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Appeal of Errors in the Absence of Objection-Pennsylvania's "Fundamental Error" Doctrine

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APPEAL OF ERRORS IN THE ABSENCE OF OBJECTION—PENNSYLVANIA'S "FUNDAMENTAL ERROR" DOCTRINE[1]

The Pennsylvania courts have established the rule that objection must be taken at the trial level to an alleged error for it to serve as the basis for reversing the decision.[2] The rule rests on the rationale that "[a] party may not sit silent and take his chances of a verdict, and then, if it is adverse, complain of a matter which, if an error, would have been immediately rectified and made harmless."[3] To this rule, however, is applied the "fundamental error" doctrine. As stated by Chief Justice Bell in *Commonwealth v. Williams*:[4] "[The] *general rule will not be applied* where there is basic and fundamental error which affects the merits or justice of the case . . . ."[5] Hence an error not objected to can serve as the basis for a reversal if the above requirements mentioned by Chief Justice Bell are met.

Three recent decisions of the Pennsylvania Supreme Court have centered on the "fundamental error" doctrine.[6] These cases

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1. While the problems examined in this Comment are common to both civil and criminal cases, the paper will focus only on criminal appeals. Some of the policy reasons discussed are inapplicable to civil cases; therefore, the recommendations are only submitted for use in criminal cases. Further, no distinction is made between errors in the body of the trial and those in the trial judge's charge.

2. *E.g.*, Commonwealth v. Donough, 377 Pa. 46, 103 A.2d 694 (1954); Commonwealth v. Razmus, 210 Pa. 609, 60 A. 264 (1905); Commonwealth v. Hilbert, 190 Pa. Super. 602, 155 A.2d 212 (1959).

3. Commonwealth v. Razmus, 210 Pa. 609, 611, 60 A. 264, 265 (1905); *accord*, Segriff v. Johnston, 402 Pa. 109, 113, 166 A.2d 496, 499 (1960); Commonwealth v. Hilbert, 190 Pa. Super. 602, 607, 155 A.2d 212, 215 (1959); Commonwealth v. Shinfield, 83 Pa. Super. 292, 298 (1924). The purpose of the rule is to allow the trial judge to remedy the error. Without the rule, it would be common trial strategy to allow errors to go uncorrected and then appeal on them. The number of retrials would push the cost of litigation beyond the means of the average citizen. Finally, the backlog of cases awaiting trial and retrial would so burden the court calendar as to make litigation of a particular case an extremely prolonged affair.

4. 432 Pa. 557, 248 A.2d 301 (1968).

5. *Id.* at 563-64, 248 A.2d at 304.

6. In Commonwealth v. Simon, 432 Pa. 386, 248 A.2d 289 (1968), the defendant was convicted of first degree murder and sentenced to life in prison. The majority affirmed without opinion while Justice Roberts concurred on the basis that since defendant failed to object to the alleged error, he could not appeal. *Id.* at 387, 248 A.2d at 289. In Commonwealth v. Scoleri, 432 Pa. 571, 248 A.2d 295 (1968), the defendant was convicted of first degree murder and sentenced to death. He appealed on the basis that there was error in the trial judge's admonition that he could not confer with

have two points in common: (1) no objections were taken to the alleged errors at the time they were committed; and (2) at least one Justice argued that the errors were "basic and fundamental."[7] These cases become important not only for the ques-

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his counsel during a recess in the trial. The majority agreed this was error but affirmed the sentence because the error was not objected to. *Id.* at 573, 248 A.2d at 295. In Commonwealth v. Williams, 432 Pa. 557, 248 A.2d 301 (1968), the defendant was convicted of numerous charges. His appeal was based on an alleged error in the charge to the jury. The conviction was reversed and a new trial granted on the basis that there had been "fundamental error." *Id.*

7. In Commonwealth v. Simon, 432 Pa. 386, 248 A.2d 289 (1968), the error was based on confusion in the charge when the trial judge stated that "[v]oluntary manslaughter consists in the unlawful killing of another without malice . . . and that means without direct intent to kill. . . ." and "[i]f you bear in mind that manslaughter is never accompanied by legal malice, that is, by a direct intent to kill. . . ." In Pennsylvania the above statements are incorrect. *See, e.g.*, Commonwealth v. Walters, 431 Pa. 74, 244 A.2d 757 (1968); Commonwealth v. Jordan, 407 Pa. 575, 181 A.2d 310 (1962); Commonwealth v. Drum, 58 Pa. 9 (1917); B. LAUB, PENNSYLVANIA TRIAL GUIDE, 281-82, 387-93, 463-65 (1959).

