct.

Id. at 1093 (quoting *State v. Ruiz*, 521 A.2d 1025, 1033 (Conn. 1987)).

108. *See id.* at 1090–91.

109. *See id.* at 1094–99.

110. *Id.* at 1099.

111. *Id.*

prosecutorial misconduct and our experience counsels that nothing short of reversal will deter similar misconduct in the future.”¹¹²

But cases that rely on a reviewing court’s supervisory power to reverse are a vanishing breed.¹¹³ The Supreme Court has almost completely dismantled the prerogative of federal courts to reverse or to provide comparable remedies, such as dismissal of an indictment, on supervisory power grounds, casting such remedies as illegitimate attempts to “circumvent” the harmless error rule.¹¹⁴ State courts are not obliged to follow the Supreme Court’s lead on this matter, and some of them have displayed greater willingness to exercise their supervisory power to reverse as a means of deterring future violations of procedural law.¹¹⁵ Yet many states subscribe to the federal approach or something closely approximating it, holding, in the words of one court, that “[t]he supervisory power of the appellate court to reverse a conviction is inappropriate as a remedy when the error is harmless.”¹¹⁶

II. ASLEEP AT THE WHEEL

The harmless error rule, as I have shown, is a nearly pervasive feature of criminal appellate and postconviction litigation that, in its conventional form, directs reviewing courts to overlook legal errors that did not affect the outcome below. This part contends that the conventional approach to harmless error review fosters a dangerous level of disregard for procedural law in the lower criminal courts.

112. *Id.* at 1100.

113. Indeed, the tide has turned against the supervisory power in a wide range of doctrinal settings. See Bruce A. Green, *Federal Courts’ Supervisory Authority in Federal Criminal Cases: The Warren Court Revolution That Might Have Been*, 49 STETSON L. REV. 241, 258–61 (2020) (documenting this trend in the federal system). This is partly because the very notion of an inherent judicial authority to maintain standards of justice that cannot be traced to a specific grant of power invites questions about legitimacy and separation of powers. Compare Sara Sun Beale, *Reconsidering Supervisory Power in Criminal Cases: Constitutional and Statutory Limits on the Authority of the Federal Courts*, 84 COLUM. L. REV. 1433, 1520–21 (1984) (questioning the legitimacy of some decisions grounded in inherent supervisory power and arguing that “the term supervisory power should be abandoned”), with Monaghan, *supra* note 35, at 39–40 (arguing that the Supreme Court’s foundational supervisory power cases can be “rationalized” as “constitutional common law”).

114. See *Bank of N.S. v. United States*, 487 U.S. 250, 253–55 (1988) (holding that dismissal was improper absent a showing of prejudice, as Federal Rule of Criminal Procedure 52 “is, in every pertinent respect, as binding as any statute duly enacted by Congress” and thus “[t]he balance struck by the Rule between societal costs and the rights of the accused may not casually be overlooked ‘because a court has elected to analyze the question under the supervisory power’” (quoting *United States v. Payner*, 447 U.S. 727, 736 (1980))); see also *United States v. Hasting*, 461 U.S. 499, 505 (1983) (holding that “the harmless-error rule of *Chapman* . . . may not be avoided by an assertion of supervisory power, simply to justify a reversal of these criminal convictions”).

115. *Payne* is one case in point. See *supra* notes 106–12 and accompanying text; see also, e.g., *State v. Beecroft*, 813 N.W.2d 814, 846–50 (Minn. 2012).

116. *State v. Murray*, 443 So. 2d 955, 956 (Fla. 1984) (“We agree with the recent analysis of the Court in [*Hasting*].”). See generally *State v. Sherman*, 378 P.3d 1060, 1077 (Kan. 2016) (“The majority view [among state courts] . . . is that supervisory powers are not sufficiently omnipotent to permit the reversal of an otherwise constitutionally sound conviction.”).

My case for this conclusion centers on two points.¹¹⁷ First and foremost, outcome-centric harmless error review seriously diminishes the incentives of trial judges, prosecutors, and relevant organizational and systemic entities to abide by procedural law. Legal violations spring from a variety of causes, not just from deliberate attempts to influence the outcome, and many are unlikely to cause outcome-determinative prejudice. Conventional harmless error review creates impunity for the judges, prosecutors, and others that bear responsibility for the host of errors that, while not outcome altering, nevertheless degrade the quality of justice emerging from the criminal process. And even with respect to violations of the law that were in fact designed to hand an undeserved win to the prosecution, reviewing courts lack reliable tools to detect when an error has swayed the outcome. Insofar as trial judges, prosecutors, and others are inclined to break the law as a means of giving the prosecution a leg up, they might well calculate that the risk of getting caught is slim enough to make cheating a safe bet.

Second, putting incentives to the side, trial judges, prosecutors, and other entities depend on reviewing courts to clarify what the law requires from them so they can conform their conduct to its strictures. But outcome-centric harmless error review stymies the vital process of norm clarification, since reviewing courts frequently use it to avoid confronting novel questions of procedural law. They do so by disposing of defense claims on harmless error grounds without ever deciding whether the allegedly erroneous conduct was illegal in the first place. As the question posed by conventional harmless error rules—did the error affect the outcome—generally has no logical relationship to the question of whether the law was violated below,¹¹⁸ these dispositions deprive trial judges and other entities of guidance regarding how they should handle similar scenarios that may arise in future cases.

A. Unaccountability

Dissenting from his colleagues' decision to affirm a criminal conviction despite prosecutorial misconduct in *United States v. Antonelli Fireworks Co.*,¹¹⁹ Judge Jerome Frank sensed a troubling pattern was emerging.¹²⁰ In a string of opinions, the Second Circuit had “used vigorous language in

117. As discussed above, there are additional reasons to worry about conventional harmless error rules—having to do with their tendency to unfairly deny redress in individual cases—beyond the two concerns outlined here. See *supra* note 11 and accompanying text. On the other hand, as explored in Part III.C, *infra*, reversal is a costly remedial tool that should not be ordered lightly and, moreover, some form of harmless error review is essential to a well-functioning criminal justice system.

118. This claim is qualified to some degree for the small but important subset of procedural rules that I refer to as prejudice-based rights. See *infra* note 214.

119. 155 F.2d 631 (2d Cir. 1946).

120. The trial, which took place during World War II, centered on allegations that the defendants had manufactured defective war materials and conspired to defraud the federal government in its war effort. See *id.* at 633. The prosecutor wrapped up his closing argument with an appeal to the jurors' sense of patriotic duty during wartime. See *id.* at 637. The court concluded that, “[t]hrough the remarks were ill advised and overzealous, they seem insignificant when properly considered in their setting.” *Id.* at 638.

denouncing government counsel” for misconduct,¹²¹ yet it affirmed the judgment below each time, often relying on the harmless error rule.¹²² As Judge Frank saw things, “a reversal in a case like this might well serve as a deterrent” and “make [the prosecutor] subsequently live up to professional standards of courtroom decency.”¹²³ But, Judge Frank wrote, if the court continued to “merely go through the form of expressing displeasure” without penalizing the offending prosecutors by “depriv[ing] them of their victories,” its condemnations would accomplish little, for “[g]overnment counsel, employing such tactics, are the kind who, eager to win victories, will gladly pay the small price of a ritualistic verbal spanking.”¹²⁴ Reviewing court judges have voiced a concern akin to Judge Frank’s many other times and places, revealing a fairly widespread perception that prosecutors and sometimes even trial judges “are conducting criminal cases with an eye to the saving grace of the” harmless error rule.¹²⁵

Is this perception accurate? And if so, what lies behind it? There is some debate in the academic literature as to whether judges, prosecutors, and other relevant entities are responsive to the threat of reversal.¹²⁶ To the extent their incentives to follow or flout the law are independent of the risk of reversal, the harmless error rule will have a limited impact on what transpires in the lower criminal courts. Furthermore, some have argued—though here, too, there is controversy—that conventional harmless error rules adequately deter violations of the law because, by requiring reversal when illegal conduct has

121. *Id.* at 661 (Frank, J., dissenting).

122. *See id.* at 656–57.

123. *Id.* at 661–62.

124. *Id.* at 661. Judge Frank even upped the ante a few chips further, asserting that “[i]f we continue to do nothing practical to prevent such conduct, we should cease to disapprove it” or else prosecutors will learn to treat the court’s rules regulating their behavior as “pretend-rules.” *Id.*

125. *People v. Black*, 238 P. 374, 387 (Cal. Ct. App. 1925) (“It seems evident that the prosecutors of the state, and possibly that the trial judges, are conducting criminal cases with an eye to the saving grace of the [state constitution’s harmless error provision].”); *see also*, e.g., *United States v. Pallais*, 921 F.2d 684, 691–92 (7th Cir. 1990) (“[This Court’s] rebukes seem to have little effect, no doubt because of the harmless error rule, which in this as in many other cases precludes an effective remedy for prosecutorial misconduct.”); *State v. Rodriguez*, 254 S.W.3d 361, 373 (Tenn. 2008) (“[W]hen the rules of evidence and procedure stand unenforced through a finding of harmless error, there is no deterrence that would encourage future adherence to the rule. The absence of deterrence may ‘tacitly inform[]’ prosecutors that they can weigh the commission of evidentiary or procedural violations . . . against an increasingly accurate prediction that the appellate courts will ignore the misconduct when sufficient evidence exists to prove the defendant’s guilt.” (second and third alterations in original) (footnote omitted) (quoting Bennett L. Gershman, *The New Prosecutors*, 53 U. PITT. L. REV. 393, 425 (1992))); *Jones v. State*, 735 P.2d 699, 703 (Wyo. 1987) (Urbigkit, J., dissenting) (“Prosecutorial overreaching will only be discontinued when the detriment in case reversals exceeds the benefit in excused convictions. The evidentiary tactic of using bad-acts and bad-actor evidence for proof of guilt has continued unreasonably, despite adverse comment by this court. The ‘do better next time’ admonition seldom deters future conduct.”). In one especially poignant illustration, the appellate prosecutor in *State v. Neidigh*, 895 P.2d 423 (Wash. Ct. App. 1995), effectively admitted that the court’s liberal use of the harmless error rule was influencing the behavior of trial prosecutors, prompting some stern words from the court followed by yet another affirmation on harmless error grounds. *See id.* at 427–29.

126. *See infra* notes 128–39 and accompanying text.

contributed to the outcome, such rules counteract any incentive that judges or prosecutors may have to sink the defendant's prospects through legal error.¹²⁷ In this section, I contend that reversal has the potential to serve as an effective deterrent but that outcome-centric harmless error review hampers that potential, liberating trial judges, prosecutors, and other entities to violate procedural law with a fair assurance of impunity.

1. Reversal as a Prophylactic Tool

Let us begin by examining how reversal interacts with the incentive structure of individual trial judges. Even without a threat of reversal looming overhead, it seems fair to assume that many judges are at least minimally self-motivated to abide by legal norms to the extent that the law is integral to their professional identity and is the source of their legitimacy.¹²⁸ Yet trial judges sometimes violate the law inadvertently, either out of negligence—for instance, a judge who overvalues leisure might fail to conduct an adequate level of legal research—or because the controlling legal principles are so opaque that even a diligent judge might not be able to discern them.¹²⁹ Moreover, not all judicial errors are wholly inadvertent. Judges, like other people, are driven by a variety of goals that can tug them in disparate directions—at times in a direction opposed to the law.¹³⁰ Broadly speaking, a credible prospect of reversal induces trial judges to comply with the law, both by disincentivizing intentional errors and encouraging negligence-prone judges to exert a greater level of diligence to avoid error.¹³¹ As a reversal can, depending on the situation, impose reputational costs, engender shame, generate extra work by sending the case back for a whole or partial redo, or interfere with a judge's ideological objectives, “there are good reasons to expect that district judges . . . react to reversals.”¹³²

127. See *supra* note 12.

128. See, e.g., Pauline T. Kim, *Beyond Principal-Agent Theories: Law and the Judicial Hierarchy*, 105 Nw. U. L. REV. 535, 572–75 (2011). That said, not all judges possess a strong role-based affinity for following the law. See, e.g., Nigel J. Cohen, *Nonlawyer Judges and the Professionalization of Justice: Should an Endangered Species Be Preserved?*, 17 J. CONTEMP. CRIM. JUST. 19, 30–32 (2001).

129. See *infra* notes 156–57 and accompanying text.

130. See *infra* notes 152, 159 and accompanying text.

131. See, e.g., Steven Shavell, *The Appeals Process as a Means of Error Correction*, 24 J. LEGAL STUD. 379, 408–10 (1995) (arguing that a risk of reversal will induce trial judges to increase their level of effort). Because the prosecution lacks the right to appeal acquittals and most other adverse rulings, a strong risk of pro-defendant reversal might even prompt trial judges to err in favor of criminal defendants when confronted with close legal questions. See, e.g., Stith, *supra* note 12, at 36–42.

132. Joseph L. Smith, *Patterns and Consequences of Judicial Reversals: Theoretical Considerations and Data from a District Court*, 27 JUST. SYS. J. 28, 31–33 (2006) (discussing the “psychological, social, and policy-related costs” of reversal that may affect trial judges). But see, e.g., Pauline T. Kim, *Lower Court Discretion*, 82 N.Y.U. L. REV. 383, 404–08 (2007) (questioning the efficacy of reversal's potential deterrent mechanisms as to judges). While some studies have found that intermediate appellate judges do not alter their behavior when the likelihood of reversal by an apex court increases, see, e.g., David E. Klein & Robert J. Hume, *Fear of Reversal as an Explanation of Lower Court Compliance*, 37 LAW & SOC'Y REV. 579, 594–600 (2003), the bulk of the admittedly limited available data suggests that trial

The same is true of prosecutors.¹³³ Reversal can diminish a prosecutor's standing among colleagues or within the broader legal community, perhaps jeopardizing their prospects for securing a promotion or outside employment.¹³⁴ It potentially burdens a prosecutor with the hassle of relitigating a formerly closed case.¹³⁵ And to the extent a prosecutor cares about preserving trial-level victories, whether out of a sense of justice or otherwise, that prosecutor will not relish seeing those victories spoiled.¹³⁶ These costs are not equally present in every case: reversal seems to have little negative impact on the reputation of prosecutors in certain circumstances;¹³⁷ the labor resulting from remand proceedings may wind up falling on someone else's shoulders in the event that the offending prosecutor has retired or is otherwise out of the picture;¹³⁸ and some prosecutors, though eager to rack up wins in the trial courts where they practice, might have little interest in what transpires after that point.¹³⁹ But given the variety of plausible deterrent mechanisms that may be operative in any particular case, the threat of reversal—if credible—seems likely to have a significant disciplinary effect for many prosecutors.

It would be a mistake, though, to evaluate reversal's potential efficacy in deterring illegal conduct solely by looking at its immediate impact on the incentives of individual trial judges and prosecutors, as reversal can also serve as a collective sanction. Daryl Levinson defines collective sanctions as punishments that “are threatened against or imposed on groups of two or

judges do seek to avoid reversal, *see* Christina L. Boyd, *The Hierarchical Influence of Courts of Appeals on District Courts*, 44 J. LEGAL STUD. 113, 115–16 (2015) (reviewing relevant literature).

133. *See, e.g.*, Landes & Posner, *supra* note 7, at 176. *But see, e.g.*, Alexandra White Dunahoe, *Revisiting the Cost-Benefit Calculus of the Misbehaving Prosecutor: Deterrence Economics and Transitory Prosecutors*, 61 N.Y.U. ANN. SURV. AM. L. 45, 92–96 (2005) (arguing that reversal cannot deter prosecutorial misconduct significantly or efficiently). To my knowledge, there are no empirical studies examining the extent to which reversal influences prosecutorial behavior, as there are for judicial behavior; this may be a fruitful area for future research. There is, however, a burgeoning literature that explores other aspects of prosecutors' motivations and incentive structures. *See, e.g.*, Ronald F. Wright & Kay L. Levine, *Career Motivations of State Prosecutors*, 86 GEO. WASH. L. REV. 1667 (2018).

134. *See, e.g.*, Bennett L. Gershman, *Mental Culpability and Prosecutorial Misconduct*, 26 AM. J. CRIM. L. 121, 139–40 (1998).

135. *See, e.g.*, Albert W. Alschuler, *Courtroom Misconduct by Prosecutors and Trial Judges*, 50 TEX. L. REV. 629, 647 (1972).

136. *See, e.g.*, Tracey L. Meares, *Rewards for Good Behavior: Influencing Prosecutorial Discretion and Conduct with Financial Incentives*, 64 FORDHAM L. REV. 851, 900 (1995).

137. *See, e.g.*, James S. Liebman, *The Overproduction of Death*, 100 COLUM. L. REV. 2030, 2119–29 (2000) (making this point in the context of death penalty reversals). The reputational costs associated with reversal will be less pronounced when the reviewing court's opinion omits the prosecutor's name, as routinely happens. *See infra* note 243.

138. *See, e.g.*, Bidish Sarma, *Using Deterrence Theory to Promote Prosecutorial Accountability*, 21 LEWIS & CLARK L. REV. 573, 605–06 (2017).

