

**EAST vs. WEST—WHERE ARE ERRORS HARMLESS?  
EVALUATING THE CURRENT HARMLESS ERROR DOCTRINE IN  
THE FEDERAL CIRCUITS**

*“Errors are the insects in the world of law, travelling through it in swarms, often unnoticed in their endless procession. Many are plainly harmless; some appear ominously harmful. Some, for all the benign appearance of their spindly traces, mark the way for a plague of followers that deplete trials of fairness.*

*The well-being of the law encompasses a tolerance for harmless errors adrift in an imperfect world. Its well-being must also encompass the capacity to ward off the destroyers. So an inquiry into what makes an error harmless, though one of philosophical tenor, is also an intensely practical inquiry into the health and sanitation of the law.”*

*— Chief Justice Roger J. Traynor.*<sup>1</sup>

**INTRODUCTION**

When an appellate court finds error in a trial, it faces an inherently futile challenge: to evaluate the effect of a hypothetical situation on a group of persons the judges have never met and about whom they seldom have information. Why, then, other than a court’s duty to preserve the parties’ right to an equitable trial, does an appellate court attempt this challenge? The short answer lies in the importance we place on the jury’s role in a trial. In the United States, the Sixth and Seventh Amendments to the Constitution cement the jury trial’s inviolable presence in our justice system.<sup>2</sup> This right to a trial by jury forms one of the pillars on which the scales of justice are balanced.<sup>3</sup>

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1. ROGER J. TRAYNOR, THE RIDDLE OF HARMLESS ERROR, at i (1970).

2. U.S. CONST. amends. VI, VII. These rights have been protected since their enactment in 1789. U.S. CONST. pmbl. amends. I–X.

3. The various statutes enacted to protect the Sixth and Seventh Amendments are like branches of a tree; they incessantly reach into the chaos of justice, spreading the gospel of the jury trial’s protection. *See, e.g.*, 28 U.S.C. § 1411 (2006) (preserving right to jury trial in non-bankruptcy actions); 48 U.S.C. § 1616 (2006) (extending right to jury trial to the Virgin Islands); FED. R. CIV. P. 38 (preserving the right to jury trial in all civil claims).

Therefore, this fundamental right is given wide deference,<sup>4</sup> and encroachment upon it is met with an almost visceral reaction.<sup>5</sup>

The jury's fundamental role in a trial creates difficulties with appellate review of trial court error. Because we hold the jury's participation in the resolution of disputes in such high esteem, an appellate court must weigh the effect a trial court's error had on the jury or its verdict.<sup>6</sup> If our justice system did not hold the jury's participation to be so inalienable, an appellate court's purpose could be a swift and simple affirmation of the facts and their fulfillment of the burdens of proof, for there would be no danger of invading the fact finder's role.<sup>7</sup> It is with this perspective—protecting the fact finder's autonomy—that a discussion of harmless error may begin.

The starting point in this discussion is a deceptively simple question: How should an appellate court treat error at the trial level? There is a broad spectrum of approaches courts may take. At one end stands a rigid protection of the parties' rights: an appellate court may decide that any error, from the minutiae of evidence admission and exclusion to blatant violations of constitutional rights, warrants reversal.<sup>8</sup> This view, taken by both the early courts in this country and the royal courts of early England, represents a rigid adherence to the principle of blind equity and the sanctity of the jury's role in deciding disputes.<sup>9</sup> In sharp contrast is a concern for efficiency and practicality; an appellate court may decide that only egregious constitutional violations or errors that clearly influence the jury should be disturbed.<sup>10</sup> This deferential view recognizes the difficulty in evaluating an error's impact on a

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4. See, e.g., *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 510–11 (1959) (holding that when claims are both legal and equitable, the legal claims almost always should be heard in front of a jury first).

5. See, e.g., *United States v. Gaudin*, 515 U.S. 506, 511, 522–23 (1995) (rejecting the government's argument against defendant's right to jury trial).

6. Theoretically, bench trials have the same difficulties. Harmless error analysis still compels an appellate court to decide an error's effect on the fact finder. So, for brevity and clarity, although I generally refer to a "jury," all triers-of-fact, be it an administrative hearing, a bench trial, or a traditional jury trial, are subject to the same protections.

7. The jury was not always as important as we hold it today. Some of our founding fathers questioned the role of the jury trial in an efficient system of justice administration. See, e.g., Alexander Hamilton, *No. 83: The Judiciary Continued in Relation to Trial by Jury*, in ALEXANDER HAMILTON, JAMES MADISON & JOHN JAY, *THE FEDERALIST PAPERS* 494, 503–06 (Clinton Rossiter ed., Signet Classic 2003).

8. Violations of constitutional rights are usually thought of in relation to criminal trials; however, there are constitutional rights protecting civil litigants as well. See, e.g., U.S. CONST. amend. VII (right to jury trial in civil context).

9. See Roger A. Fairfax, Jr., *Harmless Constitutional Error and the Institutional Significance of the Jury*, 76 *FORDHAM L. REV.* 2027, 2032–34 (2008).

10. See *id.* at 2035–37.

proceeding, and that, while perfection should always be sought, it is rarely obtained.<sup>11</sup> Evaluations of trial error are necessary in this quest for equitable perfection, but expend significant judicial resources.<sup>12</sup> The difficulty in reaching conclusions may render suspect the justification behind consuming these resources.

The standard to be used for criminal constitutional violations has been resolved,<sup>13</sup> and will not be addressed in this Note. However, the federal circuits have developed their own standards for judging non-constitutional error in civil trials.<sup>14</sup> It is not surprising that they have struggled with the determination. No less than four statutes attempt to define harmless error analysis:<sup>15</sup> two Federal Rules of Civil Procedure,<sup>16</sup> a Federal Rule of Evidence,<sup>17</sup> and a statute in the United States Code.<sup>18</sup> However, very few cases from the Supreme Court offer definitive guidance on how to apply them.<sup>19</sup> All four statutes seek to preserve trial court judgments despite error if that error does not affect a “substantial right” of the parties.<sup>20</sup>

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

12. Determinations require both appellate resources in trying to judge an error’s harm as well as trial court resources when error is found to be harmful and the case remanded.

13. The Supreme Court resolved the standard to be used in constitutional violations in *Chapman v. California*, stating that a constitutional error is harmless when it appears “beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.” *Chapman v. California*, 386 U.S. 18, 24 (1967).

14. Lacking unequivocal and decisive interpretation from the Supreme Court for non-constitutional errors, the circuits have developed several standards. Sometimes the circuits have even disagreed with one another or overruled their own precedent. For example, with respect to criminal proceedings, the First, Second, Fourth, and Fifth Circuits have all, at one time or another, used a “fair assurance” standard. See *United States v. Ivezaj*, 568 F.3d 88, 98 (2d Cir. 2009); *United States v. Wood*, 924 F.2d 399, 402 (1st Cir. 1991); *United States v. Bernal*, 814 F.2d 175, 184–85 (5th Cir. 1987); *United States v. Nyman*, 649 F.2d 208, 211–12 (4th Cir. 1980). However, the Fifth, Seventh, and Tenth Circuits have also used a higher standard, the “very slight effect” standard. See *United States v. Sands*, 899 F.2d 912, 916 (10th Cir. 1990); *United States v. Hays*, 872 F.2d 582, 588 (5th Cir. 1989); *United States v. Shackelford*, 738 F.2d 776, 783 (7th Cir. 1984). This Note will focus on the Third and Ninth Circuits.

15. The prevalence of various rules in differing codes suggests that lawmakers have also struggled to define harmless error analysis.

16. FED. R. CIV. P. 61 (“At every stage of the proceeding, the court must disregard all errors and defects that do not affect any party’s substantial rights.”); FED. R. CRIM. P. 52 (“Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.”).

17. FED. R. EVID. 103(a) (“Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected . . .”).

18. 28 U.S.C. § 2111 (2006) (“On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties.”).

19. The case cited frequently in the Supreme Court’s most recent jurisprudence is *Kotteakos v. United States*, 328 U.S. 750 (1946), for its guidance. See, e.g., *Fry v. Pliler*, 551 U.S. 112,

The standards used by the Third and Ninth Circuits in their application of the harmless error statutes provide a good example of the chaos rampant among the federal circuits.<sup>21</sup> The Third Circuit finds non-constitutional error harmless when it is “highly probable” that the error did not contribute to the judgment.<sup>22</sup> The Ninth Circuit uses a facially less stringent standard, upholding a decision when the court can say with “fair assurance,” or if it is “more probable than not,” that the error did not have a substantially injurious effect.<sup>23</sup>

This Note examines the development and rationale for the Third and Ninth Circuits’ divergent approaches to the harmless error doctrine. The goal is to determine which circuit has come to the better conclusion.<sup>24</sup> To reach this goal, this Note will first briefly consider the development of this doctrine and its subsequent adoption and development by the Third and Ninth Circuits. Next, the tests used by each circuit will be compared to ascertain whether they reach different results. Following this, the proper standard for implementing harmless error review will be discussed. Finally, a new test for resolving the issues presented by the competing values framing harmless error analysis will be proposed. The test will balance the equity of litigants with concerns of judicial economy.

This analysis suggests several conclusions. First, both circuits are correct in trying to determine whether the error affected the verdict as rendered by the fact finder. Second, the Ninth Circuit’s “fair assurance” test most efficiently balances the concerns competing to create a workable standard.<sup>25</sup> Third, the

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116–17 (2007). The more recent cases have been more specific applications, leaving the question of general harmless error analysis dangerously open for interpretation.

20. See *supra* notes 16–18.

21. The Third and Ninth Circuits were chosen for two reasons. First, both the Third and Ninth Circuits are large enough to have a robust line of cases that shows a clear adherence to one consistent standard. Second, the standards are different, but well-defined.

