Winter 1972

Miranda Warnings and the Harmless Error Doctrine: Comments on the Indiana Approach

Michael W. Fruehwald
Indiana University School of Law

Follow this and additional works at: https://www.repository.law.indiana.edu/ilj

Part of the Constitutional Law Commons, Evidence Commons, and the Law Enforcement and Corrections Commons

Recommended Citation

This Note is brought to you for free and open access by the Law School Journals at Digital Repository @ Maurer Law. It has been accepted for inclusion in Indiana Law Journal by an authorized editor of Digital Repository @ Maurer Law. For more information, please contact rvaughan@indiana.edu.
MIRANDA WARNINGS AND THE HARMLESS ERROR DOCTRINE: COMMENTS ON THE INDIANA APPROACH

The Indiana Supreme Court in both Greer v. State\(^1\) and Vasquez v. State\(^2\), assuming arguendo that certain statements had been admitted into evidence in violation of Miranda v. Arizona\(^3\), held the admissions harmless. Neither of the Indiana opinions reflects the controversy over the propriety of applying harmless error rules to Miranda violations which has led other courts to lengthy justifications.\(^4\) These opinions also fail to establish fully the criteria to be used in future decisions. This note will attempt to explain the principles underlying application of harmless error rules to Miranda violations and to evaluate the standards developed thus far by the Indiana Supreme Court.

THE PRINCIPLES BEHIND HARMLESS ERROR

The harmless error doctrine became widespread in the United States in the early part of this century. In most states harmless error statutes were passed in reaction to the effects perceived to have followed from the automatic reversal rules which prevailed up to that time.\(^5\) Proponents of these statutes argued that automatic reversal for error had made the law appear a quagmire of technicality and delay, thereby undermining confidence in the judicial system among the public. It was urged that automatic reversal also rewarded "sharp practices" of error manipulation among lawyers.\(^6\) Harmless error rules were instituted to promote

---

5. The present Indiana statute is typical of the wording of most harmless error statutes:

In consideration of questions which are presented upon an appeal, the court shall not regard technical errors or defects, or exceptions to any decision or action of the trial court, which did not, in the opinion of the court to which the appeal is taken, prejudice the substantial rights of the defendant.


efficient allocation of judicial resources. It was thought that needless expensive retrials could be avoided by presumably less costly appellate examination of potential harm. None of these statutes, however, made any distinction between constitutional and non-constitutional errors, and under their mandate many state courts found constitutional errors to be harmless.

In 1967 the United States Supreme Court, in *Chapman v. California*, held that the harmless error standard applicable in state courts to federal constitutional errors was a matter of federal law. The Court then announced the rule to be applied: the beneficiary of a constitutional error must satisfy the reviewing court that the error was harmless beyond a reasonable doubt. The criterion by which the prejudice caused by an error is to be judged is the effect which the error had upon the jury at the trial considered in its entirety. As more fully explained by Mr. Justice Rutledge in *Kotteakos v. United States*:

9. The Indiana Supreme Court indicated its standard for harmless constitutional error in *Batchelor v. State*, 189 Ind. 69, 125 N.E. 773 (1920):

Where it appears on appeal from a judgment of conviction in a criminal case that the defendant has been denied a right guaranteed by the Constitution, such showing requires a reversal, unless the record clearly shows that the right was waived or that no injury could have resulted to the accused by reason of such denial.

Id. at 78-79, 125 N.E. at 776.

Cf. Van Tornhaut v. State, 199 Ind. 481, 157 N.E. 100 (1927) (admission of illegally seized evidence found harmless); Bloom v. State, 155 Ind. 292, 58 N.E. 81 (1900) (coerced admission found harmless).
11. *Id.* at 21. State rules remain applicable to errors of state law or procedure.
12. *Id.* at 24. The Indiana Supreme Court defined the reasonable doubt standard in *Greer*:

It requires the trier of the facts to be so convinced by the evidence that as a prudent man he would feel safe to act upon such conviction in matters of the highest concern and importance to his own nearest, dearest and most important interests in circumstances where there was no compulsion or coercion to act at all.

252 Ind. at 30, 245 N.E.2d at 163-64.

13. 386 U.S. at 23-24, 25-26. "Jury" is being used here to designate the fact finder at the trial, whether actually a jury or a judge. The rules of evidence are applicable to trials before both jury and judge, Thomas v. State, 237 Ind. 537, 147 N.E.2d 577 (1958), presumably because it is assumed that their reactions to admitted evidence will be the same. A similar rule should govern harmless error judgments, which are based on determinations of evidentiary impact. Data from the University of Chicago Jury Project showed no consistent differences in the way judges and juries evaluate repudiated confessions. H. Kalven, Jr. & H. Zeisel, *The American Jury* 172-74 (1966) [hereinafter cited as Kalven]. "Jury" shall be used throughout this note to include judges acting as fact-finders unless a distinction is specifically made. See notes 56 and 74 infra.

[T]he question is not were [the jurors] right in their judgment, regardless of the error or its effect upon the verdict. It is rather what effect the error had or reasonably may be taken to have had upon the jury's decision. The crucial thing is the impact of the thing done wrong on the minds of other men, not on one's own in the total setting.

... The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand. 15

Under the federal standard an error cannot be harmless unless there is no reasonable possibility that it contributed to the conviction. 16

15. Id. at 764, 765. See also 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 our own reading of the record and what seems to us to have been the probable impact of the two confessions on the minds of an average jury.

