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Winter 2009

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#### Recommended Citation

Roger Fairfax, *A Fair Trial, Not a Perfect One: The Early Twentieth-Century Campaign for the Harmless Error Rule*, 93 Marquette Law Review 433 (2009).

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# A FAIR TRIAL, NOT A PERFECT ONE: THE EARLY TWENTIETH-CENTURY CAMPAIGN FOR THE HARMLESS ERROR RULE

ROGER A. FAIRFAX, JR.\*

A defendant is entitled to a fair trial but not a perfect one.<sup>1</sup>

## I. INTRODUCTION

From just after the turn of the twentieth century through World War II, there was a great deal of activity around criminal justice reform. Much like today, many commentators in the early twentieth century considered the American criminal justice system to be broken. With regard to all of its phases—substance, sentencing, and procedure—the criminal justice system was thought to be inefficient and ineffective, and it failed to inspire the confidence of the bench, bar, or public.

Against this backdrop, a group of reformers sought to address the shortcomings of early twentieth-century criminal justice—during what I consider the “Golden Age” of criminal justice reform. Many contemporary scholars can attest to the richness and depth of the criminal law and procedure scholarship in the law journals in the first third of the twentieth century. In addition to research conducted by full-time law professors during this era, judges and practicing members of the bar were frequent authors of legal scholarship on various problems vexing the criminal justice system.

These judges, lawyers, and law professors often gathered to discuss various topics in criminal law. These discussions and collaborations ultimately produced concrete reform proposals, many of which would go on to be implemented in law and practice. This era of reform is a fascinating

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1. U.S. v. Lutwak, 344 U.S. 604, 619 (1953).

study in the effective advancement of the legal profession through the coordinated efforts of those who practice, study, apply, and interpret the law.

This Article focuses on *one* aspect of the early twentieth-century criminal justice reform movement—*procedural* reform in the criminal context.<sup>2</sup> More specifically, it examines the movement to reform criminal appellate procedure in the early twentieth century. The centerpiece of this movement—and, arguably, one of the most significant objectives of the larger criminal procedure reform project—was the adoption of the harmless error rule.

Although there are nuanced and important differences between different formulations of the harmless error rule, the basic model in the criminal context provides that when an appellate court notices error at trial, it is not bound to reverse a conviction and grant a new trial unless that error had some bearing on the outcome. In other words, if the verdict would have been the same even had the error not occurred, the conviction can stand.<sup>3</sup> This Article seeks to explore not the functional meaning of the rule,<sup>4</sup> but the fascinating story of how and why it came into being.

Part II of the Article provides the historical context from which the movement for the harmless error rule sprang. Part III illuminates the personalities and institutions involved in the surprisingly coordinated effort to establish the harmless error rule in American criminal appellate procedure. In Part IV, the Article explores the rhetoric and tactics employed by the reformers in their campaign to change the landscape of criminal appellate

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2. Although this Article focuses on criminal procedural reform, it should be noted that reform efforts aimed at early twentieth-century substantive criminal law and civil procedure were just as robust as, and sometimes were intertwined with, the criminal procedural reform project. For example, the campaign for a federal harmless error statute sought (and obtained) a rule applicable to both criminal and civil cases. See, e.g., *Kotteakos v. United States*, 328 U.S. 750, 762 & n.15 (1946); see also FED. R. CIV. P. 61; Judicial Code of the United States, ch. 231, § 269, 36 Stat. 1087, 1163 (1911) (codified as amended at 28 U.S.C. § 391 (1926)).

3. Again, there are important nuances (some of them consequential) distinguishing various formulations of the rule used in various procedural contexts. The primary distinguishing feature of varying articulations of the harmless error rule is the requisite level of certainty we require of the reviewing court regarding the impact of the error on: (1) the jury's verdict; (2) the defendant's rights ("substantial rights"); or (3) the interest of justice ("miscarriage"). For treatment of the important distinctions among variants of the harmless error rule, see, e.g., Harry T. Edwards, *To Err is Human, But Not Always Harmless: When Should Legal Error Be Tolerated?*, 70 N.Y.U. L. REV. 1167, 1175–80 (1995); see generally Stephen A. Saltzburg, *The Harm of Harmless Error*, 59 VA. L. REV. 988, 988 (1973). However, the aforementioned general explanation of the harmless error rule is sufficient for purposes of this Article on the historical background of the campaign for the harmless error rule.

4. For scholarly treatment of how the harmless error rule functions in modern criminal justice, see, e.g., ROGER J. TRAYNOR, *THE RIDDLE OF HARMLESS ERROR* (1970); Roger A. Fairfax, Jr., *Harmless Constitutional Error and the Institutional Significance of the Jury*, 76 FORDHAM L. REV. 2027 (2008); Sam Kamin, *Harmless Error and the Rights/Remedies Split*, 88 VA. L. REV. 1 (2002); Daniel J. Meltzer, *Harmless Error and Constitutional Remedies*, 61 U. CHI. L. REV. 1 (1994).

review and to capture the hearts and minds of appellate judges and the profession as a whole. Part V sheds light on the reformers' final victory on the federal stage—the adoption of the harmless error doctrine by judicial rulemaking in the Federal Rules of Criminal Procedure. The Article concludes with thoughts about the importance of the harmless error rule campaign for the broader criminal procedure reform project of the early twentieth century, and how we might assess its enduring success.

## II. THE ERA OF PRESUMED PREJUDICE AND AUTOMATIC REVERSAL

Why was there such a strong emphasis on a harmless error rule within the early twentieth-century criminal reform agenda? We may lack appreciation today for how criminal appeals looked to the early twentieth-century reformers. After all, for the past forty years, we have operated under a regime in which the Supreme Court has explicitly approved the state and federal appellate courts' application of harmless error review to most federal *constitutional* errors. This sits in stark contrast to the dominant criminal appellate practice in the early twentieth century, in which virtually *any* error—pleading errors, evidentiary errors, and constitutional errors—would be deemed presumptively prejudicial and often would prompt automatic reversal of the conviction and the granting of a new trial to the defendant.<sup>5</sup>

This approach derived from English practice. An 1835 English case in the Court of Exchequer is thought by most to be the beginning of an era in which error at trial was thought to be presumptively prejudicial or subject to automatic reversal.<sup>6</sup> Almost forty years later, in 1873, Parliament authorized English courts to implement a harmless error rule in civil cases.<sup>7</sup> Nearly thirty-five years after that, Parliament passed the Criminal Appeal Act of 1907, imposing a harmless error rule in criminal cases,<sup>8</sup> although English judges took slowly to the idea of applying the harmless error rule.<sup>9</sup>

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5. Meltzer, *supra* note 4, at 20.

6. See *Crease v. Barrett*, (1835) 149 Eng. Rep. 1353, 1353 (Exch. Div.); Fairfax, *supra* note 4, at 2032. Judge Traynor has argued persuasively that the English approach toward trial error was due to an incorrect interpretation of *Crease v. Barrett*. See TRAYNOR, *supra* note 4, at 6–8. Nevertheless, the *Crease* case began an era when an appellate finding of error at the trial level virtually guaranteed reversal of the verdict and the grant of a new trial. Fairfax, *supra* note 4, at 2032.

7. See Supreme Court of Judicature Act, 1873, 36 & 37 Vict., c. 66, § 48 (Eng.).

8. See Criminal Appeal Act, 1907, 7 Edw. 7, c. 23, § 4 (Eng.) (“Provided that the court may, notwithstanding that they are of [the] opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if they consider that no substantial miscarriage of justice has actually occurred.”).

9. See TRAYNOR, *supra* note 4, at 11.

American courts were broadly influenced by the old Exchequer rule of automatic reversal followed by English courts in the nineteenth century.<sup>10</sup> By the beginning of the nineteenth century, it is fair to say, the prevalent approach in American courts was to apply a presumption of prejudice or a strict rule of automatic reversal in criminal (and civil) cases upon a finding of error below.<sup>11</sup> As one might imagine, such an approach, whatever its merits, led to absurd results, such as granting convicted murderers new trials because of the misspelling of non-essential words or other typographical errors in the indictment, or minor and inconsequential evidentiary errors at trial.<sup>12</sup> Such instances were widely reported and often sensationalized in the media, which led to growing public outcry over perceived "technicalities" and "formalism" in criminal appellate practice.<sup>13</sup>

Nevertheless, American legislatures were slow to follow Parliament's lead in the late nineteenth century and early twentieth century to rid the old Exchequer rule of automatic reversal from criminal appellate practice.<sup>14</sup> As American reformers often complained (with regard to the harmless error rule and a number of other items on the criminal procedural reform agenda), American courts and legislatures seemed to adhere steadfastly to practices inherited from the English, long after the English had discarded the approach as unsatisfactory.<sup>15</sup> American appellate courts of this era were described as "impregnable citadels of technicality,"<sup>16</sup> which created an environment where "the fear of reversal hangs as a sword of Damocles over the heads of prosecutors and trial judges."<sup>17</sup>

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10. Fairfax, *supra* note 4, at 2033.

11. See, e.g., Meltzer, *supra* note 4, at 20; Austin W. Scott, *The Progress of the Law, 1918-1919—Civil Procedure*, 33 HARV. L. REV. 236, 250 (1920).

