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Harmless Error and the Valid Rule Requirement

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Nearly a decade ago in the pages of this journal, in discussing the nature of overbreadth challenges, I drew attention to what may be characterized as the "valid rule requirement." A defendant in a coercive action always has standing to challenge the rule actually applied to him. This means that he can resist sanctions unless they are imposed in accordance with a constitutionally valid rule, whether or not his own conduct is constitutionally privileged.[1] The valid rule requirement focuses upon the rule as applied to the defendant by the jury instructions.[2] In *Pope v. Illinois*[3] the Court held that harmless error analysis could be applied to jury instructions that contained a constitutionally infirm liability-imposing rule. Four dissenting justices thought that this result violated the defendant's Sixth Amendment right to trial by jury.[4] For me, the difficulty is elsewhere, and *Pope* provides an occasion for further reflection on the valid rule re-

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[1]Monaghan, Overbreadth, 1981 Supreme Court Review 1, 4–14. See also Monaghan, Third Party Standing, 86 Colum. L. Rev. 277 (1984). The Supreme Court has referred to this proposition approvingly but only in a passing manner in a footnote in New York v. Ferber, 458 U.S. 747, 768 n. 21 (1982).

[2]See, for example, Terminiello v. Chicago, 337 U.S. 1 (1949); Stromberg v. California, 283 U.S. 359 (1931). See also DeJonge v. Oregon, 299 U.S. 353, 362 (1937). The death penalty cases provide particularly good examples of the point that the issue is how a reasonable jury would have interpreted the instructions. Penry v. Lynaugh, 109 S.Ct. 2934, 2945–49 (1989).

[3]481 U.S. 497 (1987).

[4]*Id.* at 507–11. *Pope* arose in the state courts. For convenience, however, I refer to the Sixth Amendment, because the substance of that requirement is imposed on the states by the Fourteenth Amendment. See Apodaca v. Oregon, 406 U.S. 404, 411 (1972); Blanton v. City of North Las Vegas, 109 S.Ct. 1289, 1291 n. 4 (1989).

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quirement. Is harmless error analysis ever appropriate when a state court conviction rests upon a constitutionally infirm rule? My conclusion is that it is not. This paper is an account of my difficulties in addressing this seemingly rather straightforward question.

I. The Valid Rule Requirement

The claim that the Constitution forbids the imposition of sanctions except in accordance with a constitutionally valid rule, whether or not the defendant's conduct is itself constitutionally privileged seems to me embedded in our conception of the "rule of law." Its operation can be illustrated by reference to the Due Process Clauses.[5] Settled doctrine has it that these Clauses prohibit substantively unreasonable legislation. Of course, determinations of this nature take their content from our social context. Thus, for us, "[g]overnment control of harmless actions like whistling in one's room" could not be justified as a "technique to induce unquestioning obedience to government authority."[6] Accordingly, a statute that prohibited "whistling in any building" would have a substantial number of invalid applications. Suppose that a defendant were charged under such a statute and the evidence showed that he intentionally whistled in the middle of a judicial proceeding and materially interfered with the proceeding. While this conduct is not itself independently privileged, the conviction would be constitutionally infirm were the state courts to affirm jury charges that stated that the fact of whistling sufficed to violate the statute.[7]

From this premise, I argued that neither need nor justification exists for treating the First Amendment overbreadth doctrine as a special standing doctrine. In an overbreadth challenge, the litigant invokes only his own right; he insists upon the application of a sub-

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[5]The Equal Protection Clause provides perhaps an even better illustration of the thesis. It is no answer to an equal protection challenge to argue that the conduct regulated is not independently privileged.

[6]Greenawalt, Free Speech Justifications, 89 Colum. L. Rev. 119, 121 (1989).

[7]This is not a "no-evidence" case within the compass of Thompson v. Louisville, 362 U.S. 199 (1960), See Hart & Wechsler's The Federal Courts and the Federal System (3rd ed., 1988) (Bator et al., eds.) at 677–82 (cited below as Hart & Wechsler). Like *Thompson*, I assume that the conduct is not independently privileged, Hart & Wechsler, *id.* 679; but unlike *Thompson*, I accept the fact that the terms of the regulatory rule, as defined by state law, *id.* at 679, violate the Due Process Clause. For an elahorate discussion, see Neumann, The Consititutional Requirement of "Some Evidence," 25 San. Diego L. Rev. 633 (1988).

stantive constitutional rule that requires a high degree of specificity and substantial congruence between means and ends.[8]

The undemanding nature of rational basis review and the presumption of separability deprive the valid rule requirement of significant operational bite.[9] But being clear on the underlying theory is quite important where heightened scrutiny is required. The Supreme Court is not, and the reason is its frequently expressed belief that an overbreadth litigant invokes a special rule of standing. For the Court, when the defendant asserts an overbreadth challenge, he is in effect private attorney general—or perhaps a bounty hunter—who invokes a judicially fashioned license to raise the rights of others (imaginary others, at that). This understanding has led to much puzzling and unstable doctrine.[10] Moreover, this understanding has led the Court to revoke its license when the challenged statute has been repealed or amended. Indeed, *Pope* itself rejected an overbreadth challenge on this ground.[11]

The consequences of the Court's attitude surfaced in stark terms in *Massachusetts v. Oakes*,[12] decided late in the last term. The defendant had been charged with taking photographs of his partially nude physically mature fourteen-year-old stepdaughter. The highest state court reversed the conviction on the ground that the statute was substantially overbroad. After the grant of certiorari, the statute was amended. Justice O'Connor's four-person opinion declined to permit an overbreadth challenge. She characterized overbreadth challenges as an "exception to the general rule" that a litigant can raise only his own rights,[13] and concluded that such challenges were "inappropriate if the statute being challenged has been amended or repealed."[14] Justice O'Connor saw nothing "unconstitionally offensive" in such a conclusion, because the former statute "cannot chill protected ex-

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[8]Monaghan, Overbreadth, note 1 *supra*.

