

The Challenge of Harmless Error

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One of the ways we can understand the debate over the proper uses of the harmless error doctrine is in terms of the traditional distinction in moral philosophy between consequentialism and non-consequentialism. Consequentialism (or teleology, as it was once known) holds that the rightness or wrongness of actions should be determined by a comparative assessment of their consequences. Non-consequentialism (or deontology, as it is also known) asserts that there are certain kinds of acts that are wrong in themselves, and thus provide a morally unacceptable means to the pursuit of any ends, including ends that may otherwise be morally attractive.¹

A consequentialist looking at the question of harmless error would say that appellate courts should decide whether to reverse a conviction by considering the effect of the claimed procedural error. If the error can be shown to have affected the outcome of the trial, then reversal would be appropriate. But if the verdict would have been the same regardless of whether the error had ever been committed, there is no reason to reverse, since the error was, in effect, morally irrelevant. Indeed, the consequentialist would say that reversing an error that, by hypothesis, had no effect on the outcome of the trial would lead to affirmatively bad consequences—including a wasteful and redundant second trial that would likely end the same way as the first.

A non-consequentialist would view the issue quite differently. The non-consequentialist would say that when a trial error results in the violation of a defendant's procedural rights, then those rights should be (in Ronald Dworkin's famous phrase) taken seriously, regardless of whether the violation actually affected the trial's outcome. Indeed, as Dworkin has argued, for a right against the government to be meaningful, considerations of general social utility alone must be inadequate to authorize the state to override it.² And, the non-consequentialist would say, one of the clearest and most straightforward ways of taking such rights seriously would be to reverse the conviction and require the defendant to be tried again, this time with his rights restored.

So how is one to decide between these two approaches? The traditional argument against consequentialism is that it allows (indeed, requires) agents to do horrific acts (such as rape and torture) so long as they will produce the best

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1. For a helpful introduction to these concepts, see Samuel Scheffler, *Consequentialism and its Critics* (1988); Nancy (Ann) Davis, *Contemporary Deontology*, in *A Companion to Ethics* 205 (Peter Singer, ed. 1991); Philip Pettit, *Consequentialism*, in *A Companion to Ethics* 230 (Peter Singer, ed. 1991). The most common form of consequentialism is utilitarianism, which holds that we should judge actions according to their ability to promote utility, happiness, or pleasure.

2. Ronald Dworkin, *Taking Rights Seriously*, in *Taking Rights Seriously* 191 (1977).

overall consequences.³ Yet such *reductio ad absurdum* arguments seem not to apply in the context of harmless procedural error, where the evidence against the defendant is considered so strong that, absent the procedural error, the defendant would nevertheless have been convicted.

On the other hand, the idea that serious violations of a defendant's rights—procedural “errors” as we euphemistically call them—should go unremedied simply because the appellate court believes (with the benefit of counterfactual hindsight) that they had no impact on the outcome of the trial is a troubling one. The fact that the defendant's rights were violated, one might think, should be harm enough to justify reversal.

By itself, the choice between consequentialism and non-consequentialism, though perhaps instructive, seems unlikely to resolve the practical complexities of the harmless error doctrine. In what follows, I would like to mention three additional considerations that ought to play a role in the development of any comprehensive theory of harmless error.

My first point is that we need to consider the role of appellate courts in a common law system. The most obvious function of appellate courts is to identify errors and, where appropriate, to make corrections. In this manner, appellate courts are concerned with the impact of their decisions on the litigants in the particular case *sub judice*. But common law adjudication also reflects a second vital function. In the common law system, appellate courts formulate law that will apply in future cases. As one scholar has put it, they “enrich the supply of legal rules.”⁴

When an appellate court holds that a lower court has erred, it has a significant opportunity (even an obligation) to identify, articulate, and analyze the nature of that error. Through the publication of appellate decisions, trial courts are put on notice that such conduct constitutes error and other appellate courts have precedent to guide them in future decisions. The fact that a trial court's error was harmless on the facts of a particular case need not affect the precedential value of the court's determination that there was in fact error. Applying the law developed in such a decision to a subsequent case in which a similar error has occurred, a court could well determine that the subsequent error was not harmless.

