

To Err Is Human, To Forgive, Often Unjust: Harmless Error Analysis in Child Abuse Dependency Proceedings

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I. Introduction

Courts¹ and commentators² have argued for decades that the *Chapman v. California*³ “beyond a reasonable doubt” harmless error standard is too rigorous and should not be applied in determining the effects of errors in civil cases. Although neither the United States Supreme Court nor any state supreme court has held that a lower than *Chapman* harmless error standard is applicable to determinations of federal constitutional errors in civil cases, review of the issue is imminent since there is currently a split both in the federal circuits and among divisions in state appellate courts regarding the appropriate harmless error standard. In fact, an *amicus curiae* advocate recently asked the California Supreme Court to hold that *Chapman* is inapplicable when determining the effect of federal constitutional error in California civil child abuse cases.⁴ This article will examine the legality and wisdom of lowering the harmless error standard in civil child abuse and neglect dependency proceedings.

II. An Overview of Harmless Error Standards.

The multiplicity of standards of appellate review, the determination of what standards are appropriate or required for particular types of trial error, and the application of those standards have been called, “one of the most significant tasks

¹ See, e.g., *Haddad v. Lockheed Cal. Corp.*, 720 F.2d 1454, 1458-59 (9th Cir. 1983); *Denny H. v. Superior Court*, 33 Cal. Rptr. 3d 89, 97-98 (Ct. App. 2005).

² GARY C. SEISER & KURT KUMLI, CALIFORNIA JUVENILE COURTS: PRACTICE AND PROCEDURE 2-462 to -464 (2d ed. 2008). As early as 1970, former California Supreme Court Chief Justice Roger J. Traynor argued that the *Chapman* beyond a reasonable doubt standard, which requires reversal if there is “a reasonable possibility” that the error may have influenced the verdict, is too harsh, and he proposed a “high probability” for constitutional harmless error analysis. ROGER J. TRAYNOR, THE RIDDLE OF HARMLESS ERROR 35-37 (1970).

³ *Chapman v. California*, 386 U. S. 18 (1967).

⁴ *In re James F.*, 174 P.3d 180, 186 n.1 (Cal. 2008).

of an appellate court, as well as one of the most complex.”⁵ The evolution of standards of review has been, and continues to be, a product of political pressure. Early Nineteenth Century English and American courts liberally determined that even minor errors sufficiently infected trials so as to require “reversals of conviction for mistakes unrelated to the guilt or innocence of the accused.”⁶ Such liberal determinations of prejudicial error eroded public confidence in the judicial system and “[p]ublic outcry...led legal scholars to approach Congress and legislatures on both sides of the Atlantic to enact statutes in an attempt to rein in the courts.”⁷ Congress and state legislatures since the beginning of the Twentieth Century until today have continued to promulgate hundreds of harmless error statutes that circumscribe courts’ discretion to reverse both criminal and civil trials based on non-federal constitutional trial errors.⁸

Judges’ and Justices’ reversal rates have become part of the political fodder of judicial elections and judicial

⁵ TRAYNOR, *supra* note 2, at 80.

⁶ Martha S. Davis, *Harmless Error in Federal Criminal and Habeas Jurisprudence: The Beast that Swallowed the Constitution*, 25 T. MARSHALL L. REV. 45, 46 (1999); Roy Wasson, *The Appellate Process: The Riddling of the Diguilio Harmless-Error Standard: Whether Error “Contributed” to the Verdict*, 5 BARRY L. REV. 57, 62-64 (2005).

⁷ Wasson, *supra* note 5, at 65-66.

⁸ For instance, in 1911 Florida passed a statute providing that “[n]o judgment shall be set aside or reversed, or new trial granted by any court of the State in any cause, civil or criminal...unless in the opinion of the court...after an examination of the entire case it shall appear that error complained of has resulted in a miscarriage of justice.” Wasson, *supra* note 5, at 65-66. In addition, Congress in 1949 enacted 28 U.S.C. § 2111 defining the standard of review for non-constitutional errors in federal cases. David M. Bowman, *A Matter of Life and Death: Revising the Harmless Error Standard for Habeas Corpus Proceedings*, 72 WASH. L. REV. 567, 569 (1997). And in 1996 Congress enacted the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA), 28 U.S.C. § 2254(d)(1), that precluded federal habeas corpus relief from a state court decision unless the “state court determination was not simply error, but an objectively unreasonable application of federal law.” Jeffrey S. Jacobi, *Mostly Harmless: An Analysis of Post-AEDPA Federal Habeas Corpus Review of State Harmless Error Determinations*, 105 MICH. L. REV. 805, 806-07 (2007).

reconfirmation proceedings.⁹ The negative societal connotation of high reversal rates has even affected judges' views of their own percentage of overturned verdicts and the relationship of their reversal rates to those of other judges within the same jurisdiction. In one judicial survey, "the judges demonstrated self-serving or egocentric bias in their responses. Of the 155 judges who responded..., 56.1% reported that their reversal rate would place them in the lowest quartile, and 31.6% placed themselves in the second-lowest quartile. In other words, 87.7% of the judges believed that at least half of their peers had higher reversal rates on appeal."¹⁰

⁹ One of the most infamous political events centered on justices' reversal rates involved California Supreme Court Chief Justice Rose Bird and her colleagues regarding their reversal rates for death penalty cases. In 1986 California voters rejected the retention of Chief Justice Bird and Associate Justices Grodin and Reynoso based mainly on their death penalty voting record. David E. Pozen, *The Irony of Judicial Elections*, 108 COLUM. L. REV. 265, 287 & n.99 (2008); Michael H. Shapiro, *Introduction: Judicial Selection and the Design of Clumsy Institutions*, 61 S. CAL. L. REV. 1555, 1555 n.1 (1988). The politicization of the Rose Bird retention election even sprouted a web site in 1986 that discussed the specifics of her voting record on 57 death penalty cases. Rose Bird Pro Con.org, Conformity of Voting Records, <http://www.rosebirdprocon.org/pop/Conformity.htm> (last visited Oct. 27, 2008). The irony was that it was not until after her death that Chief Justice Rose Bird's legal career was sufficiently lauded. See, e.g., Dick Meister, *The Courage of Rose Bird*, LABORNET VIEWPOINTS 2002, <http://www.labornet.org/viewpoints/meister/rosebird.htm>. In addition, the California Women Lawyers Association in 2000 established the Rose Bird Memorial Award for "excellence as a jurist and longstanding and/or groundbreaking public service and inspiration to women lawyers in California." California Women Lawyers, CWL Awards & Judicial Receptions, <http://www.cwl.org/bird.shtml> (last visited Oct. 27, 2008).

¹⁰ Chris Guthrie, *Misjudging*, 7 NEV. L. J. 420, 436-37 (2007). Judges' egocentric biases affect almost every aspect of trials and "may make it hard for judges to recognize that they can and do make mistakes." Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 815 (2001). One study found support for the conclusion that "district-wide reversal rates also influence judges' decisions...." Joseph L. Smith, *Patterns and Consequences of Judicial Reversals: Theoretical Considerations and Data from a District Court*, 27 JUST. SYS. J. 28, 43 (2006).

It is no wonder that appellate reversal rates have fallen dramatically over the last several decades due to the synergistic effects of heightening the standard of review necessary to prove a trial error sufficiently prejudicial to require reversal during an anti-reversal political climate in which the judges themselves must look over their shoulders at reversal rate “bean counters.” As one study has noted, “the reversal rate in the federal courts of appeals has declined precipitously since 1960...”¹¹ Reversal rates vary considerably according to the substantive area being litigated,¹² the “ideological diversity” of the panel,¹³ the

¹¹ Stefanie A. Lindquist, *Bureaucratization and Balkanization: The Origins and Effects of Decision-Making Norms in the Federal Appellate Courts*, 41 U. RICH. L. REV. 659, 675 (2007). “For all circuits, reversal rates have declined somewhat over time.” *Id.* at 676. However, lower court judges’ fear of being overruled by the Supreme Court has been found to have little effect on lower court decision-making. Pauline T. Kim, *Lower Court Discretion*, 82 N.Y.U. L. REV. 383, 397, 402 (2007).

¹² For instance, “for the twelve months ended September 30, 1997” the reversal rates in the federal appellate courts were 5.4% in criminal cases, 14.5 % in bankruptcy, 7.18% in administrative appeals, and 12.1% in all civil cases. MICHAEL E. & JANE B. TIGAR, *FEDERAL APPEALS: JURISDICTION AND PRACTICE* § 5:1 (3rd ed. 1999). In 2006 the appellate reversal rate in U.S. Courts of Appeals for civil cases was 11.5%. JAMES C. DUFF, *JUDICIAL BUSINESS OF THE UNITED STATES COURTS 2006*, at 130. Between 1973 to 1995 “the overall percentage of capital punishment cases reversed was 68%.” 1 WAYNE R. LAFAVE, JEROLD H. ISRAEL, NANCY J. KIND & ORIN S. KERR, *CRIMINAL PROCEDURE*, § 1.8(e), n.83 (3d ed. 2008). The reversal rate for “patent claim construction” cases has varied from [estimates of] 34.5% to...71%.” Paul M. Scheonhard, *Reversing the Reversal Rate: Using Real Property Principles to Guide Federal Circuit Patent Jurisdictions*, 17 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 299, 303 (2007). The reversal rate for “hybrid law cases” that involve “both state and federal law” is approximately 55%. John F. Preis, *Jurisdiction and Discretion in Hybrid Law Cases*, 75 U. CIN. L. REV. 145, 148, 165 (2006). “The Federal Circuit affirmed Veterans Court’s judgments in nearly three out of every four cases in which the Circuit Court reached the merits.” Michael P. Allen, *Significant Developments in Veterans Law (2004-2006) and What They Reveal about the U.S. Court of Appeals for Veterans Claims and the U.S. Court of Appeals for the Federal Circuit*, 40 U. MICH. J.L. REFORM 483, 492-493 (2007).

¹³ Lindquist, *supra* note 10, at 702.

federal circuit being considered,¹⁴ and by the state being studied.¹⁵

A. *Defining The Lexicon of Harmless Error Analysis.*

One of the major difficulties discussing the many different aspects of standards of appellate review is the inconsistent and confusing use of identical appellate terms to refer to very different concepts. For instance, the term “burden” regarding appeals can refer to many different procedural and substantive concepts. Some courts and commentators refer to the specific degree of certainty required regarding harmless error (beyond a reasonable doubt, clear and convincing evidence, or preponderance of the evidence) as a burden of proof. For instance, Roy Watson states that the “harmless error test, as set forth in *Chapman* and progeny, places the burden on the state, as the beneficiary of the error, to prove beyond a reasonable doubt that the error complained

¹⁴ For instance from 1980-2002 the reversal rate for the Eleventh Circuit was 17%, but the reversal rate for the District of Columbia was 69%. Kevin M. Scott, *Understanding Judicial Hierarchy: Reversals and the Behavior of Intermediate Appellate Judges*, 40 LAW & SOC’Y REV. 163, 176-178 (2006). In addition, the “Ninth Circuit has been at the high end of reversal rates, not just over the past decade, but over the past thirty years.” Stephen J. Wermiel, *Exploring the Myths About the Ninth Circuit*, 48 ARIZ. L. REV. 355, 357 (2006). In 2006 the reversal rate for civil cases was 6% in the District of Columbia, but it was 13.2% in the First Circuit. Those figures changed for criminal appeals with the District of Columbia compiling a 13.6% reversal rate compared to the 7.5% reversal rate for the First Circuit. DUFF, *supra* note 11, at 130.

