Harmless Error and Misjoinder Under the Federal Rules of Criminal Procedure: A Narrowing Division of Opinion

Thomas C. Wales
NOTES

HARMLESS ERROR AND MISJOINDER UNDER THE FEDERAL RULES OF CRIMINAL PROCEDURE:
A NARROWING DIVISION OF OPINION

A primary purpose of rule 8 of the Federal Rules of Criminal Procedure,¹ which governs joinder of offenses and defendants in federal criminal cases, is to balance each defendant's right to a fair trial against the desire of the courts, the government, and the public for efficiency and economy in the judicial system.² The major function of rule 52(a) of the Federal Rules of Criminal Procedure,³ the harmless error rule, is similar. Errors not affecting the "substantial rights"⁴ of a defendant should not cause retrial of cases which have ended in conviction and which have cost vast amounts of effort, time, and the public's money.

Whether rule 52(a) should apply to cases in which offenses or defendants are misjoined under rule 8, or whether, in fact, the interaction of the two rules defeats the rationale for both is the subject of this note. The federal courts of appeals are divided on this issue and, despite numerous opportunities, the Supreme Court has declined to resolve the matter.⁵

1. FED. R. CRIM. P. 8 provides:
   (a) Joinder of Offenses.
   Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.
   (b) Joinder of Defendants.
   Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.


3. FED. R. CRIM. P. 52(a) provides: "Harmless Error. Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded."

4. Courts applying rule 52(a) to improper joinder under rule 8 have hesitated to deal directly with what are "substantial rights" in the context of misjoinder. See text accompanying notes 120-125 infra.

5. Courts find rule 52(a) inapplicable based primarily upon a finding of prej-
Considered first are the background and application of rules 8 and 52(a) independent of one another.\(^6\) The application of rule 52(a) to joinder improper under rule 8 is then examined. The respective positions of the courts are set out and criticized. Finally, closer analysis of the decisions of several of the circuits finding rule 52(a) inapplicable to misjoinder indicates what may be a trend in these circuits toward expanding permissible joinder under rule 8 by defining its terms more broadly. This suggests further that the division between the circuits may in fact be narrowing: The more broadly joinder rules are construed, the less likely misjoinder will occur, and, equally, the less likely it is that the issue of harmless error will even arise.

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udice per se to a defendant forced to undergo a trial where either offenses or defendants were improperly joined under rule 8. This stance has been expressed most recently by the Fifth Circuit in United States v. Levine, 546 F.2d 658 (5th Cir. 1977): "...When unrelated transactions involving several defendants are joined together..." Id. at 662 (citations omitted). Accord, United States v. Whitehead, 539 F.2d 1023, 1026 (4th Cir. 1976); United States v. Marroineaux, 514 F.2d 1244, 1248 (5th Cir. 1975); United States v. Graci, 504 F.2d 411, 413-14 (3d Cir. 1974); United States v. Bova, 493 F.2d 33, 35 (5th Cir. 1974); United States v. Reynolds, 489 F.2d 4, 6 (6th Cir. 1973), cert. denied, 416 U.S. 988 (1974); United States v. Eagleston, 417 F.2d 11, 14 (10th Cir. 1969); Chubet v. United States, 414 F.2d 1018, 1020 (8th Cir. 1969); United States v. Gougis, 374 F.2d 758, 762 (7th Cir. 1967); Metheany v. United States, 365 F.2d 90, 94-95 (9th Cir. 1966); Cupo v. United States, 359 F.2d 990, 993 (D.C. Cir. 1966), cert. denied, 385 U.S. 1013 (1967); King v. United States, 355 F.2d 700, 704-05 (1st Cir. 1966); United States v. Spector, 326 F.2d 345, 350-51 (7th Cir. 1963); Ward v. United States, 289 F.2d 877, 878 (D.C. Cir. 1961); Ingram v. United States, 272 F.2d 567, 570-71 (4th Cir. 1959). Even more recently, the Second Circuit has reaffirmed the counterposition in United States v. Turbine, 558 F.2d 1053 (2d Cir.), cert. denied, 98 S. Ct. 421 (1977):

It is well-settled in this circuit that the harmless error doctrine applies to misjoinder of counts under Fed. R. Crim. P. 8(b)....[W]hen evidence tending to prove the charge that should have been severed would nevertheless have been admissible at the trial of the objecting codefendant, and was admitted subject to appropriate limiting instructions, any error was harmless.