16. Fahy v. Connecticut, 375 U.S. 85, 86-87 (1963). The effect upon this federal harmless error standard of Harrington v. California, 395 U.S. 250 (1969), has been a matter of some controversy. That case involved admission at a joint trial of incriminating confessions of Harrington's co-defendants, in violation of Bruton v. United States, 391 U. S. 123 (1968). Justice Douglas, for the majority, said that apart from the confessions the case against Harrington was so overwhelming that the violation of Bruton was harmless beyond a reasonable doubt. 395 U.S. at 254. Justice Brennan, in a dissent joined in by Chief Justice Warren and Justice Marshall, charged that the holding effectively overruled Chapman by changing the focus from the effect of the error to the amount of untainted evidence. Id. at 255.

In spite of the majority's express reaffirmation of Chapman, Harrington has been interpreted by some commentators as a retreat from the stringency of the "beyond a reasonable doubt" standard. See Traynor, supra note 7, at 45-46; Note, Application of the Harmless Error Doctrine to Violations of Miranda: The California Experience, 69 Mich. L. Rev. 941, 944 (1971). The controversy may be merely a battle over labels reflecting the inadequacy of one verbal formula for capturing the same standard of subjective certainty in all persons. Different people may have different thresholds of doubt which can lead to different results in any decision in spite of agreement on the criteria. See Kalven, supra note 13, at 182-90. Chief Justice Traynor may find only "highly probable" what Justice Douglas finds "beyond a reasonable doubt," although both agree that sufficient certainty is present to affirm.

More fundamentally, however, Harrington's use of overwhelming evidence can be seen as a means of determining the likelihood that any piece of evidence contributed to a verdict. For harmless error purposes the trial is to be examined in its entirety. The underlying theory is that the jury does not decide the case until all evidence has been presented. Then, from the total record it is assumed that the jury rationally relies upon the most direct and persuasive evidence to decide an issue and retreats to more remote and less credible evidence only if it is needed to meet strong evidence on the other side. If the evidence against the defendant is overwhelming, the jury needs only the best evidence to resolve its doubts. The weaker the character and quality of the tainted evidence relative to other evidence on the issue, the more probable the jury was able to and did ignore it in reaching the verdict. Under this model the issue is not whether there is overwhelming evidence to convict, but rather whether there is overwhelming evidence
Although Chapman articulated the federal standard to be used, it left open the scope of the standard's application. The Court held that some constitutional errors may be harmless in particular cases, but it also noted that "there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error." Thus, Chapman did not, however, expressly overrule the Court's prior practice of granting reversals for certain constitutional errors without examination for prejudice or with comment that lack of prejudice would be irrelevant. Therefore, the applicability of the federal harmless error rule to errors not decided or noted in Chapman remains uncertain until resolved in later cases. Thus far the Court has not decided the question of harmless error in violations of Miranda.

Once it has been decided that a certain type of constitutional error falls within the scope of the Chapman rule there remains the task of

of a quality better than that erroneously admitted. The majority and dissent in Harrington essentially disagreed about the value of the eyewitness testimony which would remain in the prosecution's case if the illegally used confessions were ignored. Later cases citing Harrington can be explained by the same model. See Chambers v. Maroney, 399 U.S. 42 (1970); Dutton v. Evans, 400 U.S. 74, 90 (1970) (Blackmun, J., concurring).

Whatever may be the difficulties in scaling evidence values under the overwhelming evidence model suggested, it is plain that out-of-court statements of the defendant, as a class, will be near the very highest. The existence of better or equally probative evidence in the record will be rare. Thus, harmless error findings are limited to cases in which this superior evidence is present.


18. See Mr. Justice Stewart's list of prior decisions of automatic reversal in his concurring opinion in Chapman v. California, 386 U.S. 18, 42-44 (1967).

19. Chapman applied the new harmless error rule to a violation of the rule established in Griffin v. California, 380 U.S. 609 (1965) (comment on defendant's failure to testify unconstitutional), finding the error prejudicial in that case. See note 33 infra.

20. See note 17 supra.


22. In Harris v. New York, 401 U.S. 222 (1971), the majority held that use for impeachment purposes of statements taken without Miranda warnings was not a violation of Miranda. Dissenting Justices Brennan, Douglas and Marshall, finding constitutional error, argued that the error was not harmless under the Chapman standard. No argument for automatic reversal was made. Id. at 229 n.2.
developing criteria to ascertain the potential impact of the error on the jury. It is doubtful that the Court can or will undertake comprehensive supervision of this phase of the application of the federal standard.\textsuperscript{23} Harmless error determinations must be made on a case-by-case basis, analyzing the total record of each trial. The inability of the Court to undertake a burden of this type has led some judges and commentators to suggest automatic reversal as the only feasible means to assure protection of defendants' rights.\textsuperscript{24} Such an approach, which would foreclose the states from furthering their own judicial economy policies, was implicitly rejected by the majority in \textit{Chapman}.\textsuperscript{25} The Court realistically responded to its limited capacity to review these questions with a willingness to rely upon the ability of state appellate courts to apply the law in good faith.\textsuperscript{26} Therefore, the responsibility for defining the relevant criteria for ascertaining the impact on the jury of each type of constitutional error will remain with the state appellate courts.\textsuperscript{27}