[9]The looseness in fit between ends and means tolerated by the rational basis test and the frequent use of the separability technique reduce the importance of the requirement that the rule actually applied to the defendant be constitutional.

[10]See, for example, Hart and Wechsler, note 7 *supra*, at 189, 194–95, and note 5 (discussing the rise and fall of the claim that a litigant whose own conduct is constitutionally privileged cannot mount an overbreadth challenge). For other examples of confusion, see Monaghan, Overbreadth, note 1 *supra*, at 23–24, 27–30.

[11]481 U.S. at 501–502.

[12]109 S.Ct. 2633 (1989).

[13]*Id.* at 2637. My article was cited for this proposition.

[14]*Ibid.*

pression in the future."[15] For her, "overbreadth question . . . become[s] moot as a practical matter."[16] Justice O'Connor's plurality concluded that a remand was in order to permit the defendant to make an as applied challenge.

Part I of the concurring and dissenting opinion of Justice Scalia, joined by four other Justices on this point, rejected Justice O'Connor's analysis:[17]

> I do not agree with the plurality's conclusion that the overbreadth defense is unavailable when the statute alleged to run afoul of that doctrine has been amended to eliminate the basis for the overbreadth challenge. It seems to me strange judicial theory that a conviction initially invalid can be resuscitated by postconviction alteration of the statute under which it was obtained. Indeed, I would even think it strange judicial theory that an act which is lawful when committed (because the statute that proscribes it is overbroad) can become retroactively unlawful if the statute is amended *preindictment*.

Justice Scalia's view is without citation of authority or indeed analysis. But it should be noted that his intuitions are not premised on some crude cost/benefit assessment about whether the supposed deterrence underpinnings of overbreadth challenges would be marginally impaired if the overbreadth challenge is denied here. He seems to be seeking far more fundamental ground. Yet less than one week later Justice Scalia wrote an opinion for the Court in which he insisted both that overbreadth is a special rule of standing and that as applied standing is the equivalent of a claim of constitutionally privileged conduct.[18] I think both propositions are wrong.

This brings me to *Pope* itself. That case arose out of the conviction of a part-time adult book store attendant for violating the Illinois obscenity statute. Earlier, in *Miller v. California*,[19] the Court had reformulated its well-known tripartite test for determining whether material is obscene. *Miller*'s "social value" prong requires a deter-

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[15] *Id.* at 2638.

[16] *Ibid.*

[17] *Id.* at 2639. However, in Part II of his opinion, *id.* at 2640–41, Justice Scalia, writing for himself and Justice Blackmun, rejected the overbreadth challenge on the merit. Both Justices concurred that remand on the as applied challenge was appropriate.

[18] For example, Justice Scalia's opinion in Board of Trustees of State University v. Fox, 109 S.Ct. 3028, 3036 (1989), contains both assertions.

[19] 413 U.S. 15 (1973).

mination "whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value."[20] The *Pope* jury was instructed to make this determination based upon state-wide community standards.[21] This instruction was erroneous: "The proper inquiry," said the Court, "is not whether an ordinary member of any given community would find serious [social value], but whether a reasonable person would [so] find."[22]

After having found that "[t]he instruction at issue in this case . . . unconstitutional," the Court divided sharply over whether the conviction was nonetheless "subject to salvage if the erroneous instruction is found to be harmless error."[23] A bare majority concluded that in the circumstances such an analysis was appropriate, and it ordered a remand on that basis.[24]

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[20]413 U.S. at 24. The other requirements are (*a*) an appeal to prurient interests (*b*) that is patently offensive when measured by contemporary community standards.

[21]481 U.S. at 499.

[22]481 U.S. at 500–501. Justice Scalia concurred with regard to harmless error because he saw no real difference between the instruction given and the Court's substantive standard. *Id.* at 504. See also Allen, Unexplored Aspects of the Theory of the Right to Trial by Jury, 66 Wash. U. L. Q. 33, 40 (1988) (describing the Court's standard as "virtually incomprehensible . . . [or] inordinately silly [because] the values of the reasonable person from the community and community values will be virtually indentical.").

[23]481 U.S. at 501. This disposition limits Marks v. United States, 430 U.S. 188 (1977), not discussed in *Pope*. There, as in *Pope*, the jury was misinstructed on the social value test. The government argued that the error was harmless because the court of appeals had concluded that, under any standard, the material was obscene. The Supreme Court's response was a judicial conclusion "is not an adequate substitute for the decision in the first instance of a properly instructed jury as to this important element of the offense under 18 U.S.C. §1465," *id.* at 196–97 n.12.

[24]The Court's attention was focused entirely on the Sixth Amendment aspects of the problem. No attention was given to the "constitutional fact" dimensions of the case. Bose Corp. v. Consumers Union, 466 U.S. 485 (1984). See Monaghan, Constitutional Fact Review, 85 Colum. L. Rev. 229 (1985). Whether viewed as a question of law, or of law-application (constitutional fact), the question whether a book possesses social value in the eyes of a "reasonable person" seems to be a constitutional fact upon which the defendant is entitled to the Court's independent judgment. See Monaghan, First Amendment Due Process, 83 Harv. L. Rev. 518, 530–31 (1970).

