California's Dueling Harmless Error Standards: Approaches to Federal Constitutional Error in Civil Trials and Establishing the Proper Test for Dependency

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I. INTRODUCTION

Civil and criminal appellate review of lower court proceedings, for the
most part, are seen as two distinct processes with differing standards for
reversal of mistakes by the trial court. Indeed, for forty years, California
appellate courts generally have applied one discrete test for harmless error in

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civil proceedings, while reserving a stricter standard exclusively for federal constitutional error in criminal cases, a distinction predicated on the fundamental rights at stake in state criminal trials. In appeals from convictions in California state criminal cases, errors rising to a federal constitutional dimension are governed by the standard of *Chapman v. California*,\(^1\) which requires that these errors be proven by the state to be harmless beyond all reasonable doubt. The more lenient standard (for the trial court) of *People v. Watson*,\(^2\) which holds errors of state law and procedure harmless unless there is a reasonable probability that such error prejudiced the outcome, is generally applicable to civil cases.\(^3\) Where a fundamental right such as personal liberty may be erroneously infringed upon, the logic goes, greater protection of such a right is required, in contrast to the errors merely of state statutory or procedural nature that by and large arise in state civil trials.

However, on several important occasions civil cases enter a gray area involving the suspension or infringement of fundamental constitutional rights. As a result, for the same forty years, appellate courts in the state have varied considerably regarding which of the two standards to apply in assessing the harmlessness of federal constitutional errors arising in civil proceedings. This twilight zone means that little definitive guidance exists for courts evaluating the effect of error in civil cases that nonetheless implicate fundamental rights. Such circumstances include, for example, involuntary civil commitments for sexually violent predators and mentally disordered offenders, conservatorship and competency hearings, and child protection and parental severance (“dependency”)\(^4\) proceedings. Given the lack of guidance from higher courts, California appellate courts have varied widely regarding which harmless error standard should be applied to federal constitutional errors in such civil cases.

In the choice of which standard to apply to federal constitutional error arising in civil cases, clearly, “[w]hich harmless error test a court applies may be dispositive of the outcome of the case.”\(^5\) Moreover, “the degree of protection that one’s constitutional rights receive may depend . . . on [the] choice of harmless error test.”\(^6\) Without a clear harmless error standard

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\(^1\) *Chapman v. Cal.*, 386 U.S. 18 (1967).

\(^2\) *People v. Watson*, 46 Cal. 2d 818 (1956).

\(^3\) *Watson* remains applicable to errors in state criminal cases that do not rise to a federal constitutional dimension, and even in the criminal context *Watson* is much more commonly applied than *Chapman*. *See infra* Part IIC. For example, the improper admission or exclusion of evidence in a California criminal trial is evaluated for a miscarriage of justice using *Watson* error review. *See Cal. Evid. Code §§ 353, 354 (2008).*

\(^4\) In 1989, California consolidated its previously bifurcated child protection and parental severance procedures, under which the juvenile court determined dependency and the superior court determined termination, into the modern series of joint “dependency” hearings held entirely in juvenile court. *See infra* Part IV, for further background and discussion of the significance of this procedural distinction.


\(^6\) Mitchell, *supra* n. 5, at 1364-1365.
established for federal constitutional error in these instances, outcomes are rendered unpredictable and the level of protection afforded the affected parties’ federal constitutional rights is problematically inconsistent.

Dependency proceedings present a complex case for harmless error analysis due to the unique rules governing dependency and the separate, often-conflicting fundamental rights of both parents and minor children. So, it is little wonder that this area has provoked quite divergent applications by different California appellate districts, with a consequent lack of guidance for all courts across the state.7 The California Supreme Court has never reached the open question of which harmless error standard should apply in dependency appeals,8 nor does United States Supreme Court precedent illuminate the matter.9 As a result, state appellate courts remain split on the issue. Outside of the judicial system, too, where the issue has not been addressed at all, no clear consensus exists among scholars or practitioners; some commentators even go as far as to advocate reversal per se for certain federal constitutional errors in dependency proceedings, precluding harmless error analysis altogether; others propose the application of an intermediate “clear and convincing evidence” standard somewhere between Chapman and Watson.

This Article argues for the application of the Chapman v. California harmless error standard on appeal when rights of federal constitutional magnitude arise in dependency proceedings. Part II provides an overview of the evolution of harmless error analysis in California appeals, and describes the People v. Watson test used for review of virtually all error in civil proceedings and the Chapman v. California “constitutional” test applied to constitutional

7 The California Courts of Appeal are divided into six appellate districts, which contain a total of nineteen different divisions, each of whose opinions constitute equally final and binding precedent for all courts throughout the state, not only on those within the district. This is distinct from the federal Circuit Courts of Appeal system, in which each Circuit Court of Appeal’s rulings are binding on all the lower federal district courts in the circuit and become respected precedent under the doctrine of stare decisis in subsequent matters before that Circuit Court of Appeal, but only constitute persuasive authority for other federal circuits. Therefore, any split of opinion on a given issue between California appellate districts results in lack of clear authority to assist the trial courts, with the ostensibly finality of Courts of Appeal decisions undermined and confused by contradictory appellate holdings in different districts and the absence of a decisive California Supreme Court ruling.

8 Review was recently granted by the California Supreme Court to one case from the Second Appellate District that had the potential to reach this question. See In re James F., 146 Cal. App. 4th 599 (2007) (concluding that the erroneous appointment of a guardian ad litem was structural error requiring automatic reversal and assuming, without discussion of the Watson standard, that Chapman harmless error analysis would otherwise apply), review granted and depublished by In re James F., 56 Cal. Rptr. 3d. 476 (Cal. 2007). However, the resulting California Supreme Court opinion leaves the question open. The Court held that a juvenile court's procedural error in appointing a guardian ad litem for a parent in a dependency proceeding is subject to harmless error review, rather than constituting structural error requiring automatic reversal of an order terminating the parent's parental rights. In re James F., 42 Cal. 4th 901, 905 (2008). The Court found the error in question harmless, stating that “[i]f the outcome of a proceeding has not been affected, denial of a right to notice and a hearing may be deemed harmless and reversal is not required.” Id. at 918. But, the Court declined to address whether Chapman, Watson, or a “clear and convincing evidence” standard should apply to such error in dependency context. Id. at 911, n. 1 (“Because we did not grant review on the appropriate harmless error standard and the parties have not briefed it, we do not address that issue here.”).

9 “To date, the Court has failed to dictate a single, controlling rule of harmless error.” Mitchell, supra n. 5, at 1364. “Because the Supreme Court has not definitively selected one harmless error test, lower courts have great discretion in their choice of test.” Id. at 1363.
error in criminal appeals. Part III explores the variety of applications of the Chapman and Watson standards to non-dependency civil proceedings, such as involuntary civil commitments, and identifies a perceptible trend toward application of Chapman in many instances. Part IV addresses the fundamental rights implicated by dependency proceedings and summarizes the inconsistency in California cases as to which harmless error standard should be applied to dependency reviews. Part V concludes that the Chapman standard best protects fundamental constitutional rights for both parents and children in the dependency context.

II. HARMLESS ERROR STANDARDS IN CALIFORNIA CIVIL AND CRIMINAL APPEALS

A. Overview of Harmless Error Doctrine

Harmless error analysis involves, in its simplest description, a test applied by reviewing courts to determine whether an identified error in lower court proceedings was either “harmless” or so sufficiently prejudicial that reversal of the decision is required.10 “It is a universal principle of appellate review, in civil and criminal cases, that error in proceedings in a lower court does not call for reversal of a judgment or order unless it is prejudicial.”11 Thus, trial court judgments will be affirmed on appeal, despite the existence of

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11 It should be noted that until the 1960s, “the general view was that errors reaching a federal constitutional dimension were not susceptible to harmless error analysis.” 5 Am. Jur. 2d Appellate Review § 723 (1995). In other words, “errors involving the deprivation of constitutional rights could never be treated as harmless error.” Goldblatt, 60 U. Chi. L. Rev. at 995. This Article is chiefly concerned with the application of the Chapman v. California federal constitutional harmless error standard to California state cases, in which context this Article argues that the Chapman rule provides greater protection of constitutional rights than the People v. Watson standard and, therefore, should be the preferred standard for assessing harmlessness of constitutional error in dependency proceedings and other civil cases that implicate fundamental rights. However, an important parallel effect of Chapman, and for which it is best known nationally, is its holding that federal constitutional errors are in fact subject to harmless error analysis at all, rather than to automatic per se reversal. See infra Part IID for further discussion of the Chapman decision. This move by the Supreme Court away from a presumption of automatic reversal for federal constitutional error can thus be seen, outside of the California context, as a relaxation of traditional (over) protections of constitutional rights on appeal. While a nuanced exploration of the reversal per se doctrine is beyond the scope of this Article, references to the doctrine’s relation to harmless error analysis are provided where appropriate.

Most importantly, for purposes of this Article, errors deemed subject to reversal per se (often conceived of as “structural”) “defy harmless error review,” and so in California “trigger neither the Watson reasonable-probability test otherwise applicable under California law, nor the Chapman reasonable doubt test governing most violations of a criminal defendant’s federal constitutional rights.” People v. Hurtado, 28 Cal. 4th 1179, 1196 (2002) (Baxter, J., concurring). Although most constitutional errors are rarely found subject to reversal per se, it is common for both criminal and civil defendants to argue that an error at trial rose to the level of requiring reversal per se, in hopes of thereby avoiding harmless error analysis altogether.

11 B. E. Witkin & Norman L. Epstein, California Criminal Law, Reversible Error § 1 (3d ed. vol. 6, Witkin Legal Institute 2000).
error, if such error is found to be harmless.

Unfortunately, harmless error doctrine in its application is anything but coherent, and it is misleading to speak of a singular "harmless error rule."

