COMMENTS

Toward a Uniform Rule: The Collapse of the Civil-Criminal Divide in Appellate Review of Multitheory General Verdicts

Nathan H. Jack†

INTRODUCTION

General verdicts are a staple of the American judicial system.[1] Juries frequently decide cases through general verdicts, in which the jury applies the law as instructed by the court to its factual determinations.[2] But general verdicts create problems for reviewing courts. Cases often involve multiple theories of liability and multiple elements within each theory.[3] The hybrid nature of general verdicts—juries make factual findings and decide the outcome without specifying anything beyond the final verdict—prevents reviewing courts from determining the theory or element on which the jury relied. If the jury instruction for one of the theories was erroneous, a court reviewing the verdict cannot determine whether the jury relied on that erroneous theory. This problem extends beyond general verdicts, occurring even when a jury answers an interrogatory of a single question that

† BA 2011, Brigham Young University; JD Candidate 2014, The University of Chicago Law School.

1 See Arthur R. Miller, 9B Federal Practice and Procedure § 2501 at 91 (West 3d ed 1982) (noting that special verdicts and interrogatories are used less frequently than the "time-honored general verdict").

2 See *Black's Law Dictionary* 1696 (West 9th ed 2009). See also *Walker v New Mexico & South Pacific Railroad Co*, 165 US 593, 596 (1896) ("[A] general verdict embodies both the law and the facts. The jury, taking the law as given by the court, apply that law to the facts as they find them to be and express their conclusions in the verdict."). Contrast this with a special verdict, where the jury makes only factual findings on questions submitted by the judge and the judge then decides the legal effect of those findings. See *Black's Law Dictionary* at 1697 (cited in note 2). The most significant difference between general and special verdicts for purposes of this Comment is that special verdicts allow reviewing courts to see what factual findings the jury made, and therefore the appropriate grounds for liability, whereas general verdicts do not.

3 Throughout this Comment, a general verdict based upon multiple theories, elements of liability, or defenses will be referred to as a "multitheory general verdict."

contains multiple theories.[4] Even without multiple theories, a jury could answer interrogatories but award damages in a lump sum. The question of what to do with such verdicts—whether to uphold verdicts when an adequate theory exists or reverse verdicts on an inadequate theory—has troubled courts for centuries.[5]

Historically, the common-law standards of appellate review differed for civil and criminal cases. The civil rule, outlined in *Maryland v Baldwin*,[6] required appellate courts to reverse and remand for a new trial if a general verdict could have been based on an inadequate theory, even if another theory was legally and factually adequate.[7] The criminal rule, on the other hand, allowed appellate courts to uphold a verdict as long as one of the theories was legally and factually adequate.[8] This difference between the civil and criminal rules could lead to incoherent results if interpreted in absolute terms. In a civil case, for example, a verdict could be reversed if one of thirty-one theories of liability were not supported by the evidence, even if the remaining thirty theories were valid.[9] However, a criminal conviction could be upheld even if the judge's legal instruction for one of two theories were incorrect.

Perhaps due to this tension, courts have recently moved toward a similar rule for civil and criminal verdicts. The criminal rule now dictates reversing general verdicts when one of the underlying theories was plagued by a legal error, similar to the approach in *Baldwin*.[10] This shift in criminal cases has generated significant confusion among the lower courts. Some courts still adhere to a strict interpretation of the *Baldwin* principle in civil cases, holding that an error on a single theory is grounds for au-

---

4 See *Dougherty v Continental Oil Co*, 579 F2d 954, 960 n 2 (5th Cir 1978) ("An interrogatory containing multiple issues is really no better than a general verdict. Such an interrogatory presents the same dilemma as a general verdict submitted to the jury on two theories of law, one of which is incorrect.") (citation omitted).

5 See, for example, *Grant v Astle*, 99 Eng Rep 459, 466 (KB 1781) (Mansfield) (questioning the rules governing appellate review of general verdicts).

6 112 US 490 (1884).

7 See id at 493.

8 See *Claassen v United States*, 142 US 140, 146–47 (1891) ("[I]t is settled law . . . that in any criminal case a general verdict and judgment on an indictment or information containing several counts cannot be reversed on error, if any one of the counts is good.").

9 See, for example, *American Airlines, Inc v United States*, 418 F2d 180, 195 (5th Cir 1969) (finding that one of thirty-one theories of negligence was inadequate, but refusing to reverse on those grounds despite the rule laid down by the Supreme Court).

10 See *Stromberg v California*, 283 US 359, 368 (1931); *Yates v United States*, 354 US 298, 311–12 (1957).

tomatic reversal. Those courts maintain separation between civil and criminal rules. Other courts have imported a criminal law–like rule by upholding general verdicts in civil cases. Adding to the confusion is the federal harmless error statute[11] and other harmless error rules,[12] which require reviewing courts in both civil and criminal cases to ignore errors, including both legal and factual errors, that "do not affect the substantial rights of the parties."[13] Harmless error analysis is an additional step to determining whether a general verdict should be reversed, taken after deciding which rule—the civil or criminal rule—to apply. Courts disagree on whether harmless error analysis should displace the strict mandates of *Baldwin* and its progeny. These two sources of confusion—the harmless error rules and the application of criminal law—have led to inconsistencies both within and among circuits.

This Comment argues for a single rule that applies in both civil and criminal cases: General verdicts with a legal error—such as an erroneous jury instruction on the law or an improper admission of evidence—should be reversed unless the error was harmless. General verdicts with a factual error—insufficient evidence to support a theory—should be upheld unless the error was prejudicial.[14] This approach is already the rule in criminal cases and should be adopted in civil cases based on the enactment of the harmless error rules. Because federal statutes generally displace the common law, this Comment suggests that the harmless error rules—which were enacted after *Baldwin*—require courts to conduct harmless error analysis before reversing a general verdict. Factual errors should be treated as presumptively harmless,[15] so verdicts containing factual errors should be presumptively upheld under the harmless error exception. The application of a uniform rule in civil and criminal cases would resolve lower court confusion by informing courts of when verdicts can be upheld and whether courts can apply criminal–case law precedent in civil cases.

This Comment proceeds as follows: Part I discusses Supreme Court cases analyzing appellate review of multitheory

---

11 Act of May 24, 1949 § 110, ch 139, 63 Stat 89, 105, codified at 28 USC § 2111.

12 Other sources of harmless error analysis include FRCP 61, FRCrP 52(a), and FRE 103. See Part I.C.

13 28 USC § 2111.

14 In cases in which a verdict includes both legal and factual errors, courts should treat the verdict as they would a verdict with a legal error.

15 See Part III.A.2.

general verdicts in both civil and criminal cases. Part II explains the confusion among the lower courts concerning the application of Supreme Court precedent. Part III synthesizes the law to assert that the civil and criminal rules have converged under harmless error analysis. Based on this convergence and on policy considerations, this Comment argues in favor of a uniform rule regarding the reversal of general verdicts.

I. SUPREME COURT PRECEDENT ON APPELLATE REVIEW OF GENERAL VERDICTS

As early as 1711, English courts recognized different rules for appellate review of general verdicts in civil and criminal cases.[16] Under the common law, general verdicts in civil cases were reversed if there was a single inadequate theory. For criminal cases, general verdicts were upheld as long as there was one adequate theory. According to one English court, the rules differed because courts reviewing civil verdicts could not reapportion damages since they did not know what amount the jury awarded based on each theory.[17] This problem did not occur in criminal cases, since judges making sentencing decisions would typically rely only on adequate theories.[18]

Over the past century, however, the law has changed. This Part discusses the historical development of the case law regarding appellate review of general verdicts, beginning with the civil side and then moving to the criminal side. This Part then introduces harmless error analysis and discusses its applicability to multitheory general verdicts.

A. The Civil Side—*Baldwin* and Its Progeny

Well before the Declaration of Independence, English courts reversed general verdicts in civil cases when a single count was inadequate. In 1884, the Supreme Court held in *Baldwin* that this rule governs in American courts. The rule, now known as the *Baldwin* principle, states that if a legal error exists for one

---

16 *Regina v Ingram*, 91 Eng Rep 335, 335 (KB 1711):

> In a civil action, where one part of the declaration is ill, and the jury find entire damages, the judgment must be arrested, because the Court cannot apportion them; but in indictments the Court assess the fine, and they will set it only according to those facts which are well laid. If an offence sufficient to maintain the indictment be well laid, it is enough.

17 Id.

18 Id.

theory of liability, then the general verdict must be reversed.[19] The reason for this rule is that "[the verdict's] generality prevents [courts] from perceiving upon which plea [the jury] found."[20]

Baldwin involved the improper admission of evidence. The plaintiff sued the administrators of the estate of his alleged father, claiming that he was the deceased's heir because his mother and the deceased had secretly wed. At trial, the deceased's son-in-law testified that the deceased told him of the secret marriage. A witness for the administrators then testified that the deceased told the witness that his son-in-law was dishonest and that the deceased did not trust him. The trial court allowed the administrators' witness's testimony, and the jury returned a general verdict for the administrators.[21] The Supreme Court held that the administrators' witness's testimony was inadmissible as hearsay.[22] The Court also held that the evidence was material since it discredited a key witness for the plaintiffs, and "[i]t is impossible to say what effect it may have had on the minds of the jury."[23] Outlining the common-law civil approach, the Supreme Court offered the following rule: "If [ ] upon any one issue error was committed, either in the admission of evidence, or in the charge of the court, the verdict cannot be upheld, for it may be that by that evidence the jury were controlled under the instructions given."[24] The Court reversed the general verdict and remanded the case for a new trial.[25]

While *Baldwin* concerned a legal error, the Supreme Court extended the rule to cover factual errors in *Wilmington Star Mining Co v Fulton*.[26] The case regarded the death of a miner in a gas explosion. The miner's widow sued the mining company for wrongful death under eight theories of liability, and the jury awarded a general verdict in her favor.[27] On appeal, the Supreme Court assessed the evidence for three of the theories, finding that there was insufficient evidence to support them.[28] Citing *Baldwin*,

---

19 *Baldwin*, 112 US at 493.
20 Id.
21 Id at 493–94.
22 Id at 494.
23 *Baldwin*, 112 US at 494.
24 Id at 493.
25 Id at 495.
26 205 US 60 (1907).
27 Id at 64–66.
28 Id at 77–78.

the Court reversed and remanded the case because it was "impossible to say that prejudicial error did not result."[29]

Wilmington is questionable in three important respects. First, the *Wilmington* Court contradicted its own precedent in following *Baldwin*. Twenty years earlier, the Supreme Court decided a case that involved the same Illinois statute at issue in *Wilmington*.[30] The statute required a verdict to be upheld as long as "one or more of the counts . . . be sufficient to sustain the verdict."[31] The Court recognized the common-law rule—later adopted in *Baldwin*—but held that the Illinois statute, not the common-law rule, applied.[32] It then held that because there were "indisputably good" counts, there was no need to consider the counts in question and affirmed the judgment.[33] The *Wilmington* Court, contrary to this precedent, applied the *Baldwin* principle rather than the Illinois statute. Its justification was that the Illinois statute did not relate to counts that were "vitally defective."[34]

Second, the *Wilmington* Court did not determine whether the trial court's error was material, as the *Baldwin* Court did. In fact, the Court in *Wilmington* found that no evidence had been introduced to support the three inadequate counts,[35] indicating that a reasonable jury would have recognized that the theories were unsupported and would not have relied on them. Yet it still found prejudicial error without any explanation as to why it was prejudicial.[36] This suggests that *Wilmington* created a rule that errors in multitheory general verdicts are automatically prejudicial. Such a rule diverges from the Court's analysis in *Baldwin*, in which it explicitly found that influential material evidence *that could have swayed the jury* was improperly admitted.[37] The *Wilmington* Court did not explain how submitting clearly unsupported theories to the jury affected the outcome.

