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Arguments Appealing to Racial Prejudice: Uncertainty, Impartiality, and the Harmless Error Doctrine

A keen observer has said that "next to perjury, prejudice is the main cause of miscarriages of justice." If government counsel in a criminal suit is allowed to inflame the jurors by irrelevantly arousing their deepest prejudices, the jury may become in his hands a lethal weapon directed against defendants who may be innocent. He should not be permitted to summon that thirteenth juror, prejudice.

Judge Jerome Frank¹

INTRODUCTION

Arguments by the prosecution contrived to stimulate latent racial prejudice² represent a brazen attempt to subvert a defendant's sixth amendment right to trial³ by an impartial jury.⁴ Whether express or implied, such arguments

1. *United States v. Antonelli Fireworks Co.*, 155 F.2d 631 (2d Cir.) (Frank, J., dissenting), *cert. denied*, 329 U.S. 742 (1946).

2. Shocking appeals by defense counsel to racial prejudice have also occurred. *See, e.g., Kornegay v. State*, 174 Ga. App. 279, 329 S.E.2d 601 (1985). In *Kornegay* the defense counsel in an interracial rape case stated in closing argument, "I told them [when I went to see them before trial], 'Y'all are the sorriest bastards I have ever seen,' telling these [referring to defendants], I said, 'Y'all niggers 40 or 50 years ago would be lynched for something like this . . .'" *Id.* at 280, 329 S.E.2d at 603. The defense counsel reinforced his statements with what the court called "further demeaning references and stories regarding race" and summed up the argument by saying, "It just ain't right for them [the [hitchhiker victims]] to come through here doing what they did and it was not right for the two niggers to do what they did." *Id.* at 280, 329 S.E.2d at 603.

3. U.S. CONST. amend. VI. *See Kornegay*, 174 Ga. App. at 282, 329 S.E.2d at 605.

4. *See Kornegay*, 174 Ga. App. at 282, 329 S.E.2d at 605. An extensive listing of examples of appeals to the racial prejudices of the jury can be found in B. GERSHMAN, PROSECUTORIAL MISCONDUCT § 10.2(d) (1985). *See Withers v. United States*, 602 F.2d 124, 125 (6th Cir. 1979) ("Not one white witness has been produced in this case that contradicts [the victim's] position in this case."); *Kelly v. Stone*, 514 F.2d 18, 19 (9th Cir. 1975) (per curiam) ("[M]aybe the next time it won't be a little black girl from the other side of the tracks; maybe it will be somebody that you know."); *United States ex rel. Haynes v. McKendrick*, 481 F.2d 152, 153-61 (2d Cir. 1973) (discussing repeated references to distinguishing characteristics of black defendants); *Holland v. State*, 247 Ala. 53, 53, 22 So. 2d 519, 520 (1945) ("You should consider the fact that Mary Sue Rowe is a young white woman and that this defendant is black for the purpose of determining his intent at the time he entered Mrs. Rowe's home."); *Harris v. State*, 209 Miss. 141, 147-48, 46 So. 2d 91, 93 (1950) ("[T]he defendant [was] a big, black gorilla with arms as long as your legs."); *People v. Walker*, 66 A.D.2d 863, 864, 411 N.Y.S.2d 377, 378 (1978) (use of racial epithets in describing defendants violates rights).

See also Smith v. Indiana, 516 N.E.2d 1055 (Ind. 1987). *Smith* concerned the trial of a black defendant charged with killing a white police officer. The prosecutor's closing remarks to an all-white jury included a racially-sensitive description of a black defense witness' demeanor

foster jury bias through untested racial stereotypes and group predilections,⁵ thereby impelling the jury to ignore relevant, perhaps exculpatory, arguments based on the legitimate evidence in the case.⁶ Moreover, such appeals represent an explicit affront to the concept of equal protection⁷ by most definitions⁸ and ultimately threaten core constitutional values.⁹

In *Chapman v. California*,¹⁰ the Supreme Court applied the harmless error doctrine to an improper comment by the prosecution on a defendant's failure to testify.¹¹ The Court rejected the defendant's argument that all such errors of constitutional dimension require automatic reversal.¹² Rather,

while testifying ("She did a little *shucking and jiving on the stand*." Brief for Petitioner at 76, *Smith v. State*, 516 N.E.2d 1055 (Ind. 1987) (No. 49S00-8610-PC-918) [hereinafter Brief for Petitioner]) and a description of the defendant's actions strongly tending to evoke negative racial stereotypes ("[The defendant] couldn't be satisfied with tearing [the victim's] gut's apart with the first shot. Oh, no. He's got to play *super-fly* and come out here and blow holes in a man who is lying dying on the sidewalk." Brief for Petitioner, *supra*, at 76). The Indiana Supreme Court found no error in the prosecutor's argument because the language's "*use reminds the jury of the untrustworthy appearance of [the] witness*," *Smith*, 516 N.E.2d at 1064 (emphasis added), although the court conceded that the prosecutor's reference to the black witness "was clearly of black origin, used to . . . talk in a patently misleading or evasive manner." *Id.* For a discussion of the effects of racially prejudicial language, see *infra* notes 89-96 and accompanying text.

5. Express appeals to racial prejudice invite the jury to maintain the fiction that the defendant is separate and somehow inferior to themselves. See, e.g., *Haynes*, 481 F.2d at 153-61. Implied appeals to racial prejudice usually take the form of an argument based on untested racial predilections. See *Miller v. North Carolina*, 583 F.2d 701, 704 (4th Cir. 1978). See also *infra* note 96.