In *Pope*, the Court began its opinion by stating that *Miller* had mandated a three prong determination by the "trier of fact." 481 U.S. at 498. It is customary to submit the issue of social value to the jury, as one of the elements of the state law offense, and such a submission may very well be required by the Sixth Amendment. But surely it is not evident that the First Amendment requires submission to the jury of an issue that the jury cannot authoritatively resolve (subject to conventional standards on post-verdict motions), at least if that issue is not inextricably intertwined with issues that must be submitted to the jury. See Dennis v. United States, 341 U.S. 494, 511–15 (1951), a criminal prosecution where the judge refused to submit the issue of whether the speech constituted a clear and present danger, and over two dissents, his decision was affirmed on appeal.

II. Harmless Error

Harmless error doctrine reflects the general perception that "the well-being of the law encompasses tolerance for harmless error in an imperfect world."[25] The doctrine has received its closest examination in the jury trial context. Here, special concern exists that judicial toleration of harmless error is not a license for judicial invasion of the issue-resolving province constitutionally reserved to the jury.[26] Nonetheless, here too the Court's animating principle is that error free proceedings cannot be an inexorable demand.[27]

Of course, errors of constitutional dimension might have been treated differently and understood to require automatic reversal. Over two decades ago, in *Chapman v. California*,[28] the Supreme Court formally rejected that view: most constitutional errors were subject to harmless error analysis.[29] But, as a prominent judge writing shortly after the decision noted, the standard articulated by the Court for determining whether a constitutional error was harmless came very "close to [stating a rule of] automatic reversal:"[30] "Before [such an] error can be held harmless, the court must be able to declare a belief that it was harmless beyond reasonable doubt."[31] While by no means free from ambiguity, the Court's formulation seemed decidedly jury oriented. Error that increased the likelihood of a guilty verdict by a reasonable jury could not be disregarded, whatever the strength of the untainted evidence of guilt.[32]

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[25]Traynor, The Riddle of Harmless Error, Introduction (1970).

[26]See Harte-Hanks Communications v. Connaughton, 109 S.Ct. 2678 (1989).

[27]See U.S.C. §2111, and Fed. R. Cr. Proc. 52(a), Fed. R. Civ. Proc. 61, and Fed. R. Ev. 103(a), all of which require use of harmless error analysis.

[28]386 U.S. 18 (1967).

[29]*Id.* at 21–22.

[30]Traynor, note 25 *supra*, at 43. In *Chapman*, the Court assumed that it had the duty to specify the actual content of the harmless error rule, despite the existence of the statute and rules mentioned in note 27 *supra*. Moreover, the Court rejected Justice Harlan's view that the issue was one of state law. *Id.* at 20–21. See Monaghan, Constitutional Common Law, 89 Harv. L. Rev. 1, 21 (1975) (*Chapman* should be viewed as a federal common law rule).

[31]*Id.* at 24.

[32]The conclusion that only constitutional errors that have only marginal impact on the jury's guilt-determining deliberations may be ignored follows from *Chapman*'s endorsement of the standard expressed in Fahey v. Connecticut, 375 U.S. 85, 86–87 (1963): "There is little, if any, difference between our statement in Fahey v. Connecticut about 'whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction' and requiring the beneficiary of a constitutional error to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." 386 U.S. at 24. See also Traynor, note 25 *supra*, at 43–44; Field, Assessing the Harmlessness of Federal Constitutional

But *Chapman* did not evolve into a rule of nearly automatic reversal; over time the Court's cases reflected increased tensions, as the Court moved uncertainly among such variables as the nature of the error, the error's probable impact on the jury's ultimate determination, and the Court's own independent assessment of guilt. Increasingly, the last factor assumed a dominant role.[33]

Almost two decades after *Chapman*, the Court undertook a major restatement and reformnlation of doctrine in *Rose v. Clark*.[34] First, the Court reinforced *Chapman's* holding that harmless error analysis should be applied to most claims of constitutional error, stating that given "an impartial adjudicator," "a strong presumption" exists to that effect. Then, while still professing a strict adherence to *Chapman*, *Rose* reformulated the operative standard:[35]

> The thrust of the many constitutional rules governing the conduct of criminal trials is to ensure that those trials lead to fair and correct judgments. Where a reviewing court ean find that the record developed at trial establishes guilt beyond reasonable doubt, the interest in fairness has been satisfied and the judgment should be affirmed.

Operationally, *Rose*'s "correct judgment" is judge centered: the relevant judicial inquiry is the sufficiency of the evidence on guilt.[36] The question is whether (assuming a fair trial) a directed verdict against the defendant would have been proper on the basis of the evidence untainted by the constitutional error.[37] This reformulation mirrored

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Error—A Process in Need of a Rationale, 125 U. Pa. L. Rev. 15, 16 (1976) (whether the error contributed to the result should be decisive, not the sufficiency of the other evidence of guilt).

[33]For example, Stacy & Dayton, Rethinking Harmless Constitutional Error, 88 Colum. L. Rev. 79, 80 (1988) (noting tendency of the Court to invoke harmless error analysis when satisfied of factual guilt).

[34]478 U.S. 570 (1986).

[35]481 U.S. at 579. Justice Powell, the author of *Rose*, prefigured this guilt-oriented approach in his dissenting opinion in Connecticut v. Johnson, 460 U.S. 73, 97 n.5 (1983). Saltzburg, The Harm of Harmless Error, 59 Va. L. Rev. 988 (1973). See also Kornstein, A Bayesian Model of Harmless Error, 5 J. Legal Studies 121, 131 (1976). It is of course possible to formulate harmless error doctrine so that both probable impact and reasonable doubt analysis are required rather than only one of the two. LaFave & Israel, Criminal Procedure 1008 (1985).

[36]This leaves open the question of whether the "other" evidence should be viewed from the prosecution's perspective or the defendant's. Although concerned with an analytically distinct issue, Jackson v. Virginia, 443 U.S. 307 (1979), suggests that that the proper perspective is that of the verdict-winner, the prosecutor. But this seems wrong. Defendant's right to trial by jury is compromised unless the evidence is considered from the defendant's perspective. See Stacy & Dayton, note 33 *supra*, at 131–38.