Third, *Wilmington* extended *Baldwin* beyond legal errors. The *Baldwin* Court specifically limited its rule to instances of "the admission of evidence, or [ ] the charge of the court."[38] *Wilmington*,

---

29 Id at 78–79, citing *Baldwin*, 112 US at 493.

30 See *Bond v Dustin*, 112 US 604, 609 (1884).

31 Ill Rev St 1874, ch 110, § 58.

32 *Bond*, 112 US at 609.

33 Id.

34 *Wilmington*, 205 US at 79.

35 Id at 77–78.

36 See id at 77–79.

37 *Baldwin*, 112 US at 493.

38 Id.

on the other hand, brings factual errors within the purview of *Baldwin* without providing any justification. These three problems highlight the larger concern about whether *Wilmington* should be relied on by lower courts.

Also relevant to this Comment, *Wilmington* acknowledged a difference between the civil rule and the criminal rule with respect to appellate review. After finding prejudicial error, the Court noted that if the case were a criminal case the verdict could be upheld.[39] Thus, as early as 1907, the Supreme Court recognized that the treatment of general verdicts differed depending on whether it was a criminal case or a civil case.

The Supreme Court has affirmed the *Baldwin* principle on two other occasions.[40] In both instances, the trial court judge gave the jury incorrect instructions on the law.[41] As in *Baldwin*, the Court overturned both general verdicts because it was impossible to determine whether the erroneous theory was the sole basis of liability.[42]

B. The Criminal Side—the Shift to Distinguishing by Error Type

Appellate review of general verdicts in the criminal law originally took the opposite approach of *Baldwin*. Under the common-law criminal rule, a general verdict could be upheld as long as a single theory was adequate to support it. Over the past century, however, the Supreme Court has altered the rule to follow *Baldwin* for legal errors in criminal cases and has expressly adopted a harmless error exception, which requires courts to ignore trial court errors that do not substantially affect the rights of the parties.

1. The common-law criminal rule.

Under the common-law criminal rule, a general verdict could be upheld as long as one of the grounds for liability is adequate,

---

[39] *Wilmington*, 205 US at 78.

[40] See *Sunkist Growers, Inc v Winckler & Smith Citrus Products Co*, 370 US 19, 29–30 (1962); *United New York & New Jersey Sandy Hook Pilots Association v Halecki*, 358 US 613, 618–19 (1959).

[41] *Sunkist Growers*, 370 US at 24–25; *United New York & New Jersey Sandy Hook Pilots Association*, 358 US at 613–14.

[42] *Sunkist Growers*, 370 US at 30, quoting *Baldwin*, 112 US at 493; *United New York & New Jersey Sandy Hook Pilots Association*, 358 US at 619.

meaning that the ground was legally and factually sufficient.[43] This was the settled rule in England in 1775.[44] The justification for this rule was a presumption that "the court awarded sentence on the good count only."[45] This presumption stands in stark contrast to the approach in *Baldwin*, which held that a court could *not* make any assessment on the grounds for liability because of the general verdict.[46] The common-law criminal rule is not an absolute bar on reversal, however. Because it is based on a presumption that the verdict rested on an adequate theory, evidence showing otherwise may be grounds for reversal.[47] Nonetheless, doing so will be difficult because of the general verdict.

The common-law criminal rule was in force in America as early as 1813.[48] In *Locke v United States*,[49] the Supreme Court held that the fourth count of a multicount criminal case was valid.[50] The validity of this count "render[ed] it unnecessary to decide on the others."[51] The Court did not provide any explanation for why it was unnecessary to consider the other counts, but seemingly adhered to the common-law criminal rule.

The Court applied the same approach in several subsequent cases. In one case, it upheld a general verdict because the sentence was not greater than what would have been imposed under any single count.[52] Because there was a single count to support the general verdict and the outcome would have been the same regardless of whether the other counts were sufficient, the Court upheld the verdict.[53]

---

43 See *Claassen v United States*, 142 US 140, 146–47 (1891).

44 See *Peake v Oldham*, 98 Eng Rep 1083, 1083–84 (KB 1775) (Mansfield).

45 *Claassen*, 142 US at 146–47.

46 See *Baldwin*, 112 US at 494.

47 See *Claassen*, 142 US at 146–47.

48 See *Locke v United States*, 11 US (7 Cranch) 339, 344 (1813).

49 11 US (7 Cranch) 339 (1813).

50 Id at 344.

51 Id.

52 *Abrams v United States*, 250 US 616, 619 (1919). See also *Roviaro v United States*, 353 US 53, 59 & n 6 (1957).

53 *Abrams*, 250 US at 624.

During the twentieth century, however, the Supreme Court retreated from the common-law criminal rule. As the next Section explains, the Court adopted a different rule when constitutional or legal errors are involved.

2. Distinctions based on constitutional, legal, and factual error.

The Supreme Court has abandoned the common-law criminal rule in some circumstances. Increasingly, the Court has made distinctions based on the type of error involved, rejecting the common-law rule for constitutional errors and legal errors, but adhering to the common-law rule for factual errors.

In the first case to make this distinction, *Stromberg v People*,[54] the Supreme Court reversed a conviction because one of the theories of liability was unconstitutional.[55] The defendant, Stromberg, was convicted under a California statute that made it a felony to display a red flag in any public place if the display was based on one of three impermissible purposes.[56] The state appellate court questioned the constitutionality of the statute's first purpose—"opposition to organized government"—as "opposition" could include peaceful and constitutional means.[57] Given the state court's interpretation of the statute, the Supreme Court held that the first purpose was unconstitutional.[58] It reversed the verdict, holding that "if any of the clauses in question is invalid under the Federal Constitution, the conviction cannot be upheld."[59] Because the jury might have convicted Stromberg on unconstitutional grounds, the verdict could not be sustained.[60] Since *Stromberg*, the Court has applied this rule in

---

54 283 US 359 (1931).

55 Id at 368.

56 Id at 367–68 (listing the three impermissible purposes of opposing organized government, inviting anarchistic action, and aiding seditious propaganda). The text of then-California Penal Code § 403a was as follows:

> Any person who displays a red flag, banner or badge or any flag, badge, banner, or device of any color or form whatever in any public place or in any meeting place or public assembly, or from or on any house, building or window as a sign, symbol or emblem of opposition to organized government or as an invitation or stimulus to anarchistic action or as an aid to propaganda that is of a seditious character is guilty of a felony.

Id, citing Cal Penal Code § 403a.

57 *People v Mintz*, 290 P 93, 97–98 (Cal App 1930).

58 *Stromberg*, 283 US at 369–70.

59 Id at 368.

60 Id.

numerous cases to reverse a general verdict conviction that may have been based on unconstitutional grounds.[61]

The Court has also used *Stromberg* to diverge from the common-law criminal rule in cases that do not involve a constitutional question. In *Yates v United States*,[62] the Court extended the *Stromberg* rule to apply to legal errors.[63] The case involved fourteen defendants who were convicted of a single count of conspiracy with two objectives, one of which was organizing a group who advocated overthrowing the government with violence.[64] On appeal, the Supreme Court disagreed with the trial court's definition of "organize," concluding that the word referred only to the creation of a new organization and not to the continuation of an existing group's activities.[65] Because of this legal error, the Court thought that "the proper rule to be applied is that which requires a verdict to be set aside in cases where the verdict is supportable on one ground, but not on another, and it is impossible to tell which ground the jury selected."[66] The *Yates* Court thus extended the *Stromberg* exception to reverse a general verdict if one of the theories was legally flawed.

The Supreme Court subsequently limited the scope of *Stromberg* and *Yates*. In *Griffin v United States*,[67] the Court reverted back to the common-law criminal rule with respect to factual errors and declined to extend *Yates* beyond legal errors. Griffin was charged with a single count of conspiring to defraud a federal government agency. The government alleged two purposes to the conspiracy: "(1) impairing the efforts of the Internal Revenue Service (IRS) to ascertain income taxes; and (2) impairing the efforts of the Drug Enforcement Administration (DEA) to ascertain forfeitable assets."[68] Evidence connecting Griffin to the DEA object failed to materialize, but there was enough evidence to implicate her in the IRS object. The judge instructed the jury that they could convict her under either of the two objects of the conspiracy, and the jury returned a general guilty verdict.[69]

---

61 For a list of cases applying the *Stromberg* rule, see *Griffin v United States*, 502 US 46, 55 (1991). The Court has declared that the rule outlined in *Stromberg* is "settled law." *Francis v Franklin*, 471 US 307, 322–23 n 8 (1985).

62 354 US 298 (1957).

63 Id at 312.

64 Id at 300.

65 Id at 310.

66 *Yates*, 354 US at 312, citing *Stromberg*, 283 US at 367–68.

67 502 US 46 (1991).

68 Id at 47.

69 Id at 48.

The Supreme Court began its analysis by relaying the history behind the common-law criminal rule, concluding that the general rule is to uphold a conviction if there is one adequate theory to support it.[70] It then rejected the defendant's argument that her verdict should be reversed according to *Yates*. While noting that its adherence to *Yates* was not at issue in the case,[71] the Court questioned whether *Yates* was an appropriate extension of *Stromberg*, stating that the cases cited in *Yates* did not support reversing a verdict for a legal error.[72] However, as the defendant was requesting an extension of *Stromberg* to factual errors, the Court decided that *Yates* was distinguishable because it regarded legal errors.[73] Instead, the Court turned to other precedent for the prevailing rule—"the verdict stands if the evidence is sufficient with respect to any one of the acts charged"[74]—and affirmed the conviction.[75]

This distinction between legal error and insufficiency of evidence provides, according to the Court, a "clear line" of separation based on jurors' abilities: jurors are able to analyze evidence, but not the law.[76] As such, courts can presume that the jury based its verdict on adequate grounds when the issue is insufficiency of evidence, but courts cannot make the same presumption for legal errors.[77]

The current criminal rule, combining *Yates* and *Griffin*, is much different than the original common-law criminal rule. Instead of looking for a single valid count, the current approach requires courts to apply different rules for different types of error: legal errors are governed by *Yates* and factual errors are governed by *Griffin*. This demonstrates that the Court has moved away from the common-law criminal rule and embraced—at least implicitly—the *Baldwin* principle in criminal cases, thereby bridging the civil-criminal divide with respect to legal errors.[78] The only remaining difference between civil and criminal review relates to the treatment of factual errors, with

---

70 Id at 49–51.

71 *Griffin*, 502 US at 56.

72 Id at 52.

73 Id at 56.

74 Id at 56–57, quoting *Turner v United States*, 396 US 398, 420 (1970).

75 *Griffin*, 502 US at 60.

76 Id at 59.

77 Id at 59–60.

78 See, for example, *Hedgpeth v Pulido*, 129 S Ct 530, 531–32 (2008).

Wilmington governing civil cases and *Griffin* governing criminal cases.

Applying the relevant rule does not end the inquiry. Before reversing a verdict, reviewing courts must engage in harmless error analysis, as explained by the following Section. This applies to both legal and factual errors, and in both civil and criminal cases.[79]

C. Harmless Error Analysis

Even if a reviewing court finds an error, it could still uphold the verdict through harmless error analysis. In 1919, Congress adopted a harmless error statute,[80] later codified at 28 USC § 2111,[81] which requires courts to ignore all errors that are harmless. The statute reads in its entirety: "On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties."[82]

The purpose of the harmless error statute is to curb unnecessary reversals. In *Kotteakos v United States*,[83] the Supreme Court analyzed § 2111's legislative history and determined that it was motivated by the perception that reviewing courts "tower above the trials of criminal cases as impregnable citadels of technicality."[84] Reviewing courts would reverse verdicts based on mere technicalities, which "enabled the guilty to escape just punishment" through the "skillful manipulation of procedural rules."[85] To remedy this, § 2111 limits instances when errors are reversible: the error must affect the substantial rights of the parties.[86]

Although Congress was originally concerned with technicalities, the harmless error statute covers more than just technicalities. When Congress codified the 1919 Act into § 2111, it removed

---

79 See *Kotteakos v United States*, 328 US 750, 762 (1946) ("The statute in terms makes no distinction between civil and criminal causes.").