The United States Supreme Court has vacillated widely regarding which standard it applies in its harmless error review of different federal constitutional and statutory violations. States, for their part, have been at liberty since 1967 to adopt their own methods of harmless error determination for violations of rights under state law, and every state in the union has done so. At the same time, modern jurisprudence is subjecting an increasing number of errors to harmless error review, and today, "errors to which harmless error analysis does not apply 'are the exception and not the rule.'" Appellate courts at every level have developed a bewildering array of standards for assessing the harmlessness of error, predicated variously on the nature of the case being reviewed (e.g. civil or criminal, and specific sub-categories thereof), the nature of the error (e.g. statutory or constitutional, "structural" or "mere trial error," of federal constitutional dimension or not), and the effect of the error on the trial (e.g.
whether and to what extent it influenced or compelled the verdict).\(^19\)

Some tests for harmless error involve the balancing of multiple considerations, without a bright-line definition of where precisely in the balance an error is deemed harmless.\(^20\) Most tests for harmless error, however, operate by setting a requisite threshold for proving prejudice (in other words, the degree of likelihood that the error influenced the verdict or not) based on the nature of the case and/or the nature of the error. In practice, “harmless error rules measure not only the likelihood that an error affected the outcome, but also how great a likelihood the law should deem acceptable,”\(^21\) for different categories of errors. In California, for instance, the state constitution provides

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\(^{19}\) See the remainder of infra Part II for discussion referencing examples of various harmless error standards and their bases.

\(^{20}\) In addition, while beyond the scope of this Article, the area of standards for reversal “continues to become more complicated as the United States Supreme Court continues to articulate different standards for reviewing identical issues depend[ing] on whether they are filed as direct appeals or writs.” Patton, supra n. 5, at 214 n. 115. Notably, the Chapman standard was applied to habeas corpus review of federal constitutional errors until Brecht v. Abrahamson, 507 U.S. 619 (1993). Brecht limited Chapman to direct review of constitutional errors and for habeas instead implemented the less onerous (and less protective of criminal defendants) standard of Kotteakos v. U.S., 328 U.S. 750 (1946) (formerly only applied to unconstitutional errors), under which constitutional errors are deemed harmless on habeas review unless “substantial and injurious effect or influence” on the verdict is shown. Brecht, 507 U.S. at 631, 636-639 (quoting Kotteakos, 328 U.S. at 776). See generally John H. Blume & Steven P. Garvey, Harmless Error in Federal Habeas Corpus After Brecht v. Abrahamson, 35 Wm. & Mary L. Rev. 163 (1993); James S. Liebman & Randy Hurtz, Brecht v. Abrahamson: Harmless Error in Habeas Corpus Law, 84 J. Crim. L. & Criminology 1109, 1155 (1994); Bennett L. Gershman, The Gate is Open But the Door is Locked—Habeas Corpus and Harmless Error, 51 Wash. & Lee. L. Rev. 115 (1994).

The Brecht standard for harmless error on habeas review was upheld and refined in O’Neal v. McAntich, 513 U.S. 432, 437 (1995), in which the Court held that “where the record is so evenly balanced that a conscientious judge is in grave doubt as to the harmlessness of the error,” the petitioner must prevail. Subsequently, though, it became uncertain whether the holdings in Brecht and O’Neal have survived the passage of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). Compare Nevers v. Killinger, 169 F.3d 352, 371 (6th Cir. 1999) (holding that “the test set out by the Supreme Court in Kotteakos and explicitly reiterated in Brecht quite precisely captures Congress’s intent as expressed in AEDPA and, therefore, continues to be applicable”) with Whitmore v. Kemna, 213 F.3d 431, 433 (8th Cir. 2000) (suggesting in dicta that AEDPA may have abrogated “the requirement that federal habeas courts conduct a harmless error analysis under Brecht in situations . . . where the state court already has conducted a Chapman harmless error analysis . . . ”). See also Anderson v. Cowan, 227 F.3d 893, 898 n. 3 (7th Cir. 2000) (noting this disagreement between Circuits as to whether Brecht articulates a more generous standard than AEDPA, as well as the unenthusiastic following of Nevers even within the Sixth Circuit), Thomas v. Gibson, 218 F.3d 1213, 1226 n. 12 (10th Cir. 2000) (recognizing that “the applicability of Brecht after the passage of the AEDPA is less than clear”). Most recently, however, the Brecht standard was reaffirmed as the proper standard for habeas harmless error review in Fry v. Pilier, 127 S. Ct. 2321 (U.S. 2007) (holding that in federal habeas proceedings a court must assess the prejudicial impact of constitutional error in a state court criminal trial under Brecht, even if the state appeals court failed to recognize the error or review it under Chapman on direct review).

E.g. most notably, Delaware v. Van Arsdell, 475 U.S. 673 (1986). Van Arsdell considered the harmlessness of an unconstitutional restriction of a criminal defendant’s right to cross-examine a prosecution witness, and proposed a weighing of the impact of the error in light of the non-erroneous evidence, holding that “whether such an error is harmless in a particular case depends upon a host of factors . . . . includ[ing] the importance of the witness’ testimony in the prosecution’s case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution’s case.” Van Arsdell, 475 U.S. at 684.

broadly-worded guidance as to when harmless error may be found, and case law has differently articulated the degree of proof necessary to satisfy this standard for errors of federal constitutional dimension and those of state law and procedure in criminal and civil cases.

B. California’s “Miscarriage of Justice” State Constitutional Standard

The California Constitution, Article VI, § 13, provides the starting point for harmless error analysis in California. It states in relevant part that no judgment shall be reversed for error unless “the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice.” Initially, however, harmless error doctrine in California originated in the California Code of Civil Procedure and Penal Code, and was subsequently constitutionalized in the early 1900s. Specifically, California Code of Civil Procedure, section 475, using language that in large part was first adopted in 1872, holds that courts must disregard any error which “does not affect the substantial rights of the parties.” Section 475 provides for reversal or modification only if the record demonstrates “prejudicial” error that caused appellant “substantial injury,” without which a “different result would have been probable.” Analogous statutory provisions for criminal cases exist in the California Penal Code. While section 475 also specifies that there “shall be no presumption that error is prejudicial,” an abundance of caution by state courts accustomed to automatic per se reversal for error initially led to many

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22 In California, harmless error doctrine is alternatively referred to as the “prejudicial error” rule.
23 Cal. Const. art. VI, § 13 (“reversal for error resulting in miscarriage of justice”).
24 Id. Additional reference to harmless error analysis is also found in the California Evidence Code, which mirrors the state constitution with a provision that reversal for evidentiary error is precluded unless the erroneous admission or exclusion of evidence “resulted in a miscarriage of justice.” Cal. Evid. Code §§ 353, 354 (2008).
27 See supra nn. 10 & 18 (discussion of reversal per se).
reversals in correctly decided criminal and civil cases where the identified error was patently not prejudicial.\textsuperscript{28} Hence, in 1911, former California Constitution, Article IV, section 4 ½ was adopted, with its confirmation that courts had the authority and duty to hold error harmless absent a “miscarriage of justice,”\textsuperscript{29} and in 1966 this section became the modern Article VI, section 13.\textsuperscript{30}

The “miscarriage of justice” concept, while ostensibly offering more guidance than the “substantial injury” language of the Code of Civil Procedure, does not, on its own, “expressly or impliedly mandate[] any specific standard[s] of prejudice for any kind of error in any kind of proceeding.”\textsuperscript{31} Hence, this state constitutional provision remained the subject of significant debate and various definitions for half a century as state appellate courts wrangled over the proper test or tests for reversible error.\textsuperscript{32}

\textbf{C. The Watson “Reasonably Probable” Interpretation of the California “Miscarriage of Justice” Standard}

The state constitutional harmless error doctrine received clarification in 1956 by \textit{People v. Watson}.\textsuperscript{33} In \textit{Watson}, the California Supreme Court

\textsuperscript{28} See \textit{Watson}, 46 Cal. 2d at 834 (“[w]hile it had long been provided in our statutory law that judgments would not be reversed because of technical errors or defects which did not affect the substantial rights of the defendant, the courts nevertheless in reviewing convictions in criminal cases had generally followed the rule that prejudice would be presumed from error and upon that basis the defendant was ‘entitled to a reversal of the judgment’” (internal citations omitted)); 9 Witkin, \textit{Cal. Procedure Appeal} § 408, 460 (4th ed. 1997) (citing \textit{San Jose Ranch Co. v. San Jose Land & Water Co.}, 126 Cal. 322, 325 (1899) and \textit{Vallejo & Northern R. Co. v. Reed Orchard Co.}, 169 Cal. 545, 554 (1915)).

\textsuperscript{29} See 9 Witkin, \textit{Cal. Procedure Appeal} § 408, 460 (4th ed. 1997) (citing to \textit{Tupman v. Haberkern}, 208 Cal. 256, 263 (1929), \textit{Vallejo & Northern R. Co.}, 169 Cal. 545 and \textit{Soule v. General Motors Corp.}, 8 Cal. 4th 548, 576 (1994)) for the history, scope, and effect of the “miscarriage of justice” provision and how it revolutionized the theory of reversible error in California. In 1913, in \textit{People v. O’Bryan}, the newly adopted amendment was definitively held to have “abrogated[ed] the old rule that prejudice is presumed from any error of law . . . . The mere fact of error does not make out a \textit{prima facie} case for reversal . . . .” 165 Cal. 55, 65 (1913). O’Bryan found the state constitution “allowed the reviewing court to consider the evidence to determine whether the error did in fact prejudice the defendant,” and to apply to both constitutional and non-constitutional errors, with “not every invasion of a constitutional right necessarily requir[ing] . . . reversal.” \textit{Watson}, 46 Cal. 2d at 835 (referencing \textit{O’Bryan}, 165 Cal. 55). \textit{O’Bryan}, then had much the same effect at the state level with respect to all error as \textit{Chapman} would later have on the national level in refuting any presumption of per se reversal with respect to federal constitutional error. See \textit{supra} n. 10. For an extensive discussion of the facts, analysis, and significance of \textit{O’Bryan}, see also \textit{People v. Cahill}, 5 Cal. 4th 478, 488-491 (1993).

\textsuperscript{30} Former California Constitution Article IV, § 4 ½, was first adopted with reference only to criminal cases, but was amended in 1914 so as to apply equally to civil cases, and became Article VI, § 13, in the 1966 constitutional revision. See \textit{Watson}, 46 Cal. 2d at 834; 9 Witkin, \textit{Cal. Procedure Appeal} § 408, 460 (4th ed. 1997).


\textsuperscript{32} In this early period after the adoption of the constitutional provision, “the major battles in defining and establishing tests for reversible error were waged in criminal cases.” 9 Witkin, \textit{Cal. Procedure Appeal} § 408, 484 (4th ed. 1997).