Justice O'Brien in his dissenting opinion, in which Justice Cohen joined, states: "The act itself can well be intentional without any intent to kill being present. In view of the fact that the evidence in this case only barely supports the verdict of first degree murder, I conclude that the erroneous instructions were definitely prejudicial to appellant." Later he says: "None of the cases cited by Justice Roberts is inconsistent with this view that where there is *fundamental* error in the charge, this Court will not permit the verdict to stand." Commonwealth v. Simon, 432 Pa. 386, 397-98, 248 A.2d 289, 294 (1968) (dissenting opinion).

In Commonwealth v. Scoleri, 432 Pa. 571, 248 A.2d 295 (1968) the alleged error centered around the trial judge's admonition to defendant not to confer with counsel during a recess. It was argued that this was a deprivation of defendant's right as guaranteed by U.S. CONST. amend. VI. It was also argued that since the admonition was made in front of the jury it prejudiced defendant in their eyes. *Compare* Commonwealth v. Scoleri, 432 Pa. 571, 248 A.2d 295 (1968) *with* United States v. Venuto, 182 F.2d 519 (3d Cir. 1950); Commonwealth v. Vivian, 426 Pa. 192, 231 A.2d 301 (1967) *and* Commonwealth v. Robinson, 317 Pa. 321, 176 A. 908 (1935).

In Commonwealth v. Scoleri, 432 Pa. 571, 582, 248 A.2d 295, 300 (1968) (concurring opinion), Justice Roberts argued for affirmance on the basis that the failure to object to the above alleged errors precluded a reversal. As to "fundamental error," Justice Roberts compared the result reached here to that of Commonwealth v. Williams, 432 Pa. 557, 248 A.2d 301 (1968), and indicated his disagreement. While he did not state that the errors in *Scoleri* were "fundamental," that conclusion can be drawn from his opinion.

Commonwealth v. Williams, 432 Pa. 557, 248 A.2d 301 (1968), was appealed on the basis that the trial judge incorrectly charged the jury as to reasonable doubt. Chief Justice Bell writing for the majority stated:

> [W]e . . . believe that the following portion of the Court's charge amounts to fundamental error: 'If you feel that their testimony does not substantially do that [prove guilt beyond a reasonable doubt], . . . *then you are not required* to bring in a conviction.' This portion of the charge gave the jury a right to find defend-

tions they raise as to the "fundamental error" doctrine but also for Justice Roberts' use of them to advance his own test as to when an alleged error can be appealed. The test Justice Roberts advocates is somewhat confusing since the language in his opinions can be read to support two different theories. In *Commonwealth v. Simon*[8] Justice Roberts states:

> [W]e must insist that counsel object to *all*[9] of those events which counsel alleges to be error so that the trial court is afforded an opportunity to remedy the alleged deficiencies which the trial court determines are valid. *Then*,[10] this Court will reverse for (1) these errors which were so severe that any attempt to correct them could not dispel the earlier taint and (2) those objections which the trial court overruled and which we find meritorious.[11]

Justice Roberts reiterates this view in *Commonwealth v. Williams*:[12]

> [I] consider the failure by counsel for appellant to object to [the alleged error], or request clarification, conclusive of this issue.
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> The proper function of our guilt-determining process neither requires nor assures a defendant an errorless trial. A defendant is, however, entitled to a fair trial free of such trial errors as his trial counsel timely sought to have corrected by calling them to the court's attention. Trial errors are made in the courtroom and it is there that the correction process should at least be *initiated*.
>
> The defense may not successfully complain of trial errors for the first time *only* after the jury has returned a verdict of guilty, unless the errors were initially challenged at trial, and thereby preserved on appeal.[13]

These excerpts simply reaffirm the rule that a specific objection must be lodged with the trial court before a reversal will ensue. Justice Roberts uses other language, however, which implies a more complex test. In *Commonwealth v. Simon*[14] he states that " . . . the relevant standard must be *not* how severe was the error, *but* how easily can it be corrected."[15] The test is further developed in *Commonwealth v. Scoleri*:[16] "The correct test for whether this court will consider an issue on appeal which was

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ant guilty even when they had a reasonable doubt, and consequently constituted basic and fundamental and reversible error.

