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Chapman v. California [1] held that federal constitutional error in a state criminal proceeding does not require reversal if the state can establish that the error was harmless. [2] Writing about Chapman several years after it was decided, Professor Daniel J. Meltzer observed that in fact the case had decided two propositions: first, that constitutional errors can be deemed harmless; and second, that federal law determines the issue of harmlessness. [3] Professor Meltzer then focused exclusively on the second proposition, concluding that it was sound. [4] In this Article, we focus on the first. We will demonstrate that harmless error doctrine is conceptually incoherent. We argue that in view of this incoherence, constitutional errors ought not to be subject to harmless error review. In short, Chapman should be overruled.

Something is harmless if it causes no injury. If I shoot someone dead and then, after my victim has died, proceed to kick him in the ribs with my steel-toed boots, it would be apt to say that the kick was harmless: Because the person was already dead, the kick did no harm. The question we examine in this Article is whether a violation of constitutional rights that occurs during a criminal trial can ever be like a kick to the ribs of a dead man: Can it ever be harmless? The answer, as we will show, is that nobody knows. Or, put somewhat more precisely, the question has no coherent answer. Errors of constitutional magnitude should therefore not be subject to harmless error analysis. Instead, when a constitutional violation occurs, the verdict (or sentence) must be set aside.

Harmless error doctrine rests on a rickety and unsound philosophical and conceptual foundation. Our primary objective in this Article is to demonstrate why that is so. Nevertheless, we recognize that the cost of abjuring harmless error analysis altogether would be exceedingly high, for, as Chief Justice Rehnquist has noted, "harmless error review has become an ***484** integral component of our criminal justice system." [5] It is certainly true that, if criminal trials merited reversal whenever any error transpired during the course of the litigation, then cases would be reversed almost continually. Consequently, we do not argue that harmless error doctrine be done away with altogether; we simply argue that in view of its conceptual defects, it should be banished in criminal cases where errors of constitutional magnitude are involved. Employing a questionable mode of analysis may be justifiable on pragmatic grounds where it offends no serious values, but where the values offended are of constitutional dimension, the use of such analysis ought not to be countenanced.

The structure of the argument is as follows: In Part 1 we review the harmless error cases. Next, in Part 2, which comprises the core of the argument, we maintain that harmless error review is a form of counterfactual analysis; such analysis implicates extremely difficult philosophical problems, yet harmless error doctrine is entirely inattentive to these complexities. Finally, in Part 3, we turn to an elucidation of what Justice Scalia refers to as "the rule of law," and we suggest that, as a normative matter, the rule of law is inconsistent with harmless error analysis.

1. Harmless Error

Since the early 1990s, the Supreme Court has concluded that constitutional violations that occur during the course of a criminal proceeding fall into one of two categories.[6] They are either structural defects or trial errors.[7] If an error constitutes a structural defect, then it requires automatic reversal.[8] If it is simply a trial error, however, it must be subjected to harmless error analysis.[9]

In point of fact, this analytic distinction presently exists only in theory; in practice, virtually every constitutional error is deemed a trial error-- meaning that it triggers harmless error analysis. For example, in Arizona v. Fulminante,[10] the Supreme Court held that the admission into evidence of a coerced confession could be deemed harmless. Indeed, the Court in Fulminante affirmed that there are only two types of structural errors--that is, only two types of errors that require automatic reversal and ***485** thereby escape harmless error review: actual denial of counsel (as opposed to a denial of effective counsel) and absence of an impartial judge.[11]

When conducting harmless error analysis, the reviewing court examines the ostensible effect of the error on the verdict.[12] If the court believes that the same verdict would have been reached even in the absence of the error, then the conviction will not be set aside.[13] Justice Scalia, whose approach to harmless error doctrine is the most highly nuanced on the Court,[14] has explained that the question that the appellate court must ask when applying harmless error analysis "is not what effect the constitutional error might generally be expected to have upon a reasonable jury, but rather what effect it had upon the guilty verdict in the case at hand."[15] Accordingly, the key question for purposes of harmless error analysis is: Did this jury rely on this error in reaching this verdict? Put differently: Would this jury have reached a different verdict in this case but for this error?

Suppose, for example, that a defendant is charged with armed robbery of a bank, and the state introduces three pieces of evidence against him: a grainy videotape that shows someone about the same weight and height of the defendant pointing a gun at the teller; testimony from the teller that the defendant was the one who robbed her; and a confession. The jury votes to convict. On appeal, the defendant proves that the confession was coerced: that the police threatened him and his family with physical injury if he did not admit to committing the crime. The appellate court accepts that the confession was coerced and rules it inadmissible. The appellate court will therefore ask: Would this jury have reached a different result (i.e., not voted to convict) if the confession had not been part of the state's array of evidence? Put differently: Would this jury have voted to convict on the basis of the videotape and the eyewitness testimony alone?

The apparent simplicity and straight-forwardness of the question masks significant conceptual complexity. Indeed, although we have presented this hypothetical in such a way as to create the illusion that the relevant question is clear and that it has an answer, the truth of the matter is that constructing ***486** the relevant question proves quite difficult. Moreover, even a properly constructed question may not have a coherent answer. Furthermore, it is worth noting that, unlike many other areas of legal doctrine, which aim at encouraging behavior in accordance with a norm or rule of law, the purpose of the hypothetical question in the harmless error context is not to encourage conduct in accordance with a legal norm, but instead to forgive a breach of a legal norm (e.g., the norm against coercing confessions). Already, therefore, we can begin to see a tension between harmless error doctrine and the so-called rule of law.

1.1 A Brief Overview of Harmlessness

We will not linger on the history of harmless error review; it has been thoroughly recited elsewhere.[16] It is worth emphasizing, however, that although the state and federal legislatures have participated in the development of this doctrine, it has been largely judicially driven.[17] In the first quarter of the century, for example, Roscoe Pound and Justice Felix Frankfurter,[18] among others, pressed Congress to pass a harmless error statute. Congress obliged with the Act of February 1919,[19] which dictated that in the case of motions for new trials and appeals in all cases, civil and criminal, a decision was to be based on the whole record before the court "without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties."[20]

Professors Wright and Miller have observed that there was "a strong effort in the Congress to confine (the 1919 law) . . . to civil litigation, because of fear that the historic securities thrown around the citizen charged with crime might be too easily relaxed."[21] Similarly, a number of appellate cases and several academic commentaries suggested that courts should be ***487** particularly leery of finding error harmless in criminal cases and cautioned against extending harm analysis to constitutional error.[22] Nevertheless, the operative language of Criminal Rule 52(a) and of Civil Rule 61 permitted courts to treat error in civil and criminal cases the same,[23] and courts began to use harmless error doctrine in civil cases rather routinely.

For over a decade the federal bench restricted the doctrine, applying it only to non-constitutional errors. Then in Fahy v. Connecticut[24] the Supreme Court suggested for the first time that errors of constitutional dimension could be held harmless.[25] According to the Court in Fahy, the erroneous admission of illegally obtained evidence was "prejudicial to (the defendant) and hence it cannot be called harmless error."[26] The Court's language, in particular its reference to the concept of prejudice, implies fairly clearly that violation of the exclusionary rule can be harmless. As we will see in the following section, this implication of Fahy was soon embraced.

1.2 Contemporary Harmless Error Doctrine

The place to begin the examination of the present state of harmless error doctrine is with Chapman itself. Chapman involved a murder trial in which the defendant had exercised her Fifth Amendment right to remain silent.[27] Her trial was conducted before the Supreme Court had decided Griffin v. California,[28] which held that the state may not comment on a defendant's decision to exercise his constitutional right to remain silent.[29] Consequently, the prosecutor, acting in accordance with California law, called the jury's attention to the defendant's choice to remain silent, and the trial court charged the jury that it could draw inferences of guilt from the defendant's silence.[30]

Justice Black's majority opinion in Chapman began by suggesting that Fahy had already held that "(a)n error in admitting plainly relevant evidence which possibly influenced the jury adversely to a litigant cannot . . . be ***488** conceived of as harmless."[31] He then stated the holding of Chapman itself, as follows: "(B)efore a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt."[32]

Justice Black's locution is worth pausing over: "(T)he court must be able to declare a belief."[33] As Professor Fallon has pointed out,[34] the question before the Court in this section of Justice Black's opinion was whether to use a state law standard or a federal standard to determine the issue of harmless. Why not simply say, therefore, that the burden is on the party who benefits from the error to prove that it was "harmless beyond a reasonable doubt"?[35] What is the

significance of Justice Black's insistence that whether this burden is met is determined by whether the reviewing court is "able to declare a belief"? [36] No answer can be found in the opinions of Justice Black, who did not himself author another **harmless** **error** opinion. But it seems plausible that Justice Black appreciated from the very outset of the development of this doctrine that the question of **harmlessness** is fundamentally a matter of belief rather than fact.

In addition, Justice Black also seems to have recognized that our beliefs frequently rest on inadequate information. Beliefs are often formed before there is adequate evidence to warrant them. In many circumstances this premature formation of beliefs has no serious cost, but in criminal trials the cost is interference with a human being's liberty. Accordingly, Justice Black counseled that a belief in another's guilt be formed with hesitation and deliberation: Only if the court believes that it was impossible for the **error** to have affected the verdict may it deem the **error** **harmless**. [37] Rarely, if ever, can a human being attain that degree of certitude, which implies that the **harmless** **error** formula articulated by Justice Black would, if applied faithfully, have treated very few **errors** as **harmless**.

Two years after Chapman was decided, however, the Court, in Harrington v. California, [38] severely limited the impact of its rationale. [39] Indeed, Justice Brennan's dissenting opinion accused the majority of ***489** overruling Chapman. [40] The facts were as follows: Four defendants, three black men plus Harrington, who was white, were tried in a single trial for attempted robbery and murder. [41] All three black codefendants confessed to the crime, and their confessions were introduced. One of the three codefendants also testified during the trial and was subjected to cross-examination by Harrington's counsel. [42] Harrington argued that he was denied his right under the Confrontation Clause of the Sixth Amendment because the confessions of codefendants were used against him, yet he was not permitted to cross-examine them (because of their refusal to testify during trial). [43]

In Bruton v. United States, [44] the Court had held, in a federal prosecution analytically similar to the Harrington prosecution, that a defendant is denied his rights under the confrontation clause when a confession of a codefendant is introduced against a defendant who has no opportunity to cross-examine the confessor. [45] Hence, there was no question but that Harrington's Sixth Amendment right to confront his accuser had been abridged; [46] the question was whether to subject the **constitutional** violation to **harmless** **error** review and, if so, how to conduct such review.

Justice Douglas's majority opinion purported to apply Chapman. He examined the entire trial record in Harrington's case and concluded that "the case against (him) . . . is so overwhelming" that the violation of Bruton was **harmless**. [47] In terms of Justice Black's formulation in Chapman, Justice Douglas appears to have been saying that the denial of the right to cross-examine the co-defendant could not "possibly" have had an effect on the verdict. Harrington's lawyers had argued that the **error** could not be deemed **harmless** if even a single juror would have entertained reasonable doubt as to Harrington's guilt had the confessions of the codefendants not been used against him. [48] Justice Douglas rejected that argument as follows: "We of course do not know the jurors who sat. Our judgment must be based on our own reading of the record and on what seems to us to have been the probable impact of the two confessions on the minds of an average jury." [49] Again translating the opinion in Harrington into Justice Black's Chapman ***490** formulation, Justice Douglas's opinion can be read as saying that a majority of the Court believed that Harrington was guilty, and that the evidence of his guilt was "overwhelming." [50]

Why the belief of an appellate judge should be relevant is not at all obvious. Defendants are **constitutionally** entitled to a trial by jury, and substituting the appellate court's belief for that of a jury of the defendant's peers would seem to dilute the defendant's Sixth Amendment right. In addition, Justice Brennan complained in Harrington that attention

to what the reviewing court "believes" about a defendant's actual guilt undermines the deterrent effect of **constitutional** provisions, for if a prosecutor accumulates sufficient evidence of guilt, then he will insulate the defendant's trial from **constitutional** review. [51] But Justice Brennan's opinion was, after all, a dissent.

Analytically, however, Brennan's approach has affinities with that of Justice Scalia, who is the current Court's most sophisticated practitioner of **harmless** **error** analysis. Justice Scalia began to develop his approach in Carella v. California, [52] a case involving a felony prosecution for grand theft of an automobile. [53] Carella had rented a car and then not returned it. [54] The legal issue focussed on the trial court's charge to the jury, the relevant portion of which was as follows:

Presumption Respecting Theft by Fraud:

> Intent to commit theft by fraud is presumed if one who has leased or rented the personal property of another pursuant to a written contract fails to return the personal property to its owner within 20 days after the owner has made written demand by certified or registered mail following the expiration of the lease or rental agreement for return of the property so leased or rented. [55]

Thus, instead of leaving it entirely to the jury to determine whether Carella had intended to defraud the company from which he had rented a van, the charge required the jury (assuming that the jury found certain predicate facts) to presume an "ultimate fact" related to the determination of guilt, namely:

> (U) that the defendant intended to defraud the owner of the use of his property.

***491** In Carella's case, one plausible parsing of the predicate facts would be as follows: [56]

> (P1) Carella leased or rented property pursuant to a written contract;
>
> (P2) the property was the personal property of another;
>
> (P3) the owner of the property made written demand for its return by certified or registered mail following the expiration of the lease or rental agreement; and
>
> (P4) Carella failed to return the property to its owner within 20 days after the demand was made.

We will return to this possible parsing below in Part 2. At this point, however, it will be useful to focus on why Justice Scalia concluded that **harmless** **error** review was inapt in Carella's case.

The charge in Carella contained what is called a mandatory conclusive presumption--meaning that it compelled the jurors to answer a factual inquiry in a certain way if the jury found certain other facts to be established. [57] In the face of such an error, Justice Scalia argued, the reviewing court was required to conduct a mode of harmless error analysis "wholly unlike the typical form." [58] The typical form of such analysis, Scalia explained, calls for the appellate court to inspect the entire record for overwhelming untainted evidence in support of the jury's verdict. [59] By ***492** finding a superabundance of evidence against the defendant, a court is enabled to conclude that a constitutional error probably had no effect on the jury's deliberation. [60] In Carella, however, Justice Scalia argued that if the trial court orders jurors to presume crucial facts that they should have been left to find, or if the court misdescribes elements of an offense, then a review of the entire record becomes inappropriate; [61] the overwhelming evidence is no longer sufficient. [62] Why?

Justice Scalia appears to offer two explanations. The first is that the criminal defendant's right to have the jury find the facts is a structural protection; Scalia says that the right to trial by jury "is a structural guarantee" that a defendant may insist on "even when the evidence against him is so overwhelming as to establish guilt beyond a reasonable doubt." [63] The premise of this argument is that when a court instructs a jury to draw a mandatory presumption, it is effectively deciding the matter, and that decision by the court deprives the defendant of the right to have the jury itself decide the matter. Insofar as the right to a jury verdict is a structural guarantee, then the denial of that right compels automatic reversal.