80 Act of Feb 26, 1919, ch 48, 40 Stat 1181, 1181, codified at Judicial Code of 1911 § 269, repealed by Act of June 25, 1948, ch 646 § 39, 62 Stat 992.

81 Act of May 24, 1949 § 110, 63 Stat at 105. The original version of the harmless error statute was included in § 269 of the Judiciary Code.

82 28 USC § 2111.

83 328 US 750 (1946).

84 Id at 759 (quotation marks omitted).

85 Id at 762–63.

86 Id at 760.

the qualifying word "technical" for errors governed by the rule.[87] This broadened the scope of the statute to include errors that are not considered mere technicalities but do not affect the substantial rights of the parties. Because of the enactment of the harmless error statute, the Supreme Court dismissed the practice of presuming that all trial errors are prejudicial.[88]

The *Kotteakos* test looks at the verdict's outcome and has become the standard for harmless error analysis of nonconstitutional errors in criminal cases.[89] In determining whether an error is harmless, courts should ask "what effect the error had or reasonably may be taken to have had upon the jury's decision."[90] The Supreme Court outlined the following test:

> If . . . the conviction is sure that the error did not influence the jury, or had but very slight effect, the verdict and the judgment should stand. . . . But if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand.[91]

If a court cannot say with "fair assurance" that the verdict was not "substantially swayed" by the error and is left in "grave doubt," then the error is not harmless and the verdict must be reversed.[92] In other words, an error requires reversal when it is "highly probable that the error had substantial and injurious effect or influence in determining the jury's verdict."[93]

---

87 See *United States v Lane*, 474 US 438, 447–48 (1986).

88 *McDonough Power Equipment, Inc v Greenwood*, 464 US 548, 553 (1984) ("We have [ ] come a long way from the time when all trial error was presumed prejudicial."), citing *Kotteakos*, 328 US at 759.

89 See David A. Shields, Note, *East vs. West—Where Are Errors Harmless? Evaluating the Current Harmless Error Doctrine in the Federal Circuits*, 56 SLU L J 1319, 1321 n 19, 1324 n 41 (2012).

90 *Kotteakos*, 328 US at 764.

91 Id at 764–65.

92 Id at 765.

93 Id at 776. See also *Brecht v Abrahamson*, 507 US 619, 637–38 (1993) (discussing the *Kotteakos* standard). *Brecht* discusses the differences between nonconstitutional errors, to which *Kotteakos* applies, and constitutional errors, to which a more stringent

The harmless error statute applies to both civil and criminal cases. The *Kotteakos* Court specifically found that "[t]he statute in terms makes no distinction between civil and criminal causes," and noted that at one point a Senate committee recommended that the statute apply only in civil cases.[94] While the Supreme Court has not yet relied on the harmless error statute in civil cases involving multitheory general verdicts, it has used it in other civil cases[95] and has implied that the *Kotteakos* standard applies in civil cases.[96] Many lower courts conduct harmless error analysis either as part of or in addition to the *Baldwin* principle.[97]

In addition to § 2111, several other sources dictate that courts should conduct harmless error analysis.[98] Both civil and criminal rules of procedure require harmless error analysis. Federal Rule of Civil Procedure (FRCP) 61, entitled "Harmless Error," instructs courts that "[a]t every stage of the proceeding, the court must disregard all errors and defects that do not affect any party's substantial rights."[99] Federal Rule of Criminal Procedure (FRCrP) 52(a), also entitled "Harmless Error," says that "[a]ny error, defect, irregularity, or variance that does not affect substantial rights must be disregarded."[100] The similarity of language between these two rules further demonstrates that harmless error analysis applies in both the civil and criminal contexts. Federal Rule of Evidence (FRE) 103(a), which applies in both civil and criminal cases, also requires harmless error analysis, permitting a party to "claim error in a ruling to admit or

---

rule applies as outlined in *Chapman v California*, 386 US 18 (1967). *Chapman* requires the prosecution to prove beyond a reasonable doubt that the constitutional error did not contribute to the verdict. Id at 24. Because this Comment focuses on legal and factual errors, the relevant standard for constitutional errors is outside its scope.

94 *Kotteakos*, 328 US at 762 & n 15.

95 See *Memphis Community School District v Stachura*, 477 US 299, 312 (1986) (holding that the trial judge's erroneous inclusion of a category of damages was harmful). See also *Shinseki v Sanders*, 556 US 396, 407–08 (2009).

96 See *Shinseki*, 556 US at 407–08; *Cornelius v Nutt*, 472 US 648, 657 n 9 (1985) (citing *Kotteakos* to support its definition of harmful error); *McDonough Power Equipment*, 464 US at 553 (referencing *Kotteakos* before discussing FRCP 61 and § 2111); *Tipton v Socony Mobil Oil Co*, 375 US 34, 37 (1963) (citing *Kotteakos* alongside § 2111 and FRCP 61 in discussing whether an error was harmless). See also Shields, Note, 56 SLU L J at 1328 (cited in note 89) (noting that federal circuits have applied the "effect on the jury" test in both civil and criminal cases).

97 See Part II.A.2.

98 These sources will be collectively referred to as "harmless error rules."

99 FRCP 61.

100 FRCrP 52(a).

exclude evidence only if the error affects a substantial right of the party."[101] All these form the basis for harmless error analysis, and courts often cite to multiple sources in conducting harmless error analysis.[102]

A recent case outlines the Court's current use of harmless error analysis for multitheory general verdicts in the criminal law context.[103] In *Hedgpeth v Pulido*,[104] the defendant was convicted of felony murder by a jury.[105] He applied for and was granted federal habeas relief because the trial judge incorrectly instructed the jury on one of the theories of guilt, which the district court found had a substantial and injurious effect on the verdict.[106] The state appealed to the Supreme Court, and the defendant argued that general verdicts should automatically be set aside when a jury is instructed on both a valid and an invalid theory.[107] The Court rejected this argument, noting that harmless error analysis applies to instructional errors.[108] It opened the opinion by citing *Yates* and *Stromberg* as the relevant rule.[109] The Court then noted that those cases were decided before it recognized a harmless error exception, and that instructional errors are now subject to harmless error review.[110] Acknowledging that previous cases using harmless error analysis did not involve a multitheory general verdict, the Court nevertheless held that there was nothing about multitheory liability that would prevent courts from applying harmless error analysis.[111] This demonstrates that the Supreme Court is willing to apply harmless error analysis to multitheory general verdicts, at least in the criminal context.

Lower courts have applied the harmless error statute to multitheory general verdicts in a variety of ways. The next Part

---

101 FRE 103(a).

102 See, for example, *Tipton*, 375 US at 37 (citing § 2111, FRCP 61, and *Kotteakos* in concluding that an error was not harmless); *Asbill v Housing Authority of Choctaw Nation of Oklahoma*, 726 F2d 1499, 1504 (10th Cir 1984) (citing both § 2111 and FRCP 61 to conduct harmless error analysis).

103 See *Pulido*, 129 S Ct at 530–31.

104 129 S Ct 530 (2008).

105 Id at 531.

106 Id.

107 Id.

108 *Pulido*, 129 S Ct at 531–32.

109 Id at 530.

110 Id at 532, citing *Neder v United States*, 527 US 1, 9–15 (1999) (holding that instructional errors are subject to harmless error analysis).

111 *Pulido*, 129 S Ct at 532.

explains the different approaches lower courts have taken with respect to *Baldwin* and how courts have applied *Griffin* to civil cases.

II. LOWER COURT CONFUSION IN CIVIL CASES

As the previous Part shows, the Supreme Court has shifted the analysis away from the traditional common-law rules for reviewing general verdicts. This shift has generated significant confusion among the lower courts regarding the rule in civil cases. Specifically, there are two sources of confusion. First, *Baldwin* is ambiguous about whether a general verdict with an erroneous theory can ever be upheld. Lower courts have taken different approaches to the degree of confidence in the general verdict required for a reviewing court to uphold the verdict. Some courts uphold a verdict only if there is absolute certainty that the jury relied on the adequate theory, while other courts require only reasonable certainty.

A second source of confusion is the applicability of recent criminal precedent to civil cases. Although the Court's analysis in *Griffin* could apply to civil cases, the *Wilmington* Court previously observed a civil-criminal divide and offered its own rule for factual errors in civil cases. Most courts have applied *Griffin* to civil cases in varying degrees, but some courts have refused to apply *Griffin* to civil cases.

A. Lower Courts' Reactions to *Baldwin*

Lower courts struggle applying the *Baldwin* principle. Although circuit courts apply different harmless error tests,[112] circuits also disagree as to whether harmless error analysis should apply at all. Circuits that follow the *Baldwin* principle fluctuate between two main interpretations. The strict interpretation is that a court must be absolutely certain the jury did not rely on the inadequate theory. This essentially requires automatic reversal if any of the theories is inadequate. An alternative interpretation is that a court need be only reasonably certain that the jury did not rely on an inadequate theory. Other courts have ignored *Baldwin* and created their own rules regarding review of multitheory general verdicts. Whatever approach a court takes, however, nearly all have created some exception to Baldwin's

[112] See generally Shields, Note, 56 SLU L J 1319 (cited in note 89).

reversal requirement. This Section discusses each of the main lower court approaches.

1. Automatic reversal.

Most courts originally adhered to the strict interpretation and held that the language of *Baldwin* requires automatic reversal if an error is found with one of the theories presented at trial. In *Farrell v Klein Tools, Inc*,[113] the Tenth Circuit held that reversals of the type at issue in *Baldwin* and *Wilmington* are automatic.[114] The case involved a defective-product suit to which the defendant offered two defenses. Both were submitted to the jury, who returned a general verdict for the defendant.[115] Finding that there was insufficient evidence to support one of the defenses, the court reluctantly reversed the verdict because it could "[not] say with absolute certainty . . . that the jury was not influenced by the submission of the abnormal use instruction."[116] Although the court found it "very unlikely" that the submission of the inadequate defense was prejudicial, it reversed because its precedent "le[ft] no room for harmless error analysis."[117] Upholding the verdict therefore required "absolute certainty" that the submission of the inadequate defense did not influence the jury.[118]

This approach still has limited force. While some circuits that previously applied the strict interpretation of *Baldwin* have changed their approach,[119] many circuits continue to adhere to this interpretation, albeit inconsistently. A decade after *Farrell*, the Tenth Circuit concluded that none of its previous precedent "says that harmless-error analysis does not apply."[120] The court asserted that the question was really about "how likely must it be that an instructional error was prejudicial for this court to

---

113 866 F2d 1294 (10th Cir 1989).

114 Id at 1300.

115 Id at 1295–96.

116 Id at 1298–1301 ("[B]ecause we consider ourselves bound by *Smith* and *McMurray*, we hold that the district court committed reversible error in giving a jury instruction on the defense of abnormal use which was not supported by the evidence. We do so reluctantly.").

117 *Farrell*, 866 F2d at 1300–01.

118 Id at 1301.

119 For example, the Third Circuit originally held that a general verdict must be reversed if it could rest on a claim that is unsupported by evidence, but later adopted a harmless error approach. Compare *Avins v White*, 627 F2d 637, 646 (3d Cir 1980), with *Hurley v Atlantic City Police Dept*, 174 F3d 95, 121 (3d Cir 1999).