Id. at 567, 248 A.2d at 306.

8. 432 Pa. 386, 248 A.2d 289 (1968).
9. Emphasis added.
10. Emphasis in original.
11. Commonwealth v. Simon, 432 Pa. 386, 390-91, 248 A.2d 289, 291 (1968) (concurring opinion).
12. 432 Pa. 557, 248 A.2d 301 (1968).
13. *Id.* at 569-70, 248 A.2d at 307-08 (dissenting opinion). See also opinions by Justice Roberts in Commonwealth v. Bruce, 433 Pa. 68, 249 A.2d 346 (1969) and Commonwealth v. Johnson, 433 Pa. 34, 248 A.2d 840 (1969).
14. 432 Pa. 386, 248 A.2d 289 (1968).
15. *Id.* at 390, 248 A.2d at 291 (concurring opinion).
16. 432 Pa. 571, 248 A.2d 295 (1968).

not raised below must hinge upon the ability of the trial court to have corrected the error if it had been brought to that court's attention."[17] This language implies that where no objection was lodged and the error was *correctible* when made, the decision will not be reversed, but if the error was *incorrectible* when made the court may reverse.[18]

The inconsistency between the sets of quoted sections above results in two separate tests. This Comment will be devoted to an analysis of these two tests and the "fundamental error" exception to the general rule. The Comment will also examine the possible future effect of the recently enacted Pennsylvania Rule of Criminal Procedure 1119.[19]

I. Fundamental Error Test

The "fundamental error" exception to the general rule can be traced back at least as far as the 1891 case of *Knapp v. Griffin*.[20] In *Knapp* the court stated in dictum: "[when an alleged error is not brought to the trial judge's attention] the error would have to be serious to induce us to reverse . . . ."[21] This development became well recognized both in civil[22] and criminal cases[23] by the early twentieth century.

The benefits derivable from the "fundamental error" test are two-fold. Regarding the particular case on appeal, the rule allows

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17. *Id.* at 582, 248 A.2d at 300 (concurring opinion).

18. It is of little value to examine earlier cases since it appears that the test or tests expounded here is stated incompletely in previous cases. *See* Lobalzo v. Varoli, 422 Pa. 5, 7, 220 A.2d 634, 636 (1966) (concurring opinion).

19. The pertinent part of Rule 1119 is section (b) which states: "No portion of the charge nor omissions therefrom may be assigned as error, unless specific objections are made thereto before the jury retires to deliberate. All such objections shall be made beyond the hearing of the jury."

This section becomes effective August 1, 1968, thus having no effect on the three principal cases discussed in this Comment which were tried prior to that date.

20. 140 Pa. 604 (1891).

21. *Id.* at 616.

22. Medvidovich v. Schultz, 309 Pa. 450, 453, 164 A. 338, 338 (1932); Philadelphia v. Strange, 306 Pa. 178, 184, 159 A. 7, 9 (1932); Schlossstein v. Bernstein, 293 Pa. 245, 252-53, 142 A. 324, 327 (1928); Loughrey v. Penna. R.R. Co., 284 Pa. 267, 271, 131 A. 260, 262 (1925); Stone v. Stone, 277 Pa. 277, 278, 121 A. 500, 501 (1923); Lerch v. Hershey Transit Co., 255 Pa. 190, 196-97, 99 A. 800, 801 (1916); Foley v. Phila. Rapid Transit Co., 240 Pa. 169, 172, 87 A. 289, 290 (1913).