\textsuperscript{33} \textit{Watson}, 46 Cal. 2d 818. \textit{Watson}, a criminal case, involved an appeal from the second degree murder conviction of an Army corporal for the bludgeoning killing of his wife. \textit{Id.} at 820-821, 825. Appellant argued various trial errors as grounds for reversal, including allegedly insufficient jury instructions as to the standard of proof required for essential facts in a chain of circumstantial evidence and the overruling of an objection to certain lines of inquiry on his cross-examination seemingly introduced only to degrade his character. \textit{Id.} at 820-821. The objectionable
definitively refined the test for determining whether an error at trial resulted in a miscarriage of justice, after noting that “[i]n determining the meaning of this phrase, the reviewing courts have stated the test to be applied in varying language.” A “miscarriage of justice,” the court held, properly results only when “after an examination of the entire cause, including the evidence,” the court finds “that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error.” The court characterized its new test as an affirmative “crystallization” of the guiding principles employed by other courts in their variously enunciated tests for “miscarriage of justice.”

While Watson was a criminal case, the “reasonably probable” test was subsequently applied to a wide variety of types of error, for both civil and criminal cases alike in California. It was not until the decision in Chapman v. California that any differentiation was mandated between the two as to federal constitutional error.

D. Chapman v. California’s Harmless-Constitutional-Error Rule and the Supreme Court’s Effort to Protect Federal Constitutional Rights in Criminal Trials

In 1967, the case of Chapman v. California was decided by the United States Supreme Court on certiorari from the Supreme Court of California. The Court was asked to evaluate whether an admitted violation in state court of criminal appellants’ federal constitutional right against self-incrimination could be held harmless. In response, the majority made three key determinations.

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34. Id. at 835.
35. Id. at 836 (emphasis added).
36. Id. at 837. Watson, to be sure, defined its own test as one “generally” rather than mandatorily applicable, and courts have occasionally varied from the reasonable probability standard. For instance, Brown, 46 Cal. 3d at 447, sets forth a “reasonable possibility” test for “state-law error[] at the penalty phase of a capital trial.” This standard has been held to be “the same in substance and effect” as Chapman. People v. Ashmus, 54 Cal. 3d 932, 965 (1991).
38. Chapman, 386 U.S. 18. Chapman arose out of a defendant’s appeal from conviction in a California state court for robbery, kidnapping, and murder, in which trial jury instructions were given and comments made in the prosecutor’s argument, pursuant to a state constitutional provision, allowing the jury to make adverse inferences against defendants based on their failure to testify. Id. at 18-19. While defendants’ appeal to the California Supreme Court was pending, the United States Supreme Court held, in Griffin v. Cal., 380 U.S. 609 (1965), that allowing negative inferences to be drawn from a defendant’s failure to testify violated the Fifth Amendment right against self-incrimination made applicable to the states by the Fourteenth Amendment, and that therefore California’s constitutional provision and practice violated the Constitution. Chapman, 386 U.S. at 19-20. The California Supreme Court subsequently admitted that appellants had hence been denied a federal constitutional right by the instructional comments on their silence, but affirmed the conviction under the “miscarriage of justice” state constitutional standard. Id. at 20.
39. Id. at 20.
First, the Court held that where a federally guaranteed right is at stake in a state criminal trial, the state harmless error rule should not govern. Application of a state harmless error rule, the Chapman Court explained, is a state question only where it involves errors of state procedure or law, and not when a state “has failed to accord federal constitutionally guaranteed rights . . .” to a criminal defendant. In emphatic language, the Court stated that “we cannot leave to the States the formulation of the authoritative laws, rules, and remedies designed to protect people from infractions by the States of federally guaranteed rights . . . it is our responsibility to protect [federal constitutional rights] by fashioning the necessary rule.”

Second, the Court dismissed the contention that this “necessary rule” should be reversal per se. Petitioners claimed that all federal constitutional errors, regardless of the circumstances and magnitude of the errors, ought always to be deemed harmful and subject to automatic reversal. The Court, however, “decline[d] to adopt any such rule,” pointing out that the harmless error doctrine serves the useful purpose of blocking the setting aside of convictions for insignificant and nonprejudicial errors. While “some constitutional rights [are] so basic to a fair trial that their infraction can never be treated as harmless error . . .,” there certainly may be federal constitutional errors, no less than state or federal statutory and procedural errors, “which in the setting of a particular case are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless, not requiring the automatic reversal of the conviction.”

Finally, the Chapman Court concluded that the ideal approach to
analyzing the harmlessness of identified federal constitutional error, while stopping short of reversal per se, should promote “an intention not to treat as harmless those constitutional errors that ‘affect substantial rights’ of a party.” To this end, the Court announced a more protective “harmless-constitutional-error rule” that was preferable to the California standard in criminal cases: “[B]efore a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt.”

Essentially, under the Chapman test, a reviewing court must find no reasonable possibility that the error complained of might have contributed to the lower court’s decision.

The Chapman “harmless beyond reasonable doubt” test had the effect of supplanting the Watson “reasonably probable” (that a decision more favorable to appellant would have been reached absent the error) standard for federal constitutional error in criminal cases in California. Chapman is not a blanket criminal standard, but rather a specifically constitutional standard—Watson still may be applied postjudgment to errors of exclusively state law and procedure in criminal cases. The nature of the error, not merely the criminal nature of the trial, is the relevant factor. Although in practice many errors in criminal cases are explicitly or implicitly found to have a constitutional dimension due to the liberty interests at stake, certainly the availability of the more generous Watson review gives prosecutors incentive to argue that a given error in a criminal trial does not rise to a federal constitutional level. So, Watson remains a familiar and frequently applied standard in the criminal context despite the presence of Chapman review for constitutional error. The converse is not true—that is, for California state civil cases Watson review is virtually a blanket standard, with Chapman used in civil cases much less frequently than is Watson in criminal cases. From the civil litigation perspective, Chapman is largely understood as a criminal standard with little bearing on civil appeals, with Watson “the” civil harmless error standard.

48. Id. at 22.
49. Id. at 24 (emphasis added). The Court then applied this rule to the case, and found that the comments and instructions at trial regarding defendants’ failure to testify, and the negative inferences that could be drawn, did not constitute harmless error. Id. at 24-26.
50. See Brecht, 507 U.S. 619; 5 Am. Jur. 2d Appellate Review § 722 (1995). Also, under Watson review, appellant generally bears the burden of making the reasonable probability showing, whereas under Chapman, the burden is on the state. See Chapman, 386 U.S. at 26 (“it is completely impossible for us to say that the State has demonstrated, beyond a reasonable doubt, that the prosecutor's comments and the trial judge's instruction did not contribute to petitioners' convictions”). In other words, once federal constitutional error is established by the appellant, the burden effectively shifts to the state, which makes Chapman an even more demanding standard to meet.
51. See supra n. 42; see also Hurtado, 28 Cal. 4th at 1195-1196 (Baxter, J., concurring) (stating that the Watson standard still applies postjudgment to all kinds of cases, civil and criminal, where errors of state law or procedure occur). For federal criminal trials, nonconstitutional errors are governed by the standard of Kotteakos, 328 U.S. at 776 (under which an error is harmless unless it “had substantial and injurious effect or influence in determining the jury’s verdict”). As set forth in Brecht and refined in O’Neal, Kotteakos also ostensibly remains the standard for habeas review of federal constitutional errors, although some courts more recently have questioned whether this standard survives the passage of AEDPA. See supra n. 19.
III. APPLICATION OF THE CHAPMAN AND WATSON HARMLESS ERROR STANDARDS TO NON-DEPENDENCY CIVIL PROCEEDINGS

The fundamental rights protection rationale for Chapman’s constitutional-harmless error test in state criminal trials presents a conundrum: what harmless error standard should apply to a federal constitutional error when it arises in a state civil case? Surprisingly little attention has been given to this obvious puzzle by either case law or academic literature. Professor Meltzer, for instance, notes that the arguments for Chapman as law designed to promote “the faithful enforcement of federal constitutional guarantees” would seem, [generally], to apply equally to civil cases. However, Meltzer discovered that no United States Supreme Court decisions even raised the question of whether or not a federal standard should govern determination of harmlessness of federal constitutional error in state civil cases.

In California, likewise, the California Supreme Court has not conclusively determined whether Chapman, Watson, or another standard altogether is most appropriate in such situations. The lower state courts of appeal thus have had free reign to apply whichever harmless error test they deem fit, and have varied widely in their application of harmless error doctrine in review of cases of involuntary civil commitment, for example, as well as in competency and conservatorship proceedings. Before considering which standard should apply to dependency proceedings, it is illustrative to examine the California courts’ treatment of federal constitutional error in these classes of civil proceedings.

A. Involuntary Civil Commitment Proceedings

Involuntary civil commitments present a prime example of civil proceedings that implicate fundamental rights, because of the due process implications inherent in depriving persons of their liberty. As a result of the close parallels between criminal imprisonment and civil commitment, many cases have leaned toward applying Chapman to proceedings under a variety of civil commitment schemes, although this tendency is by no means exclusive. Not infrequently, courts avoid the issue altogether, by determining that the error in question is harmless under either test, which has the effect of implicitly applying Chapman without taking a position on which standard should in fact apply. Conversely, a finding of harmfulness under either test amounts to an

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52 Id. at 39.
53 Id. at 36.
54 Id.
implicit Watson application. Whether or not both tests are discussed in a given case, however, the choice of Chapman or Watson at times can indicate a general merits reflection, with Watson review frequently employed to emphasize the harmlessness of a given error and Chapman to emphasize the harmfulness of a given error. Even in some civil commitment cases that explicitly or implicitly apply Watson, though, courts have used language otherwise indicating preference for Chapman.