It might even be argued that the harmless error doctrine has the potential to promote judicial candor and integrity. In a society that perceives itself as besieged by crime, appellate courts are under terrific pressure to uphold criminal convictions. Many judges apparently fear that reversing a conviction on the basis

3. See, e.g., Thomas Nagel, *War and Massacre*, in *Mortal Questions* 53-74 (1979). An analogous argument that one often sees in the context of substantive criminal law is that strict adherence to consequentialism would lead to the perverse conclusion that, so long as sufficient deterrence would be achieved, we should impose severe punishments for minor offenses and require that those who are known to be innocent be convicted.

4. Melvin A. Eisenberg, *The Nature of the Common Law* 4 (1988).

of a "technicality" will create the impression that they are "soft on crime."⁵ This is particularly so in states, like Louisiana, with popularly elected judges and a politically conservative electorate. To require a judge to reverse in every case in which she finds error might well create a perverse incentive against finding error in the first place. In theory, the harmless error doctrine should free up appellate judges to consider the merits of the alleged violation on its own terms, before considering the ultimate disposition of the case. Even if a judge ultimately decides to affirm the conviction, she can preserve the integrity of the common law by writing a decision that fully explains the nature of the violation that occurred.

Second, while acknowledging the importance of the appellate court's prospective lawmaking function, we need also to recognize the effect on the defendant in the case under consideration. In particular, we need to appreciate the significant difference between decisions rendered by juries (who hear the witnesses and view the evidence at the time of the trial) and decisions rendered by appellate judges (who must engage in inherently speculative counterfactual thinking about what such juries *might have done* if only various trial errors had not occurred). By allowing judges to uphold convictions by jurors who were improperly deprived of exculpatory evidence or improperly instructed on the elements of an offense based on the appellate judges' belief that such jurors *would have* reached the same verdict even without such errors requires judges to put themselves in the place of the jurors, and thereby creates the danger that the constitutionally prescribed role of the jury might be undermined.

Finally, in order to understand the full significance of the harmless error doctrine, we need to keep in mind that different kinds of rights further different kinds of interests. Some rights—such as the right to obtain exculpatory evidence from the government, the right against having one's confession coerced, and the right to have the jury instructed on each element of the offense—are largely intended to ensure the accuracy of the verdict. Other rights—such as the right to have unlawfully seized evidence excluded from trial, and the right to have a grand jury selected in a race neutral fashion—serve other goals, such as protecting privacy, preserving the dignity of the defendant, promoting equal protection, and preventing police and prosecutorial abuse. Although their importance is undisputed, such rights have little or nothing to do with the search for truth. Indeed, the exercise of such rights often has the tendency to *impair* the search for truth.⁶

5. E.g., Mark Hamblett, *Federal Judge Gave In to Pressure in Suppressing Cocaine*, *Lawyer Claims*, *Crim. J. Weekly*, June 29, 1999, at 120 (reporting on appellate arguments in case in which District Judge Harold Baer allegedly gave in to political pressure by reversing his own prior decision to suppress).

6. A similar argument is discussed at length in Tom Stacy & Kim Dayton, *Rethinking Harmless Constitutional Error*, 88 *Colum. L. Rev.* 79, 98-106 (1988), but seems to have had little impact in the courts.

With respect to the first category of rights—those that are intended primarily to promote truth—the machinery of harmless error analysis is properly employed. Indeed, to fail to consider the possibility of harmless error would be to undermine the very goal that these rights are intended to further. But when the purpose of the rights violated relates to matters *other than* the accuracy of the verdict, it makes little sense to apply a doctrine triggered by a finding that the accuracy of the verdict was not compromised. To forgive the violation of such rights simply because they had no impact on the accuracy of the verdict would be a bit like canceling a patient's planned heart surgery simply because his cancer had gone into remission. We may be relieved to learn that the truth-finding function of the trial was not impaired, but we need still to honor those rights that further goals other than the promotion of truth.

In sum, the problem of harmless error is not susceptible to any easy, one-size-fits-all resolution. A system without some allowance for harmless error would be paralyzed by the need to retry every case in which even trivial error occurred. Yet a system that applied the harmless error doctrine indiscriminately would offer little but lip service to the notion that procedural rights be taken seriously. The challenge of harmless error, then, is to develop a doctrine sufficiently flexible to accommodate the most pressing demands of both the consequentialist and the non-consequentialist.