Justice Scalia also offers a second, somewhat less unyielding, approach. He reasons that when the jury is instructed to find an ultimate fact, there is virtually no way that the reviewing court can be confident that the jury would have reached the same factual conclusion even in the absence of such an instruction - virtually no way, but not impossible. [64] Scalia endorsed the approach of Connecticut v. Johnson, [65] under which a conclusive presumption can be deemed harmless if "'the reviewing court can be confident that (the) . . . error did not play any role in the jury's verdict.'" [66] But the two examples Justice Scalia gives as exemplifying those cases when the reviewing Court can have this required degree of confidence are when the defendant admits the relevant fact or when the defendant is acquitted. [67] These examples obviously represent a narrow universe of cases. As a practical matter, therefore, Justice Scalia seems poised to embrace the conclusion that certain types of erroneous jury instructions cannot be ***493** subjected to harmless error review: If the error is present, reversal is required.

Yet in the final few paragraphs of his Carella concurrence, Scalia balks at following the logic of his argument and instead concludes that a mandatory conclusive presumption can be deemed harmless if two conditions are satisfied. First, the appellate court must be able to identify predicate facts, or other facts, necessarily found by the jury. [68] Second, if the appellate court is able to identify facts necessarily found, the error can be deemed harmless if the appellate court can also conclude that these facts are so closely related to the facts to be presumed that no rational juror could find the predicate facts (or other necessarily found facts) without also finding the presumed fact. [69] Thus, the first step requires the appellate court to ask what this jury did; the second demands that the reviewing court determine what a reasonable jury would do. For example, to sustain the verdict against Carella, an appellate court would have to find that his jury necessarily found the predicates, P1 through P4 above, and the court would also have to find that no rational jury could find P1-P4, without perforce finding the ultimate fact, U. [70]

Next, in Arizona v. Fulminante, [71] a bare majority of the Court, in an opinion by Chief Justice Rehnquist, concluded that harmless error analysis could be used in almost all cases. [72] The Court divided the universe of constitutional errors into two categories. [73] One category consists of so-called structural errors. [74] Such errors are presumed to have affected "the

entire conduct of the trial from beginning to end" [75] and for that reason cannot be evaluated as harmless; consequently, structural errors necessarily require reversal. The second category consists of trial errors. These errors are those "which occurred during the presentation of the case to the jury, and which may therefore be quantitatively assessed." [76] For example, when reviewing evidence that was improperly admitted due to trial errors, regardless of whether the errors are of constitutional dimension, the appellate court, according to Justice Rehnquist, "simply reviews the remainder of the evidence against the defendant to determine whether the admission . . . was *494 harmless beyond a reasonable doubt." [77] Consequently, the admission into evidence of an involuntary confession could be deemed harmless "if the evidence other than the involuntary confession was sufficient to sustain the verdict." [78]

Notably, Justice Scalia joined that portion of Chief Justice Rehnquist's opinion in Fulminante announcing that the erroneous admission of a coerced confession could be subjected to harmless error review. "When reviewing the erroneous admission of an involuntary confession, the appellate court, as it does with other forms of improperly admitted evidence, simply reviews the remainder of the evidence against the defendant to determine whether" the jury would have probably convicted anyway. [79]

Just two Terms after Fulminante was decided, however, Justice Scalia's more nuanced approach to harmless error achieved dominance (albeit dominance of the most fleeting kind). In Sullivan v. Louisiana, [80] a defendant was convicted of murder following a constitutionally deficient reasonable doubt instruction to the jury. [81] The Louisiana Supreme Court had applied harmless error review and upheld the conviction, reasoning that the trial evidence was such that a reasonable jury would have convicted the defendant even had a constitutionally permissible instruction been given. [82] In a 9-0 decision, with Justice Scalia writing for the Court, the Supreme Court reversed, holding that harmless error review was inapt. [83] Justice Scalia's opinion put forward two distinct bases for the result. [84] One basis, that a defective reasonable doubt instruction constitutes a structural error, appears almost as an afterthought in the penultimate paragraph of Scalia's opinion. [85] The more interesting basis for the decision pertains to what Justice Scalia thinks a court actually does when it engages in harmless error analysis. It is that basis of the opinion that is worth lingering over.

*495 Justice Scalia emphasized at the outset that "(h)armless-error review looks . . . to the basis on which the jury actually rested its verdict." [86] What does that mean? It means, Scalia says, that the court's task in applying harmless error doctrine is not to ask whether the same result would have obtained even in the absence of the error; instead, the court's task is to ask "whether the guilty verdict actually rendered in this trial was surely unattributable to the error." [87] What is the difference between these two questions? The difference is subtle indeed. If the jury was wrongfully charged, then, according to Justice Scalia, it never rendered a verdict at all. Ordinary harmless error review takes the jury's verdict and asks whether the jury would have rendered that same verdict even had there been no error. When the jury is properly charged, the reviewing court takes the jury's conclusion that the defendant is guilty beyond a reasonable doubt and asks whether the jury would have reached the same conclusion in the absence of error. But where the jury was erroneously charged, then it has not concluded that the defendant is guilty beyond a reasonable doubt, with the result, according to Justice Scalia, that "(t)here is no object, so to speak, upon which harmless-error scrutiny can operate." [88] There is no verdict to which harmless error analysis can be applied. Why, though, is the appellate court not permitted to determine that the jury would have found the defendant guilty beyond a reasonable doubt had it been properly charged? Because, Scalia argues, the Sixth Amendment "requires more than appellate speculation about a hypothetical jury's action . . . ; it requires an actual jury finding of guilty." [89]

Clearly, the premise that is doing all the work here is the dubious assertion that the jury's verdict is not really a verdict at all. If **harmless** **error** review proceeds by asking whether the same verdict would have been rendered in the absence of **error**, then Scalia is surely correct in saying that there must be a verdict. But, of course, there is a verdict; the jury returned the verdict form and said that it found the defendant guilty. To be sure, if the jury was erroneously charged, then it cannot be deemed to have said that the defendant was guilty beyond a reasonable doubt. All that, that means, however, is that it has said "guilty" without saying "beyond a reasonable ***496** doubt." Justice Scalia's argument that **harmless** **error** review is inapt in such a circumstance is thus dependent on his view that this ostensible verdict--the pronouncement of "guilty"--really is not a verdict at all.

Concurring in Sullivan, Chief Justice Rehnquist stressed that appellate courts never "know for certain what factors led to the jury's verdict." [90] Criminal juries typically render simple verdicts; they do not make explicit fact findings. If an item of evidence is wrongfully admitted, for example, how does a court determine whether it affected the verdict? As the Chief Justice pointed out, it can do so only by "engag(ing) in some speculation as to the jury's decisionmaking process." [91] How is that any different from asking what a reasonable jury would have done? Rehnquist implies that it is not. But if it is the same, then why cannot the court ask what a reasonable jury would have done had it been properly charged concerning reasonable doubt?

Justice Scalia's answer to this question, as well as the apparent rejection of his answer by a majority of the Court, are reflected in two subsequent cases. First, in California v. Roy, [92] the Court considered yet another challenge to a defective jury instruction, but in this case involving a collateral, rather than direct, appeal. [93] The issue in Roy involved a failure to instruct the jury that it was required to determine that the capital murder defendant intended to assist his confederate in the carrying out of a murder. [94] The Ninth Circuit held that this failure could be deemed **harmless** only if a review of the facts found by the jury established that the jury "necessarily" found that the defendant had acted with intent. [95] With Justice Scalia concurring separately, a unanimous Court reversed, holding that the view expressed by Justice Scalia in Carella was not the relevant standard in a case on collateral appeal. [96] The Roy Court concluded that in habeas actions, even when the **error** concerns a mistaken jury instruction, the **harmless** **error** standard enunciated in Kotteakos v. United States [97] governs, and that standard permits a jury verdict to be set aside only if the **error** "had substantial and injurious effect or influence" in producing the verdict. [98]

Justice Scalia agreed with the majority that the test of **harmlessness** must be more favorable to the state on collateral review than it is on direct ***497** review. [99] Nevertheless, he continued to argue that the question of whether Roy acted with intent could not be answered by asking what a "reasonable jury would have found." [100] Roy's Sixth Amendment right entitles him to "'an actual jury finding of guilty"'--meaning that the **error** could be deemed **harmless** only if the jury's verdict on other issues " effectively embraces" a finding that Roy acted with intent. [101]

Finally, in Neder v. United States, [102] a majority of the Court unequivocally repudiated Justice Scalia's approach. [103] In Neder, a defendant was convicted for violating federal fraud statutes. [104] The indictment charged that the defendant's false statements were material, but the trial court instructed the jury that it did not need to determine whether the defendant's false statements were material. [105] The Supreme Court held: (i) that materiality is an element of the federal mail fraud, wire fraud, and bank fraud statutes; and (ii) that the omission of an element from a trial court's charge to the jury can be deemed **harmless**. [106]

Based largely on Justice Scalia's opinions in Sullivan and Carella, Neder argued that the failure to charge the jury that it must determine whether his false statements were material meant that there was "no object," i.e., no verdict, to which harmless error analysis could be applied. Chief Justice Rehnquist's majority opinion conceded that support for Neder's position could in fact be located in language in Sullivan and Carella. Rehnquist then proceeded to repudiate that language, insisting that "it cannot be squared with our harmless-error cases." [107]

The language of Chief Justice Rehnquist's Neder opinion is perhaps more interesting than the holding. Quoting Delaware v. Van Arsdall, [108] Rehnquist explained that an error can be deemed harmless, and the conviction not set aside, "if the reviewing court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt." [109] Whereas Justice Black insisted that the reviewing court itself be able to express a belief in the defendant's guilt, Rehnquist requires merely that the court be able to say that the error was harmless. And whereas Black's formulation required that the reviewing court be close to certain (it ***498** must believe that the error did not possibly influence the verdict), Rehnquist's formulation simply demands that the reviewing court say that the error was harmless beyond a reasonable doubt. Applying this test, a majority concluded that the materiality of the false statements was "supported by overwhelming evidence" [110] such that the jury, had it been asked, would have found the statements to be material--meaning that "the jury verdict (guilty) would have been the same absent the error." [111]

In dissent, Justice Scalia attempted to walk an extremely fine line. Continuing his theme from Sullivan and Carella, he argued that there is something distinctive about flawed jury instructions. If a jury fails to find an element of the offense, the conviction cannot be sustained; it is not enough that "judges can tell that (the defendant) is unquestionably guilty," [112] for the defendant is constitutionally entitled to have a jury make that determination.

There are two interconnected strands to Scalia's argument: Part of it is a classic slippery slope, the other is the premise that there is something unique about a flawed jury charge. The essence of the slippery slope argument is Scalia's claim that if a guilty verdict can be upheld where the jury has failed to find an element of the offense, then logic dictates that directed verdicts must be permitted against criminal defendants. [113]

Of course, Scalia is facing a slippery slope of his own: The trumpeting of the importance of having the jury find all the facts threatens to undermine all of harmless error doctrine, and the Neder majority homes in on precisely this vulnerability in Scalia's approach. In Rehnquist's view, any time a court upholds a verdict following an erroneous jury charge, it is not doing anything different from when it upholds a jury verdict after determining that certain evidence should have been excluded: In both cases, it is reviewing facts and guessing as to what the jury would have done had the error not occurred. [114] Scalia then moves to the second strand of his argument and suggests that there is a salient distinction "between speculation directed towards confirming the jury's verdict . . . and speculation directed towards making a judgment that the jury has never made." [115] Where the jury was erroneously charged, then, in Scalia's view, there has been no judgment by the jury, and harmless-error analysis is inapt.

***499** Like the majority, Justice Scalia is willing to countenance the affirming of some verdicts simply "because we as judges can tell that (the defendant) is unquestionably guilty"; unlike the majority, he is not willing to tolerate such an exercise in cases where the jury was erroneously charged. [116] Scalia seems both to realize that harmless-error doctrine involves the substitution of a judge's judgment for that of the jury, and simultaneously unwilling to follow that realization to its logical end. He seems, in other words, aware of the conceptual vulnerability of harmless-error doctrine, but not quite willing to acknowledge it.

Three salient points emerge from this survey of harmless error jurisprudence. First, the doctrine assumes the coherence as well as the scrutability of the so-called reasonable jury; it assumes that juries use a rigorous logical approach to the question of a defendant's guilt. Second, the test of whether an error is harmless is whether the reviewing court believes that a (reasonable) jury, applying rigorous logic, would have convicted even in the absence of error. Third, Justice Scalia's discrete approach to harmless error exhibits some discomfort with each of these first two points; he appears to realize that an approach that asks what a reasonable juror would have done is different from an approach that asks what a particular jury did do, and he seems uncertain that the former question is an acceptable one.

2. Counterfactual Analysis and Harmless Error Review

Harmless error analysis is a form of counterfactual reasoning. In this section we argue that this form of analysis embodies serious philosophical defects. We are not presently inclined to argue that these defects are irremediable; [117] our aim is to demonstrate that they have yet to be remedied. The consequence is that harmless error analysis as currently deployed, and Justice Scalia's discrete approach as well, is either incomplete or incoherent. It therefore ought to be abandoned where constitutional violations are at issue; in short, Chapman should be overruled.

***500 2.1. Counterfactuals**

Counterfactuals are subjunctive conditionals that presuppose the falsity of their antecedents. What makes a statement a subjunctive conditional is a syntactical feature; what makes an antecedent false is a semantic feature. Consequently, the definition of a counterfactual involves both semantic and syntactic elements. Consider, for example, the following counterfactual:

> (1) If I were Justice Scalia, I would abandon harmeless error analysis.

The “If I were” locution creates a subjective conditional, and the content of the antecedent--“If I were Justice Scalia”--is false. Such statements take the logical form of “If P then Q,” where P is the antecedent and Q is the consequent.

Analysis of counterfactuals overlaps in significant respects with analysis of causation, but causation is a distinct concept with distinctive difficulties. The most famous explanation of causation was articulated by Hume, who said:

> (W)e may define a cause to be an object, followed by another, and where all the objects, similar to the first, are followed by objects similar to the second. Or, in other words, where, if the first object had not been, the second never had existed. [118]

Hume's definition is evocative, but famously imprecise, and a more nuanced definition is as follows:

> (A)n event or state of affairs P causes another Q only if there are actual initial conditions I and a law of nature L such that, by necessity, if P and I and L all obtain then Q must obtain, where the law L is essential in that P and I alone do not necessitate Q. [119]

Judea Pearl distinguishes among predictive statements, interventions, and counterfactuals. [120] Suppose, for example, that there is a walkway that becomes slippery when wet, and it becomes wet when it rains and when the grass adjacent to the walkway is watered by the sprinkler. [121] A predictive statement takes the form of "Would the walkway be slippery if we find that ***501** the sprinkler is off?"; an interventionist statement takes the form of "Would the walkway be slippery if we make sure that the sprinkler is off?"; and a counterfactual statement takes the form of "Would the pavement be slippery had the sprinkler been off, given that the walkway is in fact not slippery and the sprinkler is on?" [122] Despite certain semantic similarities, these three statements demand increasingly detailed knowledge. [123]

It is simple to see how causation is involved in counterfactual analysis generally and how it is involved in **harmless error** review in particular. In the context of a criminal trial, the relevant state of affairs, P, can be thought of as everything that transpires in the course of the trial. In this scenario, what P causes is Q, where Q represents the jury's determination that the defendant is guilty.