6. See *Haynes*, 481 F.2d at 157; see also *McFarland v. Smith*, 611 F.2d 414, 416-17 (2d Cir. 1979).

7. U.S. CONST. amend. XIV.

8. See *McFarland*, 611 F.2d at 416-17; see also *Kornegay*, 174 Ga. App. at 282, 329 S.E.2d at 605. The court in *Kornegay* was unequivocal in its position on the use of racial prejudice:

The factor of racial prejudice has been formally and officially squelched in our society after long and arduous struggles. Where it remains informally, it cannot be condoned. Certainly, then, its use cannot be invoked by counsel in a court of law, without running counter to the Sixth and Fourteenth Amendments' guarantees.

Id. at 282, 329 S.E.2d at 605. But see *Batson v. Kentucky*, 476 U.S. 79, 134-39 (1986) (Rehnquist, J., dissenting). Justice Rehnquist criticized the majority in *Batson* for applying equal protection analysis to the discriminatory use of peremptory challenges, stating that "there is simply nothing 'unequal' about the State's using its peremptory challenges to strike blacks from the jury in cases involving black defendants, so long as such challenges are also used to exclude whites in cases involving white defendants." *Id.* at 137. A full treatment of the equal protection claims potentially available to the target of courtroom racial prejudice is beyond the scope of this Note.

9. See *McFarland*, 611 F.2d at 416-17. See also *supra* note 8.

10. 386 U.S. 18 (1967).

11. W. LAFAVE & J. ISRAEL, CRIMINAL PROCEDURE 1001 (1985) [hereinafter LAFAVE & ISRAEL]. The prosecutor's comment in *Chapman* clearly violated the constitutional standard announced two years before in *Griffin v. California*, 380 U.S. 609 (1965). The California Supreme Court, stressing the overwhelming evidence against the defendant, had held this *Griffin* violation harmless under the California harmless error standard. *Id.*

12. *Id.*

the Court held that an otherwise valid conviction will not be set aside if the errors are harmless beyond a reasonable doubt.¹³ Since *Chapman*, the Court has shown a marked commitment to extend the sweep of the doctrine to reach previously untouched areas.¹⁴ This commitment culminated in the Court's recent adoption of a strong presumption in favor of harmless error analysis.¹⁵ At the same time, the Court has been notably reluctant to recognize any new exceptions beyond those explicitly stated in *Chapman*.¹⁶

This Note contends that the recently formulated strong presumption in favor of applying harmless error analysis should not reach racially prejudicial arguments by the prosecution. Once such an argument is identified, the remedy must be automatic reversal.¹⁷ To support this conclusion, Section I

13. *Chapman*, 386 U.S. at 22. The Court's holding in *Chapman* was restated in *Delaware v. Van Arsdall*, 475 U.S. 673 (1986): "[A]n otherwise valid conviction should not be set aside if the reviewing court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt." *Id.* at 680-81.

14. *The Supreme Court, 1985 Term—Leading Cases*, 100 HARV. L. REV. 100, 113 (1986). See also *Developments in the Law—Race and the Criminal Process*, 101 HARV. L. REV. 1472, 1593-94 (1988) [hereinafter *Developments in the Law*] (citing *United States v. Hastings*, 461 U.S. 499, 509-12 (1983) for holding that a comment on the defendant's failure to challenge certain charges was harmless error and *Donnelly v. DeChristoforo*, 416 U.S. 637, 644-45 (1974) for holding that a comment on the defendant's offer to plead guilty to a lesser charge was harmless error).

15. The recent case of *Rose v. Clark*, 478 U.S. 570 (1986) clearly demonstrates the Court's resolve to further expand the applicability of the harmless error doctrine through a new strong presumption in favor of applying harmless error analysis. See *id.*, 478 U.S. at 579; see also *supra* note 13. Although Justice Stevens concurred in the application of the harmless error rule to a violation of the rule formulated in *Sandstrom v. Montana*, 442 U.S. 510 (1979) (an instruction that effectively shifts the burden on proof about criminal intent to the defendant violates due process), which occurred in *Rose*, he dissented from that portion of the majority opinion by Justice Powell that recognized a strong presumption in favor of harmless error analysis. The result is a five-Justice majority supporting the strong presumption dictum. See *Rose*, 478 U.S. at 586-87 (Stevens, J., dissenting).

16. *Leading Cases, supra* note 14, at 108.

17. This Note argues that all forms of harmless error analysis are inappropriate when applied to improper racial statements by the prosecution. Although there is some debate concerning which standard of harmless error analysis should be applied, courts continue to use harmless error analysis. The Eleventh Circuit is notably split over whether the "prejudice prong" of *Strickland v. Washington*, 466 U.S. 668 (1984) is the appropriate standard to determine if an allegedly improper argument requires reversal of a state conviction or death sentence. Compare the majority and dissenting opinions in *Brooks v. Kemp*, 762 F.2d 1383, 1399-413, 1426 (11th Cir. 1985) (en banc), *vacated on other grounds*, 106 S.Ct. 3325 (1986). See also *Harich v. Wainwright*, 813 F.2d 1082, 1095 n.12 (11th Cir. 1987), *reh'g granted*, 828 F.2d 1497 (11th Cir. 1987), *aff'd en banc*, 844 F.2d 1464 (11th Cir. 1988); *Robison v. Maynard*, 829 F.2d 1501, 1509 (10th Cir. 1987) (stating the test for reversal of a state conviction as whether there is a "reasonable probability the outcome of the trial would have been different"); *Tucker v. Kemp*, 762 F.2d 1480, 1483-84, 1489 (11th Cir.) (en banc), *remanded*, 474 U.S. 1001 (1985), *on remand en banc*, 802 F.2d 1293, 1295-96 (11th Cir.), *cert. denied*, 107 S.Ct. 1359 (1986); *United States v. Rodriguez*, 765 F.2d 1546, 1560 (11th Cir. 1985) (employing the standard from *United States v. Young*, 470 U.S. 1, 11-12 (1985), to an improper comment on the defendant's patriotism). Significantly, however, none of these cases concerned improper arguments by the prosecution designed to summon racial prejudice. Cf. *infra* notes 71-87 and accompanying text.