[37]To be sure, *Rose* itself acknowledged that a judge cannot direct a verdict in a criminal ease. 478 U.S. at 578. Nonetheless, that seems to be the general standard to be applied in determin-

the Court's general concern with preserving the results of a fair trial.[38]

Rose also sought to give a principled explanation for the existing per se cases—"exceptional"[39] situations in which the nature of the constitutional violation alone precludes inquiry into the sufficiency of the evidence concerning defendant's guilt. The Court sorted the exceptions into two categories: first, errors that compromised the defendant's right to a fair trial. The explanation—only partially convincing—is that here the criminal trial "cannot reliably serve its function as a vehicle for determination of guilt or innocence."[40] Interestingly, the Court's "reliability" explanation seems to give the "fair trial" exception very limited independent content; operationally, judicial concern with reliability invites focus on the adequacy of the record, with the question being whether that record is sufficient to leave reviewing court convinced of defendant's guilt. If so, there was a fair trial.[41]

Second, the Court explained that because of the Sixth Amendment's clear command to afford jury trials in serious criminal cases, judicial action that is the equivalent of directing a verdict for the prosecution cannot be harmless because "the wrong entity judged the defendant guilty."[42] Unless further elaboration is provided, the

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ing whether to set aside the jury's verdict because of constitutional error. See also Burger v. Kemp, 483 U.S. 776, 783–87 (1987).

[38]See in particular Strickland v. Washington, 466 U.S. 668 (1984) (demonstration of prejudice an element of establishing violation of Sixth Amendment assistance of counsel); Murray v. Carrier, 477 U.S. 478 (1986) (impact of procedural defaults in state courts on availability of habeas corpus). See also Teague v. Lane, 109 S.Ct. 1060 (1989), and Penry v. Lynaugh, 109 S.Ct. 2934 (1989), limiting habeas corpus challenges.

[39]See Rose v. Clark, 478 U.S. at 578. These situations "are the exception and not the rule."

[40]*Id.* at 577–78. See also Satterwhite v. Texas, 108 S.Ct. 1792, 1797 (1988) (concern with errors that "pervade the entire proceeding"). Reliability is the key word here. I recognize that in many cases the prejudice from fair trial errors is often hard to detect, and thus the record will be too infirm to permit the appellate court to check that fact finding by a directed verdict standard. Surely, any doubt on this score would favor the defendant. But to acknowledge the existence of high risk situations provides only limited explanatory power: on many occasions the record will not be compromised, and guilt may be still plain beyond a rational doubt. Nonetheless, the Court has long been resolute on this point. For example, a litigant has a right to an impartial tribunal "no matter what the evidence was against him." Tumey v. Ohio, 273 U.S. 510, 535 (1927).

[41]Indeed, the equivalence of fair trial and reliable trial seems to be the situation in *Rose* itself. See 478 U.S. at 579 n.7 (". . . error in this case did not affect the composition of the record"). Note should be made here of the Court's tendency to define rights themselves in terms of reliable outcomes. *E.g.*, Strickland v. Washington, 466 U.S. 668, 686–87 (1984) (effective assistance of counsel guarantee satisfied if "a trial whose result is reliable"); Pennsylvania v. Ritchie, 108 S.Ct. 989, 1002 (1987) (discovery); United States v. Bagley, 473 U.S. 667, 678 (1985).

[42]478 U.S. at 578.

Court's "wrong entity" analysis provides little more than a description of the error, not an explanation of why the error cannot be harmless. After all, judges can fairly determine guilt.[43] Nonetheless, the "wrong entity" exception possesses a strong grip on the judicial imagination. It was twice endorsed in strong language at the close of the 1988 term.[44]

Statterwhite v. Texas,[45] a death penalty case, contains the Court's most recent extended discussion of harmless error. *Rose* was drawn upon for the proposition that harmless error analysis is applicable to Sixth Amendment violations except where "the violations pervade the entire procedure."[46] Interestingly, however, when it came time to define the meaning of harmless error, the Court ignored *Rose* and cited *Chapman*: "The question, however, is not whether the legally admitted evidence was sufficient to support the death sentence, which we assume it was, but rather, whether the State has proved 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'"[47] The long-term significance of this aspect of *Satterwhite* outside the death penalty remains to be seen.

Seemingly, both the jury-centered *Chapman* and the judge—centered *Rose* formulations exclude the "value" of any specific constitutional right from being assessed as an independent variable in its own right, except for rights that bear upon a fair trial before a "proper adjudicator."[48] Accordingly, the third party deterrence rationale of the Fourth Amendment's exclusionary rule receives only incidental and erratic vindication.[49] Nonetheless, a small but significant category of decisions quite clearly make the "value" of the con-

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[43]It is a commonplace that judges and jurors are not interchangeable institutions. But the move from that observation to no harmless error requires explieation. See United States v. Kerley, 838 F.2d 932, 937 (7th Cir. 1988) (Posner, J.).

[44]See Carella v. California, 109 S.Ct. 2419, 2421–22 (1989) (concurring opinion). The wrong entity analysis is apparently not limited to the jury. In Gomez v. United States, 109 S.Ct. 2237 (1989), the Court held that a magistrate could not preside over the selection of a criminal jury. The court rejected a harmless error claim: "Equally basic is a defendant's right to have all critical stages of a criminal trial conducted by a person with jurisdiction to preside." *Id.* at 2248.

[45]108 S.Ct. 1792 (1988).

[46]*Id.* at 1797.

[47]*Id.* at 1798.

[48]See *Rose*, 478 U.S. at 586–89 (Stevens, J., concurring); see generally Stacy & Dayton, note 33 *supra*.