139. *See, e.g.*, Geoffrey S. Corn & Adam M. Gershowitz, *Imputed Liability for Supervising Prosecutors: Applying the Military Doctrine of Command Responsibility to Reduce Prosecutorial Misconduct*, 14 BERKELEY J. CRIM. L. 395, 408 (2009).

more individuals.”¹⁴⁰ From a regulatory standpoint, as opposed to a moral or retributive one, the “basic functional mechanism of collective sanctions” involves “detering wrongdoers indirectly by delegating enforcement authority to some third-party or -parties who are well situated to monitor and control them.”¹⁴¹ Using collective sanctions to induce a group to self-regulate may prove more fruitful than individualized sanctions when sanctions imposed on an individual after a wrong is committed (i.e., *ex post* sanctions) are unlikely to work and a group is better positioned than an “external sanctioner” (for our purposes, a reviewing court) to regulate the conduct of its members *ex ante*¹⁴² or when the panoply of sanctions a group can impose on its members *ex post* is more effective (perhaps because they are quicker, more certain, or more versatile) than the sanctions the external sanctioner can levy against individual wrongdoers.¹⁴³ Collective sanctions also carry risks: groups sometimes react “by hiding wrongdoing from the [external] sanctioner rather than by preventing it,” and they may attempt to “undermine the sanctioner in the hope of destroying his capacity to administer punishment.”¹⁴⁴ These dangers are not always salient, however, and the regulatory benefits of collective sanctions at times will outweigh them.

Reversal functions like a collective sanction insofar as it generates disutility not just for individual judges or prosecutors but also for courthouses, prosecutors’ offices, and the state as a whole.¹⁴⁵ Revealingly,

140. Daryl J. Levinson, *Collective Sanctions*, 56 STAN. L. REV. 345, 376–77 (2003). Levinson’s definition covers collective “punishments or rewards,” *id.* at 376 (emphasis added), but this Article is concerned with only the first half of this definition, as my point has to do with a form of punishment (reversal) rather than a reward.

141. *Id.* at 362.

142. *Id.* at 381. As Levinson elaborates, “*ex post* liability will be ineffectual and *ex ante* regulation may be preferable” if wrongdoers “will fail to internalize monetary costs above the level of their ability to pay” or if they “lack the capacity to behave properly, either because they lack knowledge about what optimal behavior entails or because optimal risk-reduction strategies are structural and cannot be effected by individuals acting alone.” *Id.* (citing Steven Shavell, *Liability for Harm Versus Regulation of Safety*, 13 J. LEGAL STUD. 357, 358–64 (1984)).

143. *See id.* at 381, 383–85. Another potential justification for collective sanctions is that “the outside sanctioner cannot cost-effectively narrow down the identity of the wrongdoer any further.” *Id.* at 379. But this rationale has only limited relevance in the context of reversal for procedural errors. The identity of the judge or prosecutor who is responsible for the error is usually clear from the trial court record or else it can often be uncovered through fact-finding during postconviction review. There are exceptions, as when a multimember prosecution team comprising police and prosecutors does not turn over exculpatory evidence that is subject to disclosure under *Brady v. Maryland*, 373 U.S. 83 (1963), and the reviewing court cannot ascertain which team members, if any, knew of the evidence, grasped its significance, and chose to suppress it. The constructive knowledge doctrine, which generally imputes the knowledge of team members to each prosecutor for *Brady* purposes, is meant to address this problem, though the doctrine has significant limits. *See* Jonathan Abel, *Brady’s Blind Spot: Impeachment Evidence in Police Personnel Files and the Battle Splitting the Prosecution Team*, 67 STAN. L. REV. 743, 754–57 (2015).

144. Levinson, *supra* note 140, at 390.

145. *Cf.* Alice Ristorph, *Regulation or Resistance: A Counter-Narrative of Constitutional Criminal Procedure*, 95 B.U. L. REV. 1555, 1608 (2015) (arguing that the rules comprising constitutional criminal procedure should not be conceptualized merely as “regulations for the

the main reason why many think that reversal is weak or inefficient as an individualized sanction is that much of its cost may be borne by people other than the wrongdoer (such as a new judge who is assigned to handle remand proceedings), state entities (such as a district attorney's office that may have to relitigate the case and manage public relations), or the broader community (especially if the crime is serious and there is little reason to doubt the defendant's guilt).¹⁴⁶ While this point is a strong one, the logic of collective sanctions indicates that it is double-edged.

To the extent reversal is costly for groups other than the particular judges or prosecutors who violated the law, it may induce those groups to generate their own, potentially superior mechanisms for preventing or, after the fact, sanctioning judicial and prosecutorial errors. A realistic prospect of reversal for judicial errors, for instance, could spur chief judges or other courthouse administrators to formulate local rules or other internal practices aimed at rooting out recurring forms of illegal conduct.¹⁴⁷ Likewise, a string of reversals stemming from prosecutorial error might prompt a chief prosecutor to allocate additional resources to training new attorneys on their legal obligations or to fire line prosecutors or supervising attorneys who have displayed a persistent disregard for the law.¹⁴⁸ Or perhaps not—reversal, like other collective sanctions, could instead elicit undesirable responses, such as a greater investment in secrecy so as to evade detection or open attacks on the legitimacy of the sanctioner (i.e., the reviewing court).¹⁴⁹ But if these risks are managed appropriately,¹⁵⁰ reversal's capacity to stimulate group-based self-regulation should generally help reinforce the more direct

police" but "as restricting the state as a whole," where "the state . . . should be understood as a complex set of actors and institutions interacting with one another"). Reviewing courts are also arms of the state, of course. But it is a basic feature of American constitutional governance that the state itself must act within the law and that courts play a key role in articulating and policing the law's boundaries.

146. *See, e.g.*, *United States v. Modica*, 663 F.2d 1173, 1184 (2d Cir. 1981) (per curiam) ("Reversal is an ill-suited remedy for prosecutorial misconduct; it does not affect the prosecutor directly, but rather imposes upon society the cost of retrying an individual who was fairly convicted.").

147. Criminal procedure scholarship has traditionally not paid much attention to how courthouse-wide policies and practices impact the level of compliance with procedural law in individual judges' courtrooms, though this is starting to change. *See* Elizabeth Nevins-Saunders, *Judicial Drift*, 57 AM. CRIM. L. REV. 331, 368 (2020) (highlighting "a gap when it comes to scholarship about how [criminal] courts act as administrative bureaucracies" and arguing that judges "function as administrators not just as they issue opinions in individual cases, but also as they set (or fail to set) internal, court-wide policies and rules, which in turn affect due process norms in individual cases").

148. *Cf.* Rachel E. Barkow, *Organizational Guidelines for the Prosecutor's Office*, 31 CARDOZO L. REV. 2089, 2105–12 (2010) (urging prosecutors' offices to formulate internal policies and practices geared toward preventing and penalizing legal errors by staff prosecutors).

149. *See generally supra* note 144 and accompanying text (discussing potential hydraulic reactions to collective sanctions).

150. This Article's proposal reduces, without wholly eliminating, the risk of blowback by calling on reviewing courts to account for the social cost of reversal through a balancing test. *See infra* Part III.C.

incentives it creates for individual trial judges and prosecutors to act within the bounds set by law.

2. Harmless Error and Accountability in the Lower Criminal Courts

Up to this point, I have argued that reversal theoretically could be a valuable tool for deterring violations of procedural law in the lower criminal courts. The next stage of the argument, however, aims to show that reversal's theoretical potential as a prophylactic is compromised by the harmless error rule—more specifically, by conventional harmless error rules that equate harm with outcome-determinative prejudice. Some commentators have concluded otherwise, reasoning that outcome-centric harmless error rules should yield a tolerable level of deterrence by neutralizing whatever incentive may exist to violate the law as a means of helping the prosecution win.¹⁵¹ In my view, however, that conclusion is premised on an unduly narrow understanding of the causes that contribute to judicial and prosecutorial error as well as misplaced faith in the capacity of reviewing courts to determine when an error has had an influence on the outcome.

While there surely are times when a prosecutor or even a judge deliberately violates the law in an effort to rig the outcome,¹⁵² that does not seem to be the reason why most procedural errors occur. Widespread systemic deficiencies, such as oversized caseloads,¹⁵³ inadequate training,¹⁵⁴ and the absence of vigorous adversarial contestation due to disinvestment in public defense¹⁵⁵ predictably lead to legal error even when individual trial judges and prosecutors strive to do their best under trying circumstances. Judges and prosecutors are also bound to make inadvertent mistakes in unsettled areas of law simply because it is too difficult to figure out *ex ante* what the

151. See, e.g., Stith, *supra* note 12, at 43–48. But see, e.g., Kamin, *supra* note 12, at 72–75 (arguing that the *Chapman* harmless error rule is not up to the task of deterring prosecutorial misconduct but should suffice as to judicial errors).

152. See, e.g., Julia Simon-Kerr, *Systemic Lying*, 56 WM. & MARY L. REV. 2175, 2202–08 (2015) (documenting evidence of judicial complicity in the widespread practice of police “testilying” during Fourth Amendment suppression hearings, which points to “the willingness of judges to subvert the law in criminal cases in order to thwart application of the exclusionary rule” (quoting Paul Butler, *When Judges Lie (and When They Should)*, 91 MINN. L. REV. 1785, 1796 (2007))).

153. See, e.g., Adam M. Gershowitz & Laura R. Killinger, *The State (Never) Rests: How Excessive Prosecutorial Caseloads Harm Criminal Defendants*, 105 NW. U. L. REV. 261, 282–85 (2011) (arguing that heavy caseloads are a risk factor for *Brady* violations).

154. See, e.g., Barkow, *supra* note 148, at 2105–08 (arguing that poor training is a risk factor for prosecutorial misconduct).

155. As William Stuntz has explained, “the law of criminal procedure establishes a detailed regulatory system” for judicial, prosecutorial, and police conduct that “depends for its enforcement on criminal defense counsel,” but “[c]riminal procedure’s regulatory system is . . . incomplete” insofar as it “leaves the level of defense litigation . . . basically unregulated.” William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 19–21 (1997). As a result, “funding for criminal defense is very low in absolute terms,” and “public defenders in many jurisdictions must cope with mind-boggling caseloads.” *Id.* at 55.

governing legal rule requires.¹⁵⁶ Moreover, judges and prosecutors sometimes violate the law without intent by, for example, skimping on necessary legal research¹⁵⁷ or falling prey to cognitive biases.¹⁵⁸ And even for violations that are more or less intentional, a judge's or prosecutor's underlying incentives—or the incentives of relevant groups or systems—may at times have more to do with conserving scarce resources than with putting a thumb on the scale.¹⁵⁹

Needless to say, it is possible that a procedural error not *intended* to tamper with the outcome will nevertheless have that *effect*. When this happens, conventional harmless error rules should in theory mandate reversal and thereby deter future violations.¹⁶⁰ Many errors, however, have little or no potential to alter the outcome. Most prosecutorial errors at the grand jury stage, for example, are exceedingly unlikely to influence the outcome of a subsequent trial.¹⁶¹ If such errors are not discovered until after trial, a reviewing court conducting outcome-centric harmless error review will

156. See, e.g., Mary Nicol Bowman, *Mitigating Foul Blows*, 49 GA. L. REV. 309, 320 (2015) (identifying “the fine line between proper argument and prosecutorial trial misconduct” as a major source of error by prosecutors). Even when the law’s boundaries are hazy, error often can be avoided—or pro-defense error can be substituted for pro-prosecution error—if judges and prosecutors defer to the defense when confronting debatable legal issues. But this strategy for preventing pro-prosecution error under conditions of uncertainty carries obvious costs of its own. See *infra* note 246 and accompanying text (discussing legal uncertainty and overdeterrence).

157. See, e.g., Geoffrey P. Miller, *Bad Judges*, 83 TEX. L. REV. 431, 439–41 (2004) (discussing a variety of ways in which “[b]ad judges” neglect their duties).

158. See, e.g., Alafair S. Burke, *Improving Prosecutorial Decision Making: Some Lessons of Cognitive Science*, 47 WM. & MARY L. REV. 1587, 1609–12 (2006) (explaining why prosecutors’ cognitive biases can lead to *Brady* violations).

159. See, e.g., ROBERT C. BORUCHOWITZ ET AL., NAT’L ASS’N OF CRIM. DEF. LAWS., *MINOR CRIMES, MASSIVE WASTE: THE TERRIBLE TOLL OF AMERICA’S BROKEN MISDEMEANOR COURTS* 15 (2009), <https://www.nacdl.org/getattachment/20b7a219-b631-48b7-b34a-2d1cb758bdb4/minor-crimes-massive-waste-the-terrible-toll-of-america-s-broken-misdemeanor-courts.pdf> [<https://perma.cc/WL9W-M3SR>] (noting that the chief justice of the South Carolina Supreme Court stated she “simply told [her] magistrates that we just don’t have the resources” to effectuate the Supreme Court’s extension of the right to appointed counsel in *Alabama v. Shelton*, 535 U.S. 654 (2002), adding, “[s]o I will tell you straight up we [are] not adhering to *Alabama v. Shelton* in every situation” (third alteration in original) (quoting Jean Hoefler Toal, Chief Just., Sup. Ct. of S.C., Address at the 22nd Annual Criminal Law Update of the South Carolina Bar Association (Jan. 26, 2007))).

160. This theory does not play out well in practice. See *infra* notes 168–76 and accompanying text.

161. To see why, consider the following scenarios. First, and most obviously, if the grand jury refused to indict, it follows that the error had no effect and the prosecution gained nothing from it. Similarly, if the grand jury did indict but the defendant was later acquitted at trial, the error must not have affected the trial outcome, even though it conceivably may have affected the grand jury’s decision at the charging stage. Finally, if the grand jury issued an indictment and the petit jury later convicted the defendant of the same charge or charges, the conviction (under the standard of proof beyond a reasonable doubt) is a strong indicator that the grand jury (applying the far less stringent probable cause standard) would have issued an indictment anyway, even if the prosecutor had not erred, meaning that in this scenario, too, the error did not contribute to the outcome. See *United States v. Mechanik*, 475 U.S. 66, 70–71 (1986).

predictably—indeed, *automatically*—deem them harmless and decline to reverse.¹⁶²

More broadly, whenever the prosecution's admissible evidence overwhelmingly supports a particular outcome, virtually no error, no matter how egregious it might be, will have much of an impact on the outcome.¹⁶³ To the extent this condition exists—or more precisely, to the extent reviewing courts *believe* it exists,¹⁶⁴ as they frequently do¹⁶⁵—trial judges, prosecutors, and others will be in a position to violate the law in just about any way they please without facing a meaningful risk of reversal under an outcome-centric harmless error regime.¹⁶⁶ To be sure, no one will have much of an incentive to err in order to influence the outcome in cases where the evidence against the defendant is overwhelming because, by hypothesis, the outcome is essentially a foregone conclusion anyway. It bears repeating, however, that errors spring from many different causes—not solely or, I think, primarily, from a calculated effort to stack the deck.¹⁶⁷ In cases where the untainted evidence is overwhelming, or will *seem* overwhelming to a reviewing court, conventional harmless error rules remove any credible prospect of reversal from the equation, leaving judges, prosecutors, and

162. *See, e.g., id.* at 72–73 (deeming violations of Federal Rule of Criminal Procedure 6(d) during grand jury proceedings harmless in light of the petit jury's verdict). Two caveats are in order. First, when a grand jury error is detected before trial, the defendant can request that the trial court dismiss the indictment without prejudice. At least in the federal system, however, the trial court would not be able to order dismissal unless the error had affected the outcome at the grand jury stage (i.e., the decision to indict)—if the trial court refused to dismiss, the defendant would have no right to appeal that ruling unless and until convicted at trial, at which point *Mechanik* would apply, requiring the appellate court to affirm on harmless error grounds. *See* Anne Bowen Poulin, *Supervision of the Grand Jury: Who Watches the Guardian?*, 68 WASH. U. L.Q. 885, 893–96 (1990). Second, racial discrimination in selecting the grand jury is one of the few types of errors that generally leads to automatic reversal on appeal. *See* Vasquez v. Hillery, 474 U.S. 254, 266 (1986). But while the Court “labored mightily [in *Hillery*] to produce a reason why grand jury discrimination might affect the accuracy of a subsequent conviction . . . the strain is obvious.” Eric L. Muller, *Solving the Batson Paradox: Harmless Error, Jury Representation, and the Sixth Amendment*, 106 YALE L.J. 93, 126 (1996) (“*Hillery* may best be understood . . . as a last gasp from the group of Justices who opposed the Court's growing fixation on the reliability of verdicts.”).

163. *See infra* notes 165, 187 and accompanying text; *infra* text accompanying note 186.

164. From a deterrence standpoint, it is the putative sanctioner's perceptions that ultimately matter. *See, e.g.,* Lee Epstein & Tonja Jacobi, *The Strategic Analysis of Judicial Decisions*, 6 ANN. REV. L. & SOC. SCI. 341, 349–50 (2010). Insofar as trial judges, prosecutors, and others fear reversal, they will strive to anticipate the reviewing court's perspective—as relevant here, the reviewing court's perspective concerning whether the prosecution's untainted evidence is overwhelming—and act accordingly. *Id.*

165. *See, e.g.,* 3B WRIGHT ET AL., *supra* note 50, § 854 (“Perhaps the single most significant factor in weighing whether an error was harmful . . . is the strength of the case against the defendant.”). When a reviewing court assessing harmlessness concludes that the prosecution has “overwhelming evidence” against the defendant, “[this] alone may be dispositive.” *State v. Romero*, 381 P.3d 297, 302 (Ariz. Ct. App. 2016); *accord* *Harrington v. California*, 395 U.S. 250, 254 (1969). Even when the evidence is not overwhelming, the strength or weakness of the prosecution's case remains an important factor in the analysis. *See, e.g.,* *Brecht v. Abrahamson*, 507 U.S. 619, 639 (1993).