will develop the uncertainty principle, an implicit, doctrinally-based exception to harmless error analysis found in cases where the prejudicial effect of the particular type of error cannot be determined.¹⁸ Section II will discuss the scope of the explicit impartial adjudicator exception recognized in *Chapman* and reaffirmed in subsequent cases.¹⁹ Finally, Section III will examine these exceptions in light of current socio-psychological research and ultimately conclude that harmless error analysis should not be applied to improper racial arguments.²⁰

I. THE HARMLESS ERROR UNCERTAINTY PRINCIPLE

The harmless error doctrine is grounded on an implicit assumption that a reviewing court can determine with certainty whether a particular deprivation is minor or trivial and thus would not have contributed to the defendant's conviction.²¹ The doctrine seeks to conserve scarce judicial resources by avoiding unnecessary retrials without sacrificing valued substantive rights.²² Harmless error analysis, however, is an unavailing exercise where the type of error at issue is widely recognized as having a prejudicial effect on the jury's verdict.²³ When a specific type of error is invariably prejudicial, applying harmless error analysis simply wastes judicial resources.²⁴ Once an error of this magnitude is identified,²⁵ a further search of the record for prejudicial impact is unnecessary.²⁶ Similarly, when the prejudicial effect of a particular category of error is too uncertain to be

18. See *infra* notes 21-61 and accompanying text.

19. See *infra* notes 62-70 and accompanying text.

20. See *infra* notes 71-107 and accompanying text.

21. See *Anderson v. Warden*, 696 F.2d 296, 300 (4th Cir. 1982) (en banc) ("Harmless error analysis essentially involves the question of whether the error is but a 'small error[] or defect that [has] little, if any, likelihood of having affected the result of the trial.'" (citations omitted)); cf. R. TRAYNOR, *THE RIDDLE OF HARMLESS ERROR* 50 (1970) ("Reversal for error, regardless of its effect on the judgment, encourages litigants to abuse the judicial process and bestirs the public to ridicule it.").

22. Mause, *Harmless Constitutional Error: The Implications of Chapman v. California*, 53 MINN. L. REV. 519, 543 (1969).

23. In similar fashion, when a certain error is acknowledged by the courts as undeviatingly nonprejudicial, harmless error analysis is unnecessary. See, e.g., *United States v. Mechanik*, 475 U.S. 66, 70 (1986) ("Measured by the petit jury's verdict . . . any error in the grand jury proceeding connected with the charging decision was harmless beyond a reasonable doubt."). But see *Vasquez v. Hillery*, 474 U.S. 254 (1986) (setting aside a conviction because of racial discrimination in the composition of the grand jury that indicted the defendant).

24. Since prejudicial errors can never be deemed harmless, applying the doctrine is futile. See Mause, *supra* note 22.

25. *Payne v. Arkansas*, 356 U.S. 560 (1958). The introduction of a coerced confession will almost always be prejudicial. Mause, *supra* note 22, at 543.

26. R. TRAYNOR, *supra* note 21, at 57 ("There may be some 'errors or defects' that so 'affect the substantial rights of the parties' as to call for automatic reversal within or outside the scope of any harmless-error rule, without any review of the evidence to determine whether such errors or defects affected the judgment.").

dependably ascertained, a reviewing court will never be able to certify that the error was harmless beyond a reasonable doubt, which is the standard of review required by the doctrine.²⁷ Applying harmless error analysis squanders judicial resources and, more significantly, creates a possibility that a reviewing court might inaccurately certify such an error as nonprejudicial.

Harmless error as *doctrine* rests on an underlying assumption that minor errors and those errors which affect a defendant's substantial rights can be successfully distinguished. This assumption, together with the aforementioned reasons has led commentators to suggest that an implicit exception to applying the harmless error *rule* must exist in cases where the requisite level of certainty is absent.²⁸ For purposes of this Note, this can be called the harmless error "uncertainty principle."²⁹ The principle, simply stated, recognizes that particular errors exist whose prejudicial impact is necessarily undeterminable and, consequently, by avoiding harmless error analysis, a rule of automatic reversal eliminates uncertainty and maximizes fairness while conserving judicial resources.

*Chapman v. California*³⁰ set forth three exceptions to applying harmless error analysis which clearly illustrate the uncertainty principle: 1) a denial of counsel,³¹ 2) a biased judge,³² and 3) a coerced confession.³³ In all of these situations, a reviewing court will not be able to determine with certainty the actual impact of the error on the verdict. In cases such as *Gideon v. Wainwright*,³⁴ where the defendant is denied his constitutional right to counsel, no appellate court can fairly determine what might have ensued at trial had such a deprivation not occurred.³⁵ Even if the defendant does a credible job of self-representation and proof of guilt is overwhelming, there remains a strong potential for serious omissions in the record.³⁶ To be certain that all of the relevant evidence and arguments that competent legal counsel might have presented at trial were in fact presented to the jury, a reviewing court would be forced to conduct a massive factual investigation since the trial record will merely reflect what was actually presented. Clearly,

27. See generally Mause, *supra* note 22, at 540-47. For a list of cases discussing the harmless error standard, see *supra* note 17.