[49]Error in admission of evidence obtained in violation of the Fourth Amendment is harmless if the other evidence suffices to establish guilt. Chambers v. Maroney, 399 U.S. 42, 52–53 (1970), cited in Rose v. Clark, 478 U.S. at 576–77. See generally Loewy, Police Obtained Evidence and the Constitution: Distinguishing Unconstitutionally Obtained Evidence from Unconstitutionally Used Evidence, 87 Mich. L. Rev. 907 (1989).

stitutional right alone determinative.[50] Race discrimination in selecting the grand and petit juries is a striking example.[51] So, too, is the Court's categorical refusal to treat admission of a coerced confession as harmless.[52] Other examples can be cited. *Penson v. Ohio*,[53] involving a violation of the "*Anders*" rule on the responsibilities of a indigent's appellate counsel,[54] is the most recent such instance.[55] We shall see that the overbreadth doctrine itself is an excellent illustration of this category, at least in the Court's mind.

My view is that the real explanation for most of these per se cases, as well as for much of the fair trial and "wrong entity" exceptions recognized in *Rose*, is not that prejudice from the violation is hard to detect. No doubt that is part of it.[56] But precisely the opposite perception seems more to the point: in these situations the Court all too frequently is faced with a case where the defendant's guilt is plain beyond contradiction. Thus, application of harmless error analysis might effectively render the relevant constitutional commands judicially unenforceable.

III. The Sixth Amendment and Harmless Error

Pope drew upon *Rose* not only for its general guilt-oriented approach to harmless error, but also for an even closer parallel.[57] *Rose* itself involved a defective jury instruction, one that was assumed to

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[50]Hart & Wechsler, note 7 *supra*, at 637 n.6 states: "Note that a harmless error rule not only measures the degree of risk that a particular error actually had an adverse effect; it also defines the extent to which such a risk is accepted as permissible. Isn't this latter judgment a function of the importance attached to vindicating the underlying constitutional right? . . . If so, is not the definition of 'harmless error' inseparable from the task of defining the scope of that constitutional right?"

[51]Vasquez v. Hillery, 474 U.S. 254, 262 (1986) (rejecting harmless error analysis in connection with racial discrimination in selection of grand jury).

[52]The Court's effort in *Rose*, 478 U.S. at 578 n.6, to treat the admission of such a confession as invariably "abor[ting] the basic trial process . . ." is wholly unpersuasive. See Stacy and Dayton, note 33 *supra*, at 102–104. See Colorado v. Connelly, 479 U.S. 157 (1986) (involuntary confession admissible absent police misconduct).

[53]109 S.Ct. 346 (1988).

[54]Anders v. California, 386 U.S. 738 (1967).

[55]See also McKaskle v. Wiggins, 465 U.S. 168, 177 n.8 (1984), suggesting that violation of right to self representation is not subject to harmless error analysis; Gray v. Mississippi, 107 S.Ct. 2045, 2056 (1987) (plurality opinion) (exclusion of "death qualified juror" from sentencing jury).

[56]For example, *Vasquez*, note 51 *supra*, purports to rest on the difficulty of ascertaining prejudice, 474 U.S. at 263–64. See also *Rose*, 481 U.S. at 579 n.7, but this claim seems quite strained.

[57]478 U.S. 570 (1986). *Pope* is not a case where taken as a whole the instructions provide a

have impermissibly shifted the burden of proof on the issue of malice.[58] Harmless error analysis was thought acceptable because the instruction "did not entirely preclude the jury from considering the element of malice," and given the predicate facts that the jury was required to find, "no rational jury," properly instructed, could have failed to find malice.[59] In *Pope*, both elements were equally present:

> Similarly, [here] the jurors were not precluded from considering the question of value: they were informed that to convict they must find, among other things, that the magazines petitioners sold were utterly without redeeming social value[60] . . . . [I]f a reviewing court concludes that no rational juror, if properly instructed, could find value in the magazines, the convictions should stand.[61]

Justice Stevens's dissenting opinion objected that in a criminal case no court is free to decide that, if asked, a jury would have found something it did not find. For him, harmless error analysis "may enable a court to remove a taint from proceedings in order to *preserve* a jury's findings, but it cannot constitutionally *supplement* those findings."[62]

The difference between the Court and the dissent on the Sixth Amendment is exceedingly narrow. For both, the jury is a federally mandated mechanism to adjudge substantive claims defined by state or federal law,[63] and no state may pursue a policy of subverting the

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constitutionally valid rule—that is, where it is plain beyond doubt that any alleged defects in a particular aspect of the instructions were adequately cured by the instruction considered as a whole. Mistakes, even of consitutional dimension, are properly ignored in the latter case. Greer v. Miller, 483 U.S. 756, 766 (1987); Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967), seems explicable on that basis.

[58]In *Rose* the Court assumed that this was the effect of the instruction. 478 U.S. at 576 n.5. For a replay of *Rose*, see Carella v. California, 109 S.Ct. 2419 (1989).

[59]*Rose*, 478 U.S. at 580–81.

[60]In this respect, the jury was given a charge more favorable than that required by *Miller*, note 19 *supra*. *Miller* rejected the "utterly with redeeming social value" standard, a standard that had considerable support in the case law.

[61]481 U.S. at 503.

[62]481 U.S. at 509–10; 109 S.Ct. 2419 (1989). At the end of the last term the *Rose/Pope* issue was revisited. Carella v. California, note 58 *supra*, like *Rose*, involved an instructional error that unconstitutionally shifted the burden of proof. Largely on the authority of *Rose*, the case was remanded for harmless error analysis. Four justices concurred in an opinion by Justice Scalia, emphasizing that for them impermissible burden-shifting instructions are bad because they amount to a directed verdict; like Justice Stevens, Justice Scalia looked askance at judicial authority to supplement jury finding in criminal cases. Turning to *Pope*, Justice Scalia said that the effect of "misdescription of an element of the offense. . . deprives the jury of its fact finding role. . ." 109 S.Ct. at 2423.