The more problematic aspects of causation involve defining I, the relevant initial conditions, as well as L, the law that compels a jury faced with P and I to return a verdict of guilt. Consider, for example, the following statement:

> (2) (2A) Two dead bodies, with their throats cut, were found. (2B) A bloody knife was found adjacent to the dead bodies. (2C) Blood from the dead was found on the knife. (2D) Blood from the dead was found in the automobile of the defendant. (2E) Blood from the dead was found at the home of the defendant. (2F) The jury found the defendant guilty.

A state of affairs, which we refer to as P, results from the conjunction of propositions 2A, 2B, 2C, 2D, and 2E. Proposition 2F represents the consequent, which we refer to as Q. Hence, a simple statement of causation would be:

2A + 2B + 2C + 2D + 2E --> Q,

P = 2A + 2B + 2C + 2D + 2E,

therefore (by transitivity),

P --> Q,

where the symbol --> means "causes."

We obviously know that this statement of causation is incomplete, for there surely are possible worlds where P, represented by 2A + 2B + 2C + 2D ***502** + 2E, does not cause Q. Our statement of causation is so far incomplete because we have not yet said anything concerning the relevant conditions I and the pertinent law L. Whether the jury finds the defendant guilty, in other words, will depend, as we know, not only on the evidence, represented by propositions 2A +

2B + 2C + 2D + 2E, but as well on the qualities of the respective lawyers and the judge; on the judge's rulings, including the charge to the jury; and on a host of intangible factors (including the defendant's demeanor, individual characteristics of the jurors, and so on). Hence, the complete statement of causation is

P, I, L --> Q.
If we think of I, the relevant initial conditions, as embodying personal characteristics of the lawyers (both defense and prosecution), the judge, and the jurors; and we further think of L as the court's rulings and its charge to the jury, then our causal statement is arguably complete.

Now, of course, when P consists of propositions 2A-2E, we can nonetheless use our single statement of causation (i.e., P, I, L --> Q) to explain jury findings of guilty as well as jury findings of not-guilty by devoting attention to how either I or L (or both) differ from one case to the other. Why will one jury confronted with 2A-2E choose to convict while another jury confronted with 2A-2E instead acquits? Perhaps it is because the prosecutors were better in the former case, or because the judge's ruling were more favorable to the defense in the latter, or owing to some other variation of either I or L (or both).

Now suppose that the knife referred to in proposition 2B was found by the police as a result of an illegal search. On appeal, the defendant argues that the knife should not have been admitted as evidence, and the appellate court agrees. The court further believes, however, that it is appropriate to apply **harmless error** analysis to determine whether the admission into evidence of the knife was harmful. The question the court will ask is: If the knife had not been admitted, would the jury have found the defendant guilty? Thus, the court is asking whether P --> Q is true where P comprises not 2A-2E, but instead 2A, 2C, 2D, and 2E. This statement of causation is counterfactual because, in accordance with our hypothetical, the actual world as we know it is described as P = 2A + 2B + 2C + 2D + 2E. There is no world where P = 2A + 2C + 2D + 2E; such a world exists only in an appellate judge's imagination.

Following **David** Lewis, we will use the notation "P □--> Q" to refer to the expression "If it were the case that P, then it would be the case that Q." As we argue in the following section, whether such a proposition is true cannot be cogently answered in the context of a criminal prosecution.

*503 2.2 The Unsound Foundation of Harmless Error Doctrine

Harmless error doctrine is at best philosophically incomplete and at worst conceptually incoherent. In this section, we argue that five serious epistemic difficulties inhere in **harmless error** analysis, yet doctrine appears entirely inattentive to any of them. In a sense, all of these difficulties revolve around a single issue: namely, that determining the truth conditions of counterfactuals has proven to be a problem of significant logical complexity. One reason is that, in a strictly logical sense, all counterfactuals are true, because their antecedents are false. [124]

For example, the statement "If the confession had not been admitted into evidence the jury would have found the defendant guilty" is true as a logical proposition because the confession was admitted into evidence. Nelson Goodman gives as an illustration of this problem the following statement:

> (3) If that piece of butter had been heated to 150° F., it would have melted. [125]

A linguistic (or what we prefer to call a semantic) problem arises because, insofar as the antecedent is false (i.e., the butter was not heated to 150° F.), the statement remains truth-functional even if the consequent is changed. Hence, the truth-value of (3) is equivalent to the truth-value of:

> (3) If that piece of butter had been heated to 150° F., it would not have melted. [126]

David Lewis refers to such propositions as "vacuously" true, by which he means that their logical truth-value does not help us to understand them. [127] Goodman therefore says that the problem is "to define the circumstances under which a given counterfactual holds while the opposing conditional with the contradictory consequent fails to hold." [128]

A major difficulty associated with solving this problem is that by its nature, the counterfactual is not subject to empirical testing. The reason that this is so is that the antecedent is false; if the antecedent were true we would have a straightforward problem of causation. Goodman's key observation-- ***504** that the counterfactual is not subject to empirical verification--is extremely important. It emphasizes that there is no world where a jury that had convicted the defendant after hearing a confession that was later deemed inadmissible by an appellate court convicted him again following the determination that the confession should not have been admitted. Thus, any statement we make about whether the jury would have convicted is hypothetical; it represents conjecture, not historical inquiry.

The following subsections discuss briefly five discrete philosophical problems associated with harmless error doctrine. Any single problem would be sufficient to call into question the soundness of relying on this doctrine so pervasively. Taken together, they compel the conclusion that the doctrine is too tenuous to be used where constitutional violations are at stake.

2.2.1 The Problem of Identifying Relevant Conditions

A statement can possess logical truth-value and not be known to be true. Together with Roderick M. Chisholm, Goodman has stressed that notwithstanding the logical truth-value of a counterfactual proposition, ascertaining the actual (semantic) truth of such a proposition requires, as an initial matter, that we be capable of identifying the relevant physical conditions under which the antecedent is articulated. [129] For example, the actual truth of statement (3) above, will depend not only on temperature, but as well on pressure, whether there are additives in the butter, and so on. Goodman calls this problem the problem of defining the relevant conditions. [130]

Thus, using the letter "P" to represent antecedent and "Q" to represent consequent, and further using the letter "I" to refer to the relevant conditions which, when conjoined with "P," generate "Q," Goodman derives the following rule:

> (A) counterfactual is true if and only if there is some set (I) . . . such that (I) is compatible with (P) and with (~ P), and such that ((P,I)) is self-compatible and leads by law to (Q); while there is no set (I') compatible with (Q) and with (~ Q), and such that ((P,I')) is self-compatible and leads by law to (~ Q); and neither (I) nor (I') follows by law from (~ P). [131]

***505** As this rule suggests, the truth of one counterfactual appears to be tied to the truth of another, meaning that one counterfactual is explicable only in terms of another. If that is the case, then the problem of determining the truth of counterfactuals has not been resolved, for we are trapped in circularity. [132]

Consider, for example, the following hypothetical.

> (4) (4A) Two dead bodies, with their throats cut, were found. (4B) A bloody knife was found adjacent to the dead bodies. (4C) An expert testified that blood belonging to the dead people was found in the defendant's car. (4D) The defendant confessed to murdering the two people by cutting their throats. (4E) The jury found the defendant guilty.

In this hypothetical, proposition 4E represents the consequent (the verdict of guilty), i.e., Q; propositions 4A + 4B + 4C + 4D represent the basic facts of the case.

It may be reasonable to think that, at times, the mere fact of a confession will be sufficient to cause a jury to return a verdict of guilty. [133] Without further analysis, however, we do not know whether the confession alone was sufficient in a particular case (such as this hypothetical). Hence, in terms of proposition 4, our causal statement might be as follows:

> 4A + 4B + 4C + 4D --> Q,
>
> 4A + 4B + 4C + 4D = P, therefore,
>
> P --> Q. [134]

If the confession is subsequently found to be inadmissible, and we want to know whether the jury would have convicted even in its absence, we must create a counterfactual, and to do so, we must alter (or negate) one of the propositions that created the world as it was (i.e., P). One way to create a counterfactual would be to alter proposition 4D to read as follows:

> (4D') The defendant did not confess to murdering the two people by cutting their throats.

***506** By changing one component part of P, we have created ~P. [135] That is, by changing any component of P, we have created a world that did not exist. The question we are interested in answering is: When 4A + 4B + 4C + 4D' = ~P, is the statement "~P --> Q" true? In ordinary English, would an array of evidence comprising 4A + 4B + 4C + 4D' have caused the jury to convict the defendant? Or more simply still: Would the jury have convicted the defendant had the defendant not confessed?

Obviously, it is logically possible for both P --> Q and ~P --> Q to be true. That is, we can imagine a world where 4A + 4B + 4C + 4D causes a jury to convict, and we can also imagine a world where 4A + 4B + 4C + 4D' causes a jury to convict. This possibility indicates that one factor we examine when deciding whether the jury would have convicted even in the absence of a confession consists of the remaining evidence that was heard in the particular case (in this hypothetical propositions 4A, 4B, and 4C). Yet this factor will be underdeterminative; that is, where P = 4A + 4B + 4C, we can still imagine cases of P --> Q as well as P --> ~Q. Goodman's rule emphasizes that the truth of the counterfactual is therefore determined by something other than simply the propositions that are used to define P. This something else Goodman calls the "relevant conditions." [136]

In the context of a criminal prosecution, what are the relevant conditions? Is publicity surrounding a notorious case a relevant condition? What about the notoriety of the crime or criminal or the esteem in which the victim was held? As Pearl points out:

> (W)hat kind of conditions should we include in the background context? On the one hand, insisting on a complete description of the physical environment would reduce probabilistic causality to deterministic physics (barring quantum-level considerations). On the other hand, ignoring background factors altogether--or describing them too coarsely--would introduce spurious correlations and other confounding effects. A natural compromise is to require that the background context itself be "causally relevant" to the variables in question, but this very move is the source of circularity in the definition of probabilistic causality. [137]

Many conditions have an impact on any given case, but we must have some principle for identifying the relevant ones. **Harmless** **error** doctrine in its present form provides no answer.

*507 2.2.2 The Problem of Defining Relevant Laws

A second difficulty with **harmless** **error** review is that, even once the relevant conditions are specified, the truth of the counterfactual will not be due to a law of logic or mathematics, but rather to a causal law. [138] What is it that causes the jury, confronted with certain evidence, to render a particular verdict? It is certainly not the evidence alone, for different juries facing extremely similar bodies of evidence commonly render inconsistent verdicts. Yet defining the causal laws that determine which counterfactuals are true is a notoriously difficult project.

Goodman suggests that the type of law we must identify "is a principle we are willing to commit ourselves to in deciding (other) cases." [139] Goodman's approach here possesses legal appeal, because it is not tied to particular cases--indeed, Goodman's proposal sounds very much like Scalia's notion in "The Rule of Law." Thus, Goodman defines such a principle as "lawlike if its acceptance does not depend upon the determination of any given instance." [140] One problem with this definition that Goodman identifies is that we are left "to define the circumstances under which a statement is acceptable independently of the determination of any given instance." [141] The other problem that does not concern Goodman but must concern us is that the notion of "guilt"--unlike, say, the question of the temperature at which butter melts--seems beyond any such physical law.

Consider again our foregoing hypothetical.

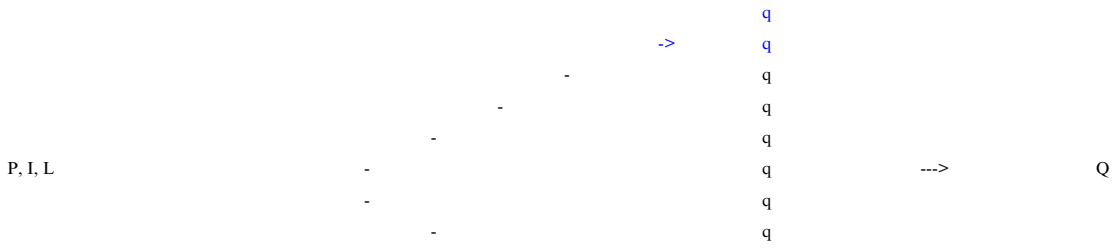
> (4) (4A) Two dead bodies, with their throats cut, were found. (4B) A bloody knife was found adjacent to the dead bodies. (4C) An expert testified that blood belonging to the dead people was found in the defendant's car. (4D) The defendant confessed to murdering the two people by cutting their throats. (4E) The jury found the defendant guilty.

Again, 4E = Q, and 4A + 4B + 4C + 4D = P. When describing the trial and its outcome, we say P --> Q as if it were the cold facts alone that caused the jury to return a verdict of guilt. But what does "guilty" mean? It means that the jury believed that the state proved every element of the offense beyond a reasonable doubt. [142] And what does "beyond a reasonable doubt" mean? Some courts have told jurors that it means that they must be convinced of a defendant's guilt to a "moral certainty"; [143] others have said that the jurors ***508** must have an "abiding conviction" that the defendant is guilty. [144] Indeed, the Supreme Court has held that although the **Constitution** requires that the trial court charge the jury that it cannot convict without determining that the defendant it guilty beyond a reasonable doubt, the **Constitution** does not require that the trial court define the meaning of "beyond a reasonable doubt." [145] The Court did say in Victor that "a fanciful doubt is not a reasonable doubt," [146] but that assertion does not seem terribly helpful.

One reason, though certainly not the only reason, that different juries facing more-or-less identical evidence may produce different verdicts is that they understand the concept of guilt differently. Hence, one reason why both P --> Q as well as P --> ~Q are coherent is that Q is not necessarily understood by different juries to mean the same thing. [147] One factor that influences a jury's understanding of Q is L, i.e., what the court tells the jury it means (though it is also likely that many jurors have an understanding of what Q means that is uninfluenced by anything the court says).