28. See generally Mause, *supra* note 22, at 540-47.

29. This term is borrowed, with apology, from the Heisenberg uncertainty principle, which suggests that it is impossible to know simultaneously both the exact location and speed of an electron. See WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2484 (1986).

30. 386 U.S. 18 (1967).

31. *Id.* at 23 n.8 (citing *Gideon v. Wainwright*, 372 U.S. 335 (1963)).

32. *Id.* (citing *Tumey v. Ohio*, 273 U.S. 510 (1927)).

33. *Id.* (citing *Payne*, 356 356 U.S. 560).

34. 372 U.S. 335.

35. Mause, *supra* note 22, at 541.

36. See generally *Gideon*, 372 U.S. at 345 (stating that the defendant might not establish an adequate record for a later appeal of issues raised at trial).

an appellate court is not the appropriate forum to engage in such an investigation.³⁷ These attendant difficulties prompted the Supreme Court to recognize an exception to the harmless error rule based in part on the uncertainty principle.

The uncertainty principle is also evident in cases like *Tumey v. Ohio*.³⁸ When the trial judge has a financial incentive to convict, the defendant is presumed to have been denied a fair trial. Given the wide discretion afforded the trial court, the effect of a judge's financial interest in the outcome of the case on rulings throughout the trial is too speculative to be adequately evaluated.³⁹ As in the denial of counsel cases, the trial record will likely be incomplete. A reviewing court bent on attempting to discern the error's effect would be forced to engage in either flagrant guesswork or extensive investigation. Nothing less than a thorough and time-consuming examination of every discretionary trial ruling would likely suffice.⁴⁰ The expenditure of resources would be vast and the result achieved would be at best a Pyrrhic victory. Again, the reviewing court's role in the judicial system would be compromised.

In *Payne v. Arkansas*,⁴¹ the indeterminate prejudicial effect of a coerced confession on the jury was acknowledged as sufficient to create an exception to harmless error analysis.⁴² The Court expressly refused to countenance any speculation regarding the effect of coerced confessions on a jury:

[W]here, as here, a coerced confession constitutes a part of the evidence before the jury and a general verdict is returned, no one can say what credit and weight the jury gave to the confession. And in these circumstances this Court has uniformly held that even though there may have been sufficient evidence, apart from the coerced confession, to support a judgment of conviction, the admission in evidence, over objection, of the coerced confession vitiates the judgment⁴³

Because a jury is likely to accord great weight to any confession, the prejudicial effect on the verdict is too significant to be easily discounted. By rejecting harmless error analysis in this context, the Court in part relied on the uncertainty principle.

Four recent Supreme Court cases further demonstrate a tacit acceptance of the uncertainty principle. *Rose v. Clark*⁴⁴ and *Delaware v. Van Arsdall*⁴⁵ recognize that speculative inquiries are inconsistent with the harmless error

37. See J. FRIEDENTHAL, M. KANE & A. MILLER, CIVIL PROCEDURE 598-99 (1985).

38. 273 U.S. 510.

39. See *id.* at 535. See also R. TRAYNOR, *supra* note 21, at 65. The vast discretion of the trial judge is easily recognized. See, e.g., FED. R. EVID. 403.

40. R. TRAYNOR, *supra* note 21, at 65.

41. 356 U.S. 560.

42. *Id.* at 568.

43. *Id.* at 568 (citations omitted).

44. 478 U.S. 570 (1986).

45. 475 U.S. 673 (1986).

doctrine. In restating the test for harmless error, the Court supplements the doctrine with language supporting the uncertainty principle.⁴⁶ First, the Court in *Van Arsdall* states that "an otherwise valid conviction should not be set aside if the reviewing court may *confidently* say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt."⁴⁷ The Court specifically rejects speculation about whether the error was harmless by demanding "confidence." Second, further recognition of the uncertainty principle can be seen in the Court's distinction between the types of errors which affect the composition of the trial record, where difficult inquiries are necessary concerning matters not in evidence, and those errors which leave the record unaffected.⁴⁸ There is a heightened concern for the integrity of the record which follows from the recognition that reviewing courts are confined to the formal trial record when investigating the possible prejudice flowing from the asserted error.⁴⁹ This heightened concern shows the Court's sensitivity to the danger of a baseless inquiry.

In *Gray v. Mississippi*,⁵⁰ the Court refused to apply harmless error analysis to the improper exclusion of a juror for cause in a capital case. Although the prosecutor indicated that he would have used one of the state's unexercised peremptory challenges had the juror not been excluded for cause, the Court nevertheless found the jury selection process too speculative for harmless error analysis.⁵¹ The decision rested in part on the realization that the prosecution's use of peremptory challenges was irrevocably tied to strategy.⁵² The Court refused to delve into the multiplicity of factors which might have contributed to the prosecutor's decision to employ the peremptory challenge.⁵³ Justice Powell stated that "[t]he facts before us illustrate why a harmless-error analysis is inappropriate [I]t is difficult on appeal to reconstruct the prosecutor's *voir dire* strategy, and to predict who would have been excluded had the facts been different."⁵⁴

The clearest example of the uncertainty principle may be found in *Vasquez v. Hillery*,⁵⁵ in which the Court invalidated a twenty-year-old murder con-

46. Compare *Van Arsdall*, 475 U.S. at 681 with *Chapman*, 386 U.S. at 24. The comparison shows the added certainty language.

47. 475 U.S. at 681 (emphasis added).

48. *Rose*, 478 U.S. at 579.

49. The Court at this point makes reference to errors involving the denial of the right to counsel and judicial bias. See *Rose*, 478 U.S. at 579 n.7. Comparable language in the *Van Arsdall* opinion is unclear.