166. *But cf. supra* Part I.C (discussing narrow exceptions where reversal is available outside the harmless error framework).

167. *See supra* notes 153–59 and accompanying text.

others largely unconstrained to break the law for reasons other than influencing the outcome.

But what about procedural errors that do cause outcome-determinative prejudice? Can we depend on reviewing courts to reliably identify and set aside outcomes that are tainted by error so that the conventional approach to harmless error review will at least produce adequate deterrence with respect to the subset of errors that help the prosecution get across the finish line?

I am deeply skeptical, for outcome-centric harmless error review is a complex and precarious enterprise.¹⁶⁸ At its core, assessing outcome-determinative prejudice involves estimating “the impact of the thing done wrong on the minds of other men, not on one’s own.”¹⁶⁹ Whether the object of inquiry is a plea-bargained outcome,¹⁷⁰ a trial verdict,¹⁷¹ or a sentence,¹⁷² “one must judge others’ reactions not by his own, but with allowance for how others might react”¹⁷³—a challenging task that demands a possibly unrealistic level of intersubjective understanding.¹⁷⁴ Moreover, outcome-centric harmless error analysis requires mastery of the “whole record,”¹⁷⁵ since the outcomes of criminal cases often stem from diverse causal factors that *collectively* persuade the relevant decision maker, not a single item of evidence or other factor considered in a vacuum. Detecting outcome-determinative prejudice is therefore a “fact-intensive” process that can require a large investment of scarce time and attention¹⁷⁶—an investment that reviewing courts are not always willing or able to make.

Commentators have proposed a number of ideas to help reviewing courts do a better job sniffing out when legal errors have influenced the outcome.¹⁷⁷ Many contend that there is a divide within outcome-centric harmless error

168. My doubts on this score are shared by dozens of other commentators who have analyzed the capacity of reviewing courts to detect outcome-determinative prejudice. See, e.g., Linda E. Carter, *Harmless Error in the Penalty Phase of a Capital Case: A Doctrine Misunderstood and Misapplied*, 28 GA. L. REV. 125, 151–57 (1993); Dow & Rytting, *supra* note 101, at 503–17; Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55, 107–09 (2008); Lisa Kern Griffin, *Criminal Adjudication, Error Correction, and Hindsight Blind Spots*, 73 WASH. & LEE L. REV. 165, 200–04 (2016); Kamin, *supra* note 12, at 62–71; Dan Simon, *A Third View of the Black Box: Cognitive Coherence in Legal Decision Making*, 71 U. CHI. L. REV. 511, 579–83 (2004); Jason M. Solomon, *Causing Constitutional Harm: How Tort Law Can Help Determine Harmless Error in Criminal Trials*, 99 NW. U. L. REV. 1053, 1085–95 (2005); Lee E. Teitelbaum et al., *Evaluating the Prejudicial Effect of Evidence: Can Judges Identify the Impact of Improper Evidence on Juries?*, 1983 WIS. L. REV. 1147, 1181–86.

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

170. See *supra* note 47 and accompanying text.

171. See *supra* note 48 and accompanying text.

172. See *supra* note 49 and accompanying text.

173. *Kotteakos*, 328 U.S. at 764.

174. See Murray, *supra* note 14, at 307 n.193, 311 n.217 (summarizing empirical evidence regarding the reliability of reviewing courts’ harmless error determinations).

175. E.g., *Delaware v. Van Arsdall*, 475 U.S. 673, 681 (1986).

176. E.g., *Rhodes v. Dittmann*, 903 F.3d 646, 664 (7th Cir. 2018).

177. As mentioned before, there is also a voluminous academic literature urging courts to categorically exempt certain types of procedural error from harmless error review. See *supra* notes 100–01 and accompanying text (discussing automatic reversal rules).

jurisprudence between cases that embody a “guilt-based” approach, which these commentators find objectionable, and cases that reflect an “effect-on-the-verdict” approach, which the critics say should become the norm.¹⁷⁸ Others believe that reviewing courts should demand a greater degree of certainty that errors had no effect on the outcome before deeming them harmless.¹⁷⁹ And for cases that proceed to trial, a few commentators have suggested that the fact finder, whether it be a jury or judge, should be invited to explain the basis for its decision—through special verdicts, interrogatories, or other techniques—so that reviewing courts will not have to speculate about whether an error impacted the verdict.¹⁸⁰ While I think some of these reform strategies are worthwhile and would do some good, I doubt they would significantly alleviate the systemic problems this section has identified.

Working in reverse order, the third option—eliciting direct evidence from the jury or trial judge regarding what drove the decision—would make outcome-centric harmless error review a bit more dependable in some situations.¹⁸¹ Most of the time, though, I think trial judges and litigants would find it difficult to predict what questions will become salient on appeal or subsequent review and thus what questions need to be answered before trial court proceedings come to a close.

The second idea—raising the bar that must be cleared for a reviewing court to say that an error did not affect the outcome—also might help in contexts not already covered by the *Chapman* test, a test that requires the prosecution to prove beyond a reasonable doubt that the outcome is not attributable to error.¹⁸² But even *Chapman*’s seemingly stringent standard has not prevented reviewing courts from finding—often for rather flimsy reasons¹⁸³—that many constitutional errors are harmless, especially where the court considers the prosecution’s evidence overwhelming.¹⁸⁴

And finally, proponents of the first strategy—which would reorient outcome-centric harmless error review away from a “guilt-based” approach

178. See, e.g., Harry T. Edwards, *To Err Is Human, but Not Always Harmless: When Should Legal Error Be Tolerated?*, 70 N.Y.U. L. REV. 1167 *passim* (1995).

179. See, e.g., Saltzburg, *supra* note 45, at 1021–22 (arguing that the *Chapman* harmless error test should apply to nonconstitutional errors just as it does to constitutional errors).

180. See, e.g., TRAYNOR, *supra* note 25, at 23–24; see also D. Alex Winkelman et al., *An Empirical Method for Harmless Error*, 46 ARIZ. ST. L.J. 1405, 1417–19 (2014) (arguing for commissioning experiments in appropriate cases—employing mock jurors, a control group, and vignettes that summarize the relevant facts and law—to estimate the likelihood of conviction with and without procedural error).

181. So would the experimental approach to evaluating prejudice discussed in the preceding footnote. See *supra* note 180.

182. See generally *supra* notes 31–33 and accompanying text (discussing the *Chapman* test and its scope).

183. See *supra* note 168 (identifying relevant academic literature, much of it critical of the way reviewing courts have implemented *Chapman*).

184. See *supra* note 165 and accompanying text (noting that the strength or weakness of the evidence against the defendant is a major factor—probably the *main* factor—in outcome-centric harmless error analysis); see also *supra* note 45 (noting that scholars and judges do not all agree about whether and to what extent the variations among outcome-centric harmless error tests make much of a difference).

in favor of an “effect-on-the-verdict” approach¹⁸⁵—diagnose a serious ailment but prescribe the wrong cure. As should by now be clear, I share the concern that the dominant method of harmless error review is unduly guilt-based and that the strength (or weakness) of the evidence against the defendant should not play such a determinative role in the evaluation of harmless error.¹⁸⁶ Yet the solution, in my view, cannot be to substitute one type of outcome-centric harmless error review for another. As I have explained in prior work,

[t]he question posed by the guilt-based approach to harmless error review—whether the prosecution’s untainted evidence is so overwhelming that any reasonable jury would have reached the same verdict as the actual jury—is . . . an indispensable ingredient of the effect-on-the-verdict approach and not something alien to it.¹⁸⁷

As long as harmless error doctrine remains built on the premise that outcome-determinative prejudice is the only kind of harm that truly matters, deep reform will elude our grasp. This does not mean we should despair; rather, it means we need to look elsewhere for answers—a task I take up in Part III. But before examining potential solutions, the next section explores a second way in which the conventional approach to harmless error review objectionably loosens oversight of the lower criminal courts.

B. Avoidance

Procedural errors are not always the product of nefarious intentions or inadequate precautions. As we have seen, even trial judges and prosecutors who make a good faith, reasonably diligent effort to follow legally required procedures may nevertheless err through little fault of their own when the law itself is unclear.¹⁸⁸ A natural way to minimize this risk, of course, is to make the law more perspicuous by resolving unsettled legal issues. But conventional harmless error rules inhibit the adjudication of novel questions of law because they tempt reviewing courts to “bypass the merits”¹⁸⁹—that is, to reject procedural claims on fact-bound harmless error grounds while announcing no decision regarding whether the law was violated to begin with. When reviewing courts determine that an alleged error did not affect the outcome and therefore was harmless but decline to address whether an

185. See *supra* note 178 and accompanying text.

186. See *supra* notes 163–67 and accompanying text.

187. Murray, *supra* note 11, at 1804–05; see also *id.* at 1801–04; accord Daniel J. Kornstein, *A Bayesian Model of Harmless Error*, 5 J. LEGAL STUD. 121, 143 (1976) (arguing that there is no deep conceptual rift within modern harmless error jurisprudence between a guilt-based approach and an effect-on-the-outcome approach, since “the probability of guilt given the rest of the [untainted] evidence . . . is absolutely necessary to arrive at an intelligent conclusion regarding the error’s effect on the verdict”).

188. See *supra* note 156 and accompanying text.

189. John M. M. Greabe, *Mirabile Dictum! The Case for “Unnecessary” Constitutional Rulings in Civil Rights Damages Actions*, 74 NOTRE DAME L. REV. 403, 405–06 (1999) (noting that qualified immunity and other remedial doctrines enable courts, when “presented with a novel constitutional claim for which the relief sought is unavailable,” to “bypass the merits of the claim, rejecting it on the straightforward premise that it cannot be remedied”).

error actually occurred, they leave procedural law in exactly the same condition it was in at the outset and fail to educate trial judges, prosecutors, and other relevant entities about what they ought to do going forward.

As an illustration, consider *State v. Hull*.¹⁹⁰ The defendant claimed that the trial court had erred by allowing the prosecution to introduce expert testimony involving handwriting and fingerprint analysis without conducting a full hearing to ensure its reliability.¹⁹¹ The trial court summarily concluded that handwriting and fingerprint analysis had been “generally accepted as scientifically reliable for a long time” and thus refused to let the defendant put on contrary evidence at the pretrial admissibility hearing.¹⁹² On appeal, the Minnesota Supreme Court “decline[d] to decide whether the district court erred in failing to hold a complete . . . hearing before admitting the evidence.”¹⁹³ In lieu of ruling on the merits, the court concluded that “any error in the admission of either type of forensic evidence was harmless” because, given the “extensive evidence” establishing the defendant’s guilt, “there is no reasonable possibility that the admission of the evidence significantly affected the verdict.”¹⁹⁴ Justice Helen M. Meyer penned a concurring opinion criticizing the majority for “skip[ping] over” the threshold question of whether the trial court had erred in truncating its pretrial inquiry regarding the reliability of the prosecution’s handwriting and fingerprint evidence.¹⁹⁵ As Justice Meyer explained, “this issue has wide-ranging implications for future cases,” and “we do a disservice to district courts and the administration of criminal justice in this state by declining to decide the issue on its merits.”¹⁹⁶

Cases like *Hull*, in which a reviewing court uses the harmless error rule to avoid addressing whether a defendant’s claim of error is well-founded, are fairly commonplace.¹⁹⁷ Two facets of current doctrine make it possible for

190. 788 N.W.2d 91 (Minn. 2010).

191. *See id.* at 102–04.

192. *Id.* at 103 (quoting the trial court decision). The trial court did conduct a pretrial hearing but limited its scope “to the second prong of the *Frye-Mack* test,” i.e., “whether the laboratory conducting the tests in the individual case complied with appropriate standards and controls,” while not allowing the defense to present evidence contesting the first prong, i.e., “whether experts in the field widely share the view that the results of scientific testing are scientifically reliable.” *Id.* (quoting *State v. Roman Nose*, 649 N.W.2d 815, 819 (Minn. 2002)).

193. *Id.* at 104.

194. *Id.*

195. *Id.* at 108 (Meyer, J., concurring).

196. *Id.* Justice Meyer ultimately agreed with her colleagues that the harmless error rule required affirmance in light of the “overwhelming evidence” against the defendant. *Id.* at 110–11. But before considering harmless error, Justice Meyer “would address the substantive issue this case presents,” holding that “the district court erred when it limited the admissibility hearings.” *Id.* at 108–09.

197. To get a rough sense of the prevalence of this phenomenon, I collected a sample of seventy-five federal criminal decisions that resolved a total of 208 qualifying procedural claims on direct appeal between November 23, 2019, and December 10, 2019. Of these seventy-five decisions, twelve (16.0 percent) avoided resolving whether error occurred as to at least one of the defendant’s claims by finding the alleged error harmless. Of the 208 qualifying procedural claims, fourteen (6.7 percent) were rejected by the court on harmless

courts to employ harmless error review in this way—as an instrument of legal avoidance. The first has to do with courts’ discretion to choose which step of the error/harmlessness inquiry to lead with, and the second relates to how courts evaluate harmlessness if and when they reach the issue.

First, in reviewing claims that are subject to the harmless error rule, courts have unbridled discretion to commence their analysis either by deciding whether an error occurred or, instead, examining whether the alleged error was harmless. *Hull* is typical in this regard.¹⁹⁸ For one of the defendant’s claims—relating to the prosecution’s forensic evidence—the court “decline[d] to decide whether the district court erred,” opting to consider harmlessness first.¹⁹⁹ At the same time, the court began its analysis of several other defense claims by adjudicating error, finding no error in most instances and, with respect to one claim, finding that the trial court had erred but that the error was harmless.²⁰⁰ The court did not explain why it sequenced its analysis one way—resolving harmlessness before error—when reviewing the forensic evidence claim, while turning that chronology on its head for the remaining claims.²⁰¹ It simply proceeded in whichever order it preferred for each claim, exercising the same discretion over decisional sequencing that courts have taken for granted in countless other cases.²⁰²

Some scholars have suggested that courts actually lack such discretion, at least with respect to constitutional errors; in their view, the law currently requires courts to decide whether there was a constitutional error before

error grounds without a ruling as to whether there was an error. Although not directly relevant to my immediate point, it may also be of interest that the court expressly addressed the question of harmlessness for thirty-six (17.3 percent) of the claims, and of those thirty-six claims, thirty-one (86.1 percent) were deemed harmless while five (13.9 percent) were deemed not harmless. In fairness, these numbers paint a somewhat bleaker picture of defendants’ prospects than a full examination of the data would suggest, as a few defense claims resulted in partial or wholesale reversal even though the court did not explicitly consider harmlessness, perhaps because the government chose not to litigate the matter or because an automatic reversal rule was applicable. As used here, the term “qualifying procedural claims” encompasses (1) claims that call for separate analysis of error and outcome-determinative prejudice, as do the vast majority of procedural claims; and (2) claims for which error leads to automatic reversal. The term excludes claims involving so-called prejudice-based rights—that is, rights for which outcome-determinative prejudice is hardwired into the test for error, rendering the very idea of a harmless error logically impossible. *Cf. infra* note 305 and accompanying text (defining prejudice-based rights). The methodology and dataset used to calculate these results are on file with the author and with the *Fordham Law Review*. They are available on request.

198. Revealingly, Justice Meyer’s concurrence did not cast doubt on the court’s power to follow this order of operations; rather, she thought the court should exercise its discretion differently for prudential reasons. *See supra* notes 195–96 and accompanying text.

199. *Hull*, 788 N.W.2d at 104.

200. *See id.* at 101–02, 105–06.

201. Instead of providing a reason for sidestepping the merits of the defendant’s challenge to the trial court’s pretrial procedure relating to forensic evidence, the court simply cited another case in which it had previously done the same thing. *Id.* at 104 (citing *State v. Fratzke*, 354 N.W.2d 402, 409 (Minn. 1984)).

202. *See, e.g., Milton v. Wainwright*, 407 U.S. 371, 372 (1972) (“Assuming, *arguendo*, that the challenged testimony should have been excluded, the record clearly reveals that any error in its admission was harmless beyond a reasonable doubt.”).

conducting harmless error review.²⁰³ The main case those scholars rely on is *Lockhart v. Fretwell*,²⁰⁴ where the Supreme Court rejected an ineffective assistance of counsel claim on the ground that the defendant had failed to establish prejudice²⁰⁵ under *Strickland v. Washington*.²⁰⁶ In response to a dissenting opinion accusing the majority of improperly applying harmless error review to a violation of the right to counsel,²⁰⁷ the majority remarked in a footnote that “today’s decision does not involve or require a harmless-error inquiry” because “[h]armless-error analysis is triggered only *after* the reviewing court discovers that an error has been committed,” whereas under *Strickland*, “an error of constitutional magnitude occurs . . . only if the defendant demonstrates . . . prejudice.”²⁰⁸

The majority, however, cited no authority and put forward no reasoning to support its assertion regarding the order of operations in cases covered by the harmless error rule.²⁰⁹ And the Court had said just the opposite, indicating that courts have discretion to start their analyses with either error or harmlessness, on at least one other occasion.²¹⁰ Viewed in context, *Fretwell*’s footnote does not plausibly stand for the proposition that harmless error review is forbidden until there has been an error determination. Rather, it seems that the *Fretwell* majority meant only to make the point that for *Strickland* claims, prejudice constitutes part of the test for error, meaning that the dissent was wrong (in the majority’s view, anyway) to characterize its prejudice analysis as a form of harmless error review. Perhaps recognizing that the Supreme Court, like Congress, does not make a habit of “hid[ing] elephants in mouseholes,”²¹¹ reviewing courts have not ascribed much

203. See, e.g., Kamin, *supra* note 12, at 53–55.

204. 506 U.S. 364 (1993); see, e.g., James S. Liebman & Randy Hertz, Brecht v. Abrahamson: *Harmful Error in Habeas Corpus Law*, 84 J. CRIM. L. & CRIMINOLOGY 1109, 1136 n.117 (1994).

