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HARMLESS ERROR: ABETTOR OF COURTROOM MISCONDUCT

I. INTRODUCTION

The United States Constitution protects individual rights and liberties by restricting the actions of governmental entities. Neither the federal nor the state government may deprive an individual of life, liberty, or property without the fair procedure or "due process" required by the fifth and fourteenth amendments.¹ These guarantees are particularly important in the area of criminal justice. A criminal conviction is not only a determination of guilt in fact; it is an establishment of legal guilt following settled procedural rules that are based on societal notions of fairness and on constitutional rights.² Society and the courts have a significant interest in promoting confidence in the administration of justice, and in preserving the judicial process from contamination by courses of action found illegal or deemed unfair.³

Not all errors occurring at trial require reversal of the resulting conviction. Errors that affect neither the rights of the defendant nor the integrity of the judicial process may be overlooked. Currently, however, the harmless error doctrine focuses exclusively on the effect of an error on the defendant: if an error did not affect the defendant's "substantial rights," it will be adjudged harmless.⁴ This doctrine of harmless error,

¹ "No person shall . . . be deprived of life, liberty, or property, without due process of law," U.S. CONST. amend. V; "nor shall any State deprive any person of life, liberty, or property, without due process of law," U.S. CONST. amend. XIV.

² "[Conviction] is different, or may be, from guilt in fact. It is guilt in law, established by the judgment of laymen." *Kotteakos v. United States*, 328 U.S. 750, 764 (1946).

³ See generally *Olmstead v. United States*, 277 U.S. 438, 471, 484 (1928) (Brandeis, J., dissenting).

⁴ The present harmless error statute reads: "On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties." 28 U.S.C. § 2111 (1976).

Harmless error rules also are found in collections of federal rules: "Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." FED. R. CRIM. P. 52(a); see also FED. R. EVID. 103(a); FED. R. CIV. P. 61.

In addition, all fifty states have adopted harmless error statutes or rules. See *Chapman v. California*, 386 U.S. 18, 22 (1967). The Supreme Court, however, has not clearly defined "substantial rights," resulting in a series of ad hoc and vague decisions. Whether a particular right is a substantial right, essential to a fair trial, has been determined on a case by case basis without the formulation of an objective standard. Compare *Price v. Georgia*, 398 U.S. 323

then, is designed to prevent inconsequential errors from upsetting a lawful conviction while preserving the fairness of a trial.⁵ A fair trial, however, does not depend only on the factual guilt of a particular defendant. It is grounded in the overall integrity of the judicial system.⁶

Many state and federal procedural rules that govern the criminal judicial process monitor the conduct of prosecutors and judges during trial.⁷ These rules assure that the verdict is based only on competent evidence by proscribing behavior that would give rise to unprovable inferences regarding the guilt of the accused. Recurrent violations of such trial rules bias criminal trials in favor of the prosecution and deny defendants the due process guaranteed by the Constitution. This is indeed what has occurred. The repeated application of a harmless error standard to violations of these trial rules has resulted in repeated violations of these rules by prosecutors and judges.⁸ Appellate court expressions of disapproval and warnings of impropriety provide little deterrent if con-

(1970) (double jeopardy); *Duncan v. Louisiana*, 391 U.S. 145 (1968) (right to a jury trial); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (right to counsel); *Payne v. Arkansas*, 356 U.S. 560 (1958) (coerced confession); *Tumey v. Ohio*, 273 U.S. 510 (1927) (impartial judge) (all constitutional errors requiring automatic reversal) with *Harrington v. California*, 395 U.S. 250 (1969) (admission of confession of codefendant who did not take the stand); *Bumper v. North Carolina*, 391 U.S. 543 (1968) (illegally admitted evidence); *Chapman v. California*, 386 U.S. 18 (1967) (prosecutorial comment on defendant's failure to testify) (all constitutional errors receiving harmless error tests). *But see* Note, *Harmless Constitutional Error*, 20 STAN. L. REV. 83 (1967) (attempting to harmonize the Court's decisions).

For examples of vague decisions regarding harmless error, see *Milton v. Wainwright*, 407 U.S. 371 (1972) (if *Miranda* violation occurred, it was harmless); *Harrington*, 395 U.S. at 254 (overwhelming untainted evidence to support conviction, therefore cumulative illegal admission of codefendants' confession harmless; but "[w]e do not suggest that, if evidence bearing on all the ingredients of the crime is tendered, the use of cumulative evidence, though tainted, is harmless error"); *Fahy v. Connecticut*, 375 U.S. 85 (1963) (defendant entitled to a new trial because state court erroneously held the admission of evidence in violation of the exclusionary rule was not prejudicial).

⁵ See generally R. TRAYNOR, *THE RIDDLE OF HARMLESS ERROR* (1970).

⁶ See Note, *The Supervisory Power of the Federal Courts*, 76 HARV. L. REV. 1656, 1659 (1963).

⁷ These rules encompass rules of evidence as well as court directives in decisions. For example, a prosecutor may not present evidence of the defendant's past crimes, wrongs, or other acts to invite the jury to conclude that it is therefore more likely than it otherwise would be that the defendant committed the crime for which he is being tried. FED. R. EVID. 404(b). Similarly, a prosecutor may not inject into his or her closing argument any extrinsic or inflammatory matter that has no basis in the evidence. *United States v. Goodwin*, 625 F.2d 693 (5th Cir. 1980). A trial judge may not abuse his or her discretion in controlling the scope of the closing argument by preventing the defense counsel from making a point essential to the defense. *United States v. Sawyer*, 443 F.2d 712 (D.C. Cir. 1971).

⁸ The academic commentators who have examined the problem of prosecutorial misconduct have almost universally bemoaned its frequency. . . . They have referred to reversal as a 'quasi sanction' and have said, "Appellate justices time and time again have condemned . . . poor conduct and warned prosecutors to keep within the bounds of propriety. Later opinions reflect the result—frustrating failure."

Alschuler, *Courtroom Misconduct by Prosecutors and Trial Judges*, 50 TEX. L. REV. 629, 631, 645 (1972); see also *United States v. Rodriguez*, 627 F.2d 110, 112 (7th Cir. 1980) ("A federal prosecutor in final argument has done it again The problem is not new. It continues to

victions resulting from error-tainted trials are allowed to stand.⁹

Although the duty of the prosecutor is "to seek justice, not merely to convict,"¹⁰ the adversarial system demands aggressive advocacy to the limit of the law. Holding these errors harmless extends that limit.¹¹ Indeed, because conviction, not justice, is frequently the primary object of prosecutors,¹² and seemingly, of some trial judges,¹³ the systematic application of harmless error standards encourages deliberate violations of longstanding trial rules.

This Comment contends that deliberate violations of rules which regulate the conduct of prosecutors and judges at trial should not be measured by a harmless error standard, but should result in automatic reversals of convictions. Automatic reversals of this class of error would create a most effective deterrent against the erosion of defendants' due process rights¹⁴ and would preserve the integrity of our criminal justice system.

II. THE HARMLESS ERROR DOCTRINE: HISTORY AND CURRENT STATUS

As early as the eighteenth century, English courts applied a harmless error rule in criminal appeals: if the evidence excluding the error was "ample," the judges would "not think themselves bound to stop the course of justice."¹⁵ Later courts varied the rule, changing to a stricter standard,¹⁶ then reverting to the earlier standard which required reversal if the error might have affected the jurors.¹⁷ The final common law version, known as the Exchequer Rule, required a presumption of prejudice and virtually automatic reversal of convictions upon a show-

arise with disturbing frequency throughout this circuit despite the admonition of trial judges and this court.")

⁹ See, e.g., *infra* notes 58-59 & 64-65 and accompanying text.