12. See, e.g., H.R. REP. NO. 65-1949, at 1 (1911); *State v. Campbell*, 109 S.W. 706, 708-09 (Mo. 1908); see also EVERETT P. WHEELER, SIXTY YEARS OF AMERICAN LIFE: TAYLOR TO ROOSEVELT, 1850-1910, at 403 (1917); WILLIAM F. WILLOUGHBY, PRINCIPLES OF JUDICIAL ADMINISTRATION 425 (1929); Marcus A. Kavanagh, *Improvement of the Administration of Criminal Justice by Exercise of Judicial Power*, 11 A.B.A. J. 217, 219-20 (1925) (recounting instances of appellate reversal on grounds perceived to be technical); John Henry Wigmore, *Case Comment, "Good" Reversals and "Bad" Reversals*, 4 ILL. L. REV. 352, 353 (1909).

13. See, e.g., Saltzburg, *supra* note 3, at 1005-06 n.56.

14. However, a number of state legislatures did beat Congress to the punch. See, e.g., H.R. REP. NO. 65-913, at 2 (1919) (listing states that previously had implemented the harmless error rule by statute or court rule (quoting H.R. REP. NO. 62-611, at 2 (1912))).

15. See, e.g., LESTER B. ORFIELD, CRIMINAL APPEALS IN AMERICA 190 (1939); Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 29 A.B.A. ANN. MEETING REP. 395, 405 (1906).

16. Kavanagh, *supra* note 12, at 222.

17. Herbert S. Hadley, *Present Conditions Historically Considered*, 11 A.B.A. J. 674, 678 (1925); see also WILLOUGHBY, *supra* note 12, at 417.

Against this backdrop, the criminal procedural reform project's campaign for the harmless error rule was set in motion.<sup>18</sup> For these reformers, the adoption of a harmless error rule in American criminal appellate practice would lead to improved efficiency of, and enhanced public confidence in, the criminal process.<sup>19</sup> In addition, the formalistic rules and requirements, the violation of which frequently triggered reversals and grants of new trials, were themselves often the target of the reform agenda.<sup>20</sup>

However, the adoption of a harmless error rule was important to the reform agenda not only on its own merits, but also because the strict rule of automatic reversal, which dominated early twentieth-century criminal appellate practice, was *emblematic* of the antiquated procedural regime the criminal procedural reform project, as a whole, was seeking to dismantle. The harmless error rule, therefore, had tremendous symbolic value. By replacing the strict rule of automatic reversal with the harmless error rule, the reformers would be making a powerful statement on the direction criminal procedural practice was to take as a complement to the reform and modernization of criminal justice administration in the United States.

### III. THE CAMPAIGN FOR HARMLESS ERROR REVIEW

Who were the players responsible for the adoption of the harmless error rule? The campaign consisted of an effective coalition of highly respected individual members of the legal profession, as well as a collection of powerful law reform institutions. The identities of these reformers and the manner in which they collaborated on the harmless error rule provide tremendous insight to the inner workings and aims of the larger early twentieth-century criminal procedure reform project.

#### A. Individuals

Despite the harmless error rule campaign's strong institutional grounding described below, perhaps what is most remarkable is the impressive array of prominent individual lawyers, judges, and scholars enlisted in the cause.<sup>21</sup> John Henry Wigmore, the preeminent expert in the field of evidence, lent his

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18. See, e.g., TRAYNOR, *supra* note 4, at 14; James W. Garner, *Campaign for Reform of Judicial Procedure*, 2 J. AM. INST. CRIM. L. & CRIMINOLOGY 331 (1912).

19. See, e.g., Judge Charles F. Amidon, U.S. Dist. Ct. for the D.N.D., *The Quest for Error and the Doing of Justice*, Address Before the Minnesota State Bar Association (Apr. 1906), in 40 AM. L. REV. 681, 691 (1906).

20. For example, indictment pleading requirements were the source of many "hypertechnical" findings of error necessitating reversal. See, e.g., *State v. Campbell*, 109 S.W. 706, 709, 715 (Mo. 1908); William E. Mikell, *A Proposed Draft of a Code of Criminal Procedure*, 5 J. AM. INST. CRIM. L. & CRIMINOLOGY 827 (1915).

21. See, e.g., *Kotteakos v. United States*, 328 U.S. 750, 759 (1946).

considerable clout to the campaign for the establishment of the harmless error rule. Wigmore, who had taught law in Japan and later served as dean of Northwestern University Law School for twenty-eight years, was a strong proponent of law reform, including in the area of procedure.<sup>22</sup> He served on the Joint Committee on Improvement of Criminal Justice, which featured the combined efforts of the American Bar Association, American Law Institute, and Association of American Law Schools.<sup>23</sup> His writings advocating the legal community's embrace of the harmless error rule added credibility to the reformers' efforts, particularly as they challenged the automatic reversal for evidentiary trial error.<sup>24</sup>

Herbert S. Hadley, chancellor of Washington University in St. Louis and former governor of Missouri, was a key member of the committee of the American Law Institute to investigate defects in criminal justice administration.<sup>25</sup> Hadley not only helped lead the American Law Institute's work on criminal procedure reform in the 1920s, he also served as an ambassador for such efforts to the outside world, often recounting the progress of the reformers in various periodicals.<sup>26</sup> Bemoaning the poor state of the criminal justice system in the early twentieth century, Hadley placed blame at the feet of the "present burden of technicality and formalism that a dead past has imposed upon it."<sup>27</sup> Hadley also chaired a committee of the National Crime Commission,<sup>28</sup> which, in the mid-1920s, produced a set of

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22. See WILLIAM R. ROALFE, JOHN HENRY WIGMORE: SCHOLAR AND REFORMER (1977).

23. *Id.* at 221. In addition, Wigmore was tremendously active in each of these three organizations separately. *Id.* at 220–26. Furthermore, Wigmore was the organizer of the 1909 National Conference on Criminal Law and Criminology, which brought together hundreds of delegates from across the nation to discuss criminal justice reform. *Id.* at 60–61; James W. Garner, Editorial Comment, *The American Institute of Law and Criminology*, 1 J. AM. INST. CRIM. L. & CRIMINOLOGY 1, 2–5 (1910). The conference spawned the American Institute of Criminal Law and Criminology, ROALFE, *supra* note 22, at 62, an important source of scholarly support for the criminal reform movement in the early part of the twentieth century. Wigmore served as the first president of the Institute, *see id.* at 5, which under Wigmore's leadership founded the *Journal of the American Institute of Criminal Law & Criminology*, *id.*, and produced a set of reforms in the form of a proposed criminal procedure code, *see, e.g.,* Mikell, *supra* note 20, at 827; Jennifer Devroye, *The Rise and Fall of the American Institute of Criminal Law and Criminology*, 100 J. CRIM. L. & CRIMINOLOGY 7, 7–8 (2010).

24. *See, e.g.,* 1 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 21 (rev. vol. 1983); John H. Wigmore, "Reversible Error," 19 J. AM. JUDICATURE SOC'Y 28 (1935) [hereinafter Wigmore, "Reversible Error"].

25. *See, e.g.,* Hadley, *supra* note 17, at 675.

26. *See, e.g.,* Herbert S. Hadley, *Outline of Code of Criminal Procedure*, 12 A.B.A. J. 690 (1926) [hereinafter Hadley, *Outline of Code*]; Hadley, *supra* note 17, at 674; A.L.I., REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL JUSTICE 1 (1935) [hereinafter ALI REPORT].

27. Hadley, *supra* note 17, at 679.

28. Hadley, *Outline of Code*, *supra* note 26, at 690. Also serving on the sixteen-member committee were Roscoe Pound and John Wigmore. *Id.*

proposed criminal procedure reforms, including a harmless error provision.<sup>29</sup> The note to the harmless error provision proposed by Hadley's committee asserted that the presumption of prejudice approach of appellate courts of the era was "the most disastrous doctrine that has developed in the criminal jurisprudence of America."<sup>30</sup>

Everett P. Wheeler, a prominent leader of the New York bar and champion of civil service reform, was one of the most consistent and effective voices advocating criminal procedural reform just after the turn of the twentieth century.<sup>31</sup> Wheeler, who was a frequent writer and speaker to the academic and practitioner communities,<sup>32</sup> also took his message of the need for criminal procedural reform to the general public.<sup>33</sup> One theme that jumps out from Wheeler's writings is the notion that procedure plays an essential role in crime control, order maintenance, and in quelling compulsion toward vigilantism.<sup>34</sup>

Lester Orfield, easily one of the most influential criminal law academics of the first half of the twentieth century, also lent his considerable prestige to the campaign for harmless error reform. Orfield was a prolific scholar of criminal law and procedure and lent a keen eye toward diagnosing and offering solutions to problems of criminal justice administration. Just as Hadley and others in the campaign had complained regarding criminal procedure more generally, Orfield often argued that twentieth-century criminal appellate procedure was burdened by the formalistic approaches of the past.<sup>35</sup> In particular, Orfield cited the inclination of appellate courts to

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29. See *id.* at 693 ("On the hearing of an appeal a judgment of conviction shall not be reversed on the ground of misdirection of the jury or rejection of evidence, or for error as to any matter of pleading or procedure, unless in the opinion of the appellate court, after an examination of the record before the court it shall appear that the error complained of has resulted in a miscarriage of justice.").