22. *McQueeney v. Wilmington Trust Co.*, 779 F.2d 916, 924–25 (3d Cir. 1985).

23. *United States v. Hitt*, 981 F.2d 422, 425 (9th Cir. 1992). *Hitt* also points out that, at that time, there was a split within the Ninth Circuit over the standard to be applied. *Id.* As will be explained *infra*, the Ninth Circuit has reconsidered the different tests and decided they are expressions of the same standard. See *infra* note 118 and accompanying text. The two circuits use their respective test for both criminal and civil proceedings, albeit for different reasons. See *infra* notes 92–95 and accompanying text (explaining that the Third Circuit applies its harmless error test in both civil and criminal trials in order to avoid distorting the already-imbalanced burdens of proof); see also *infra* note 118 and accompanying text (explaining that in 1993, the Ninth Circuit concluded that the tests it had previously applied in criminal and civil cases express the same standard).

24. “Correct” might seem more preferable than “better,” but the question of which standard to use in which situation is trying enough that a definitive conclusion still eludes even the Supreme Court.

25. See *infra* Part II.A.

Supreme Court's somewhat ambiguous guidance, as well as the nature of harmless error analysis, shows that some consideration of the amount of evidence for or against a party is appropriate and perhaps unavoidable.<sup>26</sup> The proposed test attempts to resolve some of this ambiguity by preserving the fact finder's role in trial judgments while still allowing appellate courts to consider evidence offered against a party.

## I. DEVELOPMENT OF THE HARMLESS ERROR DOCTRINE

### A. A Brief Background of American Harmless Error Jurisprudence

The harmless error doctrine has been hotly debated numerous times, both in general<sup>27</sup> and considering its specific applications.<sup>28</sup> According to the Honorable Chief Justice Roger Traynor's<sup>29</sup> seminal essay on the development, rationale, and correct implementation of the doctrine of harmless error, the doctrine has its roots in the misapplication of the English case *Crease v. Barrett*, decided in 1835.<sup>30</sup> *Barrett* was a reaction to previous decisions holding that verdicts should be sustained if the courts were satisfied that the evidence supported the verdict and the jury had reached the correct result.<sup>31</sup> *Barrett* effectively discarded these previous decisions, noting that appellate

26. See *infra* Part II.B.

27. E.g., Gregory Mitchell, Comment, *Against "Overwhelming" Appellate Activism: Constraining Harmless Error Review*, 82 CALIF. L. REV. 1335, 1341 (1994) (arguing against the "overwhelming evidence" test of appellate review of the harmfulness of errors); Stephen A. Saltzburg, *The Harm of Harmless Error*, 59 VA. L. REV. 988, 988–89 (1973) (discussing the development and proper application of the harmless error doctrine).

28. E.g., Daniel J. Kornstein, *A Bayesian Model of Harmless Error*, 5 J. LEGAL STUD. 121, 122 (1976) (proposing a theory for determining the level of harm using statistical and probabilistic methods); Erika Plumlee, Comment, *"To Err is Human" — But is it Harmless?: Texas Rules of Appellate Procedure Rule 81(b)(2) and the Court of Criminal Appeals' Effort to Fashion a Workable Standard of Review*, 21 TEX. TECH L. REV. 2205, 2205 (1990) (discussing the doctrine's applications to the Texas Rules of Criminal Procedure).

29. The story of Chief Justice Traynor's appointment to the California Supreme Court by California Governor Culbert Olson is entertaining. While Chief Justice Traynor taught at Berkeley, Governor Olson nominated an outspoken liberal colleague, much to the chagrin of then California State Attorney General Earl Warren. See G. Edward White, Tribute, *Roger Traynor*, 69 VA. L. REV. 1381, 1382 (1983). Warren had the candidate's nomination blocked, denouncing his inexperience. See *id.* Governor Olson, wanting to expose Warren's political motives, nominated similarly inexperienced Chief Justice Traynor, who, though liberal, was less outspoken about it. See *id.* He quietly ascended to the court with no protest from Warren. See *id.* For an illuminating look at Chief Justice Traynor's professional career and nomination to the California Supreme Court, see generally *id.* at 81–86.

30. TRAYNOR, *supra* note 1, at 4.

31. *Id.* at 7–8.

courts would be invading “the province of the jury.”<sup>32</sup> Following this line of thinking, both English and American courts were loath to invade the sanctity of the jury’s role as the community’s voice and repeatedly declined to hold that an error was harmless if it could not be said with certainty that the error had no effect on the jury.<sup>33</sup> This reasoning led the appellate courts in both countries to vacate judgments at the slightest hint of error.<sup>34</sup> Such treatment not only reduced trials to an exercise in assuring that error was preserved in the record, but also relieved the appellate courts of their responsibility to fully consider both parties’ contentions.<sup>35</sup> Thus, the mechanical treatment by the appellate courts gave birth to the first harmless error statutes attempting to prevent this automatic voiding of verdicts.<sup>36</sup>

This concern about mechanical overturning of jury decisions was espoused most poignantly in 1946 by the Supreme Court decision of *Kotteakos v. United States*.<sup>37</sup> *Kotteakos* considered the application of conspiracy to money laundering,<sup>38</sup> but its focus was on the appellate court’s affirmation of the trial judgment because the evidence indicated guilt was “manifest.”<sup>39</sup> It used the opportunity to give guidance on harmless error analysis.<sup>40</sup> The Supreme Court stressed the need for sound judgment to avoid loopholes that would allow “correct” outcomes to stand, but also prevent trials from being “impregnable citadels of technicality” whose errors are reversed mechanically.<sup>41</sup> In this respect, it agreed with the appellate court’s attempt to avoid a “miscarriage of justice.”<sup>42</sup> To combat the difficulty of balancing these competing forces, Congress handed down a simple harmless error statute.<sup>43</sup> According to the

32. *Id.* at 8.

33. *Id.* at 8–9, 13.

34. *Id.* at 9, 13.

35. TRAYNOR, *supra* note 1, at 14.

36. *Id.* The current harmless error statutes are codified in three places. In the Federal Code, the statute governing harmless error is codified as 28 U.S.C. § 2111 (2006). In the Federal Rules of Civil Procedure, it is contained in Rule 61. FED. R. CIV. P. 61. The Federal Rules of Evidence codified a harmless error statute in Rule 103(a). FED. R. EVID. 103(a).

37. *Kotteakos v. United States*, 328 U.S. 750, 758–62 (1946).

38. *Id.* at 753–55.

39. *Id.* at 755.

40. *See id.* at 758–77.

41. *Id.* at 759–60. *Kotteakos* remains an integral part of the Supreme Court’s harmless error jurisprudence. Several of the Court’s more important and recent harmless error cases cite *Kotteakos* extensively. *See, e.g.*, *Shinseki v. Sanders*, No. 07–1209, slip op. at 10 (U.S. Apr. 21, 2009); *Brecht v. Abrahamson*, 507 U.S. 619, 637–38 (1993); *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 553 (1984); *Chapman v. California*, 386 U.S. 18, 49 (1967) (Harlan, J., dissenting).

42. *See Kotteakos*, 328 U.S. at 755, 758–59.

43. At the time, it was codified as 28 U.S.C. § 391 (1940). None of the current statutes existed in its current form when *Kotteakos* was decided in 1946, but they all retain the basic

Court, this statute (and by implication the subsequent statutes) has a deceptively simple command: “Do not be technical, where technicality does not really hurt the party whose rights in the trial and in its outcome the technicality affects.”<sup>44</sup>

In resolving how to best preserve the statute’s command, the Court set out several considerations as guidance to appellate courts in resolving the harmless error question.<sup>45</sup> The Court noted that “[s]ome aids to right judgment may be stated more safely in negative than in affirmative form.”<sup>46</sup> Because of the difficulty in defining a standard, the Court told appellate justices what *not* to do.<sup>47</sup> “[I]t is not the appellate court’s function to determine guilt or innocence.”<sup>48</sup> The proper determination asks “not were they right in their judgment . . . [but] what effect the error had . . . upon the jury’s decision.”<sup>49</sup> With this in mind, the *Kotteakos* Court expounded its cherished rule: “if one cannot say, *with fair assurance*, after pondering all that happened . . . that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected.”<sup>50</sup> The Court was urging full and thoughtful contemplation on the trial as a whole, not based on rules or considering the evidence offered in isolation.<sup>51</sup> The “fair assurance” language is the most cited of the opinion,<sup>52</sup> and with it, the Supreme Court adopted the “effect on the jury”<sup>53</sup> test in determining what errors affect a party’s “substantial rights.”<sup>54</sup>

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principle of that era’s harmless error statute, 28 U.S.C. § 391, which provides that error is not harmful if it does not affect the “substantial rights” of the wronged party. *See supra* notes 16–18.

44. *Kotteakos*, 328 U.S. at 760.

45. *See id.* at 761–64.

46. *Id.* at 763.

47. *Id.* at 763–64.

48. *Id.* at 763.

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

50. *Id.* at 765 (emphasis added).

51. *Id.* at 764–65.

52. According to Westlaw’s KeyCite feature, this language has been cited more than 2,250 times.

53. *See infra* notes 55–58 and accompanying text.