\textbf{Miranda Policies and Harmless Error}

In \textit{Miranda} the Court held that no statements of a defendant made during custodial interrogation could be admitted into evidence unless the prosecution demonstrates that procedural safeguards to secure the defendant's privilege against self-incrimination have been utilized. The Court announced that prior to any questioning the suspect must be warned that he has the right to remain silent, that any statement he makes may be

\textsuperscript{23} The Supreme Court may have reviewed enough violations of Griffin v. California, 380 U.S. 609 (1965) (unconstitutional comment on a defendant's failure to testify), to be able to develop some crude criteria. \textit{See} Chapman v. California, 386 U.S. 18 (1967); Anderson v. Nelson, 390 U.S. 523 (1968); Fontaine v. California, 390 U.S. 593 (1968); Ross v. California, 391 U.S. 470 (1968), \textit{rev'd mem.}, People v. Ross, 67 Cal.2d 64, 429 P.2d 606, 60 Cal. Rptr. 254 (1967). Such repeated exposure has not been duplicated with other types of error.

\textsuperscript{24} Chapman v. California, 386 U.S. 18, 45 (1967) (Stewart, J., concurring); Mause, \textit{supra} note 7, at 536.

\textsuperscript{25} Presumably a state supreme court can still practice automatic reversal after \textit{Chapman} if it finds that procedure more economical for its own judicial system.


\textit{To say the least, the question whether an error in a particular case is harmless is an issue peculiarly for lower, not for the highest, appellate courts. Then, too, this issue can usually be tried more efficiently, and just as fairly by the local court that tried the case or by the local appellate court that heard the first appeal. This Court was not established to try such minor issues of fact for the first time.}

\textsuperscript{27} The Supreme Court has adopted a policy of refusing to rule upon questions of harmless error in the first instance and remanding to state appellate courts for determination. Foster v. California, 394 U.S. 440 (1969).
used against him and that he has the right to the presence of an attorney, retained or appointed, during the questioning. A suspect may waive these rights if the waiver is made voluntarily and intelligently, but if he indicates at any time that he wishes the interrogation to cease or an attorney to be present, the police may no longer question him. To determine whether the Court in Miranda established one of those "constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error," the goals of Miranda must be examined.

One goal which seems basic to a fair trial is the exclusion of unreliable evidence which might be obtained through coercion. Miranda accomplishes this goal since such statements presumably will not be preceded by the standardized warnings and waiver. Application of a harmless error rule would not, however, undercut Miranda as a reliability safeguard, but would merely allow an appellate court to conclude that an error did not produce the feared result. It is only when a statement of questionable reliability has an effect upon the jury that a concern for the integrity of the guilt-determination process requires reversal. An appellate court finding that the admission of a certain statement was harmless is, under Chapman, a declaration that beyond a reasonable doubt that statement played no part in the jury's determination of guilt. This finding is logically independent from any conclusion about the statement's reliability. Regardless of their reliability, statements which have an effect

30. 384 U.S. at 455 n.24: "Interrogation procedures may even give rise to a false confession."
31. The fact that Miranda was not applied retroactively, Johnson v. New Jersey, 384 U.S. 719 (1966), may indicate that the Court did not think noncompliance with the newly required warnings created a significant fault in the fact-finding process. The Court relied on the adequacy of previous voluntariness tests to provide protection in those cases to which Miranda did not apply. Some courts have taken the nonretroactivity of Miranda as an indication that the harmless error rule is applicable. Guyette v. State, 84 Nev. 160, 166-67, 438 P.2d 244, 248 (1968); Commonwealth v. Padgett, 428 Pa. 229, 234-35, 237 A.2d 209, 212 (1968).

Although the effect of an error on the fact-finding process is a relevant factor in decisions concerning both automatic reversal and retroactivity, the degree of potential unreliability introduced by noncompliance is balanced against different costs in each decision so that the criteria may not overlap exactly. Mause, supra note 7, at 549 n.191.

In Harrington v. California, 395 U.S. 250 (1969), the Supreme Court held harmless a violation of Bruton v. United States, 391 U.S. 123 (1968) (illegal use of co-defendant's confession), although Bruton had been applied retroactively in Roberts v. Russell, 392 U.S. 293 (1968). This example indicates that application of harmless error rules is not limited to decisions which have been applied only prospectively.

32. At least one state court has attempted to apply harmless error rules only to Miranda violations which produce statements that would have been voluntary under the tests employed prior to Miranda. Commonwealth v. Padgett, 428 Pa. 229, 237 A.2d 209 (1968). The distinction is probably a result of the need to reconcile the logic of the
on the jury will be cause for reversal under the federal harmless error rule. Based upon an unreliability rationale, therefore, *Miranda* errors fail to qualify for automatic reversal if violations do not automatically have an effect on the jury.\footnote{33}

A second goal of *Miranda* is the deterrence of obnoxious and brutal police practices used to extort confessions, although again this effect is achieved because statements produced by such methods are within the much wider class of statements rendered inadmissible.\footnote{4} Theoretically, the exclusion of evidence obtained by "third degree" techniques eliminates any incentive for such illegal activity. In this respect *Miranda* anticipated the same effect on police conduct as was to be achieved by the exclusionary rule announced in *Mapp v. Ohio*\footnote{8} and, therefore, is subject to much of the same criticism that *Mapp* has received.\footnote{86}

There seems to be general agreement that a harmless error rule consistently applied too liberally or in bad faith can do much to undercut the deterrent effectiveness of exclusionary rules such as *Mapp* and

application of harmless error rules to *Miranda* with the inclusion of coerced confessions in *Chapman's* list of automatic reversal errors. That contradiction can be resolved by a showing that the inclusion of coerced confessions was erroneous. See note 33 infra.