Further, the Supreme Court has emphasized that in order to find a defendant guilty, each juror must agree that the elements of the crime have been established beyond a reasonable doubt. [148] It follows that if even a single juror does not believe that one or more elements have been established beyond a reasonable doubt, then the jury may not convict. This observation suggests that it may well be impossible to construct a causal law of the sort Goodman has in mind because individual jurors are not like electrons; the number of factors that influence whether a particular juror believes that the state has met its burden may not quite be infinite, but it is nonetheless exceedingly large. "Guilt" in other words, does not mean that the defendant did some act; it means that the state has proved that the defendant did so, where "proved" means that each of the twelve jurors who heard the evidence became convinced beyond a reasonable doubt that the defendant did what the state accused him of. [149]

***509** Diagramatically, therefore, the simple statement P, I, L --> Q may be misleading. Insofar as each individual juror filters the evidence as well as the court's instructions through his or her own conceptual apparatus, a statement that better evokes reality might look as follows:



- q
- q
-> q
q

In the preceding diagram, q represents each individual juror's determination that the defendant is guilty, while Q represents the determination by the jury as a body that the defendant is guilty. Whether any particular juror believes the defendant to be guilty depends on that individual juror's assessment of the evidence (P) as well as the juror's understanding of the meaning of reasonable doubt (L). And, of course, unless every juror reaches the conclusion q, then an ultimate conclusion of Q is impermissible.

This understanding of guilt is certainly conceptually susceptible of counterfactual analysis, but any such analysis would be dauntingly difficult. Because juror unanimity is required in order to find a defendant guilty, the preceding diagram suggests that **harmless** **error** doctrine may require twelve individual counterfactuals, rather than just one. Judea Pearl emphasizes that none of the individual counterfactuals could be deemed to be true; stochastic causal models cannot suffice to test the truth-function of counterfactuals because such models require "actual knowledge" of the process that generated a certain result. With respect to counterfactuals, such knowledge does not exist. The problem is not that we do not know enough; the problem is that what we need to know is literally unknowable. [150]

Of course, all of the jurors could be collapsed into a single "reasonable juror," but this solution is vulnerable to Justice Scalia's argument that the defendant has a Sixth Amendment right to have his or her particular jury determine guilt. [151] And in any event, **harmless** **error** doctrine is not perspicuous even with respect to the process by which the hypothetical reasonable juror couples evidentiary propositions with a causal law in order to generate a verdict.

*510 2.2.3 Constructing the Logical Proposition

So far we have assumed that actually constructing the counterfactual expression is tractable. That assumption, however, is probably unwarranted. Consider, for example, the following, slightly modified, hypothetical:

> (5) (5A) Two dead bodies, with their throats cut, were found. (5B) A bloody knife was found adjacent to the dead bodies. (5C) Blood from the dead was found on the knife. (5D) Blood from the dead was found in the automobile of the defendant. (5E) Blood from the dead was found at the home of the defendant. (5F) The defendant confessed to murdering the two people by cutting their throats. (5G) The jury found the defendant guilty.

On appeal, the defendant challenges the legality of the confession (proposition 5F), and the appellate court concludes that the confession was coerced and should have been suppressed. However, the court, applying **harmless** **error** analysis, declines to disturb the conviction.

How will the court construct the logical proposition that it will use for purposes of counterfactual reasoning? If we denominate proposition 5G as the consequent and label it as Q, then we might write the entire proposition as:

5A + 5B + 5C + 5D + 5E + 5F = P,

P --> Q.
But of course there are many factual propositions included in the testimony at trial that are not included in proposition 5. For example, suppose that the evidence at trial also supported the following statements:

(5W) The defendant did not wear a jacket or tie to court during the trial.

(5X) One of the apparent murder victims was the wife of the defendant.

(5Y) The defendant had threatened to leave his wife for another woman.

(5Z) The defendant was a Nobel prize winning cosmologist.

***511** We certainly could write a narrative that included each of these additional propositions, but the problem is that the trial record will consist of hundreds or thousands of such propositions. Yet we have no rule that dictates which propositions must be included in our logical analysis. What, in other words, is P equal to? Must we include propositions that support a defendant's innocence? **Harmless** **error** doctrine provides no answer to this problem.

Moreover, in deciding which propositions to include in our analysis, we confront intractable problems associated with causation. For example, there is a significant distinction between singular and general causes. A general cause takes the form of the statement "drinking hemlock causes death," whereas a singular cause takes the form of the statement "Socrates's drinking hemlock caused his death." Which species of cause is relevant in conducting **harmless** **error** analysis? Again, current doctrine provides no answer. [152]

One possible approach to this problem would be for **harmless** **error** doctrine to piggy-back on the rules of evidence, and include all propositions that an appellate judge deems relevant. But there are at least two difficulties to the relevancy approach. The first is that it would mean that an **error** could be **harmless** in one jurisdiction yet harmful in another; the reason is that rules of evidence vary from state to state. The second and more compelling difficulty is that the issue of relevancy is determined by a judge, not the jury, yet the defendant has a Sixth Amendment right to have the jury determine guilt.

2.2.4 Defining the Counterfactual

Whereas the preceding problem relates to how we articulate the universe of propositions to which we will attempt to apply counterfactual analysis, we also confront a difficulty in articulating the counterfactual itself. Recall that as an empirical matter, the confession was admitted into evidence. Hence, when we are applying counterfactual analysis, we must ask what would have happened in a world that never was. In **David** Lewis's approach, we must imagine what would have happened in the world that is closest in characteristics to the world we have. [153]

In the real world, P --> Q, where P = 5A + 5B + 5C + 5D + 5E + 5F. Once the court determines that the confession should have been ***512** excluded, the court must invent a fictitious P. How should it do so? For purposes of determining whether the evidence would have caused the jury to convict had the evidence not included the confession, does the body of evidence comprise 5A + 5B + 5C + 5D + 5E, or does P = 5A + 5B + 5C + 5D + 5E + ~5F? If the defendant had not confessed, would the jury have regarded the absence of a confession as a denial of guilt (in which case P = 5A + 5B + 5C + 5D + 5E + ~5F)? Or would the jury have been agnostic about the meaning of no confession (in which case P = 5A + 5B + 5C + 5D + 5E)?

In ordinary English, one way of formulating the counterfactual is to ask whether the jury would have convicted even in the absence of a confession. But insofar as it is plausible to think that jurors treat a defendant's plea of "not guilty" as tantamount to an assertion by the defendant that he did not commit the crime, it may be preferable in constructing the counterfactual to ask whether the jury would have convicted had the defendant sworn he had no involvement.

There is yet a third possibility. Perhaps the correct question is whether the jury would have convicted if it had been told that the police coerced a confession. Indeed, if the objective is to construct a counterfactual that comes closest to describing the world as it actually was, then there is good reason for posing the counterfactual proposition in this latter way. [154]

In constructing the counterfactual, it is also imperative that necessary cause be distinguished from sufficient cause. Generally, sufficient causation tends to involve generic tendencies, whereas necessary causation is singular: tailored to a specific event under consideration. In order for a court to answer the question of what a particular jury would have done under specific circumstances--rather than the question of what a reasonable jury would have done under similar circumstances--the court must analyze the issue as one of necessary causation. [155]

Courts appear to believe that in applying **harmless error** analysis, they can merely erase a proposition from a series of propositions in creating a counterfactual. But this ostensible belief is unsound. For even if it is possible to articulate the proposition that represents the **constitutional** violation (the subject of the preceding subsection), the counterfactual cannot be constructed simply by excising the proposition that represents the **constitutional** violation, because there are a variety of ways to characterize the remaining propositions. Thus, the opposite of a defendant who confesses may be a defendant who does not confess, but a stronger opposite is a defendant who ***513** proclaims his innocence, and a stronger opposite still is a defendant who protests his innocence until police administer physical force and coerce the defendant to sign a confession. **Harmless error** doctrine has no principled mechanism for constructing the counterfactual.

2.2.5 Answering the Counterfactual

We now turn to the most serious defect with **harmless error** analysis. Pretermitting the foregoing difficulty, suppose that we say that following the decision to suppress the confession, the relevant statement for purposes of counterfactual analysis is:

P = 5A + 5B + 5C + 5D + 5E and

P □--> Q.

What does it mean to say: "If P had been the case, then Q would have been the case."? There are at least four plausible answers. First, it might mean that the jury that voted to convict the defendant did determine that P --> Q, where P = 5A

+ 5B + 5C + 5D + 5E. Second, it might mean that where P = 5A + 5B + 5C + 5D + 5E, the court believes that P --> Q. Third, it might mean that where P = 5A + 5B + 5C + 5D + 5E, the court believes that a reasonable jury would determine that P --> Q. Finally, it might mean that the court believes that the defendant's actual jury would have determined that P --> Q. (These final two statements collapse into one if we assume that the defendant's jury was a reasonable jury.) [156]

We can rule out the first possibility because **harmless** **error** review does not involve interviewing members of the jury that convicted the defendant. It would in theory be possible to determine that the jury did determine that P --> Q, where P = 5A + 5B + 5C + 5D + 5E, but so determining would demand that jurors be interviewed and examined as to their reasoning. There would be daunting difficulties associated with such a procedure (e.g., would jurors be able to recall their reasoning? Would the soundness of their reasoning be subject to scrutiny? and so on). But these problems are moot because the practice of conducting post hoc juror interviews is not followed when **harmless** **error** review is conducted. Indeed, where this issue has been ***514** considered at all by the courts, post hoc juror statements have been deemed to be not germane. [157]

We can also rule out the second alternative because, as Justice Scalia has emphasized, the Sixth Amendment guarantees the defendant the right to have a jury determine his guilt or innocence. It is **constitutionally** insufficient merely for the court to believe that P □--> Q, where P = 5A + 5B + 5C + 5D + 5E.

We are therefore left with the third and fourth alternatives. Now, by assuming that the defendant's particular jury was also a reasonable jury, we can evaluate the two alternatives singly. The causal proposition can be stated symbolically as follows:

P = 5A + 5B + 5C + 5D + 5E + 5F,

P, I, L --> Q.

However, 5F is inadmissible; therefore, the court conducting **harmless** **error** analysis must transform the foregoing statement into:

P = 5A + 5B + 5C + 5D + 5E,

P, I, L □--> Q.

The expression P, I, L □--> Q can be read as saying that the court believes that the jury (which is assumed to have been a reasonable jury) that determined the defendant's guilt would have found the defendant guilty had P comprised 5A + 5B + 5C + 5D + 5E, and had I and L remained unchanged.

Now we have asked the question but we cannot answer it. The basic reason is that insofar as P is defined by multiple propositions, it is impossible, for epistemic reasons, to determine which (if any) proposition is sufficient to cause Q.

Following **David** Lewis, we use the expression P ~--> Q to say "If it were the case that P, then it might be the case that Q." [158] Consider the following hypothetical:

> (6) (6A) Two dead bodies, with their throats cut, were found. (6B) A bloody knife was found at the home of the defendant. (6C) An expert testified that there was a 90 percent chance that the blood on the knife ***515** belonged to one of the dead. (6D) The defendant confessed to murdering the two people by cutting their throats. (6E) The jury found the defendant guilty.

Treating the jury's finding, proposition 6E, as the consequent, Q, our logical proposition is as follows:

6A + 6B + 6C + 6D --> Q,

6A + 6B + 6C + 6D = P; therefore

P --> Q.

Again assume that, on appeal, the defendant challenges the legality of the confession, and the appellate court agrees that the confession was coerced and should not have been admitted. Applying **harmless** **error** analysis, the question the court will ask is:

Where:

P = 6A + 6B + 6C,

is it the case that

P □--> Q?

Intuitively, the following assumptions seem tenable, and it would be reasonable for a court conducting **harmless** **error** review to make them:

There is no logical relationship between 6A and Q:

6B <<diamond>>--> Q;

6C <<diamond>>--> Q;

6D <<diamond>>--> Q.

That is, it would be reasonable for an appellate court to conclude that it might be the case that a jury would convict a defendant of murder solely on the basis of any of the three pieces of evidence referred to by propositions 6B, 6C, and 6D. Indeed, Pearl points out that, in addition to the concepts of necessary and sufficient causation, there is also the idea of "actual" cause. [159] This concept, as important as it is, is largely intuitionistic.

However, it is not enough when conducting **harmless** **error** review for the appellate court to say that "maybe" the jury would have convicted even had the confession been excluded; for the relationship we refer to symbolically as << diamond>>--> will not sustain a conviction. The burden is on the state to prove ***516** that the jury would have convicted the defendant even in the absence of the admission of a coerced confession. Yet, for both conceptual and empirical reasons, it is impossible for a reviewing court to say this.

The empirical reason is that, not surprisingly, even jurors who are told not to consider something cannot help but consider it. Thus, researchers have demonstrated that even jurors who aver that they are capable of following a judge's instruction to ignore a wrongfully admitted confession are in fact influenced significantly by the confession when deliberating the defendant's guilt or innocence. [160] There is no reason to believe that these findings are not equally applicable to appellate courts as well, and if they are, the very possibility of **harmless** **error** review is called into question. The reviewing court is not permitted to use the confession to sustain the conviction--to buttress its belief that the defendant would have been convicted anyway--but if, in applying **harmless** **error** analysis, it is impossible for the court not to do so, then **harmless** **error** analysis is beyond our human capacity.

Further, even if judges could overcome this empirically observed difficulty, there remain insuperable conceptual obstacles. Namely, although we can be confident that there is some relationship between 6B, 6C, and 6D, we do not and cannot know what it is. [161]

One possibility is that each of the propositions is redundant. Under this view, each of the following would be true:

6B □--> Q, and

6C □--> Q, and

6D □--> Q.

If each of the foregoing propositions were true, then we could say that each evidentiary proposition is insensitive to all the others. The greater the degree of insensitivity (or redundancy), the more likely it is that the jury would have convicted even if a single evidentiary proposition had not been admitted.

The counterpart to insensitivity is fragility. Where propositions are fragile, the truth of the consequent is dependent on their relationship to one another. Consider, for example, proposition 6B. Is a blood-stained knife at ***517** the home of the defendant sufficient to cause a jury to convict that defendant? That is, is the statement "6B □--> Q" true? Whatever the answer to that question, it is surely the case that the likelihood of a conviction is enhanced by the presence of a confession (proposition 6D). Thus, it would be coherent to assert the following:

6B <<diamond>>--> Q, and

6D <<diamond>>--> Q, and

6B, 6D □--> Q.

Furthermore, there is a greater likelihood that "6B, 6D □--> Q" is true than that "6D □--> Q" is true. This relationship can be referred to as strengthening. We cannot say that either 6B or 6D alone would lead to Q, but we are still able to say that the conjunction of the two would lead to Q. Where 6B and 6D strengthen one another, they have fragility with respect to each other.

Further, the complexity of the analysis grows as the total universe of evidentiary propositions expands. As Pearl puts it, "(w)henever we undertake to evaluate the effect of one factor (X) on another (Y), the question arises as to whether we should adjust our measurements for possible variations in some other factors (Z)." [162] We cannot ignore the influence of an excised proposition without formally testing the effect of the inadmissible evidence on the believability of the remaining evidentiary propositions.