23. Commonwealth v. O'Brien, 312 Pa. 543, 546, 168 A. 244, 244-45 (1933); Commonwealth v. Corrie, 302 Pa. 431, 436-37, 153 A. 743, 744-45 (1931); Commonwealth v. Kahn, 116 Pa. Super. 28, 30, 176 A. 242, 243 (1935).

the appellate court to correct errors which have prevented the defendant from receiving a fair and impartial trial. There is merit in the oft-quoted statement that "[a] man is not to be deprived of his liberty and reputation because of the inadvertance of a trial judge or the carelessness of his counsel in failing to call the attention of the trial court to palpable error which offends against the fundamentals of a fair and impartial trial.[24]

The "fundamental error" test can also be beneficial to the judicial system as a whole. When an error is clearly apparent and of such magnitude that injustice results, respect for the judicial system is lessened by failure to correct that error. The purpose of criminal convictions are *inter alia* to punish the perpetrator and deter others from similar acts. Levying punishment based on an erroneous trial does not further these objectives of punishment and deterrence. Elevating procedural niceties to a super-imposing position does not elicit public support for the guilt-determining process. While procedural rules are necessary to an orderly administration of justice, they should not be viewed as ends in themselves.

The "fundamental error" doctrine, however, has a number of significant shortcomings. For the doctrine to be of value, its applicability must be clearly understood. The cases which refer to the "fundamental error" test speak in terms of "basic [error],"[25] "fundamental error,"[26] "basic and fundamental error,"[27] "basic and fundamental error seriously affecting the merits of the case and imperatively calling for reversal,"[28] "serious error,"[29] "palpable error,"[30] "extraordinary circumstances,"[31] and "extremely

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24. Commonwealth v. O'Brien, 312 Pa. 543, 546, 168 A. 244, 245 (1933); *accord*, Commonwealth v. Robinson, 317 Pa. 321, 323, 176 A. 908, 909 (1935); Commonwealth v. Wadley, 169 Pa. Super. 490, 494, 83 A.2d 417, 419 (1951); Comonwealth v. Bird, 152 Pa. Super. 648, 651, 33 A.2d 531, 533 (1943); Commonwealth v. Wiand, 151 Pa. Super. 444, 449, 30 A.2d 635, 637 (1943).

25. Commonwealth v. Donough, 377 Pa. 46, 53, 103 A.2d 694, 699 (1954).

26. Commonwealth v. Hilbert, 190 Pa. Super. 602, 607, 155 A.2d 212, 214 (1959); Commonwealth v. Wiand, 151 Pa. Super. 444, 449, 30 A.2d 635, 637 (1943); Commonwealth v. Kahn, 116 Pa. Super. 28, 30, 176 A. 242, 243 (1935).

27. Commonwealth v. Robinson, 317 Pa. 321, 323, 176 A. 908, 909 (1935); Commonwealth v. Bushkoff, 177 Pa. Super. 231, 233 n.1, 110 A.2d 834, 834 n.1 (1955); Commonwealth v. Bird, 152 Pa. Super. 648, 651, 33 A.2d 531, 533 (1943).

28. Commonwealth v. Pittman, 179 Pa. Super. 645, 647, 118 A.2d 214, 215 (1955); Commonwealth v. Zang, 142 Pa. Super. 573, 577, 16 A.2d 745, 747 (1941).

29. Knapp v. Griffin, 140 Pa. 604, 616, 21 A. 449, 449 (1891).

30. Commonwealth v. Robinson, 317 Pa. 321, 323, 176 A. 908, 909 (1935); Commonwealth v. O'Brien, 312 Pa. 543, 546, 168 A. 244, 245 (1933); Commonwealth v. Wadley, 169 Pa. Super. 490, 494, 83 A.2d 417, 419 (1951); Commonwealth v. Wiand, 151 Pa. Super. 444, 449, 30 A.2d 635, 637 (1943).

31. Commonwealth v. Mays, 182 Pa. Super. 130, 132, 126 A.2d 530, 531 (1956).

extraordinary circumstances."[32] All these terms are on the same level of abstraction and therefore offer no guide as to what degree of error will call into play the "fundamental error" test. There is no clear delineation of what comprises "fundamental error." In short, "fundamental error" is what the court says it is. This inherent vagueness leads to further problems. Since a criminal defendant cannot determine whether a particular error is fundamental, he is likely to be optimistic about reversal and therefore initiate an appeal. Thus, the defendant exhausts additional funds in what usually results in an affirmance of the conviction. The large number of unwarranted appeals is also detrimental to the legal system by congesting the court calendar, thereby obstructing other more meritorious cases.