1. Mentally Disordered Offender Commitments

In 2006, in People v. Vance,55 for instance, a mentally disordered offender (MDO) challenged the extension of his confinement at a state hospital, after a civil hearing56 during which his legs were shackled in the presence of the jury despite the objection of his counsel. Criminal law on this point is clear that a defendant “cannot be subjected to physical restraints of any kind in the courtroom while in the jury’s presence, unless there is a showing of manifest need”57 due to aberrant behavior by the defendant. If a trial court abuses its discretion in shackling a defendant and a jury is then aware of the restraints, it “means that the error rises to the level of constitutional error to be tested under the Chapman test.”58

The prosecution conceded that the trial court erred in not exercising its discretion to rule on the defense objection to the shackling, but argued that criminal law jurisprudence should not be extended to this civil case.59 In response, the Third Appellate District of the California Court of Appeal first pointed out that “physical restraints involve rights of a different order than those . . . ordinarily not accorded defendants in civil proceedings,” and that the potential for jury prejudice against a defendant is the same whether the defendant is shackled in a criminal case or in a MDO proceeding.60 Then, after noting that the California Supreme Court had not ruled which harmless error standard applies,61 the court held that “the error in this case is prejudicial under either the Chapman or Watson standard.”62 While invoking Watson effectively emphasized the harmfulness of the actual error at hand, the court nevertheless seemed to favor Chapman based on its wording in concluding that “we cannot say the court’s error in failing to exercise its discretion . . . was harmless

56 Pursuant to Cal. Penal Code § 1026.5. The MDO civil commitment scheme in general is governed by Cal. Penal Code § 2960 et seq.
58 Id. at 1114-1115 (quoting People v. Jackson, 14 Cal. App. 4th 1818, 1830 (1993)).
59 Vance, 141 Cal. App. 4th at 1112, 1114.
60 Id. at 1113-1114. Such trial court error “may deprive defendant of his due process right to a fair and impartial jury, and may affect the presumption of innocence.” (quoting Jackson, 14 Cal. App. 4th at 1830).
61 Id. at 1114.
62 Id. at 1115.
beyond a reasonable doubt.\textsuperscript{63}

While Vance’s favorability toward Chapman seems predicated on the similarities between civil and criminal proceedings under the circumstances, other recent MDO civil commitment cases take pains to distinguish MDO proceedings as distinctly civil and therefore subject to Watson harmless error review.

In People v. Cosgrove,\textsuperscript{64} defendant appealed his directed verdict MDO commitment based on an erroneous deprivation of the right to a jury trial. The Fourth Appellate District of the California Court of Appeal emphasized that legislative intent and the policy goals of mental health treatment and public safety (versus any punitive purpose or effect) underscored the purely civil nature of the MDO scheme.\textsuperscript{65} Notwithstanding California’s provision of procedural safeguards at MDO proceedings similar to those afforded criminal defendants, “such safeguards do not transform what the Legislature expressly determined to be a civil hearing into a criminal prosecution.”\textsuperscript{66} As a result, the court found that the right to jury trial was merely statutory and that the erroneous deprivation of that right did not implicate the federal Constitution.\textsuperscript{67} Therefore, the court rejected Chapman and applied the Watson reasonable probability standard for prejudice, under which it found the error harmless, concluding that it was not reasonably probable that a result more favorable to defendant would have been reached if a jury had determined whether he met the MDO criteria.\textsuperscript{68} Subsequent cases have relied on Cosgrove in holding that due process and ineffective assistance of counsel errors in MDO proceedings do not rise to a federal constitutional dimension and thus are subject merely to Watson review.\textsuperscript{69}

\textsuperscript{63} Id. (emphasis added).
\textsuperscript{64} 100 Cal. App. 4th 1266 (2002).
\textsuperscript{65} Id. at 1270-1271.
\textsuperscript{66} Id. at 1272 (relying on Seling v. Young, 531 U.S. 250, 261 (2001). See also id. at 1271 (“the MDO provisions are neither punitive in purpose nor effect and their procedural safeguards do not require us to transform the hearing into a criminal trial”) (quoting People v. Super. Ct. (Myers), 50 Cal. App. 4th 826, 834 (1996)); id. at 1272 (“the [MDO] scheme’s placement in the Penal Code is not a material feature in differentiating it . . .”) (quoting People v. Robinson, 63 Cal. App. 4th 348, 352 (1998)); id. at 1273 (“we hold that . . . MDO hearings are civil in nature”)).
\textsuperscript{67} Id. at 1274, 1275. Moreover, the error was “purely one of state law.” Id. at 1276.
\textsuperscript{68} Cosgrove, 100 Cal. App. 4th at 1276. The court also rejected defendant’s contention that the error was “structural” and thus should be reversible per se. Id. at 1275.
2. Sexually Violent Predator Commitments

Civil commitments pursuant to the Sexually Violent Predators Act (SVPA)\(^70\) have more firmly established a preference for \textit{Chapman} harmless error review. In \textit{People v. Martinez}\(^71\) in 2001, the Sixth Appellate District of the California Court of Appeal considered a defendant’s claim of prejudicial error from prosecutorial examination of his psychological records that infringed on his rights to privacy and counsel in a sexually violent predator (SVP) hearing. The court avoided reaching the questions of whether a federal constitutional dimension existed in the claim of error and which standard should apply, since even if \textit{arguendo} such constitutional error existed, “any impropriety by the prosecutor in reviewing defendant’s records was harmless under any standard of review.”\(^72\)

The next year, however, the California Supreme Court in \textit{People v. Hurtado}\(^73\) seemed to definitively adopt \textit{Chapman} as the standard for analyzing constitutional error in SVPA cases. \textit{Hurtado} involved a claim of prejudicial error from a trial court’s failure to instruct the jury on the predatory act requirement for commitment under the SVPA. The court noted that “[t]he United States Supreme Court has not spoken on the standard of prejudice for instructional error in involuntary commitment cases,” and although the case had become moot after the defendant’s SVP commitment ended, the court found that “the standard of prejudice for constitutional error in SVPA cases . . . is an important and recurring issue likely to evade review” and exercised its discretion to decide the issue.\(^74\)

In \textit{Hurtado}, the defendant argued for “structural error” per se reversal, the Attorney General argued for \textit{Watson}, and the Fourth Appellate District of the California Court of Appeal had split the difference by applying \textit{Chapman}.\(^75\) In an opinion by Justice Kennard, the California Supreme Court dismissed the argument for reversal per se, and proceeded to engage in a detailed analysis of the nature of SVPA proceedings to discern the applicable test of prejudice.\(^76\) Although the SVPA is nonpunitive in purpose and its proceedings are civil, “its procedures have many of the trappings of a criminal proceeding . . . with consequences comparable to a criminal conviction—involuntary commitment, often for an indefinite or renewable period, with associated damages to the defendant’s name and reputation.”\(^77\) The court also observed that the United States Supreme Court has held that civil preponderance of the evidence burdens

\(^70\) Cal. Welf. & Inst. Code § 6600 et seq.
\(^72\) Id. at 482 (citing both \textit{Chapman} and \textit{Watson}) (also rejecting defendant’s argument for reversal per se).
\(^73\) 28 Cal. 4th 1179 (2002).
\(^74\) \textit{Hurtado}, 28 Cal. 4th at 1190.
\(^75\) Id. at 1190-1191.
\(^76\) Id. at 1192.
\(^77\) Id. at 1192. Comparable procedures in this case include a probable cause hearing, defendant’s right to appointed counsel, a burden of proof to find defendant to be a SVP beyond reasonable doubt, and a requirement of unanimous jury verdict.
of proof are inadequate in involuntary commitment cases, recognizing that “civil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection.” 78 Overall, the California Supreme Court found in Hurtado that civil commitment threatens a person’s liberty and dignity with equally drastic consequences as those associated with criminal prosecutions. The court then pointed to examples where Chapman’s “harmless beyond reasonable doubt” test was applied to civil commitments under even less onerous commitment schemes than the SVPA, 79 identified Chapman as the standard used for review of federal constitutional error in California civil commitment cases generally, and concluded that Chapman “necessarily governs review under the SVPA.” 80

In a concurring opinion, Justice Baxter disagreed with the Hurtado “majority”’s explicit holding that the demanding Chapman standard of prejudice must apply . . . , 81 and urged adherence to Watson. Justice Baxter considered departure from Watson’s reasonable-probability test proper only under “narrow circumstances” of “extraordinary” error, faulted the majority for failing to adequately identify any federal constitutional error, and rejected any analogy between SVPA proceedings and criminal law as “misleading.” 82 In the absence of United States Supreme Court authority, he further pointed out, “other state courts do not seem anxious to embrace Chapman under similar circumstances,” 83 and “this significant and difficult question deserves closer scrutiny than the majority opinion provides.” 84 Notwithstanding Justice Baxter’s disapproval, in the aftermath of Hurtado, the lower California appellate courts accordingly have applied Chapman to SVPA case review, although they have exercised their discretion, seemingly more so than in criminal appeals, to determine that a given error does not rise to a federal constitutional dimension and still to apply Watson to errors deemed exclusively of state law or procedure. 85

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78. Id. at 1192-1193 (quoting Addington v. Tex., 441 U.S. 418, 425 (1979)).
80. Hurtado, 28 Cal. 4th at 1193-1194.
81. Id. at 1195 (Baxter, J., concurring).
82. Hurtado, 28 Cal. 4th at 1198 (Baxter, J., concurring).
83. Id. at 1199 (Baxter, J., concurring) (citing examples from other jurisdictions).
84. Id. at 1200 (Baxter, J., concurring).
85. See e.g. People v. Tilley, 2003 Cal. App. Unpub. LEXIS 3414, **7-8, *77 (Sixth Appellate District SVPA decision identifying choice of harmless error standard as an “evolving area of law” with Chapman “govern[ing] review of federal constitutional error in civil commitment cases generally,” and ostensibly applying Chapman review “to the extent that defendant’s appeal raises federal constitutional claims” and Watson “to the extent that the appeal rests on other grounds.” The only cognizable error identified by the court, however, which rejected every other of defendant’s constitutional claims on the merits or by waiver, was jury instruction error which it found harmless under Chapman); People v. Sundquist, 2003 Cal. App. Unpub. LEXIS 11421, **20-21, **24-25 (First Appellate District SVPA decision finding that a claim of error from ineffective assistance of counsel did not rise to the egregious standard of due process subversion calling for the stricter Chapman standard, but applying Chapman to a separate instructional error). These two cases notably differ in that the court in Tilley indicated that it applied Chapman based on defendant’s claims of federal constitutional error (although the claims were largely found meritless and not rising
3. Dangerous Mental Retardation Commitments

Similarly to SVPA proceedings, involuntary civil commitments of persons deemed mentally retarded and a danger to themselves or others commonly utilize Chapman as the proper harmless error standard for federal constitutional error. The California Supreme Court, for instance, applied Chapman without discussion of Watson in the 1979 case of Cramer v. Tyars, despite emphasizing the civil nature of the proceedings. In Cramer, an alleged dangerous mentally retarded defendant was erroneously called as a witness in his own commitment hearing, over the objections of his counsel. First, the court stressed that the commitment of dangerous mentally retarded persons, because of its limited duration (renewable one-year periods) and nonpunitive design and purpose, “must be deemed essentially civil in nature . . . . It is not analogous to criminal proceedings.” Thus, the court continued, the defendant did not enjoy the absolute Fifth Amendment right of a criminal defendant not to testify and not to be called as a witness. Nevertheless, the constitutional privilege against self-incrimination has been found by the United States Supreme Court to extend to any proceeding, criminal or civil, so any criminally incriminating evidence of the dangerousness of defendant’s mental retardation must “be elicited from sources other than the individual who is the subject of the commitment proceeding.” Ultimately, though, the court concluded that “any erroneous questioning of the appellant was harmless beyond all reasonable doubt” under Chapman.