30. *Id.*

31. See WHEELER, *supra* note 12, at 403. The 1917 *New York Times* book review of Wheeler's memoir credits him with making significant contributions to tariff reform, civil service reform, and the reform of municipal government in New York City. *Sixty Years of American Life: Mr. Everett P. Wheeler's Reminiscences of Well-Known Men and Affairs*, N.Y. TIMES, Feb. 11, 1917, at BR3 (book review).

32. See, e.g., Everett P. Wheeler, The American Bar Association's Recommendations as to Judicial Procedure (Jan. 28–29, 1909) (paper presented at the 32nd Annual Meeting of the New York State Bar Association), in 1909 N.Y. ST. BAR ASS'N PROC. 32–50. Interestingly, Wheeler also had a special interest in, and wrote an early twentieth-century biography of, Daniel Webster. See EVERETT PEPPERRELL WHEELER, DANIEL WEBSTER: THE EXPOUNDER OF THE CONSTITUTION (1905).

33. See, e.g., Everett P. Wheeler, *Procedural Reform in the Federal Courts*, 66 U. PA. L. REV. 1 (1917) [hereinafter Wheeler, *Procedural Reform*]; Everett P. Wheeler, Letter to the Editor, *Reform in Criminal Procedure*, N.Y. TIMES, July 19, 1903, at 8 [hereinafter Wheeler, Letter to the Editor].

34. See, e.g., WHEELER, *supra* note 12, at 403; Wheeler, *Procedural Reform*, *supra* note 33, at 9; Wheeler, Letter to the Editor, *supra* note 33, at 8.

35. See, e.g., ORFIELD, *supra* note 15, at 190.



reverse criminal convictions on technical grounds.<sup>36</sup> As is discussed below, this emphasis on appellate reversals due to “technicalities” would be a central rhetorical weapon of the harmless error campaign.

William Howard Taft, the only person to serve both as President and Chief Justice of the United States,<sup>37</sup> was a forceful advocate of criminal procedural reform,<sup>38</sup> including criminal appellate reform in the form of the harmless error rule,<sup>39</sup> throughout the early twentieth century. Even while serving as President, Taft spoke out in favor of criminal procedural reform.<sup>40</sup> Although it may seem odd today for a sitting commander-in-chief to engage on such a level, Taft had been a state prosecutor, state trial judge, federal appellate judge, law school professor, and dean in his early career,<sup>41</sup> so his experience and associations made him uniquely positioned and inclined to use the ultimate “bully pulpit” to advance the campaign for the harmless error rule. When his presidency ended in 1913, Taft not only took a chair in law on the Yale College faculty and joined the Yale Law School faculty,<sup>42</sup> he also assumed the presidency of the American Bar Association,<sup>43</sup> the organization which—as is discussed below—made the most concrete progress toward establishing the federal harmless error rule. Later, as Chief Justice, Taft would remain a critic of criminal law administration in the United States.<sup>44</sup>

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36. See, e.g., *id.* at 182.

37. See, e.g., ALPHEUS THOMAS MASON, WILLIAM HOWARD TAFT: CHIEF JUSTICE 17 (Univ. Press of Am. 1983) (1964).

38. See, e.g., William H. Taft, The Administration of Criminal Law, Commencement Speech to Yale Law School (June 26, 1905), in 15 YALE L.J. 1, 16–17 (1905).

39. See, e.g., Nathan William MacChesney, *A Progressive Program for Procedural Reform*, 3 J. AM. INST. CRIM. L. & CRIMINOLOGY 528, 530 (1912).

40. See, e.g., William H. Taft, First Annual Message of the President (Dec. 7, 1909), available at <http://millercenter.org/scripps/archive/speeches/detail/3782> (last visited Apr. 23, 2010) (“In my judgment, a change in judicial procedure, with a view to reducing its expense to private litigants in civil cases and facilitating the dispatch of business and final decision in both civil and criminal cases, constitutes the greatest need in our American institutions.”); William H. Taft, Administration of Criminal Law, Commencement Speech to Yale Law School (June 26, 1905), in WILLIAM H. TAFT, PRESENT DAY PROBLEMS: A COLLECTION OF ADDRESSES DELIVERED ON VARIOUS OCCASIONS 333 (1908); see also *Third Annual Report of the Standing Committee to Suggest Remedies and Propose Laws Relating to Procedure* (Sept. 3–5, 1919) (presented at American Bar Association meeting) [hereinafter *Third Annual Report 1919*], in 5 A.B.A. J. 455, 457 (1919); Marcus Cauffman Sloss, *Reform of Criminal Procedure*, 1 J. AM. INST. CRIM. L. & CRIMINOLOGY 705, 705 (1910).

41. FREDERICK C. HICKS, WILLIAM HOWARD TAFT: YALE PROFESSOR OF LAW & NEW HAVEN CITIZEN 10–11 (1945).

42. *Id.* at 29, 48.

43. *Id.* at 83.

44. See, e.g., MASON, *supra* note 37, at 278 (quoting Chief Justice Taft as once stating that “the administration of criminal law in the United States is a disgrace to our civilization”). Taft was dogged in his efforts at federal judicial reform and served as the catalyst for the eventual adoption of the Federal Rules of Civil Procedure in 1938, eight years after his death. See *id.* at 88–120.

Also among this impressive group of reformers was the eminent legal scholar, Roscoe Pound. Indeed, Roscoe Pound might be thought of as the father of the larger early twentieth-century criminal procedure reform project—and not only because of his voluminous and meticulous research on the functioning of American criminal courts, which supplied much of the undergirding for the effort.<sup>45</sup> Pound, who has been referred to as the “high-priest of the forces concerned with the improvement of criminal justice,”<sup>46</sup> gave a rousing address in 1906 at the Minnesota State Capitol building where the twenty-ninth annual gathering of the American Bar Association was convened.<sup>47</sup> The speech, which some consider to be “the most influential paper ever written by an American legal scholar,”<sup>48</sup> was *the* “call to action” to the legal profession on the issue of procedural reform.<sup>49</sup> In the address, Pound, then dean at the University of Nebraska Law School (ten years before accepting the deanship at Harvard Law),<sup>50</sup> decried what he termed the “sporting theory of justice,”<sup>51</sup> in which lawyers would plant error in the record with the knowledge that appellate courts would grant a new trial if the jury ultimately did not rule in their favor.<sup>52</sup> Pound thought this situation was attributable, in significant part, to the technical and formalistic approach being taken by appellate courts in assessing and remedying error at trial.<sup>53</sup>

These and other prominent legal figures worked independently and collaboratively in varying combinations under the sponsorship and auspices of

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45. See, e.g., ROSCOE POUND, *CRIMINAL JUSTICE IN AMERICA* (1930); RAYMOND FOSDICK ET AL., *CRIMINAL JUSTICE IN CLEVELAND* (Roscoe Pound & Felix Frankfurter eds., 1922); Roscoe Pound, *The Canons of Procedural Reform*, 12 A.B.A. J. 541, 545 (1926) [hereinafter Pound, *The Canons*]; see also FRANKLYN C. SETARO, *A BIBLIOGRAPHY OF THE WRITINGS OF ROSCOE POUND* (Eldon R. James ed., 1942). Pound was also responsible for laying the groundwork of the massive and influential restatement project of the American Law Institute. PAUL SAYRE, *THE LIFE OF ROSCOE POUND* 258 (1948).

46. Harvard Law School Library, Roscoe Pound Papers, 1888–1964 Finding Aid, <http://oasis.lib.harvard.edu/oasis/deliver/~law00087> (last visited Apr. 23, 2010).

47. See SAYRE, *supra* note 45, at 260; see Pound, *supra* note 15, at 395–417.

48. Rex E. Lee, *The Profession Looks at Itself—The Pound Conference of 1976*, 1981 B.Y.U. L. REV. 737, 738 (quoting WILLIAM T. GOSSETT ET AL., *Foreword*, *THE POUND CONFERENCE: PERSPECTIVES ON JUSTICE IN THE FUTURE* 7 (A. Leo Levin & Russell R. Wheeler eds., 1979)); see also Symposium, *Centennial Reflections of Roscoe Pound's "The Causes of Popular Dissatisfaction with the Administration of Justice"*, 48 S. TEX. L. REV. 849, 849–942 (2007). But see Russell R. Wheeler, *Roscoe Pound and the Evolution of Judicial Administration*, 48 S. TEX. L. REV. 943 (2007).

49. Although Pound limited his comments to civil procedural reform, see Pound, *supra* note 15, at 396, many of his observations, such as those critiquing the automatic reversal regime, see *id.* at 405, applied with equal force to the criminal context.

50. See SAYRE, *supra* note 45, at 137–60, 208–46.

51. Pound, *supra* note 15, at 404, 406.

52. *Id.* at 404–05.

53. *Id.* at 406, 413–14.

several leading law reform entities dedicated to the establishment of the harmless error rule in criminal appellate practice. Although, as discussed below, the institutional players are often cited as being responsible for the establishment of the harmless error rule, the true credit belongs with the aforementioned group of loosely affiliated individuals. This notion goes beyond the observation that any institution is only as effective as the individuals who comprise it. Instead, it highlights the prestige and skill these individuals lent to the cause, along with the diligent effort they expended in its favor—all of which ultimately spelled success for the harmless error rule campaign.