Another detriment of the "fundamental error" test stems from the fact that the defendant can use the test as a sword rather than a shield. The "fundamental error" doctrine was devised to shield the defendant from conviction based on an erroneous trial. The doctrine becomes a sword, however, when the defendant, allowing the error to pass unchallenged, takes a chance on acquittal while fully aware that he has the option of seeking a new trial based on the alleged fundamental error. The appellate court reviewing the above situation is only concerned with determining (1) whether there was error; and (2) if so, was it fundamental. They have no way of differentiating carelessness on the part of defendant's attorney from an intentional act.

Justice Roberts relied heavily on this problem in criticizing the "fundamental error" doctrine. In his dissenting opinion in *Williams*,[33] he states:

> The majority now . . . encourages defense counsel to sit by silently without calling errors to the trial court's attention until *after* the guilty verdict is returned. . . .
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> I suggest that the majority now not only approves and encourages such trial silence, but more tragically places a distinct premium upon such strategy. This may well become one of the frequently used techniques of trial counsel for obtaining a new trial—simply do not seek to have errors corrected before the jury retires to deliberate.[34]

This defense strategy has long been recognized by the courts and is often cited for support of the general rule that an appeal cannot be raised on a point which was not objected to when committed.[35]

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32. Commonwealth v. Landis, 193 Pa. Super, 373, 376, 165 A.2d 110, 111 (1960).
33. 432 Pa. 557, 248 A.2d 301 (1968).
34. *Id.* at 570, 248 A.2d at 308 (dissenting opinion).
35. See discussion p. 496 & note 3 *supra.*

While the argument that the "fundamental error" doctrine is used as a common defense tactic appears valid at first glance, closer scrutiny is necessary. Due to the inherent vagueness of the "fundamental error" doctrine, few trial attorneys could predict with any degree of accuracy when an appellate court would apply it to particular facts. In a close case the defense attorney would want as many factors as possible favorable to his client in hopes of receiving an immediate acquittal. To allow prejudicial errors to go to the jury and rely on an appellate court's application of the "fundamental error" doctrine would be hazardous; the "fundamental error" doctrine is not that predictable. This reasoning is not infallible in all close cases, but would probably hold true in a majority of them.

In the case where defendant has almost no chance of acquittal, however, the defense strategy would more likely be employed. If the defense counsel senses imminent conviction, he would be strongly tempted to allow an error to pass unchallenged and then appeal, hoping that the appellate court would find the alleged error fundamental. But this situation also has tempering factors: (1) appellate courts only infrequently find that an error is fundamental, and (2) the prosecution may call the error to the court's attention. While it is unlikely that the prosecution is interested in protecting the defendant's rights, it is vitally concerned with protecting the trial record. An alert prosecutor would be foolish to allow prejudicial error into a strong prosecution case, thereby giving defendant a basis for appeal.

Thus the argument that the "fundamental error" doctrine will be used as a defense tactic appears to be less valid than was initially assumed. This is not to say that the defense-tactic-argument is completely invalid, but rather it will not come into extensive use.

The final shortcoming of the "fundamental error" test stems from the difference in connotation derived from the written as opposed to the spoken word. The jury listens to the witnesses' testimony and the charge given by the judge; they are subjected to the totality of the trial. The appellate court, on the other hand, experiences the trial only vicariously by way of the printed record. Neither emotion, inflection, nor demeanor of witnesses can be conveyed. What may appear to be serious error on paper to the appellate court may actually have been harmless and sufficiently deemphasized as to have had no impact on the jury. Similarly, there is a difficulty in evaluating whether one part of a charge which contains erroneous material is corrected by the charge as a whole.[36]

While the entire system of appellate review can be criticized on the above basis, yet it seems that the "fundamental error"

36. *But cf.* Commonwealth v. Simon, 432 Pa. 386, 387, 248 A.2d 289, 289 (1968) (concurring opinion).

doctrine is especially open to this attack. The legal determination of particular wording as error per se is difficult; the correct determination of the degree of error, fundamental or harmless, borders on the impossible.[37] Again, this problem stems from the vagueness of the term "fundamental error." With no clear acknowledgement of what the term represents, its application will appear haphazard. Justice by chance, or even the appearance of unequal treatment, will destroy public confidence in the legal system.