Cramer has been followed by subsequent dangerous mental retardation commitment cases such as In re Krall in which the Second Appellate District of the Court of Appeal of California in 1984 applied Chapman to an erroneous jury instruction regarding the definition of mental retardation. The Krall court, more so than the California Supreme Court in Cramer, strongly highlighted the fundamental rights at stake, referring to the “massive curtailment of liberty involved in involuntary confinement [of mentally retarded persons].” The court specifically based its application of Chapman on the analogy of this liberty impingement to that imposed by criminal imprisonment, stating that “[s]ince a finding against appellant results in his involuntary commitment to an institution akin to that restriction of liberty following a criminal conviction and sentencing to a penal institution[,] it is incumbent upon the respondent to show

to federal constitutional dimension), while Sundquist first analyzed the constitutionality of each claimed error, then chose which test to apply. Additionally, it is perhaps telling that both of these cases preserving Watson review (and implicitly limiting Chapman review in SVPA cases to instructional error) were left unpublished.

87 23 Cal. 3d 131 (1979).
88 Id. at 137.
89 Cramer, 23 Cal. 3d at 137.
90 Id. at 138.
91 Id. at 139.
93 Id. at 795.
4. Competency and Conservatorship Proceedings

As in civil commitments, deprivation of the fundamental right to individual liberty is at stake in conservatorship hearings to place a gravely disabled individual under the care of a legal guardian and competency hearings which determine a criminal defendant’s competency to stand trial. In line with the trend of civil commitments to apply Chapman, most California courts have eschewed Watson where federal constitutional error is found in competency and conservatorship proceedings.

In People v. Johnwell, for instance, in a 2004 appeal from a competency hearing, the Fifth Appellate District of the California Court of Appeal extensively analyzed whether to apply Chapman or Watson review to an erroneous jury instruction which denied defendant the reasonable opportunity to demonstrate that he was not competent to stand trial. In determining which standard it should use to judge the error, the court began by establishing that “[a]lthough it arises in the context of a criminal trial, a competency hearing is a special proceeding, governed generally by the rules applicable to civil proceedings.” As such, the right to a jury trial is only statutory and “as in the case of an MDO proceeding, a jury in a competency trial ‘does not impose criminal punishment and has no power to determine the extent to which the defendant will be deprived of his liberty.’” But, the court cautioned, while the standard of prejudice for erroneous instruction in an ordinary civil case is that of Watson, “[t]his does not mean, however, that the Watson standard applies simply because a trial on the issue of competency is [a civil proceeding].” The court concluded that “the appropriate standard of prejudice in the instant case is the harmless-beyond-a-reasonable-doubt standard of Chapman. The right to a jury trial in a competency proceeding may be only statutory, but a defendant’s right not to be put to trial when he or she is more likely than not incompetent, is constitutional.”

In this analysis, the Johnwell court carefully distinguished that the constitutional nature of the specific error at hand, rather than the overall nature of the case, determines the standard of review. Because the erroneous instruction “‘implicated defendant’s ‘fundamental right not to stand trial while incompetent,’ . . . it must be judged in terms of its compatibility ‘with the dictates of due process.’” In short, assessment under the Chapman standard is

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94. Id. (internal citations omitted) (citing Conservatorship of Roulet, 23 Cal. 3d 219, 223 (1979) and Cramer v. Tyars, 23 Cal 3d. 131, 139 (1979)).
96. Id. at 1275 (quoting People v. Lawley, 27 Cal. 4th 102, 131 (2002)).
97. Id. at 1276 (quoting People v. Montoya, 86 Cal. App. 4th 825, 832 (2001)).
98. Id. at 1275 (citing Hurtado, 28 Cal. 4th at 1190-1194).
99. Id. The court further underscored this point by stating that “[t]he deep roots and fundamental character of the defendant’s right not to stand trial when it is more likely than not that he lacks the capacity to understand the nature of the proceedings against him or to communicate effectively with counsel mandate constitutional protection.” Id. at 1277 (quoting Cooper v. Okla., 517 U.S. 348, 368 (1996)).
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required.” In contrast to the practice, noted throughout this Article, of many California courts to use Chapman review as a proxy for harmlessness of error, the Johnwell court decided that the instructional error in this case was indeed not harmless beyond reasonable doubt, and reversed the judgment.

In conservatorship cases, in which individuals deemed “gravely disabled” are subject to involuntarily confinement under the Lanterman-Petris-Short Act (LPS), California courts also seem to favor Chapman review. In Conservatorship of Wilson, for instance, the Fourth Appellate District of the Court of Appeal of California in 1982 found an erroneous jury instruction in a conservatorship proceeding to be of a constitutional dimension “[b]ecause a finding of gravely disabled may result in a serious deprivation of personal liberty . . . ,” and ruled the error not harmless beyond reasonable doubt without any consideration of Watson review as an alternative.

In an earlier LPS case, Conservatorship of Buchanan, the First Appellate District of the Court of Appeal of California had specifically considered the choice between Chapman and Watson. Defendant, appealing based on the erroneous submission of his entire medical record to the jury without a limiting instruction, argued for the “more stringent rule of Chapman . . . ,” whereas the state public administrator assumed Watson should apply. The court noted that “our research has disclosed no prior decision on the question here presented . . . ,” and held that “the imposition of a stricter standard is preferable where, as here, the deprivation of individual liberty is involved. We conclude that the properly applicable standard is that of Chapman . . . .” It would be of great value to California appellate courts if the California Supreme Court undertook a similarly conclusive examination of the properly applicable standard for dependency proceedings, for which this

100. Id. at 1278 (internal citations omitted) (quoting Cooper v. Okla., 517 U.S. at 369).
101. Id. at 1281.
103. Conservatorship of Wilson, 137 Cal. App. 3d 132.
104. Conservatorship of Wilson, 137 Cal. App. 3d at 135.
105. Id. at 136. As in Johnwell, this application of Chapman to an error then determined not harmless beyond reasonable doubt does not, as opposed to several other cases discussed, appear to function as a merits-based proxy for harmlessness. Where an error, as here, is determined not harmless under Chapman, and Watson as an alternative standard is either not mentioned or is dismissed without the court feeling the need to emphasize that the error would also not be harmless under Watson as well, it can be inferred that Chapman is definitively considered the proper standard.
106. Conservatorship of Buchanan, 78 Cal. App. 3d 281 (1978) (“[w]e are faced with the question of the appropriate standard of review for an LPS civil commitment proceeding . . . .”).
107. Id. at 288.
108. Id.
109. Id. In addition, while not in the context of harmless error review, the California Supreme Court has strongly emphasized that LPS commitments involve a “most basic form of personal liberty deprivation . . . .” “[T]he indisputable fact [i]s that civil commitment entails a ‘massive curtailment of liberty’ in the constitutional sense[,] scarcely less total than that effected by confinement in a penitentiary.” This court has also rejected reliance on a civil label. “[I]nvoluntary commitment is incarceration against one’s will regardless of whether it is called ‘civil’ or ‘criminal’ . . . . these are mere labels.” Conservatorship of Roulet, 23 Cal. 3d at 225 (1979) (emphasis added, internal citations omitted).
Article asserts that *Chapman* would also be the correct harmless review standard.

**IV. HARMLESS ERROR APPLICATION IN CALIFORNIA DEPENDENCY PROCEEDINGS**

Dependency proceedings raise a distinctive set of issues in the choice between *Chapman* and *Watson* review for federal constitutional error in California civil cases. First, dependency proceedings occupy a category primarily understood to be civil, but this categorization has been historically debated and dependency proceedings remain uniquely subject to their own set of rules and procedures. Second, dependency implicates separate, frequently-conflicting fundamental rights of both parents and minor children.

**A. Background on Dependency in California and Fundamental Rights at Stake**

While now predominantly conceived of as civil in nature, child protection and parental severance proceedings were inconsistently defined prior to the early 1990s. Because of the punitive aspects of removing a child from parental custody, some courts considered severance proceedings to be quasi-criminal, while others considered both dependency (the term by which child protection alone was then known) and severance to be purely civil. In *In re Malinda S.*, for instance, the California Supreme Court stated that the “dependency proceedings are a form of civil case” inasmuch as they were “designed not to prosecute a parent, but to protect a child.” In 1989, however, California consolidated its previously bifurcated child protection and parental severance procedures into the modern scheme of joint, multistage “dependency” hearings in juvenile court, beginning with the filing of a petition under California Welfare and Institutions Code section 300 and potentially concluding with a selection and implementation hearing terminating parental rights pursuant to section 366.26.

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110 “Child protection” refers to temporary state custody of the child upon a finding or of actual of substantial risk of abuse or neglect. See Gary C. Seiser & Kurt Kumli, California Juvenile Courts Practice and Procedure, Part IIA, § 2.10 2-18 (2004). I am indebted to the authors of this practice guide for much of the general overview of California dependency law and proceedings in this Part, although, as I discuss infra, I disagree with their assertion that federal constitutional error in dependency cases should be subject to a standard intermediate between *Watson* and *Chapman*.


112 See e.g. *In re Robinson*, 8 Cal. App. 3d 783, 786 (1970).

113 See e.g. *In re Malinda S.*, 51 Cal. 3d 368, 381 (1990) (en banc) (in a case that arose under the pre-1989 bifurcated dependency/severance scheme).