Harmless error doctrine pays no attention to any of this complexity or to the relationship among propositions. It simply excises a single proposition and then proceeds as if the remaining propositions are unaffected by that excision. That approach is neither empirically nor philosophically justified. We know, for example, that the presence of a confession in a series of evidentiary propositions makes the jury more likely to give credence to the remaining propositions. [163] Confessions, in other words, strengthen other evidentiary propositions. Consequently, an approach to **harmless error** that creates a counterfactual simply by removing a confession from the series of propositions that cumulatively define P fails

to approximate a world that is closest to the world as it actually is. By overlooking the relationship among propositions, harmless error doctrine is fundamentally unsound.

***518** We have suggested in the preceding section that harmless error doctrine is at best incomplete and at worst incoherent. As indicated, there are five independent epistemic reasons why that is so. Justice Scalia has suggested that at least some of these defects with harmless error doctrine are obviated by his somewhat different approach. His argument, as we have pointed out, has been rejected by the Court, and in any case, as we show in the following section, his approach does not remedy any of the defects we have identified.

2.3. Justice Scalia's Method

Sensitive to the philosophical difficulty at the heart of counterfactual analysis, Justice Scalia in Carella and Sullivan attempted to develop a method of harmless error analysis that would be invulnerable to these problems. Specifically, he sought to devise a method of analyzing mandatory conclusive presumptions and elemental misdescriptions that, if applied rigorously, would prevent appellate courts from arrogating to themselves the fact-finding function that the Constitution has assigned to the jury. [164]

The analysis developed in Carella and Sullivan aspires to obviate resort to counterfactual considerations of what a reasonable jury would have done had the trial court permitted it to find support for the proper element or ultimate fact. Justice Scalia aims to avoid the difficulties inherent in counterfactual analysis by asking a purely historical question: What did this jury actually do? Justice Scalia believes that an appellate court, by following the Carella-Sullivan approach, can determine the actual basis on which the jury that heard the evidence in the case on review "actually rested its verdict." [165]

But how does an appellate court determine the basis upon which the jury actually rested its verdict? One way would be to record jury deliberations and then review the recording of those deliberations if necessary. Another alternative would be to conduct a social-scientific investigation after the verdict, using extensive questionnaires and polls of the jurors. Neither of these alternatives is followed, of course, and Justice Scalia does not suggest that either be implemented. Instead, the strategy embraced in Carella is to create a method of review that allows the court to deduce from ***519** a limited review of the record that the jury that heard the case actually found the defendant guilty. Justice Scalia is confident that by translating certain statements from the record into logical propositions, and by then manipulating those propositions and applying to them rules of formal logic, the jury's actual conclusions will become scrutable.

The Carella methodology has three steps. [166] The first two steps involve the construction of two logical propositions; the third step involves deriving a conclusion from those propositions.

The first step requires the appellate court to find:

> Pr1: that the jury necessarily found certain predicate facts. [167]

The second step of Scalia's analysis then requires the reviewing court to compare the propositions expressing the predicate facts to the proposition expressing the "ultimate fact." The purpose is to determine:

Pr2: that the predicate facts are functionally equivalent to the ultimate fact. [168]

Finally, by finding both prongs satisfied, an appellate court can conclude:

C: that the jury necessarily found the functional equivalent of the ultimate fact. [169]

On the basis of such an argument, Justice Scalia says, one can say an "**error** is **harmless** because it is 'beyond a reasonable doubt' . . . that the jury found the facts necessary to support the conviction." [170] Note Justice Scalia's locution: He says that the jury "found," using the past tense, as opposed to the subjunctive "would have found." Justice Scalia thinks he has substituted a simple historical question for a complicated epistemological one.

But he has not. Justice Scalia's primary mistake lies in thinking that it is obvious, or even clear, what count as the facts found by the jury. An appellate record obviously does not literally contain found facts; instead, the record comprises propositions that represent testimony purportedly about ***520** facts. What Carella really involves, therefore, is an examination of sets of propositions representing "predicated facts" to determine whether they are conceptually and logically equivalent to the propositions expressing ultimate facts. This approach is consonant with Justice Scalia's jurisprudence, which favors a mode of appellate review whereby the court applies logic to language rather than standards of reasonableness to facts. But Justice Scalia's reasoning in Carella does not live up to the formalist ideal of using linguistic and logical analysis to determine how the world actually is. The application of either of the first two steps in the analysis requires appellate courts to engage in counterfactual reasoning, which involves evaluating possibilities in light of reasonableness standards.

Justice Scalia's approach to **harmless** **error** cannot avoid counterfactual reasoning because a reviewing court must still answer the question: To what extent (if any) did the **error** affect the verdict? On appeal, however, judges do not poll jurors, nor do they receive a detailed description of their deliberations. As a result, they are compelled to make assumptions about what reasonable jurors would have found. That is a form of counterfactual reasoning.

2.3.1 Counterfactuals and Carella's First Step

The first step in Justice Scalia's methodology is to articulate the propositions that represent facts necessarily found by the jury, but Justice Scalia never explains just what he means by "facts necessarily found by the jury." The phrase suggests that the jury merely finds some facts while necessarily finding others. Taken as expressing a philosophical distinction about types of facts, or types of actions, this suggestion is highly contestable. For example, an empiricist who believes that only propositions of logic and mathematics express necessary truths will correctly respond that only an empirical investigation will yield an answer to the question of whether a jury found something to be true. This is the case because whether a jury does or does not find a fact is a question about a contingent matter; in this regard, it is no different in kind from the question "Did the jurors eat pie during lunch recess?" To be sure, we can learn the answer to this question, but only by examining particular facts, not by recourse to principle or logic.

On the other hand, Justice Scalia's Carella approach may seem persuasive to those (non-empiricists) who believe it is possible to talk about a wide range of necessary truths, but only against an appropriate background (or framework) of assumptions. (There are people, for example, who, on seeing a juror with pie crumbs on his chin following the noon

recess, will conclude--after ruling out certain other possibilities, such that someone threw a pie at that juror--that the juror had pie for lunch.) Thus, it makes ***521** sense to say that the jury necessarily found a fact, given various assumptions about the reasonableness of the jurors, the state of the evidence, and so on. [171]

The "non-empiricist" account of necessity, however, does not satisfactorily explain what Justice Scalia means by "facts necessarily found by the jury." The reason is that Justice Scalia claims that in analyzing mandatory conclusive presumptions and elemental misdescriptions the courts are not to consider what a reasonable jury would do. To entertain such questions, he writes, is to invite speculation by the appellate courts. [172] Decisions made on the basis of speculation, in turn, amount to a usurpation of the jury's role. The problem here for Justice Scalia is that assumptions about what reasonable jurors would do are an indispensable part of the framework against which non-empiricist conclusions about what any given jury necessarily found must be made.

Justice Scalia might respond by saying that his idea of "facts necessarily found" is connected to the notion of a logically valid argument. If an argument is valid, then the conclusion is said to follow necessarily, or "of necessity," [173] from the premises. However, this sense of "necessary" seems inapplicable to the inquiry concerning which predicate facts the jury necessarily found. The test for **harmlessness** in Carella is to determine if predicate facts are sufficient to ensure that the "functional equivalent" of the ultimate fact was actually found by the jury. Thus, the propositions expressing predicate facts, in Justice Scalia's analysis, serve as premises, not conclusions, and therefore cannot be said to be necessary on the ground that they are derived.

Had Justice Scalia stipulated in Carella that a "necessarily found fact" was one that the judge instructed the jury to find, then he might have provided lower courts with a test they could apply simply and uniformly. Under such a conception of "necessarily found facts," appellate courts would have to inspect only a discrete portion of the trial record--i.e., the jury charge-- for "predicate facts." The next step would be to give the "predicate facts" a suitable linguistic expression, as done in P1 through P4 above. The court would then also express the "ultimate fact" propositionally, as in U ***522** above. Instead of resorting to questions about how a reasonable jury would view the relationship between evidence and ultimate facts, the appellate court could simply apply logical criteria to these linguistic expressions to determine, for example, whether U was derivable from P1-P4. [174]

Moreover, by insisting that the set of propositions that the jurors "necessarily found" to be true had to be included in the set of propositions discernible from the instructions the trial judge gave the jury, Justice Scalia could explain "necessarily found" in terms of two, interrelated senses of necessity, which he has embraced in other opinions. He could either say that facts are necessarily found in the sense that they are authorized, or he could say that they are necessarily found in the sense that they are deducible from the guilty verdict itself. It may be worthwhile to discuss this point at some length.

Given a guilty verdict, Justice Scalia's argument would run, it necessarily follows that the jury found all the facts that the court instructed it to find in order to convict. The assumption that juries invariably follow their instructions is crucial to the deduction that the jury found these instructed facts. [175]

The idea that appellate courts can deduce that the jury found instructed facts is connected to the form in which a trial court has issued its charge. Typically, the judge will tell the jury that in order to convict, the jury must find all the elements of the offense beyond a reasonable doubt. Alternatively, the judge may instruct that a conviction is proper only if the jury finds all elements of the crime beyond a reasonable doubt. Symbolized, such a charge would look as follows:

G--> E1 & E2 & E3,

where "G" stand for "guilty," "E" stands for "element of the offense is satisfied," and "-->" means "implies" or "only if." Consequently, if the verdict is G, modus ponens permits the appellate court to say that the jury found the elements E1, E2, and E3.

Close attention must be paid to the expressions in the charge that express logical relationships. For example, the phrase, "You must find the ***523** elements" is an acceptable representation of the idea that a valid conviction implies proof of each of the elements.

If the trial court had told the jury that it was required to find the predicate facts in order to presume U, the intent to commit fraud, then, on the assumption that juries invariably follow their instructions, the appellate court could infer that the jury found the predicate facts. The argument could be parsed as follows:

(1) If, the jury found Carella guilty (A), then it is because the jury presumed intent to commit fraud (B).

(2) If the jury presumed intent to commit fraud (B), then the jury found the predicate fact (C).

Thus,

(3) If the jury found Carella guilty (A), then it is because the jury found the predicate facts (C).

(4) The jury found Carella guilty (A).

Therefore,

(5) The jury found the predicate facts (C).

The form of this reasoning, set out in two stages, is:

(A-->B) & (B-->C)--> (A-->C)

((A-->C) & A)--> C

These two formulae can be reduced to a single expression:

((A-->B) & (B-->C) & A)--> C,

which is a valid formula.

The charge in Carella, however, instructed the jury that if certain predicates are obtained, then the ultimate fact of "intent to commit theft by fraud is presumed." [176] Instead of (2) above, the appellate court would be entitled to assume from this instruction that:

(2') If the jury found the predicate facts (C), then the jury presumed intent to commit fraud (B).

***524** Premise (2') is represented as (C-->B), not (B-->C). From (1) and (2'), the conclusion (3) does not follow, nor would (5) follow. In symbols, the argument substituting (2') for (2) would be:

((A-->B) & (C-->B) & A)--> C),

which is invalid. Hence, with (2') as a premise, we cannot conclude that Carella's jury found the predicate facts, even on the assumption that the jury followed the trial court's instruction.

One way of expressing the difference between (2) and (2') is to say that (2) asserts that the finding of the predicate facts by the jury is a necessary condition for the jury to presume intent to commit fraud, whereas (2') asserts that finding the predicate facts is a sufficient condition for the jury's presuming fraud. In appellate opinions, the language of necessary and sufficient conditions is often used interchangeably, but nonetheless mistakenly. For example, a court will often say that the jury found evidence necessary to support a guilty verdict, when it means that the jury found evidence sufficient to support a verdict. [177]

All an appellate court is logically entitled to infer from a guilty verdict, however, is that the jury found evidence sufficient to establish elements of an offense beyond a reasonable doubt. Consider, for example, jurors who are permitted to find a defendant guilty on one of several theories. Each theory may be supported by distinguishable sets of evidence. Handed a general verdict, the appellate court cannot tell what set of evidence such a jury necessarily found; at most the court can say that the jury "must have found" evidence to support a conviction under at least one of the theories. Furthermore, in cases where the jurors are allowed to convict under one theory only, the evidence that they have relied upon cannot be determined solely by logical inference because the evidence will often overdetermine guilt, such that the jurors will have the option of convicting on the basis of several sets of evidence. [178]

***525** The effort to buttress the soundness of Carella by focussing narrowly on the trial court's charge to the jury may be too generous to Justice Scalia, however, and in any case this approach is not how lower courts have read his opinion. [179] In fact, Justice Scalia himself in Carella, in addition to referring to "predicate facts relied upon in the instruction," [180] also refers to "other facts necessarily found by the jury." [181] Although Justice Scalia did say that review of the entire record is inappropriate when the **error** facing an appellate court is a mandatory presumption or elemental misdescription, he did

not, aside from this admonition, set any explicit limits to the scope of review. As a result, appellate courts may presume that the reference to "other facts necessarily found by the jury" gives them virtually free reign to scour the record. [182]

The implication that "other facts necessarily found" means the court can support a finding of **harmlessness** under Carella by looking for facts that the charge did not address, therefore, threatens to dilute Justice Scalia's suggestion that **harmless error** analysis will rarely be permissible under such circumstances. The reason is that in a trial record, the "other facts" will be the propositions that represent testimony and argument at trial. In order to determine whether the jury necessarily found other facts, appellate courts will consider the evidence that propositions representing these "other facts" are true. This could lead the courts to say that the jury necessarily found a missing element or presumed fact once it determines that there is sufficient evidence in the record in support of that element, rather than finding facts that are the functional equivalent of the element or presumed fact.

Of course, it may be that Justice Scalia's use of "other facts necessarily found by the jury" was simply infelicitous, and any attempt to attach a ***526** philosophical sense to the occurrence of "necessarily" in the phrase is vain. Even so, something can be gleaned from the realization that Justice Scalia could have avoided some interpretive problems if he had clarified that appellate courts were not to search beyond the trial court's instructions to the jury for "other facts necessarily found." Solving the problem presented by the phrase "facts necessarily found" by restricting the possible set of such facts to those referred to in judicial instructions would make Carella an extremely rigorous test. At the same time, however, it would have made it an extremely narrow test, applicable to an exceedingly narrow universe of cases.

2.3.2 Counterfactualism and Carella's Second Step

While Justice Scalia neglects to elucidate the meaning of the first step of his Carella analysis, he expends considerable effort explaining the second. According to Justice Scalia a set of predicate facts is functionally equivalent to ultimate facts only if the following test or standard is met: "No rational jury could find the predicate facts without finding the ultimate facts." [183] This standard, Justice Scalia insists, is distinguishable from the standard expressed by "a reasonable jury." [184] It is meant to be a rigorous logical test, which permits appellate courts to avoid speculation about the meaning of "a hypothetical jury's action." [185]

The second step of Carella, coupled with the "no rational jury" standard, gives the impression that Justice Scalia has successfully devised a means for determining what the jury actually found (as opposed to what some reasonable jury could have found). If that were so, he would have managed to elude the difficulties associated with counterfactual analysis. In point of fact, however, the "no rational jury" standard does not enable Justice Scalia to dodge counterfactual reasoning involving the concept of a reasonable jury.