II. Roberts' First Test

As previously stated, it is not clear what test Justice Roberts advocates.[38] Briefly stated they are: where no objection was taken at the time the error was committed, (1) no decision will be reversed or, (2) only those errors are reversible which were incorrectible at the time they were made.

The most appealing aspect of Justice Roberts' first test is its certainty. Unless an objection was lodged at the time the error was committed, no reversal will ensue. This certainty is welcome as an alternative to the vague "fundamental error" doctrine. The predictability of the test will have the immediate effect of reducing the number of appeals as well as the number of retrials. Additionally, many defendants will benefit by saving the expense of useless appeals.

The onus imposed by this test is on a defendant's attorney to protect his client from trial errors, thus relieving the appellate court of the role of a "super-trial-defense counsel."[39] This result places a premium on the competent attorney and does not allow an escape hatch for those attorneys who are careless or unprepared. As a final result this test prevents the use of the defense tactic of allowing errors to slip by unchallenged to create a record which will allow reversal. As discussed earlier,[40] this tactic is probably not widespread, but any use of it, no matter how slight, should be discouraged if possible.

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37. *Compare* Commonwealth v. Simon, 432 Pa. 386, 387, 248 A.2d 289, 289 (1968) (concurring opinion); Lobalzo v. Varoli, 422 Pa. 5, 220 A.2d 634 (1966) *and* Commonwealth v. Richardson, 392 Pa. 528, 140 A.2d 828 (1958) *with* Commonwealth v. Williams, 432 Pa. 557, 248 A.2d 301 (1968); Commonwealth v. O'Brien, 312 Pa. 543, 168 A. 244 (1933) *and* Commonwealth v. Norris, 87 Pa. Super. 66 (1925).

38. See discussion p. 498-99 & notes 8-18 *supra*.

39. *Cf.* Commonwealth v. Williams, 432 Pa. 557, 570, 248 A.2d 301, 308 (1968) (dissenting opinion).

40. See discussion p. 501-02 *supra*.

Despite its benefits, the "no appeal without objection" test has major drawbacks. The principle one being that the test is more concerned with form than substance. This is not to say that an objection is purely procedural, for its use does necessitate the investigation of substantive elements. To refuse to correct clear errors because no objection was taken, however, is to elevate a quasi-procedural rule to an overbearing position. The purpose of the trial, as stated by the late Justice Musmanno in *Segriff v. Johnston*,[41] "is the ascertainment of truth and the production of justice."[42] The "no appeal without objection" test is not designed to attain either of these goals.

A second criticism of this test is that it only decides the question when an appeal can be taken. It does not touch the problem of when an error should be reversed after an objection has been properly raised. It could be argued that these are two distinct problems and the "no appeal without objection" test was not intended to solve the latter. Yet since the two problems are so closely tied one rule which controls errors objected to and those where no objection was raised would be beneficial.[43]

III. Roberts' Second Test

The second test attributable to Justice Roberts is: when no objection is raised, only those errors which were *incorrectible* at the time they were made will be reversed; if the errors were *correctible*, no reversal will ensue.[44] An example of a correctible error involves the situation set out in *Commonwealth v. Williams*[45] when the trial court stated in the charge: "If you feel that [the prosecution has not proved its case beyond a reasonable doubt] based on the credibility of the witnesses, *then you are not required to bring in a conviction.*"[46] The error could have easily been corrected by calling the court's attention to the legally erroneous statement. An example of an incorrectible error is the prosecution's mention of an alleged confession which had previously been determined to be inadmissible. No amount of instruction by the court could remove the prejudice to defendant. In this situation, the "reversible only where incorrectible error"