The application of separate rules has been criticized as forcing reversion to the time-consuming case-by-case analysis of voluntariness that *Miranda* was intended to replace. Mause, supra note 7, at 550. A more fundamental criticism is that the voluntary-involuntary distinction has nothing to do with the criterion for harmless error: effect on the jury. People v. Schader, 62 Cal.2d 716, 730, 401 P.2d 665, 674, 44 Cal. Rptr. 193, 202 (1965).

33. The inclusion of Payne v. Arkansas, 356 U.S. 560 (1958), in the class of automatic reversal errors in *Chapman* presents a difficulty under this analysis. The same reasoning about lack of jury effect should apply as well to coerced confessions. Perhaps the explanation lies in the Court's failure to visualize those rare circumstances in which a confession may have little impact on the jury. See text accompanying note 67 infra.

The Court's decision on the facts of *Chapman* shows that it could not have been using an unreliable evidence rationale in classifying automatic reversal errors. The defendants in that case claimed error in comments made by the prosecutor and trial judge about their failure to testify. This practice had been declared unconstitutional in *Griffin v. California*, 380 U.S. 609 (1965), in part because the inference of guilt from silence made permissible by such comments was untrustworthy. *Id.* at 614-15. The Court in *Chapman* held that the harmless error rule was applicable to *Griffin* violations.

34. 384 U.S. at 447:

Unless a proper limitation upon custodial interrogation is achieved—such as these decisions will advance—there can be no assurance that practices of this nature [the "third degree"] will be eradicated in the foreseeable future.

The Court excluded the confessions in *Miranda* in spite of the absence of "overt physical coercion or patent psychological ploys." *Id.* at 457. The police conduct was evidently not repugnant to due process because the statements might well have been voluntary in traditional terms.


Miranda. But there is no reason to believe that a harmless error rule as narrowly drawn as that in Chapman and applied in good faith should change police expectations about the results of misconduct. A conviction will be secured in spite of misconduct only when a trial judge admits the evidence and the highest state court finds that, examining the trial as a whole, the error was harmless. No police force could rationally plan to evade constitutional norms and secure convictions on the basis of these unpredictable events. Also, a finding that an error was harmless is a declaration that the evidence played no significant role in the verdict and, therefore, the conviction cannot be seen as a reward for misconduct.

The Court has applied the federal harmless error rule to violations of Map  and, therefore, there seems to be no basis in the deterrence rationale for denying its applicability to Miranda.

The third and most important goal of Miranda is the translation into working guidelines of the exclusionary rule already present in the fifth amendment. The Court sought to perform this function by defining "compulsion" with reference to broad and historic principles of proper "state-individual balance" rather than merely in response to the particular preventable evils presented by the unreliability and deterrence rationales. Because of its fifth amendment base, the Miranda exclusionary rule differs from the one announced in Map. The search and seizure exclusionary rule is not expressed in the Constitution and is aimed at

41. No person . . . shall be compelled in any criminal case to be a witness against himself. . . .
42. All these policies point to one overriding thought: the constitutional foundation underlying the privilege [against self-incrimination] is the respect a government—state or federal—must accord to the dignity and integrity of its citizens. To maintain a "fair state-individual balance," to require the government "to shoulder the entire load," . . . to respect the inviolability of the human personality, our accusatory system of criminal justice demands that the government seeking to punish an individual produce the evidence against him by its own independent labors, rather than by the cruel, simple expedient of compelling it from his own mouth.

384 U.S. at 460.
MIRANDA WARNINGS

preventing violations of the fourth amendment. These violations are complete in themselves irrespective of any criminal prosecutions. The fifth amendment, on the other hand, is not violated at the moment police compel a suspect to speak, but only when his compelled speech is used against him.\(^43\) *Miranda* appears, therefore, to be basic to a fair trial because it seeks to prevent violations of the fifth amendment.

Exemption from the harmless error rule for errors based on the fifth amendment was, however, implicitly rejected by *Chapman* itself. The defendants in that case claimed that the prosecutor's comment upon their failure to testify had violated their rights under the fifth amendment as interpreted by *Griffin v. California*.\(^44\) Although the Court agreed that by their silence in face of the comments the defendants "had served as irrefutable witnesses against themselves,"\(^45\) it rejected automatic reversal and proceeded to examine for prejudicial impact.\(^46\)

In summary, an examination of *Miranda* and its foundations indicates that a harmless error judgment under the *Chapman* standard of certainty should not be precluded. Also evident, however, is the importance of accuracy in the application of harmless error standards to avoid undermining the integrity of the guilt-determination process, the judicial supervision of police conduct and the constitutional limitations imposed on the government by the fifth amendment.