### *B. Institutions*

Although the aforementioned reformers often worked in an individual capacity, they also collaborated under the auspices of many law reform entities active in the early twentieth century. These entities, such as the National Commission on Law Observance and Enforcement (also known as the Wickersham Commission),<sup>54</sup> the Association of American Law Schools,<sup>55</sup> and the American Institute of Criminal Law and Criminology,<sup>56</sup> all were integral to the campaign of lobbying legislators, producing scholarship, and shaping public opinion in favor of the adoption of a harmless error rule. However, two institutions in particular, the American Bar Association and the American Law Institute, were at the forefront of the successful effort to establish the harmless error rule.

#### 1. American Bar Association

With its ability to bring together the bar, bench, and academy, the American Bar Association (ABA) served a key role in the adoption of a harmless error rule, as well as the larger criminal procedure reform project.<sup>57</sup> A review of the archives of the *American Bar Association Journal*, which was a widely read and influential periodical in the early twentieth century, reveals the steady march of advocacy on this and other procedural reforms advanced by the ABA through its Standing Committee to Suggest Remedies and

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54. See, e.g., MASON, *supra* note 37, at 153–55. It has been noted that although the Hoover-appointed Crime Commission was chaired by former Attorney General George Wickersham, Roscoe Pound was the true workhorse of the effort. See SAYRE, *supra* note 45, at 119.

55. ROALFE, *supra* note 22, at 221; *Report of the Joint Committee on the Improvement of Criminal Justice*, 54 A.B.A. ANN. MEETING REP. 513, 513 (1931) [hereinafter *Report on Improvement of Criminal Justice*].

56. ROALFE, *supra* note 22, at 60–62; see also Devroye, *supra* note 23.

57. See, e.g., Everett P. Wheeler *Congratulates the American Bar on Its First Victory for Reform in Judicial Procedure*, 72 CENT. L.J. 123 (1911) [hereinafter *Wheeler Congratulates*].

Propose Laws Relating to Procedure.<sup>58</sup> The ABA Standing Committee lobbied vigorously in the states and drafted proposed federal legislation establishing a harmless error rule in both civil and criminal cases in federal courts. The ABA's proposed legislation amending the federal Judicial Code read in relevant part as follows:

On the hearing of any appeal, certiorari, writ of error, or motion for a new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors or defects or to exceptions which do not affect the substantial rights of the parties.<sup>59</sup>

A bill largely parroting this ABA-drafted legislation passed the House of Representatives in 1916<sup>60</sup> but languished in the Senate due to concerns expressed by a number of Senators that the harmless error rule "created too strong a presumption in favor of the correctness of the judgment in the court of first instance."<sup>61</sup> After revision and wordsmithing, ABA legislation was introduced in the Senate and eventually reported out from the Senate Judiciary Committee, only to be held over by individual Senators with grave concerns about the legislation, a pattern that played out over several sessions of Congress.<sup>62</sup> Finally, in 1919, the legislation passed both houses of Congress and was signed into law by President Woodrow Wilson.<sup>63</sup> The "harmless error" statute read as follows:

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58. See, e.g., *First Annual Report of the Standing Committee to Suggest Remedies and Propose Laws Relating to Procedure*, 3 A.B.A. J. 507 (1917) [hereinafter *First Annual Report 1917*].

59. *Id.* at 507.

60. The legislation went through several iterations in the House in response to various concerns, but the core harmless error provision received consistent support. See H.R. REP. NO. 64-264 (1916); H.R. REP. NO. 63-1218 (1914); H. REP. NO. 62-1066 (1912); H.R. REP. NO. 62-611 (1912); H.R. REP. NO. 61-1949 (1911).

61. *First Annual Report 1917*, *supra* note 58, at 507. A significant reason for opposition in the Senate was an aversion to the application of a harmless error rule in *criminal* cases. Saltzburg, *supra* note 3, at 1010 n.67. Records of the reform efforts show that a coordinated lobbying effort was undertaken in the Senate. See, e.g., *Wheeler Congratulates*, *supra* note 57, at 123 (urging supporters to attempt to persuade members of the Senate Judiciary Committee to support the harmless error legislation). Interestingly, the ABA had argued that the proposed legislation was important to the nation's war effort. *First Annual Report 1917*, *supra* note 58, at 508 ("[T]he passage of [the harmless error legislation] would be of great service to the government and to the public in the litigation which was certain to arise during the present war.").

62. See, e.g., *Wheeler, Procedural Reform*, *supra* note 33, at 11-12; *First Annual Report 1917*, *supra* note 58, at 507-08; *Ninth Annual Report of the Special Committee to Suggest Remedies and Formulate Proposed Laws to Prevent Delay and Unnecessary Cost in Litigation*, 2 A.B.A. J. 603 (1916).

63. *Third Annual Report 1919*, *supra* note 40, at 455; H.R. REP. NO. 65-913 (1919).

On the hearing of any appeal . . . , in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties.<sup>64</sup>

A reminder of the ABA's influence lies in the fact that the language of the 1919 law was derived almost entirely from that of the ABA proposal.<sup>65</sup> The statute, later described by the U.S. Supreme Court as "a reaction to the hypertechnicality that had developed in American jurisprudence,"<sup>66</sup> was a significant legislative victory for the reformers. Moreover, the federal legislative campaign helped to raise the profile of the reform movement in the states, yielding legislative victories there as well.<sup>67</sup>

However, the statute establishing a harmless error rule in federal cases was limited in its impact. First, it did not reach errors grounded in violations of constitutional or statutory rights.<sup>68</sup> Second, the statutory commands of the 1919 law and similar state statutes insufficiently instructed appellate judges on how to assess whether an error was prejudicial.<sup>69</sup> Perhaps most important for the reformers, as with the English experience just after Parliament's passage of its harmless error rules, the 1919 Act of Congress failed to capture the "hearts and minds" of federal appellate judges.<sup>70</sup> In other words, despite the legislation, many appellate courts still operated under the old approach, in which trial error was deemed to be presumptively prejudicial.<sup>71</sup> Much more

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64. Act of Feb. 26, 1919, Pub. L. No. 65-281, 40 Stat. 1181 (amending Judicial Code § 269, 36 Stat. 1163 (1911)).

65. Compare text accompanying note 59 with text accompanying note 64. See also H.R. REP. NO. 62-611 (1912) ("The bill, as originally drawn, was prepared by a committee of the American Bar Association."); Everett P. Wheeler, *Disregarding Technical Errors*, 89 CENT. L.J. 390, 390 (1919).

66. *United States v. Lane*, 474 U.S. 438, 471 (1986).

67. See, e.g., S.S.P. Patteson, *A Blow at Technicalities*, 18 VA. L. REG. 161, 161-65 (1912); Wheeler, *Procedural Reform*, *supra* note 33, at 12-16; *Third Annual Report 1919*, *supra* note 40, at 456-57 (noting that, by 1919, over half of the states had adopted some form of the harmless error rule).

68. See, e.g., *Bruno v. United States*, 308 U.S. 287, 294 (1939) ("Suffice it to indicate what every student of the history behind the Act of February 26, 1919, knows, that that Act was intended to prevent matters concerned with the mere etiquette of trials and with the formalities and minutiae of procedure from touching the merits of a verdict."); Kamin, *supra* note 4, at 10.

69. See, e.g., TRAYNOR, *supra* note 4, at 15-17; ORFIELD, *supra* note 15, at 196; see also Paul M. Hebert, *The Problem of Reversible Error in Louisiana*, 6 TUL. L. REV. 169, 170 (1932); N.C. Collier, *Harmless Error*, 72 CENT. L.J. 151 (1911).

70. See, e.g., ORFIELD, *supra* note 15, at 196; Wigmore, "Reversible Error," *supra* note 24, at 29; see also Lester B. Orfield, *Appeal Under the American Law Institute Code of Criminal Procedure*, 2 U. CHI. L. REV. 437, 453 (1935) [hereinafter Orfield, *Appeal Under the American Law Institute*].

71. See, e.g., Edson R. Sunderland, *The Problem of Appellate Review*, 5 TEX. L. REV. 126,

work needed to be done to make these legislative victories complete; part of that work fell to the American Law Institute.

## 2. American Law Institute

In the early 1920s, the ABA, the Association of American Law Schools, and the Institute of Criminal Law and Criminology—all major players in the criminal procedural reform project in their own right—all requested that the American Law Institute (ALI) develop a model code of criminal procedure.<sup>72</sup> In response to the call, in 1925 the ALI Committee to Study Defects in Criminal Justice, led by Herbert Hadley, reluctantly undertook the massive task of proposing a model set of criminal procedural rules.<sup>73</sup> As the result of several years of work, in 1930 the ALI Council adopted a model Code of Criminal Procedure containing rules that covered most aspects of the criminal process, from arrest, pretrial, and grand jury proceedings, to trial through posttrial motions, judgment, and appeal.<sup>74</sup> This model code also contained a harmless error provision:

No judgment shall be reversed or modified unless the appellate court after an examination of all the appeal papers is of the opinion that error was committed which injuriously affected the substantial rights of the appellant. It shall not be presumed that error injuriously affected the substantial rights of the appellant.<sup>75</sup>

Within a decade of the ALI's adoption of the model Code of Criminal Procedure, Congress and many state legislatures passed statutes establishing

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146–47 (1926). *But see* HARLAN F. STONE, *LAW AND ITS ADMINISTRATION* 116–17 (Colum. Univ. Press 1967) (1915); Zechariah Chafee, Jr., *The Progress of the Law, 1919–1922—Evidence* (pt. 3), 35 HARV. L. REV. 673, 711 (1922) (noting changes in appellate practice in the wake of the passage of harmless error legislation).