6. The courts themselves have experienced great difficulty in determining rule 8's correct application: "None of the Federal Rules has given rise to so much misunderstanding." 8 MOORE'S FEDERAL PRACTICE ¶ 8.02 [1], at 8-2 (2d rev. ed. 1977). It is this misunderstanding of rule 8 which triggers its misapplication, from which misjoinder many times results. The analysis which the courts bring to application of rules 8 and 52(a) independent of one another is therefore central to understanding any approach to the interaction of these rules.
BACKGROUND AND APPLICATION OF THE RULES

Joinder of Offenses and Defendants—Rule 8

The Advisory Committee notes to rule 8 indicate that the rule is substantially a restatement of existing law.\(^7\) Rule 8(a) is, as suggested by the committee, substantially the same as its predecessor.\(^8\) Rule 8(b), on the other hand, has no statutory basis, but rests on judicial decision.\(^9\)

There is case law which indicates that joinder of offenses of the same class against multiple defendants was permitted prior to the adoption of the Federal Rules.\(^10\) This, in conjunction with the Advisory Committee note, suggests that the drafters may have intended rule 8 to perpetuate that practice.\(^11\) However, following the

7. The Advisory Committee note to rule 8 states:

Note to Subdivision (a). This rule is substantially a restatement of existing law, 18 U.S.C. former § 557 (Indictments and presentments; joinder of charges) [now repealed].

Note to Subdivision (b). The first sentence of the rule is substantially a restatement of existing law, 9 Edmunds, Cyclopaedia of Federal Procedure, 2d Ed., 4116. The second sentence formulates a practice now approved in some circuits, Carignella v. United States, 78 F.2d 563, 557, C.C.A. 7th.

8. Act of Feb. 26, 1853, ch. 80, § 1, 10 Stat. 162 (prior to amendment) (current version at Fed. R. Crim. P. 8(a)) provides as follows:

Whenever there are or shall be several charges against any person or persons for the same act or transaction, or for two or more acts or transactions connected together, or for two or more acts or transactions of the same class of crimes or offenses which may be properly joined, instead of having several indictments, the whole may be joined in one indictment in separate counts; and if two or more indictments shall be found in such cases, the court may order them to be consolidated.


10. See United States v. Liss, 137 F.2d 995, 998 (2d. Cir.), cert. denied, 320 U.S. 773 (1943). The court first stated that the “same class” language of the statute preceding rule 8(a), see note 8 supra, “presupposes that the transactions may be quite independent of each other.” United States v. Liss, 137 F.2d 995, 998 (2d Cir.), cert. denied, 320 U.S. 773 (1943). The court then stated: “The mere fact that the accused are different in two counts is no longer important, despite what was said in McElroy v. United States . . . .” Id. (citation omitted). For a discussion of McElroy v. United States, 164 U.S. 76 (1896), and related cases, see note 58 infra and accompanying text. See also 8 Moore’s Federal Practice § 8.06(1), at 8-27 (2d rev. ed. 1977).

11. Professor Wright has reached the same conclusion. He indicates that the drafters of rule 8 may well have intended rule 8(a) to be read in conjunction with rule 8(b); once rule 8(b)'s requirements are met with respect to joinder of defendants, rule 8(a) indicates what offenses may be properly joined. This result, he suggests, would be consistent with the pattern of the Federal Rules of Civil Procedure which the drafters seem to have used as their model. C. Wright, Federal Practice and Procedure § 144, at 318-19 (1969). See Fed. R. Civ. P. 18 & 20 (amended 1969), 28 U.S.C. app., at 6075, 6099, 6100 (1984), as they were prior to the
adoption of rule 8, the great majority of courts, without significant debate, have interpreted rules 8(a) and 8(b) as mutually exclusive; rule 8(b) is to apply in cases of multiple defendants.\textsuperscript{12} As indicated below,\textsuperscript{13} application of the harmless error rule to improper joinder under rule 8 may effectively be to read rules 8(a) and 8(b) in conjunction with one another. In that event, debate as to whether the drafters intended rule 8 to permit joinder of unrelated but similar offenses against multiple defendants may finally have begun, somewhat belatedly and in the unexpected guise of whether rule 52(a) should be applied to misjoinder.