¹⁵ For instance, the reversal rate in Indiana in 2006 in civil cases was 35%, in 2005 in Georgia 30%, and in California between 2003 to 2006, 20.6%. 24 GEORGE T. PATTON, INDIANA PRACTICE APPELLATE PROCEDURE § 5.1 (3d ed. 2001 & Supp. 2008); CHRISTOPHER J. MCFADDEN, EDWARD C. BREWER III & CHARLES R. SHEPPARD, GEORGIA APPELLATE PRACTICE WITH FORMS app. 2, at 3 (2d ed. 2005 & Supp. 2008); JUDICIAL COUNCIL OF CALIFORNIA, 2007 COURT STATISTICS REPORT: STATEWIDE CASELOAD TRENDS: 1996-1997 THROUGH 2005-2006, at 26. “[T]he average reversal rates vary somewhat from year to year and court to court, [and] they usually are in the 10 to 15 percent range.” Raymond T. Elligett, Jr. & Amy S. Farrior, *To Appeal or Not to Appeal – That is the Client’s Question*, 81 Fla. B.J. 16, 17 (2007).

of did not contribute to the verdict....”¹⁶ However, the term “burden of proof” is most often a trial, not an appellate concept.¹⁷ that refers to the twin issues of which party has the responsibility of producing evidence and the onus of persuading the factfinder.¹⁸ In fact, the Supreme Court has indicated that in harmless error analysis the judge’s application of a particular legal standard to a record to determine harmlessness or prejudice should be characterized as the judge’s degree of doubt, not a party’s burden of proof:

As an initial matter, we note that we deliberately phrase the issue in this case in terms of a judge’s grave doubt, instead of in terms of “burden of proof.” The case before us does not involve a judge who shifts a “burden” to help control the presentation of evidence at a trial, but rather involves a judge who applies a legal standard (harmlessness) to a record that the presentation of evidence is no longer likely to affect. In such a case, we think it conceptually clearer for the judge to ask directly, “Do I, the judge, think that the error substantially influenced the jury’s decision?” than for the judge to try to put the same question in terms of proof burdens (*e.g.*, ‘Do I

¹⁶ Wasson, *supra* note 5, at 57-58. Mills v. Cason, No. 1:03-cv-626, 2006 WL 2632293 (W.D. Mich Sept. 8, 2006) provides another example of the term “burden” on appeal where the court held that under the Antiterrorism and Effective Death Penalty Act that the defendant had the burden of rebutting “the presumption of correctness [of admitting a photographic identification] by clear and convincing evidence.” *Id.* at *4.

¹⁷ The Supreme Court has termed the degree of certainty required of the factfinder in trial court as a “standard of proof” [beyond a reasonable doubt, clear and convincing evidence, or preponderance of the evidence] which “reflects the value society places on individual liberty.” Addington v. Texas, 441 U.S. 418, 425 (1979); In re Winship, 397 U.S. 358, 370-374 (1970) (Harlan, J., concurring).

¹⁸ Richmond Dep’t of Soc. Servs. v. Carter, 507 S.E.2d 87, 88-89 (Va. Ct. App. 1998).

believe the party has borne its burden of showing...?').¹⁹

Other appellate terminology is equally confusing when addressing the appellate justices' role in assessing harmless error. Many opinions and experts confuse the terms "standards of review" and "scope of review" in harmless error analysis.²⁰ For instance, some refer to the level of deference the appellate court should provide the trial court's verdict,²¹ such as de novo, clearly erroneous, or abuse of discretion²² as "standards of review," while others use "scope of review" to refer to those same standards,²³ or to very different appellate

¹⁹ O'Neal v. McAninch, 513 U.S. 432, 436-437 (1995).

²⁰ Professor Richard Maloy, clearly describes the differences between the appellate terms scope of review and standards of review: "'Scope of review' refers to 'the confines within which an appellate court must conduct its examination.' In other words, it refers to the matters (or 'what') the appellate court is permitted to examine. In contrast, 'standards of review' refers to the manner in which (or 'how') that examination is conducted....[W]e have also referred to the standard of review as the 'degree of scrutiny' that is to be applied." Richard H.W. Maloy, "Standards of Review" – *Just a Tip of the Icicle*, 77 U. DET. MERCY L. REV. 603, 608 (2000).

²¹ *Id.* at 610.

²² As the Supreme Court noted in *Concrete Pipe and Prods. of Cal. v. Constr. Laborers Pension Trust for S. Cal.*, 508 U.S. 602 (1993), terms such as "clearly erroneous" and "unreasonable" usually "describe, not a degree of certainty that some fact has been proven in the first instance, but a degree of certainty that a factfinder in the first instance made a mistake in concluding that a fact had been proven under the applicable standard of proof. They are, in other words, standards of review, and they are normally applied by reviewing courts to determinations of fact made at trial by courts that have made those determinations in an adjudicatory capacity.... As the terms readily indicate, a reviewing body characteristically examines prior findings in such a way as to give the original factfinder's conclusions of fact some degree of deference." *Id.* at 622-23 (citation omitted).

²³ Paul R. Verkuil refers to the concepts of de novo, clearly erroneous, substantial evidence, and arbitrary and capricious appellate review as "scope of review" issues. Paul R. Verkuil, *An Outcomes Analysis of Scope of Review Standards*, 44 WM. & MARY L. REV. 679, 689-690, 696 (2002).

issues such as the means of determining prejudicial impact,²⁴ or to the scope of factual evidence permissibly considered on appeal.²⁵

Discussions of standards of review are often difficult to follow because courts and scholars frequently do not make explicit which of the four basic components of a standard of review is being considered.²⁶ The standard of review must allocate the degree of proof necessary for judicial relief²⁷ and determine which party must carry the burden of persuasion.²⁸ In addition, the standard contains at least four elements:

- (1) who bears the burden of proof to show that the error is or is not harmless [**burden of proof**];
- (2) what that burden is [**degree of proof**];
- (3) what the requisite standard of “prejudice” is (i.e., how likely is it that the error did or did not affect the verdict) [**degree of certainty**]; and
- (4) what “approach” the reviewing court must take to evaluate

²⁴ Kim Dayton, *Rethinking Harmless Constitutional Error*, 88 COLUM. L. REV. 79, 126 (1988); (“At present, the proper scope of review is the subject of considerable uncertainty and confusion and dispute. In applying the Chapman test, for instance, some courts have focused on the essentially empirical question of whether the jury that actually convicted the defendant would have done so had no constitutional error occurred. Others have looked to how a hypothetical average jury would have decided the case in the absence of the constitutional error.”).

²⁵ See, e.g., *In re Zeth S.*, 31 Cal. 4th 396, 405 (2003) and *In re Josiah Z.*, 36 Cal. 4th 664, 676 (2005) (determining whether the appellate court can rely on post-judgment data in a dependency appeal).

²⁶ William Wesley Patton, *It Matters Not What is But What Might Have Been: The Standard of Appellate Review for Denial of Counsel in Child Dependency and Parental Severance Trials*, 12 WHITTIER L. REV. 537, 541 (1991).

²⁷ See *Addington v. Texas*, 441 U.S. 418, 423 (1979).

²⁸ Patton, *supra* note 25, at 541.

whether prejudice has been demonstrated
[scope of review].²⁹

If the choice of a particular standard of review is key in determining the percentage of appellate cases that are affirmed or reversed, then the political decision of which standard to adopt should include a discussion of all relevant variables, including whether the current reversal rate under the existing standard of review is consistent with the reversal rates in other similar substantive areas, the reasons why the standard should be changed, and the anticipated results of a proposed change in the test for harmless error.

In order to avoid the confusion among the labels of standards of proof, burden of proof, scope of review, and standards of review, this article will use the term “degree of certainty of harmlessness” to refer to the appellate justices’ decision regarding whether an alleged constitutional error is sufficiently prejudicial to require reversal.³⁰

B. The Dispositive Effects of Different Degrees of Certainty of Harmlessness

As discussed, *supra.*, rules of appellate review range from errors so fundamental and structural as to require automatic reversal without the application of a harmless error analysis,³¹ to standards of review, such as abuse of discretion,

²⁹ John H. Blume & Stephen P. Garvey, *Harmless Error in Federal Habeas Corpus After Brecht v. Abrahamson*, 35 WM. & MARY L. REV. 163, 165-66 (1993). See also Martha A. Field, *Assessing the Harmlessness of Federal Constitutional Error – A Process in Need of a Rationale*, 125 U. PA. L. REV. 15, 16 (1976).

³⁰ For the insignificance of labels for concepts, see John Kaplan, *Of Mabrus and Zorgs – An Essay in Honor of David Louisell*, 66 CAL. L. REV. 987, 987-990 (1978) wherein he used two coined terms to discuss the relationship between juries and judges on questions regarding the admissibility of evidence in relations to the determination of preliminary facts.

³¹ “Only a few constitutional errors have been held to be reversible without application of harmless error analysis.” Wasson, *supra* note 5, at 68-69. “Structural errors are immune from harmless error analysis because

that not only place the persuasion of prejudice on the moving party, but which enshrine the trial court's decision with a presumption of correctness. Empirical data demonstrate that the chosen standard of proof, standard of review, and/or scope of review are potentially outcome determinative in a substantial percentage of appeals.³² Although "the doctrine of harmless error disposes of more appellate issues than any other single judicial application"³³ its application varies widely. For instance, federal courts have used three different standards of review in determining whether or not constitutional error is harmless. Under *Chapman v. California*, "an error is not harmless if it is likely to have had

the right involved is so basic to a fair trial that an infection can never be considered harmless." *Review Proceedings: Appeals*, 36 GEO. L. J. ANN. REV. CRIM. PROC. 817, 859 (2007). Recently the Supreme Court in *U.S. v. Gonzalez-Lopez*, 548 U.S. 140, 150 (2006) determined that denial of the Sixth Amendment right to counsel of one's choice is a structural error not subject to the harmless error rule because "it is impossible to know what different choices the rejected counsel would have made, and then to quantify the impact of those different choices on the outcome of the proceedings." The *Gonzalez-Lopez* court noted that harmless error analysis is appropriate in claims of ineffective assistance of counsel because the court can assess the mistakes made by counsel and their effects on the judgment. *Id.* at 152.