120 *Morrison Knudsen Corp v Fireman's Fund Insurance Co*, 175 F3d 1221, 1236–37 (10th Cir 1999).

reverse."[121] Recently, however, the Tenth Circuit cited *Farrell* to reverse a verdict when it was unable to tell what theory the jury relied on.[122]

The First Circuit provides another example of inconsistency: in 2001 it adopted harmless error analysis,[123] but the following year reverted back to the *Wilmington* rule,[124] only to switch again and apply "a generous harmless error analysis" a few years later.[125] The Eighth Circuit has also required automatic reversal for errors in multitheory general verdicts,[126] and other circuits occasionally have as well.[127]

Some courts that require absolute certainty have still found an exception—known as the subset theory—under which the verdict can be upheld.[128] If there was a separate, adequate theory whose elements were a subset of the erroneous theory, then a jury that relied on the erroneous theory must have found that each of the elements of the adequate theory was satisfied. Because a court in this situation can tell with absolute certainty

---

[121] Id at 1237.

[122] See *Kellogg v Energy Safety Services Inc*, 544 F3d 1121, 1126 (10th Cir 2008). See also *Allen v Wal-Mart Stores, Inc*, 241 F3d 1293, 1298 (10th Cir 2001).

[123] *Davis v Rennie*, 264 F3d 86, 105–07 (1st Cir 2001) (applying harmless error analysis to affirm the verdict).

[124] *Kerkhof v MCI WorldCom, Inc*, 282 F3d 44, 52–53 (1st Cir 2002) (adhering to the *Wilmington* rule over plaintiff's request to apply *Griffin*, but finding that the lower court's denial of a new trial was not an abuse of discretion because the risk of prejudice was slight).

[125] *Massachusetts Eye and Ear Infirmary v QLT Phototherapeutics, Inc*, 552 F3d 47, 72–73 (1st Cir 2009), citing *Davis*, 264 F3d at 109 ("Where, as here, the jury heard a legally adequate instruction, which was supported by competent evidence, we will not assume jury confusion or verdict taint.").

[126] See *Friedman & Friedman, Ltd v Tim McCandless, Inc*, 606 F3d 494, 502 (8th Cir 2010) (requiring retrial when a question on the verdict form did not differentiate between two theories, one of which was inadequate); *Dudley v Dittmer*, 795 F2d 669, 673 (8th Cir 1986) ("The rule in this circuit is clear that when one of two theories has erroneously been submitted to the jury, a general verdict cannot stand."). But see *Mueller v Hubbard Milling Co*, 573 F2d 1029, 1038–40 (8th Cir 1978) (utilizing harmless error analysis but reversing the verdict).

[127] See *Bennett v Hendrix*, 426 Fed Appx 864, 866 (11th Cir 2011) (rejecting the trial court's ruling that conducting a new trial is unnecessary because the outcome would probably be the same); *West v Media General Operations, Inc*, 120 Fed Appx 601, 620, 624 (6th Cir 2005) (reversing general verdict because statement was erroneously submitted to the jury); *Crowell v Angelus Sanitary Can Machine Co*, 2000 WL 991616, *3 (4th Cir) (finding that the error was not harmless because the court could not tell from the general verdict whether the jury relied on an inadequate defense, which makes reversal automatic).

[128] *Brochu v Ortho Pharmaceutical Corp*, 642 F2d 652, 662 (1st Cir 1981).

that the jury found liability under the adequate theory, reversal is not required.[129]

Brochu v Ortho Pharmaceutical Corp,[130] the first case to articulate the subset exception, involved a plaintiff who suffered injuries after taking an oral contraceptive.[131] She sued the drug manufacturer under two theories: (1) strict liability based on design defect and failure to warn, and (2) fraudulent misrepresentation.[132] The First Circuit held that there was sufficient evidence to support finding a failure of the duty to warn and therefore did not have to decide whether there was fraud.[133] Because the duty-to-warn theory was supported, the court concluded that if the jury based its verdict on the fraud claim, then it must have also found all the elements establishing strict liability; if the manufacturer misrepresented the side effects, then it also failed to warn about the side effects.[134] Even though the court could not determine what theory the jury relied on, it could tell from the verdict for the plaintiff that the jury found everything needed to support an adequate theory. The court therefore upheld the general verdict for the plaintiff.[135] But because the subset theory requires an adequate theory to be a subset of an erroneous theory, it is an exception that arises only rarely.[136]

2. Harmless error exception.

Automatic reversal can have undesirable results. Requiring a new trial because an inadequate theory was submitted to the jury, which the jury may not have relied on, can be both unjust and a drain on judicial resources.[137] To limit reversals, many courts have engrafted a harmless error gloss onto the *Baldwin*

---

129 Id.

130 642 F2d 652 (1st Cir 1981).

131 Id at 662.

132 Id at 653.

133 Id at 661–62.

134 *Brochu*, 642 F2d at 662.

135 Id at 664.

136 See *Kern v Levolor Lorentzen, Inc*, 899 F2d 772, 790 (9th Cir 1990) (Kozinski dissenting) ("*Brochu* involved a very rare situation and, in the few cases where it applies, the *Brochu* rule is fully consistent with *Baldwin*."). For another example of the subset theory, see *Shepp v Uehlinger*, 775 F2d 452, 456–57 (1st Cir 1985) (finding that a breach of contract theory was a subset of an indemnification theory).

137 See *McDonough Power Equipment, Inc v Greenwood*, 464 US 548, 555–56 (1984) (stating that requiring a new trial due to a juror's mistaken response during voir dire would be "contrary to the practical necessities of judicial management reflected in Rule 61 and § 2111").

principle.[138] This exception allows a reviewing court to uphold a general verdict despite the presence of errors if the reviewing court is certain that the jury was not significantly influenced by any of the erroneously submitted issues.[139] Factors courts traditionally consider in determining whether an error prejudicially affected a multitheory general verdict include: whether the error concerned an issue that was dominated by another issue, whether the dominant issue was legally and factually adequate, and whether the error was likely to impact that valid issue.[140]

Courts introduce harmless error analysis through two ways: the language of *Baldwin* itself and the harmless error rules.[141] Some courts find that the *Baldwin* principle already included a harmless error exception.[142] Other courts independently add a harmless error analysis to *Baldwin*, often through § 2111 and FRCP 61.[143]

The first and quintessential case to find a harmless error in the multitheory-general-verdict context, *American Airlines, Inc v*

---

[138] See *Muth v Ford Motor Co*, 461 F3d 557, 564 & n 15 (5th Cir 2006) (listing cases). See also, for example, *Davis*, 264 F3d at 105–07 (using the harmless error exception to affirm a verdict despite insufficient evidence to support one of the claims); *Hurley*, 174 F3d at 121–22 ("[W]e are satisfied that no jury would have found the defendants liable solely on the basis of the quid pro quo instruction. . . . Because any error in the quid pro quo instruction could not by any stretch of the imagination change the verdict, we need not reverse."); *Braun v Flynt*, 731 F2d 1205, 1206 (5th Cir 1984) ("[A] general verdict can be upheld, even when a claim erroneously has been submitted 'where it is reasonably certain that the jury was not significantly influenced by issues erroneously submitted to it.'"), quoting *E.I. du Pont de Nemours & Company v Berkley and Company*, 620 F2d 1247, 1258 n 8 (8th Cir 1980); *Mueller*, 573 F2d at 1038–40 (utilizing harmless error analysis but reserving the verdict).

[139] *E.I. du Pont de Nemours*, 620 F2d at 1258 n 8. See also Part I.C.

[140] See *Gardner v General Motors Corp*, 507 F2d 525, 529 (10th Cir 1974) ("Although we might well hesitate to affirm the judgments if duty to warn were the single theory of liability we consider plaintiffs' other theories of recovery . . . to overwhelm any potential error in this regard."); *Collum v Butler*, 421 F2d 1257, 1260 (7th Cir 1970) ("Error must be viewed with respect to its relative effect on the results of trial. In our considered opinion, the results of the present trial would not have been substantially affected if these issues had not been submitted to the jury."); *Roginsky v Richardson-Merrell, Inc*, 378 F2d 832, 837 (2d Cir 1967) (upholding a verdict despite improperly submitted evidence for fraud because "the jury's finding on [negligence] could not have been significantly influenced by admission of evidence on the fraud count").

[141] See, for example, *Asbill v Housing Authority of Choctaw Nation of Oklahoma*, 726 F2d 1499, 1504 (10th Cir 1984). See also Part I.C (discussing the harmless error rules).

[142] See, for example, *Asbill*, 726 F2d at 1504.

[143] See, for example, *Hurley*, 174 F3d at 121–22 (noting that *Baldwin* "does not speak to the harmless error situation" and citing FRCP 61 to uphold a general verdict). For discussion of the harmless error rules, see Part I.C.

United States,[144] involved a plane crash that killed fifty-eight passengers. The family of one of the victims brought a wrongful death claim against American Airlines.[145] After an eighteen-day trial, the jury returned a verdict against the airline.[146] On appeal, the Fifth Circuit held that of the thirty-one submitted theories of negligence, all but one was supported by substantial evidence. The court acknowledged that *Wilmington* required it to reverse "if it is impossible to say upon which counts the verdict was based."[147] However, the court found that "it is [ ] inconceivable that in the mass of testimony so clearly establishing negligence in thirty other particulars this issue could have influenced the verdict against American."[148] Citing FRCP 61, the court upheld the verdict.[149]

Some courts interpret the *Baldwin* principle as requiring absolute certainty that the jury reached its verdict on the nonerroneous theory, but still conduct harmless error analysis. One such case that popularized the harmless error exception is *Morrissey v National Maritime Union of America*.[150] The case involved a union worker who sued the union for arresting him, claiming the arrest was an improper disciplinary action.[151] The trial judge failed to define "discipline" in the jury instructions, and the jury returned a general verdict for the worker.[152] On appeal, the Second Circuit held that the trial court erred in not defining "discipline."[153] In deciding how to address this error, the court observed that the general rule would be to reverse and that "[t]he language used [in *Baldwin*] is generally quite absolute."[154] It also took note of the harmless error exception, but ruled that such an exception "must be kept within rather strict bounds."[155] Because it was not clear that the jury would have

---

144 418 F2d 180 (5th Cir 1969).

145 Id at 183.

146 Id.

147 Id at 195.

148 *American Airlines*, 418 F2d at 195.

149 Id.

150 544 F2d 19 (2d Cir 1976).

151 Id at 22.

152 Id at 22, 25.

153 Id at 26.

154 *Morrissey*, 544 F2d at 26–27, citing *United New York & New Jersey Sandy Hook Pilots Association v Halecki*, 358 US 613, 619 (1959).

155 *Morrissey*, 544 F2d at 27.

returned a verdict for the worker in the absence of the error, the court concluded that the error was not harmless and reversed.[156]

Other courts have interpreted *Baldwin* and its progeny to contain a harmless error exception in the language of the cases themselves and require only reasonable certainty that the jury reached its verdict on the adequate theory. One of the most notable cases relying on this interpretation is the Tenth Circuit's decision in *Asbill v Housing Authority of Choctaw Nation of Oklahoma*.[157] The court quoted the language from *Baldwin*, but declared that "this holding does not paint with as broad a brush as appears from the language quoted."[158] Instead, *Asbill* held that all trial errors are subject to harmless error analysis. The court, contrary to previous courts who interpreted an absolute rule from *Wilmington*, cited *Wilmington* to support a harmless error exception: "A general verdict may be upheld if it appears that the errors committed were not 'vital,' or prejudicial to the 'substantial rights' of the objecting party."[159] It also cited § 2111 and FRCP 61 to support the harmless error analysis.[160] However, despite the harmless error analysis the court reversed and remanded for a new trial because it was not "reasonably certain that the jury was not significantly influenced by issues erroneously submitted to it."[161]

Many of these earlier opinions applied harmless error analysis but did not actually find that the error was harmless.[162] Recently, courts have been more willing to affirm general verdicts under a harmless error exception.[163] But inconsistency within

---

156 Id.

157 726 F2d 1499 (10th Cir 1984).