¹⁰ ABA STANDARDS FOR CRIMINAL JUSTICE, Standard 3-1.1 (1980); see also Goldberg, *Harmless Error: Constitutional Sneak Thief*, 71 J. CRIM. L. & CRIMINOLOGY 421, 438-39 (1980).

¹¹ See, e.g., *infra* notes 53-65 and accompanying text; see also Rodriguez, 627 F.2d at 110-112.

¹² See, e.g., *infra* notes 59-60, 64-65 & 66 and accompanying text; see also Seymour, *Why Prosecutors Act Like Prosecutors*, 11 REC. A. B. CITY N.Y. 302, 312-13 (1956).

¹³ See, e.g., *infra* notes 71-72 and accompanying text; see also Alschuler, *supra* note 8, at 693.

¹⁴ See Alschuler, *supra* note 8, at 646-47; Inbau, *Restrictions on the Law of Interrogation and Confessions*, 52 NW. U.L. REV. 77, 78 (1957); see also Stein v. New York, 346 U.S. 156, 201-03 (1953) (Frankfurter, J., dissenting).

¹⁵ See Rex v. Ball, 168 Eng. Rep. 721 n.(b) (K.B. 1807) (discussing *Tinkler's Case*, an unreported 1781 decision). Rex v. Ball restated the *Tinkler* rule, requiring reversal if the error "might be supposed to have had an effect on the minds of the jury." Ball, 168 Eng. Rep., at 722.

¹⁶ Affirmance would be required only when the appellate court was satisfied that the jury decided correctly. Doe v. Tyler, 130 Eng. Rep. 1397 (C.P. 1830).

¹⁷ The court reasoned that the Doe v. Tyler rule compelled appellate judges to invade the province of the jury. Crease v. Barrett, 149 Eng. Rep. 1353 (Ex. 1835).

ing of error.¹⁸ Under this rule, convictions were reversed even for trivial errors, and cases were remanded for retrials.¹⁹ Thus, the Exchequer Rule generated more retrials than new prosecutions, extending litigation, in some instances, for decades.²⁰

Most American courts adopted the Exchequer Rule, creating a similar backlog and delay.²¹ In *Williams v. State*,²² the court reversed a murder conviction because the indictment described the offense as "against the peace of the state" rather than "against the peace and dignity of the state."²³ Similarly, in *State v. Campbell*,²⁴ the court reversed a rape conviction because of an omission of "the" before the words "peace and dignity" in the indictment.²⁵ The rule was harshly criticized by some judges and commentators.²⁶ In response, "to prevent matters concerned with the mere etiquette of trials and with the formalities and minutiae of procedure from touching the merits of a verdict,"²⁷ Congress in 1919 passed a harmless error statute:

On the hearing of any appeal, certiorari, writ of error, or motion for a new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties.²⁸

The harmless error statute was at first interpreted to be inapplicable to constitutional errors.²⁹ It was not until 1963 in *Fahy v. Connecticut*

¹⁸ The Exchequer Rule was a misinterpretation of the *Crease v. Barrett* test, *supra* note 17 and accompanying text. See, e.g., *Rex v. Gibson*, 18 Q.B.D. 537 (1887); *Wright v. Tatham*, 7 A. & E. 313 (1837); *Rutzen v. Farr*, 111 Eng. Rep. 707 (K.B. 1835); see also R. TRAYNOR, *THE RIDDLE OF HARMLESS ERROR* 4-12 (1970); cf. 1 J. WIGMORE, *EVIDENCE* § 21 (3d ed. 1940).

¹⁹ See generally R. TRAYNOR, *supra* note 18. The Exchequer Rule was criticized for needlessly protracting litigation. In response, Parliament enacted the Criminal Appeal Act of 1907, 7 Edw., ch. 23, § 4(1), requiring reversal only when there was a substantial miscarriage of justice.

²⁰ See generally R. TRAYNOR, *supra* note 18.

²¹ *Id.* at 13.

²² 27 Wis. 402 (1871).

²³ *Id.* at 403.

²⁴ 210 Mo. 202, 109 S.W. 706 (1908).

²⁵ *Id.* at 227-28, 109 S.W. at 711.

²⁶ See, e.g., *Lipscomb v. State*, 75 Miss. 559, 617-18, 23 So. 210, 225-26 (1898) (Whitfield, J., dissenting); *State v. Musgrave*, 43 W. Va. 672, 710, 28 S.E. 813, 828-29 (1897) (Brannon, J., dissenting); see also *Kotteakos v. United States*, 328 U.S. 750, 758-60 nn.10-14 (1946) (listing judges and commentators).

²⁷ *Bruno v. United States*, 308 U.S. 287, 294 (1939).

²⁸ Act of Feb. 26, 1919, ch. 48, 40 Stat. 1181. For the current version of this statute, see *supra* note 4.

²⁹ See, e.g., *Kotteakos*, 328 U.S. at 764-65. A constitutional error is a violation of a constitutional mandate. For an example of a violation of the fifth amendment right against self-incrimination, see *Griffin v. California*, 380 U.S. 609 (1965) (discussed *infra* in text accompanying note 63).

cut³⁰ that the Supreme Court indicated the possibility of a federal constitutional error being adjudged harmless. Four years later, in *Chapman v. California*,³¹ the Court concluded that some constitutional errors "are so unimportant and insignificant" that they may, without violating the Constitution, be deemed harmless, not requiring the automatic reversal of the conviction.³² In order for these "insignificant" constitutional errors to be deemed harmless, the reviewing court must be certain that they are harmless beyond a reasonable doubt.³³ The burden is on the government to prove beyond a reasonable doubt that the error in question did not influence the verdict.³⁴ The Court, however, neglected to formulate any test or standard for differentiating between constitutional errors which require automatic reversal of convictions and those "insignificant" constitutional errors which may be harmless. Indeed, the Court merely included a footnote giving three examples of constitutional errors requiring automatic reversal.³⁵ This lack of a standard has caused commentators both to criticize the Court and to attempt to impose a method of weighing the significance of a constitutional error.³⁶

The harmless error statute was passed to curb reversals upon a showing of a "technical" error. In interpreting the statute, the Court included in this category most errors not violating explicit constitutional rights.³⁷ For a non-constitutional error to be harmless, a reviewing court, after considering the entire record, need only find "with fair assurance" that the judgment "was not substantially swayed by the error."³⁸ Moreover, the defendant has the burden of proving that the

³⁰ 375 U.S. 85, 86 (1963).

³¹ 386 U.S. 18 (1967).

³² *Id.* at 22.

³³ *Id.* at 24.

³⁴ *Id.*

³⁵ *Id.* at 23 n.8 (citing *Gideon*, *Payne* and *Tuney*, discussed *supra* note 4).

³⁶ Field, *Assessing the Harmlessness of the Federal Constitutional Error—A Process in Need of a Rationale*, 125 U. PA. L. REV. 15, 16 (1976) ("At least three possibilities for demonstrating harmlessness appear in Supreme Court opinions: . . . Supreme Court opinions often do not distinguish between these variant approaches, although the approach selected can change the disposition of many cases."); Goldberg, *Harmless Error: Constitutional Sneak Thief*, 71 J. CRIM. L. & CRIMINOLOGY, 421, 422 (1980) ("[T]he doctrine of harmless constitutional error destroys important constitutional and institutional values and therefore should be discarded."); Mause, *Harmless Constitutional Error: The Implications of Chapman v. California*, 53 MINN. L. REV. 519, 557 (1969) ("[T]he Court, if only in an effort to further the interest of net judicial economy, should attempt to delineate certain well-defined classes of constitutional error which require automatic reversal."); Saltzburg, *The Harm of Harmless Error*, 59 VA. L. REV. 988, 988 (1973) ("Chaos surrounds the standard for appellate review of errors in criminal proceedings. . . . Missing from past efforts has been an attempt to relate harmless error rules to standards of proof at trial."); see also Note, *Harmless Constitutional Error*, 20 STAN. L. REV. 83 (1967).