Having decided that *Miranda* errors as a class should not be exempted from application of the federal harmless error standard, appellate courts must decide the criteria to be used in determining the effect of any particular *Miranda* error on the jury. It is suggested that *Miranda* errors can be harmless in either or both of two ways. First, the content of an erroneously admitted statement may have had so little inferential value that, even if believed by the jury, the statement cannot be said to have contributed to a conviction. Second, a statement even

\(^{44}\) 380 U.S. 609 (1965).
\(^{45}\) 386 U.S. at 25.
\(^{46}\) It might also be argued that a defendant does not become "a witness against himself," unless his compelled statements play a part in causing infliction of a criminal penalty. Under this interpretation the fifth amendment is not violated if the defendant's statements are ignored by the jury, any more than when they are excluded from evidence. Preventive procedural rules such as *Miranda* and *Griffin* are properly based on the assumption that most evidence of this type is not ignored. If, however, an appellate court finds in retrospect that a *Miranda* error did not lead to an effect on the jury, then the trial has been fair by fifth amendment standards and the error should be held harmless.
if inferentially significant, may not have had any impact on the jury's belief of its content. If an erroneously admitted statement has significant content and measurable impact, the error should not be held harmless.

**Harmless Content**

The possibility that the content of an erroneously admitted statement may make its admission harmless arises because the *Miranda* exclusionary rule has broad application:

The warnings required and the waiver necessary in accordance with our opinion today are, in the absence of a fully effective equivalent, prerequisites to the admissibility of any statement made by a defendant. No distinction can be drawn between statements which are direct confessions and statements which amount to “admissions” of part or all of an offense. The privilege against self-incrimination protects the individual from being compelled to incriminate himself in any manner; it does not distinguish degrees of incrimination. Similarly, for precisely the same reason, no distinction may be drawn between inculpatory statements and statements alleged to be merely “exculpatory.”

Because of *Miranda*’s breadth the required inquiry as to admissibility of any statement will be made before the statement is heard by the jury and without regard to its content. The statement which is eventually admitted after an erroneous ruling may turn out to be one of several varieties, each presenting potentially different harmless error problems.

One type of statement which might be admitted in violation of *Miranda* is a denial by the defendant of any connection with the crime. In theory these statements would never be used by the prosecution since they do not imply guilt or affect credibility. Nevertheless, they occasionally do enter the record, most often in descriptions of a defendant’s behavior upon arrest. In such cases the proper course of action for the appellate court is to hold that such admission into evidence was error since

---

adequate warnings or waiver had not occurred. The error, however, should be found to be harmless beyond a reasonable doubt because the content, even if believed, could in no way contribute to a conviction.48

Two recent Indiana cases have involved such exculpatory denials. In Jones v. State49 and Fulk v. State50 the defendants claimed Miranda errors, although neither had admitted connection with the crimes. The Indiana Supreme Court affirmed both convictions holding that Miranda was not applicable unless the defendants demonstrated harm from the failure of the police to give adequate warnings.51 This analysis violates both Miranda, as to the scope of its application, and Chapman, as to the burden of proof on harmless error.52 Although the conviction is affirmed under both analyses the “error, but harmless” method suggested previously better defines the separate issues involved and maintains Miranda’s focus on police conduct rather than content.

A second class of statements which might be admitted in violation of Miranda lies at the other end of the inferential scale—confessions. These have been traditionally defined as express acknowledgements of guilt containing every element of the crime with which the defendant is charged.53 There can be no doubt that confessions are so directly probative of the guilt that they can never be held harmless on the basis of content alone.

Between exculpatory denials and confessions, in terms of inferential value, are admissions. These statements have some tendency to establish guilt but are insufficient in themselves to authorize a conviction.54 Statements in this broad category may vary significantly in the degree of incrimination. It has been argued that since some logical contribution to a conviction is always conceivable, admissions should never be held harmless.55 Empirical studies indicate that it is extremely difficult to identify which facts are most significant in the minds of jurors or which

51. —Ind. at—, 255 N.E.2d at 221; —Ind. at—, 262 N.E.2d at 652. The extent to which extra-judicial statements were used at the trials in these two cases is unclear from the opinions. If no statements were admitted in evidence, the result reached by the court is proper. See text accompanying note 43 supra.
52. See text accompanying note 12, supra.
55. Cf. Thompson, supra note 37, at 464.
inferential routes they follow in arriving at a verdict.\textsuperscript{56} Also, since the prosecution introduced an admission as part of its case, it could be estopped from arguing on appeal that the statement played no part in the conviction.\textsuperscript{57}

A rigid rule precluding appellate courts from judging the inferential value of a particular admission would, however, re-introduce the evils of inflexibility which led to the adoption of harmless error statutes.\textsuperscript{68} Judges at both trial and appellate levels are constantly called upon to decide questions of relevancy and sufficiency of evidence. It would seem, therefore, that under the restraint of the "beyond a reasonable doubt" standard, appellate courts should be allowed to find some admissions of remote or minor facts harmless on the basis of content alone.\textsuperscript{59}

The Indiana Supreme Court faced such judgments about the content of admissions in \textit{Greer}\textsuperscript{60} and \textit{Vasquez}.\textsuperscript{61} In \textit{Greer} an admission by the defendant that she had previously beaten the infant victim was entered in evidence at her trial for murder. Although the statement had been used to prove only the malice element of the crime, the supreme court did not base its harmless error finding on content (inferential remoteness). Rather the court found that the statement lacked significant impact on the jury.\textsuperscript{62} During police interrogation the defendant in \textit{Vasquez} had