Joinder of offenses with respect to single defendants is analyzed under rule 8(a),\textsuperscript{14} this analysis has never been seriously question-

\textsuperscript{12} 1966 amendments. Professor Wright indicates, however, that he believes joinder of offenses of the same or similar character should be “inapplicable to cases involving multiple defendants.” \textit{C. Wright, Federal Practice and Procedure} § 144, at 319 (1969).


\textsuperscript{14} \textit{See} text accompanying notes 95-98 infra.

\textsuperscript{14} Before discussing the application of rule 8, it should be noted that \textit{Fed. R. Crim. P.} 13 & 14 also affect joinder and are relevant to this discussion. Rule 14 provides in pertinent part:

\textit{If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires.}

\textit{FED. R. CRIM. P.} 14. It is well-settled that rule 14 only applies once a threshold determination has been made that joinder is proper under rule 8. United States v. Park, 501 F.2d 754, 760 (5th Cir. 1974); United States v. Graci, 504 F.2d 411, 413 (3d Cir. 1974); Ingram v. United States, 272 F.2d 567, 570 (4th Cir. 1959); Cataneo v. United States, 167 F.2d 820, 823 (4th Cir. 1948). The trial court determines motions under rule 14 by balancing the prejudice to defendant inherent in a joint trial against the expense and inconvenience to the Government of multiple trials. United States v. Wallace, 272 F. Supp. 838, 841 (S.D.N.Y. 1967); United States v. Andreadis, 238 F. Supp. 800, 802 (E.D.N.Y. 1965). Courts have historically been reluctant to grant relief under rule 14. \textit{8 Moore's Federal Practice} ¶ 8.06[2], at 8-29 (2d rev. ed. 1977); \textit{C. Wright, supra} note 11, § 222, at 436, § 223, at 446. \textit{See also} Walsh, \textit{Fair Trials and the Federal Rules of Criminal Procedure}, 49 A.B.A.] 853 (1963). Walsh has characterized this reticence to grant relief under rule 14: “Rule 14 is entitled 'Relief from Prejudicial Joinder,' but might as well be entitled 'No Relief from Prejudicial Joinder as now construed.'” \textit{Id.} at 856. For the defendant who goes to trial properly joined under rule 8, the chances of receiving a separate trial at a later time are unlikely at the trial level and even less likely on appeal; the trial court's decision is reversible only to rectify clear abuse of discretion. Cataneo v. United States, 167 F.2d 820, 823 (4th Cir. 1948).
Rule 8(a) provides for joinder in four situations. Offenses may be joined under the rule if they are "of the same or similar character," stem from the "same act or transaction," from "acts or transactions connected together," or from "a common scheme or plan."16

Commentators have generally agreed with the latter three provisions.17 While individual courts may define such terms as "transaction" and "connected together" broadly or narrowly,18 the only provision which has provoked serious disagreement is that permitting joinder of offenses of the same or similar character.19 The principal justifications for this provision are judicial economy20 and the argument that evidence of such offenses may be admissible at a separate trial of the offense to which it is joined under the "prior similar acts" or "other crimes" rule.21 However, joinder under this provision can easily result in the introduction of evidence which fails to meet the "other crimes" test.22 In such

1948). See also Orfield, Relief from Prejudicial Joinder in Federal Criminal Cases (pt. 2), 36 NOTRE DAME L. REV. 495, 509-10 (1960). It is for this reason that the courts' interpretation of rule 8 and what they first determine to be the bounds of proper joinder are of central importance. A broad interpretation of rule 8 means broad joinder. See text accompanying notes 126-166 infra. FED. R. CRIM. P. 13 provides:

The court may order two or more indictments or informations or both to be tried together if the offenses, and the defendants if there is more than one, could have been joined in a single indictment or information. The procedure shall be the same as if the prosecution were under such single indictment or information.

Consequently, the test for consolidation under rule 13 is whether all offenses and defendants could have been joined initially under rule 8. Daley v. United States, 231 F.2d 123, 125 (1st Cir.), cert. denied, 351 U.S. 964 (1956); Cataneo v. United States, 167 F.2d 820, 822 (4th Cir. 1948).


16. See note 1 supra.


18. See note 126 infra and accompanying text.

19. For discussions critical of the inclusion of rule 8(a) in the federal rules, see C. WRIGHT, supra note 11, § 143, at 316-18; Maguire, Proposed New Federal Rules of Criminal Procedure, 23 YALE L. REV. 58, 58 (1943) (criticizing then proposed "Rule 9(a)," since adopted as rule 8(a)).