³² Of course, one must distinguish the effects of a chosen standard of review or standards of proof from a chosen scope of review. "Standards of proof differ from scope of review standards in two relevant ways. First, standards of proof are applied by a lower court or agency rather than by a reviewing court. Second, standards of proof are subject to constitutional review, which is rarely the case for scope of review standards." Verkuil, *supra* note 22, at 698. Professor Verkuil notes that different scopes of review will also affect the percentage of appellate reversals. He indicates the affirmance rate for the "arbitrary and capricious" scope of review is 85-90%, for "substantial evidence" review, 75-85%, for "clearly erroneous" review, 70-80%, and for "de novo" review, 40-50%. *Id.* at 689-690. Another study found that harmless error cases were reversed in 58% of appeals, whereas only 15% were reversed under plain error review. Michael W. McConnell, *The Booker Mess*, 83 DENVER U. L. REV. 665, 668-669 (2006).

³³ 2 STEVEN ALAN CHILDRESS & MARTHA S. DAVIS, FEDERAL STANDARDS OF REVIEW 7-1 (3d ed. 1999).

even a minimal impact on juror deliberations”³⁴ In *Harrington v. California*, the harmless error analysis was described as “an error is harmless if overwhelming, untainted evidence of guilt exists in the trial record.”³⁵ And in *Delaware v. Van Arsdall*, the harmless error test was described as a “court balanc[ing] the impact of the error against the overwhelmingness of the untainted evidence. The outcome will rely on either the severity of the error or the weight of the untainted evidence....”³⁶ One study found that these three different harmless error tests resulted in significantly different findings of harmless error. Harmless error was found in 5.9% of cases under the *Chapman* test, nearly 100% under the *Harrington* test, and approximately 70.6% under the *Van Arsdall* hybrid test.³⁷ However, one must remember that even when criminal cases are reversed based upon harmless error analysis most of the defendants are again convicted on retrial or on remand.³⁸ Professor Verkuil argues that the United States Supreme Court in *Santosky v. Kramer* chose the clear and convincing evidence standard with full knowledge that the state could lose more termination of parental rights cases than under the preponderance of the evidence test, and that Congress often chooses a de novo scope of review rather than an arbitrary and capricious test when it wants to place the risk of error on the government rather than on the individual.³⁹

³⁴ *Chapman v. California*, 386 U.S. 18, 34 (1967); Gregory Mitchell, *Against “Overwhelming” Appellate Activism: Constraining Harmless Error Review*, 82 CAL. L. REV. 1335, 1339(1994).

³⁵ *Harrington v. California*, 395 U.S. 250, 254 (1969); William Wesley Patton, *Standards of Appellate Review for Denial of Counsel and Ineffective Assistance of Counsel in Child Protection and Parental Severance Cases*, 27 LOYOLA UNIV. CHICAGO L.J. 216 (1996).

³⁶ *Delaware v. Van Arsdall*, 475 U.S. 673, 684 (1986); Patton, *supra* note 34, at 216.

³⁷ Mitchell, *supra* note 33, at 1335, 1341-52.

³⁸ McConnell, *supra* note 31, at 672.

³⁹ *Id.*; *Santosky v. Kramer*, 455 U. S. 745 (1982).

C. *A Comparison of Reversal Rates in Ordinary Civil Cases and in Child Dependency Cases*

Since California has the highest number of children under dependency court protective placements and publishes detailed statistics regarding the number of civil and dependency cases filed and reversed on appeal, that system's comparative appellate reversal rates assists in gauging whether there is an appellate crisis in dependency law that requires a reconsideration of the degree of certainty of harmlessness.⁴⁰ The number of California court cases involving minors has been dropping during the last decade. Juvenile delinquency arrests have gone from 261,647 in 1995 to 218,146 in 2004, status offense arrests have decreased from 32,172 in 1995 to 30,740 in 2004, and dependency court filings have lowered from 35,124 in 1995 to 33,815 in 2004.⁴¹ Despite the decrease in the number of dependency cases, the percentage of reversals in these cases has remained unchanged. The average reversal rate in California dependency appeals from 2003-2004 through 2005-2006 was 10%.⁴² That 10% reversal rate

⁴⁰ On September 30, 2005, there were approximately 513,000 children in foster care in the United States. Fact, Sheet, Nat'l Working Group on Foster Care and Educ., Educational Outcomes for Children and Youth in Foster Care and Out-of-Home Care 1 (Sept. 2007), available at <http://www.casey.org/friendsandfamilies/partners/NWGFCE>; Am. Bar Ass'n Ctr. on Children and the Law, Our Accomplishments, <http://www.abanet.org/child/accomplishments.pdf> (last visited Nov. 7, 2008). Approximately 19% of all foster children live in California. Ctr. for Families, Children & the Courts, Children in Foster Care in California, <http://www.courtinfo.ca.gov/programs/cfcc/pdf/CJSA-FosterCareMAP.pdf> (last visited Nov. 7, 2008).

⁴¹ JUDICIAL COUNCIL OF CALIFORNIA, CALIFORNIA JUVENILE STATISTICAL ABSTRACT 1-1, 2-7 (Dec. 2005). This decline in child abuse cases is a welcome trend and a dramatic change from the 46% increase experienced between 1979 and 1983. William Wesley Patton, *Forever Torn Asunder: Charting Evidentiary Parameters, The Right To Competent Counsel and the Privilege Against Self-Incrimination in California Child Dependency and Parental Severance Cases*, 27 SANTA CLARA L. REV. 299, 300 (1987).

⁴² 2007 COURT STATISTICS REPORT, *supra* note 14, at 26. Although this data includes dependency court and status offense appeals, a search of Westlaw for the years 2005-2006 did not reveal a single juvenile appeal

is extremely low in relationship to the average reversal rates in criminal appeals, 34%, and in ordinary civil appeals, 20.6%.⁴³ Therefore, if anything, under the current degree of certainty of harmlessness in California dependency appeals, the reversal rate for dependency cases is substantially lower than the rates for other appeals.

1. *The Underlying Explanation for the Reversal Rate in California Dependency Appeals*

Even if one considers a 10% reversal rate in California dependency appeals to be too high, one must consider whether changing the standard is either necessary or the most effective means of lowering that already comparatively low reversal rate. In order to determine whether there might be a pattern of errors among that 10% of child dependency reversals, I conducted a Westlaw search of all dependency court reversals from 2005 through 2007 in termination of parental rights cases. That study discovered that approximately 55% of reversals in child dependency parental severance appeals were based on a single type of error: a failure to follow the law regarding the Indian Child Welfare Act [ICWA].⁴⁴ The results also demonstrated that in California between 2005 and 2007

that only involved a status offense. Those few cases that involved any mention of status offenses pursuant to CAL. WELF. & INST. CODE § 601 involved arguments that the system failed to hold a hearing pursuant to CAL. WELF. & INST. CODE § 241.1 to determine whether a child should proceed in juvenile or dependency court. Therefore, status offense reversal rates had no effect on the dependency court reversal rates.

⁴³ *Id.*

⁴⁴ Indian Child Welfare Act, 25 U.S.C. § 1901 et seq.; CAL. WELF. & INST. CODE § 305.5 (West 2007). On February 6, 2008, I ran the following Westlaw search: “termination /2 parental /1 right & remand reverse & date (after 2004)”. That resulted in 543 reversals and 29 of those cases were from 2008. Therefore, the result was 543 terminations of parental rights reversals from 2005 through 2007, or an average of approximately 181 reversals per year. On February 6, 2008, I also ran the following Westlaw search: “termination /2 parental /1 right & remand reverse & ICWA & date (after 2004)”. That search located 313 terminations of parental rights cases reversed for ICWA error. After subtracting the 14 ICWA reversals, it yielded 299 ICWA reversals for the period between 2005 and 2007, for an average yearly reversal rate of approximately 100 ICWA cases.

there was an average of only 81 non-ICWA terminations of parental rights cases reversed per year.⁴⁵

This study demonstrates that it is not the degree of certainty of harmlessness that is the most significant determinate of California's termination of parental rights reversal rate. The main problem is that attorneys and judges still do not understand and/or follow the dictates of ICWA. Therefore, rather than modifying the *Chapman* harmless beyond a reasonable doubt harmless error standard, California needs to provide more mandatory continuing education for judges and attorneys regarding ICWA. Reducing ICWA errors will precipitously decrease California's already low reversal rate in child dependency proceedings.

2. The Anticipated Results of Lowering the Degree of Certainty of Harmlessness in Child Dependency Appeals

As the previous discussion demonstrated, few dependency appeals in California result in reversal, and the rate of dependency appeal reversals is two times lower than the reversal rate in other civil appeals and three times lower than rate in criminal appeals.⁴⁶ In order to determine whether California should make it even more difficult for parents to prove prejudicial error in attempting to regain custody of their children, one must look at the procedural nature of dependency court cases to determine whether the current equipoise of evidentiary and substantive burdens needs to be altered. California dependency cases are special proceedings and many of the procedural and/or evidentiary rules inherent in criminal and ordinary civil cases are inapplicable.⁴⁷ Unlike

⁴⁵ There was an average of 181 terminations of parental rights reversals per year; 100 were ICWA reversals and 81 were non-ICWA reversals. See Westlaw search on "termination," *supra* note 43.

⁴⁶ *Supra* notes 40 and 41.

⁴⁷ CAL. WELF. & INST. CODE § 345 (West 1987) provides that dependency petitions must be heard in a "special or separate session of the court." CAL. WELF. & INST. CODE § 346 (West 1982) limits access of the press and public to dependency court proceedings. CAL. WELF. & INST. CODE § 355 (West 2004) sets out special evidentiary and hearsay rules for dependency court proceedings.

in ordinary civil cases, the Legislature has lightened the burden of proving child abuse or neglect by substantially expanding the breadth of admissible hearsay evidence.⁴⁸ In addition, the Legislature has provided a statutory *res ipsa loquitur* statute that places the burden of producing evidence on the parents in cases where a minor's injury "is of a nature as would ordinarily not be sustained except as the result of the unreasonable or neglectful acts or omissions of either parent...."⁴⁹

In addition to the less demanding evidentiary standards in child dependency actions, several other variables support a conclusion that the verdicts in these cases may be less reliable than those in ordinary civil and criminal cases. First, as the United States Supreme Court noted in *Santosky v. Kramer*⁵⁰, dependency cases involve very emotionally charged allegations that severely test the factfinder's ability to remain neutral and detached: "For the average adult, few subjects evoke stronger emotions than children, victimization, and sex. Put the three together to form child sexual abuse, and the stage is set for emotional pyrotechnics."⁵¹ Furthermore, the issues are replete with normative decision-making requirements that often involve the potential for cultural and economic biases to affect the determinations. Most of the ultimate dependency court standards such as "best interest of the child" or parenting "in a proper or reasonable manner" are so vague and normatively based that biases may possibly infect the fact finding in spite of the judge's attempt to remain neutral.⁵²

⁴⁸ CAL. WELF. & INST. CODE § 355 (West 2004). For a general discussion of the fairness of the liberal evidentiary rules in California dependency proceedings, see William Wesley Patton, *Evolution in Child Abuse Litigation: The Theoretical Void Where Evidentiary and Procedural Worlds Collide*, 25 LOYOLA L.A. L. REV. 1009 (1992).

⁴⁹ CAL. WELF. & INST. CODE §355.1 (West 1999).