The key point to note is that Justice Scalia's standard for testing functional equivalence of predicate to ultimate facts imports a reasonable juror standard into the Carella analysis. It is not difficult to demonstrate that Justice Scalia's test is equivalent to a proposition in which "some rational jury" is used as a standard. The proposition that "no rational jury would find predicate facts P1-P4, and not find the ultimate fact U" is logically the same as the proposition that "it is not the case that some rational juror would find P1-P4, and not find U." Furthermore, when one considers what concepts people come to grasp, it seems clear as well that in order to conceive of what ***527** no rational jury would fail to do, one would have to have an idea of what some rational jury would do. Finally, when an appellate court evaluates the state's argument that an **error** is **harmless** under Carella, it will also have to determine whether some rational juror might find predicate facts and not find an ultimate fact. All of these exercises are forms of counterfactual reasoning. But Justice Scalia in Carella does not provide any standards for determining what the set of relevant conditions is, nor does

he identify a causal law from which it can be concluded from the conditions that an **error** was **harmless**. In short, he does not even address, much less solve, the five epistemic difficulties discussed above in section 2.2.

In fairness, Justice Scalia at times does reflect an awareness of these difficulties. For example, he gives the impression that mandatory conclusive presumptions and elemental misdescriptions make it particularly difficult for an appellate court to overcome epistemological barriers to figuring out how the jury came to its verdict. Nevertheless, he stubbornly insists that reviewing judges find, in effect, that all juries, not just some, would find an ultimate fact if they found the right predicates; whence it follows, with the certainty of a valid deduction, that this jury would find the ultimate fact if it found the predicates.

Justice Scalia's concurring opinion in California v. Roy [186] amplifies the conclusion that he is proposing to tackle the problem of mandatory presumptions and elemental misdescriptions by purely logical means. A passage from his concurrence suggests that the term "rational" in the "no rational jury standard" refers to abilities that jurors, qua thinking beings, possess, while the term "reasonable," whether embedded in the standard of "a reasonable jury" or "no reasonable jury," ineluctably refers to a slough of extralogical tendencies. [187] The other thing Justice Scalia does in Roy is take a step away from the "no rational jury" standard. Certain **errors** (such as failure to instruct adequately on an element) can be **harmless** only if:

> (1) the jury verdict on other points effectively embraced this one; or
>
> (2) it is impossible, upon the evidence, to have found what the verdict (i.e. jury) did find without finding this point as well.

Justice Scalia does not give a detailed explanation of the crucial terms "effectively embraced" and "impossible to have found"; however, the first ***528** phrase connotes a logical relationship sometimes expressed in terms of one concept's including or containing another. [188] According to this theory, a concept includes another if the latter can be derived from the former. The soundness of syllogistic reasoning is sometimes said to be based on this type of relationship. [189]

Conceptual relationships amongst terms also permit deductive thinking in ordinary parlance where premises are often unexpressed. Take the example:

> Mammals are hairy;
>
> this is a dog;
>
> therefore,
>
> this is hairy.

This syllogism includes what is known as an enthymemic premise--the premise, "dogs are mammals," is unspoken. Nevertheless, such an argument is typically understood as valid despite its being formally incomplete. One reason advanced to explain this understanding is that the concept of being a dog includes the concept of being a mammal. It is not problematic that Justice Scalia's Carella formulation may well rely on a host of such premises; the problem is that they cannot be identified in a general way. If the premises can be identified at all, it is only in a highly fact-specific form. In other words, if Justice Scalia can surmount the counterfactual problem of identifying the relevant conditions, it is at the cost of violating the injunction of "The Rule of Law." [190]

Roy makes clear that Justice Scalia believes that he can subject **constitutional** **errors** to formal, logical analysis: specifically, to concepts of modern, propositional logic. His use of "impossible to find" in formulation (2) above closely mirrors definitions of logical entailment and necessary implication. One set of propositions, S1, is said to entail another, S2, if and only if it is impossible for the propositions in S1 to be true and the propositions in S2 to be false. [191] Consequently, Justice Scalia's Carella standard can be fairly reconsidered in terms of logical entailment, in which case erroneous jury instructions, in the event of a mandatory conclusive ***529** presumption, are **harmless** only if the predicate facts entail the ultimate facts. [192]

Again the problem is that absent an empirical inquiry, identifying the predicate facts is not a logical matter. Moreover, constructing the logical entailment implicates what Goodman calls the problem of specifying a causal law. [193] Such a specification presents intractable, if not unsolvable, problems because virtually every legal argument is enthymemic. In order to show that an ultimate fact can be derived from predicate facts, the appellate court will inevitably rely on "suppressed" or background premises, or it will have to rely on the conceptual relationships between (or among) terms as in the example of syllogistic reasoning used above.

Judges, in short, will always have to make judgments about reasonable, relevant relationships between (or among) concepts and propositions, rather than conduct a mathematically rigorous analysis. When they do, they are acting on the basis of something other than principle, yet Justice Scalia's broader judicial philosophy purports to abhor the abandonment of principle. As we argue in the following section, Justice Scalia's futile effort to construct a coherent **harmless** **error** doctrine runs headlong into his overarching jurisprudence.

3. The Rule of Law

King Solomon, says Justice Scalia, "is supposed to have done a pretty good job . . . (of) dispensing justice case-by-case." [194] Yet although Solomon may have gotten the right answers, Justice Scalia does not think very much of his method. Solomon was a particularist who relied less on clear rules than on an instinct or a hunch. [195] Solomon epitomizes wisdom because he strikes one as having reached an agreeable result, not because of his methodology.

***530** Justice Scalia's jurisprudence, in contrast, is formalistic rather than particularistic; it is less inspired by the wisdom of Solomon than it is haunted by the ghost of Alexander Bickel. [196] Embodying Bickel's democratic sensibility, Justice Scalia believes that any juridical method that sacrifices legitimacy in exchange for the right answer is a dubious method.

Cass Sunstein has characterized Justice Scalia's jurisprudence as "democratic formalism." [197] Professor Sunstein's phrase nicely evokes Scalia's twin aspirations: to minimize conflict between judicial review and majoritarian government, and

to conduct judicial review in accordance with formal, perdurable principles. In a recent book, Justice Scalia defends his own method and contrasts it with his nemesis, common law adjudication. [198] The signal characteristic of common law adjudication--namely, its flexibility [199] --is not, in Justice Scalia's view, a virtue. In fact, Justice Scalia insists this flexibility conceals dual evils: Common law adjudication is both antidemocratic and unpredictable. More than any other current member of the Court, Justice Scalia has given voice to the tension between doing justice on the one hand, and respecting democratic majorities on the other; and as much as any other Justice, he has stressed the importance of predictability.

Justice Scalia has been stressing these themes for some time and with some energy. In a lecture delivered over a decade ago and subsequently published under the title "The Rule of Law as a Law of Rules," [200] Justice Scalia drew a distinction between two models of judging. [201] One he associates with Solomon, the other with Aristotle. [202] Whereas Solomon may get the right answers, his jurisprudence is quintessentially discretionary. [203] Aristotle, in contrast, exemplifies principled decision-making, adhering to principle regardless of consequences. [204] Although Aristotle may, from time ***531** to time, get the wrong answer, the damage thereby done is far outweighed by the benefit of adhering steadfastly to a principle. [205] When judges follow principles, no matter where those principles may lead in a particular case, they command the respect of the populace, and consequently maintain their credibility, which in turn preserves their capacity to issue judgments that will command obedience. [206] Justice Scalia's notion is that the people will forgive an unpalatable result if they appreciate that judges rigorously adhere to principle; but once judges are seen as uncircumscribed by principle, then they squander their legitimacy. [207] This idea is not new, and Scalia does not claim to have invented it; nevertheless, he is among its most forceful contemporary advocates. "I stand," says Scalia, "with Aristotle . . . which is a pretty good place to stand." [208] Justice Scalia associates Aristotle with the proposition that " (r)ightly constituted laws should be the final sovereign; and personal rule . . . should be sovereign only in those matters on which law is unable . . . to make an exact pronouncement." [209]

There is, of course, some irony in Justice Scalia's embrace of Aristotle if he is truly concerned about judicial legitimacy, for that was not Aristotle's concern at all. The Athenian **constitution**, unlike that of the United States, was exclusively devoted to the distribution of offices and powers, and not in the slightest aimed at safeguarding individual right from governmental power. [210] Notably, Athens had no Bill of Rights. It is therefore a bit peculiar to encounter an American jurist who regards his Athenian counterparts as methodological role models. Moreover, the laws that individuals in Athens could claim protection of--the unwritten laws--were essentially ethical mores, and Aristotle clearly accepted the notion that the best judges were those who understood these mores and could render decisions based on them. Finally, perhaps the greatest irony here is that a Justice ostensibly concerned with democratic legitimacy would so fervently embrace a theorist who did not think well of democracy at all.

In any event, Justice Scalia's aim in "The Rule of Law" is not to present an overarching theory of law: he is specifically concerned with the problem associated with law-making by federal appellate judges, and his aim is to establish that adherence to general rules for the purpose of deciding cases rather than an ad hoc, fact-intensive, case-by-case approach better serves democratic and **constitutional** values. Discretionary decision-making ***532** undermines respect for the legal system itself, Justice Scalia argues, and principled decision-making is therefore superior, even if it results in the wrong decision in a particular case because over the long run it better preserves judicial legitimacy. Furthermore, the power of the judges, who may or may not be the least dangerous federal officers but who surely are the least representative, is most effectively circumscribed by a demand that they act in accordance with general principle.

Whatever one might think about the judicial philosophy expressed in "The Rule of Law," one thing is clear: Justice Scalia commits himself to the general over the particular, to adherence to principle over attention to outcome. On the

surface, Justice Scalia's avowed preference for general principle over ad hoc case-by-case discretionary justice would seem to evince a hostility toward **harmless error** analysis. For what is a judge doing when engaging in **harmless error** review other than determining that, notwithstanding the violation of a legal principle, the result in the case is agreeable and hence will not be disturbed? Is not **harmless error** review the paragon of Solomonic adjudication? Scalia identifies "personal discretion to do justice" with fact-intensive inquiries and condemns such a method as destructive of judicial legitimacy. [211] And yet, the **harmless error** doctrine that Justice Scalia has subscribed to and even developed is perhaps the purest form of the exercise of personal discretion.

In Justice Scalia's view, the reason why the personal discretion approach to judging is insidious is because although it may produce a better result in a particular case, it gives the appearance of inequality. [212] Suppose that the same legal norm is violated in two different cases, but the appellate court disturbs the result in only one of the cases because it believes that only one of the outcomes is incorrect. The effect on the polity of such a dynamic is that respect for the judiciary wanes because of the perception that the equal-treatment norm is being ignored. It is not enough, argues Justice Scalia, that like cases be treated alike and unlike cases be treated dissimilarly; it is also imperative that such equal treatment "be seen as so." [213]

At a rather high level of generality, it is possible to reconcile Justice Scalia's jurisprudential approach with **harmless error** doctrine. But such high abstraction makes consistency cheap. As Hegel noted, all cows look black in the dark. Justice Scalia attempts in Carella and Sullivan to articulate a principled, logical basis for the determination of whether an **error** is **harmless**, but the Carella-Sullivan approach is limited to a rather small universe of **constitutional errors**. In the larger universe, as reflected by his ***533** position in Fulminante, Justice Scalia seems comfortable with discretionary justice where criminal proceedings are involved.

When a court applies **harmless error** analysis in the **constitutional** context, that court is concluding that a **constitutional** right--a fundamental legal principle--was violated by the state. Yet it disregards the violation of that principle, at least sometimes. Likewise, a court applying **harmless error** doctrine is thereby acting particularistically; it is engaging in a fact-intensive, ad hoc, case-by-case approach. It is acting, in short, like Solomon, not Aristotle; it is saying that notwithstanding the violation of a principle, the right result was attained. To paraphrase Justice Black, a court upholding an **error** as **harmless** is saying, "we recognize that a principle, a **constitutional** right, was violated by the state, but we nonetheless believe that the defendant is guilty." [214]

Justice Scalia is not altogether unmindful of this tension between the rule of law and **harmless error** doctrine, and he has sought to cabin the conflict by developing a more nuanced approach to **harmless error**. Even under his approach, however, exemplified by Carella and Sullivan, the appearance of principled decision-making is misleading. Recall that Justice Scalia insists that even an erroneous jury charge can be deemed **harmless** if the reviewing court determines that "no juror could find (X) without also finding (Y)." [215] The reference to "no juror" appears to evoke general principles; if no juror could think or find something, then the court applying **harmless error** doctrine is doing nothing more than stating an incontestable fact.

But the appearance of a principled approach in Justice Scalia's **harmless error** philosophy is misleading. For one thing, jurors do find X every day without also finding Y. The O.J. Simpson trial, the trial of the officers accused of beating Rodney King, and even the McDonald's hot coffee litigation prove, if nothing else, that jury deliberations are not exercises in syllogistic reasoning.

Furthermore, and in any event, facts X and Y vary from case to case, so that when Justice Scalia says that no juror could find X without also finding Y, he is talking about a particular case, not a general principle. Even Justice Scalia is, therefore, saying that the violation of the general principle can be excused in the context of a particular case.

***534** Justice Scalia's concern in "The Rule of Law" is not with logic but with appearance. Those are the terms on which he must be judged. If he is truly concerned that the same rules be followed in all like cases, and if he is further genuinely committed to fostering the perception that the same rules are followed in all like cases, then no approach to **harmless error** analysis will be acceptable.

4. Conclusion

In Johnson v. United States,[216] Chief Justice Rehnquist, writing for a unanimous Court, rejected Justice Scalia's approach to **harmless error** analysis.[217] Rehnquist had been resisting it from the outset. Thus, as early as Sullivan, while Justice Scalia was developing his discrete approach, Chief Justice Rehnquist demurred, noting that "any time an appellate court conducts **harmless-error** review it necessarily engages in some speculation as to the jury's decisionmaking process."[218] The reason is that "no judge can know for certain what factors led to the jury's verdict."[219] Chief Justice Rehnquist realized three key facts: first, no approach to **harmless error** can avoid counterfactual analysis; second, applying such analysis demands that judges draw conclusions about what a reasonable juror would have done; and third, in asking what a reasonable juror would have done, the appellate judge is effectively asking what he or she believes. Johnson and Neder make it clear that at last Chief Justice Rehnquist's view, along with its attendant realizations, prevails.