72. *See* ALI REPORT, *supra* note 26, at 3; CHARLES B. HOWLAND & HERBERT F. GOODRICH, A.L.I., *THE CODE OF CRIMINAL PROCEDURE—A SHORT DESCRIPTION* 4 (1931). These organizations, particularly the ABA, ALI, and Association of American Law Schools, had a history of combining efforts on procedural reform. *See, e.g., Report on Improvement of Criminal Justice, supra* note 55, at 513.

73. *See* A.L.I., *REPORT TO THE COUNCIL BY THE COMMITTEE ON A SURVEY AND STATEMENT OF THE DEFECTS IN CRIMINAL JUSTICE* 52–54 (1925) (recommending to the ALI Council that a restatement of criminal procedure not be undertaken by the Institute at that time).

74. *See* CODE OF CRIMINAL PROCEDURE (Official Draft 1930).

75. *Id.* at 169–70; *see also* Orfield, *Appeal Under the American Law Institute, supra* note 70, at 453. From the outset of the ALI's work on criminal procedural reform, appellate “[r]eversals for unsubstantial error” were considered to be a major problem with the status quo. *See* WILLIAM E. MIKELL & EDWIN R. KEEDY, A.L.I., *A PLAN FOR THE PREPARATION OF A CODE OF CRIMINAL PROCEDURE* 8 (1925).

harmless error review.<sup>76</sup> Still other states had established harmless error review by judicial decree.<sup>77</sup> Given the high esteem in which the ALI is held, its model Code's harmless error provision represented important validation of the legislative trend toward harmless error review.<sup>78</sup>

#### IV. RHETORIC AND TACTICS OF THE REFORMERS

Despite the ABA's successful work toward the passage of the 1919 federal harmless error rule, and the ALI's considered adoption of a harmless error provision in its model Code a decade later, there remained about a dozen holdout state jurisdictions where the reformers were unable to establish a harmless error rule.<sup>79</sup> Furthermore, even in jurisdictions with a harmless error statute, there persisted the perception among reformers that the hearts and minds of appellate judges had not been sufficiently changed such that they ceased to reverse convictions for technical errors under the harmless error statute.<sup>80</sup> Likewise, many practitioners' views of appellate practice had been forged in the era of automatic reversal, and hence, they were not inclined to push for changes in appellate practice.<sup>81</sup> Additionally, there were concerns regarding the public perception of fairness under a regime in which not all trial errors led to a new trial for a criminal defendant.<sup>82</sup> Therefore, the reformers not only sought out legislative victories, but also looked for ways to influence public opinion, as well as the mindset of the bench and bar through the use of robust rhetoric regarding the harmless error rule, and a new vision of the appellate function in criminal cases.

Certainly, the reformers' primary mode of persuasion was to trumpet the ways in which a harmless error rule would enhance the efficiency, effectiveness, and fairness of the criminal justice system. These worthy aims mimicked those of the larger criminal procedure reform project. However, a survey of the literature and speeches produced by the reformers' advocacy efforts from the turn of the twentieth century through World War II reveals a number of rhetorical themes that provide insight to the unique strategies and priorities of those engaged in the campaign for the harmless error rule.

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76. See, e.g., ORFIELD, *supra* note 15, at 195 n.52; Hebert, *supra* note 69, at 172-76; Sunderland, *supra* note 71, at 147.

77. Sunderland, *supra* note 71, at 147.

78. However, as is discussed below, some harmless error reformers believed that establishment of the harmless error rule through rulemaking was superior to legislative adoption. See *infra* Part V.

79. ORFIELD, *supra* note 15, at 195 n.52.

80. See, e.g., Sunderland, *supra* note 71, at 146-47 (describing the problem as one of "professional psychology"); Kavanagh, *supra* note 12, at 222-23.

81. See, e.g., Kavanagh, *supra* note 12, at 222-23.

82. See, e.g., G.N. Williamson, Letter to the Editor, *Is All Error Presumptively Prejudicial?*, 84 CENT. L.J. 309, 309-10 (1917); ORFIELD, *supra* note 15, at 196-97.

*A. Responsibility of the Appellate Bench*

Many in the harmless error campaign sought to place the blame for the problems of the presumed prejudice and automatic reversal regime squarely at the feet of the appellate bench.<sup>83</sup> Reformers often advanced the idea that appellate judges were fearful of judging and, in applying a strict rule of automatic reversal, were simply hiding behind the argument that they should avoid trampling on the jury's prerogative.<sup>84</sup> Also, some reformers appealed to the notion that, because many appellate judges generally were drawn from so-called "better classes" of society and the profession, they were expected to support and apply the harmless error rule for the benefit of the profession and society.<sup>85</sup>

In support of the desired attitudinal shift on the part of appellate judges, some reformers called for unification of the trial and appellate bench, and rotations of appellate judges for service on the trial bench.<sup>86</sup> The hope was that, as a result of this trial experience, appellate judges would be more sensitive to the impact of reversals on the work and morale of trial courts.<sup>87</sup> Additionally, some reformers also called for appellate judges to be appointed, rather than elected,<sup>88</sup> and for a norm of brevity to be imposed on the drafting of appellate opinions—the idea presumably being that in fewer reporter pages, there would be less temptation and opportunity for appellate judges to engage in reasoning leading to reversals.<sup>89</sup> The reformers' call for the harmless error rule was complemented by another key item of the larger criminal procedural reform agenda: the call for waiver of jury trial.<sup>90</sup> The reformers not only considered the ability to waive jury trial a tremendous efficiency benefit,<sup>91</sup> but

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83. See, e.g., ORFIELD, *supra* note 15, at 182.

84. John Wigmore wrote in 1935 that judges' steadfast adherence to the automatic reversal approach "labels as senseless mechanized robots the incumbents of a high office whose function presupposes in every cause the conscious exercise of mature wisdom and intelligent justice." Wigmore, "Reversible Error," *supra* note 24, at 29.

85. See, e.g., Hadley, *supra* note 17, at 678; Kavanagh, *supra* note 12, at 222–23.

86. See, e.g., ORFIELD, *supra* note 15, at 197; Orfield, *Appeal Under the American Law Institute*, *supra* note 70, at 453; Pound, *The Canons*, *supra* note 45, at 545.

87. See, e.g., Orfield, *Appeal Under the American Law Institute*, *supra* note 70, at 453.

88. See, e.g., ORFIELD, *supra* note 15, at 202–03; Orfield, *Appeal Under the American Law Institute*, *supra* note 70, at 453.

89. See, e.g., ORFIELD, *supra* note 15, at 203–04; Orfield, *Appeal Under the American Law Institute*, *supra* note 70, at 453.

90. See, e.g., ORFIELD, *supra* note 15, at 206–08; Orfield, *Appeal Under the American Law Institute*, *supra* note 70, at 453.

91. See, e.g., Charles S. Potts, *Criminal Procedure from Arrest to Appeal: A Book Review*, 26 TEX. L. REV. 607, 623 (1948) (reviewing LESTER B. ORFIELD, *CRIMINAL PROCEDURE FROM ARREST TO APPEAL* (1947)); cf. Roger A. Fairfax, Jr., *The Jurisdictional Heritage of the Grand Jury Clause*, 91 MINN. L. REV. 398, 430–37 (2006). Even the most ardent of the early twentieth-century



some reformers also thought jury trial waiver would avoid jury instructions and evidentiary errors at trial that led to perceived abuses of appellate review in the automatic reversal regime.<sup>92</sup>

Another rhetorical device reformers often utilized to influence appellate judges was the perceived nexus between the lack of a harmless error rule and increasing crime rates in many urban jurisdictions across the country in the early twentieth century.<sup>93</sup> Reformers often characterized such rising crime rates as a direct result of the automatic reversal regime, in which, given the difficulty of securing conviction on retrial,<sup>94</sup> criminals were portrayed as escaping just conviction due to “technicalities” noticed by appellate courts.<sup>95</sup> Reformers thus linked the harmless error rule to public safety. As one commentator wrote in 1926, “[i]n their zeal for the protection of the defendant the courts too often forget that the public are also entitled to be protected. This is deplorable.”<sup>96</sup> The use of such rhetoric is somewhat curious given that in many jurisdictions, criminal appeals were relatively rare, with prohibitive record and filing fees, lack of counsel, and other barriers to most defendants obtaining appellate review of their convictions.<sup>97</sup> In fact, as Lester Orfield pointed out in the early 1930s, most criminals were being set free not because of appellate rulings but because of police error or exercises of prosecutorial discretion to *nolle pros* or dismiss cases.<sup>98</sup> However, perhaps because a

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reformers advocating for waiver in jury trials likely would be surprised by the ubiquity of plea bargaining in today’s criminal justice system. See, e.g., Michael M. O’Hear, *Plea Bargaining and Procedural Justice*, 42 GA. L. REV. 407, 409 (2008).