54. *Kotteakos*, 328 U.S. at 765. The Court went beyond simply deciding how to evaluate an error’s prejudice to a party; it also left clues as to which standards courts were to use in their analysis. Indeed, *Kotteakos* has been responsible for no less than three separate tests: the “highly probable” test, the “fair assurance” test, and the “grave doubt” test. *See id.* at 765, 776. The circuits have varied widely in their adoption of the language, moving between these three tests, as well as others. *See, e.g.*, *United States v. Wood*, 924 F.2d 399, 402 (1st Cir. 1991) (citing *United States v. Hernandez-Burmudez*, 857 F.2d 50, 53 (1st Cir. 1988) (“highly probable” test)); *United States v. Tyler*, 943 F.2d 420, 423 (4th Cir. 1991) (quoting *Kotteakos*, 328 U.S. at 765 (“grave doubt” test)); *United States v. Sands*, 899 F.2d 912, 916 (10th Cir. 1990) (holding that an appellate court must be able to say “with reasonable certainty that the [error] had but very slight

The *Kotteakos* “effect on the jury” test requires an appellate court to consider how the error could have swayed the jury in its deliberation and decision.<sup>55</sup> At its heart, this test considers the totality of the record, minus the error, and attempts to determine whether the error could have influenced the jury in reaching its verdict.<sup>56</sup> In employing this test, a court must eschew evaluation of the evidence for fear of stepping on the jury’s all-important toes.<sup>57</sup> As articulated by Chief Justice Traynor, the “effect on the jury” test demands a standard by which an appellate court should find its conscience clear in affirming a verdict, despite error.<sup>58</sup>

This standard is where courts differ in their harmless error analyses.<sup>59</sup> The reasons for deciding on a particular standard aside,<sup>60</sup> there are three relevant standards used by the Third and Ninth Circuits to determine an error’s effect on the jury.<sup>61</sup> They diverge in a fashion similar to differing burdens of proof. The standards require appellate courts to consider the probability, or the degree of certainty, with which appellate judges can say that the error affected the

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effect”) (internal quotations omitted); *United States v. Weger*, 709 F.2d 1151, 1158 (7th Cir. 1983) (“more probable than not” test).

55. *Kotteakos*, 328 U.S. at 764–65. *Kotteakos* is not the only case that focuses the analysis of harmless error on the effect of the error on the jury or its verdict. In *Chapman v. California* the Court noted that harmless error statutes protect against reversal based on “small errors or defects that have little, if any, likelihood of having changed the *result* of the trial[;]” rather, reversal should be reserved for cases where, if jurors were to consider the cases produced at trial without error, “honest, fair-minded jurors might very well have brought in not-guilty verdicts.” 386 U.S. 18, 22, 26 (1967) (emphasis added).

56. *Kotteakos*, 328 U.S. at 765.

57. *Id.* at 764.

58. See TRAYNOR, *supra* note 1, at 34–35. Indeed, as we will see, this is where the split between the Third and Ninth Circuits lays.

59. Different harmless error standards are used by the federal circuits not only in their split in evaluation of the “effect on the jury” test, but also in their treatment of harmless error in other situations; for example, harmless error analysis is used when deciding if a constitutional error is “structural” in nature and requires automatic reversal. See *Washington v. Recuenco*, 548 U.S. 212, 218–19 (2006) (quoting *Neder v. United States*, 527 U.S. 1, 9 (1999)); *Chapman*, 386 U.S. at 23–24.

60. Professor Saltzburg has argued that the standard of measuring the harm of an error should correspond to the action’s burden of proof. See Saltzburg, *supra* note 27, at 989. This method, presumably, could cover every standard used in common practice: beyond a reasonable doubt, clear and convincing evidence, preponderance of the evidence, even reasonable suspicion and probable cause. This Note will not address this debate because neither the Supreme Court nor Congress has mandated such an analysis based on the burden of proof. However, it is worth noting that the “effect on the jury” test asks if error has influenced the jury’s deliberation in some way. See *Kotteakos*, 328 U.S. at 764. If the question is whether the error was included in the jury’s mental deliberations, assuming they were properly instructed on their burden of proof, then this question necessarily includes the burden of proof.

61. See *infra* notes 62–63, 66 and accompanying text.



minds of the jury.<sup>62</sup> The two standards used in the Ninth Circuit's development of the harmless error doctrine are the "fair assurance" standard and the "more probable than not" standard.<sup>63</sup> The "fair assurance" standard allows a court to affirm a verdict when it can say with "fair assurance" that the error was harmless.<sup>64</sup> The "more probable than not" standard allows an appellate court to affirm a verdict if it finds that it is "more probable than not" that the error did not have an effect on the jury's verdict.<sup>65</sup> This suggests that the "more probable than not" test is roughly equivalent to fifty-one percent certainty that the error did not affect the verdict. The Third Circuit, however, will affirm if it is "highly probable" that the error did not affect the jury.<sup>66</sup> This standard seems to be higher on its face than both the "more probable than not" and "fair assurance" standards.

*Kotteakos* contrasts the correct "effect on the jury" test with a different, but ultimately impermissible, determination.<sup>67</sup> Instead of considering the effect of error on the minds of the jury, a court could also weigh the amount and degree of evidence against a party to determine if it reaches the correct result.<sup>68</sup> In contrast to the "effect on the jury" test of harmless error, this alternative test allows what the previous one does not: evaluation of the evidence against a party in the determination of whether error is harmful.<sup>69</sup> This test concedes that "in equating a correct result with justice, an appellate court necessarily envisages what result it would have reached as a trier of fact, thereby substituting itself for the actual trial court or jury."<sup>70</sup> The rationale behind this test is that if the verdict, given the overwhelming evidence against a party, is clearly correct, it should not be disturbed unless an egregious error has occurred.<sup>71</sup> *Kotteakos* cautions against such determinations being the sole criteria used to evaluate error because "[t]hose judgments are exclusively for the jury."<sup>72</sup>

62. See TRAYNOR, *supra* note 1, at 33–37.

63. United States v. Hitt, 981 F.2d 422, 425 (9th Cir. 1992).

64. *Id.*

65. *Id.*

66. State Farm Mut. Auto. Ins. Co. v. Lincow, 715 F. Supp. 2d 617, 635 (E.D. Pa. 2010).

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

68. *Id.* at 763–64.

69. TRAYNOR, *supra* note 1, at 18–19.

70. *Id.* at 18. Per the reasons discussed in the Introduction, *supra*, this test is met with resistance by Chief Justice Traynor. See *id.* at 18–22.

71. See *id.* at 22 (criticizing this test even where there is overwhelming evidence supporting the verdict).

72. *Kotteakos*, 328 U.S. at 763. Notice that the jury's importance to our judicial system is at the heart of such a determination.

Other opponents of this test, like Chief Justice Traynor, argue not just that an appellate court cannot replace the jury, but that the right to a fair trial free of harmful error is fundamental.<sup>73</sup> This fundamental right, says Traynor, is more than just a right to a “correct” verdict; it is a right to a fair process, to “objective consideration of all proper evidence by triers of fact without violations of any substantial rights . . . .”<sup>74</sup> The “overwhelming evidence” test, unlike the “effect on the judgment” test, does not beg for a standard of assurance.<sup>75</sup> The standard, presumably, is inherent in its verbiage: “overwhelming.”

The Third and Ninth Circuits, as well as the other federal circuits, have held to the “effect on the jury” test, or some similar iteration, in both the civil and criminal context<sup>76</sup> because both circuits were heavily influenced by *Kotteakos*.<sup>77</sup> However, as we will see, despite *Kotteakos*’s prohibition on appellate consideration of the evidence in isolation, the “effect on the jury” test has been incorrectly applied at times, and appellate courts have weighed the evidence under the guise of the “effect on the jury” test.<sup>78</sup> The following is an examination of the development of this doctrine and the standards to be applied for the “effect on the jury” test in both the Third and Ninth Circuits.

#### B. *The Third Circuit’s Adoption of the Harmless Error Rule*

The Third Circuit’s journey through the doctrine of harmless error begins, ironically, with a 1983 Ninth Circuit decision, *Haddad v. Lockheed California*

73. TRAYNOR, *supra* note 1, at 19–20.

74. *Id.* at 20.

75. See *Harrington v. California*, 395 U.S. 250, 254 (1969) (applying the overwhelming evidence test, while at the same time cautioning against its use in general for constitutional errors, because the evidence was so clear and overwhelming in the case being reviewed).

76. See *Virgin Islands v. Martinez*, 620 F.3d 321, 335 (3d Cir. 2010) (applying the “effect on the jury” test in a criminal context); *Rosa v. City of Chester, Pa.*, 278 F.2d 876, 881 (3d Cir. 1960) (applying the “effect on the jury” test in a civil context). It is unclear whether the Ninth Circuit recognizes a distinction. In *Mockler v. Multnomah County*, a civil case, the Ninth Circuit stated that the “harmless error standard used in a civil case is less stringent than that used in a criminal case.” *Mockler v. Multnomah Cnty.*, 140 F.3d 808, 813 (9th Cir. 1998) (quoting *City of Long Beach v. Standard Oil Co.*, 46 F.3d 929, 933 (9th Cir. 1995)). Subsequent Ninth Circuit civil cases have not used such language in conjunction with citing the harmless error test. See, e.g., *Geurin v. Winston Indus., Inc.*, 316 F.3d 879, 882 (9th Cir. 2002); *Lambert v. Ackerley*, 180 F.3d 997, 1008 (9th Cir. 1999).

77. See *infra* Part I.B–C. There are a few exceptions to this rule, but they have mostly fallen into disfavor. See, e.g., *United States v. Simon*, 995 F.2d 1236, 1237–38 (3d Cir. 1993) (finding the trial court’s “otherwise reversible [jury instruction] error” was harmless due to overwhelming evidence of defendant’s guilt); *Bates v. Nelson*, 485 F.2d 90, 94 (9th Cir. 1973).