21. 8 MOORE'S FEDERAL PRACTICE ¶ 8.05[2], at 8-20 (2d rev. ed. 1977). See also Drew v. United States, 331 F.2d 85, 90 (D.C. Cir. 1964). The "other crimes" rule is now embodied in FED. R. EVID. 404(b).

22. A classic illustration of the introduction of such evidence was presented in Drew v. United States, 331 F.2d 85 (D.C. Cir. 1964). Defendant was tried in a single trial for two different robberies. The only similarities between the two robberies were that they occurred at different branches of the same store and were committed
cases, arguments of judicial efficiency are greatly weakened because the only substantial time saved by such joinder is the selection of one jury rather than two, a process that does not consume much time in most cases.\textsuperscript{23} Moreover, the defendant will almost certainly be prejudiced by the joinder in one of several ways: (1) The jury is apt to infer a criminal disposition on the part of the defendant and convict him of the unrelated offenses because of it;\textsuperscript{24} (2) the jury may convict based upon a cumulation of guilt from all the offenses charged, which, when considered separately might not have resulted in conviction;\textsuperscript{25} (3) defendant may become confounded or embarrassed in presenting separate defenses;\textsuperscript{26} or (4) the jury may simply become confused in considering unrelated offenses which are juxtaposed in a single trial.

These factors led to severe criticism of the rule prior to its adoption\textsuperscript{27} and have prompted at least one call for its abolition.\textsuperscript{28} Such considerations are important for the present discussion because misjoinder of defendants under rule 8(b) often results from a trial court’s mistaken analysis of a rule 8(b) problem in rule 8(a) terms.\textsuperscript{29}

Rule 8(b) need only be mentioned briefly here. Rule 8(b) permits joinder of multiple defendants only if “they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses.”\textsuperscript{30} As indicated, in cases involving multiple defendants, the overwhelming majority of courts have held that rule 8(b) controls exclusively; rule 8(a) should not be considered. Offenses which are similar but unrelated are not grounds for joinder of multiple defendants.\textsuperscript{31}

\begin{footnotesize}
25. \textit{Id}.
26. \textit{Id. See also} Cross v. United States, 335 F.2d 987, 991 (D.C. Cir. 1964).
28. See, \textit{e.g.}, 74 Yale L.J. 553, 560 (1965).
29. See King v. United States, 355 F.2d 700, 704-05 (1st Cir. 1966).
30. See note 1 \textit{supra}. For a discussion of the interpretation of these terms by several circuits holding rule 52(a) not applicable to misjoinder under rule 8, see text accompanying notes 128-166 infra.
31. See note 12 \textit{supra} and accompanying text.
\end{footnotesize}
Harmless Error—Rule 52(a)

The harmless error doctrine embodied in rule 52(a)\(^32\) derives from two statutes no longer in effect.\(^33\) Section 391 provided that on the hearing of any appeal, certiorari, or motion for a new trial "the court shall give judgment . . . without regard to technical errors . . . which do not affect the substantive rights of the parties."\(^34\) Section 556 provided that no indictment should be deemed insufficient or trial or judgment be affected "by reason of any defect or imperfection in matter of form only, which shall not tend to the prejudice of the defendant."\(^35\)

The language of these statutes emphasizes their limitation to matters of form and technicality. The early cases so held.\(^36\) There was a general reticence to apply the doctrine more broadly; in fact, in drafting section 269 of the Judicial Code,\(^37\) the predecessor of the present rule, there was great hesitation in the Senate as to whether the doctrine should be applied to criminal cases at all.\(^38\)