⁵⁰ *Santosky v. Kramer*, 455 U.S. 745, 748-752 (1982).

⁵¹ John E.B. Myers, *The Child Sexual Abuse Literature: A Call for Greater Objectivity*, 88 MICH. L. REV. 1709, 1709 (1990).

⁵² One commentator has noted: "[The] term 'the best interests of the child' is a rather nebulous and ill-defined standard that opens a plethora of considerations. There have been many attempts by courts, not only in

There are two other elements of the child dependency system that should provide additional caution in comparing the validity of fact finding to that in criminal and ordinary civil cases. First, litigants in child dependency cases do not receive the same careful and sophisticated litigation as criminal defendants or parties in ordinary civil cases. Although civil trials may last days or weeks, because of dependency court judges' overburdened dockets and dependency court attorneys' low salaries, the average dependency court hearing lasts approximately 3 to 15 minutes.⁵³ Second, error in dependency court cases is further

California but in other jurisdictions, to attach to that standard some definitive, concrete, and objective terms. Those efforts have failed, for the most part, differing even from case to case. There is still no concrete or definitive standard to which a judge can look when the court must consider the best interests of the child." Christian Reichel Van Deusen, *The Best Interests of the Child and the Law*, 18 PEPP. L. REV. 417, 419-20 (1991) (footnote omitted). "Some critics and courts have questioned the law's presumption that judges conducting bench trials are able to disregard highly prejudicial evidence." Patton, *Evolution In Child Abuse Litigation*, *supra* note 47, at 1012 (relying, in part, on Teri Kathleen Martin, Developing Disposition Decisionmaking Guidelines for Juvenile Courts 80 (date 1985) (unpublished Ph.D. dissertation, University of Illinois at Chicago) ("Emotionalism rather than reason appears to prevail [even in the] legal community charged with decision-making responsibilities for the alleged child molester.")).

53 Melissa D. Protzek, *A Voice for the Children: Court-Appointed Child Advocates are Trying to Make a Difference One Case at a Time in the Lives of Children in the Juvenile Court System*, 22 PA. LAW. 26 (Jan.-Feb. 2000) (explaining that "[j]uvenile court judges in urban areas have about 15 minutes per case to decide the fate of abused and neglected children" and that "caseworkers carry double the caseload recommended by state regulations," up to "several hundred clients" scattered across several counties). "[D]ependency court calendars are so crowded that many juvenile courts only spend between three and 15 minutes hearing a dependency case." Amy Pellman & William Wesley Patton, *The Reality of Concurrent Planning: Juggling Multiple Family Plans Expeditiously Without Sufficient Resources*, 9 U.C. DAVIS J. JUV. L. & POL'Y 171, 181 (2005) (relying on NAT'L CTR. FOR STATE COURTS, EVALUATION DATA: OPEN HEARINGS AND COURT RECORDS IN JUVENILE PROTECTION MATTERS 8 (Aug. 2001). In addition, in the National Center for State Courts survey of the Minnesota open dependency court system they found that the average dependency court hearing lasted between three and ten minutes. William Wesley Patton, *Revictimizing Child Abuse Victims: An*

exacerbated by the unmanageable caseloads of social workers and the inability of parents to receive rapid and complete rehabilitative services that are often not available. Although the social worker to child ratio varies from state to state, California has one of the highest ratios in the nation. For instance, the ratio in Alabama is 13.4 to 1, 15 to 1 in Arkansas, 17 to 1 in Colorado, 18 to 1 in Massachusetts, but between 35 and 50 to 1 in California.⁵⁴ Nevertheless, reform in California is unlikely because it is predicted that there is a need of more than 25,000 new social workers in the next few years.⁵⁵ Furthermore, California social workers do not just have an excessively high case load, changes in the dependency system have made their role in each of those cases much more complex and time-consuming.⁵⁶ Ever since the implementation of concurrent planning, social workers must immediately strive to perfect not only family reunification, but also permanency planning in case the reunification with parents is not accomplished.⁵⁷ One author has described the current dependency system as one of “skyrocketed” caseloads, backlogs in “assessing, ‘marketing,’ and preparing waiting children [for adoption] combined with finding, home studying,

Empirical Rebuttal to the Open Juvenile Dependency Court Reform Movement, 38 SUFFOLK U. L. REV. 303, 321 (2005) (relying on 1 FRED L. CHESSMAN, NAT’L CTR. FOR STATE COURTS, KEY FINDINGS FROM THE EVALUATION OF OPEN HEARINGS AND COURT RECORDS IN JUVENILE PROTECTION MATTERS 8 (Aug. 2001)). For a discussion of the salary and payment methods of dependency court attorneys, see, William Wesley Patton, *Searching for the Proper Role of Children’s Counsel in California Dependency Cases: Or the Answer to the Riddle of the Dependency Sphinx*, 1 J. CENTER CHILD. FAM. & CTS., 21, 30-33 (1999).

⁵⁴ Pellman & Patton, *supra* note 52, at 180.

⁵⁵ CAL. ASSEMBLY HUMAN SERVS. COMM., RECOMMENDATIONS FOR ADDRESSING CALIFORNIA’S SHORTAGE OF SOCIAL WORKERS FINDINGS FROM A SERIES OF HEARINGS CONVENED BY THE CALIFORNIA ASSEMBLY HUMAN SERVICES COMMITTEE 7-8 (Nov. 2002).

⁵⁶ Concurrent planning requires a more “careful thorough and deliberate work in gathering information to make an accurate assessment and solid case plan” than the older reunification model. Fairfax County Foster Care & Adoption Ass’n, Concurrent Planning, Fairfax County, Virginia, at 1, available at <http://www.fcfa.net/concurrentplanning.html>.

⁵⁷ CAL. WELF. & INST. CODE § 361.5(a)(2) (West. 2008) provides for a maximum of six months of reunification services if the child is under three.

and readying willing adoptive parents. In the midst of this pell-mell, helter-skelter environment, unfortunate errors can occur.”⁵⁸

In addition to the overloaded dependency system, states are not meeting their obligations under the Adoption and Safe Families Act of 1997 in terms of permanency time goals or in relation to efforts to provide families with reunification services.⁵⁹ The federal government’s 2002 review of the California Welfare System found that the state failed many of the benchmarks regarding timely permanency, and disclosed that in 19% of cases “diligent efforts” at permanency were not achieved.⁶⁰ The report further found that in 18% of cases the quality and frequency of social workers’ visits with parents “were not sufficient to promote the safety and well-being of the child or promote attainment of case goals.”⁶¹ And in 47% of cases the California Department of Social Services “had not made diligent efforts to involve parents and/or children in the case planning process.”⁶² Finally, even though approximately 67% of parents entering the child dependency system suffer from substance abuse, “only 31% of the agencies responsible for providing them with treatment have the capacity to do so.”⁶³

These alarming statistics beg the question, if the current reversal rate in dependency case is *substantially lower* than in other civil or criminal cases, and if the risk of social

⁵⁸ Richard J. Delaney, *The Permutation of Permanency: Making Sensible Placement Decisions*, IN CHILDREN’S LAW MANUAL 2003: ACCESS TO JUSTICE FOR CHILDREN 8 (Nat’l Ass’n of Counsel for Children ed., 2003).

⁵⁹ Laura Meckler, *States Are Failing Child Welfare Test*, CINCINNATI ENQUIRER, Aug. 19, 2003, http://www.enquirer.com/editions/2003/08/19/loc_wwwloc4awelf19.html.

⁶⁰ ADMIN. OF CHILDREN & FAMILIES, U.S. DEP’T OF HEALTH & HUMAN SERVS., FINAL REPORT: CALIFORNIA CHILD AND FAMILY SERVICES REVIEW 6 (Jan. 2003).

⁶¹ *Id.* at 7-8.

⁶² *Id.* at 10.

⁶³ Shay Bilchik, Remarks at Child Welfare League of America Annual Conference Press Briefing (March 4, 2003), *available at* <http://www.cwlaw.org/execdir/edremarks030304.htm>, at 2.

worker and trial error is greater than in other proceedings due to the expedited nature of dependency case, the high case loads, and the very short court hearings, why should the burden placed on parents appealing decisions affecting their fundamental right to parent be increased by lowering the degree of certainty of harmlessness? The answer seems clear that the standard should not be lowered.⁶⁴ Nevertheless, assuming arguendo, that some states may still consider such a change, Part II discusses the variables to be considered regarding which lower degree of certainty of harmlessness to select.

III. The Issues and Variables Inherent In Deciding Which Degree of Certainty of Harmlessness to Use In Child Dependency Appeals

Courts considering which of the many standards of review to apply in a particular case face a substantial number of policy decisions requiring analysis and balancing of multiple variables. Courts must determine the societal value of the right being litigated since choosing too low a standard of review will denigrate that right,⁶⁵ and too rigorous of a standard of review may marginalize other competing rights and interests.

A. Violations of Federal Constitutional and Statutory Law Litigated in State Courts

The law regarding which degree of certainty of harmlessness applies to violations of federal constitutional or statutory law being litigated in state courts is one of the most

⁶⁴ See Meehan Rasch, *California's Dueling Harmless Error Standards: Approaches To Federal Constitutional Error in Civil Proceedings and Establishing the Proper Test for Dependency*, 35 W. ST. U. L. REV. 433, 462 (2008) (arguing that *Chapman* is the appropriate standard of harmlessness in dependency appeals).

⁶⁵ “[T]here is the danger that a lenient harmless error rule may denigrate the interests and policies which both constitutional and non-constitutional rules promote...courts must be careful in applying the harmless error rule, for if the violation of a rule is too readily held harmless, the importance and effectiveness of the rule is denigrated.” *Commonwealth v. Story*, 383 A.2d 155, 163 (Pa. 1978).

unsettled areas of appellate review.⁶⁶ On the one hand, as one of the staunchest critics of the harmless error rule, former Chief Justice of the California Supreme Court, Roger J. Traynor,⁶⁷ conceded, under the Supremacy clause of the United States Constitution, “[s]tate courts must follow the United States Supreme Court’s test of harmlessness in cases involving the denial of federal constitutional rights...[because] the question of harmlessness is essentially a federal question governed by federal law.”⁶⁸ Under *Chapman v. California*,⁶⁹ the Court determined that the standard of review for constitutional errors is a federal question. Furthermore, the Court decided in *Rushen v. Spain*⁷⁰ that the determination of harmlessness is a “decision...of federal law.”⁷¹ Therefore, state courts appear bound by the Supreme Court’s determinations that federal constitutional structural errors are reversible per se⁷² and non-structural constitutional errors on direct appeal are subject to the *Chapman* beyond a reasonable doubt harmless error rule.⁷³ On the other hand, Professor Coombs and several state courts have questioned not only the

⁶⁶ However, some scholars question the Supreme Court’s power to compel state courts’ use of particular standards of review, even when the state court is considering federal constitutional error in state criminal trials. In their recent treatise, Judge Harry T. Edwards and Professor Linda A. Elliot note that “[i]n the context of civil litigation, there is only sparse Supreme Court precedent defining how the ‘affects substantial rights’ prerequisite [of harmless error analysis] should be assessed. Consequently, generalizations are difficult to draw, and circuit-specific research regarding the precise error at issue is critical.” HARRY T. EDWARDS & LINDA A. ELLIOT, FEDERAL COURTS STANDARDS OF REVIEW 81 (2007).