[63]For the entire Court in *Pope*, in assessing whether the error was harmless, nothing whatever turns on the fact that the error complained of was itself of independent constitutional di-

jury's constitutionally prescribed role by withdrawing elements of the offense from its consideration. (The majority's emphasis in both *Rose* and *Pope* that the jury was not entirely precluded from consideration of the relevant issues responds to that concern.) Moreover, the Sixth Amendment requires that the jury be properly instructed on the essential elements of the offense,[64] and presumably, the "failure to charge correctly is not harmless [when] the verdict may have resulted from the incorrect instruction."[65]

To my mind, the dissent's complete rejection of harmless error analysis is unpersuasive. Surely it is too late to argue that the protection of the jury as a constitutionally mandated institution[66] calls for the elimination of all harmless error analysis.[67] Nor is the argument more compelling if viewed from the defendant's perspective. Any right based claims seem weak because of the law's fundamental ambivalence toward the jury. For example, the rules of evidence are infused with a pervasive distrust of the jury's intelligence and emotion.[68] Yet courts, particularly appellate courts, presume a rational jury that will act in accordance with the instructions given it.[69] They do not care very much about how a particular jury reached its

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mension. Indeed, this seems generally true in harmless error analysis. Compare *Rose* and *Pope* with United States v. Lane, 474 U.S. 438, 444–50 (1986), and United States v. Mechanik, 475 U.S. 66, 71–72 (1986), and Traynor, note 25 *supra*, at 55.

[64]Cabana v. Bullock, 474 U.S. 376, 384–85 (1986). Of course, *Pope* imposes some limit on *Cabana*. See *Pope*, 481 U.S. at 503–4 n.7 (*Cabana* "no longer good authority" to the extent that it excludes harmless error analysis). See also Judge Posner's discussion United States v. Kerley, 838 F.2d 932, 938–39 (7th Cir. 1988).

[65]Brotherhood of Carpenters v. United States, 330 U.S. 395, 409 (1947).

[66]See also Matthews v. United States, 108 S.Ct. 883 (1988); Tull v. United States, 481 U.S. 412 (1987) (jury and civil liability).

[67]In Rose v. Clark, the Court pointed out that harmless error analysis had been applied to evidentiary rulings that affected the jury's decision-making role. 478 U.S. at 582 n.11. Moreover, other institutional changes should be noted. In light of the inroads already made on the traditional state criminal jury by decisions sanctioning nonunanimous verdicts by less than 12 persons, it is hard to believe that so inflexible a rule is necessary to protect the jury. In addition, both the civil and criminal juries have lost much of their constitutionally intended significance with the rise of administrative adjudication.

[68]Note, 98 Yale L.J. 187 n.1 (1989) (collecting sources).

[69]"[T]he theory under which jury instructions are given by trial courts and reviewed on appeal is that juries act in accordance with the instructions given them." City of Los Angeles v. Heller, 106 S.Ct. 1571, 1573 (1986); Mills v. Maryland, 108 S.Ct. 1860, 1867 (1988). See also Tanner v. United States, 107 S.Ct. 2739, 2745–51 (1987) (verdict cannot be impeached by proof of internal dynamies of jurors' conduct). Compare Resnik, On the Bias: Feminist Reconsideration of the Aspirations for Our Judges, 61 So. Cal. L. Rev. 1877, 1899–1903, 1937–38 (1988), with Alschuler, The Supreme Court and the Jury: Voir Dire, Peremptory Challenges, and the Review of Jury Verdicts, 59 U. Chi. L. Rev. 153, 221–29 (1989).

conclusion; in large measure, they care only about how their artifact—the rational jury—would act.[70] This premise may be challenged, but it is difficnlt to see how any other premise could be employed in a systematic way as a basis for judicial reasoning.[71] If that be true, *Pope*'s restrained "no rational juror" approach to jury instructions is an attractive one in the Sixth Amendment context.[72] But it does not dispose of a different objection, namely, that the state cannot impose sanctions except in accordance with a constitutionally valid rule.

IV. Harmless Error and the Valid Rule Requirement

Can a valid rule requirement claim complete immunity from harmless error analysis? The argument against such a proposition is that the right involved is not visibly more important than other rights that are subject to harmless error analysis. Moreover, the policies supporting a valid rule requirement are not rendered empty if harmless error analysis is let in: the requirement already receives significant indirect protection from other constitutional sources, such as

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[70]Harrington v. California, 395 U.S. 250, 254 (1969) ("We of course do not know the jurors who sat. Our judgment must be based on . . . the minds of an average jury"). Schneble v. Florida, 405 U.S. 427, 432 (1972). See also Satterwhite v. Texas, 108 S.Ct. 1792 (1988); Mills v. Maryland, 108 S.Ct. 1860, 1866 (1988). Stacy and Dayton argue that on occasion the Court seems concerned with the particular jury, note 33 *supra*, at 128 and note 195, but the materials relied on strike me as unpersuasive.

[71]Professor Alschuler notes that the Court's positive attitude toward the jury is at its highest at the "back end" of the jury trial: when the verdict is in. Alschuler, note 69 *supra*, at 154. The "no rational juror" approach does not impinge upon the power of the jury (illustrated in the highly publicized North trial) to disregard the instructions and refuse to convict whatever the evidence. No right of the defendant is implicated: jury nullification is simply a situation where we prefer to be or necessarily must be not governed by rules. Strickland v. Washington, 466 U.S. 668, 695 (1984). Compare Stacy & Dayton, note 33 *supra*, at 138–42, arguing that jury nullification serves a more limited and structured function of implementing "legally irrelevant [but] fundamental community values." *Id.* at 142.