78. See, e.g., *Simon*, 995 F.2d at 1247; *Bates*, 485 F.2d at 94.

*Corp.*<sup>79</sup> *Haddad* has two important holdings.<sup>80</sup> First, *Haddad* rejected prior Ninth Circuit application of the “highly probable” and “more probable than not” standards based on the right on which the error infringes: specifically, whether that right is constitutional in nature.<sup>81</sup> It reasoned that such a rigid distinction allows courts to circumvent their duty to ensure a fair and correct result, “avoid[ing] relying on the distinction by finding harmlessness under all standards.”<sup>82</sup> Ninth Circuit panels were finding errors harmless under both standards before reaching the more difficult question of constitutionality, thus negating harmless error analysis altogether.<sup>83</sup>

Presumably, the Ninth Circuit in *Haddad* found this analysis to be unacceptable in both rationale and result.<sup>84</sup> This facial distinction accords too much deference to constitutional errors and ignores the fairness and analysis that litigants deserve when appealing a non-constitutional error.<sup>85</sup> The Ninth Circuit implies that this ignorance has created an imbalance in judging error, finding too many errors harmless.<sup>86</sup> Thus, similar to the concerns that sparked the enactment of the harmless error statutes, the Ninth Circuit declined to apply the previous doctrine (which focused on the constitutional nature of the error) because its automatic rules deprive the parties of a full and careful analysis of the error’s impact on the trial.<sup>87</sup>

Having rejected the distinction between constitutional and non-constitutional errors, the *Haddad* court looked to the nature of the harmless error doctrine to decide the standard by which to judge an error’s impact on the trial.<sup>88</sup> The doctrine’s purpose, according to the Ninth Circuit, is to “gauge the probability that the trier of fact was affected by the error.”<sup>89</sup> It concluded that this purpose requires distinct standards based on the burden of proof required in the trial.<sup>90</sup> The Court thus concluded that in civil actions, appellate courts

79. *Haddad v. Lockheed Cal. Corp.*, 720 F.2d 1454 (9th Cir. 1983).

80. *See id.* at 1457–59.

81. *Id.* at 1457–58. Prior cases in the Ninth Circuit had framed the question based solely on whether the error was constitutional or non-constitutional. *Id.*

82. *Id.* at 1458.

83. *Id.* at 1458 n.5.

84. *See Haddad*, 720 F.2d at 1458.

85. *Id.* at 1457–58.

86. *Id.* at 1485 n.5.

87. *Id.* at 1457–59.

88. *Id.* at 1458–59.

89. *Haddad*, 720 F.2d at 1458–59.

90. *Id.* at 1459.

need only consider whether an error “more probably than not” affects the verdict.<sup>91</sup>

Two years later, in *McQueeney v. Wilmington Trust Co.*, the Third Circuit took direct issue with the *Haddad* court’s rationale for splitting the standard between criminal and civil trials.<sup>92</sup> It reasoned that jury verdicts in civil cases demand respect and tolerance for error equal to that of criminal cases, citing some significant consequences civil cases may have, such as large awards of damages and civil rights ramifications.<sup>93</sup> Further, society’s tolerance for error in civil cases is “subsumed in . . . [the] lower burden of proof in civil cases,” and a less stringent standard of harm will only enlarge this margin, distorting this rationale’s objective.<sup>94</sup> Thus, in *McQueeney*, the Third Circuit declined to match the standard used to judge the harmfulness of the error with the burden of proof at trial.<sup>95</sup>

The court then needed to decide the standard it would use. Using language of balance and sound judgment reminiscent of *Kotteakos*, the court noted that the goal of harmless error analysis requires:

[r]espect for the dignity of the individual, as well as for the law and the courts that administer it . . . . [This respect] may call for rectification of errors not visibly affecting the accuracy of the judicial process. And the prophylactic effect of a reversal occasionally might outweigh the expenditure of effort on a new trial.<sup>96</sup>

This language echoes *Kotteakos*’s guidance: temperance and sound judgment to ensure fairness to the parties and the court.<sup>97</sup> The court in *McQueeney* concluded that adopting a similarly balanced standard best preserves these competing values.<sup>98</sup> To the Third Circuit, the “highly probable” standard of harmlessness is the appropriate standard.<sup>99</sup>

### C. The Ninth Circuit’s Adoption of the Harmless Error Rule

91. *Id.* It is important to note that *Haddad* quotes *Kotteakos* heavily as authority supporting its propositions. *See id.* As we have seen, however, this distinction between criminal and civil cases was not *Kotteakos*’s intent. *See supra* Part I.A.

92. *McQueeney v. Wilmington Trust Co.*, 779 F.2d 916, 926 (3rd Cir. 1985).

93. *Id.*

94. *Id.*

95. *Id.* at 927.

96. *Id.* (quoting *United States v. Burton*, 584 F.2d 485, 512–13 (D.C. Cir. 1978) (Robinson, J., dissenting)).

97. *Kotteakos v. United States*, 328 U.S. 750, 762–65 (1946).

98. *McQueeney*, 779 F.2d at 927. This rationale will be of critical importance while trying to discern the appropriate test for the circuits to utilize.

99. *Id.* at 927–28.

The Ninth Circuit's development of the harmless error doctrine began with the premise in *Haddad* that the Third Circuit summarily rejected: that the standard for judging an error's harm should be bifurcated between civil and criminal trials.<sup>100</sup> This idea was a reaction to previous Ninth Circuit holdings that differentiated only between constitutional and non-constitutional errors.<sup>101</sup> To the Ninth Circuit, this division was of less practical importance than the distinction between criminal and civil actions.<sup>102</sup>

Having done away with the constitutional distinction,<sup>103</sup> the *Haddad* court decided that the proper standard should reflect the different burdens of proof in civil and criminal cases.<sup>104</sup> Paradoxically, the Ninth Circuit in *Haddad* cites *Kotteakos* as authority for this distinction.<sup>105</sup> As we have seen, *Kotteakos* stands more for the premise that appellate courts must examine the error's effect on the jury, not for bifurcating standards between civil and criminal cases.<sup>106</sup> *Haddad*, correctly citing both *Kotteakos* and Justice Traynor, reasons that appellate courts, when determining an error's harm, stand in the dangerous position of usurping the jury's function.<sup>107</sup> It then disregards the logic underlying Judge Traynor's central premise and continues with its criminal-civil distinction with a twofold argument: first, the danger of usurping the jury's function "has less practical importance . . . in . . . civil cases;"<sup>108</sup> second, there are "differing degrees of certainty owed to civil and criminal litigants" and "[t]he civil litigant's lessened entitlement to veracity" continues in the appeal stage.<sup>109</sup> The court then adopted the "more probably than not harmless" test in civil cases, matching it with the civil burden of proof.<sup>110</sup> This idea flies in the face of both Traynor's and *Kotteakos*'s logic,<sup>111</sup> both of which the *Haddad* court cited in immediately preceding sentences.<sup>112</sup>

The most fascinating aspect of the *Haddad* opinion is not its misguided reasoning and ambiguous citations to authority, but that it came to the same

100. *Haddad v. Lockheed Cal. Corp.*, 720 F.2d 1454, 1459 (9th Cir. 1983).

101. *Id.* at 1457.

102. *Id.* at 1457–59.

103. *Id.* at 1457.

104. *Id.* at 1458–59.

105. *Haddad*, 720 F.2d at 1459.

106. *See supra* notes 49–54 and accompanying text.

107. *Haddad*, 720 F.2d at 1459.

108. *Id.*

109. *Id.*

110. *Id.* Professor Saltzburg agrees with this distinction and argues it forcefully. Saltzburg, *supra* note 27, at 989.

111. *See Kotteakos*, 328 U.S. at 765; TRAYNOR, *supra* note 1, at 25.

112. *Haddad*, 720 F.2d at 1459.

result as *Kotteakos*.<sup>113</sup> Despite *Haddad*'s presumption of a necessary distinction between civil and criminal cases, the Ninth Circuit adopted a "fair assurance" test for criminal cases as well.<sup>114</sup> In *United States v. Hitt*, the Ninth Circuit discovered a split within the circuit at the time it was decided in 1992, with some courts using the "fair assurance" test, while others used a different test, reversing if an error is more probable than not harmless.<sup>115</sup> It is unclear whether the split mentioned was considered by the *Hitt* court to be exclusive to criminal cases, or applied to both criminal and civil cases.<sup>116</sup> However, at the time, civil cases were resolved using the "more probable than not" test.<sup>117</sup>

How are these two tests, *Haddad*'s "more probable than not" test and *Kotteakos*'s "fair assurance" test, reconciled in the Ninth Circuit? A subsequent Ninth Circuit case, *United States v. Brooke*, decided less than a year after *Hitt*, pointed out the split within the circuit and determined that the two standards are one and the same.<sup>118</sup> Thus, the *Haddad* court's misapplication of *Kotteakos* and Chief Justice Traynor's rules were harmless, as the Ninth Circuit eventually reached the result handed down in *Kotteakos*: that courts should decide the question using the "fair assurance" standard.<sup>119</sup>

#### D. Reconciling the Tests Used by the Two Circuits

Before beginning a comparison of the tests, it is worth noting at the outset that the circuits have sometimes not reached the question the harmless error statutes demand.<sup>120</sup> Some courts, in applying rules and statutes, simply decide that a failure to abide by them is reversible error without consideration of the

113. Compare *United States v. Felix-Jerez*, 667 F.2d 1297, 1304 (9th Cir. 1982), with *Kotteakos*, 328 U.S. at 765. The Riddle of Harmless Error rears its head again: should we consider the *Haddad* court's error in rationale in reaching its conclusion, or accept that it came to the "correct" result argued in *Kotteakos*?

114. That is, a Ninth Circuit appellate court can affirm only if there is a "fair assurance" that the error was harmless, which is the same test handed down in *Kotteakos*. See, e.g., *United States v. Webbe*, 755 F.2d 1387, 1389 (9th Cir. 1985); *Felix-Jerez*, 667 F.2d at 1304.