50. 107 S. Ct. 2045 (1987).

51. *Id.* at 2055.

52. *Id.* at 2057 (Powell, J., concurring).

53. See *id.* at 2054-55 n.15.

54. *Id.* at 2057 (Powell, J., concurring).

55. 474 U.S. 254.

viction because of racial discrimination in the grand jury selection process.⁵⁶ Rejecting the state's contention that the defendant's subsequent conviction by a fairly constituted petit jury rendered any errors in the indictment harmless,⁵⁷ the Court stated as follows:

When constitutional error calls into question the objectivity of those charged with bringing a defendant to judgment, a reviewing court can neither indulge a presumption of regularity *nor evaluate the resulting harm*. Accordingly, when the trial judge is discovered to have had some basis for rendering a biased judgment, his actual motivations are *hidden from review*, and we must presume that the process was impaired.⁵⁸

....

Once having found discrimination in the selection of a grand jury, we simply cannot know that the need to indict would have been assessed in the same way by a grand jury properly constituted. The overriding imperative to eliminate this systemic flaw in the charging process, *as well as the difficulty of assessing its effect on any given defendant*, requires our continued adherence to a rule of mandatory reversal.⁵⁹

The Court also said of the adverse pretrial publicity cases that "we have required reversal . . . because the effect of the violation cannot be ascertained."⁶⁰ Although decidedly concerned with the impartial adjudicator exception,⁶¹ the Court's language nevertheless rejects speculation about the effect of these errors on the jury and thereby recognizes the uncertainty principle as one important theoretical basis for harmless error exceptions.

II. THE IMPARTIAL ADJUDICATOR EXCEPTION

While the uncertainty principle is logically discernible from the implicit certainty requirements underlying the harmless error doctrine, *Chapman v. California*⁶² expressly recognized that trials tainted by the existence of biased adjudicators call for automatic reversal.⁶³ From the inception of harmless error analysis, the Supreme Court has asserted that the defendant's right to trial by an impartial adjudicator is so fundamental that its denial would be invariably prejudicial.⁶⁴ In support of this proposition, the *Chapman* Court cited *Tumey v. Ohio*,⁶⁵ making clear its intention to look beyond the

56. *Id.* at 262.

57. *Id.* at 260.

58. *Id.* at 263 (emphasis added).

59. *Id.* at 264 (emphasis added).

60. *Id.* at 263 (citing *Davis v. Georgia*, 429 U.S. 122 (1976); *Sheppard v. Maxwell*, 384 U.S. 333, 351-52 (1966)).

61. *See infra* text accompanying notes 62-70.

62. 386 U.S. 18 (1967).

63. *See id.* at 23.

64. *Gray v. Mississippi*, 107 S. Ct. 2045, 2056-57 (1987).

65. *Chapman*, 386 U.S. at 23 (citing *Tumey v. Ohio*, 273 U.S. 510 (1927)). The *Tumey* Court made clear its position: "A conviction must be reversed if the trial judge's remuneration is based on a scheme giving him a financial interest in the result, even if no particular prejudice is shown and even if the defendant was clearly guilty." 273 U.S. 510, 535 (1927).

uncertainty principle alone as justification for shunning harmless error analysis in these cases. "No matter what the evidence was against [the defendant], he had the right to have an impartial judge."⁶⁶ When the judge's impartiality is in question, the Court's language leaves no room for any appellate court to sustain a conviction on the possibility that the effect of the error might be minor or inconsequential. No amount of evidence would be sufficient to overcome the presumed prejudice flowing from adjudicator bias. The potential prejudice associated with a biased adjudicator is considered so subversive to the integrity of the judicial process that the Court recognizes it as a complete and independent exception.⁶⁷

Since *Chapman*, the Supreme Court has consistently reaffirmed the biased adjudicator exception. Although the Court was sharply divided on other grounds, no Justice in *Gray v. Mississippi*⁶⁸ took issue with the majority's language reaffirming this exception: "[B]ecause the impartiality of the adjudicator goes to the very integrity of the legal system, the *Chapman* harmless-error analysis cannot apply."⁶⁹ The language added emphasis to previous statements that the existence of a biased adjudicator could never be deemed harmless.⁷⁰ The primary significance of this approach rests upon an express recognition that an exception exists for these cases based on the integrity of the judicial system which goes beyond the simple pragmatic concerns of the uncertainty principle.

III. APPEALS TO RACIAL PREJUDICE AND HARMLESS ERROR

In *United States ex rel. Haynes v. McKendrick*,⁷¹ the Second Circuit Court of Appeals indicated for the first time since *Chapman v. California*⁷² that harmless error analysis might be inappropriate when applied to racially prejudicial statements by the prosecution.⁷³ Although not directly confronted with the issue, the Second Circuit nevertheless found "[r]acially prejudicial remarks are . . . so likely to prevent the jury from deciding a case in an *impartial* manner and so difficult, if not impossible, to correct once introduced, that a good argument for applying a more absolute standard may be made."⁷⁴ The Second Circuit's analysis reflects an understanding of the

66. *Tumey*, 273 U.S. at 535.

67. R. TRAYNOR, *supra* note 21, at 65.

68. 107 S. Ct. 2045.

69. *Id.* at 2056.

70. *Rose v. Clark*, 478 U.S. 570, 579 (1986); *Delaware v. Van Arsdall*, 475 U.S. 673, 681 (1986).

71. 481 F.2d 152 (2d Cir. 1973).

72. 386 U.S. 18 (1967).

73. 481 F.2d at 161.