\textbf{56. Cf.} R. \textsc{Simon}, \textit{The Jury and the Defense of Insanity} 133-44, 175 (1967); \textsc{Weld} \& \textsc{Roff}, \textit{A Study in the Formation of Opinion Based upon Legal Evidence}, 51 \textit{Am. J. Psych.} 609, 625-28 (1938). It may be that an appellate court can insist upon a more logical chain of inference from a judge than from a jury. See the comments of Judge \textsc{Friendly}, refusing to extend to judges the right to give multiple inconsistent verdicts which had been allowed to federal juries under the rule of Dunn v. United States, 284 U.S. 390 (1932), and accepted by Indiana in Flowers v. State, 221 Ind. 448, 48 N.E.2d 56 (1943):

We do not believe we would enhance respect for law or for the courts by recognizing for a judge the same right to indulge in "vagaries" in disposition of criminal charges that, for historic reasons, has been granted the jury. . . . We know the rule of logic in law is not unlimited; but "Holmes did not tell us that logic is to be ignored when experience is silent." Since we find no experience to justify approval of an inconsistent judgment when a criminal case is tried to a judge, we think logic should prevail.

\textit{United States v. Maybury}, 274 F.2d 899, 903 (2d Cir. 1960).


. . . \text{[W]e have seen how important these statements were to the People's case, and} "There is no reason why we should treat this evidence as any less 'crucial' than the prosecutor—and so presumably the jury—treated it."


\textbf{58. See} notes 6-7 \textit{supra} \& accompanying text.

\textbf{59. \textit{See} \textsc{Traynor}, \textit{supra} note 7, at 59.}

\textbf{60. 252 Ind. 20, 245 N.E.2d 158 (1969).}


\textbf{62. 252 Ind. at 28-29, 245 N.E.2d at 163.}
described his activities and apparel on the night of the alleged rape. The statements used at his trial contained exculpatory denials but also admitted his presence in the vicinity of the crime and the wearing of clothing which in part matched the description of the assailant. The court commented on the general and non-confessional nature of the admissions but did not find the error harmless on that basis. Rather, the presence of other evidence of the same facts in the record was decisive, indicating a judgment based on impact instead of content.63

Given selection of evidence by the prosecution and rulings on relevancy by the judge, it is unlikely that many admissions will ever be so lacking in probative value as to be found harmless under the standard of certainty required. The policies underlying harmless error, however, require that the possibility of finding harmless content be left open for those cases in which such a finding is appropriate. A statement by the defendant entered in evidence in violation of Miranda should be found harmless if beyond a reasonable doubt its content did not contribute to the conviction. This will be the case only when the statement contains exculpatory denials or insignificant factual admissions. In all other cases the error should be held harmless only if the incriminating statement failed to have a significant impact on the jury's belief of the facts contained in the statement.64

**Harmless Impact**

Erroneous admission of incriminating statements made by a defendant has traditionally been considered cause for automatic reversal on appeal. The necessity for this practice in terms of the goals of Miranda has been examined and rejected earlier.65 One further argument for automatic reversal in confession cases has been made purely in terms of harmless error theory and retains general validity: the defendant's statement has such an evidentiary impact on the jury that it can rarely be said to have had no effect on the verdict. An incriminating statement by the defendant has been called "an evidentiary bombshell which shatters the defense."66

---

63. ——Ind. at——, 260 N.E.2d at 781-82.
64. Because the same test must be applied to both confessions and significant admissions, both will be subsumed under the term "confession" for purposes of the remainder of this note.
65. See text accompanying notes 30-46 supra.
66. People v. Schader, 62 Cal.2d 716, 731, 401 P.2d 665, 674, 44 Cal. Rptr. 193, 202 (1965). The University of Chicago Jury Project found that the presence of a confession in the prosecution's case before a jury dropped the acquittal rate to twenty-one per cent from thirty per cent for other strong cases. Kalven, supra note 13, at 160. The cor-
Almost invariably a confession will constitute persuasive
evidence of guilt and it is therefore usually extremely difficult
to determine what part it played in securing the conviction even
though it is apparent that there is considerable evidence of guilt
in the case on appeal. 67

Because a confession will have an impact on the jury's belief of
facts in an overwhelming majority of cases, it has been suggested that
judicial economy requires an automatic reversal rule be applied to such
statements. 68 Since few convictions will be affirmed on grounds of
harmless impact, it has been argued that the amount of retrial time saved
would be less than the amount of appellate time spent in examination of
the impact in every case. This general abstract calculation, however, has
apparently been found unduly restrictive in practice by the several
appellate courts which have decided to make harmless error inquiries in
\textit{Miranda} cases. 69 Still, judicial economy will be furthered if appellate
courts can identify classes of cases in which \textit{Miranda} error impact is
significantly minimized and limit examination to those cases.