⁶⁷ In THE RIDDLE OF HARMLESS ERROR (1970) Justice Traynor provided an extensive criticism of the *Chapman* beyond a reasonable doubt harmless error standard.

⁶⁸ *Id.* at 41.

⁶⁹ *Chapman v. California*, 386 U.S. 18 (1967).

⁷⁰ *Rushen v. Spain*, 464 U.S. 114 (1983).

⁷¹ Davis, *supra* note 5, at 90.

⁷² *U.S. v. Gonzalez-Lopez*, 548 U.S. 140, 150 (2006); *Neder v. U.S.*, 527 U.S. 1, 8-9 (1999).

⁷³ “When a state court addresses a harmless-error claim on direct review, that clearly established federal law that it must apply is the *Chapman* standard.” *Eddleman v. McKee*, 471 F.3d 576, 582- (6th Cir. 2006).

scope of Supreme Court and congressional decisions regarding the degree of certainty of harmlessness of federal law in state courts, but have also questioned the Supreme Court's unarticulated power to bind state courts with decisions regarding those appellate standards.⁷⁴

The applicability of federal statutory⁷⁵ or case law degrees of certainty of harmlessness to state court proceedings involving federal questions is a divisive issue among the courts. State courts have concurrent jurisdiction to enforce federal law unless Congress has reserved exclusive federal jurisdiction.⁷⁶ It “takes an affirmative act of power under the

⁷⁴ Professor Coombs has lamented the Supreme Court's failure to “identify... the purported source of its power...” to bind state court standards of review. Russell M. Coombs, *A Third Parallel Primrose Path: The Supreme Court's Repeated, Unexplained, and Still Growing Regulation of State Court's Criminal Appeals*, 2005 MICH. ST. L. REV. 541, 543 (2005). Professor Coombs further noted that the “Court has not yet disclosed how, if at all, its extremely malleable due process rationale may apply to the specific issue of standards of appellate review of decisions of mixed questions of federal constitutional law and fact.” *Id.* at 613. For state decisions questioning federal preemption of state standards of review, see, for instance, *Trombetta v. Raymond James Fin. Servs., Inc.*, 907 A.2d 550, 567-570 (Pa. 2006); *State v. Thurman*, 846 P.2d 1256, 1265-1268 (Utah 1993); *Milstead v. Diamond M. Offshore, Inc.*, 676 So. 2d 89, 92-94 (La. 1996).

⁷⁵ Usually the federal law that a state court is called upon to enforce is statutory, but this need not always be the case. There is an expanding area of “federal common law,” involving matters in which the federal interest is so strong that the federal courts are free to develop substantive rules to protect that interest. When an issue of this nature arises in a state action, the state court must enforce the federal doctrine rather than its own law.” 20 CHARLES ALAN WRIGHT & MARY KAY KANE, *FEDERAL PRACTICE & PROCEDURE DESKBOOK* §47, at 3 (2008).

⁷⁶ 20 WRIGHT & KANE, *FEDERAL PRACTICE & PROCEDURE DESKBOOK* §47, at 1 (2008). “Federal law is enforceable in state courts not because Congress has determined that federal courts would otherwise be burdened or that state courts might provide a more convenient forum – although both might well be true – but because the Constitution and laws passed pursuant to it are as much laws in the States as laws passed by the state legislature.” *Howlett v. Rose*, 496 U.S. 356, 367 (1990). For instance, in *Tafflin v. Levitt*, 493 U.S. 455, 458-59 (1990), the Supreme Court held that “state courts have concurrent jurisdiction over civil RICO claims, in part, because “under our federal system, the States possess sovereignty concurrent with

Supremacy Clause to oust the States of jurisdiction....”⁷⁷ Although it is settled that a decision by Congress or the Supreme Court to preempt state law is binding on the states, there is uncertainty whether or not decisions by lower federal courts regarding standards of review on federal questions are binding on state appellate courts. There is a split in the states on this issue and currently 29 states “expressly consider themselves unbound by federal court of appeals’ decisions on issues of federal law... [because] the Supremacy Clause simply does not compel adherence to ‘inferior’ federal court conclusions on federal law.”⁷⁸ This led one scholar to

that of the Federal Government, subject only to limitations imposed by the Supremacy Clause. Under this system of dual sovereignty, we have consistently held that state courts have inherent authority, and are thus presumptively competent, to adjudicate claims arising under the laws of the United States.”

⁷⁷ *Tafflin*, 493 U.S. at 471 (Scalia, J., concurring) (citing *Houston v. Moore*, 18 U.S. (5 Wheat.) 1, 26 (1820)).

⁷⁸ Colin E. Wrabley, *Applying Federal Court of Appeals’ Precedent: Contrasting Approaches to Applying Court of Appeals’ Federal Law Holdings and Erie State Law Predictions*, 3 SETON HALL CIRCUIT REV. 1, 18-19 (2006). For instance, the California Supreme Court in *Etcheverry v. Tri-AgServ., Inc.*, 22 Cal. 4th 316, 320-321 (Cal. 2000) held that “[w]hile we are not bound by decisions of the lower federal courts, even on federal questions, they are persuasive and entitled to great weight...[w]here lower federal precedents are divided or lacking, state courts must necessarily make an independent determination of federal law, but where the decisions of the lower federal courts on a federal question are ‘both numerous and consistent,’ we should hesitate to reject their authority.” *See also* Comment, *The State Courts and the Federal Common Law*, 27 ALB. L. REV. 73 (1963). Some state courts assume without much independent analysis that federal standards of review apply to all questions of federal law litigated in state court. *See, e.g.*, *Dufour v. Union Pac. R.R. Co.* -Mo. Pac. R.R. Co., 610 So. 2d 843, 845 (La. 1993) (“[b]ecause the instant case arises under FELA, we must apply the standards of review applicable in the federal court system.” [citations omitted]). However, other courts, even within the same state, may take a very strict approach to federalism in determining federal preemption of state standards of review. In *Milstead v. Diamond M. Offshore, Inc.*, 676 So. 2nd 89, 92-93 (1996), the court held that state standards of appellate review were not preempted by standards in the federal Jones Act because standards of review are “procedural in nature”, not substantive, and because the state standards do not frustrate the purposes of the federal statutory scheme. *See also* *Blackburn v. CSX Transp., Inc.*, No. M2006-01352-COA-R10-CV, 2008

conclude, “state courts should decide federal questions the way they believe the Supreme Court would decide them.”⁷⁹

The Ninth Circuit has been the most vocal supporter of the notion that lower federal court decisions on federal questions bind state courts.⁸⁰ Although the Supreme Court has not ruled on the effects of lower federal court decisions on state court’s consideration of federal questions, the Court has “reacted skeptically to the Ninth Circuit’s views...”⁸¹ The conclusion that state appellate courts are not bound by lower federal court determinations of federal issues is based, in large part, on the concepts of structural hierarchy and parallelism, which merely hold that inferior courts are bound by decisions of higher ranked courts. Thus, evenly ranked courts do not bind one another. For instance, the Seventh Circuit disagreed with the Ninth Circuit conclusion that lower federal court decisions on federal law bind state appellate courts: “The court explained that both state courts of last resort and federal courts of appeal were, with respect to federal law questions, ‘co-ordinate courts’ subject to the supervisory jurisdiction of the Supreme Court of the United States.’ But ‘because lower federal courts exercise no appellate jurisdiction over state

WL 2278497, at *7 (Tenn. Ct. App. May 30, 2008) (holding that when a federal FELA case is brought in state court, a state “procedural rule cannot be used to interfere with a substantive right”). The *Blackburn* court rejected the substantive/procedural test for determining whether federal or state standards of review are applicable in FELA cases, and decided that the federal standard of review applied to the review of state court determinations of new trial motions in FELA cases. *Id.* at *13.

⁷⁹ Donald H. Zeigler, *Gazing Into The Crystal Ball: Reflections on the Standards State Judges Should Use to Ascertain Federal Law*, 40 WM. & MARY L. REV. 1143, 1177 (1999).

⁸⁰ *Yniguez v. Arizona*, 939 F.2d 727, 736 (9th Cir. 1991).

⁸¹ *Wrabley*, *supra* note 76, at 27 n.138 (citing *Arizonans for Official English v. Arizona*, 520 U.S. 43, 58, n.11 (1997)). *See also* *Lockhardt v. Fretwell*, 506 U.S. 364, 376 (1993) (Thomas, J., concurring) (“An Arkansas trial court is bound by this Court’s (and by the Arkansas Supreme Court’s and Arkansas Court of Appeals’) interpretation of federal law, but if it follows the Eighth Circuit’s interpretation of federal law, it does so only because it chooses to and not because it must.”).

tribunals, decisions of lower federal courts are not conclusive on state courts.”⁸²

Some state courts have become much more aggressive in fending off claims of federal supremacy and preemption regarding which standards of proof are applicable in state appellate court review of federal questions. For instance, in *State v. Thurman*,⁸³ the Utah Supreme Court found that it was “not required to apply federal standards of review when presented with challenges to trial court determinations made under federal law,” specifically the question⁸⁴ of voluntariness of consent under the Fourth Amendment. Although the Utah court recognized that it “must follow federal standards of review when expressly mandated to do so by Congress or the United States Supreme Court as a matter of substantive federal law,” it found that “the standard of review used by state courts is presumptively a question of state law” because standards of review are normally procedural, not substantive law.⁸⁵ In addition, the Utah court found that in cases in which the Supreme Court fails to expressly mandate a standard of proof for an issue of substantive law, state courts are permitted to determine the appropriate burden of proof for federal constitutional questions provided that the state’s standard of proof is at least comparable to the federal standard’s favorability towards the defendant.⁸⁶ Since the Utah court failed to find any federal standards of review regarding determinations of the voluntariness of consent under the

⁸² Wrabley, *supra* note 76 (discussing U.S. ex. rel. Lawrence v. Woods, 432 F.2d 1072, 1075 (7th Cir. 1970)).

⁸³ 846 P.2d 1256 (1993).

⁸⁴ *Id.* at 1265.

⁸⁵ *Id.* at 1266-1267.

⁸⁶ *Id.* at 1267-1268. The court cited *Lego v. Twomey*, 404 U.S. 477, 489 (1972), in which the Supreme Court “observed that states are free to impose higher burdens of proof on the prosecution than the federal preponderance standard when proving the voluntariness of a confession under the federal constitution.”

Fourth Amendment, it fashioned what it believed was the appropriate state standard of review.⁸⁷

In summary, the majority view is that Supreme Court and congressional findings on the minimal degree of certainty of harmlessness for violations of federal law are binding on state court determinations. However, a majority of states and lower federal courts have held that lower federal court decisions regarding standards of review for federal questions are not binding on the states, but that states have discretion regarding the weight to provide such lower federal court determinations.