158 Id at 1504.

159 Id.

160 Id.

161 *Asbill*, 726 F2d at 1504, quoting *E.I. du Pont de Nemours*, 620 F2d at 1258.

162 See Ryan Patrick Phair, *Appellate Review of Multi-claim General Verdicts: The Life and Premature Death of the* Baldwin *Principle*, 4 J App Prac & Process 89, 111 n 89 (2002) (noting that at the time the article was written, only four courts had found a harmless error).

163 See, for example, *Tire Engineering and Distribution, LLC v Shandong Linglong Rubber Co*, 682 F3d 292, 315 (4th Cir 2012) (upholding a general verdict on damages despite dismissing several claims because the error was harmless); *Muth*, 461 F3d at 565 (holding that the court was "reasonably certain" that the jury found liability under the adequate theory and affirming the verdict) (quotation marks omitted); *Davis*, 264 F3d at 105–10; *Pratt v Petelin*, 2011 WL 3847022, *3 (D Kan) (citing dicta in *Farrell* to apply a harmless error exception and deny defendant's motion for new trial), affd 733 F3d 1006 (10th Cir 2013).

circuits prevents any clear consensus on what rule each circuit follows.

3. Discretionary rule.

Some circuits have disregarded *Baldwin* entirely. The Ninth Circuit created another way to avoid reversing general verdicts, known as the discretionary rule. The discretionary rule allows courts to use discretion to construe a general verdict as attributable to a supported theory.[164] Courts determine whether to use this discretion based on four factors: the potential for jury confusion from the error, whether the appellant's privileges or defenses apply to the count on which the verdict is sustained, the strength of evidence supporting the adequate theory, and the extent to which disputed issues apply to the theories in question.[165] This has been recognized as "functionally equivalent" to harmless error analysis.[166] In creating this rule, the Ninth Circuit did not cite any of the relevant Supreme Court precedent, including *Baldwin*.

Kern v Levolor Lorentzen, Inc[167] demonstrates the application of the discretionary rule. The plaintiff sued her former employer for wrongful termination, breach of implied covenant of good faith and fair dealing, and age discrimination.[168] The jury returned a general verdict for the plaintiff and the defendant appealed, claiming insufficient evidence for each of the claims.[169] The Ninth Circuit found that there was no evidence to support the age-discrimination claim, but used the discretionary rule to uphold the verdict.[170] Going through each of the factors, the court determined that there was little chance for confusion because the age discrimination claim was not emphasized and was offered only to explain the disparate treatment; the employer's defenses applied to all three claims; the evidence for the contractual claims was strong; and basing liability on age discrimination would necessarily require a breach of contract.[171]

---

164 See *Traver v Meshriy*, 627 F2d 934, 938 (9th Cir 1980).

165 Id at 938–39.

166 See Phair, 4 J App Prac & Process at 101 (cited in note 162).

167 899 F2d 772 (9th Cir 1990).

168 Id at 774.

169 Id at 775–78.

170 Id at 777.

171 *Kern*, 899 F2d at 777–78.

This exception has received "vigorous and persuasive" criticism.[172] Ninth Circuit Chief Judge Alex Kozinski, dissenting in *Kern*, advocated for automatic reversal.[173] He viewed the majority's adherence to the discretionary rule as "overrid[ing] sub silentio" the *Baldwin* principle, and criticized the majority for ignoring stare decisis.[174] Despite such criticism, the Ninth Circuit still follows this rule.[175] Its current analysis is much less extensive, however, and it tends to look only at whether there is enough evidence to support one theory rather than engaging in analysis of all four factors.[176] Thus, instead of being a narrow exception to the general rule of reversal, upholding the verdict has become the rule.[177]

4. Two-issue rule.

The Seventh Circuit has also ignored the *Baldwin* principle altogether and follows a rule similar to the common-law criminal rule: courts should uphold a general verdict as long as one theory is supported.[178] This is known as the two-issue rule.[179] The court justified this rule by observing that even if the instructions regarding one of the claims was erroneous, "it cannot be shown, other than on the basis of speculation or conjecture, to have affected the jury's decision, there being a totally adequate independent theory upon which the verdict may have rested."[180] This turns *Baldwin* on its head since it requires affirmance rather

---

[172] See *Knapp v Ernst & Whinney*, 90 F3d 1431, 1439–40 (9th Cir 1996). See also David M. Axelrad and Loren Homer Kraus, *The Federal General Verdict Rule: Conflict in the Courts of Appeal*, 43 Fed Law 43, 43 (1996).

[173] *Kern*, 899 F2d at 782 (Kozinski dissenting) ("When there is insufficient evidence to support one legal theory [ ] the entire verdict must be reversed.").

[174] Id (Kozinski dissenting).

[175] See *Knapp*, 90 F3d at 1439–40 (stating that while the Ninth Circuit's rule has been criticized, it is nevertheless the law in that circuit). See also, for example, *Woods v Carey*, 488 Fed Appx 194, 197–98 (9th Cir 2012).

[176] See, for example, *Goldberg v Pacific Indemnity Co*, 405 Fed Appx 177, 180 (9th Cir 2010) (citing *Traver* to uphold a general verdict without analyzing the four factors).

[177] See *Kern*, 899 F2d at 791 (Kozinski dissenting) (listing cases in which the Ninth Circuit cited *Traver* to uphold a verdict without doing the analysis, noting that "the exceptions have now submerged the rule").

[178] *McGrath v Zenith Radio Corp*, 651 F2d 458, 472 (7th Cir 1981). See also *Kossman v Northeast Illinois Regional Commuter Railroad Corp*, 211 F3d 1031, 1037 (7th Cir 2000) ("[W]hen a jury only returns a general verdict, we need only find support in the record for one of the theories presented to the jury in order to affirm the jury award.").

[179] See Elizabeth G. Thornburg, *The Power and the Process: Instructions and the Civil Jury*, 66 Fordham L Rev 1837, 1883 (1998).

[180] *McGrath*, 651 F2d at 472.

than reversal. The Ninth Circuit has also taken this approach with respect to factual errors in civil cases, although it did not cite Seventh Circuit precedent in doing so.[181] This is the same as the *Griffin* rule, but the Ninth Circuit's decision predated *Griffin*.

* * *

The above analysis demonstrates that lower courts are unclear on what exceptions, if any, apply to *Baldwin*, and the circumstances under which they apply. Not only do circuits disagree with each other on whether there are exceptions, but each circuit is internally inconsistent in its approach. Some circuits, like the Seventh and the Ninth, have even ignored *Baldwin* altogether and created their own rules.

B. Application of Criminal Precedent to Civil Cases

Courts also disagree about whether the rules established in criminal cases can apply in civil cases as well. Before courts began to apply *Griffin* to civil cases, only a few courts relied on criminal law precedent in civil cases. In one case, the Second Circuit followed the harmless error analysis outlined in *Morrissey*, but used *Kotteakos* to define harmless error.[182] The Fifth Circuit relied on criminal law precedents to reverse a general civil verdict because there was insufficient evidence to support one of the theories of liability.[183] The court cited *Stromberg* as providing the relevant rule, even though *Stromberg* was a criminal case and *Wilmington* would have been directly applicable.[184]

The biggest division between courts is whether the *Griffin* rule for factual errors—which allows courts to uphold general verdicts—also applies in civil cases. The majority of circuits that have mentioned *Griffin* in civil cases have at least used *Griffin*'s reasoning to support their decisions, and some circuits have even

---

[181] See *McCord v Maguire*, 873 F2d 1271, 1273–74 (9th Cir 1989) ("When a general verdict may have rested on factual allegations unsupported by substantial evidence, we will uphold the verdict if the evidence is sufficient with respect to any of the allegations."). See also *Securities and Exchange Commission v Todd*, 642 F3d 1207, 1213 n 1 (9th Cir 2011) (citing *McCord* for the proposition that only one factual claim needs to be supported by substantial evidence).

[182] *Bruneau v South Kortright Central School District*, 163 F3d 749, 759–60 (2d Cir 1998), citing *Kotteakos*, 328 US at 764.

[183] *Neubauer v City of McAllen, Texas*, 766 F2d 1567, 1575–78 (5th Cir 1985), overruled in *Walther v Lone Star Gas Co*, 952 F2d 119 (5th Cir 1992).

[184] *Neubauer*, 766 F2d at 1575–76.

cited *Griffin* as the relevant rule. Other circuits have refused to apply *Griffin* to civil cases because it was a criminal case.

1. Courts that have applied *Griffin* to civil cases.

Courts have applied *Griffin* in civil cases in two ways: by importing *Griffin*'s reasoning regarding the role of jurors or by referring to *Griffin* as the applicable rule. The Fifth Circuit was the first to apply *Griffin* in a civil case.[185] It had previously cited *Stromberg* in a civil case to reverse a general verdict due to insufficient evidence.[186] In *Walther v Lone Star Gas Co*,[187] the Fifth Circuit cited *Griffin*, which limited *Stromberg*, to overrule its prior precedent. *Walther* involved a plaintiff who sued his former employer for age discrimination. The trial judge instructed the jury that statistics alone may be sufficient evidence, and the jury returned a general verdict for the plaintiff.[188] The Fifth Circuit found that the instructions were "legally correct, although not factually supported" because the statistical evidence was insufficient.[189] Although noting that a previous Fifth Circuit decision had relied on *Stromberg*,[190] the court adopted the rule from *Griffin*, holding that "we will not reverse a verdict simply because the jury might have decided on a ground that was supported by insufficient evidence. Instead we must assume that the jury considered all of the evidence in reaching its decision."[191] The Fifth Circuit later questioned the reasoning of *Walther* but found it to be authoritative.[192] The court recently applied the *Griffin* rule again in a civil case to uphold a verdict, without any reference to *Walther*.[193]

The Fifth Circuit has also extended the reasoning in *Griffin*. It has used *Griffin* not only to uphold verdicts with factual errors, but also to grant a new trial because of a legal error.[194] The court cited *Griffin* as holding that a general verdict is valid only

---

185 See *Walther*, 952 F2d at 126.

186 *Neubauer*, 766 F2d at 1575–78.

187 952 F2d 119 (5th Cir 1992).

188 Id at 125.

189 Id at 126.

190 Id, citing *Neubauer*, 766 F2d at 1575.

191 *Walther*, 952 F2d at 126.

192 *Prestenbach v Rains*, 4 F3d 358, 361–62 n 2 (5th Cir 1993) ("Although its reasoning may be questioned, *Walther* appears authoritative in our Court at this time.").

193 *Advocare International LP v Horizon Laboratories, Inc*, 524 F3d 679, 696 n 67 (5th Cir 2008).

194 *Banc One Capital Partners Corp v Kneipper*, 67 F3d 1187, 1195–96 (5th Cir 1995).

if it was "*legally* supportable on one of the *submitted* grounds" and reversed and remanded the case.[195] This interpretation misapplies *Griffin*, which questioned the reasoning of *Yates*, but ultimately distinguished cases involving legal errors.[196]

The Federal Circuit has been more forthright in applying *Griffin* to civil cases. Like *Griffin*, it has distinguished between legal errors and factual errors.[197] In a patent-infringement case, the court relied on *Griffin*'s distinction between legal and factual errors in affirming the jury's verdict.[198] The defendant offered prior art references to show that the patent was anticipated and therefore not novel.[199] The plaintiff argued on appeal that it was entitled to a new trial because each of the prior art references constituted an alternative legal theory and at least one was defective.[200] The court rejected this argument, finding that the different prior art references were separate factual bases to support the single theory of anticipation.[201] Quoting from *Griffin*, the court held that evidence for at least one prior art reference was sufficient to prove anticipation.[202] Recently the Federal Circuit explicitly stated that *Griffin* applies in civil cases despite the fact that *Griffin* was a criminal case, and identified other circuits that it thought would similarly apply *Griffin* in civil cases.[203]

The Tenth Circuit also recently treated *Griffin* as the relevant rule in a civil case.[204] Similar to the Federal Circuit, the court used *Griffin* to draw a distinction between legal and factual errors, denying the appellant's request for a new trial because he did not allege a legal error.[205]

---

195 Id at 1195, quoting *Griffin*, 502 US at 49.

196 See notes 71–73 and accompanying text.

197 See *i4i Ltd Partnership v Microsoft Corp*, 598 F3d 831, 849 (Fed Cir 2010) ("Different rules apply depending upon whether the flaw is in the legal theory or the evidence.").