115. *United States v. Hitt*, 981 F.2d 422, 425 (9th Cir. 1992).

116. See *id.*

117. *Pau v. Yosemite Park and Curry Co.*, 928 F.2d 880, 888 (9th Cir. 1991); see also *Geurin v. Winston Indus., Inc.*, 316 F.3d 879, 882 (9th Cir. 2002). *Pau* also noted inconsistent treatment of the *Haddad* "more probable than not" standard in the civil arena. *Pau*, 928 F.2d at 888. This is a testament to the confusion rampant through the federal circuits as a result of the Supreme Court's refusal to create a workable standard for non-constitutional errors.

118. *United States v. Brooke*, 4 F.3d 1480, 1488 (9th Cir. 1993); see also *United States v. Crosby*, 75 F.3d 1343, 1349 (9th Cir. 1996). More recently, the Ninth Circuit uses both phrases in its test. See *United States v. 87.98 Acres of Land More or Less*, 530 F.3d 899, 907 (9th Cir. 2008).

119. *Brooke*, 4 F.3d at 1488.

120. See *supra* notes 43–44 and accompanying text.

prejudice of the parties.<sup>121</sup> Other courts have formulated their own specific rules governing how to resolve specific errors.<sup>122</sup> A trial judge's expression of opinion on an ultimate issue of fact in front of the jury will also be reversed as prejudicial without regard to harmless error analysis.<sup>123</sup> Evidentiary and jury instruction errors, because of their direct effect on the jury, are much more susceptible to harmless error analysis, and thus courts seem to apply the standard and attempt analysis on them more often than other types of errors.<sup>124</sup>

Facially, the "fair assurance/more probable than not" test is less stringent than the "highly probable" test of harmless error, but is there a practical difference in how the circuits execute the two tests? Instructive are two cases about the effect of erroneously admitted evidence of prior convictions on the jury when the plaintiff's character is key to his burden of proof.<sup>125</sup>

In the 2008 Ninth Circuit case *Simpson v. Thomas*, Simpson filed a civil claim seeking damages for mistreatment as a prisoner under 42 U.S.C. § 1983 and claimed that Thomas, a prison guard, used excessive force against him.<sup>126</sup> Simpson and Thomas's testimony understandably differed, and the jury was essentially asked to find a verdict based on whom they believed was more truthful.<sup>127</sup> Simpson filed a motion *in limine* to exclude his three prior arrests and incarcerations, each of which was more than ten years prior to the incident.<sup>128</sup> The trial court denied the motion *in limine*, and the prior convictions were admitted.<sup>129</sup>

121. See, e.g., *Grider v. Keystone Health Plan Cent., Inc.*, 580 F.3d 119, 139–140 (3d Cir. 2009) (overturning sanctions against counsel for trial judge's failure to consider the standard with which a certification can be made to excuse a violation of FED. R. CIV. P. 26(g)).

122. See, e.g., *Barry v. Bergen Cnty. Prob. Dep't*, 128 F.3d 152, 163 (3d Cir. 1997) (setting out a specific three-element test for examining the effect on a verdict of impermissible publicity of a trial).

123. See *In re Aircrash in Bali, Indon.*, 871 F.2d 812, 815 (9th Cir. 1989).

124. See, e.g., *Smith v. Horn*, 120 F.3d 400, 416, 418 (3d Cir. 1997); *Hanna v. Riveland*, 87 F.3d 1034, 1038–39 (9th Cir. 1996) (applying a harmless error analysis to faulty jury instructions); see also *Neder v. United States*, 527 U.S. 1, 7 (1999) (stating there is a "limited class" of constitutional errors that defy harmless error analysis, but indicating that most appellate courts should apply a harmless error analysis).

125. See generally *Simpson v. Thomas*, 528 F.3d 685 (9th Cir. 2008) (finding reversible error where the trial court improperly admitted the plaintiff's three prior felony convictions because the outcome of the case depended on the credibility of the witnesses and which witness's version of the facts the jury believed); *Walker v. Horn*, 385 F.3d 321 (3d Cir. 2004) (finding harmless error in improperly admitting the plaintiff's prior convictions, despite credibility being a central issue).

126. *Simpson*, 528 F.3d at 686–87.

127. See *id.* at 687–88, 691.

128. *Id.* at 688.

129. *Id.*

On appeal, Simpson argued that the prior convictions impaired his credibility, prejudicing the jury against him.<sup>130</sup> The Ninth Circuit agreed that the trial court erroneously allowed the prior convictions into evidence and found that the error was not harmless under the “more probable than not” test.<sup>131</sup> The court paid special attention to the fact that the jury had to choose between two versions of the same events, making Simpson’s credibility an essential aspect of trial.<sup>132</sup> The jury clearly knew Simpson had committed one crime because he was in jail, but “the knowledge that he had at least three other felony convictions likely prejudiced the jury against Simpson and made them more likely to question his credibility.”<sup>133</sup> It is important to note that the opinion dispensed with the harmless error problem in only a paragraph.<sup>134</sup> Thus, the Ninth Circuit found, under their “more probable than not” standard of review, that the admission of prior convictions in this case was not harmless error.<sup>135</sup>

In an analogous 2004 Third Circuit case, *Walker v. Horn*,<sup>136</sup> plaintiff-prisoner Walker brought suit under 42 U.S.C. § 1983, alleging that his First, Eighth, and Fourteenth Amendment rights were violated when he was forced by prison officials.<sup>137</sup> While imprisoned, Walker began a religious fast that he planned to continue for as many as fifteen days.<sup>138</sup> In response, prison officials obtained a court order to force-feed him to prevent him from dying.<sup>139</sup> They removed him from his cell, restrained his feet, hands, chest, and head, forced nasogastric tubes into his nose and throat, and force-fed him.<sup>140</sup>

Walker testified that he told the attending physician, Dr. Lasky, that he was fasting for religious reasons, but would eat voluntarily to avoid being force-fed.<sup>141</sup> Dr. Lasky denied that this occurred.<sup>142</sup> At trial, counsel for Dr. Lasky successfully moved to introduce Walker’s three prior convictions;<sup>143</sup> however,

130. Appellant’s Opening Brief at 36, *Simpson v. Thomas*, 528 F.3d 685 (9th Cir. 2008) (No. 07-16228).

131. *Simpson*, 528 F.3d at 691.

132. *Id.*

133. *Id.*

134. *See id.*

135. *Id.*

136. *Walker v. Horn*, 385 F.3d 321 (3d Cir. 2004).

137. *Id.* at 324, 326.

138. *Id.* at 324.

139. *Id.* at 325.

140. *Id.* at 326. Walker remained strapped to the table, feeding tubes inserted in his nose and mouth, for two days. *Id.* at 326–27.

141. *Walker*, 385 F.3d at 325–26.

142. *Id.* at 326.

143. *Id.* at 332.



the Third Circuit ruled the admissions as error.<sup>144</sup> Walker's argument, like Simpson's above,<sup>145</sup> was that his credibility was central to proving his claims of First and Eighth Amendment violations, because the jury had to evaluate who to believe.<sup>146</sup> According to Walker, "the robbery convictions were central to Lasky's efforts to discredit" Walker.<sup>147</sup> Further, Walker was the only witness who testified that he was fasting for religious reasons and that he offered to eat to avoid being force-fed.<sup>148</sup> Because the jury did not find either of these facts to be true, Walker argued the admission of the previous convictions prejudiced him by "significantly undermin[ing] his credibility" in front of the jury.<sup>149</sup>

The Third Circuit, in a discussion requiring several pages, disregarded Walker's argument and adopted Dr. Lasky's argument—that his counsel's reference to Walker's credibility was "limited," and that Walker had lied about being on a religious fast—to determine that the error was harmless.<sup>150</sup> Importantly, the court noted that there was inconsistent testimony about certain collateral facts, namely whether Walker was a vegetarian and enjoyed milk.<sup>151</sup> Further, the court also emphasized that the jury had been told that Walker had been to three prisons in the eight years since the incident, so there was ample evidence in the record to support that Walker had a substantial criminal record.<sup>152</sup> The Court then found the error to be harmless, and affirmed the dismissal of Walker's constitutional claim.<sup>153</sup>

The Ninth and Third Circuits, facing similar circumstances,<sup>154</sup> came to different results.<sup>155</sup> Both Walker and Simpson were the only witnesses

144. *Id.* at 334.

145. *See supra* notes 132–33 and accompanying text.

146. *Walker*, 385 F.3d at 334.

147. *Id.* at 335. Specifically, "Walker contends that [Dr.] Lasky's counsel told the jury that they needed to consider Walker's credibility while deliberating reminding them that Walker had been 'convicted of crimes of dishonesty nine times, the robberies.'" *Id.* Dr. Lasky's counsel sought to admit the convictions under FED. R. EVID. 609(a)(2), which includes what are known as *crimen falsi*, or crimes "the commission of which involves some element of deceit, untruthfulness, or falsification bearing on the accused's propensity to testify truthfully." *Id.* at 332–33.

148. *Id.* at 326, 334, 336.

149. *Id.* at 335.

150. *Id.* at 334–36.

151. *Walker*, 385 F.3d at 336.

152. *Id.*

153. *Id.* at 336–37.