Like Carella and Sullivan, Johnson involved an erroneous jury instruction,[220] and a unanimous Court concluded that even such an **error** can be analyzed under the doctrine of Fulminante. At least eight Justices, therefore, and perhaps even Justice Scalia himself, recognize that **harmless error** analysis is a form of counterfactual reasoning. What not even a single Justice has done is provide a sound philosophical foundation for its exercise.

Harmless error doctrine has returned to its beginnings. Chief Justice Rehnquist in Johnson can be heard echoing Justice Douglas's opinion in Harrington: Appellate judges, said Justice Douglas, "do not know the jurors who sat."[221] The judges, therefore, cannot say what the jurors would have done had the world been different. All a judge can do is say whether he or ***535** she believes that the defendant is guilty based on the record.[222] Chief Justice Rehnquist goes even a step further in Johnson, saying that the violation of the individual's right will be weighed against the " 'fairness, integrity or public reputation of judicial proceedings.'"[223] In other words, the firmer the judge's belief in the defendant's guilt, the greater the **constitutional** violation it will be willing to overlook.[224] Remarkably, even Justice Scalia, who purports to reject particularism in favor of principle, joined that portion of the Johnson opinion that called for such a balancing test.[225]

Justice Brennan saw the unavoidable mischief of this approach: If **errors** can be overlooked as long as the reviewing court believes that the defendant is guilty, then there is every incentive for police and prosecutors to extract a confession, or otherwise violate the defendant's rights, as long as they are confident they will be able to acquire adequate other evidence that points toward the defendant's guilt.[226] Adherence to the rule of law, Justice Brennan explains, is inconsistent with a doctrine that overlooks the violation of a legal principle simply because an appellate judge is confident that adhering to the principle would have made no difference.

Why we believe what we believe is often a complicated matter. Some people believe that Alger Hiss committed treason and others believe that he did not. Everyone can point to evidence on which he or she relies, but the evidence will underdetermine the conclusion. In the realm of **harmless error**, however, the question of what the judge believes is the wrong question. The proper question is what would the jury have believed. To be sure, we must transpose this impossible question into a more tractable form, and we do so by asking what a reasonable juror would believe (a formulation that works because the judge is reasonable). But even once we have written the question ***536** in this form, we still do not at present have any way of answering it reliably. We may well need to ask it anyway in most appellate cases, but we should surely not be asking it in criminal trials, where **constitutional** violations have occurred, unless we can provide the question with a firmer and sounder conceptual foundation.

In the ideal world, the state respects every defendant's **constitutional** rights, and all guilty defendants (and no innocent ones) get convicted. But the ideal world is a counterfactual world. In the world that we actually have, we must choose between imperfect alternatives. One imperfect option is that any defendant whom a judge believes to be guilty will not have his conviction disturbed, irrespective of any **constitutional** violations, unless the defendant requested a lawyer and did not receive one. A second imperfect option is that some defendants whom judges believe to be guilty will have their convictions set aside if the state violates their **constitutional** rights. The principle known as the rule of law suggests that, as between these two options, the latter is far preferable. But rights, especially rights of criminal defendants, are not currently held in high esteem. And so it is that **harmless error** doctrine, in its present unsophisticated, incomplete, even incoherent form, is just a transparent device for overlooking **constitutional** violations, no matter how egregious, when the victims of those violations are men or women whom appellate judges believe to be guilty.

Footnotes

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1 386 U.S. 18 (1967).

2 386 U.S. at 23-24. The evidentiary burden under Fahy v. Connecticut is to establish **harmlessness** beyond a reasonable doubt. Fahy v. Connecticut, 375 U.S. 85, 86-87 (1963).

3 Daniel J. Meltzer, **Harmless Error** and **Constitutional** Remedies, 61 U. Chi. L. **Rev**. 1, 1 (1994).

4 Id. at 5-39.

5 Sullivan v. Louisiana, 508 U.S. 275, 284 (1993). **Harmless error** doctrine is also integral to our civil justice system; we are presently concerned with the doctrine, however, only in the criminal context.

6 Arizona v. Fulminante, 499 U.S. 279, 290 (1991).

7 Id.

8 Id.

9 Id.

10 499 U.S. 279 (1991).

11 Id. at 309; id. at 290 (opinion by White, J.). Denial of the right of self-representation is included in the denial of counsel category. Prior to Fulminante, use of a coerced confession had been widely viewed as on the list of structural **errors**. Payne v. Arkansas, 356 U.S. 560, 568 (1958); Chapman, 386 U.S. at 23 n.8.
Obviously it makes no sense for a physical absence of counsel to represent a structural **error** while the physical presence of incompetent counsel is only trial **error**, and that is especially so insofar as the **constitutional** basis for requiring that counsel be effective is the Sixth Amendment guarantee of counsel. Strickland v. Washington, 466 U.S. 668 (1984). But that is an argument for another day.

12 Fulminante, 499 U.S. at 296.

13 Id.

14 See infra Section 2.3.

15 Sullivan, 508 U.S. at 279 (emphasis added).

16 John M.M. Greabe, Spelling Guilt Out of a Record? **Harmless**-**Error** Review of Conclusive Mandatory Presumptions and Elemental Misdescriptions, 74 B.U.L. **Rev**. 819, 822-30 (1994); Philip J. Mause, **Harmless** **Constitutional** **Error**: The Implications of Chapman v. California, 53 Minn. L. **Rev**. 519, 523 (1969); Steven H. Goldberg, **Harmless** **Error**: **Constitutional** Sneak Thief, 71 J. Crim. L. & Criminology 421 (1980).

17 Greabe, supra note 16.

18 See Goldberg, supra note 16, at 422 n.15 (noting that in order to push for **harmless** **error** legislation organized bar spearheaded coalition counting among its participants Pound, Taft, Wigmore, Hadley, and Frankfurter).

19 Section 269 of the former Judicial Code. See Wright, Miller & Cooper, Federal Practice and Procedure § 852 (West 1982) (giving background on the legislative history of **harmless** **error** statutes) (hereinafter Wright & Miller).

20 Kotteakos v. United States, 328 U.S. 750, 758 (1946) (meaning without regard to **harmless** **errors**). When, in 1946, Congress adopted Criminal Rule 52(a), it, along with Civil Rule 61, replaced the 1919 legislation. Wright & Miller, supra note 19, at § 2881.

21 Wright & Miller, supra note 19, at § 853.

22 See, e.g., Deluna v. United States, 308 F.2d 140, 155 (5th Cir. 1962) (contending that **harmless** **error** rule has restricted applicability in criminal cases); see also Wright & Miller, supra note 19, at § 298 (stating that "even today there is a reluctance to apply the notion of **harmless** **error** in a criminal case").

23 Wright & Miller, supra note 19, at § 2881.

24 375 U.S. 85 (1963).

25 Id. at 91-92.

26 Id.

27 Chapman, 386 U.S. at 19-20.

28 380 U.S. 609 (1965).

29 Id. at 613-14.

30 Chapman, 386 U.S. at 19.

31 Id. at 23-24 (emphasis added). Justice Black's use of the word "possibly" is important, and we shall return to the issue of his word choice below.

32 Id. at 24 (emphasis added).

33 Id.

34 Richard H. Fallon, Jr. & Daniel J. Meltzer, New Law, Non-Retroactivity, and Constitutional Remedies, 104 Harv. L. Rev. 1731, 1772 n.222 (1991).

35 Chapman, 386 U.S. at 24.

36 Id.

37 Id. at 23-24.

38 395 U.S. 250 (1969).

39 Id. at 254.

40 Id. at 255 (Brennan, J., dissenting).

41 Id. at 252.

42 Id. at 253-54.

43 Id.

44 391 U.S. 123 (1968).

45 Id. at 124 n.1.

46 Harrington, 395 U.S. at 252. The way to have avoided the violation would have been to sever Harrington's trial from the that of other three codefendants. Id. In fact, Harrington requested that his trial be severed, but that motion was denied by the trial court. Id.

47 Id. at 254.

48 Id.

49 Id.

50 Id. at 254.

51 Id. at 255-56 (Brennan, J., dissenting).

52 491 U.S. 263 (1989).

53 Id. at 264.

54 Id.

55 Id.

56 Other more discriminating parsings are possible, and it is significant that Justice Scalia never addresses the fact that there may be multiple ways of laying out predicate facts. For example, instead of the fourth predicate displayed in the text above, we could substitute the following:

(P4'): The defendant failed to return the property to its owner within 20 days;
(P5'): The owner made a written demand.
Often, for the purposes of this analysis, it will not matter which way is chosen. But it could, especially when an instructional **error** contains a presumption related to the very definition of a mental state. We return to this issue in section 2.3 below.

57 Carella, 491 U.S. at 265.

58 Id. at 267 (Scalia, J., concurring).

59 In Carella, Justice Scalia described "usual **harmless** **error** analysis" as follows: "'Where a reviewing court can find that the record developed at trial establishes guilt beyond a reasonable doubt, the interest in fairness has been satisfied and the judgment should be affirmed.'" Id. at 272 (quoting Rose v. Clark, 478 U.S. 572, 579 (1986)) (emphasis added).
Although this statement is arguably dictum in Carella, the description suggests that reversal is avoided if the reviewing court determines that some rational jury could find beyond a reasonable doubt that the defendant was guilty. This approach to **harmless** **error** analysis bears affinities to review for sufficiency of the evidence. In Jackson v. Virginia, the Court held that in considering whether evidence in the record was sufficient to sustain the verdict, appellate courts were to assess the evidence in a light most favorable to the verdict and inquire whether some rational jury could have found guilt beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319 (1979). The description of usual **harmless** **error** analysis that Justice Scalia endorses differs from sufficiency review in that he does not explain in what light the evidence is to be reviewed in order to determine whether **error** was **harmless**.

60 Harrington, 395 U.S. at 254. It merits mention that the Harrington court has replaced Justice Black's "possibly" with a far more forgiving "probably."

61 Carella, 491 U.S. at 269-70.

62 Id. at 268.

63 Id. at 268 (Scalia, J., concurring).

64 Id. at 269-70 (Scalia, J., concurring).

65 460 U.S. 73 (1983).

66 Carella, 491 U.S. at 270 (quoting Connecticut v. Johnson, 460 U.S. 73, 87 (1985)) (emphasis added).

67 Id.

68 Id. at 271.

69 Id.

70 Already in Carella, therefore, we begin to see Scalia's thaumatrope at work: looking first at a particular jury and focussing next on a hypothetical, reasonable jury. We discuss this point further in section 2.3, infra.

71 499 U.S. 279 (1991).

72 Id. at 309-10.

73 Id. at 310.

74 Id.

75 Id. at 309-10.

76 Id. at 307-08 (emphasis added).

77 Fulminante, 449 U.S. at 310. Eventually, in Brecht v. Abrahamson, the Court held that the burden of proving **harmlessness** on collateral review had to be lower than the **harmless** beyond a reasonable doubt standard applicable to direct appeals. Brecht v. Abrahamson, 507 U.S. 619, 633 (1993). A court could reverse on habeas, the Brecht Court held, only if the reviewing judges had grave doubts that the **error** was **harmless**. Id. at 637.

78 Fulminante, 499 U.S. at 309.

79 Id. at 310.

80 508 U.S. 275 (1993).

81 Id. at 277.

82 596 So. 2d 177 (La. 1992). The Louisiana Supreme Court, however, vacated the defendant's death sentence on the grounds that his counsel at the sentencing phase had been **constitutionally** ineffective. Id. at 190-192.

83 Sullivan, 508 U.S. at 282.

84 Id. at 280-81.

85 Id. at 281-82.

86 Id. at 279 (emphasis added by Justice Scalia) (interior quotes omitted) (quoting Yates v. Evatt, 500 U.S. 391, 404 (1991)).

87 Id. at 279 (emphasis in original and emphasis added). The phrase "surely unattributable" is far more evocative of Justice Black's formulation in Chapman than the more contemporary Harrington formulation.

88 Id. at 280.

89 Sullivan, 508 U.S. at 280. Justice Scalia realizes that if **harmless** **error** review is permitted where the jury has rendered no verdict, it is tantamount to directing a verdict for the state in a criminal proceeding. Of course, as we argue in the text, the premise that the jury has rendered no verdict is tendentious and tenuous.

90 Id. at 284.

91 Id.

92 579 U.S. 2 (1996).

93 Id. at 4.

94 Id. at 3.

95 Id. at 4.

96 Id. at 6.

97 328 U.S. 750 (1946). Kotteakos was adopted as the relevant standard in collateral appeals in Brecht v. Abrahamson, 507 U.S. 619, 622 (1993).

98 Roy, 579 U.S. at 5 (internal citations omitted).

99 Id. at 6 (Scalia, J., concurring).

100 Id. at 7 (Scalia, J., concurring).

101 Id. at 7 (Scalia, J., concurring) (quoting Sullivan, 508 U.S. at 280).

102 527 U.S. 1 (1999).

103 Id. at 11-13.

104 Id. at 6-16.

105 Id. 5-6.

106 Id. at 15-16, 24.

107 Id. at 11.

108 475 U.S. 673 (1986).

109 Neder, 527 U.S. at 15-16 (quoting Van Arsdall, 475 U.S. at 681).

110 Id. at 17.

111 Id. at 17-19.

112 Id. at 31-32 (Scalia, J., dissenting).

113 Id. at 33-34 (Scalia, J., dissenting). Rehnquist's not-terribly-persuasive answer is that the life of law is not logic but experience, and directed verdicts against criminal defendants remain impermissible. Id. at 17 n.2 (reiterating vitality of Rose v. Clark, 478 U. S. 570 (1986)).

114 Id. at 17.

115 527 U.S. at 38 (Scalia, J., dissenting).

116 Id. at 39.

117 Examples of efforts to provide a coherent conceptual foundation for counterfactuals include Judea Pearl, Causality (**2000**) and **David** Lewis, Counterfactuals (1973). Neither Lewis nor Pearl, however, has developed a model that successfully addresses limitations with **harmless** **error** analysis. In addition, we find especially congenial a "realist" approach to counterfactuals developed by Robert C. Stalnaker, Inquiry 147-69 (1987).

118 **David** Hume, An Enquiry Concerning Human Understanding 51 (1748) (Open Ct. Press 1958).

119 Ernest Sosa, Varieties of Causation, in Causation 234 (Ernest Sosa & Michael Tooley, eds., 1993).

120 Pearl, supra note 117, at 29.

121 Id.

122 Id.

123 Id.

124 Nelson Goodman, Fact, Fiction, and Forecast 4 (4th ed. 1983); **David** Lewis, Counterfactuals (rev'd ed. 1986).

125 Goodman, supra note 124, at 4.

126 Id.

127 **David** Lewis, Counterfactuals and Comparative Possibility, in 2 Philosophical Papers 18 (1986).