114 *Id.* at 384 (quoting *In re Mary S.*, 186 Cal. App. 3d 414, 418 (1986). *But see In re Kristin H.*, 46 Cal. App. 4th 1635, 1662 (1996) (“the possible end result of the process, namely the total and irrevocable severance of the parent-child relationship, has been acknowledged as a punitive sanction . . . ‘as great, if not greater, than a criminal penalty’”) (internal citations omitted).

115 Prior to 1989, juvenile court had jurisdiction over the “dependency” portion of the case (then the term used to refer to the adjudication of child protection alone, e.g. the determination of whether a given child was in fact abused or neglected) and the superior court determined the parental termination disposition. In that era, “dependency proceedings under [Welfare and Institutions Code] section 300 were entirely separate from actions which terminated parental rights under former Civil Code section 232. Thus courts referring to ‘dependency
Critical distinctions between dependency and ordinary civil actions exist under the modern scheme. For one, “rules applicable to civil cases are not applicable to dependency actions unless expressly made so.” The dependency system is governed by the California Welfare and Institutions Code and the California Rules of Court, and California Civil Code and Code of Civil Procedure requirements generally do not apply. On the contrary, despite the ostensibly nonpunitive nature of dependency proceedings, Rule 39 of the California Rules of Court provides that rules governing criminal cases and appeals apply to juvenile proceedings unless otherwise indicated. And, while allegedly abusive or negligent parents in dependency proceedings are not prosecuted as defendants, proceedings “often contain allegations of criminal activity” and in practice may be highly adversarial. In terms of its firm identification of dependency as civil, the applicability of In re Malinda S. today also “is subject to considerable doubt because it did not involve the radically altered California . . . scheme” unifying dependency and parental termination cases. Now, the combined nature of the proceedings means that from the initial section 300 petition on, parental termination is directly contemplated as the possible result of a series of hearings before one court, raising the procedural stakes overall. Courts have stopped short of requiring a criminal burden of proof standard for dependency where undefined by statute, however, holding that most findings leading to parental severance must be shown by “clear and convincing evidence” rather than beyond reasonable doubt. Dependency hearings thus can be seen as occupying a “third” or “blended” category of proceedings, sharing with civil commitment schemes a considerable amount of grey area as to the extent of their resemblance to either criminal prosecutions or civil actions. Although this Article argues that the nature of the error rather than the civil or criminal character of the proceedings proceedings’ or ‘section 300 proceedings’ under the old statutes did not contemplate that the termination of parental rights was at issue . . . . Effective January 1, 1989, the two proceedings have been combined. The entire dependency process is now governed by one statutory scheme, which begins with the filing of a petition under section 300 and may end with a selection and implementation hearing terminating parental rights under section 366.26.” In re Kristin H., 46 Cal. App. 4th at 1660-1661 (internal citations omitted).

119. See In re Jennifer R., 14 Cal. App. 4th 704, 711 (1993) (“[d]ependency proceedings in the juvenile court are special proceedings governed by their own rules and statutes. Unless otherwise specified, the requirements of the Civil Code and the Code of Civil Procedure do not apply”) (internal citations and footnote omitted).
120. See id.; Cal. Rules of Ct., Rule 39.
121. In re Kristin H., 46 Cal. App. 4th at 1662. “While the parent in modern day dependency proceeding[s] may not stand in the same shoes as a criminal defendant facing a loss of personal liberty, . . . to say simply that dependency proceedings are civil in nature fails to acknowledge the fundamental difference between these proceedings and the ordinary civil action.” Id. at 1661.
122. Patton, supra n. 5, at 226 n. 176.
123. See e.g. In re Angelia P., 28 Cal. 3d 908 (1981). But see Cynthia D. v. Super. Ct., 5 Cal. 4th 242, 256 (1993) (requiring only proof by a preponderance of the evidence at a section 366.26 hearing, because “the evidence of detriment [to the child was] already so clear and convincing [from prior hearings],” and “more [could not] be required without prejudice to the interests of the . . . child . . . .”
should govern which harmless standard error should apply, some courts have
looked to the character of the proceedings for guidance as to how to classify the
nature of a given error and as to which standard should apply—independently
or derivatively of the nature of the error.

Moreover, as with civil commitments, dependency implicates certain
fundamental rights, for parent and child alike. Perhaps most obvious is the
interest of a parent in retaining her parental rights. The United States Supreme
Court has repeatedly affirmed, most definitively in Lassiter v. Department of
Social Services, that the well-established, presumptive right of a parent to the
“companionship, care, custody, and management of his or her children” is a
fundamental liberty interest.124 The integrity of this essential right, considered
“far more precious than any property right,”125 has been protected by the Due
Process Clause, the Equal Protection Clause, and the Ninth Amendment of the
United States Constitution.126 Accordingly, the California Supreme Court has
never questioned that parenting “is a fundamental right, and accordingly, is
disturbed only in extreme cases of persons acting in a fashion incompatible
with parenthood.”127 In addition, a parent’s important interest in retaining her
parental rights “may be supplemented by the dangers of criminal liability
inherent in some termination proceedings.”128 Indeed, in some cases, the
parents’ fundamental right not to be separated from their child entitles them to
rights similar to those of a criminal defendant.129

Prior to 1989, the bifurcated nature of dependency and severance
hearings allowed for an easier determination of when parents’ fundamental
rights were implicated—“California cases following Lassiter routinely applied
its principles only to actions terminating parental rights under former Civil
Code section 232, and not to section 300 proceedings.”130 As a result of child
protection and parental severance proceedings being combined, the basic

have by now made plain beyond the need for multiple citation that a parent's desire for and right to
'the companionship, care, custody, and management of his or her children' is an important interest
that 'undeniably warrants deference and, absent a powerful countervailing interest, protection’")
(quoting Stanley v. Ill., 405 U.S. 645, 651 (1972)). See also Santosky v. Kramer, 455 U.S. 745, 759
(1982) (referring to the right to parent as a “fundamental liberty interest”).

125 In re Kristin H., 46 Cal. App. 4th at 1661; Lassiter, 452 U.S. at 27-28; In re

126 See Stanley, 405 U.S. at 651.

127 In re Angelia P., 28 Cal. 3d at 916 (quoting In re Carmaleta B., 21 Cal. 3d 482,
489 (1978)). See also In re Kieshia E., 6 Cal. 4th 68, 76 (1993).

128 Patton, supra n. 5, at 201 (referencing Lassiter, 452 U.S. at 31). See also
Lassiter, 452 U.S. at 27 n. 3 (pointing out that “[p]etitions to terminate parental rights are not
uncommonly based on alleged criminal activity”).

129 In re Kristin H., 46 Cal. App. 4th at 1666 (citing In re Mary S., 186 Cal. App. 3d
414, 418 n. 3 (1986). For instance, a “parents' right not to be separated from their child entitles them
to appointment of counsel [under Welfare and Institutions Code section 317], and the same degree of
review of the case on appeal as criminal defendants.” In re Mary S., 186 Cal. App. 3d at 419 n. 3.

130 In re Kristin H., 46 Cal. App. 4th at 1665. However, as the Kristin H. court
noted, “Lassiter itself may not compel such a restricted application. Although that case concerned a
termination proceeding, the court observed that ‘[i]nformed opinion has clearly come to hold that an
indigent parent is entitled to the assistance of appointed counsel not only in parental termination
proceedings, but in dependency and neglect proceedings as well.’” Id. (quoting Lassiter, 452 U.S. at
33-34).
parental right is now threatened by implication or express result at every stage of dependency proceedings, and the gravity of this potential deprivation calls for great deference in dependency proceedings to preservation of parental rights.  

However, it is increasingly recognized that the child in a dependency proceeding has fundamental rights at stake, too. Not only is the overriding goal of the dependency system to serve the child’s best interests, since 1995 children have been considered parties to, rather than solely subjects of, dependency proceedings, and some of their “best interests” are of a constitutional dimension. Chiefly, a child has a fundamental right to a stable, permanent placement in a family unit, as well as compelling rights to be free from abuse and neglect. These rights are “constitutionally protected liberty interest[s] . . . clearly part of the basic values implicit in the concept of ordered liberty and of the basic civil rights of individuals.”

Contemporary courts are sensitive to the idea that “the child’s interests should be given great weight in a proceeding involving parental rights . . . .” In the years after the adoption of combined dependency proceedings, California courts have attempted to balance the interests of parent and child, and to distinguish between errors occurring at different stages of the proceedings. Sometimes, certainly, the interests of parent and child in a stable family unit may be the same, particularly in circumstances where a parent-child relationship has been inappropriately terminated. Often, however, their interests may collide, where a child’s interest in freedom from abuse and neglect requires the severance of an abusive or neglectful parent’s right to raise that child. In 1992, the In re Arturo A. court noted that “at some point in the administrative process of terminating parental rights and creating new lives for

132. See Welf. & Inst. Code, §202(a)-(b).
133. See Welf. & Inst. Code, § 317.5(b).
134. See e.g. Adoption of Kay C., 228 Cal. App. 3d 741, 749 (1991) (“natural children have a fundamental, independent right in belonging to a family unit”); In re Arturo A., 8 Cal. App 4th 229, 241-242 n. 6 (1992) (children have a “constitutional right to a reasonably directed early life” and there is “no question that at some point the child acquires a fundamental right . . . to a settled life”); In re Marilyn H., 5 Cal. 4th 295, 306 (1993) (“children have a fundamental independent interest in belonging to a family unit[,] . . . to be protected from abuse and neglect and to have a placement that is stable, permanent, and that allows the caretaker to make a full emotional commitment to the child”); In re Jasmon O., 8 Cal. 4th 398, 419 (1994) (children have fundamental rights including protection from neglect and abuse and to have a permanent and stable placement).
135. See e.g. id. (where “inappropriate termination of the parent-child relationship” has occurred, “the child may have an interest equal to that of the parent’s in its restoration”).
dependent children, the due process rights of the delinquent parent may be neutralized by the competing liberty interests of the child . . . .”

The California Supreme Court gave a formula in 1993 for where this point of neutralization might lie, proposing that “up until the time the section 366.26 hearing is set, the parent’s interest in reunification is given precedence over the child’s need for stability and permanency.” However, other and subsequent decisions have rejected the idea that the attachment and balance of federal constitutional rights might depend on the particular stage of the proceedings, and instead have espoused a case-by-case analysis approach.