41. 402 Pa. 109, 166 A.2d 496 (1960).
42. *Id.* at 115, 166 A.2d at 500 (dissenting opinion).
43. The "fundamental error" test by contrast answers both these questions, but in reverse order. First, the court must decide whether the alleged error is fundamental. If they decide it is fundamental they will then allow a hearing of that error. If, on the other hand, the court initially decides that the alleged error is not fundamental, the case is affirmed. The affirmance, however, is based on the general rule that when no objection is taken, no reversal will ensue. Thus, the second question—degree of error—must be answered before the first—when can an appeal be taken.
44. See discussion p. 498-99 and notes 14-18 *supra*.
45. 432 Pa. 557, 248 A.2d 301 (1968).
46. *Id.* at 562-63, 248 A.2d at 304.

test would allow a reversal although defendant's counsel did not object.

It appears that this test has its roots in earlier cases. For example, the test can be implied from the language in *Commonwealth v. Razmus*:[47] "A party may not sit silent and take his chances of a verdict, and then, if it is adverse, complain of a matter which, if an error, *would have been immediately rectified and made harmless.*"[48] Where this language was used, however, the court always determined that the errors were correctible and therefore affirmed the decisions.[49] In no case does the court apply the "reversible where incorrectible" part of the test.

Application of the test would have a number of benefits. The test is more equitable, as compared to Justice Roberts' first test, in situations where an objection could not have corrected the error. Justice Roberts' first test does not allow a reversal unless an objection had been lodged, while in his second test an ineffective objection to an incorrectible error is not a prerequisite. Thus, a useless act is not required. The defendant's counsel still has the burden of pointing out errors which are correctible, for in that situation no reversal is allowed without the objection. This second test is still susceptible to the much criticized defense tactic of allowing errors to slip by hoping for a later reversal. Such use would be restricted to a small number of cases, however, due to the difficulty in distinguishing between correctible and incorrectible error.

This test, however, has real disadvantages. Extreme examples of the difference between correctible and incorrectible errors are readily ascertainable, but not all errors are so easily categorized. In those latter situations uncertainty would be as much a problem as is created by the present inherent vagueness of the "fundamental error" doctrine. The convicted defendant, unable to determine if an error not objected to is correctible, will appeal arguing that the error was incorrectible. Thus, the courts will be as burdened by excessive appeals as is presently the case under the "fundamental error" doctrine, with the resultant extra costs upon the hapless defendant.

Another disadvantage is that the test is based on correctibility rather than severity of error. The appellate courts are unable to correct clearly severe errors which were correctible at the time

47. 210 Pa. 609, 60 A. 264 (1905).
48. *Id.* at 611, 60 A. at 265 (emphasis added).
49. See, *e.g.*, cases cited note 3 *supra*.

they were made. No amount of rationalization can make this result equitable. If a severe error was committed which deprived defendant of his life or liberty, some means of correcting the situation should exist.

Finally, under this test, the court may be faced with two difficult decisions: (1) whether the error was incorrectible, and (2) if so, whether it was sufficiently grievous to require reversal. The court could decide that while there was incorrectible error, it was harmless or that the error was grievous, but correctible when made. In both those situations, they would properly affirm the conviction. Only where the error was incorrectible when made *and* grievous would a reversal ensue.[50]

IV. Acceptance of "Fundamental Error" Test

After a close investigation of all three tests—the "fundamental error," the "no reversal without objection," and the "reversible where incorrectible" doctrines—it is clear that none of them is a panacea. While all of the tests have benefits, they also have significant disadvantages. The proper resolution of this conflict is not in deciding which test has less disadvantages, but rather which is most beneficial. Ultimate fairness to a criminal defendant is submitted to be the most important requirement. The purpose of a trial " . . . is the ascertainment of truth and the production of justice." The fundamental error doctrine with the recommendations listed below best achieves ultimate fairness.