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32. See note 3 supra.
33. The Advisory Committee note to rule 52(a) states:
   Note to Subdivision (a). This rule is a restatement of existing law, 28 U.S.C.A. former § 391 (second sentence): "On the hearing of any appeal, certiorari, writ of error, or motion for a new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties"; 18 U.S.C.A. former § 556: "No indictment found and presented by a grand jury in any district or other court of the United States shall be deemed insufficient, nor shall the trial, judgment, or other proceeding thereon be affected by reason of any defect or imperfection in matter of form only, which shall not tend to the prejudice of the defendant, * * *." A similar provision is found in Rule 61 of the Federal Rules of Civil Procedure, 28 U.S.C., Appendix.
35. Act of May 18, 1933, ch. 31, 48 Stat. 58 (current version at FED. R. CRIM. P. 52(a)).
   Suffice it to indicate, what every student of the history behind the Act of February 26, 1919, knows, that that act was intended to prevent matters concerned with the mere etiquette of trials and with the formalities and minutiae of procedure from touching the merits of a verdict. Of a very different order of importance is the right of an accused to insist on a privilege which Congress has given him.
   Id. at 294.
37. Act of Feb. 26, 1919, ch. 48, § 269, 40 Stat. 1181 (current version at FED. R. CRIM. P. 52(a)).
38. See Kottekos v. United States, 328 U.S. 750, 762 (1946).
Nevertheless, it was ultimately included as rule 52(a).

The difference in wording between rule 52(a) and its predecessors has not gone unnoticed by the courts: "The word difference . . . is not great, but it is to be noted that the phrase 'technical errors' has been deleted from the present law and the word 'errors' substituted." Consequently, the doctrine embodied in the present law has evolved from one governing "technical errors" and "errors of form" to one which is now held applicable to errors of all kinds, including errors of constitutional dimension.

Yet, the courts have long had difficulty defining a precise standard under which to apply the rule. The test enunciated by the Supreme Court in *Chapman v. California* with respect to federal constitutional error is that the court must be able to "declare a belief that it was harmless beyond a reasonable doubt." However, while it seems that arguments for it could certainly be made, no federal court has raised misjoinder to an error of constitutional dimension. Matters are further complicated by the courts'


40. For a view of the thinking behind this evolution, see United States v. Antonelli Fireworks Co., 155 F.2d 631, 642-64 (2d Cir.) (Frank, J., dissenting), cert. denied, 329 U.S. 742 (1946); United States v. Bennett, 152 F.2d 342, 348-49 (2d Cir. 1945) (Frank, J., dissenting), rev'd sub nom. Bihn v. United States, 328 U.S. 663 (1946); United States v. Rubenstein, 151 F.2d 915, 919-25 (2d Cir.) (Frank, J., dissenting), cert. denied, 326 U.S. 766 (1945); United States v. Lekacos, 151 F.2d 170, 174 (2d Cir. 1945), rev'd sub nom. Kotteakos v. United States, 328 U.S. 750 (1946); Bollenbach v. United States, 147 F.2d 199, 202 (2d Cir. 1944), rev'd, 326 U.S. 607 (1946); United States v. Mitchell, 137 F.2d 1006, 1012 (2d Cir. 1943) (Frank, J., dissenting), cert. denied, 321 U.S. 794 (1944); United States v. Liss, 137 F.2d 995, 1001-05 (2d Cir.) (Frank, J., dissenting), cert. denied, 320 U.S. 773 (1943); United States v. Bruno, 105 F.2d 921, 923-24 (2d Cir.), rev'd, 308 U.S. 287 (1939); United States v. Berger, 73 F.2d 278, 280-81 (2d Cir. 1934), rev'd, 295 U.S. 78 (1939). These cases form part of a dialogue in the Second Circuit, principally between Judges Learned Hand and Jerome Frank. This evolution seems to have been accepted de facto by courts finding misjoinder under rule 8 harmless error. See text accompanying notes 121-125 infra.


42. See note 40 supra; text accompanying notes 121-125 infra.

43. 386 U.S. 18 (1967).

44. Id. at 24.

45. A due process argument could be formulated here. However, such argument seems only to have been accepted in one case, where misjoinder was accompanied by the trial court's failure to give a proper cautionary charge. Moreover, this case was reversed on appeal because defendants failed to make a timely objection to the misjoinder. See *Green v. Rundle*, 303 F. Supp. 972 (E.D. Pa. 1969), rev'd, 452 F.2d 232 (3d Cir. 1971) (consolidation of indictments charging single defendant with rape in one indictment and with assault and battery and resisting arrest, which were unrelated to rape charge, in second).
discussion of harmless error in the context of misjoinder without defining any precise test for the rule's application. 46

The standard now applied in federal cases on review of errors of nonconstitutional dimension is that set forth by the Supreme Court in Kotteakos v. United States: 47

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 . . . is . . . whether the error itself had substantial influence. 48