B. The “Criminal Versus Civil” and “Constitutional Versus Non-Constitutional” Error Distinctions Regarding Degrees of Certainty of Harmlessness.

The Supreme Court has never expressly decided in a civil case whether *Chapman*’s harmless beyond a reasonable doubt standard applies to determinations of violations of federal constitutional law. However, in dictum, the Court stated that “civil and criminal harmless-error standards do not differ in their treatment of grave doubt as to the harmlessness of errors affecting substantial rights.”⁸⁸ Therefore, lower

⁸⁷ *Thurman*, 846 P.2d at 1268. And in *Trombetta v. Raymond James Fin. Servs.*, 907 A.2d 550, 567-569 (Pa. 2006), the court found that “FAA standards of review cannot pre-empt the Pennsylvania standards of review for arbitration awards unless the Pennsylvania standards of review frustrate the underlying objectives of the FAA, as standards of review are an inherently procedural mechanism used to facilitate judicial resolution of controversies *after* the underlying arbitration agreement has been enforced in accordance with the FAA.” In addition, the *Trombetta* court found “no federal statutory scheme that purports to dictate the standards of review state courts will apply. Such a provision, therefore, is unprecedented. We feel it would stretch the bounds of federalism to conclude FAA §10 mandates pre-emption based on such an antiquated historical foundation.” *Id.* at 567-568. FAA § 10 provided that “the United States court in and for the district where in the award was made...”, and the *Trombetta* court held that that FAA provision clearly did not apply to the states. *Id.* at 569.

⁸⁸ *O’Neal v. McAninch*, 513 U.S. 432, 441 (1995). The *O’Neal* court partially based its view that harmless error standards reviewing federal constitutional issues should be identical in criminal and civil cases on 28 U.S.C. § 391, currently 28 U.S.C. § 2111, in which Congress made no

courts so far have not been constrained in experimenting with different criminal and civil standards of review.

The Ninth Circuit Court of Appeals has been the strongest proponent for differing criminal and civil standards of appellate review. In *Haddad v. Lockheed California Corporation*,⁸⁹ the Ninth Circuit considered the effect of the improper admission of evidence in a civil case not involving any federal constitutional errors. The *Haddad* opinion found that the dispositive factor in determining what degree of certainty of harmlessness to use is not whether the issue is one of federal constitutional law,⁹⁰ but rather the distinction between the burdens of proof in criminal and civil causes of action.⁹¹ The court reasoned that “the lower burden of proof in civil cases implies a larger margin of error” and further found that civil trials require a lower degree of certainty [preponderance] versus a much higher certainty [beyond a reasonable doubt] in criminal trials.⁹² The court then concluded that the “civil litigant’s lessened entitlement to veracity continues when the litigant becomes an appellant” and therefore, the appropriate standard for harmlessness in civil cases is whether the error is “more probably than not harmless” rather than *Chapman*’s harmless beyond a reasonable doubt standard.⁹³

Almost every court that has considered *Haddad*’s lower degree of certainty of harmlessness for civil cases has

distinction between civil and criminal harmless error analysis. *Id.* Although the O’Neal discussion of the criminal/civil harmless error debate still is vital, other aspects of that case have been questioned by congressional passage of the Antiterrorism and Effective Death Penalty Act (AEDPA), 28 U.S.C. § 2234, which articulated a new standard of federal habeas review. *See, e.g., Anderson v. Cowan*, 227 F.3d 893, n.3 (7th Cir. 2000).

⁸⁹ *Haddad v. Lockheed Cal. Corp.*, 720 F.2d 1454 (9th Cir. 1983).

⁹⁰ Since *Haddad* did not involve an issue of the prejudicial impact of any constitutional errors, its discussion of the appropriate distinctions between constitutional and non-constitutional harmless error analysis was dictum.

⁹¹ *Id.* at 1458-1460.

⁹² *Id.* at 1459.

⁹³ *Id.*

systematically rejected that opinion.⁹⁴ The most comprehensive rejection of *Haddad* was rendered in *McQueeney v. Wilmington Trust Company*.⁹⁵ The *McQueeney* court first found that a higher degree of certainty of harmlessness should apply to constitutional errors because of “the unquestioned priority of constitutional rights in our legal system.”⁹⁶ It further rejected *Haddad*’s rationale for lowering the standard for civil appeals based upon *Haddad*’s conclusion that society’s greater tolerance for error under the civil trial burden of proof of preponderance of the evidence⁹⁷:

There is no logical reason, however, that the tolerance for error in the civil context must be compounded by a less stringent standard of harmless error review. Society’s tolerance for risk of error in civil cases may have been subsumed in the decision to establish a lower burden of proof in civil cases; further enlargement of the margin of error therefore distorts, rather than reflect, society’s wishes.⁹⁸]

And the *McQueeney* court delineated another substantial flaw in *Haddad*’s logic in basing the degree of

⁹⁴ In *U.S. Indus. Inc. v. Touche Ross & Co.*, 854 F.2d 1223, 1253 n.38 (10th Cir. 1988), the court adopted a lower standard for civil appeals, but only for cases that do “not involve constitutional deprivations or violations that might argue for the application of a higher standard.” Several other federal courts have either rejected the *Haddad* civil/criminal proceedings distinction and/or the *Haddad* view that the constitutional vs. non-constitutional nature of the error is dispositive or they have chosen a different standard with knowledge of the *Haddad* standard. *See, e.g.*, *Williams v. U.S. Elevator Corp.*, 920 F.2d 1019, 1023 (D.C. Cir. 1990); *Aetna Cas. & Sur. Co. v. Gosdin*, 803 F.2d 1153, 1159-60 & n.13 (11th Cir. 1986); *Conway v. Chem. Leaman Tank Lines*, 525 F.2d 927, 929 n.3 (5th Cir. 1976); *O’Rear v. Fruehauf Corp.*, 554 F.2d 1304, 1308 n.3 (5th Cir. 1977); *Taylor v. Va. Union Univ.*, 193 F.3d 219, 235 & n.10 (4th Cir. 1999).

⁹⁵ *McQueeney v. Wilmington Trust Co.*, 779 F.2d 916 (3rd Cir. 1985).

⁹⁶ *Id.* at 925 n.14.

⁹⁷ *McQueeney* states that acceptance of the *Haddad* view would mean that “jury verdicts are less worthy of respect in civil cases than in criminal” cases based upon the greater margin for error under the lower burden of proof – a proposition the *McQueeney* court was unwilling to adopt. *Id.* at 926.

⁹⁸ *Id.* at 926.

certainty of harmlessness on the burden of proof in the trial court:

We note additionally that whatever facial appeal the linkage between burden of proof at trial and standard of harmless error review at the appellate level may have is further eroded when it is remembered that not all errors are evidentiary errors. When the error is, for example, in the judge's charge to the jury, any argument that derives standard of review from the burden of proof would appear to be irrelevant.⁹⁹

McQueeney articulated three policy reasons for applying identical degree of certainty of harmlessness to criminal and civil harmless error review. First, Congress uses identical standards of review in criminal and civil cases.¹⁰⁰ Second, different types of civil cases employ different burdens of proof and therefore a multitude of different standards of review in civil cases would be required.¹⁰¹ The court found that it was bad public policy to use "an unwieldy tool with which to attain broad societal objectives...through the byzantine turns of the harmless error standard."¹⁰² And finally, the court rejected lowering the degree of certainty of harmlessness in civil cases because it would reduce public confidence in the accuracy and integrity of the judicial branch.¹⁰³

In addition, in *O'Neal v. McAninch*,¹⁰⁴ the Supreme Court rejected the government's argument that a lower harmless error standard regarding prejudice should apply in habeas corpus petitions that raise federal constitutional issues even though habeas proceedings are civil proceedings. The

⁹⁹ *Id.* at 926 n.16.

¹⁰⁰ *Id.* at 927 (quoting FED. R. EVID. 103(a) and 28 U.S.C. § 2111).

¹⁰¹ *Id.* at 927.

¹⁰² *Id.* at 927 n.18.

¹⁰³ "[B]road institutional concerns militate against increasing the number of errors deemed harmless. Although it is late in the day to pretend that all trials are perfect, perfection should still be our goal" and courts "preserve a strong incentive for the district courts to minimize their errors, and we thereby bolster the integrity of the federal judicial process." *Id.* at 927.

¹⁰⁴ *O'Neal v. McAninch*, 513 U.S. 432, 441-44 (1995).

O'Neal court refused to follow ordinary civil appellate rules that place the burden of proof on the party seeking to overturn the verdict, and instead placed the obligation of demonstrating harmlessness on the state that had been victorious on appeal.¹⁰⁵

O'Neal is equally important regarding the balancing of a state's "interest in the finality of its judgments" and "federal-state comity."¹⁰⁶ In child dependency proceedings state courts have often stated that the finality of dependency court determinations, especially those terminating parental rights, is of great importance since children need rapid permanency.¹⁰⁷ Although the Supreme Court recognized important state interests, at least when "we are dealing...with an error of constitutional dimension," the state's interest is "somewhat diminished by the legal circumstance that the State normally bears responsibility for the error that infected the initial trial."¹⁰⁸ Perhaps the clearest statement of a state's interest in

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 443.

¹⁰⁷ The state interests in dependency proceedings are: "(1) [t]o protect the child; (2) to preserve the family and safeguard the parents' fundamental right to raise their child, as long as these can be accomplished with safety to the child; and, (3) to provide a stable, permanent home for the child in a timely manner." *In re Santos Y.*, 112 Cal. Rptr. 2d 692, 727 (Ct. App. 2001).

¹⁰⁸ *O'Neal*, 513 U.S. at 442-43. The Supreme Court reached a different conclusion regarding the degree of certainty regarding harmlessness for federal habeas corpus petitions. In *Brecht v. Abrahamson*, 507 U.S. 619, 634 (1993), the court permitted a lower assurance of harmlessness in post-conviction writ petitions because the defendant had exhausted state appellate remedies and the state under comity principles had a much greater "interest in finality of convictions that have survived direct review within state court systems." *See, e.g., Bowman, supra* note 7, at 575. *See also Fry v. Pliler*, 127 S. Ct. 2321, 2325-27 (2007) (explaining reasons for a more "liberal" rule in habeas corpus cases than in reviews of direct appeals in relation to finality, comity, and federalism). However, as the Court in *O'Neal* indicated, the state's interest in finality is not as great when the state appellate process is considering the questions of constitutional error on direct appeal.

the finality of a constitutionally flawed proceeding was articulated in *Eddleman v. McKee*¹⁰⁹:

A state court acknowledges that its resolution of the case was not perfect when it recognizes a federal constitutional error at trial. While an imperfect judgment still is entitled to a presumption of correctness, this presumption is not as strong as it would be absent any finding of error. Second, the relevant state interest in comity is weaker. When a state proceeding has violated federal constitutional rights, the state's interest in the autonomous administration of its criminal law gives way, at least in part, to the federal government's interest in protecting those rights. When a state court itself admits that a constitutional error occurred at a state trial (and therefore that a strong federal interest is in play), we do not compromise the state's status as a separate sovereign by lessening the deference to the final outcome reached in state court."