³⁷ See *Kotteakos v. United States*, 328 U.S. 750 (1946).

³⁸ *Id.* at 765.

error affected his substantial rights, resulting in prejudice.³⁹

The standard of prejudice in such cases, however, still eludes exact definition. Indeed, recently in *United States v. Frady*,⁴⁰ the Supreme Court, noting that previous Supreme Court cases had given the term "prejudice" no "precise content," specifically left the word undefined.⁴¹ The Court in *Frady* held that for a conviction to be reversed on collateral appeal,⁴² the defendant must show that the errors at trial "worked to [the defendant's] actual and substantial disadvantage."⁴³ This language implies that on direct review, the defendant might have to show that the error created a possibility of prejudice.⁴⁴ Reviewing courts, however, have held on direct review that a "'bare possibility' that [the] defendant may have suffered prejudice is not enough to overturn a guilty verdict."⁴⁵ In fact, some reviewing courts reason circuitously that when the defendant was not deprived of a fair trial, the error did not result in prejudice, and, because there was no prejudice, the defendant received a fair trial.⁴⁶ Under this reasoning, the convictions should therefore be affirmed. Other courts simply conclude without explanation that the error is not prejudicial.⁴⁷

³⁹ *Id.* at 760.

⁴⁰ 102 S. Ct. 1584 (1982).

⁴¹ *Id.* at 1595.

⁴² A collateral appeal, as contrasted with a direct appeal, is an action having an independent purpose and expecting a result other than the reversing of the judgment, although it may be essential to the success of the collateral appeal that the judgment be reversed. A habeas corpus proceeding is one example of a collateral proceeding.

⁴³ *Frady*, 102 S. Ct. at 1596.

⁴⁴ The Supreme Court has not defined prejudice on direct review. Lower reviewing courts likewise do not define prejudice in deciding whether it is present in a particular case. The Supreme Court has discussed the meaning of prejudice in the context of habeas corpus proceedings.

⁴⁵ *State v. Norris*, 26 N.C. App. 259, 263, 215 S.E.2d 875, 877, *cert. dismissed*, 288 N.C. 249, 217 S.E.2d 673 (1975), *cert. denied*, 423 U.S. 1073 (1976); *see also* *United States v. Rochan*, 563 F.2d 1246, 1250 (5th Cir. 1977) ("A clear effect on the jury is required to reverse for comment by the trial judge."); *Fountain v. State*, 382 A.2d 230, 231 (Del. 1980) ("A defendant must show not only that a violation occurred but that it actually had a prejudicial effect."); *Harrell v. State*, 405 So. 2d 480, 484 (Fla. Dist. Ct. App. 1981) ("Absent proof of actual reliance by the jury, or absent the presence of constitutional error, the standard of trial fairness applies, and the burden remains on the defendant to prove the error resulted in an unfair trial." (citations omitted)); *State v. Blaney*, 284 S.E.2d 920, 924 (W. Va. 1981) ("The general rule in this State is that '[a] verdict of guilty in a criminal case will not be reversed by this Court because of error committed by the trial court, unless the error is prejudicial to the accused.'").

⁴⁶ *See, e.g.*, *United States v. Carrion*, 463 F.2d 704, 709 (9th Cir. 1972); *Commonwealth v. England*, 474 Pa. 1, 17, 375 A.2d 1292, 1300 (1977).

⁴⁷ *See, e.g.*, *Khaalis v. United States*, 408 A.2d 313, 353-54 (D.C. 1979), *cert. denied*, 444 U.S. 1092 (1980); *Rupard v. Commonwealth*, 475 S.W.2d 473, 477 (Ky. 1971); *Commonwealth v. Russell*, 459 Pa. 1, 9, 326 A.2d 303, 307 (1974); *Commonwealth v. Marvel*, 271 Pa. Super. 11, 13-14, 411 A.2d 1254, 1256 (1979). In *Kotteakos*, the Supreme Court defined a technical error only to the extent of contrasting it with an error of which the "natural effect is

When an error concededly may be prejudicial, reviewing courts most frequently refute the defendant's assertion of prejudice by indicating that the trial judge "cured" any possible prejudice with instructions to the jury to disregard the error.⁴⁸ These instructions to disregard are often bland by comparison with the error they allegedly cure.⁴⁹ Professor Alschuler, in an article based on his study of courtroom misconduct, suggests, more in jest than in earnest, that the trial judge should indignantly contradict the prosecutor's improper statements as an effective counter-balance.⁵⁰ This, as Professor Alschuler admits, is not a realistic possibility.⁵¹ Thus, courts continue to affirm convictions even in the presence of substantial errors because trial judges continue to recite, "Objection sustained; the jury will disregard"

III. COURTROOM MISCONDUCT AND THE HARMLESS ERROR STANDARD

The policy underlying the rules that regulate prosecutorial and judicial conduct at trial dictates shielding the jury from matters upon which no evidence can be offered and which are likely to influence the verdict.⁵² Behavior which violates these rules often gives rise to unfavorable inferences regarding the guilt of the accused.⁵³ Such conduct creates extraneous considerations which unduly influence the jury by suggesting they decide on an improper basis, usually an emotional one.

For example, it is error for a prosecutor to attempt to persuade the jurors of the defendant's guilt by overt appeal to their passions or prejudices.⁵⁴ Invoking the jurors' racial prejudices⁵⁵ or their sympathies

to prejudice a litigant's substantial rights." 328 U.S. at 765. If the error is "technical," the defendant has the burden of proving that the error affected his substantial rights resulting in prejudice. *Id.* at 760. If an error is "technical," however, it does not prejudice a defendant's substantial rights by definition. *Id.* at 765.

⁴⁸ See, e.g., *United States v. Ness*, 652 F.2d 890, 893 (9th Cir.), *cert. denied*, 454 U.S. 1126 (1981); *United States v. Robinson*, 635 F.2d 981, 985 (2d Cir. 1980); *United States v. Carrion*, 463 F.2d 704, 709 (9th Cir. 1972); *People v. Gilkey*, 181 Colo. 103, 106, 507 P.2d 855, 857 (1973); *State v. Macomber*, 18 Or. App. 163, 169-70, 524 P.2d 574, 577 (1974).

⁴⁹ *United States v. Butera*, 677 F.2d 1376, 1382 (1982) ("The counsel, ladies and gentlemen of the jury, are not permitted to express their own opinions. The opinion must be found by you as to what the facts may be."), *cert. denied*, 103 S. Ct. 735 (1983); *State v. King*, 110 Ariz. 36, 42, 514 P.2d 1032, 1038 (1973) ("If any comment of counsel has no basis in the evidence you are to disregard that comment.").

⁵⁰ Alschuler, *supra* note 8, at 653-54.

⁵¹ *Id.*

⁵² Violations of these rules may be either constitutional or non-constitutional errors, depending on whether a constitutional mandate is violated. See *supra* note 29.

⁵³ See Alschuler, *supra* note 8, at 652; see also Singer, *Forensic Misconduct by Federal Prosecutors—And How It Grew*, 20 ALA. L. REV. 227, 261 (1968).