The impact of this shift, away from finding harmless only errors of form, on rule 52(a)'s applicability to misjoinder under rule 8 has not been explored by the courts. One effect of the shift is to focus debate not upon whether misjoinder represents a merely technical error, but rather on whether improper joinder affects "substantial rights." The question thus becomes: What are "substantial rights" in the context of rule 8? Yet, this question is one which the courts have hesitated to approach directly. 49

**THE INTERACTION OF RULES 8 AND 52(a)**

Ingram v. United States, 50 decided by the Fourth Circuit, was the seminal case refusing to apply rule 52(a) to misjoinder under rule 8. 51 Defendant Ingram was indicted with his wife, Clara, and three other defendants, James Gill, Janie Gill, and Hazel Duke for concealing and possessing nontaxpaid liquor. After the jury was impaneled, the Ingrams moved for severance of their trial from that of the Gills and Duke. The motion was denied 52 and the case went to trial. 53 The evidence showed that on March 21, 1959,

46. See text accompanying notes 120-125 infra.
47. 328 U.S. 750 (1946).
48. Id. at 764-65 (citation omitted).
49. See text accompanying notes 120-125 infra.
50. 272 F.2d 567 (4th Cir. 1959).
51. Id. at 570.
52. Id. at 568.
53. Id. at 567-68. The case was in fact somewhat more complicated. A second indictment was involved. The indictment charging the Ingrams, the Gills, and Duke arose out of events occurring on March 21, 1959. This indictment (No. 166) was consolidated with a second indictment (No. 497) which stemmed from events occurring on November 26, 1958. The second indictment charged Ingram and two defen-
Ingram was seen carrying objects away from the woodshed in back of his house. Shortly afterwards, the police apprehended Clara Ingram carrying a gallon of nontaxpaid whiskey away from the woodshed. Two more half-gallon jars of whiskey were found in the shed. Simultaneously, at the Gills' house up the street, other police officers found Janie Gill in possession of nontaxpaid whiskey and discovered fifty-six half gallons of the whiskey in a tool house behind the Gills' home. Beyond the fact that the police made these seizures at the same time and that the houses were relatively close together, there was no indication of any connection between the violations. At the close of testimony, Clara Ingram changed her plea to guilty. The two Gills and Ingram were convicted.54

On appeal Ingram contended, and the Government conceded, that the joinder of defendants was improper. The Government argued, however, that even though there had been a misjoinder of defendants, relief was in the discretion of the trial judge under rule 14 and denial of severance or of a new trial was not error unless abuse of discretion was shown. The Government argued that, in the absence of a showing of prejudice, rule 52(a) should apply.55

The Fourth Circuit first found that where joinder is prohibited by rule 8(b), severance is mandatory56 and thus not a matter within the discretion of the trial judge. The court then expounded what has become the major rationale for holding rule 52(a) inapplicable in cases of misjoinder—courts' inability to determine the extent to which defendant has been prejudiced. The court examined the language of rule 8 permitting joinder, and inferred the converse: "[Rule 8(b)] provides that two or more defendants may be jointly charged if they are alleged to have participated in the same act or transaction. The necessary inference from this is that they may not be jointly indicted or tried in the absence of a

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54. Id. at 568.
55. Id. at 568-69.
56. Id. at 569-70.
common act or transaction.”\textsuperscript{57} The reason, the court suggested, that the trial judge has no discretion to allow joinder not permitted under the rule stems from the impossibility of determining, even retrospectively, that the defendant was not prejudiced by the misjoinder. The Fourth Circuit in \textit{Ingram} quoted Chief Justice Fuller’s opinion for the Supreme Court in \textit{McElroy v. United States}:\textsuperscript{58}

\begin{quote}
[\ldots]joinder cannot be sustained where the parties are not the same and where the offences are in nowise parts of the same transaction \ldots. It cannot be said in such case that all the defendants may not have been embarrassed and prejudiced in their defence, or that the attention of the jury may not have been distracted to their injury in passing upon distinct and independent transactions \ldots.\textsuperscript{59}
\end{quote}

Given this inability to establish the extent of the prejudice resulting from improper joinder, the Fourth Circuit found no choice but to adopt a per se rule. “In other words,” the court stated, “where multiple defendants are charged with offenses in no way connected, and are tried together, they are prejudiced by that very fact \ldots.”\textsuperscript{60}

The court in \textit{Ingram} chose to emphasize, in addition, another purpose of rule 8, the deterrence of “mass trials”:\textsuperscript{61}