205. *Fretwell*, 506 U.S. at 366.

206. 466 U.S. 668 (1984).

207. See *Fretwell*, 506 U.S. at 380 (Stevens, J., dissenting).

208. *Id.* at 369 n.2 (majority opinion).

209. See *id.*

210. In its foundational decision fashioning the so-called good faith exception to the Fourth Amendment exclusionary rule, the Court indicated that “[t]here 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.” *United States v. Leon*, 468 U.S. 897, 924 (1984). To fortify this conclusion, the Court noted that its precedents in other domains, including “cases involving the harmless-error doctrine, make clear [that] courts have considerable discretion in conforming their decisionmaking processes to the exigencies of particular cases.” *Id.* at 924–25 (citations omitted) (first citing *Milton v. Wainwright*, 407 U.S. 371, 372 (1972); and then citing *Coleman v. Alabama*, 399 U.S. 1 (1970)). In *Milton*, the Court had dodged a claim alleging constitutional error by ruling against the defendant on harmless error grounds, see *supra* note 202, while in *Coleman*, the Court found constitutional error and then remanded the case for an evaluation of harmlessness. See *Coleman*, 399 U.S. at 10–11.

211. *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 468 (2001) (“Congress, we have held, does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes.”).

weight to *Fretwell*'s dictum regarding the sequence of decision-making in the harmless error context.²¹²

The discretion courts possess to decide whether they wish to adjudicate error or harmless error first is not the only ingredient in the recipe for legal avoidance—the second contributing factor is the outcome-centric character of the inquiry courts ordinarily undertake when they reach the latter issue. If, hypothetically, the law defined harmless error in such a way that a court conducting harmless error review would have to cover much of the same analytical ground that it would traverse in deciding whether an error happened below, the process of adjudicating harmless error would clarify the relevant legal norms even without a decision regarding error.²¹³ But the outcome-centric conception of harmless error embedded in existing law lacks this feature. Broadly speaking, the question of whether a challenged act affected the outcome has little if any conceptual relationship to the question of whether that act was lawful in the first instance.²¹⁴ Whereas adjudicating

212. See Healy, *supra* note 13, at 893 (“[L]ower courts seem not to be taking the Court’s instruction [in *Fretwell*] seriously.”). Scholars have also referenced *Jones v. United States*, 527 U.S. 373 (1999), specifically its twelfth footnote, as an indicator “suggest[ing] that the Court meant what it said in *Fretwell*.” Healy, *supra* note 13, at 893; accord Sam Kamin, *An Article III Defense of Merits-First Decisionmaking in Civil Rights Litigation: The Continued Viability of Saucier v. Katz*, 16 GEO. MASON L. REV. 53, 59 & n.31 (2008). In my judgment, the footnote from *Jones* is no more illuminating than the one from *Fretwell*. By way of background, although the Court granted certiorari in *Jones* for the limited purpose of deciding whether “the submission of invalid nonstatutory aggravating factors was harmless,” and the government did not argue that the nonstatutory aggravating factors were valid until after filing its opposition to certiorari, the Court decided to reach the latter issue anyway. *Jones*, 527 U.S. at 396–97, 397 n.12. To explain why the government did not waive that argument by neglecting to develop it at the certiorari stage, the Court noted, “[W]e have not [deemed an issue waived] when the issue not raised in the brief in opposition was ‘predicate to an intelligent resolution of the question presented.’” *Id.* at 397 n.12 (quoting *Ohio v. Robinette*, 519 U.S. 33, 38 (1996)). The Court then declared, “Assessing the error (including whether there was error at all) is essential to an intelligent resolution of whether any such error was harmless.” *Id.* The Court offered no explanation for this assertion, which, in any event, is plainly wrong: as discussed below, the question a court must answer when conducting outcome-centric harmless error review (did the alleged error affect the outcome?) has little or no logical overlap with the question of whether error occurred, except in the special case of so-called prejudice-based rights. See *infra* note 214 and accompanying text; accord Healy, *supra* note 13, at 894 (attacking the *Jones* footnote’s logic).

213. For a discussion of the possibility of defining harmless error in this manner, see *infra* Part III.B.

214. This generalization is not technically correct in relation to the small subset of procedural rights that have an outcome-centric prejudice element built into their doctrinal definitions such that they “apply only when failing to apply them might cause prejudice by affecting the outcome.” Murray, *supra* note 14, at 279 (defining “outcome-centric prejudice-based rights” or, for short, “prejudice-based rights”). For a right defined this way (*Brady* and the right to effective assistance of counsel, for example, arguably fit the bill, see *id.* at 285–89), a reviewing court’s decision as to whether prejudice occurred is one way to adjudicate error and, thus, to guide trial judges, prosecutors, and others regarding the scope of their procedural obligations. That said, many believe, as I do, see *id.* at 318–22, that *Brady*, effective assistance, and perhaps other prejudice-based rights should not be set up this way and that the law should be changed or clarified to conceptualize prejudice as a remedial issue akin to harmless error, rather than as an element of the right. See *infra* Part III.D.1 (discussing this controversy and exploring whether the reforms to harmless error doctrine proposed in this Article might profitably be extended to rights like *Brady* and effective assistance).

error serves to educate trial judges, prosecutors, and other relevant entities about what the law demands from them in similar future situations, outcome-centric harmless error rulings edify no one.²¹⁵

I acknowledge that not every question of procedural law that reviewing courts duck by pursuing a harm-first order of decision-making will have “wide-ranging implications for future cases,” as did the issue in *Hull*.²¹⁶ For example, if the applicable procedural rule undergoes substantial change during the interval between when the alleged error took place and when the reviewing court renders its decision, it might not matter much *prospectively* whether the challenged conduct was erroneous *at the time it occurred*. And even for issues that do have broad importance, there may be cases in which prudential considerations, such as an underdeveloped factual record or deficient briefing, will weigh in favor of resorting to avoidance techniques like harmless error review.²¹⁷ If, say, resolution of a defendant’s claim of error on the merits would necessitate a futile remand for additional fact-finding—futile, that is, because even if the remand were to establish error, the error would be harmless anyway—that might provide a strong reason for a reviewing court to affirm on harmless error grounds rather than prolonging the inevitable.²¹⁸

In the mine run of cases, however, I think it is dangerous for reviewing courts to use harmless error review as a means of bypassing the merits. If a trial judge or prosecutor truly did violate procedural law in the manner a defendant has alleged, that judge or prosecutor needs to be informed of this—as do other relevant entities that may have had a role in causing the

215. Indeed, outcome-centric harmless error rulings are unlikely to furnish meaningful guidance even to reviewing courts conducting harmless error review in other cases. After all, whether an error affected the outcome is an inherently fact-bound inquiry that turns on an “examination of the proceedings in their entirety, tempered but not governed in any rigid sense of *stare decisis* by what has been done in similar situations.” *Kotteakos v. United States*, 328 U.S. 750, 762 (1946).

216. *State v. Hull*, 788 N.W.2d 91, 108 (Minn. 2010) (Meyer, J., concurring).

217. Although there sometimes are sound prudential reasons to adjudicate harmless error before error, a federal court is not constitutionally required by Article III and its prohibition on advisory opinions to decide the issues in that sequence. See Healy, *supra* note 13, at 920–21 (arguing that merits-first adjudication in the harmless error context probably does not violate the ban on advisory opinions but that it nevertheless may be unwise). Relatedly, a reviewing court’s decision that an error occurred does not become dicta if the court then proceeds to find the error harmless. See Michael C. Dorf, *Dicta and Article III*, 142 U. PA. L. REV. 1997, 2045–46 (1994) (arguing that, in this scenario, a court’s error ruling “is not dictum in the sense of an aside” because “[i]t forms an essential ingredient in the *process* by which the court decides the case, even if, viewed from a post hoc perspective, it is not essential to the *result*”).

218. That said, it might still be possible for a reviewing court in situations like this one to engage in partial but not wholesale avoidance, depending on the circumstances. Suppose, for example, that a trial judge prematurely excluded defense evidence without allowing the defendant to make a full proffer explaining what the evidence would show. The reviewing court might hold that the judge lacked an adequate factual foundation to exclude the evidence and, in that sense, erred, yet invoke the harmless error rule to avoid a remand, even though a remand would enable the defendant to supplement the record with the proffer, laying the groundwork for an informed decision regarding whether the judge was ultimately right or wrong to exclude the evidence.

violation—to avoid committing the same error in the future. Moreover, in cases where it is not readily apparent whether the trial judge or prosecutor acted unlawfully, other judges, prosecutors, and entities—not just the ones involved in the case undergoing review—also stand to benefit when the reviewing court tackles the issue head-on and clears up the ambiguity.²¹⁹ Because trial judges, prosecutors, and the organizations to which they belong are rarely subject to suit for civil damages,²²⁰ the criminal case review process is the primary mechanism we have that can provide meaningful feedback on the lawfulness of judicial and prosecutorial behavior in the lower criminal courts. To the extent reviewing courts abdicate their responsibility to set and maintain legal standards to guide the course of criminal proceedings, no one else is likely to pick up the slack.

The existing academic literature has identified one possible solution to this problem: a mandatory decisional sequencing rule that would deprive reviewing courts of discretion to adjudicate harmlessness before error.²²¹ The main exponent of this strategy, Sam Kamin, built his case by comparing the structure of harmless error and qualified immunity analysis, exploiting the fact that the Supreme Court's then recent decision in *Saucier v. Katz*²²² had imposed a compulsory error-first order of decision-making for qualified immunity defenses.²²³

Saucier held that when a government official asserts a qualified immunity defense, a court must first determine “whether a constitutional right would have been violated on the facts alleged” and only then consider “whether the

219. Also, there is some risk that trial judges, prosecutors, and others might misconstrue a harmless error ruling as a no error ruling—leading them to believe that the conduct challenged by the defense is lawful and can be repeated in the future—or that a harmless error ruling will be taken as an indication that the reviewing court does not take the allegedly illegal behavior all that seriously. *See, e.g.*, Alschuler, *supra* note 135, at 663. *See generally* Jonathan S. Masur & Lisa Larrimore Ouellette, *Deference Mistakes*, 82 U. CHI. L. REV. 643, 731 (2015) (“[C]ourts should understand the deference regimes at issue in the precedents they cite [but] . . . deference mistakes are commonplace in areas ranging from criminal procedure to patent law, and . . . they can have pernicious effects on doctrinal development.”).

220. Absolute immunity shields judges and prosecutors from civil suits for damages premised on conduct connected to the adjudicative process. *See Imbler v. Pachtman*, 424 U.S. 409, 427 (1976) (holding that prosecutors generally have absolute immunity from 42 U.S.C. § 1983 claims for damages); *Pierson v. Ray*, 386 U.S. 547, 553–55 (1967) (same, as to judges). And municipal entities, such as district attorneys' offices, though subject to suit where there is a widespread pattern or practice of unconstitutional conduct, cannot be sued based on ordinary principles of vicarious liability. *See, e.g.*, *Connick v. Thompson*, 563 U.S. 51, 60–61, 70–72, 70 n.12 (2011) (citing *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 691–92 (1978)).

221. *See* Kamin, *supra* note 12, at 38–55. Besides Kamin, other commentators have criticized courts' reliance on harmless error review to avoid addressing error but without exploring the issue in depth or examining potential solutions. *See, e.g.*, Edwards, *supra* note 178, at 1182.

222. 533 U.S. 194 (2001).

223. *See* Kamin, *supra* note 12, at 42–50 (discussing *Saucier* and its precursors). In addition to *Saucier*, Kamin also leaned on *Fretwell* to support his position, though he acknowledged—for good reason—that “it is not entirely clear that the Court meant what it said in *Fretwell*.” *Id.* at 53; *see also supra* notes 209–13 and accompanying text (explaining why *Fretwell*'s dictum does not amount to much).

right was clearly established.”²²⁴ This protocol was needed, according to *Saucier*, because “determining whether a constitutional right was violated . . . is the process for the law’s elaboration from case to case,” and “[t]he 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.”²²⁵ Drawing on *Saucier*, Kamin argued that the harmless error rule presents the same risk as qualified immunity—the risk that courts will “duck important questions of constitutional law and the law will stagnate”—and thus that a strict rule governing courts’ order of operations should apply to both, at least when constitutional errors are involved.²²⁶

But the Supreme Court largely dismantled the doctrinal foundation for Kamin’s proposal in *Pearson v. Callahan*.²²⁷ There, the Court unanimously spurned *Saucier*’s two-step protocol for analyzing qualified immunity defenses, echoing the views expressed by many federal judges who had condemned it as a “failed . . . experiment” and a “puzzling misadventure in constitutional dictum.”²²⁸ While the Court gave lip service to *Saucier*’s goals, allowing that error-first decision-making in qualified immunity cases “is often beneficial” to the extent it “promotes the development of constitutional precedent,”²²⁹ this terse praise was followed by a litany of grievances against “the rigid *Saucier* procedure.”²³⁰ Ultimately, the Court

224. *Saucier*, 533 U.S. at 200. The doctrine of qualified immunity shields police officers and most other government officials from actions for civil damages under 42 U.S.C. § 1983 so long as “their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.” *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

225. *Saucier*, 533 U.S. at 201.

226. Kamin, *supra* note 12, at 38; *see also id.* at 72–73. In a later work, Kamin amended his proposal a bit to allow, even require, reviewing courts to perform a limited harmless error assessment at the outset of the adjudicative process so as to avoid issuing advisory opinions. *See* Kamin, *supra* note 212, at 95–96. If a threshold assessment of harmlessness reveals that the alleged error is “so trifling that no reasonable fact-finder could find that it had an effect on the outcome,” Kamin would have the court stop there. *Id.* But Kamin anticipated that “in most cases” a defense claim would clear this preliminary hurdle, leading to a full examination of whether error occurred and then, if there was an error, to the final step of determining whether the error was harmless. *Id.* at 96.

227. 555 U.S. 223 (2009).

228. *Id.* at 234–35 (first quoting *Morse v. Frederick*, 551 U.S. 393, 432 (2007) (Breyer, J., concurring in part and dissenting in part); and then quoting Pierre N. Leval, *Judging Under the Constitution: Dicta About Dicta*, 81 N.Y.U. L. REV. 1249, 1275 (2006)).

229. *Id.* at 236.

230. *Id.*; *see also id.* at 236–42. The Court’s attack on *Saucier* revolved around four main claims: (1) the protocol’s first step (was there a violation?) can unnecessarily drain “scarce judicial resources” when the answer at the second step (was the violation, if any, clear?) is readily apparent; (2) step-one determinations “often fail to make a meaningful contribution to [the law’s] development” and in some circumstances may even “create a risk of bad decisionmaking”; (3) constitutional doctrine will continue to evolve in other remedial environments, like criminal cases and actions for injunctive relief, even if not much new law is being generated in actions for damages; and (4) individual judges “are in the best position to determine the order of decision-making that will best facilitate the fair and efficient disposition of each case.” *Id.* These claims have not gone unchallenged. *See, e.g.*, John C.

held that “courts should have the discretion to decide whether [the *Saucier*] procedure is worthwhile in particular cases,” just as they do “[i]n other analogous contexts,” such as when analyzing *Strickland* claims or issues involving the good faith exception to the Fourth Amendment exclusionary rule.²³¹

In light of *Pearson* and the related doctrinal contexts referenced by *Pearson*, where courts possess discretion over the structure of their decision-making process, the outlook for a new sequencing rule applicable to harmless error review looks rather grim. This prognosis does not mean Kamin’s idea is unsound, of course; on the merits, I am highly sympathetic.²³² But as *Pearson* appears to have closed off that path for the foreseeable future—certainly in federal litigation and probably in state litigation as well due to the “gravitational pull” of federal law²³³—it is worth examining other ways of getting at the problem that may yet remain doctrinally viable. The next part takes up that task.

III. POLICING PROCEDURAL ERROR

This part presents an alternative framework for harmless error review that responds to the pathologies identified in Part II: unaccountability and avoidance. The framework has three novel aspects. In addition to examining whether an error affected the outcome—this inquiry is decidedly *not* novel, but it still has an important role to play—a reviewing court should also consider whether: (1) reversal would substantially help to prevent future errors, (2) the error caused substantial harm to a legally protected interest unrelated to the outcome, and (3) the benefits of reversal outweigh its costs. Just like under current law, reversal would generally be required if an error caused outcome-determinative prejudice.²³⁴ But even an error that had no

Jeffries Jr., *Reversing the Order of Battle in Constitutional Torts*, 2009 SUP. CT. REV. 115, 120–37.