128 Goodman, supra note 124, at 4.

129 Id. at 8; see also Roderick M. Chisholm, 14 Philosophy and Phenomenological Research 120 (1953); Roderick M. Chisholm, The Contrary-to-fact Conditional, 55 Mind 289 (1946); The Cambridge Dictionary of Philosophy 163-64 (Robert Audi ed., 1995).

130 Goodman, supra note 124, at 8.

131 Id. at 13.

132 Id. at 16-17.

133 The important distinction between necessary and sufficient causation is addressed further below.

134 For reasons stressed above, the complete causal statement is actually P, I, L --> Q. However, where our attention is focused on evidentiary propositions, we simplify by abbreviating the causal statement as P --> Q.

135 It is more precise, though more cumbersome, to think of ~P1 ~P2 ~ P3 . . . °P15, because there are 15 (i.e., 2 4-1 (the 1 representing P)) ways to change P into ~P, but the argument we make in the text will apply to any iteration of ~P.

136 Goodman, supra note 124, at 8.

137 Pearl, supra note 117, at 250-51.

138 Goodman, supra note 124, at 19.

139 Id. at 20.

140 Id. at 27.

141 Id. at 23.

142 In re Winship, 397 U.S. 358, 361-64 (1970).

143 United States v. Lawson, 507 F.2d 433, 440 (7th Cir. 1974).

144 Jones v. United States, 338 F.2d 553, 555 (D.C. Cir. 1964).

145 Victor v. Nebraska, 511 U.S. 1, 17 (1994).

146 Id.

147 If P --> Q and P --> ~Q, then, if P is true, we would seem to violate the rule of noncontradiction by asserting both Q and ~Q. However, we avoid this problem for the reasons identified in the text.

148 Schad v. Arizona, 501 U.S. 624, 641 (1991); McKoy v. North Carolina, 494 U.S. 433, 449 n.5 (1990) (Blackmun, J., concurring).

149 This point has been made in David R. Dow, The Death Penalty's Degrees of Guilt, Christian Sci. Monitor, June 26, 2000, at 9; David R. Dow, The Third Dimension of Death Penalty Jurisprudence, 22 Am. J. Crim. L. 151, 180-85 & n.150 (1994); David R. Dow, Teague and Death: The Impact of Current Retroactivity Doctrine on Capital Defendants, 19 Hastings Const. L. Q. 23, 40-41 (1991); Irene Merker Rosenberg & Yale M. Rosenberg, Guilt: Henry Friendly Meets the Maharal of Prague, 90 Mich. L. Rev. 604, 613 (1990).

150 Pearl, supra note 117, at 36.

151 Sullivan, 508 U.S. at 279.

152 Pearl, supra note 117, at 253-54. Finally, there is a sense in which all of the propositions in the transcript are a single seamless web; each proposition has an effect on every other, and each is in turn affected by every other. Cf. W.V. Quine and J.S. Jullian, The Web of Belief (1970).

153 David Lewis, Counterfactual Dependence and Time's Arrow, in 2 Philosophical Papers 57-64 (1986).

154 Id. at 62.

155 As Pearl emphasizes, resolving questions of necessary causation is profoundly complex. Pearl, supra note 117, at 238, 283-85, 298-99.

156 In addition, and problematically, the third and fourth propositions collapse into the second if we assume that the judge is reasonable and that he or she determines what a reasonable juror would have done by asking what he or she would have done had the judge been a juror.

157 See, e.g., Pyles v. Johnson, 136 F.3d 986, 991 (5th Cir. 1998) (holding juror's statements regarding discrepancies between actual and perceived crime scenes were inadmissible as related to juror's mental process).

158 Lewis, supra note 117, at 8-23.

159 Pearl, supra note 117, at 309-11.

160 Saul M. Kassin & Holly Sukel, Coerced Confessions and the Jury: An Experimental Test of the "Harmless Error" Rule, 21 Law & Hum. Behav. 27, 40-44 (1997).

161 The following discussion draws heavily on David Lewis, Causation, in 2 Philosophical Papers 159-218 (1986). See also Donald Davidson, Causal Relations, in Causation 75-87 (Ernest Sosa & Michael Toohey, eds., 1993) (analyzing difficulty of expressing cause/effect relationships as individual events); Michael Tooley, Time, Tense & Causation 58-63 (1997) (analyzing nature of causal relationships).

162 Pearl, supra note 117, at 78; see generally id. at 114-21 (establishing model in which "the causal effect P(yx) is identifiable in do calculus" and further analyzing "the probalistic evaluation of plans in the presence of unmeasured variables").

163 Kassin & Sukel, supra note 160, at 36-37.

164 See Carella v. California, 491 U.S. 263, 269 (Scalia, J. concurring). Scalia stated the that problem of mandatory conclusive presumption
would not be cured by an appellate court's determination that the record evidence unmistakably established guilt, for that would represent a finding of fact by judges, not by a jury. As with a directed verdict, "the error in such a case is that the wrong entity judged the defendant guilty."
Id. (quoting Rose v. Clark, 478 U.S. 570, 580-581 (1986)).

165 Sullivan v. Louisiana, 508 U.S. 275, 279 (citing Yates v. Evatt, 500 U.S. 391, 404 (1991)).

166 See Carella, 496 U.S. at 271 (Scalia, J., concurring) ("When the predicate facts relied upon the instruction, or other facts necessarily found by the jury, are so closely related to the ultimate fact to be presumed that no rational jury could find without also finding that the ultimate fact, making those findings is functionally equivalent to finding the element required to be presumed.").

167 Id.

168 Id.

169 Id.

170 Id. (quoting Chapman v. California, 386 U.S. 18, 24 (1967)).

171 Caution should be exercised here. It is a mistake to think that because one proposition logically entails a second, the first proposition makes the second proposition necessary. This is to confuse (N)(p-->q) with (p--> (N)q). As Hughes and Cresswell remark, expressions having these two forms "are often confused in ordinary discourse, sometimes with disastrous results." G.E. Hughes & M.J. Cresswell, An Introduction to Modal Logic 27 n.17 (2d ed. 1972).

172 Sullivan, 508 U.S. at 280.

173 Aristotle, Prior Analytics, Bk. I, ch. 1, reprinted in The Basic Works of Aristotle 65 (Richard McKeon ed., 1941). Aristotle defines the syllogism as follows: "A syllogism is a discourse in which, certain things being stated, something other than what is stated follows of necessity from their being so." Id. at 66.

174 Though this potential solution might address a philosophical concern, it does so at the cost of Justice Scalia's conception of what the Sixth Amendment requires because this solution would represent a factual finding by the court rather than the jury.

175 Justice Scalia manifestly does, perhaps naively, accept this assumption. See Richardson v. Marsh, 481 U.S. 200, 207-09 (1987) (noting "while it may not always be simple for the members of a jury to obey the instruction that they disregard an incriminating inference, there does not exist the overwhelming probability of their inability to do so").

176 Carella v. California, 491 U.S. 263, 264 (1989).

177 The source of this tendency to confuse necessary and sufficient conditions arguably stems from the belief held by many judges that from the fact of a guilty verdict it necessarily follows that the jury found the essential elements defining an offense. The instructions typically will also direct the jury to find the elements only if the evidence establishes them beyond a reasonable doubt. Thus, from the guilty verdict it follows that the jury found facts. Because the proposition, "the jury found facts establishing the elements," is deducible, there is a tendency to say, "the jury necessarily found facts," and this rephrasing becomes, "the jury found necessary facts." This last locution is, strictly speaking, false.

178 A limiting example is the case in which the evidence is so scanty that the jury could convict only on the basis of one theory supported by one set of evidence. However, it would be a peculiar outcome if, under Carella's demand that appellate courts determine what the jury necessarily found, reversals were more likely where the evidence was scanty.

179 See, e.g., United States v. Holmes, 93 F.3d 289, 293 (7th Cir. 1996) (holding defendant's firearm conviction could not be sustained because erroneous instruction seriously affected substantial rights of defendant and also fairness and integrity of proceedings); United States v. Maloney, 71 F.3d 645, 658 (7th Cir. 1995) (holding, in part, erroneous jury instruction constituted **harmless error** because "no rational jury could have failed to find the existence of a pending grand jury proceeding" during defendant's attempts to obstruct justice); United States v. Parker, 73 F.3d 48, 53 (5th Cir. 1996), vacated and reinstated in part, 104 F.3d 72 (5th Cir. 1997) (finding **harmless error** for judge to instruct jury on element of crime because jury found underlying predicate acts did occur and it was unlikely jury would have applied a proper instruction erroneously).

180 Carella, 491 U.S. at 271 (Scalia, J., concurring).

181 Id. (emphasis added).

182 Perhaps Justice Scalia's proscription against an all-out review was meant to preclude the appellate courts from examining portions of the record where the evidence goes to prove elements other than the one misdescribed or presumed. The problem with this possibility is that cases are not often organized so that each element of an offense is addressed in a discrete part of the trial. Witnesses tend to give testimony at once relevant to the proof of multiple elements.

183 Carella v. California, 491 U.S. 263, 271 (1989) (Scalia, J., concurring).

184 Sullivan v. Louisiana, 508 U.S. 275, 281 (1993).

185 Id. at 280.

186 579 U.S. 2 (1996).

187 According to the Ninth Circuit, the trial judge gave an instruction that permitted the jury to convict Kenneth Roy of first degree murder so long as the jury "concluded that (among other things) Roy, 'with knowledge of' the confederate's 'unlawful purpose' (robbery), had helped the confederate, i.e., had 'aid(ed),' 'promote(d),' 'encourage(d),' or 'instigate(d)' by 'act or advice . . . the commission of' the confederate's crime." Id. at 3 (quoting Roy v. Gomez, 55 F.3d 1483, 1485 (9th Cir. 1995)).

188 See Aristotle, Prior Analytics, Bk. I, ch. 4., reprinted in The Basic Works of Aristotle (Richard McKeon ed., 1941) ("I call that term the major in which the middle is contained.").

189 Id. at 69.

190 See infra Part 3.

191 See G.E. Hughes & M.J. Cresswell, supra note 172, at 26 ("There has been a good deal of philosophical controversy about the correct analysis of entailment, but one thing which is not disputed is that whenever (P) entails (Q) it is impossible that (P) should be true without (Q)'s being true too.").

192 Another answer, however, is that Justice Scalia is aware that the evidence cannot yield necessarily found facts. If the latter answer is the correct one, then Justice Scalia is implying that appellate courts are not to look for other facts necessarily found by the jury in the record as a whole. Instead, it seems, the appellate court must stick to the instructions. The passage indicates that the record may contain propositions that entail the proposition that expresses the missing element. But no matter how strong the evidence in support of these predicate propositions is, that evidence will not overcome the mistake in the charge, because the appellate court cannot tell if the jury bothered to determine whether the evidence presented to prove those predicate propositions was true.

193 Goodman, supra note 124, at 19.

194 Antonin Scalia, The Rule of Law as a Law of Rules, 56 U. Chi. L. Rev. 1175, 1176 (1989).

195 Cf. Joseph C. Hutcheson Jr., The Judgment Intuitive: The Function of the "Hunch" in Judicial Decision, 14 Cornell L. Q. 274 (1928) (acknowledging presence of and correctness of role of intuition in judicial decision making).

196 Bickel represents the apotheosis and the forefather of contemporary concern over judicial legitimacy. See David R. Dow, When Words Mean What We Believe They Say: The Case of Article V, 76 Iowa L. Rev. 1, 4-5 nn.20 & 22 (1990) (discussing countermajoritarian difficulty and Bickel's characterization of Supreme Court as "deviant institution" in need of legitimacy in democratic system).

197 Cass R. Sunstein, Justice Scalia's Democratic Formalism, 107 Yale L. J. 529, 530 (1997).

198 Antonin Scalia, A Matter of Interpretation: Federal Courts and the Law (1997). The book comprises an essay by Justice Scalia, criticism by Gordon Wood, Laurence Tribe, Mary Ann Glendon, and Ronald Dworkin, and a reply to the critics by Scalia.

199 The most eloquent defense of this method is Guido Calabresi, A Common Law for the Age of Statutes 1, 163-66 (1982) (explaining that in many circumstances common law development is preferable to statutorification).

200 Antonin Scalia, The Rule of Law as a Law of Rules, 56 U. Chi. L. Rev. 1175 (1989).

201 Id. at 1176.

202 Id.

203 Id.

204 Id.

205 Id. at 1179-80.

206 Id.

207 Id.

208 Id. at 1182.

209 Id. at 1176 (quoting Aristotle, The Politics, Bk. III, ch. 11, § 19, at 127 (Ernest Barker transl., 1946)).

210 See David R. Dow & R. Scott Shieldes, Rethinking the Clear and Present Danger Test, 73 Ind. L.J. 1217, 1238-39 (1998).

211 Scalia, supra note 195, at 176.

212 Id.

213 Id. at 1178.

214 See Chapman, 386 U.S. at 24 (holding that court must find beyond reasonable doubt that constitutional error was harmless before such error can be held harmless); see also Harrington, 395 U.S. at 254 (reaffirming Chapman, holding that admission of confession of codefendant, who did not take stand, constituted violation of Confrontation Clause, but was nonetheless harmless beyond a reasonable doubt).

215 Roy, 519 U.S. at 8 (Scalia, J., concurring).

216 520 U.S. 461 (1997).

217 Id. at 468-69.

218 Sullivan, 508 U.S. at 284 (Rehnquist, C.J., concurring).

219 Id.

220 Johnson held that mandatory conclusive presumptions and elemental misdescriptions violate structural guarantees and are therefore typically beyond the scope of harmless error analysis, the same conclusion embraced by Justice Scalia. Johnson, 520 U.S. at 467-68.

221 Harrington v. California, 395 U.S. 250, 254 (1969).

222 See id. (noting "our judgment must be based on our own reading of the record and on what seems to us to have been the probable impact of the two confessions on the minds of an average jury").

223 Johnson, 520 U.S. at 469-70 (quoting United States v. Olano, 507 U.S. 725, 736 (1993)).

224 This is because what most damages "integrity" of the judicial system is the perception that guilty defendants go free as a result of so-called technicalities.

225 It is possible that Justice Scalia's decision can be explained in terms of the difference between collateral and direct appeals, or in terms of the distinction between a preserved error and a waived objection. But it is also possible that Justice Scalia has seen that his approach to harmless error analysis is little more coherent than any other--that his Carella standard, as much as Fulminante, requires the Court to engage in counterfactual reasoning, for which the Court has not provided a sound defense. Yet another possibility is that Justice Scalia has recognized that any form of harmless error analysis requires the reviewing court to act in a Solomonic, rather than an Aristotelian, manner. All of which means that Justice Scalia is either going to be forced to admit that he stands with Solomon rather frequently, or to concede the incoherence of harmless error doctrine.

226 Harrington, 395 U.S. at 255-57 (Brennan, J., dissenting).

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