[72]The acceptability of the Court's analysis in *Pope* seems to me *a fortiori* in civil cases. Despite the Seventh Amendment command that "no fact tried by jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law," the issue resolving role of the jury has in fact been subjected to very cousiderable judicial interference. Judges can take the case entirely away from the jury on the the evidence both before and after its deliberations—on summary judgment, directed verdict, and judgment n.o.v. Moreover, the judge can order a new trial or a remittitur if sufficiently dissatisfied with the jury's verdict. See Schnapper, Judges against Juries—Appellate Review of Federal Civil Jury Verdicts, 1989 Wisc. L. Rev. 237 (persuasively arguing that current federal appellate review undercuts Seventh Amendment). Against this background, limited use of a "no rational juror" approach to jury instructions does not seriously compromise the institutional role of the jury, nor in any strong sense deny to a civil litigant a fundamental right.

the Sixth Amendment (as construed in both *Rose* and *Pope*), the due process requirement of fair warning, and, as will be shown, from First Amendment overbreadth doctrine.

These objections have force. Nonetheless, in the end I believe the harmless error analysis in this context is unsatisfying. Accordingly, conviction resting upon an invalid rule should be set aside.

First. Harmless error is centrally concerned with the question whether a court should vacate a jury finding that defendant's conduct violated a rule. But the rule itself is not the subject of dispute and the implications of saying that harmless error can be applied to a constitutionally infirm rule are unsatisfactory.[73] What does it mean to say to the defendant: "You were convicted under an unconstitutional rule, but it was only a little bit unconstitutional. Anyway, given the evidence before the trier of fact, you would certainly have been convicted under a valid rule"? To my mind, there are intractable difficulties with both the intelligibility and the containability of any such proposition.[74]

Surely a conviction under a constitutionally infirm provision cannot be saved as harmless error because the conduct shown would have justified defendant's conviction under another statutory provision.[75] Accordingly, the Court has consistently invalidated convictions when liability might have been predicated on the violation of either or both of two rules, one valid, the other not. For example, in

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[73]Bollenbach v. United States, 326 U.S. 607, 615 (1946) (misdirection with respect to "the standard of guilt is not harmless").

[74]We are not considering a case where separation of a valid from an invalid basis of decision is possible. In those circumstances, something like harmless error analysis is followed. Thus, a good verdict on one count need not be annulled simply because it is joined with a bad one. The same principle can be applied in administrative law. Syracuse Peace Council v. F.C.C., 867 F.2d 654, 657 (D.C. 1989). Moreover, the Court's "causation" cases provide additional support for a separation approach, when separation of the good from the bad is possible. In Mount Health School District v. Doyle, 429 U.S. 274, 286–87 (1977) the plaintiff was discharged on two grounds, one of which was consitutuionally infirm under the First Amendment. The Court stressed the need "to formulate a test of causation which distinguishes between a result caused by a constitutional violation and one not so caused." *Id.* at 286. The Court's remand instructed the district court to determine "whether the Board had shown by the preponderance of the evidence that it would have reached the same decision as to respondent's employment even in the absence of the protected conduct." *Id.* at 287. See also Village of Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252, 270–71 n.21 (1977) (defendant could prove "that the same decision would have resulted even if the [racially] impermissible purpose had not been considered"); Price Waterhouse v. Hopkins, 109 S.Ct. 1775 (1989).

[75]DeJonge v. Oregon, 299 U.S. 353, 362 (1937), settled that long ago: "We must take the indictment as thus construed [by the state court]. Conviction upon a charge so made would be sheer denial of due process." Of course, the principle applies whether or not one of the statutes is infirm. See Cole v. Arkansas, 333 U.S. 196, 200–202 (1948), 338 U.S. 345, at 347–52.

Bacheldar v. Maryland[76] the jury returned a conviction after having been charged in three different forms, one of which contained a constitutionally defective rule under the First Amendment. The Court set aside the conviction because it was at least likely that the "convictions may have rested on the unconstitutional ground."[77] More recently, the Court said, "With respect to findings of guilt on criminal charges, the Court consistently has followed the rule that the jury's verdict must be set aside if it could be supported on one ground but not another, and the reviewing court was uncertain which of the two grounds was relied upon by the jury in reaching the verdict."[78] These cases cannot be said to foreclose all discussion, because they do not involve claims that harmless error analysis could be used to insulate the conviction under a constitutionally infirm rule from attack, that is, that even assuming the jury acted upon the constitutionally infirm ground, this error was harmless because no rational jury would have reached a different result under a valid rule. But the underlying principle of the decisions seems to me inconsistent with use of harmless error analysis. Their focus is on the content of the rule applied to the defendant, and their premise is that legitimate government requires application of a valid rule if sanctions are to be imposed.

Second. Close attention to *Pope*'s First Amendment aspects supports the perception that no room exists for a "the rule is only a wee bit unconstitutional" approach. The Court was satisfied that harmless error analysis would not "pose[ ] a threat" to First Amendment values because the offending statute had been replaced on the state's statute books.[79] But, of course, the deep premise of this reasoning is that (despite the guilt-oriented approach of *Rose v. Clark*) the First

[76]397 U.S. 564, 569–71 (1970).

[77]*Id.* at 571. This does not mean that the rule need be the same as that applied to defendant's neighbor. These state law deviations are immaterial unless they are so glaring as to invoke the line of authority generated by Yick Wo v. Hopkins, 118 U.S. 356 (1886).

[78]Mills v. Maryland, 108 S.Ct. 1860, 1866 (1988). See also Penry v. Lynaugh, 109 S.Ct. at 2949 (uncertainty in death penalty instruction).