⁵⁴ See, e.g., *People v. Gay*, 28 Cal. App. 3d 661, 675, 104 Cal. Rptr. 812, 821-22 (1972); *Williford v. State*, 142 Ga. App. 162, 162, 235 S.E.2d 625, 626 (1977); *State v. McDermott*,

for the victim⁵⁶ or the victim's family⁵⁷ does not further the proof of any particular defendant's guilt. A prosecutor asks the jurors to think about the victim,

[w]ho is carried out on this isolated dead end road and stabbed seventeen times in and about the body and had his throat cut and bled to death. And as the life flowed from him and flowed from that neck where the defendant had cut and cut and Dr. Hudson said one cut went around to the back of the neck, and what did he think of as he lay there dying and the blood rolling out of his neck in the dirt road, did he think about his mother that he lived with and cared for? . . . Did he think of his brothers and sisters when he knew that his life was sputtering from his neck that he would never see again. Did he think of them? What does a person who knows that he is dying a horrible death think of?⁵⁸

Another prosecutor, referring to the victim's step-daughter, exhorts the jurors: "[T]hink of the terror of this little girl Jennifer if this man is allowed to walk the streets. . . . [D]on't let him out so he may kill someone else."⁵⁹ A third prosecutor remarks:

[I]t is unfortunate that I do not have sitting beside me a member of the family so that it would be flesh and blood and you could see the suffering and the pain that such individual has gone through because of such an incident as was committed by this monster, this executioner.⁶⁰

By playing on the jurors' sympathies in this manner, the prosecutor tampers with the presumption of innocence that is every defendant's right. Such appeals to the sympathies and prejudices of the jurors improperly tip the scales against the defendant. These emotional appeals tend to distract the jury from the main question of what happened on the occasion at issue. Thus, the defendant is unfairly burdened: not only must the defense rebut the prosecution's evidence; the defense must also counter negative implications that may be difficult to erase from jurors'

202 Kan. 399, 404-05, 449 P.2d 545, 550, *cert. denied*, 396 U.S. 912 (1969); *State v. King*, 299 N.C. 707, 712-13, 264 S.E.2d 40, 44 (1980).

⁵⁵ See, e.g., *State v. Miller*, 288 N.C. 582, 599, 220 S.E.2d 326, 338 (1975).

⁵⁶ *State v. King*, 299 N.C. at 711-13, 264 S.E.2d at 43-44 (for excerpt of prosecutor's closing argument see *infra* text accompanying note 58); *State v. Fleetwood*, 75 Wash. 2d 80, 84, 448 P.2d 502, 505 (1968) (prosecutor in argument emphasized that victim was an eighty-seven year old woman who had been assaulted and had sustained a brutal beating).

⁵⁷ *Williford v. State*, 142 Ga. App. 162, 162, 235 S.E.2d 625, 626 (1977) (prosecutor in argument to the jury, referring to the victim: "[H]e was a married man. His wife just had a baby, but he's not here to see that."); *State v. McDermott*, 202 Kan. 399, 404-05, 449 P.2d 545, 550 (prosecutor in argument to the jury refers to the victim's stepdaughter), *cert. denied*, 396 U.S. 912 (1969); *State v. King*, 299 N.C. at 712, 264 S.E.2d at 44 (prosecutor in closing argument: "'Ladies and gentlemen of the jury, this man died. There had been a death here. A horrible death, and there was a funeral, and his family has been brave and tried to be brave but what went through their minds as they went to the cemetery?'").

⁵⁸ *State v. King*, 299 N.C. at 711-12, 264 S.E.2d at 43-44.

⁵⁹ *State v. McDermott*, 202 Kan. at 404-05, 449 P.2d at 550.

⁶⁰ *People v. Gay*, 28 Cal. App. 3d at 675 n.7, 104 Cal. Rptr. at 821 n.7.

minds.⁶¹

Prosecutors likewise err when they comment on the accused's silence.⁶² In *Griffin v. California*,⁶³ the Supreme Court held that the fifth amendment forbids both references by the prosecutor to the accused's silence and instructions by the court that this silence is evidence of guilt. Even without such instructions, the prosecutor's intent that the jury draw such an inference is usually unmistakable. By commenting on the defendant's silence, the prosecutor improperly suggests to the jurors that if the defendant were innocent and had nothing to hide he would testify on his own behalf. Because the defendant has not done so, the prosecutor encourages the jury to find the defendant guilty. A prosecutor concludes in his closing argument to the jury: "It's a common defense technique to put on trial . . . everybody involved in the case except the defendant, in order to distract your attention from the real issues in this case. . . . [A]sk the defendant to explain . . . ask the defendant how he explains . . . ask him to explain those things. . . ." ⁶⁴ Another prosecutor states more directly: "Mr. Harris showed you and told you what happened at the outset. Only he and this defendant were present at those initial meetings. . . . The only two people that can bring out that testimony are the people that were there, and we have brought you the testimony of Mr. Harris."⁶⁵

In a criminal jury trial, the judge should grant a motion for judgment of acquittal if the evidence, when viewed in a light most favorable to the government, is so scant that the jury would merely be speculating as to the defendant's guilt.⁶⁶ If, however, a reasonably minded jury may have a reasonable doubt as to the defendant's guilt, the case should be submitted to the jury.⁶⁷ A prosecutor invites the jurors to agree with what the prosecutor claims is the judge's alleged opinion and to find the

⁶¹ See *supra* note 53; see also *State v. Woodward*, 21 Ariz. App. 133, 135, 516 P.2d 589, 591 (1973) ("we are all aware of the difficulty and the futility of attempting to erase improper statements from a juror's mind by presenting an objection with a motion to strike."); *State v. Kennedy*, 272 S.C. 231, 233, 250 S.E.2d 338, 339-40 (1978) (State's argument that remark was not prejudicial in view of trial judge's curative instructions to the jury was "patently naive and without merit.").

⁶² See, e.g., *United States v. Rodriguez*, 627 F.2d 110, 110, 112 (7th Cir. 1980). Although this error violates the fifth amendment, it is not reversible per se. See *Chapman v. California*, 386 U.S. 18 (1967) and discussion *supra* note 4. This Comment focuses on the *Griffin* rule (see text accompanying note 63) as a procedural trial rule rather than as a constitutionally mandated rule. It is easier for a defendant to get a conviction reversed for a constitutional error. Compare *Chapman*, *supra* note 4, at 23 with *Kotteakos*, *supra* note 37, at 764-65.

⁶³ 380 U.S. 609 (1965).

⁶⁴ *State v. Macomber*, 18 Or. App. 163, 168, 524 P.2d 574, 576 (1974).

⁶⁵ *United States v. Wilkerson*, 534 F.2d 43, 44 (5th Cir. 1976).

⁶⁶ See FED. R. CRIM. P. 29(a).

⁶⁷ *United States v. Beck*, 615 F.2d 441, 448 (7th Cir. 1980); *United States v. Frol*, 518 F.2d 1134, 1137 (8th Cir. 1975); *United States v. Stephenson*, 474 F.2d 1353, 1355 (5th Cir. 1973).

defendant guilty when he tells the jury, "if you didn't have enough facts to decide this case and that the defendants are guilty, this case wouldn't be given to you. The Judge would take it away from you."⁶⁸

Trial rules also forbid a presiding judge from disparaging a defendant or defense counsel in front of the jury.⁶⁹ Because of the trial judge's role during trial and the respect for this role that the jurors hold, the trial judge must abstain from conduct that tends to discredit the accused.⁷⁰ When a judge, seeing the defense counsel leave a knife, introduced into evidence, on a table within easy reach of the defendant, exclaims, "Step over here with the knife, don't leave that there. . . . I don't want that exhibit left anywhere where this man can get to it,"⁷¹ the jurors can only conclude that the judge knows something the jurors do not know regarding the guilt of the accused. A judge conveys the same impermissible impression by resorting to sarcasm. For example, in one case the defense offered evidence tending to show that it was not the defendant who had attacked the victim with a knife. There the trial judge's comment that the victim "must have fallen into a lawn mower," and his warning to the jurors not to go "view the scene. No telling what might happen—might fall into the lawn mower,"⁷² denied the defendant an impartial trial.