Additionally, *O'Neal* supports the *McQueeney* court's reluctance to use several different standards of appellate review¹¹⁰ because in a "highly technical area" such as harmless error analysis "simplicity" diminishes "risk of further, error-produced proceedings."¹¹¹ Even the staunch anti-*Chapman* critic, Justice Roger J. Traynor, cautioned against a complex matrix of appellate review standards based upon distinctions between civil and criminal trials and between constitutional and non-constitutional errors¹¹² since, "each new test brings new complications to appellate review, which may do less to serve justice than to impede it."¹¹³ A system requiring appellate judges to combine several different

¹⁰⁹ *Eddleman v. McKee*, 471 F.3d 576, 584-585 (6th Cir. 2006).

¹¹⁰ *McQueeney v. Wilmington Trust Co.*, 779 F.2d 916 (3rd Cir. 1985).

¹¹¹ *O'Neal*, 513 U.S. at 443.

¹¹² Of course, the distinction of constitutional versus non-constitutional errors may affect more than the degree of confidence that the error was harmless or prejudicial, "[b]ecause constitutional errors are viewed as inherently more serious than other errors, some circuits provide that such errors will be more fully noticed by the appellate court under the plain error rule than are nonconstitutional errors." Davis, *supra* note 5, at 52.

¹¹³ TRAYNOR, *supra* note 2, at 48.

degrees of certainty regarding harmlessness in relation to each different type of trial error will make the calculation of cumulative error analysis impossibly difficult.¹¹⁴

IV. An Application of Harmless Error Analysis In re James F.¹¹⁵

In *In re James F.* the trial court in a child dependency termination of parental rights proceeding appointed a guardian ad litem (hereinafter “GAL”) for the father who was accused of abusing his children. The court of appeal reversed because appointing a GAL without holding a hearing to determine the father’s competence, the purpose of the appointment of a GAL, and without providing the father an opportunity to present evidence against such an appointment, is a structural error that is reversible per se without the necessity of demonstrating actual prejudice.¹¹⁶ The California Supreme Court reversed because it determined that the improper appointment of a GAL is not a structural error, but rather requires an application of harmless error review.¹¹⁷ The Court speculated that based on the differences between criminal and dependency proceedings,¹¹⁸ it is questionable whether the

¹¹⁴ For a discussion of some of the variables in cumulative error analysis, see *Brooks v. State*, 918 So. 2d 181, 202 (Fla. 2005).

¹¹⁵ *In re James F.*, 174 P.3d 180 (Cal. 2008).

¹¹⁶ *Id.* at 182.

¹¹⁷ *Id.* at 188-189.

¹¹⁸ Many of the distinctions between criminal and dependency proceedings articulated by the California Supreme Court to justify a less exacting standard than that required under structural error analysis are of marginal relevance to the discussion. First, the court noted that the rights and protections provided to parents in dependency proceedings are less than those provided to adult defendants. It pointed out that hearsay inadmissible in criminal trials is admissible in termination of parental rights proceedings and that the 4th Amendment is inapplicable in dependency proceedings. *Id.* at 189. However, if anything, the less reliable evidence introduced in dependency proceedings should warrant at least as rigorous an appellate review standard as that used in criminal cases in order to assure that a parent’s fundamental right to parent is not erroneously severed. The court also noted that in criminal proceedings, but not in dependency proceedings, plea bargaining plays a major role and criminal defendants have a right to a jury trial. Again, these distinctions do

concept of structural error is ever applicable in dependency proceedings.¹¹⁹

But the relevance of *In re James F.* to the present discussion of the required degree of certainty of harmlessness in child dependency proceedings is contained in footnote 1:

The California State Association of Counties (hereinafter “CSAC”), appearing as *amicus curiae*, has asked us to decide not only that the error is amenable to harmless error analysis, but also that the appropriate harmless error standard is by clear and convincing evidence rather than harmless beyond a reasonable doubt. Because we did not grant review on the appropriate harmless error standard and the parties

not lead to the conclusion that appellate review in dependency proceedings should be less stringent than in criminal cases. First, the court is incorrect that plea bargaining does not take place in dependency proceedings. The Department of Child and Family Services and the parents’ attorneys often work out deals in which parents plead to amended petitions that strike some of the more egregious allegations. For a discussing of plea bargaining in dependency proceedings, see William Wesley Patton, *Child Abuse: The Irreconcilable Differences Between Criminal Prosecution and Informal Dependency Court Mediation*, 31 U. LOUISVILLE J. FAM. L. 37, 57-60 & n.86 (1992-93); WILLIAM WESLEY PATTON, LEGAL ETHICS IN CHILD CUSTODY AND DEPENDENCY PROCEEDINGS: A GUIDE FOR JUDGES AND LAWYERS 88-119 (2006). In addition, the lack of a right to a jury trial for parents in dependency proceedings should argue for heightened standards of appellate review, not lower review, since the extremely normative fact finding process will be accomplished by a single individual who may not represent community norms. In addition, since parents do not have a constitutional right to a jury trial, a more rigorous appellate review standard will not frustrate the 7th Amendment prohibition of second-guessing the jury. Finally, the court stated that in dependency proceedings, but not in criminal proceedings, the “ultimate consideration” is “the welfare of the child.” *James F.*, 174 P.3d at 189. However, what the court did not articulate is that if a termination of parental rights proceedings is infected by constitutional error, society should have confidence that the parent and child should have been permanently severed, and therefore, there is no certainty that the result was actually in the child’s best interest.

¹¹⁹ *James F.*, 174 P.3d at 189.

have not briefed it, we do not address that that issue here.¹²⁰

Although the California Supreme Court did not decide at this time whether the level of certainty of harmlessness is clear and convincing evidence rather than *Chapman's* beyond a reasonable doubt standard, given that the court took great pains to distinguish criminal from dependency proceedings, and since *amicus curiae*, California State Associations of Counties, files numerous petitions in California dependency proceedings,¹²¹ it is just a matter of time before the California Supreme Court will decide this issue.

A. *The Significance of Amicus Curiae, The California State Association of Counties*

According to its *amicus curiae* brief in *In re James F.*, the California State Association of Counties (hereinafter "CSAC") is a non-profit corporation in which every California county can be a member. CSAC subsidizes a Litigation Coordination Program, managed by the County Counsel's Association of California (hereinafter "CCAC") and supervised by the Association's Litigation Overview Committee, which consists of county counsels throughout California. San Diego County was appointed to write the *amicus curiae* brief in *In re James F.* on CSAC's behalf.¹²² Although CSAC and CCAC are separate organizations for some purposes, in CSAC's "Litigation Coordination Program" CCAC merely serves as the appellate attorney for CSAC. The symbiotic relationship between the two organizations underscores the fact that they are not fully separate

¹²⁰ *Id.* at 186 n.1.

¹²¹ According to the State of California Appellate Courts website, the California State Association of Counties has filed 32 petitions in the California Supreme Court. <http://appellatecases.courtinfo.ca.gov/search.cfm?dist=0>.

¹²² Brief of Amicus Curiae Cal. State Ass'n of Counties in Support of Los Angeles County Dep't of Children & Family Servs. at 1 n.3, *In re James F.*, 174 P.3d 180 (2007) (No. S150316) [hereinafter CSAC Amicus Brief].

organizations in their appellate functions since county counsel “is the chief civil law officer of the county” and the organization of county counsels, CCAC, writes the appellate briefs for CSAC.¹²³ In addition, in many counties it is the county counsel’s office that represents the Department of Child and Family Services in court regarding allegations of child abuse and/or neglect by parents.¹²⁴ Thus, it should come as no surprise that the California State Association of Counties’ *amicus curiae* brief, written by the San Diego County Counsel’s attorneys, would argue that the California Supreme Court should lower its burden of proving constitutional errors from the *Chapman* beyond a reasonable doubt test to the much lower clear and convincing evidence test because the new test will substantially lower the counties’ and county counsel’s burden on appeal. Nor should it be a surprise that the CSAC brief formed the basis of its clear and convincing evidence argument around one of the San Diego County Counsel attorney’s previous arguments for the clear and convincing evidence standard.¹²⁵

¹²³ See California Counties, County Offices: County Counsel, <http://www.counties.org/default.asp?id=132> (last visited Nov. 1, 2008).

¹²⁴ CAL. WELF. & INST. CODE § 318.5 (West 1987) provides that “[i]n a juvenile court hearing, where the parent or guardian is represented by counsel, the county counsel or district attorney shall, at the request of the juvenile court judge, appear and participate in the hearing to represent the petitioner.”

¹²⁵ The CSAC brief states that in 1996 “Gary Seiser, one of California’s leading experts on juvenile law and practice” first articulated the clear and convincing evidence argument in his juvenile law book, CALIFORNIA JUVENILE COURTS: PRACTICE AND PROCEDURE. CSAC Amicus Brief, *supra* note 120, at 41. Although most *amicus curiae* are not fundamentally neutral on the issues and solutions they posit in appellate cases, one must place the CSAC *amicus curiae* brief in its proper perspective. The brief was written by county counsel to serve the perceived interests of county counsel in their representation of the many Departments of Child and Family Services throughout California and the counties that fund those agencies. The CSAC apparently served as the conduit through which county counsels’ position was presented to the California Supreme Court.

*B. Analysis of CSAC's Proposed Clear and Convincing
Degree of Certainty of Harmlessness Test For Child
Dependency Proceedings*

In its *amicus curiae* brief CSAC admitted that the California “miscarriage of justice” standard is an inadequate harmless error standard for determining federal constitutional error in child dependency proceedings.¹²⁶ However, CSAC alleged that for a variety of reasons the *Chapman* beyond a reasonable doubt standard is not an appropriate degree of certainty of harmlessness in child dependency proceedings. First, CSAC adopted Justice Traynor’s criticism of the *Chapman* standard as too rigorous.¹²⁷ Second, CSAC argued that since the U.S. Supreme Court has held that in termination of parental rights cases the burden of proof is clear and convincing evidence, it is not appropriate to impose a higher standard of proof for demonstrating constitutional error was harmless in dependency cases.¹²⁸

CSAC’s argument should sound familiar: it is the same as the rationale for the *Haddad* opinion previously

¹²⁶ *Id.* at 35-37. The California “miscarriage of justice” standard is based on CAL, CONS. art. VI, § 13, and *People v. Watson*, 299 P.2d 243, 254 (1956).

¹²⁷ *Id.* at 38. Specifically, CSAC claims that Justice Traynor stated that the harmless beyond a reasonable doubt standard “came too close to automatic reversal.” *Id.* However, Justice Traynor never classified Chapman’s test as one of automatic reversal, but rather he defined it as similar to the contemporary English test for harmless error, one that requires reversal “unless the court was *almost certain* that the error did not affect the judgment.” TRAYNOR, *supra* note 2, at 35. One empirical study demonstrated that the Chapman test results in reversal in approximately 6% of cases, and is thus far from a rule of automatic reversal. *See text supra* p. 3.