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\textsuperscript{57} \textit{Id.} at 569 (emphasis in original).
\textsuperscript{58} 164 U.S. 76 (1896). In \textit{McElroy} five defendants were indicted for assault and arson occurring on May 1, 1894. Three of them were separately indicted for arson occurring on April 16, 1894. The indictments were ordered consolidated, and all defendants were tried together and convicted. The Supreme Court reversed this conviction because the indictments charged separate offenses independent of each other. The Government argued that the record contained nothing to indicate that the three defendants who had been charged in all counts had in fact been prejudiced by the joinder. It was in response to this contention that the Supreme Court replied as quoted in text.
\textsuperscript{59} \textit{Id.} at 81.
\textsuperscript{60} \textit{Ingram v. United States}, 272 F.2d 567, 570 (4th Cir. 1959). A finding of prejudice from the very fact of misjoinder is, of course, central to the question whether such error is harmless. Later cases turn on just that question. \textit{McElroy} and the per se rationale are cited for the proposition that the harmless error rule should not apply to cases of misjoinder by virtually all the circuits so holding: United States v. Levine, 546 F.2d 658, 662 (5th Cir. 1977); United States v. Whitehead, 539 F.2d 1023, 1026 (4th Cir. 1976); Graci v. United States, 504 F.2d 411, 413-14 (3d Cir. 1974); Chubet v. United States, 414 F.2d 1018, 1020 (8th Cir. 1969); United States v. Spector, 326 F.2d 345, 350-51 (7th Cir. 1963). \textit{See} United States v. Eagleston, 417 F.2d 11 (10th Cir. 1969); King v. United States, 355 F.2d 700 (1st Cir. 1966).
\textsuperscript{61} The reference to “mass trials” is taken from Judge Holtzoff’s opinion in United States v. Walsh, 15 F.R.D. 189, 190 (D.D.C. 1959).
\end{flushright}
The rule against jointly indicting and trying different defendants for unconnected offenses is a long-established procedural safeguard. Its purpose is to prohibit exactly what was done here, namely, allowing evidence in a case against one defendant to be presented in the case against another charged with a completely disassociated offense, with the danger that the jury might feel that the evidence against the one supported the charge against the other. It is not 'harmless error' to violate a fundamental procedural rule designed to prevent "mass trials." 62

Seven years after Ingram, the First Circuit in King v. United States 63 put forward an expanded rationale for the per se rule. King was tried and convicted with his codefendant on two counts of a four-count consolidated indictment charging narcotics violations. His codefendant had been charged alone in the remaining two counts. As these counts charged similar but unrelated offenses to those in which the defendants had been jointly charged, the court of appeals found that they were not part of the "same series of acts or transactions" and therefore, that they had been misjoined under rule 8(b). 64

Writing for the First Circuit, Chief Judge Aldrich viewed rule 8 as an attempt by the drafters to limit the degree of prejudice to which they considered it tolerable to subject a defendant. 65 This limit represents a balancing of what Judge Aldrich called "a presumptive possibility of prejudice to the defendant, and of benefit to the court." 66 He suggested that any joinder of offenses or defendants gives rise to this presumptive possibility of prejudice. 67 Joinder of offenses against one defendant involves prejudice because of the tendency of the jury to cumulate the offenses and convict the defendant as a "bad man." Judge Aldrich found that joinder of defendants involves an equal potential prejudice. Because

63. 355 F.2d 700 (1st Cir. 1966).
64. Id. at 705. With regard to the court’s determination of what constitutes a "series," see text accompanying notes 126-166 infra.
65. King v. United States, 355 F.2d 700, 703 (1st Cir. 1966). Implicit in the assertion that rule 8 sets the limits of tolerable prejudice is the argument that if its purpose is not to set such limits, there is no purpose in the rule. Rule 14 would vest all questions of joinder in the trial court. See note 14 supra. As both rule 14 and rule 8 were included in the rules, rule 8 must have been intended to establish the outer bounds within which the trial court has discretionary power under rule 14.
66. King v. United States, 355 F.2d 700, 703 (1st Cir. 1966).
67. Id. See text accompanying note 72 infra.
of what he described as "the natural tendency to infer guilt by association," a defendant may suffer by joinder with another allegedly "bad man."68