231. *Pearson*, 555 U.S. at 241–42. Regarding effective assistance, *Strickland* requires a defendant to establish both attorney error and prejudice while entrusting “sound discretion [to] lower courts to determine the order of decision.” *Id.* at 241. Regarding the exclusionary rule’s good faith exception, see *supra* note 210.

232. In particular, I am sympathetic to the modified order-of-decision rule Kamin has put forward, see *supra* note 212, under which reviewing courts would have to adjudicate error before harmless error unless the alleged error is obviously harmless on its face. See *supra* note 226 (discussing this version of Kamin’s proposed solution).

233. See generally Scott Dodson, *The Gravitational Force of Federal Law*, 164 U. PA. L. REV. 703 (2016) (arguing that the “gravitational force” of federal law influences states to look to federal law as a model even when such conformity is not required).

234. A strong argument could be made, and other scholars have made it, that reviewing courts should *also* reform the criteria they use in determining whether an error affected the outcome and improve the way they apply those criteria in various circumstances. See *supra* notes 177–80 and accompanying text (discussing proposals along these lines). But for the sake of simplicity, the approach this Article puts forward would leave intact all current outcome-centric harmless error rules—whatever they might be—as one pathway to reversal, then *supplement* them with a second track (i.e., the three-step balancing inquiry just summarized), bracketing the question whether outcome-centric rules should be reconfigured in other ways. So, for example, a federal court assessing outcome-determinative prejudice would continue to apply the *Chapman* standard for preserved claims on direct appeal,

effect on the outcome might still lead to reversal on preventative grounds (based on step one of the proposed balancing test) and/or because of harm to a non-outcome-related interest (based on step two), if the costs and benefits of reversal indicate that reversal is justified (based on step three). After defending this approach and examining how to implement each of its new components, this part suggests a few areas in which a similar strategy might be used to reform other significant doctrinal impediments to appellate and postconviction relief.

A. Prevention

The first thing courts should do differently when conducting harmless error review is consider whether reversal would substantially help to prevent errors in future cases. Reversal will almost always enhance marginal deterrence to some degree.²³⁵ But since the prophylactic benefits of reversal will be balanced against other interests when a court reaches the third stage of the analysis,²³⁶ the propriety of reversal will ultimately hinge on the anticipated magnitude of this effect, not whether any such effect exists.

In conducting this inquiry, what factors should courts be on the lookout for? Although it is impossible to formulate an exhaustive list, the two most important considerations will typically be whether the challenged conduct is (1) part of a recurring *pattern of error* as opposed to an isolated event²³⁷ and (2) *obviously erroneous* as opposed to a close call.²³⁸ When the action that the defendant complains of reflects a pattern of unlawful behavior, is obviously erroneous, or has both of these characteristics, a court will have strong evidence that the procedural rules in question are not being taken

Kotteakos for preserved nonconstitutional claims and for constitutional claims raised during postconviction review, and *Olano* (specifically, its third prong) for forfeited claims. *See supra* notes 31–44 and accompanying text (discussing these standards). But a court that embraced this Article’s framework would still need to perform a balancing analysis of the kind sketched in this part—and potentially reverse based on that analysis—even if it found no effect on the outcome under the applicable outcome-centric standard.

235. *See generally supra* Part II.A.1 (discussing reversal’s prophylactic mechanisms).

236. *See infra* Part III.C.

237. *Cf.* Brandon L. Garrett, *Aggregation in Criminal Law*, 95 CALIF. L. REV. 383, 400 (2007) (arguing that “substantial obstacles hinder legal efforts to enjoin persistent patterns of constitutional criminal procedure violations” and exploring various strategies both inside and outside the court system to identify and remedy recurring procedural errors); Eve Brensike Primus, *A Structural Vision of Habeas Corpus*, 98 CALIF. L. REV. 1, 5 (2010) (arguing that “federal habeas review of state criminal convictions should focus on whether . . . a state actor (or set of actors) violates defendants’ rights repeatedly, such that there is a pattern of violations across multiple cases”).

238. *Cf.* Kamin, *supra* note 12, at 73 (arguing that “[p]rosecutorial violations of clearly established constitutional rights should not be susceptible to the application of the harmless error doctrine”). The point this Article makes here, regarding the heightened need for reversal in cases involving obvious errors, resembles Kamin’s, though there are several notable differences. Kamin’s proposal is limited to *prosecutorial* errors, *see id.* at 73–75, that violate *constitutional* rights, *see id.* at 75–76, whereas mine also extends to judicial and nonconstitutional errors. Also, Kamin would require *automatic* reversal for qualifying obvious errors, *see id.* at 73, whereas the framework this Article envisions merely treats an error’s flagrancy as a significant, but not inevitably dispositive, factor.

sufficiently seriously and that reversal therefore may be needed for the sake of deterrence.²³⁹ Conversely, if the allegedly erroneous conduct is neither a recurring problem nor clearly unlawful, there ordinarily will not be a compelling deterrence-related rationale for reversal.²⁴⁰ Yet as explained below, even in cases that involve isolated, nonobvious errors, the first part of my proposed framework would still help prevent future error by nudging reviewing courts to resolve, rather than avoid, the threshold question whether error occurred, thereby clarifying the law and reducing the risk of inadvertent error going forward.

A *pattern of error* is a significant warning sign suggesting that the existing accountability regime is too feeble to hold illegal behavior in check. Such a pattern can sometimes arise within the confines of a single case—as when, for example, a prosecutor commits numerous instances of misconduct over the course of closing argument to a jury.²⁴¹ But other patterns of error take shape over the span of multiple cases.²⁴² This Article’s opening paragraph offers one illustration: in Washington State, the unlawful shackling of criminal defendants during trial court proceedings is so pervasive that the

239. “Strong evidence” is not the same thing as ironclad proof, of course—circumstances may arise where reversal is not needed as a prophylactic despite a recurring pattern of error or a particularly flagrant error. If, for example, a courthouse or prosecutor’s office had revised its policies in a manner that addresses the error’s underlying causes, or if effective alternative sanctions are available to ensure adequate deterrence, reversal might well not be necessary on prophylactic grounds despite a recurring or obvious error. *See, e.g.,* *United States v. Williams*, 949 F.3d 1056, 1065 (7th Cir. 2020) (applying the *Liljeberg* harmless error test and affirming in part because a judicial ethics committee had already disciplined the offending trial judge, and the judge had “changed his practices in response to the inquiry”). But assertions to the effect that systemic failings have been fixed without the need for judicial intervention must be scrutinized with care. Far too often courts cite the theoretical existence of some other possible remedy as a reason to withhold the remedy a litigant is currently seeking even though, in reality, the supposed alternative is illusory. *See generally* Nancy Leong & Aaron Belzer, *Enforcing Rights*, 62 UCLA L. REV. 306 (2015) (documenting and criticizing courts’ tendency to confine constitutional litigation to a single remedial avenue).

240. This Article’s emphasis on recurring and obvious illegality in connection with assessing deterrence is of a piece with recent Supreme Court decisions applying the good faith exception to the Fourth Amendment exclusionary rule, with the important caveat that I am using those concepts to liberalize access to remedies, whereas the Court has deployed them to restrict relief. *See, e.g.,* *Herring v. United States*, 555 U.S. 135, 144 (2009) (“To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it [T]he exclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence.”); *see also* Aziz Z. Huq & Genevieve Lakier, *Apparent Fault*, 131 HARV. L. REV. 1525, 1550–52 (2018) (discussing *Herring* and subsequent related cases).

241. *See, e.g.,* *State v. Payne*, 797 A.2d 1088, 1094–100 (Conn. 2002) (reversing on supervisory power grounds largely because of a pattern of prosecutorial misconduct both within and across cases); *see also supra* notes 106–12 and accompanying text.

242. *See supra* notes 82–89 and accompanying text (explaining how appellate courts applying Michigan’s unorthodox two-part harmless error test responded to certain kinds of recurrent prosecutorial misconduct); *see also, e.g.,* *In re Al-Nashiri*, 921 F.3d 224, 239–40 (D.C. Cir. 2019) (applying the *Liljeberg* harmless error test to vacate over three years of pretrial rulings in a high-profile prosecution against a Guantanamo Bay detainee, reasoning in part that “we cannot dismiss [the military judge’s] lapse as a one-time aberration, as [the defendant’s motion] is not the first meritorious request for recusal that our court has considered with respect to military commission proceedings”).

state's appellate courts found error related to shackling in *fourteen cases* over a four-and-a-half-year period.²⁴³

Another consideration that should be central to a reviewing court's deterrence inquiry is whether the challenged conduct is not merely erroneous but *obviously erroneous*.²⁴⁴ More specifically, what I have in mind is conduct that was clearly prohibited *ex ante* as opposed to conduct that was lawful or even arguably lawful at the time it occurred but later became plainly unlawful due to an intervening alteration or clarification of the law. Defined this way, obviously erroneous conduct is a strong indicator of fault, whether it be the fault of an individual judge or prosecutor whose unreasonable actions led to the error or the fault of an organization or system that failed to resource, train, or otherwise equip its frontline personnel to follow clearly established law.²⁴⁵ Much like negligence liability enables lawmakers to disincentivize unreasonable activity without obstructing harmful yet net-beneficial activity,²⁴⁶ treating obvious illegality more harshly than reasonable mistakes in the harmless error context would prompt judges, prosecutors, and other entities to exercise due care to prevent unreasonable

243. See *State v. Jackson*, 447 P.3d 633, 642 (Wash. Ct. App. 2019) (Melnick, J., concurring) (documenting this pattern of error but voting to affirm on harmless error grounds); see also *supra* notes 1–4 and accompanying text. Gauging the extent of a pattern of error spanning multiple cases can pose significant evidentiary challenges. Ideally, most or all of the relevant errors would appear in a published or otherwise searchable judicial opinion that includes the name of the offending trial judge or prosecutor. In reality, the subset of errors that find their way into a publicly available court opinion are likely to be the tip of a much larger iceberg. See, e.g., Bruce A. Green, *Regulating Prosecutors' Courtroom Misconduct*, 50 LOY. U. CHI. L.J. 797, 814–18 (2019) (noting that trial judges confronted with courtroom misconduct by prosecutors “typically settle at most for on-the-record rebukes” that are not memorialized and thus “provide little, if any, deterrence” and urging the creation of “repositories of trial transcripts reflecting prosecutors’ misbehavior”). And although appellate opinions list names of the trial judges as a matter of course, prosecutors’ names are rarely included, even in cases where prosecutorial misconduct is found. See, e.g., Adam M. Gershowitz, *Prosecutorial Shaming: Naming Attorneys to Reduce Prosecutorial Misconduct*, 42 U.C. DAVIS L. REV. 1059, 1067–84 (2009). This Article’s call for reviewing courts to identify and disrupt patterns of error would thus work best if pursued in tandem with various strategies other scholars have devised to enhance courts’ systemic awareness. See, e.g., Andrew Manuel Crespo, *Systemic Facts: Toward Institutional Awareness in Criminal Courts*, 129 HARV. L. REV. 2049, 2101–17 (2016) (exploring a number of tools to strengthen “systemic factfinding” so as to “help criminal courts better fulfill their . . . role as systemic regulators of law enforcement behavior”).

244. Cf. *supra* note 79 and accompanying text (explaining that the first prong of Michigan’s unorthodox two-part harmless error test examines whether prosecutorial error was deliberate or flagrantly negligent).

245. Inevitably, a reasonable person acting with due care will make some mistakes, even ones that are obvious—and thus unreasonable—from time to time. The same is true a fortiori with respect to organizations comprised of many people and of the state as a whole. Cf. Landes & Posner, *supra* note 7, at 181 (“[T]he complexity of modern criminal procedure suggests that a zero level of inadvertent errors could not be attained at reasonable cost.”). Even so, an error’s obviousness is a sign—circumstantial evidence, not irrefutable proof—of either inadequate precaution or bad faith at an individual, organizational, or system-wide level. Cf. *id.* at 182 & n.22 (modeling how harmless error review interacts with prosecutorial incentives using “the flagrancy of the error as a proxy for the likelihood of its being intentional”).

246. See, e.g., Richard A. Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29, 32–33 (1972).

errors, while leaving them with breathing room to take risks and experiment with untested approaches in unsettled areas of law.

Patterns of error and obvious errors are often, though not invariably, layered on top of one another, revealing a deeper accountability deficit than either might imply on its own. For example, although a moderately large number of errors might not seem too worrisome in an unsettled area of law where novel issues abound and mistakes come with the territory, a numerically comparable pattern of errors takes on a more sinister cast when some or all of the errors are clear-cut and inexcusable. Reversal might not be warranted in the former scenario, whereas in the latter case, it may be necessary to disrupt an entrenched pattern of lawlessness. Likewise, an obvious error that only crops up every once in a while can perhaps be regarded as an innocent oversight, suggesting little compelling need to stage an intervention. But if the same flagrant violation is repeated time and again, reviewing courts should begin to suspect that lack of diligence or even foul play are at work behind the curtain and that reversal may help straighten out the responsible parties' payoff matrices.

What should a reviewing court do in the inverse of this situation—that is, when a legal error may have occurred below but the alleged error was neither recurring nor obvious? Although reversal might well not be warranted (at least not on prophylactic grounds) in many such cases, a court using my approach might still need to intervene in a less drastic manner.

Recall, from Part II, that reviewing courts often avoid resolving claims of error on the merits by assuming, without deciding, that there was a legal error, then holding that the assumed error was harmless.²⁴⁷ While my proposal does not prohibit this avoidance technique, it would make the practice more difficult for a reviewing court to justify in cases where the challenged conduct is erroneous but not obviously erroneous. Whereas *obvious* errors suggest that reversal may be needed to incentivize compliance, *nonobvious* errors suggest that the law requires clarification and that, absent clarification, similar errors are likely to recur in the future. To the extent a court reviewing a nonobvious error is deciding between avoidance—that is, affirming on harmless error grounds without adjudicating error—and reversal, the first step of this Article's proposed test will often weigh in favor of reversal, as reversal entails finding that an error occurred and thereby will reduce the likelihood that the error will inadvertently be repeated. But avoidance and reversal are not the only available options, of course, in cases involving nonobvious errors: the court can also identify the error while affirming on harmless error grounds. My approach nudges courts to do just that. Once the court has found that an error was committed and has carefully explained what the law demands, it can credibly hold that no further action is needed to prevent future errors.²⁴⁸ Not only can the court then

247. See *supra* Part II.B.

248. For much the same reason, a court should generally publish its opinion when it identifies a nonobvious error; otherwise, its ruling will lack precedential effect, and the state

presume—until proven otherwise—that trial judges and prosecutors will do their best to comply with the law’s newly clarified strictures, but it can also caution more or less explicitly that future errors of a similar kind—which, going forward, will be obviously erroneous and part of a recurring pattern of error—will not be treated so tenderly.²⁴⁹

B. Procedural Harm

The second component of my proposal calls for reviewing courts to consider whether a procedural error caused substantial harm to a legally protected interest unrelated to the outcome. Conventional harmless error rules treat the defendant’s stake in the outcome as the only interest that ultimately matters, at least for purposes of appellate and postconviction review.²⁵⁰ But as I have argued previously, in an article entitled *A Contextual Approach to Harmless Error Review*, criminal procedure doctrine does not share harmless error case law’s “singular preoccupation . . . with the outputs of criminal processes.”²⁵¹ Criminal procedure’s normative horizon at times

encompasses a diverse array of ‘non-truth-furthering’ interests—interests that include providing defendants with space for autonomous decision-making, enforcing compliance with nondiscrimination norms, and making transparent the inner workings of criminal justice—in addition to ‘truth-furthering’ objectives.²⁵²

Reviewing courts should therefore assess harmless error in a “contextual” manner that would revolve around “the constellation of interests served by the particular procedural rule that was infringed” rather than “automatically confin[ing] the harmless error inquiry to estimating the error’s effect on the outcome.”²⁵³

of the law will remain obscure. See, e.g., Patricia M. Wald, *The Rhetoric of Results and the Results of Rhetoric: Judicial Writings*, 62 U. CHI. L. REV. 1371, 1373–74 (1995).

249. See *supra* notes 82–84 and accompanying text (explaining that Michigan courts, in applying the state’s unorthodox two-part harmless error test, have used a similar technique by affirming on harmless error grounds in one case while simultaneously warning that the recurrence of similar errors in future cases would likely lead to reversal).

250. See, e.g., *Rose v. Clark*, 478 U.S. 570, 579 (1986) (“The thrust of the many constitutional rules governing the conduct of criminal trials is to ensure . . . fair and correct judgments. Where . . . the record developed at trial establishes guilt beyond a reasonable doubt, the interest in fairness has been satisfied and the judgment should be affirmed.”).

251. Murray, *supra* note 11, at 1791.

252. *Id.* at 1795 (footnotes omitted) (first quoting Tom Stacy & Kim Dayton, *Rethinking Harmless Constitutional Error*, 88 COLUM. L. REV. 79, 94 (1988); and then quoting Robert M. Cover & T. Alexander Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 YALE L.J. 1035, 1092 (1977)). I acknowledge, however, that the criminal justice system’s commitment to these goals is profoundly inconstant and often gives way when competing interests assert themselves. See Darryl K. Brown, *The Perverse Effects of Efficiency in Criminal Process*, 100 VA. L. REV. 183, 187–89 (2014).