Because our adversarial system equates the interests of the defense counsel with those of the defendant,⁷³ the trial judge, in the interests of

⁶⁸ *Rupard v. Commonwealth*, 475 S.W.2d 473, 477 (Ky. 1971).

⁶⁹ *See, e.g.*, *State v. Holden*, 280 N.C. 426, 429-30, 185 S.E.2d 889, 891-92 (1972).

⁷⁰ *United States v. Cox*, 664 F.2d 257, 259 (11th Cir. 1981); *United States v. McDonald*, 576 F.2d 1350, 1358 (9th Cir.), *cert denied*, 439 U.S. 830, 439 U.S. 927 (1978).

⁷¹ *State v. Wendel*, 532 S.W.2d 838, 839 (Mo. Ct. App. 1975). The defendant's conviction was reversed. If the comments are not as extreme, however, the conviction will be affirmed. *See, e.g.*, *Commonwealth v. Marvel*, 271 Pa. Super. 11, 14, 411 A.2d 1254, 1256 (1979) (trial judge responding to defense counsel's explanation that his question was proper: "I am the one who finally decides those matters in this case. I haven't lost one yet in here," held not prejudicial.)

⁷² *State v. Whitted*, 38 N.C. App. 603, 605, 248 S.E.2d 442, 443 (1978). The defendant's conviction was reversed. In other cases, where the trial was punctuated with sarcastic comments of the trial judge, convictions may be affirmed. *See, e.g.*, *State v. Norris*, 26 N.C. App. 259, 263, 215 S.E.2d 875, 877 (1975) (exchange between trial judge and defense counsel in the jury's presence:

[Defense counsel]: Your-Honor, I'd like to be heard on a motion, if I could at this time out of the presence of the jury. [Court]: You want to be heard on it? [Defense counsel]: I would like to, yes sir, for the purpose of the record. [Court]: Ladies and Gentlemen, I'll have to let you go to your jury room again. It won't be long. I don't know as how I would light up a cigarette.);

see also *United States v. McDonald*, 576 F.2d at 1358 ("We have reviewed the record with care and have found that, although a few of the judge's remarks were sharp, even sarcastic, they do not represent an abuse of discretion that warrants a new trial.") (Significantly, these sarcastic remarks were not reproduced in the appellate opinion.).

⁷³ *See* ABA STANDARDS FOR CRIMINAL JUSTICE, Standard 4-1.1 and accompanying commentary 4-7 to 4-11 (1980).

fairness, may not display hostility toward the defense counsel.⁷⁴ When the judge repeatedly reprimands the defense counsel in front of the jury, for instance, by responding to an objection with "I have never heard of such an objection . . . [s]how me your authority for any such ridiculous assumption,"⁷⁵ the judge undermines the necessary neutrality of the trial. Violations of these and similar rules⁷⁶ attack the credibility of the defendant and improperly benefit the prosecutor.

The rules regulating the conduct of prosecutors and judges at trial have been clearly established. The sixth amendment grants every person charged with a crime an absolute right to a fair and impartial trial.⁷⁷ In order for a jury to convict a defendant, the prosecution must establish guilt beyond a reasonable doubt by presenting only proper, competent, and relevant evidence.⁷⁸ As early as 1889, a court noted that the prosecutor should be an impartial officer of the court rather than a "heated partisan," and that "heated zeal" has no place in a prosecutor's work.⁷⁹ In 1935, the Supreme Court warned prosecutors to refrain from using improper methods to secure convictions.⁸⁰ In 1923, a federal ap-

⁷⁴ See, e.g., *People v. DeJesus*, 42 N.Y.2d 519, 522, 369 N.E.2d 752, 755, 399 N.Y.S.2d 196, 199 (1977) ("the Bench must be scrupulously free from and above even the appearance or taint of partiality.").

⁷⁵ *United States v. Candelaria-Gonzalez*, 547 F.2d 291, 295 (5th Cir. 1977) (the defendant's conviction was reversed). But see, e.g., *United States v. Carrion*, 463 F.2d 704, 707 n.1 (9th Cir. 1972) (examples of exchanges between the trial court and defense counsel characterized by the appellate court as improper but not prejudicial:

[Court]: Do you see any necessity for the question really?

[Defense counsel]: Yes, your Honor, to impeach the witness.

[Court]: Well, I don't really believe you but I will let you do it.

* * *

[Court]: Let it be said that you never close a day without complicating something. I am glad we are not in a hospital. I can just imagine that the doctor would be put to sleep instead of the patient.);

Khaalis v. United States, 408 A.2d 313, 353 (D.C. 1979) (appellate court characterizing numerous comments by the trial judge as ridiculing defense counsel), *cert. denied*, 444 U.S. 1092 (1980); *State v. Holden*, 280 N.C. 426, 430, 185 S.E.2d 889, 892 (1972) ("The judge's critical remarks were indiscreet and improper and should not have been made. . . . [W]e hold that the comments . . . constituted harmless error.").

⁷⁶ The examples given of rules monitoring prosecutorial and judicial behavior are not exhaustive. For additional examples see ABA STANDARDS FOR CRIMINAL JUSTICE, Standard 3-5.8 (1980).

⁷⁷ In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. CONST. amend. VI.

⁷⁸ *Mullaney v. Wilbur*, 421 U.S. 684 (1975); *In re Winship*, 397 U.S. 358 (1970); *Deutch v. United States*, 367 U.S. 456 (1961).

⁷⁹ *Commonwealth v. Nicely*, 130 Pa. 261, 269-70, 18 A. 737, 738 (1889).

⁸⁰ *Berger v. United States*, 295 U.S. 78, 88 (1935).

pellate court noted, "It is an important rule that an attorney at law appearing in open court in the trial of a case is entitled to such treatment from the court that the interests of his client may not be prejudiced. That is not a matter of indulgence, but of right."⁸¹ The Supreme Court in 1927 underscored the defendant's right to an impartial judge by reversing a conviction because of a possibility that the judge was influenced by extraneous considerations.⁸² Since then, reviewing courts have repeatedly reprimanded prosecutors and trial judges for misconduct at trial.⁸³ Thus, prosecutors and trial judges are well aware of the standards which their conduct must meet.

Prosecutorial errors often occur because the prosecutor is trying unconditionally to secure a conviction.⁸⁴ The adversarial system demands aggressive advocacy to the limit of the law.⁸⁵ Although prosecutors owe a special obligation of fairness in seeing that justice is done,⁸⁶ they often come close to committing reversible error in order to secure a conviction.⁸⁷ Reviewing courts repeatedly express disapproval of improper prosecutorial conduct, yet affirm the convictions.⁸⁸ Courts apply the harmless error standard and focus on the weight of the evidence or on

⁸¹ *Grock v. United States*, 289 F. 544, 545 (D.C. Cir. 1923).

⁸² *Tumey v. Ohio*, 273 U.S. 510 (1927).

⁸³ *Alschuler*, *supra* note 8, at 645; *see* *United States v. Rodriguez*, 627 F.2d at 110, 112; *United States v. Carrion*, 463 F.2d at 709; *State v. Juarez*, 111 Ariz. 119, 121, 524 P.2d 155, 157 (1974); *People v. Gay*, 28 Cal. App. 3d at 675, 104 Cal. Rptr. at 821-22; *Washam v. State*, 235 A.2d 279, 280-81 (Del. 1967); *Khaalis v. United States*, 408 A.2d at 353; *State v. Miller*, 288 N.C. 582, 601, 220 S.E.2d 326, 339 (1975); *Thomas v. State*, 496 S.W.2d 96, 97 (Tex. Crim. App. 1973).