The disadvantages of the "fundamental error" test stem from the vagueness of the test. To correct this deficiency the appellate courts should take every opportunity to state specifically *why* an alleged error is held to be either fundamental or not fundamental. Such opinions will enable the legal community to recognize those areas which are considered fundamental to a fair trial. In *Commonwealth v. Williams*,[51] Justice Bell did set out the reason for finding "fundamental error" when he stated: "[The error alleged] gave the jury a right to find defendant guilty even when they had a reasonable doubt, and consequently constituted basic and fundamental and reversible error."[52] A one sentence rationale, however, is inadequate in light of the indecision surrounding the "fundamental error" test. Justice Bell assumed that the reader will supply the following steps in the logic: (1) reasonable doubt has been universally recognized as an absolute essential of Anglo-

50. Under the "fundamental error" test, only the second question above is significant. The court would only be interested in whether "fundamental error" had been committed. Correctibility of the error has no bearing on the outcome of the appeal. Thus, the "fundamental error" rule in this aspect is simpler to apply.

51. 432 Pa. 557, 248 A.2d 301 (1968).

52. *Id.* at 567, 248 A.2d at 306.

American jurisprudence; (2) a defendant cannot be convicted where there is reasonable doubt as to his guilt; therefore, (3) a charge which allows the defendant to be found guilty on less than reasonable doubt is fundamental error. The risk of over-explaining a rationale is far less dangerous than leaving any possible doubt as to the court's thinking on a particular issue.[53] These opinions will then develop a case law sufficient to remove the disadvantages surrounding the application of the doctrine.

This case law development is dependent on consistent application of the standards set forth by the courts. If reasonable doubt is "fundamental" to a fair trial, then all cases which deprive defendant of this right should be reversed. If a particular error is not "fundamental" in one case, then a later case, without more, should be decided similarly. In situations where two previously determined "non-fundamental errors" taken together create "fundamental error," the court should explain why the sum is greater than the parts. These recommendations will reduce the problems surrounding the application of the "fundamental error" doctrine in a moderate amount of time.

V. Pennsylvania Rule of Criminal Procedure 1119(b)

As of August 1, 1968 the following rule will govern erroneous charges: "No portion of the charge nor omissions therefrom may be assigned as error, unless specific objections are made thereto before the jury retires to deliberate. All such objections shall be made beyond the hearing of the jury."[54] No case has yet been decided on the basis of Rule 1119(b). If the courts interpret the rule strictly, it will effectively preclude the use of the "fundamental error" doctrine as applied to erroneous charges. The rule is also susceptible, however, to the interpretation that it is a mere codification of the general rule and will not be applied in situations where "basic and fundamental error" has been committed. Due to the long use of the "fundamental error" doctrine in Pennsylvania, the latter interpretation is more likely. In that case, Rule 1119(b) will have no effect on appellate decisions. Even

53. Not all issues are as clear as a resonable doubt question. See, *e.g.*, Commonwealth v. Simon, 432 Pa. 386, 387, 248 A.2d 289, 289 (1968) (concurring opinion) (alleged error as to the elements of manslaughter); Commonwealth v. Scoleri, 432 Pa. 571, 248 A.2d 295 (1968) (denial of constitutionally required right to counsel); Commonwealth v. O'Brien, 312 Pa. 543, 168 A. 244 (1933) (alleged mistake in judge's restatement of facts); Commonwealth v. Russo, 187 Pa. Super. 140, 144 A.2d 485 (1958) (waiver of statute of limitations).

54. Pa. R. of Crim. Proc. 1119(b).

assuming that the rule is interpreted strictly, the "fundamental error" test will not be entirely abandoned. Since the rule only applies to errors in the charge, the test is still applicable to errors which occur during the main body of the trial. As previously stated, the "fundamental error" test is a valuable adjunct to the general rule. Therefore appellate courts should lean towards an interpretation of Rule 1119(b) which will allow continued use of the "fundamental error" doctrine.

Conclusion

The present application of the "fundamental error" test has significant faults. There should be a remedy, however, for major errors which affect the life and liberty of criminal defendants. Of the three tests reviewed, retention of the "fundamental error" doctrine is suggested. The test can be improved by a clear delineation of what elements are necessary to a fair trial. Cases previously decided have relied on abstract terms not helpful to the trial judge or the practitioner. Only the well-thought use of concrete explanations will alleviate this problem and provide case law to guide the legal community through this presently confusing area.

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