198 *Northpoint Technology, Ltd v MDS America, Inc*, 413 F3d 1301, 1311 (Fed Cir 2005).

199 Id at 1306.

200 Id at 1311.

201 Id.

202 *Northpoint Technology*, 413 F3d at 1311–12.

203 *Cordance Corp v Amazon.com, Inc*, 658 F3d 1330, 1338–39 (Fed Cir 2011) ("This court and other circuits have applied [*Griffin*'s] rationale to uphold general jury verdicts in the civil context as well.").

204 See *Pratt v Petelin*, 2013 WL 4405694, *5 (10th Cir) ("We see no reason [the *Griffin*] rule should not also apply in civil cases.").

205 Id.

The Seventh Circuit has also applied *Griffin* in affirming a civil verdict.[206] In *Eastern Trading Co v Refco, Inc*,[207] the court found that submitting to the jury defenses with no evidentiary support would be an error that does not require vacating the verdict. Instead, citing *Griffin*, the court observed that "[i]t cannot just be *assumed* that the jury *must* have been confused and therefore that the verdict is tainted, unreliable. . . . This is just a case of surplusage, where the only danger is confusion, and reversal requires a showing that the jury *probably* was confused."[208] The court went on to hold that there was sufficient evidence for the defenses submitted to the jury and upheld the verdict.[209]

Other courts, including district courts, have also applied *Griffin* in civil cases.[210] Most of these cases acknowledge that *Griffin* was a criminal case.

2. Courts that have refused to apply *Griffin* to civil cases.

Some courts have declined to apply *Griffin* to civil cases. Two years after the Supreme Court decided *Griffin*, the Sixth Circuit took such a stance. In *Virtual Maintenance, Inc v Prime Computer, Inc*,[211] the court cited the *Baldwin* cases to support its initial reversal of a general verdict.[212] After that reversal, both parties petitioned for a rehearing, and Virtual requested the court apply *Griffin* to uphold the verdict. The court refused, citing *Wilmington* to hold that "*Griffin*, a criminal case, does not alter the longstanding civil general verdict rule, . . . a principle to which this circuit has consistently adhered."[213]

---

[206] *Thomas v Cook County Sheriff's Dept*, 604 F3d 293, 305 n 4 (7th Cir 2010) (citing *Griffin* to support the rule that it can uphold the jury's verdict on a single adequate theory); *Eastern Trading Co v Refco, Inc*, 229 F3d 617, 621–22 (7th Cir 2000); *Composite Marine Propellers, Inc v Van Der Woude*, 962 F2d 1263, 1265 (7th Cir 1992) (citing *Griffin* for the rule that general verdicts can be upheld if one theory is adequate).

[207] 229 F3d 617 (7th Cir 2000).

[208] Id at 622.

[209] Id at 622–27.

[210] See, for example, *Bennett v The Home Insurance Co*, 1993 WL 261982, *3 n 8 (4th Cir) (citing *Griffin* as the federal standard in reviewing challenges to general verdicts); *Agere System, Inc v Atmel Corp*, 2005 WL 2994702, *17 (ED Pa) ("Though the Supreme Court's holding in Griffin took place in the context of a criminal appeal, . . . that principle is equally applicable in the civil context.").

[211] 11 F3d 660 (6th Cir 1993).

[212] Id at 667.

[213] Id.

The Sixth Circuit was recently asked to uphold a civil verdict under *Griffin* and it again refused. The court found that "[b]ecause *Virtual Maintenance* has not been overturned by an en banc opinion of this court or by a Supreme Court decision, we are bound by it."[214] This language might imply that the court followed *Virtual Maintenance* only because it is precedent, but might otherwise apply *Griffin* in civil cases. Another judge on the Sixth Circuit cited *Griffin* in a dissenting opinion to support his view that a general verdict can be upheld if there is one adequate theory.[215]

The First Circuit has also declined an invitation to apply *Griffin* in civil cases.[216] Noting that the Supreme Court does not adhere to the *Griffin* rule in civil cases, the court proceeded to apply the *Baldwin* principle.[217] A few years later, the First Circuit again observed that the *Baldwin* principle applies in civil cases and *Griffin* applies in criminal cases.[218] However, the First Circuit has said that "it is not easy to explain the discrepancy"[219] and that *Griffin* "makes sense" when applied to cases that have no evidence on one theory and sufficient evidence on another.[220] Thus, both circuits that decline to apply *Griffin* in civil cases have nevertheless hinted that they approve of its reasoning as applied in civil cases.

* * *

As this Part shows, lower court jurisprudence for civil cases is convoluted and inconsistent. Different circuits have created different exceptions to the *Baldwin* principle and have disagreed on whether and when *Griffin* applies in civil cases. The uniform

---

[214] *Loesel v City of Frankenmuth*, 692 F3d 452, 468 (6th Cir 2012).

[215] See *Daugherty v Campbell*, 33 F3d 554, 558 n 1 (6th Cir 1994) (Suhrheinrich dissenting) (citing *Griffin* in a civil case to support the position that one adequate theory is sufficient to affirm a general verdict).

[216] See *Kerkhof*, 282 F3d at 52.

[217] Id ("Although it is not easy to explain the discrepancy, the Supreme Court has not used the same presumption in civil cases."). However, the court found that the risk of prejudice was slight and affirmed the verdict. Id at 53.

[218] *Gillespie v Sears, Roebuck & Co*, 386 F3d 21, 30 n 7 (1st Cir 2004):

> The general remand rule in civil cases, derived from [*Baldwin*,] has been reaffirmed in more recent cases. . . . The contrary rule in criminal cases involving insufficient evidence, see [*Griffin*,] makes sense when one looks at the cases in which the rule is often applied, *e.g.*, [*Griffin*] (no evidence on one theory and enough on another).

[219] *Kerkhof*, 282 F3d at 52.

[220] *Gillespie*, 386 F3d at 30 n 7.

rule outlined in the following Part removes these complications by providing a simple rule that applies in all cases: reverse for legal errors unless harmless, and uphold for factual errors unless prejudicial.

III. A UNIFORM RULE BASED ON ERROR TYPE

As Part I shows, the criminal law and civil law approaches to reviewing general verdicts have been converging, creating the confusion in lower courts outlined in Part II. This Part synthesizes the cases from both sides to propose a uniform rule for appellate review of multitheory general verdicts, applicable to both criminal and civil cases: courts should reverse for legal errors and uphold for factual errors. Since both sides already reverse for legal errors, currently the only difference between the civil and criminal rules is the treatment of factual errors, with criminal cases governed by *Griffin* and civil cases governed by *Wilmington*.[221] Thus, the confusion among the lower courts can be abated by resolving this difference.

To remedy this difference, courts should recognize that the *Wilmington* rule has been displaced by the harmless error rules,[222] which preempts the common law. Courts should conduct harmless error analysis, and under this analysis courts should find that factual errors are presumed harmless. Because jurors can be presumed to have reached their verdicts on factually adequate theories, verdicts with factual errors should be presumptively upheld. This outcome is functionally equivalent to the current criminal rule, which means that the civil-criminal divide noted in *Wilmington* has converged based on the enactment of the harmless error rules. Supreme Court precedent supports this convergence, since the Court has applied criminal case law in civil cases in other contexts.

Because there should no longer be a criminal-civil divide, *Griffin* should apply in both civil and criminal cases. Applying *Griffin* would create a simple, uniform rule: reverse general verdicts for legal errors unless harmless, and uphold verdicts despite factual errors if there is a single adequate theory. This rule would resolve both sources of confusion courts have faced. It would inform courts when a harmless error exception should apply and whether *Griffin* can be cited in civil cases. Courts should

---

221 See text accompanying note 78.

222 28 USC § 2111. See also Part I.C.

look to this uniform rule as guidance in determining whether a multitheory general verdict with an underlying error should be upheld.[223]

A. *Wilmington* under Harmless Error Analysis and the Common-Law Criminal Rule

Reliance on a strict interpretation of *Wilmington*—automatic reversal for factual errors—is misplaced. The harmless error rules, notably § 2111 and FRCP 61, require courts to uphold a verdict if the error was harmless, contrary to the original analysis in *Wilmington*. The *Wilmington* rule has therefore been displaced in favor of harmless error analysis in order to comply with these statutes.

To determine whether a factual error is harmless, courts should ask whether the error changed the verdict. Because juries can identify factually unsupported theories, factual errors are unlikely to produce a different verdict. Thus, factual errors should be presumed harmless, so general verdicts with factual errors should be presumptively upheld. This matches the analysis outlined in the common-law criminal rule.

1. The harmless error rules displace the *Wilmington* rule.

Wilmington, which held that factual errors in general verdicts are "prejudicial," has been superseded by the harmless error rules. As noted earlier, the *Wilmington* Court did not conduct harmless error analysis in deciding the case.[224] With the enactment of the harmless error rule embodied in § 2111 and FRCP 61, however, *Wilmington* can no longer stand for the proposition that factual errors should be automatically reversed.

As a preliminary matter, courts should not hesitate to conclude that the harmless error rules displace *Wilmington*. Before *Wilmington*, the Supreme Court found that a state statute governing appellate review of multitheory general verdicts applied in place of the *Baldwin* principle, indicating that statutes supersede the common-law rule.[225] The Supreme Court itself has used § 2111 to supersede precedent that required automatic reversal

---

[223] This rule would not dismiss case-by-case determinations. There will be instances in which legal errors should be upheld and factual errors should be reversed. This approach would inform courts of instances in which errors will generally be either harmful or harmless by looking at the natural effect of the error.

[224] See note 35 and accompanying text.

[225] See notes 30–33 and accompanying text.

of judgments in other contexts. In *United States v Lane*,[226] the Court held that a pre-§ 2111 case requiring automatic reversal for misjoinders was displaced by the harmless error rules.[227] Similar analysis should apply to *Wilmington*.[228]

The test for whether legislation supersedes federal common law is simply whether the statute "'speak[s] directly to [the] question' at issue."[229] There is no requirement of a clear congressional purpose for displacing federal common law.[230] Here, the harmless error rules explicitly speak to the issue of whether harmless error analysis is required.

Although *Wilmington* would not be displaced if it included harmless error analysis, the case does not include such analysis. Indeed, the majority of lower courts recognize that the *Wilmington* rule is absolute and does not contain harmless error analysis. Those courts that have interpreted *Wilmington* to include a harmless error exception by focusing on the references in *Wilmington* to "prejudicial error" and "vitally defective" errors[231] have done so based on improper reasoning. While the *Wilmington* Court found the error to be "prejudicial," such a statement would not pass muster under a harmless error test. Harmless error analysis requires that courts assess how the submitted theories affected the substantial rights of any parties.[232] *Wilmington* did not engage in such analysis; instead, the Court categorically held that the error was prejudicial because of the generality of the verdict.[233] It did not, as *Baldwin* did, evaluate the

---

226 474 US 438 (1986).

227 Id at 444–49 (rejecting the per se rule established in *McElroy v United States*, 164 US 76 (1896), in favor of harmless error analysis).