[79]481 U.S. at 501. Invalidation "would not serve the purpose of preventing future prosecutions under a constitutionally defective standard." *Id.* at 501–2. Moreover, the Court observed that Pope could have been retried under the now-repealed statute "provided that the erroneous jury instruction was not repeated." *Id.* at 502. The dissenting justices offered no challenge to this analysis. Rather, to avoid its force, they urged a complete revamping of *Miller*'s criteria when adult obscenity was at stake. *Id.* at 511–13. The Court noted that the defendant "could not plausibly claim that the repealed statute failed to give them notice that the sale of obscene materials would be prosecuted." *Id.* at 502.

Amendment generally does forbid harmless error analysis in overbreadth cases.[80] Why this should be is not clear to me, if overbreadth is only a judge-fashioned, deterrence-oriented standing rule. Indeed, several of the Court's fighting words decisions seem particularly inviting candidates for harmless error analysis: the discrepancy between liability imposing rules invoked by the state courts and what the First Amendment permits seems thin. Nonetheless, there is not even a suggestion that the state court save a conviction on a "no rational trier of fact" approach. Why not? The deterrence rationale said to underpin overbreadth is, to say the least, open to challenge, at least with respect to hot-tempered fighting words.[81] More generally, it is not evident that some limited form of harmless error analysis invariably conflicts with overbreadth's deterrence rationale, any more than does the now generally acknowledged power of state courts to narrow statutes to constitutionally acceptable boundaries.[82] Of course, for me, the overbreadth challenges are best understood as illustrations of the valid rule requirement.

Appendix

The claim that the Supreme Court cannot apply harmless error analysis to sustain a state court conviction resting upon a constitutionally infirm rule invites consideration of a closely related problem. What is the relationship between the valid rule requirement and the firmly recognized power of state (and federal) courts to narrow statutes to constitutionally prescribed boundaries? I am by no means clear in my own mind about all the matters potentially raised in this question, and this is fairly a topic that warrants a separate comment. I do have some preliminary views, however. I do not understand the valid rule requirement to be inconsistent with recog-

[80]Gooding v. Wilson, 405 U.S. 518, 521 (1972) ("It matters not that the words appellee used might have been prohibited under a narrowly and precisely drawn statute"). See also Lewis v. City of New Orleans, 415 U.S. 130 (1974).

[81]Hart and Wechsler, note 7 *supra*, at 192–93.

[82]*E.g.*, Ward v. Illinois, 431 U.S. 767, 773–76 (1977).

[83]Suppose that after a full evidentiary hearing a state court issued an injuction on the basis of statute that, as construed by that court, contained a constitutionally infirm rule. Surely an appellate court could uphold the injunction on the basis of a different, but constitutionally valid construction, if the evidence otherwise supported such an order. Yet the appellate court here is engaged in a kind of harmless error analysis. But in conventional understanding this is a penalty-free determination; the order is prospective in character and constitutes a sanction free determination of what defendant obligations are.

nition of a large power in the state courts to narrow legislative commands to constitutional boundaries.[83]

Even in criminal cases, it is plain that state courts can reshape legislative commands to satisfy the valid rule requirement.[84] The Supreme Court has repeatedly recognized that a limiting construction "may be applied to conduct prior to the construction, . . . provided such application affords fair warning. . . ."[85] Of course, the reshaping will not suffice if in the Court's judgment, the reshaping was not reasonably foreseeable.[86]

For me, a bothersome issue occurs when sanctions are imposed in the first instance by a trial court pursuant to a constitutionally infirm rule. The decisions seem to assume an appellate court preserve the conviction by reformulating the rule, and then essentially applying harmless error analysis: "our construction was clearly foreseeable and embraces the conduct shown beyond rational doubt."[87] My doubts are not grounded in fair notice or First Amendment considerations but because of the implications of the valid rule requirement.[88] Perhaps doubt is unwarranted, particularly because sanctions are seldom actually imposed before completion of the appellate process. In any event, I do not think that the Supreme Court can invoke harmless error principles to sustain the imposition of sanctions when the highest state court has itself proceeded on the basis of the invalid rule.

Nor do I see my claim as involving any challenges to the practice of imposing sanctions simply because of a change in law by the appellate court. Particularly in the civil context, appellate courts support the award on the evidence while making more or less explicit changes in the rules applied by the trial court. But in these contexts all the liability rules seem permissible under the coustitution.

[84]Ward v. Illinois, 431 U.S. at 773–76. See Hamling v. United States, 418 U.S. 87, 115–16 (1974) (judicial narrowing simply added a "clarifying gloss"); Monaghan, Overbreadth, note 1 *supra.*

[85]Dombrowski v. Pfister, 380 U.S. 479, 491 n.7 (1965), cited with approval in Massachusetts v. Oakes, 109 S.Ct. at 2638 (plurality).

[86]*Ibid.*

[87]See notes 84 & 85 *Supra.* Of course, when reshaping comes at the appellate level, the fair notice requirement may be a demand that becomes more visible. But the foreseeability cases do not turn on whether the unforeseeable construction is at the trial or appellate level. Bouie v. City of Columbia, 378 U.S. 347 (1964); Dombrowski v. Pfister, note 85 *supra.* Douglas v. Buder, 412 U.S. 430, 432 (1973); Marks v. United States, 430 U.S. 388 (1977).

[88]In the First Amendment area the Court has expressed special concern over judicial narrowing at the appellate level, Monaghan, First Amendment Due Process, 83 Harv. L. Rev. 518, 540–43 (1980). Indeed, in Ashton v. Kentucky, 384 U.S. 195, 198 (1986), could be read to prohibit narrowing at the appellate level (except prospectively) when the First Amendment is implicated. But that view is foreclosed by such decisions as *Ward* and *Hamling.*