B. No Consistency in Which Standard Applied to Appeals of Dependency Proceedings

While cases have held that standard harmless error principles “appl[y] to civil, criminal, and dependency proceedings alike,” the question of which harmless error standard should principally apply to dependency has not been settled. Although Chapman seems increasingly to be a popular choice, many California courts still regularly apply Watson—with or without discussion—and occasionally have fashioned alternate harmless error tests altogether. As with civil commitments, it also is not uncommon for both standards to be mentioned, but with an ultimate determination made that both are satisfied and therefore the issue of which should apply need not be reached. In practice, of course, this amounts to an implicit application of Chapman where constitutional error is found harmless (and, conversely, of Watson where constitutional error is found harmful). In fact, Watson seems at times to be applied as a proxy for emphasizing the harmfulness of errors (in other words, an error must be really quite harmful if it is found so under the more lenient standard), and Chapman as a proxy for emphasizing the harmlessness of errors,

138 In re Arturo A., 8 Cal. App 4th at 241. The Arturo A. court also “presumed that under the new statutory scheme the question whether due process rights [for the parents] attach would depend upon whether the particular hearing could ‘directly threaten permanent separation of child from parent.’” In re Kristin H., 46 Cal. App. 4th at 1666 (quoting In re Arturo A., 8 Cal. App. 4th at 239 (italics added)).

139 In re Marilyn H., 5 Cal. 4th at 310.

140 See e.g. In re Angelica V., 39 Cal. App. 4th 1007, 1013 (1995) (rejecting its own prior remarks in Arturo A. as dicta and espousing a case-by-case due process analysis as prescribed by Lassiter rather than depending on the stage of dependency proceedings); In re Kristin H., 46 Cal. App. 4th at 1666 (stating “[w]e do not believe the prediction of the court in Arturo has proven to be a workable standard”).

141 See e.g. In re Emilye A., 9 Cal. App. 4th 1695 (utilizing the 3-prong balancing test of Lassiter v. Dept. of Soc. Servs. to determine when there is a federal constitutional due process right to counsel). Under Emilye A. and Lassiter, a court must weigh the interests of the party bringing a claim of ineffective assistance of counsel, the state’s interest, and the risk of an erroneous decision under the circumstances if legal representation is not available. Lassiter, 452 U.S. at 31; In re Emilye A., 9 Cal. App. 4th at 1708. The “net weight of such factors” must be sufficient to rebut the presumption that a federal constitutional right to counsel does not exist where a party’s individual liberty is not threatened. In re Emilye A., 9 Cal. App. 4th at 1708. Emilye A.’s approach of using Lassiter criteria has been widely followed in California. Even under Arturo A., a case-by-case analysis applies, and the identification of a federal constitutional right to counsel “will depend upon the complexity of the issues presented and the likelihood that counsel might sway the outcome.” In re Arturo A., 8 Cal. App. 4th at 238.

for the reciprocal reason.

In *In re Monique T.*,\(^{143}\) for instance, the First Appellate District of the California Court of Appeal in 1992 considered the error of a trial court in not advising a mother of her due process right to a jurisdictional hearing and in not obtaining her personal waiver of that right. The court rejected respondent’s attempt to limit the court’s duty to acquire express waiver only to criminal trials, and found that despite the statutory explication of these rights,\(^{144}\) the error rose to a constitutional dimension because “a parent’s fundamental right to care for and have custody of her child is implicated and may not be interfered with without due process of law.”\(^{145}\) The court found the failure to obtain the mother’s waiver of her fundamental rights harmless beyond reasonable doubt, but nevertheless dodged express adoption of the *Chapman* test, saying that “[b]ecause we find the error here would be harmless even under the strict standard of *Chapman*, we need not and do not decide whether that standard or the more easily met reasonable probability test . . . is the correct test of prejudice for this error.”\(^{146}\)

In the same year, the Fourth Appellate District of the California Court of Appeal in *In re Laura H.*,\(^{147}\) similarly found that violation of a mother’s statutory right to have her counsel present when the trial judge spoke *in camera* to her child\(^{148}\) was an error of federal constitutional dimension, since the statute was intended to protect the constitutional right of confrontation.\(^{149}\) No express

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144. Cal. Rules of Ct., Rules 1412(i), 1449(b).
146. *Id.* at 1377-1378 (internal citation omitted).
149. *In re Laura H.*, 8 Cal. App. 4th at 1694-1696. In a footnote, the court explained that

[the right to counsel may be statutory, but it is conferred to protect parental rights, which clearly are fundamental. Parental rights may not be terminated without due process, and the right to counsel is a prophylactic measure designed to ensure compliance with due process. Here, violation of the statutory right to counsel’s presence at the in camera hearing detrimentally affected the constitutional rights that counsel’s presence was intended to protect. Moreover, when a court denies a party a right guaranteed by statute, the effect may be a denial of equal protection or due process. Thus, even assuming the right to counsel at the in camera hearing was only statutory, it may have been unconstitutionally taken away. And, deprivation of a statutory right may result in denial of due process when the resulting prejudice is sufficiently great.]

*Id.* at 1695 n. 6 (citing *Baires v. INS*, 856 F.2d 89, 91 (9th Cir. 1988)).
waiver of this right had been obtained, and the court expressed the opinion that “when a constitutional right is infringed upon, the appropriate standard of prejudice is the harmless beyond a reasonable doubt standard.” Respondent argued for application of the Watson test, which the court acknowledged had been used for juvenile dependency matters (prior to the merging of dependency and severance proceedings), but the court felt “the termination of parental rights demands greater standards and greater scrutiny than the institution of dependency proceedings.” However, the court concluded that as the error was prejudicial under either standard, it “need not resolve this conflict.”

More recently, though, the Fourth Appellate District of the California Court of Appeal in 2002 clearly identified a federal constitutional error, but nonetheless proceeded to apply Watson review to a dependency case, with no consideration of Chapman whatsoever. In this case, In re O. S., the court considered the appeal of an alleged father whose parental rights had been terminated by the trial court after his court-appointed attorney failed to return phone calls or assist him in establishing biological or presumed father status. First, the court examined appellant’s claim of inadequate assistance of counsel to see whether his right to counsel had risen beyond a statutory right to a federal constitutional level. It identified such an inquiry as case-by-case, giving consideration to the factual circumstances and procedural setting at the time of the error’s occurrence. Applying the Lassiter three-part test to determine whether federal constitutional rights were implicated, the court found that indeed, “[u]nder the facts of the case, he had a constitutional right to effective counsel.” Then, the court stated that it would review the error “to determine whether it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error”—the Watson standard, under which the error was in fact determined to be prejudicial.

The Sixth Appellate District of the California Court of Appeal, in similarly considering a violation of right to counsel in In re Kristin H., engaged in constitutional avoidance entirely, by focusing solely on the statutory aspect of the error. In a holding especially interesting given how heavily the court had emphasized the fundamental parental rights at stake, as discussed infra, the court concluded that “[a]lthough the parties have engaged in a lengthy analysis

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150. Id. at 1696 (referring to the use of Watson review in dependency cases such as In re Nalani C., 199 Cal. App. 3d 1017, 1028 (1988)).
151. Id.
152. Id.
153. Id.
154. Id. at 1406-1407. The California Welfare and Institutions Code and Family Code distinguish between “alleged,” “presumed,” and “biological fathers,” and “in dependency cases, a man’s status as a presumed or biological father is critical to whether he retains his rights to his child. Alleged fathers have fewer rights than presumed fathers and are not entitled to custody, reunification services, or visitation.” Id. at 1406, 1410.
155. Id. at 1407.
156. Id.
157. Id.
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**California’s Dueling Harmless Error Standards**

of the right to effective assistance of counsel under constitutional principles of due process and fundamental fairness, our conclusion regarding the statutory right to competent counsel disposes of the mother’s claim. It is a well-established principle of judicial review that “we do not reach constitutional questions unless absolutely required to do so . . . .”  

The court had treated the mother’s due process claim as merely statutory, and “agree[d] with those cases holding that violation of a statutory right to counsel is properly reviewed under the harmless error test enunciated in *People v. Watson.*” Under the *Watson* test, the error was found to be prejudicial.

While the *Kristin H.* court’s self-restraint in not applying the federal constitutional harmless error standard or even finding constitutional error to begin with may seem logical in that the error already was prejudicial under the more lenient *Watson* standard, it begs the question what the court would have done if the error in fact *was* harmless. Would it have been “absolutely required” to reach the constitutional question in that case (and perhaps apply *Chapman*), where the termination of appellant’s fundamental parental rights would be *upheld* by a finding of harmlessness? The rationale of the *Kristin H.* court appears suspect in this respect, and it supports the contention of this Article that the choice of which harmless error standard courts use tends to reflect a merits analysis, with *Watson* review frequently employed to emphasize the harmfulness of a given error and *Chapman* to emphasize the harmlessness of a given error.

Other dependency cases have presumptively applied *Chapman* review without discussion at all as to whether *Watson* should govern. In 2002, the Fifth Appellate District of the California Court of Appeal in *In re Angela C.* considered whether *Chapman* or reversal per se should apply to the constitutional error of failure to give notice of a continued termination proceeding. The court held that since notice defect is an acknowledged constitutional error, “[i]t is subject to at least a heightened *Chapman* standard of prejudice.”  