⁸⁴ *See Rodriguez*, 627 F.2d at 112 (The Seventh Circuit, reversing the conviction because of prosecutorial comment on the defendant's silence at trial, wrote:

The problem is not new. It continues to arise with disturbing frequency throughout this circuit despite the admonition of trial judges and this court. Usually it has been caused by subtle prosecutorial comments, *e.g.*, that certain evidence is "uncontradicted." Even subtle references to the fact that a defendant has not testified have been condemned. . . . This court is beginning to experience a . . . sense of futility from the persistent disregard of prior admonitions.);

see also *United States v. Banks*, 687 F.2d 967, 984 (7th Cir. 1982) (Swygert, J., dissenting) ("Technical, convoluted arguments are often advanced by the prosecution to save convictions which are in many instances flawed by the prosecutor's . . . obsessive 'overkill' tactics."); *United States v. Antonelli Fireworks Co.*, 155 F.2d 631, 661 (2d Cir.) (Frank, J., dissenting) ("Government counsel, employing such tactics, are the kind who, eager to win victories, will gladly pay the small price of a ritualistic verbal spanking."), *cert. denied*, 329 U.S. 742 (1946). *See generally* *Alschuler*, *supra* note 8.

⁸⁵ *See supra* note 73.

⁸⁶ *Id.*

⁸⁷ *See Alschuler*, *supra* note 8, at 631.

⁸⁸ *See, e.g.*, *United States v. Cox*, 664 F.2d 257 (11th Cir. 1981); *United States v. Ness*, 652 F.2d 890 (9th Cir.), *cert. denied*, 454 U.S. 1126 (1981); *State v. Juarez*, 111 Ariz. App. 119, 524 P.2d 155 (1974); *People v. Gay*, 28 Cal. App. 3d 661, 104 Cal. Rptr. 812 (1972); *Washam v. State*, 235 A.2d 279 (Del. 1967); *People v. Gilyard*, 124 Ill. App. 2d 95, 260 N.E.2d 364 (1970), *cert. denied*, 402 U.S. 911 (1971); *State v. Miller*, 288 N.C. 582, 220 S.E.2d 326 (1975).

curative statements instructing the jury to disregard the prosecutor's conduct.⁸⁹ Where a conviction is reversed, the reason given is usually that the weight of the evidence was insufficient,⁹⁰ or that the trial judge denied defense counsel's objection to improper prosecutorial statements⁹¹ or gave insufficient cautionary instructions.⁹²

Because courts in reversing convictions do not focus on the motives or behavior of the prosecutor, they do not induce prosecutors to comply with trial rules regulating their conduct. Courts occasionally have considered the deliberateness of improper prosecutorial remarks as one factor in reversing a conviction.⁹³ Usually, however, courts note that such deliberateness does not influence their decision either to reverse or to affirm a conviction.⁹⁴ Indeed, the Supreme Court has rejected any consideration of the prosecutor's bad faith in deciding whether to reverse a conviction.⁹⁵ Thus, this improper conduct by prosecutors continues to occur frequently despite admonitions of trial and appellate courts.

Some reviewing courts also are reluctant to reverse convictions when the error consists of improper judicial remarks, unless the judge's comments display extreme hostility and occur a number of times in the same proceeding.⁹⁶ While disapproving of a trial judge's comments and

⁸⁹ See, e.g., *United States v. Wilkerson*, 534 F.2d 43 (5th Cir. 1976); *Miller v. United States*, 410 F.2d 1290 (8th Cir. 1969); *People v. Gay*, 28 Cal. App. 3d 661, 104 Cal. Rptr. 812 (1972); *People v. Gilkey*, 181 Colo. 103, 507 P.2d 855 (1973); *Swenson v. State*, 525 P.2d 1395 (Okla. Crim. App. 1974); *State v. Macomber*, 18 Or. App. 163, 524 P.2d 574 (1974); *Thomas v. State*, 496 S.W.2d 96 (Tex. Crim. App. 1973).

⁹⁰ See, e.g., *United States v. Gambert*, 410 F.2d 383 (4th Cir. 1969); *State v. Rhodes*, 110 Ariz. 237, 517 P.2d 507 (1973); *Young v. State*, 280 So. 2d 13 (Fla. Dist. Ct. App. 1973); *People v. Helm*, 9 Ill. App. 3d 143, 291 N.E.2d 680 (1973); *Gregory v. Commonwealth*, 557 S.W.2d 439 (Ky. Ct. App. 1977).

⁹¹ See, e.g., *People v. McLean*, 2 Ill. App. 3d 307, 276 N.E.2d 72 (1971).

⁹² See, e.g., *State v. Cortez*, 101 Ariz. 214, 418 P.2d 370 (1966); *State v. Woodward*, 21 Ariz. App. 133, 516 P.2d 589 (1973); *Commonwealth v. Mikesell*, 475 Pa. 589, 381 A.2d 430 (1977).

⁹³ *People v. Whitlow*, 89 Ill. 2d 322, 433 N.E.2d 629 (1982); *State v. Dill*, 3 Kan. App. 2d 67, 589 P.2d 634 (1979). There is, however, no trend toward reversing convictions for deliberate courtroom misconduct.

⁹⁴ See, e.g., *State v. Rhodes*, 110 Ariz. at 238, 517 P.2d at 508; *State v. Macomber*, 18 Or. App. at 169-70, 524 P.2d at 577.

⁹⁵ *United States v. Agurs*, 427 U.S. 97, 110 (1976) ("Nor do we believe the constitutional obligation is measured by moral culpability, or the willfulness of the prosecutor."); *Brady v. Maryland*, 373 U.S. 83, 87 (1963) ("We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."). The Supreme Court, indeed, recently rejected the possibility of reviewing a conviction for prosecutorial misconduct where a harmless error standard was not applied: "[T]he interests preserved by the doctrine of harmless error cannot be so lightly and casually ignored in order to chastise what the court viewed as prosecutorial overreaching." *United States v. Hastings*, 103 S.Ct. 1974, 1979 (1983).

⁹⁶ See, e.g., *supra* notes 69-76 and accompanying text; see also *People v. DeJesus*, 42 N.Y.2d

characterizing them as improper, reviewing courts usually apply the harmless error standard and affirm the convictions.⁹⁷ Although reviewing courts are more willing to reverse convictions because of judicial improprieties than because of prosecutorial improprieties,⁹⁸ when courts fail to reverse these convictions they are sanctioning unlawful behavior.⁹⁹

Courts themselves are instruments of law enforcement. They must preserve their own integrity. As Justice Brandeis noted in an oft quoted dissent, courts must maintain respect for the law, promote confidence in the administration of justice, and preserve the judicial process from contamination:¹⁰⁰

In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. . . . If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy.¹⁰¹

IV. AUTOMATIC REVERSALS UPON A SHOWING OF BAD FAITH

The current application of harmless error standards to violations of trial rules regulating the conduct of prosecutors and judges has created two pernicious effects. The affirmance of convictions obtained in violation of these rules discourages adherence to the rules. This lack of incentive for lawful behavior gives rise to repeated violations resulting in a systematic erosion of justice in the form of a high incidence of non-trivial errors. An automatic reversal standard for these errors would motivate prosecutors and trial judges to guard against such errors.

519, 521, 369 N.E.2d 752, 754, 399 N.Y.S. 196, 197 (1977) ("The trial was punctuated by the trial court's frequent caustic, if not snide and sarcastic, remarks directed at defense counsel.").