92. See, e.g., ORFIELD, *supra* note 15, at 206–08; Orfield, *Appeal Under the American Law Institute*, *supra* note 70, at 453. Related to this was a proposal to make criminal appeals discretionary so as to ensure that those filed had substantive merit. See, e.g., ORFIELD, *supra* note 15, at 202.

93. See, e.g., Hadley, *supra* note 17, at 674–75; Kavanagh, *supra* note 12, at 217–21; see also Saltzburg, *supra* note 3, at 1005–06 n.56. It should be acknowledged that some reformers decried the inadequacy of crime statistics recordkeeping and reporting in the first part of the twentieth century. See, e.g., THORSTEN SELLIN, CRIMINAL STATISTICS IN THE UNITED STATES 504 (1931). M.K. Wischart conducted a quantitative study demonstrating that “crime waves” in one city were largely manufactured by ratcheting up media coverage of relatively stable rates of crime. See FOSDICK ET AL., *supra* note 45, at 544–55.

94. See, e.g., George B. Rose, *Why Justice Limpers in Pursuing Crime*, 60 AM. L. REV. 321, 333–34 (1926) (noting the difficulty of securing a conviction on retrial).

95. See, e.g., RAYMOND B. FOSDICK, CRIME IN AMERICA AND THE POLICE 29–34 (1920); Wigmore, *supra* note 12, at 353–54; see also Kavanagh, *supra* note 12, at 218–20.

96. Rose, *supra* note 94, at 334; see also Kavanagh, *supra* note 12, at 223 (“The tenderness of technicality which has so long encouraged and shielded the criminal is about to meet the awakening anger of an endangered public.”).

97. See, e.g., ORFIELD, *supra* note 15, at 183.

98. *Id.* at 183–84.

significant proportion of criminal appeals that proceeded resulted in reversal, the reformers had an effective rhetorical device.<sup>99</sup>

### *B. Responsibility of the Legal Academy and Profession*

#### 1. The Law Schools

Reformers, a number of whom were prominent law professors, also called upon the academy to do its part in advancing the adoption and application of the harmless error rule in criminal appellate practice. This call to action had two facets. First, reformers requested that legal scholars redouble their efforts in producing scholarship in the area of adjudicatory criminal procedure and appellate procedure.<sup>100</sup> Thus, as the campaign effectively had utilized legal scholarship as a platform for advancing its legislative agenda, it sought to use scholarly research to help shift the legal culture toward the harmless error approach.

In addition, reformers asked law schools to do a much better job of preparing law students for practice,<sup>101</sup> presumably because pedagogical innovation would pay dividends down the road with attorneys who would eschew the “gamesmanship” reformers associated with the presumption of prejudice and automatic reversal regime.<sup>102</sup> Furthermore, the reformers believed, law students exposed to inquiries into the shortcomings of criminal justice would be better equipped to work toward solutions when called to the Bar.<sup>103</sup>

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99. On a related note, some reformers cited the scourge of lynching in the early twentieth century as a rationale for adopting and applying criminal procedure reforms, including the harmless error rule. See, e.g., John David Lawson, *Technicalities in Procedure, Civil and Criminal*, 1 J. AM. INST. CRIM. L. & CRIMINOLOGY 63, 83–84 (1910); Taft, *supra* note 38, at 16–17. Reformers sometimes exploited opportunities presented when the media covered lynchings supposedly motivated by community frustration with the slow speed of justice, particularly when earlier convictions had been reversed on appeal. See WHEELER, *supra* note 12, at 403 (recounting the Virginia case of a “[N]egro desperado” who was shot while allegedly resisting arrest after having escaped from pretrial detention for three prior convictions in the same case that were overturned on appeal); Wheeler, *Procedural Reform*, *supra* note 33, at 9 (noting the “connection between lynch law and a certain proneness in the courts to grant new trials”). Interestingly, despite the high-profile work Ida B. Wells and others were doing to document the growing phenomenon of lynching of blacks in the Jim Crow South, see IDA B. WELLS, *CRUSADE FOR JUSTICE* (Alfreda M. Duster ed., 1970); ROBERT L. ZANGRANDO, *THE NAACP CRUSADE AGAINST LYNCHING, 1909–1950*, at 5–7 (1980), some reformers highlighted intraracial lynchings when advancing specific examples of the negative consequences of a regime in which convictions are lightly reversed on technicalities. See, e.g., Wheeler, Letter to the Editor, *supra* note 33, at 8.

100. See, e.g., Orfield, *Appeal Under the American Law Institute*, *supra* note 70, at 453.

101. See, e.g., ORFIELD, *supra* note 15, at 210.

102. See, e.g., WILLOUGHBY, *supra* note 12, at 417; Kavanagh, *supra* note 12, at 221; cf. TRAYNOR, *supra* note 4, at 15 (describing “battles of bright or dull wits in the courtroom on witless technicalities”).

103. See, e.g., *Report on Improvement of Criminal Justice*, *supra* note 55, at 518–19.

## 2. The Bar

Complementing this charge to law schools for better training of future lawyers was a call to the profession for increasing the quality of prosecutors and the Bar in general through improved hiring standards and increased opportunities for continuing legal education.<sup>104</sup> An interesting feature of the campaign was that it sometimes employed a fairly strident, class-based critique of the Bar. Perhaps because of the professional accomplishment and status of many of those leading the harmless error campaign, there was a not-so-subtle appeal to “class divisions” within the Bar; the reluctance of the legal profession to embrace the harmless error approach, some reformers opined, was due in part to those in the criminal defense bar who were perceived to possess lesser talents than those in other segments of the Bar.<sup>105</sup> The implication was that these opponents of the harmless error rule were lesser lawyers who exploited the strict rule of automatic reversal to make up for their lack of training, intelligence, and skill.<sup>106</sup>

## V. FINAL VICTORY—ESTABLISHMENT OF HARMLESS ERROR THROUGH JUDICIAL RULEMAKING

Despite their substantial legislative victories, many reformers believed that establishment of the harmless error rule by court rulemaking rather than by statute was the preferred course. Reformers thought rulemaking was superior to legislative activity because courts could apply expertise and experience to the task of developing harmless error rules, whereas legislators drafting harmless error statutes may not have had legal training.<sup>107</sup> In addition, whereas procedural reform such as the adoption of the harmless error rule could occupy but a tiny sliver of a broad agenda in any given legislative session, courts did not have the same level of competing interests

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104. See ROALFE, *supra* note 22, at 60 (describing John Wigmore as an early advocate of continuing legal education); ORFIELD, *supra* note 15, at 208–09; Orfield, *Appeal Under the American Law Institute*, *supra* note 70, at 453; *Report on Improvement of Criminal Justice*, *supra* note 55, at 519; MacChesney, *supra* note 39, at 529.

105. See, e.g., Hadley, *Outline of Code*, *supra* note 26, at 691; Hadley, *supra* note 17, at 679 (“The criminal practice has, except in unusual cases, been abandoned as unremunerative and unattractive by the great majority of our better lawyers.”).

106. See, e.g., E.J. McDermott, *Delays and Reversals on Technical Grounds in Criminal Trials*, 2 J. AM. INST. CRIM. L. & CRIMINOLOGY 28, 28 (1911). Similar rhetoric was used to describe state legislators who resisted harmless error legislation. See, e.g., ORFIELD, *supra* note 15, at 199–200. These legislators, many of whom had solo or small law practices, were accused of protecting their interest in maintaining the status quo, which rewarded gamesmanship in trial litigation over skill and training. See *id.*

107. See, e.g., ORFIELD, *supra* note 15, at 201.

and priorities to distract them from the task.<sup>108</sup> Furthermore, court rulemaking made sense to the reformers, given that courts would be charged with implementing, applying, and interpreting the harmless error rule.<sup>109</sup> Finally, reformers thought that there would be greater “buy-in” to the harmless error doctrine from appellate judges if the rules were established by courts rather than legislatures.<sup>110</sup>

However, on the reformers’ largest stage—the federal level—there would be a significant wait for judicial rule-based establishment of the harmless error rule in criminal cases to follow on the 1919 federal harmless error statute. In 1940, Congress granted the U.S. Supreme Court authority to promulgate rules of federal criminal procedure.<sup>111</sup> The advisory committee’s unpublished preliminary draft of the rules included a provision for harmless error—(Unpublished) Preliminary Draft Rule 41—which read as follows: “Harmless Error. Errors and defects of any kind which do not affect substantial rights shall be disregarded.”<sup>112</sup>

After receiving early feedback from the Supreme Court, the unpublished draft was edited and the First Preliminary Draft of the Federal Rules of Criminal Procedure was transmitted to Chief Justice Harlan F. Stone in May 1943.<sup>113</sup> The draft, consisting of fifty-six rules and 216 pages, contained

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108. See, e.g., *id.*

109. See, e.g., *id.*; Elihu Root, Letter to the Editor, *Is All Error Presumptively Prejudicial?—Mr. Root’s Views*, 84 CENT. L.J. 310, 310 (1917).