The Indiana Supreme Court has found \textit{Miranda} errors to be harm-
less in two situations. The first occurs when the jury has been instructed
not to give erroneously admitted statements any effect in arriving at their
verdict. In \textit{Davis v. State} 70 the prosecution in rebuttal entered certain
statements, taken without adequate warnings, to challenge the defendant's
testimony that he did not remember his acts on the night of the crime.
The trial judge later reconsidered defense objections and instructed the
jury to disregard the statements. Affirming the conviction, the supreme
court found that, under \textit{Harris v. New York}, 71 use of the statements

\begin{footnotes}
67. 250 Ind. 276, 282, 235 N.E.2d 699, 703 (1968) [emphasis omitted], citing People
68. Fahy v. Connecticut, 375 U.S. 85, 95 (1963) (Harlan, J., dissenting); People
377 U.S. 945 (1964); Mause, \textit{supra} note 7, at 543-45.
402 U.S. 911 (1971); Guyette v. State, 84 Nev. 160, 438 P.2d 244 (1968) (inadefuate
warnings given by Indiana police); Commonwealth v. Padgett, 428 Pa. 229, 237 A.2d
209 (1968). California, which had originally adopted an automatic reversal rule with
respect to confessions, later found that exceptions had to be created to obey the state's
70. \textit{---Ind.---}, 271 N.E.2d 893 (1971).
\end{footnotes}
was not error and even if it had been error, "it is ordinarily sufficient in law for the court to instruct the jury to disregard inadmissible evidence which it has heard." In selecting the judge's instructions as an alternative ground for its decision, the court implied that it might find such instructions adequate to cure Miranda errors even when statements were used in the prosecution's case in chief.\textsuperscript{73}

The normal rule that errors in the admission of evidence are presumed cured by instructions\textsuperscript{74} is inappropriate when applied to confessions, which have the "bombshell effect" described earlier.\textsuperscript{75} Courts have often expressed skepticism of the jury's understanding and obedience of instructions to ignore prejudicial evidence of other types.\textsuperscript{76} Since the jury's obedience of instructions cannot be known beyond a reasonable doubt, Miranda errors should not be found harmless merely because instructions to disregard the statements were given.\textsuperscript{77}

The second situation in which Indiana has found Miranda errors harmless occurs when the defendant has testified to the same facts as those contained in the erroneously admitted statements. This was the pattern in both Greer and Vasquez. It seems logical to assume that when a jury has heard and seen the defendant testify, statements with the same content previously reported second-hand will no longer play a part in that jury's determinations.\textsuperscript{78} The defendant's incriminating testimony

\textsuperscript{72}—Ind at.—, 271 N.E.2d at 895.
\textsuperscript{73} See Merritt v. State, 245 Ind. 362, 198 N.E.2d 867 (1964); Temple v. State, 245 Ind. 21, 195 N.E.2d 850 (1964). In both cases statements of the defendant were used in the prosecution's case, were objected to on grounds other than Miranda and were found harmless because of judicial instructions to disregard.
\textsuperscript{74} Ward v. State, 246 Ind. 374, 205 N.E.2d 148 (1965); Ross v. State, 204 Ind. 281, 182 N.E. 865 (1933).
\textsuperscript{75} See Jackson v. Denno, 378 U.S. 368 (1964).

The naive assumption that prejudicial effects can be overcome by instructions to the jury... all practicing lawyers know to be unmitigated fiction.

\textsuperscript{77} One empirical study indicates that instructions to disregard evidence may sensitize the jury to it. Kalven, \textit{A Report on the Jury Project of the University of Chicago}, 24 Ins. Couns. J. 368 (1957). Model juries witnessing civil trials in which evidence of the defendant's insurance was objected to and instructions to disregard were given awarded higher damages than juries which had not heard the evidence or had heard it without objection. The author concludes that instructions kept the jury from talking about insurance but made action on that basis more likely. \textit{Id.} at 377-78. Judges, on the other hand, gave the lowest awards in the objection-instruction cases. \textit{Id.} at 380.

\textsuperscript{78} See Motes v. United States, 178 U.S. 458, 475-76 (1900).
should act as a second and larger evidentiary "bombshell," obliterating the effect of the initial error.

Mere presence of the defendant's testimony in the record, however, is not sufficient to make the original error harmless. A further requirement has been imposed: the defendant's testimony must not have been compelled by the erroneous admission of his out-of-court statements. The Supreme Court has held that if a defendant testifies in order to overcome the impact of a confession improperly admitted, his testimony is itself a product of illegal compulsion and cannot be used against him. The Indiana Supreme Court adopted this reasoning in Greer:

This is not to say that constitutional error in the admission of an incriminating statement of an accused is always and automatically rendered harmless by the accused testifying concerning the same facts that were in the statement. If the constitutional error compels the defendant to take the stand in order to deny or explain away the statement, or substantially restricts the choice of tactics by the defendant's counsel in presenting his defense, then we would not say the error was harmless beyond a reasonable doubt.

Although the directive of this rule is clear, the task of developing methods to measure compulsion to testify remains. Three different approaches have been suggested.

First, in Harrison v. United States, the Supreme Court put the burden of proving the lack of compulsion on the prosecution:

[H]aving illegally placed his confessions before the jury,


80. 252 Ind. at 30-31, 245 N.E.2d at 164.

81. Application of any of these tests might be precluded if the defense attorney states that his client is testifying because of previous errors and his testimony does not waive them. See R. Keeton, Trial Techniques and Methods 184 (1954). A similar statement could also be made before a cross-examination likely to lead to repetition of the challenged testimony, to prevent risk of waiver on appeal. Even if this type of statement were to become pro forma, it would at least indicate that the defense was aware of the error, and an appellate court could hardly ignore this record judgment.

the Government can hardly demand a demonstration by the petitioner that he would not have testified as he did if his inadmissible confessions had not been used.  

The Court noted the natural inference that damaging testimony would not have been made without compulsion and also emphasized the opening statement of the defense. This statement, made prior to the erroneous admissions, revealed plans not to have the defendant testify. *Harrison*, therefore, seems to require some objective indication of non-compulsion in the record. Unless the defense explains its strategy before the prosecution's case, it is unlikely that the state will be able to meet the burden imposed.