154. Admittedly, the factual scenario in *Walker* was more involved because there was more conflicting testimony between Dr. Lasky and Walker, as well as Walker's own conflicting testimony and slightly more evidence against his credibility. *See id.* at 334–36. However, the cases raise the same issues in applying to the test of harmless error to the facts. *See supra* notes 126–53 and accompanying text.

testifying to facts in their favor, had previous convictions to impeach their credibility admitted erroneously, and relied on their credibility to prove their claims.<sup>156</sup> The Third Circuit, presumably because it faced a higher standard that it did not feel was met, brushed off Walker's contentions that Dr. Lasky's improper reliance on the convictions eroded Walker's credibility in front of the jury.<sup>157</sup> Instead, the Third Circuit agreed with Dr. Lasky that a mere "passing reference" to the robberies could not have affected Walker's credibility in light of the other evidence against him.<sup>158</sup>

The length and particularity of the courts' analysis also shows a discrepancy between the tests used.<sup>159</sup> The more lenient test allowed the Ninth Circuit to swiftly (perhaps too swiftly, without the thoughtfulness contemplated in *Kotteakos*) judge the error as being harmless.<sup>160</sup> In contrast, the Third Circuit's more demanding standard of harmlessness required a more detailed analysis to ensure that the threshold of harmlessness had not been reached.<sup>161</sup> Thus, the tests used in the Third Circuit and the Ninth Circuit differ in their application, at least with regard to erroneous admission of prior convictions.<sup>162</sup>

## II. ANALYSIS OF THE TWO TESTS: WHICH COURT IS CORRECT?

### A. *Supreme Court and Commentator Guidance*

The determination that the tests used in the two circuits differ in application next begs the question: Which circuit, if either, has adopted the correct standard? The question should be framed by the competing values discussed above.<sup>163</sup> On one hand, our justice system places immense importance on the jury's role in adjudicating disputes, so courts should be wary of infringing on their role in any manner.<sup>164</sup> This is what led early courts to reverse a decision with *any* finding of error, reasoning that an error necessarily

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155. See *supra* notes 135, 153 and accompanying text.

156. See *supra* notes 126–53 and accompanying text.

157. See *Walker*, 385 F.3d at 335–36.

158. *Id.* at 336.

159. See *supra* notes 134, 150 and accompanying text.

160. See *Simpson v. Thomas*, 528 F.3d 685, 691 (9th Cir. 2008).

161. See *supra* notes 150, 154 and accompanying text.

162. See *supra* notes 126–53 and accompanying text. One can imagine further evidentiary hypotheticals, where counsel for the party with the burden of proof relies on some piece of evidence that was improperly admitted. Depending on the facts of the case, such as the element to be proved or the existence of other evidence to prove the element, one could see how the error could reach the region between the activation of the different tests.

163. See *supra* Introduction and Part I.A.

164. See *supra* notes 2–5 and accompanying text.

has some effect on the jury, no matter how slight, and that this effect is unconscionable.<sup>165</sup> Further, Chief Justice Traynor points out that the parties to a lawsuit have a fundamental right to have their disputes settled justly, and justice cannot be equated with simply reaching the right result;<sup>166</sup> “justice” is fundamental to the process.<sup>167</sup>

On the other hand, pushing against the role of the jury trial are more practical considerations of judicial economy and the cost to society of repeat trials.<sup>168</sup> Trials should not be repeated with society bearing the cost when it is likely that the result will be the same. Whereas fundamental fairness to litigants is a right to an unprejudiced jury, society’s right to fundamental fairness is an efficient resolution of disputes.<sup>169</sup> Society, through its current and future litigants, has an interest in moving cases through the system as efficiently as possible.<sup>170</sup> These litigants also have an interest in predictability and consistency in preparing for and arguing their grievances.<sup>171</sup> A circuit split is directly contrary to these goals of predictability and consistency. A court applying the “wrong” test and erroneously remanding trials also hinders this notion of judicial economy.<sup>172</sup>

Determining the correct standard must also take into consideration the difficulty of the task presented. Is it not more proper for the test to be framed by the principles that govern its rationale, rather than subtle differences in verbiage, which lead to both different result and different analyses? When framed by the principles which govern its rationale, the appropriate standard for judging the harm caused by an error is the point at which, after the dust settles, the two sides meet.

Guidance from sources of authority for a definitive rule is nebulous at best. No harmless error statute offers guidance for formulating a standard.<sup>173</sup> The statutes speak in terms of “substantial rights,” but do not attempt to define

165. See *supra* notes 8–9, 32–34 and accompanying text.

166. TRAYNOR, *supra* note 1, at 17–19.

167. *Id.* at 17. Chief Justice Traynor also uses a convenient term, which will be adopted for this discussion, to describe the movement between different tests that lie along the spectrum of probability: the sliding scale of probabilities. *Id.* at 33.

168. See Charles F. Campbell, *An Economic View of Developments in the Harmless Error and Exclusionary Rules*, 42 BAYLOR L. REV. 499, 502, 504 (1990).

169. See *id.* at 504.

170. Fairfax, *supra* note 9, at 2061–62 (“Efficiency was a central complaint of those early twentieth-century reformers sponsoring the adoption of the harmless error rule in America, and the preservation of strained adjudication resources remains a key rationale for the halting expansion of the category of structural error.”).

171. See Campbell, *supra* note 168, at 503.

172. When referencing “society’s costs” later in this Note, these are the “costs” that are referred to.

173. See *supra* notes 15–18, 36 and accompanying text.

those rights, or identify which are “substantial.”<sup>174</sup> Two prominent authorities, *Kotteakos* and Chief Justice Traynor, disagree in their application.<sup>175</sup> *Kotteakos* suggests the “fair assurance”<sup>176</sup> standard, which the Ninth Circuit equates with the “more probable than not” test, approximating fifty-one percent certainty.<sup>177</sup> In contrast, Chief Justice Traynor is more comfortable with the “highly probable” test.<sup>178</sup> Chief Justice Traynor believes that “[a]ny test less stringent entails too great a risk of affirming a judgment that was influenced by an error.”<sup>179</sup>

Admittedly, *Kotteakos* did not set out to create a definitive standard for judging harmless error.<sup>180</sup> Instead, it attempted to provide suggestions with which to approach the question, pushing appellate courts to use their judgment in deciding the error’s effect on a case-by-case basis.<sup>181</sup> The Court’s suggestions in *Kotteakos* are extensive and extremely helpful, despite not providing a bright line.<sup>182</sup> They follow a discernable theme: temperance in making a judgment of error.<sup>183</sup> The suggestions call for a holistic balancing of

174. See, e.g., 28 U.S.C. § 21811 (2006) (“On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties.”); FED. R. EVID. 103(a) (“Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected . . .”).

175. Compare *Kotteakos v. United States*, 328 U.S. 750, 765 (1946) (implementing a “fair assurance” standard), with *TRAYNOR*, *supra* note 1, at 35 (advocating for a “highly probable” test).

176. *Kotteakos*, 328 U.S. at 765. For purposes of this section, the “fair assurance” test will be treated as it is in the Ninth Circuit as being equivalent to the “more probable than not” test. See *United States v. Hitt*, 981 F.2d 422, 425 (9th Cir. 1992).

177. See *supra* notes 23, 63–65 and accompanying text.

178. *TRAYNOR*, *supra* note 1, at 35.

179. *Id.*

180. This can be seen by its suggestion, and subsequent adoption, of several different tests. See *supra* note 54.

181. *Kotteakos*, 328 U.S. at 761–62.

182. The specific suggestions are not crucial to understanding the basic principle of balance, but for the sake of understanding and disclosure, they will be listed here. “The general object was simple: To substitute judgment for automatic application of rules; to preserve review as a check upon arbitrary action and essential unfairness in trials, but at the same time to make the process perform that function without giving men fairly convicted [a] multiplicity of loopholes . . .” *Id.* at 759–60; “Do not be technical, where technicality does not really hurt the party whose rights in the trial and in its outcome the technicality affects.” *Id.* at 760; “[I]t is not the appellate court’s function to determine guilt or innocence . . . [n]or . . . to speculate upon probable reconviction and decide according to how the speculation comes out. Appellate judges cannot escape such impressions. But they may not make them sole criteria for reversal or affirmance.” *Id.* at 763. “But this does not mean that the appellate court can escape altogether taking account of the outcome. To [do this] . . . would be almost to work in a vacuum.” *Id.* at 764.

183. See *id.* at 761–62.

the record, the surrounding circumstances of the error, *stare decisis*, and what is at stake upon the outcome.<sup>184</sup> *Kotteakos* stands for the proposition that justice is a balance in finding a fair result.<sup>185</sup> A “fair result” serves the competing goals discussed above:<sup>186</sup> do not deny a litigant his right to an equitable trial, but do not allow him to escape a result that justice compels. These adverse goals and the hypothetical nature of the task make determination of error extremely difficult,<sup>187</sup> and trenchant temperance is the weapon against this difficulty.

*Kotteakos* recognized this difficulty by compelling courts to “ponder[] *all that happened* without stripping the erroneous action from the whole . . . .”<sup>188</sup> “[Courts] must take account of what the error meant to [the jury], not singled out and standing alone, but in relation to all else that happened.”<sup>189</sup> This simple suggestion flows from the Court’s idea of temperance. *Kotteakos*’s suggestions follow a discernable pattern of balancing justice and fairness in harmless error determination: “do this, but not this;” “an appellate court may do this, but not every time.”<sup>190</sup> This admonition of caution and temperance to lower courts makes the insidiously difficult judgment of harmfulness of error fluid and practical. It implicitly promotes the idea that “[a litigant] is entitled to a fair trial but not a perfect one . . . .”<sup>191</sup> By framing the analysis of harmless error in competing values, the Court concluded that a test balanced in its application is the best way to judge harmless error.<sup>192</sup> This argument is made even more forceful because *Kotteakos* was interpreting a command by Congress: the federal harmless error statute.<sup>193</sup>

Chief Justice Traynor argues that a test “less stringent [than the “highly probable” test] entails too great a risk of affirming a judgment that was

184. *Id.* at 762.

185. *See id.* at 764–65.

186. *See supra* notes 41, 44 and accompanying text.