228 One commentator has argued that the harmless error rules incorporate the *Baldwin* principle, and therefore would not alter its reasoning. See Phair, 4 J App Prac & Process at 128–29, 133 (cited in note 162). The Supreme Court rejected this approach in an analogous context, describing it as precluded by *Kotteakos* and *Schaffer v United States*, 362 US 511 (1960). See *Lane*, 474 US at 448 n 11 ("It is simply too late in the day to argue that Congress intended to incorporate any *per se* rule of *McElroy* for misjoinder following *Kotteakos*, the subsequent enactment of an arguably broader statute, and this Court's prejudice inquiry in *Schaffer*.").

229 *American Electric Power Co v Connecticut*, 131 S Ct 2527, 2537 (2011) (brackets in original), quoting *Mobil Oil Corp v Higginbotham*, 436 US 618, 625 (1978).

230 *American Electric Power*, 131 S Ct at 2537.

231 See notes 157–59 and accompanying text. The "vitally defective" language is in the context of interpreting an Illinois statute that allows a general verdict to be sustained as long as one of the counts is sufficient. The *Wilmington* Court found that the statute does not apply to errors that are vitally defective. See note 34 and accompanying text.

232 28 US § 2111.

233 *Wilmington*, 205 US at 78.

significance of the error.[234] Because the *Wilmington* Court did not discuss the effect of the error, the Court did not apply harmless error analysis. Because *Wilmington* did not include harmless error analysis, the harmless error rules displace the *Wilmington* rule.

Other factors demonstrate that harmless error analysis should be incorporated into courts' review of multitheory general verdicts. Section 2111 specifies that the harmless error rule applies to "*any* case,"[235] which would include civil cases involving multitheory general verdicts, and FRCP 61 is specific to civil cases.[236] More significantly, the Supreme Court has applied the harmless error test to criminal cases involving multitheory general verdicts,[237] and the Court has also recognized that § 2111 applies to both civil and criminal cases in other contexts.[238] Furthermore, the Court has implied that *Kotteakos* applies in civil cases,[239] and has declared that "an 'absolute certainty' standard is plainly inconsistent" with the *Kotteakos* standard.[240] Since *Wilmington* did not include a harmless error test, the *Wilmington* rule should be replaced with harmless error analysis to remain consistent with the harmless error rules and Supreme Court precedent.

---

234 See note 35 and accompanying text.

235 28 USC § 2111 (emphasis added).

236 Despite concerns, which will be discussed in more depth below, with citing Rule 61 to conduct harmless error analysis, the Rule supports the argument that harmless error analysis supersedes *Wilmington*. First, even though the Federal Rules of Civil Procedure apply to district courts and not appellate courts, the Supreme Court has held that "it is well settled that the appellate courts should act in accordance with the salutary policy embodied in Rule 61." *McDonough Power Equipment, Inc v Greenwood*, 464 US 548, 554 (1984) (holding that Congress enacted § 2111 to reinforce the application of Rule 61 to appellate courts). Second, two of the *Baldwin*-principle cases, despite coming after Rule 61 was enacted, make no reference to it or any harmless error rule. While these cases did not explicitly refer to a harmless error rule, both cases concerned legal errors, and both cite to the fact that they are unable to tell if the jury relied on the inadequate theory. See *Sunkist Growers, Inc v Winckler & Smith Citrus Products Co*, 370 US 19, 29–30 (1962); *United New York & New Jersey Sandy Hook Pilots Assn v Halecki*, 358 US 613, 618–19 (1959).

237 See, for example, *Pulido*, 129 S Ct at 532 (stating that in the context of a multitheory claim, "various forms of instructional error are . . . subject to harmless-error review").

238 *Kotteakos*, 328 US at 762.

239 See note 96 and accompanying text.

240 *Pulido*, 129 S Ct at 533.

2. Factual errors should be presumed harmless.

With harmless error analysis incorporated into the review of multitheory general verdicts, the question remains as to when factual errors are harmless. As previously noted, the harmless error rules refer to errors that "do not affect the substantial rights of the parties."[241] The Supreme Court has instructed courts to analyze "what effect the error had or reasonably may be taken to have had upon the jury's decision."[242] In cases in which the jury handed down a multitheory general verdict, reviewing courts cannot tell what effect the error actually had. Courts can, however, draw inferences regarding what effect the error "reasonably may . . . have had" based on the jurors' responsibilities.[243] This Section argues that the practice of holding factual errors presumptively harmful is contrary to current Supreme Court precedent. Instead, courts should presume that factual errors are harmless.[244]

There are four possible approaches reviewing courts could take with respect to factual errors. The first approach would be to hold that factual errors are always harmful because "the substantial rights of the parties would be affected per se if the court ascribed the verdict to the valid claim."[245] This approach is premised on the argument that the harmless error rules incorporate *Wilmington* because both explicitly reference "substantial rights."[246] Such an approach cannot be accepted for several reasons. First, it fails to address the main inquiry: whether the outcome would be different in the absence of the error. More significantly, this interpretation of the harmless error rules ignores the statute's motivation, which was aimed at preventing unnecessary reversals.[247] As discussed in the paragraph below, the Court has repeatedly rejected rules that find a harmful error when none existed.

---

241 28 USC § 2111.

242 *Kotteakos*, 328 US at 764.

243 Id.

244 The Supreme Court has found that "any attempt to create a generalized presumption to apply in all cases would be contrary . . . to the spirit" of § 2111, and therefore has cautioned against making broad, rule-based presumptions. Id at 765. However, it has also noted that a permissible presumption would be based on the "*nature of the error* and 'its natural effect.'" Id at 765–66 (emphasis added). This Comment's approach is based on such a permissible presumption.

245 Phair, 4 J App Prac & Process at 127–29 (quotation marks omitted) (cited in note 162).

246 Id.

247 See note 84 and accompanying text.

A second view is that factual errors should be presumed harmful. The Supreme Court has eschewed such a position in an analogous situation. In a recent civil case, the Court criticized the Federal Circuit for imposing a mandatory presumption that errors were harmful.[248] While the case involved the Veterans Court, which has its own harmless error statute,[249] the Supreme Court also discussed § 2111. Citing *Kotteakos*, the Court noted that it has interpreted § 2111 to require courts to assess errors "without the use of presumptions insofar as those presumptions may lead courts to find an error *harmful*, when, in fact, . . . it is not."[250] There are numerous instances in which factual errors have been found harmless in the context of multitheory general verdicts.[251] A presumption of harmfulness in those cases would have led many of those courts to reverse the verdicts. The reviewing court would need evidence that the jury did not rely on the inadequate theory to overcome a presumption of harmfulness. Given the nature of general verdicts, the court would not be able to tell what theories the jury relied on.[252] Absent some indication that the jury did not rely on the inadequate theory, the court could not be sufficiently confident that the error did not alter the outcome. With insufficient evidence to rebut the presumption of harmfulness, the court would have to conclude the error was harmful. This runs contrary to the harmless error rules as interpreted by the Supreme Court. Courts therefore should not presume that factual errors are harmful.

Courts could, as a third approach, find that factual errors are always harmless. One circuit court has done this, holding that factual errors are harmless as a matter of law.[253] The reason for this ruling follows the *Griffin* rationale: jurors are responsible for making factual findings. If a theory is inadequate because of insufficient evidence, the jury will not base its verdict on that theory.[254] Thus, the outcome would not have been different if the inadequate theory was not submitted to the jury, making the

---

248 *Shinseki v Sanders*, 556 US 396, 406 (2009).

249 38 USC § 7261(b)(2).

250 *Shinseki*, 556 US at 407–08 (emphasis added), citing *Kotteakos*, 328 US at 760.

251 See, for example, *Davis v Rennie*, 264 F3d 86, 105–07 (1st Cir 2001); *Braun v Flynt*, 731 F2d 1205, 1206 (5th Cir 1984); *American Airlines*, 418 F2d at 195.

252 See *Baldwin*, 112 US at 493.

253 See *Buhrmaster v Overnite Transportation Co*, 61 F3d 461, 463–64 (6th Cir 1995).

254 Id at 464. See also *Griffin*, 502 US 46, 59–60 (1957).

error harmless. This approach "may go too far,"[255] since courts have found instances when factual errors were harmful.[256]

A final approach—and the one this Comment advocates—would recognize that factual errors can be harmful, but should be presumed harmless. Under this approach, an error is harmful, and therefore requires reversal, if it is shown that the jury "*probably* was confused."[257] If the law given to the jury was correct and the jury makes factual findings, the only concern is "surplusage," meaning a matter that is irrelevant to the case.[258] Courts can reasonably presume that adding a factually unsupported claim would not alter the outcome since the jury would recognize the lack of evidentiary support.[259]

This presumption finds support in Supreme Court precedent. The *Griffin* Court expressly invoked this inference in describing the "clear line" that separates factual errors and legal errors:

> When [ ] jurors have been left the option of relying upon a legally inadequate theory, there is no reason to think that their own intelligence and expertise will save them from that error. Quite the opposite is true, however, when they have been left the option of relying upon a factually inadequate theory, since jurors are well equipped to analyze the evidence.[260]

Thus, courts should infer that jurors can "save them[selves]" from factual errors.[261] In other words, jurors will recognize a factually unsupported theory of liability and will not rely on it. The factual error will have no effect on the jury's decision and therefore is harmless.[262] While *Griffin* was a criminal case, there is no reason to think that fact-finding capabilities differ between criminal juries and civil juries, as this Comment will discuss.[263] Therefore, courts should employ a rebuttable presumption that factual errors are harmless.

---

255 See *Eastern Trading*, 229 F3d at 621–22.

256 See, for example, *Asbill*, 726 F2d at 1504 (reversing a verdict even when the error consisted of insufficient evidence to support two of the three claims).

257 *Eastern Trading*, 229 F3d at 621–22.

258 Id.

259 See, for example, *American Airlines*, 418 F2d at 195.

260 *Griffin*, 502 US at 59–60 (emphasis omitted).

261 Id at 59.

262 See *Kotteakos*, 328 US at 764.

263 See Part III.C.

This approach is further supported by the fact that lower courts have loosely followed this presumption. In the cases that apply harmless error analysis, the majority of courts have upheld verdicts involving factual errors.[264] Even in instances in which the court finds that a legal error is harmless, it is often based on the presumption that juries can reject factually inadequate theories.[265]

Furthermore, the concerns from *Baldwin* do not apply because courts can infer that juries reject factually unsupported theories. The principal problem for the *Baldwin* Court was that the nature of multitheory general verdicts prevents courts from determining what theories the jury relied on.[266] Because juries generally do not rely on theories that have insufficient evidence, courts can uphold the grounds for the jury's decision despite the generality of the verdict. With the motivating factor behind *Baldwin* absent for factual errors, a different rule should control.

Finally, the allocation of burdens weighs in favor of presuming harmlessness instead of harmfulness for factual errors. The burden of showing that an error is harmful typically falls on the party seeking reversal.[267] That party will often be in the best position to explain how he or she has been hurt by the error,[268] and the general rule is to place the burden with the party who has easier access to relevant information.[269] The *Wilmington* rule flips this by presuming prejudice for any error in a multitheory general verdict, meaning the burden is now on the party opposing reversal to show that the error was in fact harmless. Presuming that factual errors are harmless, on the other hand, puts the burden where it properly lies since the party requesting reversal will have to show that the error was harmful.

With factual errors presumed to be harmless, the civil rule would follow the analysis of the common-law criminal rule outlined in *Griffin*. This Comment does not argue that factual errors are always harmless, only that they should be presumed

---

[264] See note 251. But see *Asbill*, 726 F2d at 1504.

[265] See, for example, *Hurley v Atlantic City Police Dept*, 174 F3d 95, 121–22 (3d Cir 1999) (holding that the instruction on quid pro quo was legally erroneous, but the error was harmless because there was not sufficient factual support for the theory so the jury did not rely on it); *Bruneau v South Kortright Central School District*, 163 F3d 749, 760 (2d Cir 1998).

[266] *Baldwin*, 112 US at 494.

[267] See *Shinseki*, 556 US at 410.