110. See, e.g., ORFIELD, *supra* note 15, at 201.

111. Act of June 29, 1940, Pub. L. No. 76-675, 54 Stat. 688. For background on the formation of the Rules Advisory Committee and the process for the drafting of the Federal Rules of Criminal Procedure, see Fairfax, *supra* note 91, at 437–39; Alexander Holtzoff, *Participation of the Bar in Judicial Rule-Making*, 3 F.R.D. 165 (1944). The Supreme Court recently had promulgated rules governing civil procedure and appellate procedure. See ORFIELD, *supra* note 15, at 304; Fairfax, *supra* note 91, at 438. The appellate rules did not contain a harmless error provision. See Act of February 24, 1933, Pub. L. No. 72-371, 47 Stat. 904, *amended by* Act of March 8, 1934, Pub. L. No. 73-117, 48 Stat. 399 (authorizing the Supreme Court to promulgate federal appellate rules).

112. In a memorandum incorporating the Supreme Court’s comments on the preliminary draft of the rules, the Justices queried whether there should “be added a provision that plain error, when prejudicial, may be noticed by an appellate court.” See Memorandum of June 10, 1942, at 12 (attached to Letter from Harlan F. Stone, Chief Justice of the U.S., to Arthur T. Vanderbilt, Chairman, Advisory Comm. on the Rules of Criminal Procedure (June 16, 1942), in 1 DRAFTING HISTORY OF THE FEDERAL RULES OF CRIMINAL PROCEDURE 11, 24 (Madeleine J. Wilken & Nicholas Triffin eds., 1991) [hereinafter DRAFTING HISTORY]). The particular comment also questioned whether a provision should be added to Rule 41 or elsewhere making clear that only upon a finding of prejudice would a variance between the indictment and proof warrant reversal of a conviction or dismissal of a charge. See Memorandum of June 10, 1942, *supra*, at 12. No further Supreme Court comment, however, was focused on the existence or merits of the harmless error rule.

113. See Letter from Arthur T. Vanderbilt, Chairman, Advisory Comm. on the Rules of Criminal Procedure, to Harlan F. Stone, Chief Justice of the U.S. (May 3, 1943), in FED. R. CRIM. P., at xiii (First Preliminary Draft 1943).

extensive notes and annotations, evidence of the tremendous effort expended by the committee in the year since the unpublished preliminary draft had been completed. The harmless error rule in the first preliminary draft was reworded slightly and recaptioned Rule 48, which included, just as the Supreme Court had suggested in its feedback on the earlier unpublished preliminary draft, a plain error provision:

Rule 48. Harmless Error and Plain Error.

(a) HARMLESS ERROR. Any error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded.

(b) PLAIN ERROR. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.<sup>114</sup>

The annotation to Rule 48(a) commented that the proposed provision superseded in criminal cases and contained the substance of the 1919 harmless error statute,<sup>115</sup> as well as the 1872 statute which saved grand jury indictments (and criminal proceedings based thereupon) from nonprejudicial errors of form.<sup>116</sup> The annotation went on to explain: "In thus rejecting, as did Congress in [the 1919 harmless error statute], the older doctrine that prejudice should be presumed from the commission of error, this proposal reflects the spirit of the rules as a whole, as expressed in proposed Rule 2 (Purpose and Construction)."<sup>117</sup> This "spirit of the rules as a whole" included the desire for "simplicity in procedure, fairness in administration, and the elimination of unjustifiable expense and delay."<sup>118</sup>

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114. FED. R. CRIM. P. 48 (First Preliminary Draft 1943); *see also* Memorandum of June 10, 1942, *supra* note 112, at 12.

115. *See* 28 U.S.C. § 391 (1926), *amended by* Act of Jan. 31, 1928, Pub L. No. 70-10, 45 Stat. 54 ("On the hearing of any appeal, certiorari, writ of error, or motion for a new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties.").

116. FED. R. CRIM. P. 48 note to subdivision (a) (First Preliminary Draft 1943); *see also* 18 U.S.C. § 556 (1926), *amended by* Act of May 18, 1933, Pub L. No. 73-16, 48 Stat. 58 ("[N]o indictment found and presented by a grand jury in any district or circuit or other court of the United States shall be deemed insufficient, nor shall the trial, judgment, or other proceeding thereon be affected by reason of any defect or imperfection in matter of form only, which shall not tend to the prejudice of the defendant . . ."). The annotation also compared FED. R. CIV. P. 61 (Harmless Error) and 59 (New Trials). FED. R. CRIM. P. 48 note to subdivision (a) (First Preliminary Draft 1943).

117. FED. R. CRIM. P. 48 note to subdivision (a) (First Preliminary Draft 1943).

118. *See id.*; FED. R. CRIM. P. 2 (First Preliminary Draft 1943) ("Rule 2. Purpose and Construction. These rules are intended to provide for the just determination of every criminal proceeding. They shall be construed to secure simplicity in procedure, fairness in administration, and the elimination of unjustifiable expense and delay.").

Committee chairman Arthur T. Vanderbilt stressed to Chief Justice Stone the advisory committee's desire to obtain "the suggestions of judges and lawyers" across the nation "[b]efore the Committee would feel justified in making any definitive recommendations to the Court" regarding the proposed rules.<sup>119</sup> Chief Justice Stone gave the Committee permission to distribute the first preliminary draft of the rules to "members of the profession and others especially interested, and invite the submission of their views to the Committee."<sup>120</sup> The first preliminary draft of the rules was thus circulated at the end of May 1943, and comments and suggestions were requested by September 15, 1943.<sup>121</sup> Committees appointed by the federal district courts reviewed the preliminary draft in most districts, and invitation was made to bar associations and committees, individual attorneys, and individual judges to transmit suggestions to the Advisory Committee directly, or via the local committees.<sup>122</sup> The Rules also were discussed as part of the Institute on Federal Criminal Rules, conducted in conjunction with the American Bar Association 1943 annual meeting and the Judicial Conference of the U.S. Court of Appeals for the Ninth Circuit. Despite the hundreds of pages worth of suggestions and recommendations received by the advisory committee, Rule 48(a) of the first preliminary draft was not the object of much commentary,<sup>123</sup> an indication of the greatly diminished controversy surrounding the harmless error rule by this time.<sup>124</sup>

The second preliminary draft of the rules was transmitted to the Supreme Court in November 1943 and distributed to the legal community for comment

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119. Letter from Vanderbilt to Stone, *supra* note 113.

120. Letter from Harlan F. Stone, Chief Justice of the U.S., to Arthur T. Vanderbilt, Chairman, Advisory Comm. on the Rules of Criminal Procedure (May 22, 1943), in *FED. R. CRIM. P.*, at xvii (First Preliminary Draft 1943). Chief Justice Stone made clear that the Court had not engaged in any substantive review of the rules, but rather had examined the draft to ensure they were "in form for submission to the Bench and Bar, and to others interested in an improved criminal procedure for the federal courts." *Id.*

121. *FED. R. CRIM. P.* foreword, at iv (First Preliminary Draft 1943).

122. *Id.* at iii.

123. See generally 1-2 COMMENTS, RECOMMENDATIONS, AND SUGGESTIONS RECEIVED CONCERNING THE PRELIMINARY DRAFT OF THE FEDERAL RULES OF CRIMINAL PROCEDURE (1943) (published separately on Sept. 25, 1943, and Oct. 4, 1943) [hereinafter COMMENTS], reprinted in 2-3 DRAFTING HISTORY, *supra* note 112. Indeed the sole comment directed toward Rule 48(a) came from the Committee on Criminal Law and Procedure of the Brooklyn Bar Association, which suggested that "[t]here should be added that if there is a divided vote in the Appellate Court as to whether the error is 'harmless,' that very division should create a reasonable doubt and a new trial granted." 2 COMMENTS, *supra*, at 541.

124. It should be noted that the Federal Rules of Civil Procedure, promulgated in 1938, contained a harmless error provision, an earlier achievement of the broader procedural reform movement. See *FED. R. CIV. P.* 61 (1938).

in February 1944.<sup>125</sup> The numerical designation of the harmless error rule was shifted from Rule 48(a) to Rule 55(a), but no substantive change was made to the text of the rule or the annotations.<sup>126</sup> There were no comments submitted through the notice and comment process regarding the harmless error rule in the second preliminary draft.<sup>127</sup>

The final draft of the rules was submitted to the Supreme Court in July 1944. The text of Rule 55(a) did not change from the second preliminary draft, though the numerical designation was shifted to Rule 52(a). The annotation to Rule 52(a) was streamlined a bit in the final draft, stating at the outset that “[t]his rule is a restatement of existing law,” and quoting both the 1919 harmless error statute and the 1872 grand jury statute which appeared in the annotations to the previous versions of the rule.<sup>128</sup> Chief Justice Stone submitted the Advisory Committee’s final report and draft of proposed rules to Attorney General Francis Biddle, who passed them along to Congress a month later.<sup>129</sup> On March 21, 1946, the Federal Rules of Criminal Procedure went into effect, and included among them was Rule 52(a): “Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.”<sup>130</sup> The federal harmless error rule in criminal cases had been established fully through court rulemaking.<sup>131</sup>

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125. See FED. R. CRIM. P. foreword, at iv (Second Preliminary Draft 1944).