74. *Id.* (emphasis added).

available sociological theory of the period⁷⁵ which supported a finding that racial prejudice can violently affect a juror's impartiality.⁷⁶ The opinion strongly emphasizes the need to remove racial prejudice from the courtroom, warning that

[m]ore than just harm to the individual defendant is involved For the introduction of racial prejudice into a trial helps further embed the already too deep impression in public consciousness that there are two standards of justice in the United States, one for whites and the other for blacks. Such an appearance of duality in our recently troubled times is, quite simply, intolerable from the standpoint of the future of our society.⁷⁷

Clearly influenced by *Haynes*, the Fourth Circuit Court of Appeals concluded five years later in *Miller v. North Carolina*⁷⁸ that racially oriented arguments potentially engender serious bias and require automatic reversal.⁷⁹ The Fourth Circuit found error in the prosecution's "blatant appeal to racial prejudice in the assertion that no white woman would consent to sexual intercourse with a black man."⁸⁰ Since the prosecutor's assertion directly contradicted Miller's defense of consent,⁸¹ the court found the error prejudicial, obviating the need to engage in harmless error analysis.⁸² In dictum, the court reasoned that harmless error analysis was inappropriate, stating, "[W]e incline to the view that the instant case falls into the category of constitutional violations to which, as *Chapman v. California* recognizes, the harmless error rule does not apply."⁸³

75. See *id.* at 157 (citing G. ALLPORT, *THE NATURE OF PREJUDICE* (1955); B. BETTELHEIM & M. JANOWITZ, *SOCIAL CHANGE AND PREJUDICE* (1964); S. BLACKBURN, *WHITE JUSTICE; BLACK EXPERIENCE IN AMERICA'S COURTROOM* (1971); J. KOVAL, *WHITE RACISM, A PSYCHO-HISTORY* (1970)).

76. *Id.*

77. *Id.*

78. 583 F.2d 701 (4th Cir. 1978).

79. *Id.* at 708.

80. *Id.* The prosecutor stated that "the average white woman abhors anything of this type in nature that had to do with a black man." *Id.* at 704. The court also observed, "The prosecutor's summation was noteworthy not only for its statements about race. Quoting from Romans 13, [the prosecutor] informed the jury that the law enforcement powers of the district attorney come from God and that to resist those powers was to resist God." *Id.* at 704 n.3.

81. *Id.* at 708 ("Where the jury is exposed to highly prejudicial argument by the prosecutor's calculated resort to racial prejudice on an issue as sensitive as consent to sexual intercourse in a prosecution for rape, we think that the prejudice engendered is so great that automatic reversal is required.").

82. See *id.*

83. *Id.* at 708. But see *United States v. Grey*, 422 F.2d 1043, 1045 (6th Cir.), cert. denied, 400 U.S. 967 (1970) (given the weak case against the defendant, the Court found "the claim of deliberate injection of race prejudice in the United States Attorney's cross examination" to have greater significance). See also *United States v. Rodriguez*, 765 F.2d 1546, 1559-60 (11th Cir. 1985) (applying harmless error analysis to an improper comment that the defendants were "liars" and had "spit on the country that had accepted them," and citing *United States v. Young*, 105 S. Ct. 1038 (1985), which held that the prosecutor's invited response to defense

The Fourth Circuit found harmless error analysis inappropriate on two grounds.⁸⁴ First, racial arguments threaten juror impartiality by encouraging the jury to use negative racial stereotypes in determining guilt.⁸⁵ Alternatively, these arguments have a profound impact on the entire proceeding thereby making the error's impact on the jury impossible to ascertain.⁸⁶ Here the uncertainty principle provides the theoretical foundation for the court's analysis.⁸⁷

A. *The Impartial Adjudicator Exception Applied*

The defendant's constitutional right to trial by an impartial jury is threatened when there exists a strong possibility that the jury will accept the state's improper argument. There is a high probability that entirely unsupported racial stereotypes will trump legitimate evidence. An even more intolerable situation exists should the prosecution's remarks encourage the jury to assign criminal culpability based on dormant racial hatred. "In such a case the impartiality of the fact-finder is fatally compromised. Because that contamination may affect the jury's evaluation of all of the evidence before it . . . [r]eversal must be automatic."⁸⁸

Current studies lend empirical support to the contention that arguments designed to invoke racial stereotypes will have a pervasive influence on the jury. In a University of North Carolina study of group decision-making situations similar to jury deliberations, the researchers found that derogatory ethnic slurs against blacks encouraged anti-minority prejudice in listeners.⁸⁹ Reviewing a number of studies, the researchers concluded that, although it was socially undesirable to demonstrate overt prejudice, privately held

counsel was not plain error). The court stated, "Our task is to determine the probable effect the improper comment had on the jury." 765 F.2d at 1560. Significantly, the court in *Rodriguez* found the prosecutor's remarks "perilously close to an attempt to take advantage of any negative feelings the jury may have had toward recent Cuban immigrants." *Id.* at 1560 n.19. This might indicate that the court is willing to view an appeal to racial prejudice differently. See generally Mause, *supra* note 22, at 540-47; Note, *Harmless Constitutional Error: A Reappraisal*, 83 HARV. L. REV. 814, 820-24 (1970).

84. *Miller*, 583 F.2d at 708.

85. See *infra* text accompanying notes 89-96.

86. See *Miller*, 583 F.2d at 708.

87. The concern with jury bias is analytically distinguishable from the uncertainty principle; the actual effect of racial arguments is independent of their tendency to incurably complicate the reviewing court's task in finding them harmless.