⁹⁷ See, e.g., *United States v. McDonald*, 576 F.2d at 1358; *State v. Norris*, 26 N.C. App. at 263, 215 S.E.2d at 877; *Commonwealth v. Marvel*, 411 A.2d at 1256.

⁹⁸ Courts sometimes cite instances of misconduct in appendices that they do not publish, or refer to particular pages of unpublished trial records to support their findings of impropriety, perhaps because of some fraternal feelings among judges. *Alschuler*, *supra* note 8, at 687, 690. In reversing convictions where prosecutorial error occurred, reviewing courts usually focus on the weight of the evidence or the sufficiency of cautionary instructions. See, e.g., *supra* notes 90-92 and accompanying text. Conversely, in reversing convictions where judicial misconduct occurred, reviewing courts focus on the egregiousness of the misconduct. See, e.g., *State v. Wendel*, 532 S.W.2d 838 (Mo. Ct. App. 1975); *People v. DeJesus*, 42 N.Y.2d 519, 369 N.E.2d 752, 399 N.Y.S. 196 (1977); *State v. Whitted*, 38 N.C. App. 603, 248 S.E.2d 442 (1978).

⁹⁹ Declaring mistrials more readily would also help deter such unlawful behavior. See generally *Alschuler*, *supra* note 8, at 650-52.

¹⁰⁰ *Olmstead v. United States*, 277 U.S. at 484 (Brandeis, J., dissenting); see also *Alschuler*, *supra* note 8, at 633.

¹⁰¹ *Olmstead*, 277 U.S. at 485 (Brandeis, J., dissenting).

A reviewing court should reverse a conviction upon a showing of a deliberate violation of a clearly established trial rule promulgated to regulate the behavior of a prosecutor or a judge. The standard should be that the violator knew or should have known that his or her conduct violated the rule. The rule should be deemed clearly established if a reasonable prosecutor or trial judge would have been aware of the rule. Examples of rules of which reasonable prosecutors and judges are aware appear in the United States Attorneys' Manual and in court decisions of the jurisdiction. An error that would trigger the reversal of a conviction¹⁰² should be a violation of a rule which prevents extraneous matters, upon which no evidence may be offered, from reaching the jury. This category would exclude those errors to which the harmless error rule was originally addressed: technical rules, ones which concern "mere etiquette of trials"¹⁰³ and "formalities and minutiae of procedure."¹⁰⁴

This automatic reversal standard would promote more rational verdicts. The jurors would not be exposed to confusing, unprovable inferences. The defendant would not be forced into a tactical dilemma: either objecting and asking for curative instructions, thus highlighting the inferences of guilt, or ignoring the error in the hope that the jurors will overlook it, thus risking that they will weigh the improper implications of guilt in their deliberations. This latter alternative is rendered even more unattractive because failing to object usually leaves defendants without recourse on appeal.¹⁰⁵

The most vigorous objection to this standard likely will be similar to that voiced by a dissent in a Seventh Circuit case: the "[d]efendant's guilt is starkly apparent."¹⁰⁶ Similarly, the Supreme Court has expressed concern with "cost[ing] society the right to punish admitted offenders,"¹⁰⁷ and with not upsetting convictions of the "guilty."¹⁰⁸ These opinions, however, neglect a basic principle of constitutional law: a defendant who is convicted in a trial tainted with errors which allow the presentation of irrelevant matters to the jury, creating unprovable inferences of guilt, is neither an admitted offender nor legally guilty.¹⁰⁹ Regardless of how "starkly apparent" the guilt of a defendant may be, directed verdicts of guilty are not part of our criminal justice system. Moreover, a reversal at this stage does not necessarily result in acquittal.

¹⁰² The trial judge could alternatively declare a mistrial.

¹⁰³ *Bruno v. United States*, 308 U.S. 287, 294 (1939).

¹⁰⁴ *Id.*

¹⁰⁵ *See, e.g.*, *State v. Murrell*, 215 Kan. 10, 12-13, 523 P.2d 348, 350 (1974).

¹⁰⁶ *United States v. Thomas*, 463 F.2d 1061, 1066 (7th Cir. 1972) (Stevens, J., dissenting).

¹⁰⁷ *Engle v. Isaac*, 102 S. Ct. 1558, 1571 (1982).

¹⁰⁸ *Stone v. Powell*, 428 U.S. 465, 490-91 (1976).

¹⁰⁹ *See, e.g.*, *Bollenbach v. United States*, 326 U.S. 607, 615 (1946).

The proceeding would be remanded for another trial. Thus, if the defendant's guilt is readily apparent, the jury will return a guilty verdict in a trial free of improper inferences, and the integrity of the judicial system will stand uncompromised.

Retrials do impose an economic burden to society, for trials are not cost-free. There is, however, a countervailing societal benefit in reversing convictions tainted with errors that compromise the administration of justice. Courts must protect the integrity of their own functions if society is to respect the legal process.¹¹⁰ Prosecutorial and judicial misconduct occurs in open court where it is noticed by the public and the press. Courts must demonstrate to the public that they will not be accomplices in willful disobedience of the law, and that they will not sanction disregard for the law.¹¹¹

The Supreme Court has exercised its supervisory authority over the administration of criminal justice in the federal courts to prevent judicial sanctioning of illegal governmental conduct when this conduct would have resulted in an abuse of governmental power.¹¹² When the Supreme Court exercises this power, it raises the standard of fairness in the administration of criminal justice in federal courts.¹¹³ Often, the standards the Supreme Court sets for the protection of procedural integrity under its supervisory power become incorporated into the constitutional concept of due process. Even without reaching the constitutional level, states may follow, and indeed have followed, the lead of federal courts to include such standards in their criminal trial systems.¹¹⁴

Thus, the supervisory power affords the courts a basis for implementing constitutional values beyond the minimum requirements of the Constitution.¹¹⁵ Applying an automatic reversal standard without examining whether the defendant was prejudiced is not without precedent. In exercising its supervisory power, the Supreme Court has looked beyond the effect of the outcome on the individual defendant to the general effect on the administration of justice in the federal courts.¹¹⁶

¹¹⁰ See *Sorrells v. United States*, 287 U.S. 435, 457 (1932) (Roberts, J., concurring); *United States v. Olmstead*, 277 U.S. 438, 484-85 (Brandeis, J., dissenting); *United States v. Cortina*, 630 F.2d 1207, 1214 (7th Cir. 1980).

¹¹¹ *Elkins v. United States*, 364 U.S. 206, 223 (1960); *McNabb v. United States*, 318 U.S. 332, 342 (1943).

¹¹² *Elkins*, 364 U.S. at 223.

¹¹³ See Note, *supra* note 6, at 1666-67. For a history of the Supreme Court's supervisory power, see *id.*; see also *McNabb v. United States*, 318 U.S. 332 (1943).

¹¹⁴ The *McNabb* rule, that any confession obtained by federal officers during illegal detention is inadmissible in federal court, does not apply to the states. Several states nevertheless applied such rules. Congress, however, has the power to abolish such rules, because they are not mandated by the Constitution.

¹¹⁵ Hill, *The Bill of Rights and the Supervisory Power*, 69 COLUM. L. REV. 181, 196, 214 (1969).

¹¹⁶ *Id.* at 195-96.