253. Murray, *supra* note 11, at 1791. Specifically, contextual harmless error review involves two steps. A court “would begin by identifying the interest (or range of interests) protected by whichever procedural rule was infringed.” *Id.* at 1795. It would then “examine whether the error harmed the interests identified in the first step of the analysis to a degree substantial enough to justify reversal.” *Id.* at 1791. For purposes of this section, I am more interested in contextual harmless error review’s first step: interest identification. Balancing,

The goal of this section is not to elaborate on arguments from my prior article, which I have just summarized in condensed form, but to highlight two ways in which contextual harmless error review could help address the distinct set of problems this Article addresses relating to systemic error prevention. My first point has to do with deterrence; the second is about avoidance.

First, the optimal level of deterrence for any particular type of legal error is a function of, among other things, the error's cost²⁵⁴—or, expressed differently, the extent to which the error harms the interests of criminal defendants and society as a whole. Even if a court, in applying the first part of this Article's proposal, projected that reversal would likely lead to a significant reduction in the incidence of legal violations, the court would still need to figure out how much it should care about the violations that might be prevented. Otherwise, the court would have no coherent way to balance the benefit of deterring illegal conduct against the social cost of reversal upon reaching the third and final analytical step in the scheme I envision. For example, hearkening back to the discussion of unlawful shackling from this Article's opening paragraph,²⁵⁵ an appellate court in the state of Washington would need to develop a rough sense not only of how many shackling violations reversal would forestall but also of the magnitude of harm such violations tend to cause, so it could then make an informed decision regarding whether reversal is warranted for prophylactic reasons.

By requiring courts to account for a broader spectrum of interests that can be undermined by illegal conduct—not just interests relating to the outcome—contextual harmless error review would force a more honest reckoning with the cost of violating procedural law and the urgency of deterring violations. To stick with the problem of shackling in Washington for another moment, an appellate court accustomed to thinking about harm through the lens of outcome-centric harmless error review might look at the impressive track record of recent violations—fourteen appellate cases had found shackling-related errors in the state's courts over the course of about four and a half years²⁵⁶—and failed to perceive any pressing need to stage an intervention. Why? Because in all fourteen cases, the error did not affect the outcome and, in that sense, was harmless—or so the appellate court found.²⁵⁷ If the only kind of harm that counts is outcome-determinative prejudice—and if, moreover, the appellate court's harmless error determinations can be

the second step of contextual harmless error review, is discussed in greater depth in the next section.

254. Cf. Guido Calabresi, *Optimal Deterrence and Accidents*, 84 YALE L.J. 656, 671 (1975) (conceptualizing optimal deterrence in the context of regulating accidents as “the minimization of the sum of accident costs and accident prevention costs”).

255. See *supra* notes 1–4.

256. See *supra* note 3.

257. See *supra* note 3. As noted earlier, the Washington State Supreme Court finally broke this long string of affirmances by deeming a shackling error harmful, and thus reversing a conviction, shortly after this Article was written. See *supra* note 3.

trusted²⁵⁸—there would perhaps be little cause for alarm. But if, by contrast, a reviewing court were to assess harm contextually, it would also have to factor in other kinds of injury—to the defendant’s dignity and freedom—that animate legal rules concerning shackling.²⁵⁹ A fuller understanding of the relevant harms would make it harder to remain complacent even assuming *arguendo*—yet *dubitante*²⁶⁰—that every one of those fourteen shackling errors identified by Washington’s appellate courts had no bearing on the outcome.

Second, contextual harmless error review would also mitigate the problem of avoidance discussed in Part II.²⁶¹ As explained earlier, the harmless error rule is a potent avoidance tool due to reviewing courts’ discretion over the order of decision—simply put, they can choose not to resolve whether error occurred and skip ahead to harmless error review²⁶²—in combination with the fact that outcome-centric harmless error rulings contribute little or nothing of value to the law’s development.²⁶³ The first part of my proposal, introduced in the previous section, gets at one dimension of the avoidance puzzle: by obliging courts to analyze whether reversal would help prevent future errors, it would nudge them to adjudicate error more often in cases where the law is unclear.²⁶⁴ Yet even a court that embraced this Article’s approach might sometimes choose to affirm on harmless error grounds without addressing the defendant’s claim of error on the merits.²⁶⁵ It is in those cases that a contextual approach to harmless error review would alleviate avoidance—not by preventing it completely but by blunting its significance when it does occur.

For instance, consider the Fifth Circuit’s decision in *Wright v. Estelle*²⁶⁶ (*Wright I*). The defendant, Archie Wright, told his court-appointed attorney that he wanted to testify during his trial for capital murder.²⁶⁷ The attorney refused, as he feared the jury would discredit Wright and become more inclined to impose a death sentence.²⁶⁸ After he was convicted, Wright filed

258. Although I have not individually reexamined each of the fourteen rulings, it strikes me as implausible that an error as serious and potentially prejudicial as illegally shackling a defendant during judicial proceedings would not cause outcome-determinative prejudice even a single time in a sample size that large. *Cf. supra* notes 168–76 and accompanying text (discussing reasons to doubt the reliability of outcome-centric harmless error review).

259. *See supra* note 2 and accompanying text (discussing the reasons behind legal rules relating to shackling).

260. *See supra* note 258.

261. *See supra* Part II.B.

262. *See supra* notes 188–212.

263. *See supra* notes 213–27.

264. *See supra* notes 247–50 and accompanying text.

265. To reiterate, this Article is not suggesting that reviewing courts should have their discretion over decisional sequencing stripped from them. *See supra* note 13 and accompanying text.

266. 549 F.2d 971 (5th Cir. 1977), *adopted on reh’g*, 572 F.2d 1071 (5th Cir. 1978) (en banc).

267. *Id.* at 972.

268. The various opinions characterize this aspect of the record somewhat differently. *Compare id.* at 974 (“The findings of the court below indicate that Wright’s counsel during the above trial refused to allow him to testify.”), *and Wright v. Estelle (Wright II)*, 572 F.2d

a federal postconviction petition arguing that he had a “fundamental right under the . . . Constitution to testify in his own behalf which could not be waived by his attorney for purposes of trial strategy.”²⁶⁹ This issue was unsettled at the time, in 1977: it was not until a decade later, in *Rock v. Arkansas*,²⁷⁰ that the Supreme Court held that the Constitution protects a defendant’s right to testify.²⁷¹ And while it is now “well-established that the right to testify may be waived only by the defendant,” that development also took time to crystallize.²⁷² Yet in *Wright*, the Fifth Circuit punted, explaining in its panel opinion that “we need not consider the question of whether a defendant has a fundamental right to testify in his own behalf that can only be waived by him,” because “[t]he evidence connecting Wright to this crime was overwhelming” and thus, even “assuming arguendo” that there was an error, it was “harmless error beyond a reasonable doubt.”²⁷³ The panel’s opinion was adopted without change by the en banc court,²⁷⁴ although two separate opinions at the en banc stage cast the majority’s disposition as an “abdication of our responsibility” to “define the law so that litigants, lawyers, and trial judges can proceed with some degree of certainty,”²⁷⁵ urging the court to “face this case squarely.”²⁷⁶

Had the court employed this Article’s harmless error framework in *Wright*, rather than the conventional, outcome-centric framework, it might still have

1071, 1074 (5th Cir. 1978) (en banc) (Godbold, J., dissenting) (“[L]ead counsel told Wright that if Wright elected to testify the attorney would no longer represent him.”), *with id.* at 1073 (Thornberry, J., specially concurring) (“[T]he dialogue between Wright and his attorney implicitly assumed that Wright could make the final choice to testify.”). But in light of the views Judge Homer Thornberry expressed on the broader legal question presented by the case, it appears he would have deemed the attorney’s conduct appropriate even if the attorney had threatened to withdraw in the event Wright insisted on testifying. *See infra* note 279 and accompanying text.

269. *Wright I*, 549 F.2d at 972.

270. 483 U.S. 44 (1987).

271. *See id.* at 49. Several earlier cases by the Court had pointed in this direction, *see* Peter Westen, *The Compulsory Process Clause*, 73 MICH. L. REV. 71, 119 & nn.215–16 (1974), but the Court’s prior remarks about the topic were arguably dicta. *Cf. Rock*, 483 U.S. at 63 (Rehnquist, C.J., dissenting).

272. Daniel J. Capra & Joseph Tartakovsky, *Why Strickland Is the Wrong Test for Violations of the Right to Testify*, 70 WASH. & LEE L. REV. 95, 155 (2013).

273. *Wright I*, 549 F.2d at 974 (citing *Chapman v. California*, 386 U.S. 18, 24 (1967)). Nowadays, alleged right-to-testify errors of the kind that took place in *Wright I*, where defense counsel overrides a client’s desire to take the stand, are typically analyzed under *Strickland*’s ineffective assistance of counsel framework, *see infra* notes 307–10 and accompanying text, not under the *Chapman* harmless error test that ordinarily applies to constitutional errors, *see supra* notes 31–35 and accompanying text. *See* Capra & Tartakovsky, *supra* note 272, at 111–13 (summarizing this development and arguing that it has “rendered [the right to testify] a nullity” because “the defendant loses almost every time” under *Strickland*’s prejudice prong). For an exploratory discussion of how my proposed changes to the harmless error rule might also be used to rethink effective assistance doctrine, *see infra* Part III.D.1.

274. *Wright II*, 572 F.2d 1071, 1072 (5th Cir. 1978) (en banc).

275. *Id.* at 1072 & n.2 (Thornberry, J., specially concurring).

276. *Id.* at 1084 (Godbold, J., dissenting). Judges Thornberry and John Cooper Godbold parted ways, however, regarding how they thought the defendant’s claim of error should be resolved on the merits. *See infra* notes 279–81 and accompanying text.

chosen to adjudicate harmless error.²⁷⁷ But the court's analysis of harmless error might itself have illuminated the governing legal principles, even without a ruling on the merits of Wright's claim of error. In identifying which "interests [are] served by the particular procedural rule that was [allegedly] infringed,"²⁷⁸ as contextual harmless error review requires, the Fifth Circuit would have had to wrestle with many of the same issues as it would had it analyzed the merits: To the extent there is a constitutional right to testify, is the main or sole purpose of that right to protect the defendant against an unjust outcome? Or, instead, is the right also meant to carve out space within the criminal justice system for autonomous decision-making and expression on the part of defendants, irrespective of their guilt or innocence? If, in our hypothetical rerun of the *Wright* decision, the Fifth Circuit had concluded that the right to testify is exclusively or primarily about preventing wrongful convictions or other unjust outcomes,²⁷⁹ this would suggest that Wright's attorney did not violate his constitutional rights in refusing to let him take the stand when, in the attorney's judgment, testifying would have harmed Wright's prospects. If, however, the court had determined that the right to testify also serves important participatory interests,²⁸⁰ that conclusion would tend to show that the attorney acted wrongfully in riding roughshod over Wright's desire to tell his side of the story and that, henceforth, attorneys should merely advise—not dictate—when it comes to their clients' right to testify.

In either scenario, a contextual assessment of harmless error would have shed valuable light on whether legal error occurred in *Wright*, thus clarifying the applicable procedural rules. The larger point here, of course, is not limited to *Wright*. By accounting for all legally protected interests and thereby making harmless error review more lawlike, the second step of my proposal would facilitate norm elaboration even in cases where, for one reason or another, a reviewing court chooses to adjudicate harmless error before error.

277. *But cf. supra* notes 247–50 and accompanying text (explaining that in cases involving unsettled legal questions, the first part of my proposal would tend to encourage, without requiring, reviewing courts to address the merits before turning to harmless error).

278. Murray, *supra* note 11, at 1791; *see supra* text accompanying notes 253–56.

279. This conception of the right to testify is suggested by the concurring opinion in *Wright II*, 572 F.2d at 1072–73 (Thornberry, J., specially concurring) (characterizing the two central questions as “who is in a better position to judge trial strategy and who is in a better position to ensure the best interests of the defendant”). And, years later, it was also suggested in the dissent in *Arkansas v. Rock*, 483 U.S. 44, 63 (1987) (Rehnquist, C.J., dissenting) (“As a general matter, the Court first recites, a defendant’s right to testify facilitates the truth-seeking function of a criminal trial Such reasoning is hardly controlling here, where advancement of the truth-seeking function of Rock’s trial was the sole motivation behind limiting her [post-hypnotic] testimony.”).

280. This understanding animates the dissent in *Wright II*, 572 F.2d at 1075–84 (Godbold, J., dissenting), and ultimately won out in *Rock*, 483 U.S. at 51–53. *See* Alexandra Natapoff, *Speechless: The Silencing of Criminal Defendants*, 80 N.Y.U. L. REV. 1449, 1480 (2005) (arguing that several constitutional rights, including the right to testify, “add up to a broad expressive commitment” that “recognizes the inherent value in speakerhood and its intimate connection to personal autonomy, dignity, and democratic participatory values”).

C. Balancing

If a reviewing court applying this Article's approach found that reversal would substantially help to prevent future errors (at step one of the analysis) or that the error caused substantial harm to a non-outcome-related interest (at step two), the court would proceed to the third and final step of weighing the benefits of reversal against its costs. The idea of weighing opposing interests is hardly foreign to harmless error jurisprudence. Indeed, the reason harmless error review—as opposed to automatic reversal or, for that matter, automatic affirmance—applies to nearly all procedural errors is that courts and legislatures see it as a way of striking a balance between fairness and finality.²⁸¹ Yet while balancing is central to the articulated justifications for harmless error review, conventional harmless error rules do not call for courts to weigh competing interests but instead to focus exclusively on determining whether the error affected the outcome.²⁸² The framework this Article proposes, by contrast, would require reviewing courts to perform a balancing analysis before ordering reversal as a means of preventing error or redressing harm to a non-outcome-related interest.²⁸³

The potential benefits of reversal, relating to error prevention and redress, were covered earlier in this part, so here I focus mainly on the cost side of the scale. One set of costs has to do with duplication of effort. When a trial court's judgment is reversed due to procedural error, the government almost always has the right to relitigate the reversed proceeding.²⁸⁴ When the government exercises this prerogative, as it usually does, judges, courthouse staff, lawyers, and litigants will need to expend time and energy in redoing the earlier, invalidated proceeding.²⁸⁵ If a new trial must be held—not merely a new pretrial or noncapital sentencing hearing—witnesses will have

281. *See, e.g.*, *United States v. Mechanik*, 475 U.S. 66, 72–73 (1986). Courts also frequently resort to balancing when deciding which outcome-centric harmless error test, among a range of possible options, they should use in various procedural contexts. *See, e.g.*, *Brecht v. Abrahamson*, 507 U.S. 619, 637–38 (1993) (selecting the *Kotteakos* harmless error test, instead of *Chapman*'s, with respect to constitutional errors raised during postconviction review because of the supposed “imbalance of the costs and benefits of applying the *Chapman* harmless-error standard on collateral review”).

282. *See supra* Part I.A.

283. It bears repeating that this Article does *not* propose that reviewing courts should be able to deploy balancing to avoid reversal when an error has affected the outcome. Just like under current law, a defendant could still establish harm, and thus be presumptively entitled to reversal, by showing that the outcome was tainted by an error. Balancing would come into play only in cases where current law would deny a remedy anyway. *See supra* note 234 and accompanying text.

284. Although the double jeopardy rule forbids re prosecution when a conviction is reversed due to the insufficiency of the prosecution's evidence, *see Burks v. United States*, 437 U.S. 1, 11 (1978), reversals predicated on procedural errors do not preclude further prosecution except in truly rare cases involving a combination of deliberate wrongdoing and severe prejudice, *see, e.g.*, *Virgin Islands v. Fahie*, 419 F.3d 249, 253–55 (3d Cir. 2005); *see also id.* at 254 (noting that some jurisdictions entirely rule out dismissal with prejudice as a remedy for procedural errors and that, “in all jurisdictions, dismissal with prejudice is in practice a rare sanction for any constitutional violation”).

285. *See, e.g.*, F. Andrew Hessick, *The Cost of Remands*, 44 ARIZ. ST. L.J. 1025, 1031 (2012).

to be resummoned, a new jury will be empaneled (unless there is a bench trial), and the victims of the alleged crime, if any, are likely to suffer additional trauma.²⁸⁶ In addition to the costs inherent in relitigation, reversal can also lead to unjust, or less just, outcomes on remand, particularly in the subset of cases we are dealing with here: cases in which an error has not affected the outcome and reversal is contemplated on other grounds. The “[p]assage of time, erosion of memory, and dispersion of witnesses may render retrial difficult, even impossible,”²⁸⁷ thus enabling some defendants who should be punished to escape conviction or, barring that, to secure an undeservedly favorable plea or sentence.

Although these costs can be quite severe, often they are not—reversal’s drawbacks, like its advantages, are highly variable. With respect to the first problem, duplication of effort, a prolonged trial involving one or more victims and numerous witnesses may well prove costly, both emotionally and economically, to stage a second time.²⁸⁸ But many prosecuted crimes lack victims,²⁸⁹ and many trials are fairly simple proceedings with few witnesses.²⁹⁰ Straightforward trials arising from victimless crimes are not all that burdensome to redo. And when it is only a defendant’s sentence that is reversed or when a conviction procured through a plea rather than a trial is undone, the hassle resulting from remand proceedings will typically be lower still.²⁹¹

Nor does reversal—even reversal for reasons unrelated to the integrity of the outcome—inevitably pose a serious risk of precipitating a different or worse outcome on remand. Sometimes it might—especially when a long period of time has elapsed between the initial adjudication and the remand

286. See, e.g., *Mechanik*, 475 U.S. at 72.

287. *Engle v. Isaac*, 456 U.S. 107, 127–128 (1982) (making this point in relation to postconviction review).