88. See *Miller*, 583 F.2d at 708.

89. Greenberg & Pyszczynski, *The Effect of an Overheard Ethnic Slur on Evaluations of the Target: How to Spread a Social Disease*, 21 J. EXPERIMENTAL SOC. PSYCHOLOGY 61, 70 (1985).

attitudes remain ambivalent toward blacks.⁹⁰ The expression of these attitudes of ambivalence can be triggered by situational cues.⁹¹ According to the researchers, "[a]lthough current norms may favor racial equality and egalitarian treatment of all, as a result of early socialization experiences, many whites in this culture may still harbor deeply rooted prejudices."⁹² The results suggested that when ethnic slurs were expressed by one member of the group, other members' evaluations of the target were affected.⁹³ "[A]n individual displaying prejudice against blacks may cue negative schemata concerning blacks."⁹⁴ Where the ethnic slurs come from the prosecution, a similar effect should be anticipated. Indeed, the possible effect on listeners could be greatly increased since the prosecutor is an authority figure for the jury and speaks with the "imprimatur of the government."⁹⁵ The practical implication of the study is clear: "When an individual overhears an ethnic slur, even relatively egalitarian-minded individuals may revert to discriminatory judgments."⁹⁶

Although *Miller* predates the Supreme Court's formulation of a strong presumption in favor of applying harmless error analysis,⁹⁷ the Fourth Circuit's application of the impartial adjudicator exception is consistent

90. *Id.* at 62-63 (citing Crosby, Bromley & Saxe, *Recent Unobtrusive Studies of Black and White Discrimination and Prejudice: A Literature Review*, 87 *PSYCHOLOGICAL BULL.* 546 (1980); Gaertner, *Helping Behavior and Racial Discrimination Among Liberals and Conservatives*, 25 *J. PERSONALITY AND SOC. PSYCHOLOGY* 335 (1973); Gaertner & Dovidio, *Subtlety of White Racism, Arousal and Helping Behavior*, 35 *J. PERSONALITY AND SOC. PSYCHOLOGY* 691 (1977); Weitz, *Attitude, Voice and Behavior: A Repressed Affect Model of Interracial Interaction*, 24 *J. PERSONALITY AND SOC. PSYCHOLOGY* 14 (1972)).

91. *Id.* at 63 (citing Dienstbier, *Positive and Negative Prejudice: Interactions of Prejudice with Race and Social Desirability*, 38 *J. PERSONALITY* 198 (1970); Katz & Glass, *An Ambivalence—Amplification Theory of Behavior Toward the Stigmatized*, in *THE SOCIAL PSYCHOLOGY OF INTERGROUP RELATIONS* (W. Austin & S. Worchel eds. 1979); Linville & Jones, *Polarized Appraisals of Out-group Members*, 38 *J. PERSONALITY AND SOC. PSYCHOLOGY* 689 (1980)).

92. *Id.* at 63.

93. *Id.* at 70.

94. *Id.* at 64 (citing Carver, Ganellen, Froming & Chambers, *Modeling: An Analysis in Terms of Category Accessibility*, 19 *J. EXPERIMENTAL SOC. PSYCHOLOGY* 403 (1983)).

95. *See, e.g., Young*, 470 U.S. at 18-19 ("[T]he prosecutor's opinion carries with it the imprimatur of the Government and may induce the jury to trust the government's judgment rather than its own view of the evidence.").

96. Greenberg & Pyszczynski, *supra* note 89, at 64. *See also* R. MATLON, *Communication in the Legal Process* 306 (1988) (citing Brand, Ruiz, & Padilla, *Ethnic Identification and Preference: A Review*, 81 *PSYCHOLOGICAL BULL.* 860 (1974); Brigham, *Ethnic Stereotypes*, 76 *PSYCHOLOGICAL BULL.* 15 (1971); Sigall & Page, *Current Stereotypes: A Little Fading, A Little Faking*, 18 *J. PERSONALITY & SOC. PSYCHOLOGY* 247 (1971); and Taylor, *Race, Sex, and Expression of Self-fulfilling Prophecies in a Laboratory Teaching Situation*, 37 *J. PERSONALITY & SOC. PSYCHOLOGY* 897 (1979) for the proposition that "[s]igns clearly point toward juries' being influenced by the race of the defendant. What unfortunately appears to be happening is that jurors are assigning characteristics and propensities to individual racial group members based on the stereotypes they possess about the characteristics and propensities of that racial group generally.").

97. *See Rose*, 478 U.S. 570. *See also supra* note 15.

with present doctrine. Even if the *Miller* decision stands in contrast to the Court's commitment to extending the harmless error doctrine, the Court has repeatedly reaffirmed that eliminating racial discrimination in the criminal justice system is of paramount constitutional interest.⁹⁸ A racially biased jury violates both the sixth amendment right to trial by an impartial jury and the fourteenth amendment right to equal protection.⁹⁹ The Supreme Court remains highly sensitive to racially based constitutional deprivations and its recent affirmation of the biased adjudicator exception lends strong support to applying the exception in these cases.