[268] See id.

[269] See *United States v Fior D'Italia, Inc*, 536 US 238, 256 n 4 (2002) (Souter dissenting).

harmless. There might be instances in which the jury is actually confused by unsupported theories of liability, so harmful errors could occur. But this is still functionally equivalent to the common-law criminal rule. The common-law criminal rule relied on a *presumption* that the verdict was based on adequate grounds. The Supreme Court noted that this presumption could be rebutted by evidence showing otherwise.[270] Since *Griffin*, some lower courts have reversed criminal convictions when there was evidence that the jury convicted on the factually inadequate theory.[271] Thus, both civil and criminal verdicts would be reversed under the harmless error analysis if evidence rebutted the presumption of harmlessness.

B. Convergence of Criminal and Civil Law

The civil rule under the harmless error analysis should be functionally equivalent to the common-law criminal rule. Even though *Wilmington* recognized a civil-criminal divide in dicta, this alone should not preclude the convergence between criminal and civil appellate review of general verdicts. The civil-criminal division is not inherent in the law, and the Supreme Court itself has mixed criminal case law in civil cases.

The convergence between the civil and criminal rules is not a recent development. Even before the formation of the United States, judges were declaring that the civil-criminal divide was normatively undesirable. In an early English civil case, Lord Mansfield noted the division between criminal and civil appellate review of general verdicts.[272] He lamented that the rule in civil cases was to reverse the verdict if any one of the counts was bad, because it "catch[es] justice in a net of form."[273] He instead thought that the criminal rule, in which a verdict can be upheld if any of the counts supports the verdict, should be applied in civil cases.[274] Lord Mansfield went on to write that the consideration of the rule in criminal cases "will make the Court lean against setting aside a verdict upon such an objection without

---

[270] See *Claassen v United States*, 142 US 140, 146 (1891). See also *Griffin*, 502 US at 49–50, quoting *Claassen*, 142 US at 146–47 (observing that the presumption exists "in the absence of anything in the record to show the contrary").

[271] See, for example, *United States v Henning*, 286 F3d 914, 922 (6th Cir 2002) (finding that it was likely that the jury convicted the defendant based on the actions of his associates, for which there was insufficient evidence).

[272] *Peake v Oldham*, 98 Eng Rep 1083, 1083–84 (KB 1775) (Mansfield).

[273] Id at 1084.

[274] Id.

very good reason, that is, without some apparent manifest defect."[275] He later wrote in a separate opinion that he saw no need to distinguish between criminal and civil cases.[276] Thus, even though early courts recognized that there were differences between criminal cases and civil cases, some judges questioned whether such a distinction was legitimate and were influenced by the other line of cases.

As further evidence of convergence, the Supreme Court has mixed civil law cases with criminal cases, and vice versa. The *Stromberg* Court, although not citing a civil law case, used the same rationale the Court previously used in civil cases. The Court justified invalidating the general verdict in part because it could not determine whether the appellant was convicted under the unconstitutional clause.[277] The Court's ruling contravened the traditional common-law criminal presumption that the verdict rested on the good theory, and instead followed the *Baldwin* rationale that "[the verdict's] generality prevents us from perceiving upon which plea [the jury] found."[278] *Stromberg* therefore blurred the line between civil and criminal law.

The Court has also applied criminal precedent to civil cases in other contexts in which the basis for a general verdict was unknown. In *New York Times Co v Sullivan*,[279] Sullivan, a Commissioner of Montgomery, Alabama, brought a civil libel suit against the *New York Times* and was awarded a verdict of $500,000.[280] The Supreme Court held that public officials could constitutionally recover damages for libel against critics of their official conduct only on proof of actual malice.[281] Although the relevant Alabama law required proof of malice for punitive damages, the trial judge did not have the jury specify which portions of award were compensatory or punitive. This made it "impossible to know, in view of the general verdict returned," whether the jury found actual malice.[282] The Court reversed and remanded the case, citing criminal cases, including *Stromberg*

---

275 Id.
276 *Grant v Astle*, 99 Eng Rep 459, 466 (KB 1781) (Mansfield).
277 *Stromberg*, 283 US at 367–68.
278 *Baldwin*, 112 US at 493.
279 376 US 254 (1964).
280 Id at 256.
281 Id at 283.
282 Id at 284.

and *Yates*, as authorities.[283] Thus, the Supreme Court has used criminal law in civil cases to reverse a general verdict.

These examples show that the civil-criminal divide is not an inherent division. Indeed, when the civil and criminal rules are the same—as is the case with the *Stromberg* rule and the *Baldwin* principle—courts should follow the *Sullivan* Court's lead and cite the other side's cases. Because the harmless error rules create the same rule for all factual errors, courts can, and should, cite to criminal law in civil cases. As the next Section explains, courts should specifically apply the law articulated in *Griffin*.

C. *Griffin* Should Control in Civil Cases

Since there should no longer be a civil-criminal divide, *Griffin* should apply in civil cases. The rationale in *Griffin* applies in civil and criminal cases. The ability of jurors to weigh evidence, and their inability to understand the law, is the same whether the case is civil or criminal. Although "civil and criminal juries' required roles are obviously not identical,"[284] in the context of this Comment, the required roles are the same. The only difference in decisional authority between criminal and civil juries is the criminal jury's authority to apply legal rules: generally speaking, criminal juries have the power to apply legal rules in deciding verdicts, whereas civil juries do not. [285] However, civil juries have the power to apply legal rules through general verdicts,[286] and this Comment focuses exclusively on general verdicts. Civil juries giving general verdicts operate the same as criminal juries; both decide the facts, are given the law, and apply the law to the facts to reach an ultimate conclusion. As such, any difference in decisional authority between civil and criminal juries should not affect any of this Comment's analysis. Additionally, fact-finding is the same for civil and criminal juries.[287] This means that the reasoning in *Griffin*, which was based on jurors' fact-finding capabilities, applies equally to criminal and civil juries. As noted above, the Supreme Court in *Stromberg* used the rationale from *Baldwin* to reverse a general verdict in a

---

[283] *New York Times*, 376 US at 284.

[284] *United States v Gaudin*, 515 US 506, 516–17 (1995).

[285] Colleen P. Murphy, *Integrating the Constitutional Authority of Civil and Criminal Juries*, 61 Geo Wash L Rev 723, 740 (1993).

[286] Id at 736.

[287] Id at 740.

criminal case. Similarly, a court could use the rationale from *Griffin* to uphold a general verdict in a civil case.

While there are countless other differences between criminal and civil cases, many differences actually support applying *Griffin* to civil cases in place of *Wilmington*. For example, because the stakes are higher in criminal proceedings,[288] courts should be more cautious in upholding verdicts in criminal proceedings. Nonetheless, *Wilmington* calls for the opposite result.

Though the standard of proof is different in civil and criminal cases, this point actually supports abandoning *Wilmington* in favor of *Griffin*. In criminal cases, defendants must be found guilty beyond a reasonable doubt,[289] while most civil cases require only a preponderance of the evidence.[290] Because criminal cases require a higher standard of evidence, verdicts in criminal cases should be easier to reverse based on insufficient evidence relative to civil cases. In fact, the Supreme Court has said, "the fact that the Government must prove its case beyond a reasonable doubt justifies a rule that makes it *more difficult* for the reviewing court to find that an error did not affect the outcome of a case."[291] If verdicts can be upheld despite factual errors in criminal cases, then it should also be the case that they can be upheld in civil cases. Instead, *Wilmington* creates the opposite result.

Lower courts should apply *Griffin* in civil cases. Because the civil-criminal divide has been bridged, *Griffin* should be binding authority on lower courts in civil cases, and thus courts should follow the Tenth and Federal Circuits' lead and treat it as the relevant rule.[292]

D. Clarifying the Rule Governing Appellate Review

With the convergence of criminal and civil rules and the application of *Griffin* to civil cases, there should be a single rule that applies in both civil and criminal cases: legal errors—incorrect instruction on the law or improper admission of evidence—are reversible unless harmless; factual errors—

---

[288] Joel Prentiss Bishop, 1 *Criminal Procedure* § 1273 at 756 (Little, Brown 3d ed 1880). See also *Baxter v Palmigiano*, 425 US 308, 318–19 (1976) (noting that "the stakes are higher" in criminal cases).

[289] *Sullivan v Louisiana*, 508 US 275, 277–78 (1993).

[290] Neil Orloff and Jery Stedinger, *A Framework for Evaluating the Preponderance-of-the-Evidence Standard*, 131 U Pa L Rev 1159, 1159 (1983).

[291] *Shinseki*, 556 US at 410–11.

[292] See notes 197–205 and accompanying text (describing the Tenth and Federal Circuits' approach).

insufficient evidence—are upheld unless harmful, if there is at least one adequate theory. This is already the rule on the criminal side, and the Tenth and Federal Circuits have embraced this rule on the civil side.[293] By helping courts understand the natural effect of different types of errors, this rule would resolve the two sources of confusion in the case law: whether and how harmless error analysis applies and whether *Griffin* is controlling in civil cases.

First, this rule informs courts that the harmless error exception applies, so reversal is not automatic and courts are not required to be "absolutely certain" that the jury relied on the inadequate theory. This uniform rule also provides context for using the harmless error exception based on the error type. As noted earlier, factual errors should be presumed harmless, so the harmless error exception dictates upholding the verdict.[294] Legal errors are also subject to the harmless error rule, but because jurors are not experts on the law, the presumption for legal errors is to reverse. This rule roughly maps what the lower courts have held. Many cases with harmless errors involved factual errors,[295] whereas many cases in which the court declined to find the error harmless involved legal errors.[296] The proposed uniform rule would help lower courts understand exactly when and why an exception applies and would correct those instances when the court should have come out the other way.

Second, the convergence of civil and criminal law means that courts are free to rely on *Griffin* in civil cases. It is appropriate for courts not only to apply the rationale from *Griffin* explaining the role of jurors, as some courts have done, but to cite *Griffin* as the binding rule. However, *Griffin* should be applied only in cases involving factual errors, and not for legal errors as some lower courts have done.[297] Lower courts should also not cite *Wilmington* to deny applying *Griffin*. Furthermore, lower courts should not cite *Wilmington* for the proposition that factual errors

---

[293] See notes 197–205 and accompanying text.

[294] See Part III.A.2.

[295] See note 251.

[296] See, for example, *Morrissey*, 544 F2d at 27 (declining to find an error harmless when the judge failed to define "discipline"). But see *Hurley*, 174 F3d at 122 (finding that an erroneous instruction of law was harmless); *Asbill*, 726 F2d at 1504 (reversing a verdict despite the error being factual—namely, insufficient evidence to support two of the three claims).

[297] See, for example, *Banc One Capital Partners Corp v Kneipper*, 67 F3d 1187, 1195–96 (5th Cir 1995).

are reversible without conducting harmless error analysis, since the harmless error rules displaced the *Wilmington* rule.

CONCLUSION

This Comment sheds light on the confusion lower courts have been facing in reviewing multitheory general verdicts. Courts are uncertain about the circumstances under which a general verdict can be upheld and whether they can apply *Griffin* to civil cases. This Comment resolves this confusion by analyzing the legal development on both the civil and criminal sides and synthesizing them into a single rule that cuts across the civil-criminal divide: legal errors should be reversed subject to harmless error analysis while factual errors should be upheld unless prejudicial. This rule explains both the movement by the Supreme Court on the criminal side toward the civil rule and the reaction by the lower courts on the civil side. Moreover, § 2111 replaces the *Wilmington* rule with harmless error analysis, which matches the common-law criminal rule. This establishes the complete convergence between civil and criminal case law, meaning that courts are free to apply criminal cases such as *Griffin* in civil cases, but only in instances of the same type of error. With the analysis in this Comment, courts should be in a better position to understand the state of the rule with respect to reviewing multitheory general verdicts and when it should apply.