288. See *supra* notes 285–87 and accompanying text.

289. See, e.g., Randy E. Barnett, *The Harmful Side Effects of Drug Prohibition*, 2009 UTAH L. REV. 11, 23 (“[D]rug laws attempt to prohibit conduct that is ‘victimless’ in a strictly nonmoral or descriptive sense: there is no victim to complain to the police and to testify at trial.” (emphasis omitted)).

290. See, e.g., DALE ANNE SIPES ET AL., NAT’L CTR. FOR STATE CTS., ON TRIAL: THE LENGTH OF CIVIL AND CRIMINAL TRIALS 8–9 (1988) (finding, in a sample of state felony prosecutions, that the median length of a jury trial was just over eleven hours (including jury selection and deliberations) and the comparable figure for a nonjury trial was around 3.5 hours).

291. As to noncapital sentencing, see, for example, *Molina-Martinez v. United States*, 136 S. Ct. 1338, 1348–49 (2016) (“[A] remand for resentencing, while not costless, does not invoke the same difficulties as a remand for retrial does.” (quoting *United States v. Wernick*, 691 F.3d 108, 117–18 (2d Cir. 2012))). The same is not true of *capital* sentencing, which entails a penalty-phase jury trial that can wind up being every bit as elaborate as the guilt-phase trial. See, e.g., CAROL S. STEIKER & JORDAN M. STEIKER, *COURTING DEATH: THE SUPREME COURT AND CAPITAL PUNISHMENT* 194, 196 (2016) (explaining that capital trials have grown increasingly “intricate and lengthy,” “exert[ing] enormous pressures on the capital system,” due in part to “the newly established ‘punishment phase’ in bifurcated trials” (citing *Williams v. Taylor*, 529 U.S. 362 (2000))). As to pleas, see, for example, *Lafler v. Cooper*, 566 U.S. 156, 172 (2012) (encouraging judges to “find[] a remedy that does not require the prosecution to incur the expense of conducting a new trial” where ineffective assistance of counsel caused the defendant to forgo a favorable plea and gamble on a trial).

proceedings, potentially causing evidence to deteriorate and jeopardizing the government's ability to put its best foot forward.²⁹² In many cases, however, the lag time separating the remand from the first proceeding is not so great as to threaten a significant loss of evidence.²⁹³ And even to the extent important evidence has degraded over time, in certain circumstances, the government can still make its case by introducing the former testimony of unavailable witnesses²⁹⁴ or by relying on other exceptions to the hearsay rule.²⁹⁵ None of these options is a perfect substitute for laying out the same evidence that the government chose to introduce—in the same format the government chose to introduce it—during the first iteration of the proceeding. But the existence of work-arounds at least partially offsets the danger that reversing a defendant's conviction or sentence will place the government at an unfair disadvantage on remand.

Moreover, the conviction and sentence from the first proceeding is not necessarily a sound measure of justice against which any possible departures on remand, such as an acquittal, dismissal, lenient plea, or lesser sentence, must be judged. Criminal codes in the United States are notoriously overbroad and harsh; police and prosecutors wield vast discretion over what and whom to criminalize and how much punishment is warranted—a level of discretion often used to extract pleas and repress low-income people and people of color rather than to achieve justice; numerous wrongful convictions have come to light in recent decades, while countless others likely still remain hidden from view; and the United States cages over two million people in its prisons and jails—a larger per capita share than any other country in the world—and criminalizes millions more people through punishments other than incarceration.²⁹⁶ To be sure, it does not follow from these

292. Loss of evidence due to delay is one of the main reasons why awarding relief at the postconviction review stage is more costly, all else equal, than reversing on direct appeal. *See, e.g.,* Henry J. Friendly, *Is Innocence Irrelevant?: Collateral Attack on Criminal Judgments*, 38 U. CHL. L. REV. 142, 147 (1970).

293. *Cf.* NICOLE L. WATERS & KATHRYN J. GENTHON, NAT'L CTR. FOR STATE CTS., *ACHIEVING TIMELY RESOLUTION FOR CRIMINAL APPEALS IN STATE COURTS 1* (2016), https://nscs.contentdm.oclc.org/digital/api/collection/criminal/id/275/page/0/inline/criminal_275_0 [<https://perma.cc/UW6U-6KLU>] (“Across all [state] appellate courts with criminal jurisdiction, half of all non-death penalty criminal appeals were resolved within 297 days—just under 10 months.”).

294. *See, e.g.,* FED. R. EVID. 804(b)(1)(B) (allowing the admission of an unavailable witness's former testimony when “offered against a party who had . . . an opportunity and similar motive to develop [the testimony] by direct, cross-, or redirect examination”).

295. Indeed, because “[r]eliable hearsay is . . . admissible during sentencing proceedings,” *United States v. Ramirez-Negron*, 751 F.3d 42, 52 (1st Cir. 2014), sentencing-only remands can often be relitigated based on little more than the transcript of the initial sentencing hearing, along with any new points the parties may wish to bring up in response to the concerns that led the reviewing court to set aside the prior sentence.

296. As to overcriminalization and harshness, see, for example, William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 512–19 (2001). As to misuse of law enforcement discretion, see, for example, Angela J. Davis, *The American Prosecutor: Independence, Power, and the Threat of Tyranny*, 86 IOWA L. REV. 393, 408–16 (2001). As to wrongful convictions, see, for example, Samuel R. Gross, *What We Think, What We Know and What We Think We Know About False Convictions*, 14 OHIO ST. J. CRIM. L. 753, 756–69 (2017). As to mass incarceration and nonincarceration punishments, see, for example, Wendy

generalizations that the disposition in any specific case is unjust or that a more lenient judgment on remand would improve on that case's outcome. But the powerful indictments directed against the U.S. criminal justice system do at least problematize the notion that the lower criminal courts tend to get things right the first time and that, if a remand results in a less severe outcome, something must have gone dreadfully wrong.

Admittedly, there is no guarantee that reviewing courts would see eye to eye with me or, more importantly, with each other regarding the weights that should be assigned to reversal's costs and benefits. In applying the framework I propose, judges who are inclined to prioritize efficiency and finality over procedural fairness would likely err on the side of affirmance in close cases, while judges with opposing proclivities would be more open to reversal. Some scholars may see this as a reason to abandon the project undertaken here²⁹⁷ or to embrace a bright-line rule of some kind—such as, for example, a rule of automatic reversal for recurring patterns of error or for certain categories of obvious errors²⁹⁸—in place of a balancing test.

Despite the subjectivity inherent in balancing,²⁹⁹ I remain convinced that it is the right approach where reversal is sought for the sake of error prevention or redress for non-outcome-related harm. As reviewing courts are heavily predisposed to affirm criminal judgments,³⁰⁰ adoption of this Article's proposal seems unlikely to precipitate a flood of unwarranted reversals—there would surely be some, but not many. I am far more concerned about mistakes in the other direction: courts opting to affirm in cases where a sound evaluation of the relevant interests points toward reversal. But under current law, courts are *required* to affirm in such cases anyway (unless the error affected the outcome).³⁰¹ The framework this

Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2020*, PRISON POL'Y INITIATIVE (Mar. 24, 2020), <https://www.prisonpolicy.org/reports/pie2020.html> [<https://perma.cc/9LVN-QBN6>].

297. *Cf.* Epps, *supra* note 35, at 2158 (criticizing contextual harmless error review as “indeterminate” because “[t]here is without doubt significant disagreement—both within the judiciary and without—about the social costs of reversal and the value of particular constitutional rights”); Brandon L. Garrett, Response, *Patterns of Error*, 130 HARV. L. REV. F. 287, 288 (2017) (responding to Murray, *supra* note 11, and suggesting that contextual harmless error review might make appellate and postconviction courts' remedial decision-making even more erratic than it currently is by “liberat[ing] judges to further rely on their own value judgments”).

298. *Cf. supra* note 238 (discussing Kamin's proposal requiring automatic reversal for clear prosecutorial errors implicating constitutional rights).

299. *See, e.g.*, T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 973–76 (1987) (arguing that balancing as a mode of legal analysis “demand[s] the development of a scale of values external to [judges'] personal preferences” but that no such scale has yet been conceived). It is worth noting that even though conventional harmless error rules do not entail balancing, they still “require[] . . . judgment transcending confinement by formula or precise rule”—judgment that “varies with judges and also with circumstance.” *Kotteakos v. United States*, 328 U.S. 750, 761 (1946).

300. *See, e.g.*, Michael Heise et al., *State Criminal Appeals Revealed*, 70 VAND. L. REV. 1939, 1953 tbl.3 (2017) (demonstrating that for defense appeals from state court decisions, only 14.9 percent of first-level appeals as of right and 2.8 percent of appeals in a court of last resort resulted in reversal or any lesser form of relief for the defendant).

301. *See supra* Part I.A.

Article proposes would at least create space within the doctrinal landscape for courts to consider whether reversal is justified for reasons other than outcome-determinative prejudice.

As for the idea of seeking reform through the expansion of automatic reversal rather than through balancing, the past half century of harmless error case law and commentary provides a cautionary tale. As explained in Part I,³⁰² scholars have been urging courts for decades to exempt additional categories of procedural error from harmless error review, but their pleas have by and large fallen on deaf ears. Courts are generally reluctant to reverse simply because a particular type of error occurred, without examining the details of what happened and how harmful the violation truly was. I take courts' reservations seriously and would allow them to consider the totality of the circumstances—not merely the category of procedural error at issue—in deciding whether to reverse despite the absence of outcome-determinative prejudice. Commentators who worry that the harmless error rule is overused to affirm criminal convictions and sentences might not find this solution completely satisfying. But since, in my view, it is rare to find a procedural right that, when violated, will always or almost always be harmful enough to justify reversal, automatic reversal is too rigid to work well in most doctrinal contexts. This Article's approach would afford the flexibility courts need to judge each error on its own merits without ascribing undue weight to the error's doctrinal label.

D. Possible Extensions

Up to this point, I have couched my prescriptions as an alternative framework for conducting harmless error analysis. But why stop there? As Brandon Garrett has pointed out, conventional harmless error rules are just one dimension of a “larger judicial and statutory [trend] toward stripping judicial review in criminal cases.”³⁰³ This section explores the possibility of further extending the reach of my proposal so as to loosen other controversial restrictions on access to reversal—restrictions having to do with so-called prejudice-based rights and forfeited claims.

302. See *supra* notes 100–01 and accompanying text.

303. Garrett, *supra* note 297, at 291 (listing “a wide range of procedural obstacles” to postconviction review and emphasizing that “the Supreme Court has interpreted a range of constitutional criminal procedure rules to incorporate . . . a second layer of harmless error rules” into the doctrinal test for error). In light of the formidable array of hurdles that now confront defendants who seek appellate and postconviction relief, Garrett suggests that “[the] trend toward more restrictive harmless error review” is no longer “an important mechanism for regulating the review of criminal convictions.” *Id.* I would not go that far. For one thing, conventional harmless error rules, as opposed to what Garrett calls the “second layer of harmless error rules,” *id.*, are still among the most daunting barriers defendants face in criminal litigation, especially on direct appeal. See *supra* notes 27, 194. And while I agree with Garrett that what he calls the “second layer of harmless error rules,” Garrett, *supra* note 297, at 291, are profoundly important and problematic, this Article's framework for reforming conventional harmless error rules would probably work quite well for Garrett's second-layer rules, too. See *infra* Part III.D.1.

1. Prejudice-Based Rights

The harmless error rule is remedial in nature: it applies only when a reviewing court finds, or assumes without deciding, that a legal error has occurred, and the court must then decide whether that error entitles the defendant to relief in the form of reversal.³⁰⁴ For some procedural rights, however, harm—defined doctrinally as outcome-determinative prejudice—has been classified as an element of the right itself rather than a distinct remedial issue. These rights, which I have previously termed “outcome-centric prejudice-based rights,” or “prejudice-based rights” for short, “apply only when failing to apply them would cause prejudice” by affecting the outcome.³⁰⁵ Two of criminal procedure’s most important rights—*Brady v. Maryland*³⁰⁶ and effective assistance of counsel³⁰⁷—likely qualify as prejudice-based rights under current Supreme Court precedent,³⁰⁸ which generally requires the defense to establish a “reasonable probability” of

304. This, at any rate, is the traditional way to understand the harmless error doctrine. *See, e.g.*, Meltzer, *supra* note 35, at 17. Dan Epps has recently staked out a contrary position, arguing that “harmless error analysis is best understood as an inquiry about constitutional rights, not remedies” because, in his view, subjecting violations of a right to harmless error review is “functionally indistinguishable” from making prejudice part of the right. Epps, *supra* note 35, at 2122, 2162; *see also* Daniel Epps, *The Right Approach to Harmless Error*, 120 COLUM. L. REV. F. 1 (2020). I disagree with Epps on this issue for reasons I have spelled out elsewhere. *See* Murray, *supra* note 14, at 296–97, 297 n.110; *accord* John M. Greabe, *Criminal Procedure Rights and Harmless Error: A Response to Professor Epps*, 118 COLUM. L. REV. ONLINE 118 (2018).

305. Murray, *supra* note 14, at 283.

306. 373 U.S. 83 (1963). *Brady* has come to stand for the proposition that a defendant has the right to obtain favorable, “material” evidence within the government’s knowledge, where evidence is *material* “only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.” *United States v. Bagley*, 473 U.S. 667, 682 (1985) (plurality opinion) (citing *Strickland v. Washington*, 466 U.S. 668, 694 (1984)).

307. Under *Strickland*, a defendant claiming ineffective assistance of counsel ordinarily must show both that counsel’s performance was deficient and that the deficiency was prejudicial, meaning that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Strickland v. Washington*, 466 U.S. 668, 694 (1984). *But cf.* Eve Brensike Primus, *Disaggregating Ineffective Assistance of Counsel Doctrine: Four Forms of Constitutional Ineffectiveness*, 72 STAN. L. REV. 1581 (2020) (emphasizing the often overlooked point that *Strickland*, though applicable to ineffective assistance claims involving “personal” and “episodic” errors by counsel, does not cover ineffectiveness that has “structural” causes or that is “pervasive”); Eve Brensike Primus & Justin Murray, *Redefining Strickland Prejudice After Weaver v. Massachusetts*, HARV. L. REV. BLOG (May 22, 2018), <https://blog.harvardlawreview.org/redefining-strickland-prejudice-after-weaver-v-massachusetts> [<https://perma.cc/NMM8-6UDC>] (arguing that even when *Strickland* is applicable, there is room to argue that “an attorney’s deficient performance is prejudicial when counsel’s errors rendered the trial process fundamentally unfair—even if those errors did not have a probable effect on the trial outcome”).

308. *See* Murray, *supra* note 14, at 285–89 (arguing that relevant Supreme Court decisions suggest that *Brady* and effective assistance are prejudice-based rights, while acknowledging that some courts and commentators interpret the decisions differently). “In addition to *Brady* and effective assistance of counsel, a number of other constitutional rights”—mainly relating to access to evidence and prosecutorial misconduct at trial—“also contain outcome-centric prejudice requirements according to the Supreme Court’s precedents.” *Id.* at 290.

outcome-determinative prejudice to prevail on such claims.³⁰⁹ If the doctrinal shifts this part advocates were limited to harmless error review, they would not impact how reviewing courts assess prejudice in contexts where prejudice is viewed as an element of the right rather than a remedial issue.

But there is nothing natural or inevitable about the way prejudice has been conceptualized in doctrinal areas like *Brady* and effective assistance of counsel. In an earlier article, I argued that stitching prejudice into the fabric of procedural rights can be dangerous insofar as it “narrow[s] the scope of defendants’ rights not only in appellate and postconviction proceedings, as intended, but also at the trial court level, where finality is not at stake and where judges and other actors must decide in the first instance what rights mean and how to enforce them.”³¹⁰ Because of this concern, I proposed that courts should “eliminate prejudice from the definition of *Brady*, effective assistance of counsel, and possibly other outcome-centric prejudice-based rights” while still “permit[ting] consideration of prejudice . . . when a convicted defendant seeks the remedy of reversal via appellate or postconviction review”—or, more simply, they should “move prejudice from rights to remedies.”³¹¹ Some courts have embraced this strategy already, holding that the prejudice requirements found in *Brady* and effective assistance doctrine are remedial rules that, much like harmless error review, apply only when a defendant seeks reversal or comparable forms of relief.³¹²

To the extent courts are prepared to reconceptualize *Brady*, effective assistance, and perhaps other prejudice-based rights along these lines, it would not require much analytical legwork to bring them within the ambit of

309. *Supra* notes 306–08.

310. Murray, *supra* note 14, at 280 (footnote omitted). Other scholars have also attacked the anomalous conception of prejudice reflected in *Brady* and effective assistance jurisprudence for a range of reasons. As to *Brady*, see, for example, Alafair S. Burke, *Revisiting Prosecutorial Disclosure*, 84 IND. L.J. 481 (2009). As to effective assistance, see, for example, Barry Friedman, *A Tale of Two Habeas*, 73 MINN. L. REV. 247, 327–28 (1988).