B. *The Uncertainty Principle Applied*

By comparing the racially prejudicial remarks in *Miller* to three previously recognized exceptions to the harmless error rule—admission of coerced confessions, total denial of counsel, and lack of an impartial judge¹⁰⁰—the Fourth Circuit found the same common characteristic and determined that “the error infects the entire proceeding making it impossible to evaluate the effect of the error on the jury. As a consequence, with such errors reversal is automatic.”¹⁰¹ An appellate court is unable to determine with certainty the actual impact of the error on the jurors because their impartiality is implicated.¹⁰² The court admitted, “speculation about the effect of the error on the verdict is fruitless.”¹⁰³

Although the court combines the uncertainty principle with the impartial adjudicator exception,¹⁰⁴ the overlap between the two harmless error exception theories is instructive. The potential for the prosecution's arguments to trigger racial prejudice adds even more confusion and speculation to a requisite determination of prejudicial effect.¹⁰⁵ In *Miller* the rejection of harmless error analysis came in part from characteristic uncertainty in these situations. Empirical socio-psychological research suggests that *Miller* is correct in assuming that arguments designed to invoke racial stereotypes have a pervasive impact on the jury.¹⁰⁶ To apply harmless error analysis in these circumstances would waste judicial resources and potentially lead to tremendous injustice since the reviewing court will never be able to deter-

98. See, e.g., *Vasquez v. Hillery*, 474 U.S. 254, 261 (1986) (“[T]he court has repeatedly rejected all arguments that a conviction may stand despite racial discrimination in the selection of the grand jury.” (citations omitted)).

99. See *supra* notes 3 and 8.

100. See *Chapman*, 386 U.S. at 23 n.8.

101. 583 F.2d at 708.

102. *Id.*

103. *Id.* (emphasis added).

104. *Id.* at 707-08.

105. See *Mause*, *supra* note 22.

106. See *supra* text accompanying notes 89-96.

mine, beyond a reasonable doubt, that the error did not contribute to the conviction. Therefore, a rule of automatic reversal is required.¹⁰⁷

CONCLUSION

Arguments appealing to the racial prejudices of the jury are anathema to a multiracial society founded on principles of racial equality and equal treatment under law.¹⁰⁸ Justice Brandeis' observation on the didactic function of the state in *Omstead v. United States*¹⁰⁹ is highly relevant to this form of forensic prosecutorial misconduct. "Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example."¹¹⁰ Where the prosecution resorts to racial prejudice in order to secure a conviction, highly prized constitutional values are profoundly defeated. Dormant racial prejudices are reborn and demeaning racial stereotypes are promulgated with the benediction of the state.¹¹¹ Where the impartiality of the jury as fact-finder is impaired by the misconduct of the prosecution, the State can boast only a hollow victory: at best, a conviction tainted by racial considerations or, at worst, a conviction of an innocent defendant.¹¹² To apply the harmless error rule here in the name of judicial economy is illogical given the near impossibility of the reviewing court's inquiry and the likelihood that such errors are invariably prejudicial to the defendant. The potential influence of racial arguments is so difficult to ascertain that the uncertainty principle should apply to provide an exception grounded in the implicit requirements of harmless error doctrine. The impartial adjudicator exception could also serve to recognize that the primary result of these arguments is to bias the jury.

The mere existence of racial arguments is a threat to the integrity of the judicial system and thus there clearly exists a need to deter such prosecutorial misconduct.¹¹³ Since the doctrine of sovereign immunity shields the errant

107. See *supra* notes 17 and 62-70.

108. *United States v. Caldwell*, 23 M.J. 748, 751 (A.F.C.M.R. 1987) ("[A]n appeal to racial prejudice is repugnant to our system and has no place in an American courtroom."). See *United States v. Krohn*, 573 F.2d 1382, 1389 (10th Cir. 1978) ("[A]ny appeal to racial prejudice is a foul blow which must be rejected by the courts."). Racial arguments threaten equal protection values by adding a burden to minority defendants not shared by non-minority defendants. See, e.g., *Haynes*, 481 F.2d at 159 ("If there is anything more antithetical to the purposes of the fourteenth amendment than the injection against a black man of racial prejudice . . . we do not know what it is").

109. 277 U.S. 438 (1928).

110. *Id.* at 485 (Brandeis, J., dissenting).

111. See *supra* notes 85-92. See also *Developments in the Law*, *supra* note 14, at 1595 ("Because of the high visibility of the prosecutor's actions, the failure to subject racially biased prosecutorial conduct to automatic reversal would project an unacceptable public message concerning society's indifference to racial equality in the criminal justice system.').

112. See *Carter v. Rafferty*, 621 F. Supp 533, 547 (D.N.J. 1985) ("[T]he jury was permitted to draw inferences of guilt based solely on the race of the [defendants].").

113. See Note, *Harmless Error: Abettor of Courtroom Misconduct*, 74 J. CRIM. L. & CRIMINOLOGY 457 (1983) [hereinafter *Harmless Error*].

prosecutor from effective rebuke in civil court,¹¹⁴ the only effective redress for the target of the misconduct is a new trial. Because voluntary compliance with the American Bar Association Model Rules of Conduct¹¹⁵ has proven insufficient, a strong standard of automatic reversal is required.¹¹⁶ In the oft-quoted words of Justice Sutherland, “[The prosecutor] may strike hard blows, but he is not at liberty to strike foul ones.”¹¹⁷ Justice is not served if such misconduct can escape effective reproach by hiding behind the veil of harmless error.

STEVEN D. DEBROTA

114. S. NAHMOD, *CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION* 438 (2d ed. 1986) (“Since *Imbler v. Pachtman*, 424 U.S. 409 (1976), it is clear that prosecutorial immunity from liability for damages attaches to those acts of the prosecutor performed in the role of advocate.”).

115. See *United States ex rel. Haynes v. McKendrick*, 481 F.2d 152, 157 (1973) (citing ABA Project on Standards for Criminal Justice, *The Prosecution Function and the Defense Function* § 5.8(c) & (d), commentary at 128-29 (1970)).

116. See *Harmless Error*, *supra* note 113, at 458 (“The repeated application of a harmless error standard to violations of trial rules has resulted in repeated violations of these rules by prosecutors and judges.”).

117. *Berger v. United States*, 295 U.S. 78, 88 (1934).