187. *Kotteakos* fully recognizes the enormous difficulty associated with the determination: “[The determination] cannot ever be wholly imprisoned in words, much less upon such a criterion as what are only technical, what substantial rights [sic]; and what really affects the latter hurtfully. Judgment, the play of impression and conviction along with intelligence, varies with judges and also with circumstance. What may be technical for one is substantial for another; what minor and unimportant in one setting crucial in another.” *Kotteakos*, 328 U.S. at 761.

188. *Id.* at 765 (emphasis added).

189. *Id.* at 764.

190. *See id.* at 763–65.

191. *Brown v. United States*, 411 U.S. 223, 231 (1973) (quoting *Lutwak v. United States*, 344 U.S. 604, 619 (1953)).

192. *See Kotteakos*, 328 U.S. at 765.

193. *Id.* at 757. The federal harmless error statute, codified in *Kotteakos* in 28 U.S.C. § 391 (1940), is now codified in 28 U.S.C. § 2111 (2006). *See also supra* notes 36, 43 and accompanying text.

influenced by an error.”<sup>194</sup> However, this standard is less straightforward than *Kotteakos*’s “fair assurance” requirement. The “fair assurance” standard places the bar of the court’s judgment at more probable than not, an easily discernable standard of just beyond equipoise (in probability terms, fifty-one percent).<sup>195</sup> In contrast, the “highly probable” test leaves no such assurance of a discernable bar. This can, and does, lead courts astray in their analysis.<sup>196</sup>

Walker and Simpson had similar cases to prove.<sup>197</sup> Following *Kotteakos*’s balancing of ideals, it seems clear that where a litigant’s credibility is central to proving his case, as it was in both *Simpson* and *Walker* in their Section 1983 suits,<sup>198</sup> any improper impeachment against this credibility could prejudice the jury and influence their verdict. The result is suspect because the error went to a fundamental element of the case.<sup>199</sup> The Ninth Circuit quickly came to this conclusion in *Simpson*.<sup>200</sup>

The Third Circuit, however, did not.<sup>201</sup> Instead of disposing with this case using its tempered judgment, the court set about analyzing the evidence against Walker and accepted Dr. Lasky’s conclusion that any error in admitting the prior convictions was harmless given the jury’s knowledge that Walker had been imprisoned before.<sup>202</sup> While *Kotteakos* accepts some consideration of the evidence,<sup>203</sup> the principle determination is the error’s effect on the minds of the jury.<sup>204</sup> In trying to evaluate the prior convictions’ prejudicial effect by its higher standard, the Third Circuit incorrectly placed heavy importance on the existence of corroborating impeachment evidence.<sup>205</sup> It mistook a higher standard as requiring a more particularized and in-depth analysis, and came to

194. TRAYNOR, *supra* note 1, at 35.

195. *Supra* note 177 and accompanying text.

196. Compare *Simpson v. Thomas*, 528 F.3d 685, 691 (9th Cir. 2008) (finding reversible error where the trial court improperly admitted the plaintiff’s three prior felony convictions because the outcome of the case depended on the credibility of the witnesses and which witness’s version of the facts the jury believed), with *Walker v. Horn*, 385 F.3d 321, 334–37 (3d Cir. 2004) (finding harmless error in improperly admitting the plaintiff’s prior convictions, despite credibility being a central issue). See also notes 126–53 and accompanying text.

197. See *supra* notes 126–53 and accompanying text.

198. See *supra* notes 126–27, 137 and accompanying text.

199. See *Simpson*, 528 F.3d at 691; *Walker*, 385 F.3d at 334.

200. *Simpson*, 528 F.3d at 691.

201. *Walker*, 385 F.3d at 336.

202. *Id.*

203. See *supra* note 184 and accompanying text.

204. See *Kotteakos v. United States*, 328 U.S. 750, 764 (1946) (“[Courts] must take account of what the error meant to [the jury], not singled out and standing alone, but in relation to all else that happened.”).

205. See *Walker*, 385 F.3d at 334–36.

an improper conclusion by examining the evidence.<sup>206</sup> A higher burden can compel courts to require more analysis justifying the conclusion. Eliminating this impractically higher and amorphous burden in exchange for a clearer standard will help alleviate divergent verdicts such as those in *Simpson* and *Walker*.

The role of the jury trial as a paramount priority for American courts, and by inference a higher standard to protect it, suggests that the “highly probable” standard is appropriate. One could argue that the jury’s role is of such importance that an “almost certainly harmless” test would be more appropriate, sliding the scale of probability of error to over ninety percent.<sup>207</sup> This argument, however powerful, is weakened by an equally valid point: that “technical errors” and errors not affecting the substantial rights of parties should not be reasons to overturn a jury verdict.<sup>208</sup> This opposite concern pushes the sliding scale back into the range of “highly probable.” Chief Justice Traynor stops his analysis at this point, settling on the “highly probable” test.<sup>209</sup> What he fails to take into account is another concern competing against the jury’s role: that a court may mistake a higher standard to require more analysis, specifically an impermissibly detailed consideration of the evidence.<sup>210</sup>

The “fair assurance” test best balances these competing objectives. Justice Rutledge recognized this feature in *Kotteakos* as he balanced the competing dangers of harmless error analysis.<sup>211</sup> The discrepancy between *Walker* and *Simpson* shows that confusion of the analysis is a real concern, not one mired in theory.<sup>212</sup> Therefore, the “fair assurance” is the appropriate test to use when evaluating a trial error’s effect on the jury.

However, this does not end our inquiry into how appellate courts should analyze error. With cases like *Walker* and *Simpson*, what role should the weight of the evidence play in harmless error analysis?

#### B. Suggestion for an Alternative Test

Some harmless error cases include evidence presented in a conclusive manner; the evidence clearly commands affirmation of the verdict.<sup>213</sup> Despite

206. *Id.*

207. See *supra* notes 8–9.

208. Indeed, this is what *Kotteakos* found in interpreting the harmless error statute of the time, 28 U.S.C. § 391 (1940). See *supra* notes 43–44 and accompanying text.

209. TRAYNOR, *supra* note 1, at 35.

210. See, e.g., *Walker*, 385 F.3d at 334–36.

211. See *supra* notes 67–72 and accompanying text.

212. See *supra* notes 126–53 and accompanying text.

213. See, e.g., *Brown v. United States*, 411 U.S. 223, 231 (1973) (“Upon an independent examination of the record . . . [t]he testimony erroneously admitted was merely cumulative of

cautionary language from *Kotteakos*<sup>214</sup> and Chief Justice Traynor's argument against weighing the evidence,<sup>215</sup> *some* consideration or weighing of the evidence should be permitted.

A few of the considerations framing the inquiry into the appropriate test to judge the harmfulness of an error are semi-translatable into whether an appellate court can consider the weight of the evidence. Jury protection becomes a fierce consideration, as an appellate court, in weighing evidence, steps directly into the fact-finder's role and conducts a second "quasi-trial."<sup>216</sup> With such a significant emphasis on the right to a jury trial, the litigant's concern for fundamental fairness substantially outweighs society's concern for efficient resolution of disputes.<sup>217</sup> Chief Justice Traynor argues forcefully for an appellant's right to a fair trial.<sup>218</sup> In his view, "[a]n appellant whose right to a fair trial in a trial court has been vitiated should be accorded that right anew."<sup>219</sup> However, the concern for the jury's province and a litigant's right to a fair trial cannot totally erase society's right to the same. Therefore, some consideration of the evidence, even if based on a scintilla of society's right to fundamental fairness, is warranted.<sup>220</sup>

Chief Justice Traynor provides an interesting but perhaps foolhardy response to *Kotteakos*'s recognition of the difficulty in judging error at the trial court level: try harder.<sup>221</sup> However, a deficiency of will or failure to inquire properly is not always the problem plaguing a misapplying appellate judge. *Walker* is instructive.<sup>222</sup> Instead of Walker having three prior convictions

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other overwhelming and largely uncontroverted evidence properly before the jury. . . . We reject the notion that a *Bruton* error can never be harmless."); *Harrington v. California*, 395 U.S. 250, 254 (1969) ("[T]he case against Harrington was so overwhelming that we conclude that this [error] was harmless beyond a reasonable doubt . . .").

214. "The crucial thing is the impact of the thing done wrong on the minds of other men, not on one's own, in the total setting." *Kotteakos v. United States*, 328 U.S. 750, 764 (1946).

215. TRAYNOR, *supra* note 1, at 28.

216. *Id.* at 21.

217. *Id.* at 19.

218. *Id.* at 20.

219. *Id.* at 22.

220. The Supreme Court and other appellate courts seem to acknowledge this and take some consideration of the weight of the evidence presented at trial. *See, e.g., Int'l Mktg., Inc. v. Counteract Balancing Beads, Inc.*, 48 Fed. Appx. 372, 375 (3d Cir. 2002) ("We need not decide whether this was error, because even if the Court erred, given the other evidence in the case, the error was harmless."); *supra* notes 191, 213. However, some courts have refused to enter into this deliberation. *See, e.g., Arnold v. Runnels*, 421 F.3d 859, 869 (9th Cir. 2005) ("The question posed for us by [the *Kotteakos*] standard is not whether the evidence was sufficient or whether the jury would have decided the same way even in the absence of the error. The question is whether the error influenced the jury.").

221. *See* TRAYNOR, *supra* note 1, at 29–30.

222. *See supra* notes 136–53 and accompanying text.



entered in against him and labeled as *crimen falsi*, while the jury knows he has stayed at two separate federal penitentiaries, let us adjust the evidence slightly. Assume the more balanced factual scenario in which the jury has been told, through Walker's own testimony, that he has stayed at five different federal penitentiaries, presumably for five different federal offenses, and that, as in the actual case, three prior convictions for robbery were erroneously admitted. In such a case, how could the Third Circuit determine that the erroneous admission of the convictions was harmless without weighing the effect of the five imprisonments? Or, put another way, if the Ninth Circuit had heard this case and quickly judged the error to be harmful because the prior convictions affected Walker's credibility, how could it ignore the effect of the five imprisonments on the jury?