¹²⁸ CSAC Amicus Brief, *supra* note 120, at 40. Courts have noted the difficulty of sufficiently defining and differentiating the clear and convincing evidence standard from the preponderance of the evidence and beyond a reasonable doubt standards. The court in *In re R.W.*, 775 N.E.2d 602, 605 (Ill. 2002) noted that different courts use different definitions for clear and convincing evidence, and some courts “have found the term best left undefined.”

discussed.¹²⁹ However, almost every other federal court that has considered the issue has soundly rejected the *Haddad* argument for a parallel standard between the burden of proof at trial and the degree of certainty of harmlessness on appeal.¹³⁰ CSAC relies on a California appellate case, *Denny H. v. Superior Court*,¹³¹ that lowered the harmless error test to clear and convincing evidence in California dependency appeals regarding federal constitutional errors. The *Denny H.* court adopted a *Haddad* parallelism standard argument and found the lower clear and convincing evidence degree of certainty a more appropriate test for the “special nature and purpose of dependency proceedings as well as the importance of the right to parent, and assigns an increased significance to the federal constitutional error established.”¹³² One must wonder, however, how does lowering the government’s standard for proving harmlessness increase the nature of the constitutional right implicated or maintain the degree of the importance of the right to parent? It clearly does not.

In an attempt to convince the California Supreme Court to adopt the *Denny H.* clear and convincing evidence standard, CSAC failed to sufficiently inform the court that California Appellate courts are split regarding whether *Chapman*’s beyond a reasonable doubt standard or the lesser clear and convincing evidence standard should apply in dependency appeals. For instance, the appellate court in *In re Mark A.*¹³³ soundly rejected the *Denny H.* clear and convincing test for several reasons.¹³⁴ First, just as other federal courts have rejected the *Haddad* parallelism argument,

¹²⁹ See text *supra* pp. 13-15.

¹³⁰ *Id.*

¹³¹ *Denny H. v. Superior Court*, 33 Cal. Rptr. 3d 89, 97-98 (Ct. App. 2005).

¹³² *Id.* at 98.

¹³³ *In re Mark A.*, 68 Cal. Rptr. 3d 106, 122-123 (Ct. App. 2007).

¹³⁴ Other California appellate courts have had an opportunity to adopt the *Denny H.* clear and convincing evidence degree of certainty of harmlessness, but have not. See, e.g., *In re Thomas H.*, No. A115425, 2007 WL 2452680 (Cal. Ct. App. Aug. 30, 2007); *In re K.W.*, No. C055903, 2007 WL 4183061 (Cal. Ct. App. Nov. 28, 2007).

Mark A. rejected the same argument in *Denny H.* because its reasoning, “conflate[s] the burden of persuasion in the trial court with the burden of persuasion in the reviewing court.”¹³⁵ Second, the *Mark A.* court found the *Denny H.* reasoning functionally problematic in dependency cases because the burden of proof at trial shifts between preponderance of the evidence and clear and convincing evidence depending not only on the procedural stage of the dependency proceeding, but also on the specific issue being litigated.¹³⁶ Therefore, in dependency cases raising cumulative error on appeal the appellate court will be forced to use several different appellate standards in determining whether or not any particular error was sufficiently harmful, or whether cumulative error is sufficiently harmful to require reversal. Finally, the *Mark A.* court found that the *Denny H.* court wrongfully balanced “a federally guaranteed constitutional right against a state created right” in determining to lower the degree of certainty of harmlessness to clear and convincing evidence. *Mark A.* stated that the Supremacy Clause prohibits state courts from substituting a lower constitutional standard for the purpose of providing greater protection for state created rights. In other words, *Mark A.* rejected the *Denny H.* court’s priority of rapid and permanent placements of abused and neglected children in circumstances that might violate or marginalize federal constitutional rights.¹³⁷ *Mark A.* reasoned:

The United States Constitution is the supreme law of the land. Heightened scrutiny of any violation of rights guaranteed under the Constitution is appropriate and need not be lessened for the purpose of honoring the “special nature and purpose of dependency proceedings.”¹³⁸

CSAC’s final argument in favor of a clear and convincing harmless error rule is that the *Chapman* standard

¹³⁵ *Mark A.*, 68 Cal. Rptr. 3d at 122.

¹³⁶ *Id.*

¹³⁷ *Id.* at 122-123.

¹³⁸ *Id.* at 122 (citing *Denny H.*).

“recognizes the rights of only two parties – the social services agency and the parent. The harmless by clear and convincing evidence standard, however, provides a balancing of rights and interests, including those of a federal constitutional dimension.”¹³⁹ This, of course, is nothing more than the balancing of federal and state interest argument in *Denny H.* that was rejected by the *Mark A.* court.

Separate from the legal arguments of whether or not such a balancing violates the Supremacy Clause, is the issue of whether or not the CSAC argument is factually correct. Inherent in CSAC’s critique of the *Chapman* beyond a reasonable doubt standard is the premise that the higher standard does not take into consideration abused children’s interests. The logical fallacy of CSAC’s argument is that it assumes that the parents’ interest in assuring that the Constitution is followed is at odds with the child’s interests. That assumption is simply not true in dependency appeals in which children and adults join against the government in attempting to demonstrate the prejudice of trial errors.¹⁴⁰ Ironically, lowering the harmless error standard to clear and convincing evidence will frequently make it more difficult for abused children to demonstrate that denials of constitutional rights are sufficiently harmful to require reversal. Lowering the degree of certainty of harmlessness will make it much more difficult for abused children to perfect their own constitutional rights. For instance, assume the following hypothetical:

¹³⁹ CSAC Amicus Brief, *supra* note 120, at 43.

¹⁴⁰ It should not be surprising that few dependency appeals feature parents’ and children’s counsel joining in arguments for reversal since the child’s appellate attorney would have to convince the child’s trial attorney who acts as the child’s appellate guardian *ad litem* the reversal is in the child’s best interest. *See* In re Josiah Z., 115 P.3d 1133, 1142 (Cal. 2005). *But see, e.g.*, In re B.A., No. A118223, 2008 WL 2428194 (Cal. Ct. App. June 16, 2008); In re Erin R., No. A118993, 2008 WL 2271152 (Cal. Ct. App. June 4, 2008). It is also possible that the Department, parents, and children will all join to seek appellate reversal. *See, e.g.*, In re Jose R., No. B203297, 2008 WL 2656120, (Cal. Ct. App. July 8, 2008).

The Department of Child and Family Services files a termination of parental rights petition for three of the parents' children. Child 1 and Child 2 want to remain with their parents; however, Child 3 wants parental severance and adoption with that child's current prospective adoptive family. Assume that the court fails to notify the parents or their attorney regarding the termination of parental rights hearing. The judge terminates parental rights, orders long-term guardianship for Child 1 and Child 2, and orders adoptive placement for Child 3.

CSAC's argument that *Chapman*, but not a clear and convincing evidence standard, only considers two parties, the parents and the Department of Children and Family Services, does not apply to this hypothetical, nor to a large number of dependency appeals. In fact, there are four separate party interests in this case: (1) DCFS wants termination of parental rights, guardianship for Child 1 and Child 2, and adoption for Child 3; (2) the parents do not want termination and want custody of all three children; (3) Child 1 and Child 2 share their desire that termination be denied and that they remain in the custody of the parents; and (4) Child 3 supports termination of parental rights and supports the DCFS desire for her adoption.

Although it may be argued that lowering the government's burden of demonstrating harmlessness to clear and convincing evidence assists DCFS and Child 3, that reduction in the degree of certainty of harmlessness weakens the legal rights of Child 1 and Child 2 who support a finding that lack of notice to their parents' counsel was sufficiently prejudicial to require reversal of the termination of parental rights determination.¹⁴¹ CSAC's argument that balancing

¹⁴¹ These conflicts among multiple siblings in child dependency proceedings have formed a significant percentage of appellate issues and topics discussed in law review articles. See, e.g., *In re Celine R.*, 71 P.3d 787 (Cal. 2003); *Carroll v. Superior Court*, 124 Cal. Rptr. 2d 891 (2002); *Care and Protection of Georgette*, 785 N.E.2d 356 (Mass. 2003); William Wesley Patton, *The Interrelationship Between Sibling Custody and*

parties' interests protects children only operates in cases in which one concludes that it is in children's best interest to obtain a ruling predicated on an issue which would be reversible under *Chapman*, but not reversible under a clear and convincing evidence standard. In addition, CSAC's argument against *Chapman* does not even consider the extremely difficult issue of cases in which the Department of Child and Family Services is arguing a best interest placement that is expressly rejected by an abused child who is sufficiently competent to determine their own stated preference to remain in her parents' custody. Lowering the degree of certainty of harmlessness to clear and convincing evidence based upon violations of the parents' or the children's constitutional rights will actually *reduce* the parents' and the children's ability to gain reversal based upon violations of the parents' and/or the children's federal constitutional rights.

Finally, the balance of dependency parties' interests, including the state's interest in the protection of children, has already been balanced by the Supreme Court in *Santosky v. Kramer*¹⁴² which lowered the burden of proof in termination of parental rights cases to clear and convincing evidence. A further lowering of the degree of certainty of harmlessness on appeal will tip the balance away from sufficiently protecting parents' rights and the rights of those children who either allege that their constitutional rights were violated or who disagree with the Department of Child and Family Services and with the trial court findings.

CSAC's argument in *In re James F.* that the *Chapman* harmless beyond a reasonable doubt standard should be reduced to a certainty of harmlessness by clear and convincing evidence is based upon the false analogy between burdens of proof at trial and justice's degree of confidence of prejudice on appeal. Further, its argument that a clear and convincing

Visitation and Conflicts of Interest in the Representation of Multiple Siblings in Dependency Proceedings, 23 CHILD. LEGAL RTS. J., Summer 2003, at 18.

¹⁴² *Santosky v. Kramer*, 455 U.S. 745.

evidence standard justly balances the rights of all dependency court parties is factually and functionally flawed since it makes it much more difficult for abused children who allege constitutional error to achieve an appellate court reversal and a new hearing not infected with federal constitutional errors.

V. Conclusion

There is a natural gut-level appeal of arguments for a classical balance and parallelism in law. The problem, however, is that no matter how one displays apples and oranges, they are not sufficiently similar to defy categorization. As this article has illustrated, the *Haddad*¹⁴³ and *CSAC*¹⁴⁴ arguments that the burden of proof at trial should establish the degree of certainty of harmless error on appeal are theoretically and functionally flawed, violate the Supremacy Clause, devalue the actual and symbolic fundamental right to parent, and increase the difficulty of abused children's efforts to perfect their constitutional rights. In addition, since the appellate reversal rate for dependency cases is already substantially lower than the reversal rates in criminal and ordinary civil appeals, there is currently no urgent public policy that supports lowering the government's appellate burden of demonstrating that constitutional trial errors are harmless. *Chapman's* harmless beyond a reasonable doubt standard is and should remain the degree of certainty of harmlessness in dependency and termination of parental rights proceedings.¹⁴⁵

¹⁴³ See *supra* note 87.

¹⁴⁴ See *supra* note 120.

¹⁴⁵ *Chapman v. California*, 386 U.S. 18 (1967).