126. See FED. R. CRIM. P. 55(a) (Second Preliminary Draft 1944).

127. See generally 3–4 COMMENTS, *supra* note 123 (published separately on May 29, 1944, and June 6, 1944). The Supreme Court, however, did comment on the harmless error provision in Rule 55(a) of the second preliminary draft. See Memorandum of Harlan F. Stone, Chief Justice of the U.S., to Arthur T. Vanderbilt, Chairman, Advisory Comm. on the Rules of Criminal Procedure (Apr. 11, 1944), at 5, in 7 DRAFTING HISTORY, *supra* note 112, at 9 (“Would it not be well for the annotation to this rule to state that by it it is intended to adopt the rulings on this subject of *McCandless v. United States*, 298 U.S. 342, 347, 348 [(1936)]; *Bruno v. United States*, 308 U.S. 287 [(1939)]; *Glas[s]er v. United States*, 315 U.S. 60, 67 [(1942)], and not merely to adopt as a rule that if there is evidence to support the conviction, error can be disregarded. There is a strong tendency for the courts in some of the circuits to treat almost any error as non-prejudicial if there is substantial evidence to support the conviction.”).

128. See FED. R. CRIM. P. 52 note to subdivision (a) (Final Draft 1945).

129. See Letter from Francis Biddle, Attorney General, to the Senate and House of Representatives of the United States (Jan. 3, 1945), in FED. R. CRIM. P., at iii (1946); Letter from Harlan F. Stone, Chief Justice of the U.S., to Francis Biddle, Attorney General (Dec. 26, 1944), in FED. R. CRIM. P., at v (1946).

130. FED. R. CRIM. P. 52(a) (1946). The rule was meant to affect the purpose of, and make no change to, the substance of the 1919 harmless error statute. See *Bihn v. United States*, 328 U.S. 633, 638 n.3 (1946) (noting that Rule 52(a) “is merely a restatement of existing law and effects no change in the ‘harmless error’ rule”). It should be noted that, two years after Rule 52 was promulgated, Congress repealed the 1919 harmless error statute, see Act of June 25, 1948, ch. 646, § 39, 62 Stat. 998, and then later passed a supplemental harmless error statute to remove any lingering doubt about the status of the harmless error rule in American criminal practice. See Act of May 24, 1949, ch. 139, § 110, 63 Stat. 105 (now codified at 28 U.S.C. § 2111 (2006)); see also Saltzburg, *supra*

Attorney General Tom Clark, when introducing the final version of the Federal Rules of Criminal Procedure in 1946, considered them the culmination of the criminal procedural reform project of the early twentieth century.<sup>132</sup> Likewise, Rule 52(a)'s harmless error provision certainly was seen as the cornerstone of that successful project. The reformers would declare victory in shifting both the law of criminal appellate review and the attitude of appellate judges and the legal profession as a whole over the forty years following Roscoe Pound's 1906 call to action. By the time the Supreme Court would take up *Chapman v. California*<sup>133</sup> a generation later, in 1967, the question was no longer whether appellate courts would apply the harmless error rule to so-called technical errors, but rather how the harmless error rule would be applied to *constitutional* errors—a tremendous shift in the legal consciousness.<sup>134</sup> It is safe to say that such a transformation was due to the efforts of those engaged in the campaign for harmless error.

## VI. CONCLUSION

Although the early twentieth-century reformers achieved their goal of establishing the harmless error rule in American criminal appellate practice, in form and substance, it is fair to ask whether the harmless error rule has achieved its intended goals. As has been suggested, the Federal Rules of Criminal Procedure themselves were a tangible product of the same forty-year

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note 3, at 1006 n.57. The statute, which explicitly applied the harmless error rule to federal appellate courts, even though the Federal Rules of Criminal Procedure already had done so, was passed either out of an abundance of caution or "on the mistaken belief" that the Federal Rules of Criminal Procedure applied only to the federal district courts. Edwards, *supra* note 3, at 1174 n.11 (quoting 3A CHARLES A. WRIGHT, *FEDERAL PRACTICE AND PROCEDURE* § 852, at 296 (2d ed. 1982)); *see also* H.R. REP. NO. 81-352, at 18 (1949) (noting that Section 110 of the bill "[i]ncorporates in title 28, U.S.C., as section 2111 thereof, the harmless error provisions of section 269 of the Judicial Code (now repealed), which applied to all courts of the United States and to all cases therein and therefore was superseded only in part by the Federal Procedural Rules, which apply only to the United States district courts").

131. *See, e.g., Note, The Harmless Error Rule Reviewed*, 47 COLUM. L. REV. 450, 450 (1947) (noting that "[t]he later trend, by decision, constitutional amendment, statute and rule of court, has been toward a return to orthodoxy, requiring affirmance where errors have been harmless"). However, questions of *application* of the harmless error rule—which errors are deemed to be harmless—remained an open question after 1946, *see id.* at 450–51, and, indeed, continue to challenge courts to this day, *see, e.g., Fairfax, supra* note 4, at 2029.

132. Tom C. Clark, *Federal Rules of Criminal Procedure: Foreword*, 6 N.Y.U. SCH. L. INST. PROC., at iii (1946) ("[T]he effective date of the Rules[] closes a struggle, lasting several decades, to achieve procedural reform through judicial rule making.").

133. 386 U.S. 18 (1967).

134. *See, e.g., Edwards, supra* note 3, at 1175–76. Indeed, in 1952, the National Conference of Commissioners on Uniform State Laws approved uniform rules of criminal procedure, which contained a harmless error provision based upon FED. R. CRIM. P. 52. *See* UNIF. R. CRIM. P. 51 (1952) (Rule 57).



campaign to improve the administration of criminal justice in the United States. Therefore, it is probably appropriate to judge the harmless error rule against the process values articulated by the Federal Rules of Criminal Procedure, including efficiency, finality, public confidence, and the fair administration of justice.<sup>135</sup>

Certainly, all of these important values are advanced by the fact that so-called “technical” errors no longer are presumed prejudicial or prompt automatic reversal. However, at what cost have these aims been achieved? Has the pendulum swung too far in the other direction? Some recognize that the harmless error rule revolutionized criminal appellate practice and brought it in line with the needs of modern criminal justice, but note that its application is sometimes flawed.<sup>136</sup> Still others have argued that harmless error review, particularly as applied to constitutional errors, is per se illegitimate.<sup>137</sup>

Though views about the utility and fairness of the harmless error rule may vary, it cannot be denied that it is emblematic of the robust and successful criminal procedure reform activity begun a century ago. The fruits of these reformers’ efforts modernized and forever changed criminal procedure and the administration of criminal justice across the United States. Today, efforts have begun anew to reevaluate and improve the administration of criminal justice in the United States.<sup>138</sup> Our quest for a more fair, efficient, and just criminal justice system—the overarching aim of our predecessors who came

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135. FED. R. CRIM. P. 2 (“These rules are to be interpreted to provide for the just determination of every criminal proceeding, to secure simplicity in procedure and fairness in administration, and to eliminate unjustifiable expense and delay.”).

136. For example, the author has written elsewhere that the harmless error rule has been applied incorrectly in at least one respect—when appellate courts apply harmless error and make findings as to whether a jury that was not instructed on all the elements of an offense “would have” found the missing element given the evidence presented, had the jury been properly instructed. See Fairfax, *supra* note 4, at 2027; see also Charles J. Ogletree, Jr., *Arizona v. Fulminante: The Harm of Applying Harmless Error to Coerced Confessions*, 105 HARV. L. REV. 152 (1991).

137. See, e.g., Steven H. Goldberg, *Harmless Constitutional Error: Constitutional Sneak Thief*, 71 J. CRIM. L. & CRIMINOLOGY 421 (1980).

138. See, e.g., National Criminal Justice Commission Act of 2009, S. 714, 111th Cong. (2009) (legislation proposing to create a national commission to comprehensively reevaluate criminal law and sentencing policies). The Obama Department of Justice recently has undertaken an effort to consider possible reform of federal sentencing policy. See Attorney General Eric Holder, Remarks at the Charles Hamilton Houston Institute for Race and Justice and Congressional Black Caucus Symposium: Rethinking Federal Sentencing Policy 25th Anniversary of the Sentencing Reform Act, (June 24, 2009), available at <http://www.justice.gov/ag/speeches/2009/ag-speech-0906241.html>. In addition, the ALI and ABA are actively considering a number of criminal law-related reforms. See The American Law Institute, 86th Annual Meeting, [http://www.ali.org/index.cfm?fuseaction=meetings.annual\\_updates\\_09](http://www.ali.org/index.cfm?fuseaction=meetings.annual_updates_09) (last visited Apr. 23, 2010); *Congress on Criminal Justice Reform Agenda*, CRIMINAL JUSTICE SECTION UPDATE (A.B.A. Criminal Justice Section, Wash., D.C.), May 2009 (on file with author).

together as bench, bar, and academy a century ago to reform criminal procedure—is just as vital and necessary now as it was then.

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