These considerations lead to a proposal of a hybrid, two part test.<sup>223</sup> First, an appellate court should make every effort to discern whether an error is harmless under the Ninth Circuit's "fair assurance" or "more probable than not" standard, taking care to stick to *Kotteakos* and Chief Justice Traynor's principles of considering the effect on the jury without weighing the evidence presented.<sup>224</sup> If the Court determines the error is harmless, its analysis is complete and the verdict stands. If, however, it cannot find, with fair assurance, that the error is harmless, or that the error is such that a determination of its effect on the jury is speculative or will not yield to rational analysis, it continues to the second part of the test. If the evidence is so overwhelming, total, or uncontradicted such that a repeat trial will almost certainly yield the same verdict, then the error can be said to be harmless and the verdict affirmed. This should be true except when the magnitude of the non-constitutional error is such that the interests of justice or deterrence of prominent, common, or significantly undesirable errors at the trial level pray for a retrial.

This lengthy test best preserves all of the competing values of fundamental fairness and practical concerns for efficiency and validity.<sup>225</sup> By making every effort to find an error harmless without considering the evidence, the court has done what it can to prevent infringing on the jury's province. It is compelled to do so with all of the guidelines *Kotteakos* has delineated.<sup>226</sup> By giving

223. This test resembles one examined but rejected by Gregory Mitchell. Mitchell, *supra* note 27, at 1345–46, 1368.

224. See *Kotteakos*, 328 U.S. at 763–64 (“[T]he question is, not were they right in their judgment, regardless of the error or its effect upon the verdict. It is rather what effect the error had or reasonably may be taken to have had upon the jury’s decision.”); TRAYNOR, *supra* note 1, at 28 (“[T]he crucial question is not whether there is substantial evidence to support the judgment, but whether error affected the judgment.”).

225. See *supra* notes 164–72 and accompanying text.

226. See *supra* notes 180–92 and accompanying text.

preference to this prong of the test, this harmless error analysis also gives deference to the jury's role in disputes. Subordinate to this concern is society's right to an efficient resolution of claims, embodied in the power of appellate courts to ignore the error in the face of evidence that is not just overwhelming, but total or uncontradicted. This idea acts as an extension of the harmless error statutes by not allowing reversal unless an error affects a substantial right of a party.<sup>227</sup> An error cannot be said to affect a substantial right in the face of overwhelming, total, or uncontradicted evidence, such that a repeat trial will almost certainly yield the same verdict.

The test, while infringing on the verdict by second-guessing the jury's determination, has such a high standard that near certainty is required. This certainty helps alleviate any concerns of invading on the jury's province. Furthermore, *Kotteakos* does not completely bar consideration of the evidence in evaluating error.<sup>228</sup> It permits an inclusion of the weight of evidence in analysis, but urges temperance.<sup>229</sup> Such a high standard is in accord with this temperance.

Additionally, after weighing the evidence to decide if it reaches the high burden, courts have the authority to guard against abusive errors in their circuits. Thus, they may decide that an error is so undesirable or has become so common in practice that reversal is warranted to dissuade repetition in the future.<sup>230</sup> For example, if errors in admitting prior convictions in section 1983 suits become too numerous or prominent, the appellate court could simply categorically reverse the judgment after finding error, signaling to trial courts that they are not resolving these questions correctly.

Lastly, and perhaps most importantly, situations such as the hypothetical based on *Walker*,<sup>231</sup> as well as *Walker* itself,<sup>232</sup> are more clearly and reliably analyzed. First, when placed in the uncomfortable position of evaluating an error that is not immediately subject to harmless error analysis, using exclusively the "effect on the jury" test, appellate courts may make the

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227. See *supra* notes 16–18, 20 and accompanying text.

228. *Supra* notes 67–72 and accompanying text.

229. "[I]t is not the appellate court's function to determine guilt or innocence. Nor is it to speculate upon probable reconviction and decide according to how the speculation comes out. Appellate judges cannot escape such impressions. But they may not make them sole criteria for reversal or affirmance." *Kotteakos*, 328 U.S. at 763 (internal citations omitted).

230. This was a concern of Chief Justice Traynor's when finding evidence to be overwhelming, despite the existence of error. TRAYNOR, *supra* note 1, at 22–23. He reasoned that the deterrent effect of such errors will be lost if they are found to be harmless because of overwhelming evidence. *Id.* Appellate judges' power to manage the errors committed in their circuit eases this concern.

231. See *supra* text following note 222.

232. See *supra* notes 136–53 and accompanying text.

determination with little weighing of the evidence, using the first prong of the test; they may then move on to a consideration of the evidence according to the standard, with their minds at ease. Thus, when courts are compelled, due to the evidence in the record or the nature of the error, to consider the evidence in some fashion, as the Third Circuit seemed to be in *Walker*,<sup>233</sup> they may do so by utilizing this uniform, tempered logic.

The test will ensure that splits like those in *Simpson* and *Walker* will not continue. If the test described above had been used in both cases, they would have come out the same way. Given that *Walker* had more evidence against him than *Simpson*,<sup>234</sup> the Third Circuit presumably felt compelled to consider the evidence more so than the Ninth Circuit. The test described above allows it to do so in a manner consistent with its sister circuits. The Ninth Circuit would have had an equally easy time with this test as it did with its own. Had the Third Circuit considered *only* the prejudicial effect of the evidence and the fact that Walker's credibility was central to his case (as in *Simpson*), and not weighed the evidence as it did, it would most likely have found the admissions harmful under the "fair assurance" test. However, it then would have had the occasion to weigh the evidence using the "overwhelming, total, or uncontradicted, such that a repeat trial will almost certainly yield the same verdict" test. Reasonable contemplation would then say that knowledge of two imprisonments, as well as other inconsistent impeachment testimony, is not "overwhelming, total, or uncontradicted" in a way that shows Walker was not telling the truth about the incident.<sup>235</sup>

Thus, the lengthy test described above will solve several of the problems plaguing the current harmless error framework, as well as balance the competing concerns that define the doctrine.

#### CONCLUSION

It is difficult to imagine a legal doctrine as important to issues of fundamental fairness as the analysis of harmless error. It is a headline conundrum, bounded on each end by a litigant's and society's right to fundamentally fair and efficient resolution of disputes. The question is not specific to criminal or civil litigation, as both types of litigants are equally deserving of this fundamental fairness. The complexity and difficulty in balancing these principles has led to sparse authority from the Supreme Court for the standard used to judge the harm caused by a trial error. This lack of

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233. See *supra* notes 136–53 and accompanying text.

234. See *supra* notes 126–53 and accompanying text.

235. This raises the interesting question of whether impeachment testimony, given its position as non-substantive evidence, can ever be so "overwhelming, total, or contradicted" such that the test can be satisfied.

definitive authority, in turn, has caused conflict between the tests used by the Third and Ninth Circuits (as well as others) in both verbiage and their practical consequences.<sup>236</sup> Evaluating the principles that guide our justice system will help in choosing which test to use.

The Supreme Court, through Justice Rutledge in *Kotteakos*, approached the problem in just this way. It acknowledged the challenge of harmless error analysis, and sought to balance the principles of fundamental fairness and efficiency by advocating sound, rational judgment and temperance in considering an error's harm.<sup>237</sup> The results of this precarious balancing act necessitate a median standard, one that is clearly delineated and lies between the competing objectives. The danger of coming to any other conclusion is confusion among the courts in applying a higher standard. As in *Walker*, a court may mistake a higher standard as demanding a more thorough analysis of the evidence presented.<sup>238</sup> Under *Kotteakos*, this concern is relevant, but cannot be the only, or indeed the most important factor in reaching a conclusion.<sup>239</sup> With these concerns in mind, the appropriate test is whether an appellate court can say, with fair assurance<sup>240</sup> that an error has not contributed to the jury's verdict.

With the concerns of fundamental fairness to society and future litigants factoring into a proper harmless error analysis, some consideration of the evidence is warranted to ensure that clearly correct verdicts are not retried. This causes confusion among future litigants and hinders judicial economy. Thus, some modification of the traditional test is in order. First, an appellate court will use the "fair assurance" test to determine whether an error is harmless. If the error is harmless, the analysis is complete. However, if the court finds that the error is harmful, it moves on to the second element of the test. There, an appellate court affirms a verdict, despite error, if the evidence is so overwhelming, total, or uncontradicted that a repeat trial will almost certainly yield the same verdict. There is, however, an exception: if the non-constitutional error is such that the interests of justice and fundamental fairness or deterrence of prominent, common, or significantly undesirable errors at the trial level pray for a remand of the case. This test puts to rest the ambiguity caused by the Supreme Court's silence, and resolves the confusion among the federal circuits as to how to analyze the harmfulness of trial error. In the end, appellate courts must be guided by the principles that have shaped our justice

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236. See *supra* Part I.D.

237. See *supra* notes 46–72 and accompanying text.

238. See *supra* note 206 and accompanying text.

239. See *supra* notes 188–90 and accompanying text.

240. Put another way, an appellate court can affirm if it is "more probable than not" that the error was harmless.

system. Yet they must, in reviewing trial error, specifically recall the most understated (and admittedly cynical) of these: “[A] defendant is entitled to a fair trial but not a perfect one,’ for there are no perfect trials.”<sup>241</sup>

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241. *Brown v. United States*, 411 U.S. 223, 231–32 (1973) (quoting *Lutwak v. United States*, 344 U.S. 604, 619 (1953)).

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