For example, in *McNabb v. United States*,¹¹⁷ the Supreme Court held that any confession obtained by federal officers during an illegal detention was inadmissible in federal court, and where such a confession was admitted, the conviction required reversal. The Court held that courts as agencies of justice and custodians of liberty cannot affirm a conviction where the government has acted unlawfully.¹¹⁸ In *Elkins v. United States*,¹¹⁹ the Court held inadmissible evidence obtained by state officers during a search which, if conducted by federal officers, would have violated the defendant's immunity from unreasonable searches and seizures under the fourth amendment. The Court thus invoked its supervisory power over the administration of criminal justice in the federal courts to strike down a conviction where the government had acted unlawfully.¹²⁰

In *United States v. Payner*,¹²¹ the Court recently repudiated the use of its supervisory power to suppress evidence tainted by illegalities if the defendant's constitutional rights are not violated. The Court concluded that the use of its supervisory power on these facts would upset the careful balance of competing interests embodied in its fourth amendment decisions.¹²² This concern with the exclusion of probative evidence, however, does not apply to deliberate courtroom misconduct, where there is no need to balance deterring unlawful conduct against furnishing the trier of fact with all relevant evidence. Here the two interests are joined. Automatic reversals of deliberate courtroom misconduct would assure that only relevant evidence reaches the trier of fact and at the same time deter the unlawful conduct.

Federal appellate courts also apply an automatic reversal standard to preserve the integrity of the criminal justice system. In *United States v. Cortina*,¹²³ the Seventh Circuit invoked its supervisory power to reverse a conviction where an FBI agent had deliberately lied both in an affidavit presented to support the search warrant and at trial on the witness stand. The court found that when the truth-finding function of the court is corrupted, the court must defend itself against deliberate violations of its own procedures.¹²⁴ There is a compelling need for courts to prohibit the corruption of their truth-finding function by reversing con-

¹¹⁷ 318 U.S. 332 (1943).

¹¹⁸ *Id.* at 347.

¹¹⁹ 364 U.S. 206 (1960).

¹²⁰ *Id.* at 216.

¹²¹ 447 U.S. 727 (1980).

¹²² *Id.* at 733.

¹²³ 630 F.2d 1207 (7th Cir. 1980).

¹²⁴ *Id.* at 1217; see also *In re Grand Jury Proceedings*, 486 F.2d 85 (3d Cir. 1973) (the court reversed a civil contempt citation issued to a grand jury witness for failure to comply with a subpoena, exercising its supervisory power to require a showing of relevance of the items requested in order to guard against improper government motives).

victions upon a showing of deliberate courtroom misconduct.¹²⁵

Indeed, the Supreme Court has found that a prosecutor's conduct may have such an unfair effect that it rises to a violation of due process. In *Brady v. Maryland*,¹²⁶ the Court stated that a conviction must be reversed if the prosecution denies a defendant's request for specific evidence containing facts material either to the guilt or to the punishment of the accused.¹²⁷ If the prosecutor withholds such evidence when the accused requests it, "[t]hat casts the prosecutor in the role of an architect of a proceeding that does not comport with the standards of justice. . . ."¹²⁸ Similarly, the Court in *Mooney v. Holohan*¹²⁹ found that a conviction based on perjured testimony must be reversed if the prosecutor should have known of the perjury.¹³⁰ The Court explained that depriving a defendant of liberty through a deliberate deception of the court and the jury by the presentation of testimony known to be perjured was inconsistent with the demands of justice.¹³¹

Automatic reversals of convictions upon a showing of deliberate misconduct at trial would prompt prosecutors and trial judges to guard against such errors. Although the research is inconclusive regarding the effectiveness of a similar doctrine created to deter unlawful police behavior,¹³² disciplining prosecutors and trial judges by ordering reversals can be distinguished in several ways from disciplining police officers by excluding evidence at trial. First, the burden of retrial falls on the prosecutor and the trial judge. If prosecutors or judges commit reversible errors they must, in effect, repeat their efforts.¹³³ Further, both prosecutors and trial judges are members of the legal profession. A reversal for misconduct will likely be perceived as a public reprimand. By the same token, assistant district attorneys' superiors follow appellate opinions closely, whereas a police officer's superiors do not regularly read such opinions.¹³⁴ Finally, while police officers are more concerned with the number of arrests than with the number of convictions,¹³⁵ a prosecutor's conviction record often is perceived as a measure of his or her

¹²⁵ See generally *United States v. Rodriguez*, 627 F.2d 110, 112 (7th Cir. 1980).

¹²⁶ 373 U.S. 83 (1963).

¹²⁷ *Id.* at 87.

¹²⁸ *Id.* at 88.

¹²⁹ 294 U.S. 103 (1935).

¹³⁰ *Id.* at 112.

¹³¹ *Id.*

¹³² Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665 (1970); cf. Mertens and Wasserstrom, *Foreword: The Good Faith Exception to the Exclusionary Rule: Deregulating the Police and Derailing the Law*, 70 GEO. L.J. 365 (1981).

¹³³ See Alschuler, *supra* note 8, at 647. But see, e.g., 7TH CIR. R. 18 (A different judge will be assigned on retrial).

¹³⁴ See generally Alschuler, *supra* note 8, at 647.

¹³⁵ *Id.*

competence.¹³⁶

Thus, reversals upon a showing of deliberate courtroom misconduct will reduce the incidence of such conduct. Other disciplinary methods have proven ineffective.¹³⁷ Even if the courtroom misconduct rises to the constitutional level of violating the defendant's right to a fair trial, the defendant cannot sue the prosecutor or trial judge for damages because prosecutors and trial judges currently enjoy absolute immunity from civil liability.¹³⁸ It is possible to hold prosecutors in contempt of court for misconduct. Such citations, however, are uncommon.¹³⁹ If the judge does not hold the prosecutor in contempt, the defendant cannot appeal. Disbarment of prosecutors or impeachment of judges is also not a viable alternative. It would help stop deliberate trial errors, but would impose a disproportionate cost on the individuals bringing the suits. Further, such extreme sanctions are almost never enforced.¹⁴⁰

V. CONCLUSION

The harmless error standards as currently applied in review of criminal trials are eroding the integrity of the criminal justice system by encouraging violations of longstanding trial rules. The application of an automatic reversal standard to deliberate violations of such rules would reduce the incidence of such violations. The corresponding costs would not be great: because prosecutors and trial judges are sensitive to reversals, few reversals would be necessary to effect the desired result. Moreover, preserving a constitutional criminal justice system does not automatically set offenders at large: Ernesto Miranda was convicted at retrial.¹⁴¹

VILIIA BILAISSIS

¹³⁶ See generally *id.*; Inbau, *Restrictions on the Law of Interrogation and Confessions*, 52 Nw. U. L. REV. 77 (1957).

¹³⁷ See generally Alschuler, *supra* note 8, at 664-77, 685-712.

¹³⁸ *Ferri v. Ackerman*, 444 U.S. 193, 202-04 (1979); see also *Barr v. Matteo*, 360 U.S. 564, 571-72 (1959). This absolute immunity is based on the need to ensure principled and conscientious governmental decisionmaking in the official performance of required duties.

¹³⁹ See Alschuler, *supra* note 8, at 674.

¹⁴⁰ For example, Wisconsin's Judge Seraphim made a career of berating defendants and making decisions without listening to testimony or evidence, and built a reputation for not caring about the rights of defendants. The state judicial review system found him guilty of thirteen counts of injudicious behavior. The three judge panel recommended permanent removal from the bench or suspension for three years without pay. The Wisconsin Supreme Court decided on the lesser sentence. Rivlin, *Suspended for Thirteen Counts of Injudicious Behavior*, Student Lawyer, Dec. 1982, at 18. See generally Alschuler, *supra* note 8, at 695-96.

¹⁴¹ *Miranda v. Arizona*, 104 Ariz. 174, 450 P.2d 364, *cert. denied*, 396 U.S. 868 (1969). Because reversal upon a showing of deliberate courtroom misconduct does not require exclusion of evidence, this rule would not change the weight of competent evidence at the new trial.