311. Murray, *supra* note 14, at 319. I also argued that courts should employ contextual harmless error review with respect to *Brady* and effective assistance claims to redress harm to interests not relating to the outcome:

[G]overnmental suppression of evidence and deficient representation by defense counsel can both cause harm to an array of private and public interests—such as autonomy, equal justice for rich and poor, transparency, and separation of powers—even when the risk of prejudice to the outcome is slim to none. The *Brady/Strickland* test for prejudice blinds courts to these forms of harm by directing them to focus exclusively on whether evidence suppression or deficient representation affected the outcome. Contextual harmless error review would remedy that oversight, since it would “assess harm in relation to the constellation of interests served by the particular procedural rule that was infringed”—as relevant here, *Brady* or effective assistance of counsel—“and would not, as under existing law, automatically confine the [prejudice] inquiry to estimating the error’s effect on the outcome.”

Id. at 324 (second alternation in original) (footnotes omitted) (quoting Murray, *supra* note 11, at 1791). See generally *supra* Part III.B (discussing contextual harmless error review and how it fits within this Article’s proposal).

312. See Murray, *supra* note 14, at 322 (collecting cases).

this Article's harmless error framework.³¹³ That would be a salutary development. *Brady* and the right to effective assistance of counsel are widely and rightly regarded as paper tigers—grand symbols of our collective commitment to fairness, but symbols that have utterly failed in practice to make good on their respective promises.³¹⁴ A heightened threat of reversal in the *Brady* context could help spur line prosecutors to err on the side of disclosure, while also motivating higher-ups to alter their discovery policies, training protocols, and personnel choices in ways that increase the flow of information to the defense.³¹⁵ And while an elevated prospect of reversal for ineffective assistance seems unlikely to have much direct impact on defense lawyers' incentives, it could potentially induce the government to infuse desperately needed funds into resource-starved indigent defense systems—or, conceivably, to bring fewer prosecutions, thereby reducing caseload burdens—so that defense attorneys will be better equipped to advocate for their clients.³¹⁶ Thus, while this Article's immediate target is the harmless error doctrine, prejudice-based rights like *Brady* and effective assistance do not lie far outside its crosshairs.

2. Review of Forfeited Claims

Remedial law does not look with favor on forfeited claims. Criminal defendants, like other litigants, are expected to assert any claim they might have in a timely fashion; if they fail to do so, the claim is deemed forfeited.³¹⁷ Forfeitures are rarely excused. While many scholars worry that a strict policy against reviewing forfeited claims unfairly punishes defendants for the

313. Indeed, if courts were to expressly classify the prejudice elements that are hardwired into various prejudice-based rights as forms of harmless error review, my proposal would reach them automatically. But even if those elements were simply “move[d] . . . from rights to remedies,” *id.* at 319, without explicitly labeling them as harmless error rules, courts could still borrow from a reformed harmless error doctrine in light of the functional similarities between harmless error review and other prejudice restrictions that are conceptually positioned on the remedy side of the right-remedy divide.

314. *See, e.g.*, Paul D. Butler, *Poor People Lose: Gideon and the Critique of Rights*, 122 YALE L.J. 2176, 2190–91 (2013) (arguing that the right to state-appointed counsel “has been a spectacular failure” partly because “[i]ndigent defense has been grossly underfunded, where it is provided at all”); Bennett L. Gershman, *Reflections on Brady v. Maryland*, 47 S. TEX. L. REV. 685, 728 (2006) (“[M]ore than any other rule of criminal procedure, the *Brady* rule has been the most fertile and widespread source of misconduct by prosecutors . . .”).

315. *See supra* notes 133–50 and accompanying text (discussing why and how a credible prospect of reversal can reduce prosecutor-driven procedural error).

316. *See supra* notes 145–50 and accompanying text (explaining that reversal functions as a collective sanction that can impact group behavior). This Article's remedial framework would also bring other benefits, beyond the prophylactic considerations just mentioned, if applied to *Brady* and effective assistance claims. *See supra* note 311 (discussing the need to redress forms of harm besides outcome-determinative prejudice that can result from evidence suppression and inadequate representation).

317. *See, e.g.*, *United States v. Olano*, 507 U.S. 725, 731–32 (1993). Forfeiture—the failure to assert one's rights at the appropriate time—is different from, yet often confused with, waiver, which involves an affirmative relinquishment of rights. *See* Ian S. Speir & Nima H. Mohebbi, *Preservation Rules in the Federal Courts of Appeals*, 16 J. APP. PRAC. & PROCESS 281, 284 (2015). This subsection deals only with forfeiture.

mistakes of their lawyers³¹⁸ and incentivizes judicial and prosecutorial error,³¹⁹ courts view such a policy as essential to “prevent[] a litigant from ‘sandbagging’ the court [by] remaining silent about his objection and belatedly raising the error only if the case does not conclude in his favor.”³²⁰ Thus, the plain error rule that governs federal appeals, a rule with many state law analogues,³²¹ forbids reversal premised on forfeited claims unless the defendant can overcome several daunting hurdles, among them a harmless error standard demanding proof of a “reasonable probability” that the error affected the outcome.³²² (The plain error rule’s other requirements are discussed below.)³²³ Likewise, to succeed with a forfeited claim in a federal postconviction proceeding, a defendant generally must establish both “cause” for failing to raise the claim earlier—whether at the trial court level, on appeal, or during state postconviction proceedings—and “prejudice” that would result if the court refused to consider the claim.³²⁴ For purposes of the

318. See, e.g., John C. Jeffries Jr. & William J. Stuntz, *Ineffective Assistance and Procedural Default in Federal Habeas Corpus*, 57 U. CHI. L. REV. 679, 683 (1990) (making this point with respect to federal habeas law’s cause-and-prejudice rule). Other times—as when the law plainly foreclosed a potential objection at the time of trial proceedings but subsequently changed prior to the time of review—neither the defendant nor defense counsel is at fault for failing to raise an objection, yet many forfeiture rules still penalize the defendant in this scenario. See, e.g., Toby J. Heytens, *Managing Transitional Moments in Criminal Cases*, 115 YALE L.J. 922, 956–58 (2006) (criticizing the federal plain error rule for presumptively barring relief in situations where the law has substantially changed between the initial proceeding and review).

319. See generally, e.g., Darryl K. Brown, *Does It Matter Who Objects?: Rethinking the Burden to Prevent Errors in Criminal Process*, 98 TEX. L. REV. 625 (2020) (arguing that judges and prosecutors are generally the “cheapest cost avoider[s]” when it comes to legal error in the criminal process and thus that forfeiture rules mistakenly allocate the duty of care for preventing errors to defendants).

320. *Puckett v. United States*, 556 U.S. 129, 134 (2009) (first quoting *Wainwright v. Sykes*, 433 U.S. 72, 89 (1977); and then citing *United States v. Vonn*, 535 U.S. 55, 72 (2002)). A number of commentators have attacked this justification, arguing that “counsel’s failure [to object] is usually the result of his inattention, his ignorance of either the applicable law or the facts of his client’s case, or his inability to appreciate the tactical value or constitutional worth of an objection” rather than a calculated choice to conceal an ace in the hole. Peter W. Tague, *Federal Habeas Corpus and Ineffective Representation of Counsel: The Supreme Court Has Work to Do*, 31 STAN. L. REV. 1, 46 (1978).

321. See 7 LAFAYE ET AL., *supra* note 97, § 27.5(d).

322. *United States v. Dominguez Benitez*, 542 U.S. 74, 81–82 (2004); see also *supra* note 44 and accompanying text (discussing the *Olano* harmless error test).

323. See *infra* notes 325–33.

324. E.g., *Sykes*, 433 U.S. at 87 (holding that, where the defendant failed to object to the admission of evidence during a state trial, he could not raise the claim in a federal postconviction proceeding “absent a showing of ‘cause’ and ‘prejudice’” (citing *Francis v. Henderson*, 425 U.S. 536 (1976))). While the Supreme Court has said that a constitutional error causing a “fundamental miscarriage of justice” can be reviewed in a federal habeas proceeding even where no cause has been shown for a forfeiture, *Murray v. Carrier*, 477 U.S. 478, 495–46 (1986) (quoting *Engle v. Isaac*, 456 U.S. 107, 135 (1982)), this exception to the cause-and-prejudice rule is almost never used and hinges largely on the defendants’ ability to prove their own innocence, see Jordan Steiker, *Innocence and Federal Habeas*, 41 UCLA L. REV. 303, 336–42 (1993). Also, when, as in *Sykes*, the prosecution relies on state law forfeiture rules to block federal review, the federal court can disregard the forfeiture and review the defendant’s claim—without finding cause and prejudice—if the state’s forfeiture rule is designed or applied in a manner that unduly subverts federal rights, though this work-

cause-and-prejudice rule, prejudice appears to bear the same meaning as it does in the plain error context, obligating the defendant to show a reasonable probability that, without the error, the outcome would have been different.³²⁵

Even without any extension or modification, the approach laid out in this Article would apply to the harmless error element of the federal plain error rule (and comparable state rules³²⁶), enabling a defendant to satisfy that part of the rule *either* by establishing a reasonable probability that the error affected the outcome³²⁷ *or* by showing that reversal's benefits outweigh its costs.³²⁸ On the other hand, the plain error rule's remaining requirements—that the error must be “plain” (meaning “clear” or, equivalently, “obvious”)³²⁹ and must “seriously affect the fairness, integrity or public reputation of judicial proceedings”³³⁰—would not be displaced or affected by my proposal (unless it were expanded along the lines suggested below). Similarly, the prejudice element of the federal cause-and-prejudice rule, which functions exactly like a harmless error rule even though it is not labeled as one,³³¹ would be softened, allowing the defendant to prove harm either in the traditional fashion (i.e., by showing a reasonable probability of outcome-determinative prejudice) or through the balancing test proposed here. The cause element of the cause-and-prejudice rule, however, would remain intact.³³²

around, too, is rarely utilized. See Eve Brensike Primus, *Federal Review of State Criminal Convictions: A Structural Approach to Adequacy Doctrine*, 116 MICH. L. REV. 75, 106–10 (2017).

325. See, e.g., Amy Knight Burns, Note, *Insurmountable Obstacles: Structural Errors, Procedural Default, and Ineffective Assistance*, 64 STAN. L. REV. 727, 748 (2012) (noting that, in cases involving both the *Sykes* cause-and-prejudice rule and the prejudice prong of *Strickland*'s test for ineffective assistance of counsel, “most courts evaluating such claims have collapsed them, holding that a satisfaction of the *Strickland* standard satisfies the *Sykes* prejudice inquiry, or vice versa”).

326. See *supra* notes 49, 73 (discussing state analogues).

327. See *supra* note 234 and accompanying text (explaining how outcome-centric harmless error rules fit within my proposed framework as one part of a multidimensional analysis).

328. See *supra* Part III.C.

329. *United States v. Olano*, 507 U.S. 725, 734 (1993) (first citing *United States v. Young*, 470 U.S. 1, 17 n.14 (1985); and then citing *United States v. Frady*, 456 U.S. 152, 163 (1982)).

330. *Id.* at 736 (quoting *United States v. Atkinson*, 297 U.S. 157, 160 (1936)).

331. See *generally supra* note 304 and accompanying text (explaining that harmless error rules use the concept of prejudice or harm to limit access to particular remedies—as relevant here, the remedy of federal postconviction relief).

332. Reforming the prejudice element of the cause-and-prejudice rule without also changing how the cause element gets administered would accomplish little in the multitude of cases where a defendant tries to show cause by alleging a *Brady* violation or ineffective assistance of counsel led to the forfeiture. In such cases, the defendant would still have to establish outcome-determinative prejudice as part of the *Brady* or ineffective assistance claim. See *generally supra* notes 306–10 and accompanying text (discussing the prejudice test for *Brady* and ineffective assistance claims). If, however, prejudice were removed from the definitions of *Brady* and the right to effective assistance of counsel and reconceptualized as a remedial issue, as suggested in the previous subsection, and as many scholars and judges support, see *supra* notes 310, 312 and accompanying text, a defendant could establish cause premised on a *Brady* violation or ineffective assistance without first needing to prove a reasonable probability that the outcome was affected. The defendant would, of course, have to establish prejudice in connection with the prejudice element of the cause-and-prejudice rule,

These reforms would mark a significant shift in how courts review forfeited claims. But they could also lay the groundwork for further measures aimed at relaxing claim forfeiture doctrine. Reshaping harmless error review to account for all relevant costs of reversal, including the very costs that motivate claim forfeiture rules,³³³ would lessen the real or perceived need for categorical barriers to relief, such as the plain error rule's clear-or-obvious-error element³³⁴ or the cause element of the cause-and-prejudice rule.³³⁵ The factors identified by these elements—whether the error is clear-cut and whether the defendant can show good cause for failing to raise the claim earlier—are undoubtedly relevant to a global assessment of reversal's costs and benefits. Yet if, when all is said and done, a thorough analysis of the relevant interests indicates that reversal is warranted for the sake of deterrence, redress, or both and is net beneficial even when the error's ambiguity and other countervailing considerations are placed on the scale, denial of relief becomes rather difficult to defend.³³⁶ By providing an alternative outlet—a more flexible and, arguably, fairer one—for effectuating the policies that underlie claim forfeiture doctrine, this Article's reconfiguration of harmless error review could potentially prompt rulemakers to reassess whether and to what extent categorical impediments to relief are truly necessary on account of forfeiture.

but that element is covered by this Article's proposed reforms and thus would no longer require a showing of outcome-determinative prejudice.

333. See *supra* note 320 and accompanying text (discussing the potential problem of tactical delay in raising defense objections); *cf. supra* notes 284–97 and accompanying text (discussing other costs associated with reversal without focusing specifically on forfeiture).

334. See *generally supra* note 43 and accompanying text (discussing the clear-or-obvious-error element of the plain error rule). The concept of clear-or-obvious error plays a much different role in plain error doctrine than it does in my proposal. For one thing, an error *must* be clear-cut to warrant reversal under the plain error rule, *Olano*, 507 U.S. at 734, whereas under this Article's approach, an error's obviousness is neither a necessary nor sufficient condition for reversal but merely an important factor weighing in the defendant's favor when it is present, see *supra* notes 244–49. Moreover, “whether a legal question was settled or unsettled at the time of trial, ‘it is enough that an error be “plain” at the time of appellate consideration’” to satisfy *Olano*'s clear-or-obvious-error requirement. *Henderson v. United States*, 568 U.S. 266, 279 (2013) (quoting *Johnson v. United States*, 520 U.S. 461, 468 (1997)). Under this Article's framework, by contrast, for an error's obviousness to weigh in favor of reversal for prophylactic reasons, it must be obviously illegal at the time of commission, not merely at the time of appellate or postconviction review. See *supra* notes 244–49.

335. See, e.g., *Murray v. Carrier*, 477 U.S. 478, 488 (1986) (“So long as a defendant is represented by counsel whose performance is not constitutionally ineffective . . . the existence of cause for a procedural default must ordinarily turn on whether the prisoner can show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule.”).

336. There are counterarguments, to be sure. Perhaps most importantly, one could argue that bright-line rules, such as the clear-or-obvious-error restriction, are needed to guard against the risk that courts, in applying a discretionary balancing test, might underrate society's interest in inducing defendants to raise claims at the earliest opportunity in order to prevent errors and preserve finality. *But cf. supra* note 300 and accompanying text (arguing that the balancing inquiry envisioned here is unlikely to cause many unwarranted reversals).

CONCLUSION

Although criminal defendants' procedural rights are routinely violated in the lower courts, generating enormous harm in the aggregate, accountability is in short supply. Even when trial judges, prosecutors, and the organizations and larger systems in which they are embedded repeatedly violate the same rule, in one case after the next, reviewing courts are generally constrained by the harmless error doctrine to disregard illegal conduct from past cases—along with the risk that such conduct will be repeated in future cases—and to focus exclusively on whether the error affected the outcome in the case currently being reviewed.

I think it is a mistake to curtail criminal review in this manner. In addition to deciding whether an error caused outcome-determinative prejudice and, if so, ordering reversal, reviewing courts should also assess whether reversal is needed to prevent future errors or to redress harm to other interests—besides the defendant's interest in the outcome—that procedural law aims to safeguard. They should then balance reversal's benefits, relating to error prevention and redress, against its costs to determine whether reversal is warranted.³³⁷ This method of harmless error review would not always generate easy or uncontroversial answers. But it at least has the virtue of asking the right questions. Rather than ignoring comparable procedural violations committed in prior cases and what those violations portend for the future, this Article's approach invites courts to identify patterns of error that link the past, present, and (probable) future so that such patterns can be disrupted. And instead of artificially reducing the concept of harm to the single dimension of outcome-determinative prejudice, the framework I propose takes into account the full range of interests that procedural law deems worthy of protection. These new tools would place reviewing courts in a far stronger position to police procedural error in the lower criminal courts.

337. The balancing test I propose would not apply where a defendant seeks reversal based on outcome-determinative prejudice: just like under current law, reversal would be presumptively required if an error has affected the outcome. Balancing would come into play only when reversal is contemplated on deterrence grounds or based on injury to non-outcome-related interests.