The court then dismissed the idea that a notice defect should be reversed per se, and explained that it was “persuaded” that *Chapman* was appropriate in this case, since when “[c]onfronted with constitutional error in dependency matters, other appellate courts have looked to the standards applied in criminal appeals . . . .” The error was, on review, found harmless beyond reasonable doubt. Similarly, the Fourth Appellate District of the California Court of Appeal in 2004—apparently in an effort to cover every conceivable harmless error review approach in its dependency decisions—also applied *Chapman* to a notice error (and found the error harmless), without discussion of

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159. *Id.* at 1672 (quoting *People v. Williams*, 16 Cal. 3d 663, 667 (1976)).
160. *Id.*
161. *Id.*
163. *Id.* at 394 (emphasis added).
164. *Id.* at 393-394 (citing other dependency cases that presumptively applied *Chapman* to a variety of constitutional errors, including *In re Dolly D.*, 41 Cal. App. 4th 440, 446 (1995); *In re Andrew S.*, 27 Cal. App. 4th 541, 547 (1994); *In re Amy M.* 232 Cal. App. 3d 849, 868-869 (1991); and *In re Steven H.*, 85 Cal. App. 4th 1023, 1033 (2001)).
any other standard.165

Some commentators, such as the authors of one California juvenile courts practice guide, remain unconvinced by either standard. Seiser and Kumli, in briefly addressing the debate over which test to apply to federal constitutional error in dependency, consider Chapman’s harmless beyond reasonable doubt standard “extreme” and “neither required nor appropriate in dependency cases even for the denial of a constitutional right.”166 On the other hand, they concede that simple Watson review is frequently considered to place “too little weight on the denial of a constitutional right.”167 In the alternative, they propose a “clear and convincing evidence” standard for assessing the harmlessness of violations of constitutional rights, on the grounds that this intermediate level of review best matches the lower standard of proof for dependency proceedings as opposed to criminal trials.168 Although Seiser and Kumli state no direct case support nor academic literature in favor of this new standard, at least one California appellate court has been subsequently convinced by their reasoning—in 2005, the First Appellate District of the California Court of Appeal in Denny H. v. Superior Court169 relied heavily on guidance from Seiser and Kumli’s text in finding it “fitting that the harmless error standard [for federal constitutional error] should be that of clear and convincing evidence,” despite noting that other courts have used Chapman for such error in dependency (as had the First District itself, e.g. in In re Monique T., supra).170 Under the “clear and convincing” test, the Denny H. court found harmless the denial of a father’s due process right to cross-examination.171 However, the court found it important to confirm that the erroneous procedure in this case “would also be harmless under Chapman.”172 Subsequently, in 2008, the California Supreme Court declined to address whether the clear and convincing standard should apply to federal constitutional error in the dependency context.173


166 Seiser & Kumli, supra n. 111, at 2-353 (emphasis added). Seiser and Kumli are firm in their opinion that “the proper standard of persuasion for harmless error regarding constitutional violations in dependency proceedings is not proof beyond a reasonable doubt,” and also dismiss out of hand the suggestion by Patton, supra n. 5, that a reversible per se standard might ever be appropriate to apply to denial of the federal constitutional right to effective assistance of counsel. Id.

167 Id. at 2-353.

168 Id. at 2-353, 2-354. This standard, they argue, “recognizes both the special nature and purpose of dependency proceedings as well as the importance of the right to parent, and assigns increased significance to the federal constitutional error established [versus mere statutory error].” Id. Seiser and Kumli also find support for their proposed “clear and convincing evidence” standard in the fact that “most violations of federal constitutional rights in dependency cases . . . arise from a single act or hearing,” but the authors do not expand on how this differs in any significant manner from error arising in criminal cases. Id. at 2-353.


170 Id. at 1514-1515.

171 Id. at 1515 (citing to and quoting directly from Seiser & Kurt, supra n. 111, at 2-18). The court did not explicate, however, why it found the right to cross-examination in a dependency hearing, which is protected by state statute, to rise to a federal constitutional level in the first place.

172 Id.

173 In re James. F., 42 Cal. 4th 901, 911 n. 1 (2008). See also discussion supra n. 8.
The debate of which standard to apply to federal constitutional error in California dependency proceedings is clearly ripe for resolution. The current plethora of opinions as to which standard should apply to dependency confuses the harmless error doctrine and dilutes the protection of constitutional rights, while providing little guidance to courts statewide, which in turn must decide anew each time which standard to apply, whenever they review a case of federal constitutional error in dependency proceedings.

Watson review is insufficient to protect federal constitutional rights in dependency proceedings, where precious liberty interests—of a parent in the care and custody of her or his child, and of the child in a stable and abuse-free permanent placement—are at stake. These interests clearly extend beyond the simple property interests generally protected at civil trials, and deserve deferential protection when threatened. To paraphrase the Fifth Appellate District of the California Court of Appeal in People v. Johnwell, supra, the Watson standard should not apply simply because a given proceeding is characterized as “civil.” Rather, the identification by the reviewing court of a federal constitutional error necessitates a higher standard of review than that for mere state law error. California courts, including the California Supreme Court, have reflected this conclusion by increasingly rejecting Watson review for federal constitutional error in civil commitment cases, conservatorship proceedings, and competency hearings.

There is no reason why “Chapman’s concern regarding the constitutional violation”174 in criminal trials should not equally extend to dependency cases, as has been regularly done for civil commitments and other civil proceedings that implicate fundamental rights. One need look no further for an alternative to Watson. The “clear and convincing” harmless error standard proposed by Sieser and Kumli, for instance, is not clearly convincing when a suitable, clear, and familiar standard for federal constitutional error already exists—Chapman. Where a state has “failed to accord federal constitutionally guaranteed rights,”175 be it to a criminal defendant or party to a civil or dependency action, the Chapman Court’s admonition that “we cannot leave to the States the formulation of the authoritative laws, rules, and remedies designed to protect people from infractions by the States of federally guaranteed rights”176 holds just as strong. In short, where a federal constitutional right is at stake, a federal harmless error rule should govern.

Those sensitive to federal intrusion into states’ rights might well be reluctant to expand the decision in Chapman, which “requires state courts to act in contravention of state harmless error rules that would otherwise govern.”177 This intrusion is justified, however, by the importance of discernable government intention not to treat as harmless federal constitutional errors that affect the substantial rights of a party. California appellate courts are already

174. Patton, supra n. 5, at 221.
176. Id.
177. Meltzer, supra n. 52, at 27.
sensitive to this concern, as evidenced by their tendency in civil commitment cases and dependency proceedings to apply Chapman expressly or implicitly to those cases where error is in fact found harmless—the courts understand the importance of an elevated standard of review when such fundamental rights are at stake. Furthermore, even in criminal cases, Watson is much more frequently applied than Chapman, despite the availability of the stricter standard. There is no reason to predict that Chapman wouldn’t be applied as prudently in the dependency context.

In addition, California courts’ choice of which harmless error standard to use often tends to reflect a merits analysis, with Watson review frequently employed to emphasize the harmfulness of a given error and Chapman to emphasize the harmlessness of a given error. While courts certainly do have discretion to determine when constitutional versus statutory rights are implicated, and while Chapman review certainly should only apply when federal constitutional error is first clearly identified, a back-door practice of first determining prejudice sufficient to satisfy Watson and only then avoiding reaching the constitutionality of the error on this basis subverts the need for a consistent doctrinal approach to federal constitutional error.

Other concerns in applying Chapman might include judicial efficiency and administration, with public time and resources being spent attending to and possibly reversing for unimportant errors. Professor Mitchell provides an excellent response to these concerns:

One goal of the harmless error doctrine is the preservation of public respect for the judicial system by not reversing for nonprejudicial errors. Yet this public respect may also be undermined when significant errors go uncorrected, and when constitutional rights thus go unprotected . . . . The opposite concern, that too strict a test would lead to reversal for trivial error, is also valid . . . . However, even the strictest harmless error test would not require reversal for insignificant errors . . . even under the Chapman test, courts must find that the error was of some import before reversing.178

An error-free case is rare, but in general most trial court error is found to be harmless and thus not cause for reversal, even in an era where most errors at trial are subject to harmless error review. There is no indication that applying the Chapman standard to dependency proceedings would more than minimally infringe upon judicial resources or lead to reversal for insignificant error. In fact, efficiency might even be improved, given the current phenomenon of many judicial opinions doing the double work of analyzing dependency error under both standards in the absence of controlling authority one way or the other.

Overwhelmingly, constitutional values, common sense, and the current direction of California courts of appeal indicate it is time for California courts to adopt the federal constitutional harmless error standard of Chapman for dependency proceedings. While “there can be no such thing as an error-free,  

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178 Mitchell, supra n. 6, at 1366-1367.
perfect trial, and [] the Constitution does not guarantee such a trial,”[]179 the Constitution does guarantee certain fundamental liberty interests, including the right to parent one’s child and a child’s right to be in a safe, stable home free from abuse and neglect. When these or any fundamental freedoms are at stake in a civil case, errors infringing on the right to counsel, due process, and other rights may often rise to a federal constitutional dimension. In any state legal proceeding, be it criminal, civil, or dependency, it is the responsibility of courts to protect individuals against the unconstitutional infringement of federally guaranteed freedoms. Harmless error doctrine hence should function, where federal constitutional error is identified, to best protect fundamental rights.

VI. CONCLUSION

Chapman harmless error review is a choice whose clear protection of fundamental rights outweighs the very minimal concerns of adopting this higher standard for federal constitutional error in dependency proceedings. As the People v. Johnwell court noted, quoting the United States Supreme Court, “[t]he function of a standard of proof . . . is to ‘instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication.’”[]180 Where fundamental rights protected by the United States Constitution are implicated in dependency or any other state civil proceeding, no less than in criminal prosecutions, society needs a high degree of confidence in the correctness of conclusions in such cases. Both the prospect of involuntarily removing a child from his or her parents without cause, or, conversely, of subjecting a child to abuse and instability from remaining in an unsafe home situation, are considerations deserving dependable constitutional protection. This protection of fundamental rights is best assured by the federal constitutional harmless error standard of Chapman—harmless beyond all reasonable doubt—rather than the reasonable probability Watson state law standard for prejudicial error.

Clarifying the standard in this way does not, of course, resolve the threshold question of when and whether a federal constitutional error has occurred to begin with. For Chapman harmless error analysis to occur, the existence of such a constitutional error must first be established by the reviewing court. Only after a given error is identified as rising to a constitutional dimension can an assessment be made as to whether it was harmless beyond a reasonable doubt.[]181 And, as indicated by the variety of determinations of the constitutionality of error, there remains a considerable range of opinion as to when, in state dependency proceedings, fundamental

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rights are implicated enough for constitutional error ever to occur, and as to which types of errors under what circumstances do then rise to such a level. Such an inquiry is beyond the scope of this Article, but the determination of whether an error rises to a federal constitutional dimension should properly remain a case-by-case analysis. California appellate courts reluctant to apply Chapman may continue to exercise their discretion to decline extension of federal constitutional status to certain statutory due process and right to counsel violations in civil cases, in the absence of controlling California Supreme Court or United States Supreme Court precedent. As is currently the case in state criminal trials, Watson would remain available to errors deemed purely of state statutory or procedural dimension. However, once federal constitutional error is established, the Chapman “beyond reasonable doubt” test for harmless error must apply in order to properly safeguard fundamental rights.

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