The second method, utilized by the Indiana Supreme Court in *Greer*, focuses attention on the content and "tenor" of the defendant's testimony. It appeared to the court that since the defendant did not attempt to qualify the previously admitted statements and the defense attorney aided in making the testimony complete and natural, the testimony was not compelled. This approach assumes that the motivation behind the decision to testify will be apparent from behavior after this decision has been made. This method, however, forces a tactical dilemma upon the defense attorney. The more successful he is in making his client's testimony sympathetic and persuasive, the more likely it is that the testimony can be used by the state on appeal to make a previous *Miranda* error harmless.

A middle course between the *Harrison* and the *Greer* methods is suggested by *Goodloe v. State*. The basic question in *Goodloe* was whether the defendant's testimony after a *Miranda* violation would allow the court to affirm the conviction. The court held that the error could not be waived by subsequent attempts to mitigate its effect. In a concurring opinion Judge DeBruler focused on the strength of the state's case absent the confession:

Clearly, without the erroneously admitted statement of appellant, the State's case-in-chief would not have been sufficient to survive a motion for a directed verdict. When an erroneously

---

83. *Id.* at 224.
84. *The Supreme Court, 1967 Term*, 82 Harv. L. Rev. 63, 224 (1968); see People v. Reid, 233 Cal. App. 2d 163, 43 Cal. Rptr. 379 (1965), *cert. denied*, 382 U.S. 995 (1966), where the defendant explained, "I just wanted the truth brought out," and the causal connection was held broken. *Id.* at 175, 43 Cal. Rptr. at 387.
85. 252 Ind. at 34, 245 N.E.2d at 166.
admitted statement is an essential part of the State's case-in-chief, it can never be harmless beyond a reasonable doubt, because without it the appellant would not have had to present a defense of any kind. The erroneous admission worked a major change in the position of appellant.  

This rule could logically be expanded to require reversal not only when the prosecution's case would fail to get to the jury, but also when the amount of proper evidence, though sufficient, would not be likely to persuade the jury beyond a reasonable doubt. Therefore, only when the state's case was convincing without the statements could the testimony be deemed not compelled by the error.

The method suggested by Goodloe reflects most directly the realities of compulsion to testify. If the proper evidence in the prosecution's case is overwhelming, the additional statement of the defendant is unlikely to affect any practical necessity that the defendant take the stand. The stronger the independent evidence of guilt, the greater is the likelihood that it—rather than the extra-judicial statement—induced the defendant's choice. The test on appeal would appear to be whether a reasonable defendant would have acted differently if he had been presented by the state with a case which did not contain the illegal statements.

As appealing and direct as this "reasonable defense" test might be, it would be impossible to reach conclusions under it beyond a reasonable doubt. This method requires an appellate court to determine from a cold record the effect of the forbidden evidence and evaluate the most rational tactical response of the defense. While this procedure may provide some general sense of what occurred at the trial, its terms are too far removed from the actual events, the jury and the defendant to be sustained with the standard of certainty required. The tactical decision to have the defendant testify is a complex balancing of many factors, only some of which may be evident from the record. The only method which might provide certainty beyond a reasonable doubt would be reliance on objective indicators and the strict burden of proof outlined in Harrison.

---

87. Id. at —, 252 N.E.2d at 792.
89. See People v. Alesi, 67 Cal. 2d 856, 434 P.2d 360, 64 Cal. Rptr. 104 (1967), where the court evaluated the tactical options open to the defendant and concluded that "[t]o assert a meaningful defense, it became incumbent upon defendant to rebut [certain] testimony." Id. at 863, 434 P.2d at 364, 64 Cal. Rptr. at 108.
90. Kalven, supra note 13, at 144-48, 177-81.
91. The Harrison method also makes the eventual finding of harmless error least predictable to the prosecutor at the time of trial and, thus, best preserves the deterrent
The Indiana Supreme Court has found that *Miranda* errors can have potentially harmless impact in two situations. Both situations, however, reflect results of tactical decisions made by defense attorneys to request instructions or to send their clients to the stand. It is important, therefore, that the court clarify the criteria it is using in making harmless error decisions so that defense attorneys can make intelligent choices with some predictability of the consequences on appeal.

*MICHAEL R. FRUEHWALD*

**effect of* Miranda.** Criminal defendants testify in their own defense in an overwhelming majority of cases. *Kalven,* *supra* note 13, at 144. A prosecutor might, therefore, be encouraged to buttress his case with inadmissible statements on the likelihood that the defendant would respond to them and enough evidence would then be available to disprove compulsion under the more flexible *Greer* or *Goodloe* approaches. Under the *Harrison* test, a prediction that the defendant will testify does not increase the likelihood of harmless error because that testimony alone will not provide the requisite extrinsic evidence of non-compulsion.

92. A third situation that presents potential for harmless *Miranda* errors is the admission in evidence by the prosecution of several statements of the defendant, only some of which are invalid. This situation has not arisen as yet in reported Indiana cases but has been involved in several cases in California, where the following criteria have been developed:

It must appear from the record that (1) the inadmissible statement did not contain details significantly different from the other confessions; (2) no undue emphasis was placed on the erroneously admitted confessions by the prosecution; and (3) the sequence of confessions was such that there could be no implication that the legally obtained confessions were induced by those improperly obtained.