He recognized that in many cases, the criminal acts or associations which would cause prejudice to a defendant at a joint trial would be admissible at separate trials, either as similar act evidence or as evidence of the defendant's association with certain individuals.69 Rule 8(b), Judge Aldrich suggested, not only includes such cases but establishes a balance which goes beyond: "Rule 8(b) is not limited to situations in which proof of the other criminal transaction would be admissible in a separate trial. It goes beyond, to others, the excuse being benefit to the court."70 This benefit the judge described as the judicial economy to be derived from joint proof. However, where there is no apparent benefit, he concluded, the balance tips toward protecting the defendant from possible prejudice: "Where . . . there are no presumptive benefits from joint proof of facts relevant to all the acts or transactions, . . . joinder is impermissible."71

It should be noted that where there is no apparent benefit and the balance gives way to presumptive prejudice to defendant, that presumption is conclusive. While finding actual prejudice to the defendant, the court emphasized that such a finding was not necessary to the result reached in the case. As the offenses on the other dates did not constitute parts of the same "series" of acts or transactions, the initial joinder was improper as a matter of law and defendant was entitled to a new trial.72

The Second Circuit in United States v. Granello73 was the first to break with the Ingram and King decisions and apply rule 52(a) to misjoinder under rule 8. Granello involved consolidation for

68. King v. United States, 355 F.2d 700, 704 (1st Cir. 1966).
69. Id.
70. Id.
71. Id. (footnotes and citations omitted).
72. Id. at 705. Finding that the presumption of prejudice is conclusive must rest on one of two grounds. It can be based on a recognition of the impossibility of determining that defendant was not prejudiced by misjoinder, i.e., that his "substantial rights" (in the language of rule 52(a)) were not affected, or, it can be grounded on a recognition that there will always be an unacceptable level of prejudice once the bounds of rule 8 are crossed. The cases indicate support for both positions. As to the former, see Ingram v. United States, 272 F.2d 567 (4th Cir. 1959); McElroy v. United States, 164 U.S. 76 (1896). As to the latter, see Cupo v. United States, 359 F.2d 990 (D.C. Cir. 1966).
73. 365 F.2d 990 (2d Cir. 1966), cert. denied, 386 U.S. 1019 (1967).
trial of counts against two defendants, Granello and Levine, initially contained in a five-count information and a three-count indictment.\(^74\) Counts one and two of the information charged Granello with failure to file income tax returns in 1956 and 1957, despite the receipt of gross income of approximately $100,000 in each of those years. Counts three and four alleged similar offenses against Levine. Count five charged Granello, Levine, and a third defendant with conspiracy to commit the substantive violations contained in counts one through four. The indictment charged Levine in one count and Granello in another with attempting to evade taxes for 1957. The third count charged the two with conspiracy to defraud the United States and impeding the lawful functions of the Treasury Department by concealing the sources of their income and the nature of their business activities. The information and indictment were consolidated by consent. The two conspiracy counts were dismissed at trial on the Government's motion. The trial resulted in a hung jury on the substantive counts and a mistrial was declared.\(^75\) The case was reassigned; the substantive offenses were recharged, but with the conspiracy counts absent. Granello's motion for severance was denied. At the second trial, defendants were convicted on each of the two substantive counts of the information.\(^76\)

On appeal, the Second Circuit dealt extensively with whether joinder was proper absent the conspiracy counts.\(^77\) However, the court avoided reaching a final decision on this question by finding that even if defendants were in fact misjoined, the error was harmless.\(^78\) *Ingram* was distinguished by the court as having involved offenses "in no way connected."\(^79\) *McElroy*, relied on by the *Ingram* court, was found inapplicable because it concerned "distinct and independent transactions."\(^80\)

The court in *Granello* cited the Supreme Court's decision in

\(^74\) Id. at 991.

\(^75\) Id. at 991-92.

\(^76\) Id. at 992.

\(^77\) The court was unconvinced that joinder was proper without the conspiracy counts, id. at 993-94, but suggested that dismissal of those counts may not have been on the merits. In that event, if double jeopardy rather than collateral estoppel were the sole bar to sending the conspiracy charge to a second jury, a court could still look to the conspiracy charge in the initial indictment or information to justify joinder under rule 8(b). Id. at 995. However, the court ultimately avoided the question by assuming misjoinder and finding that defendants were not prejudiced by it. Id.

\(^78\) Id.

\(^79\) Id. (quoting *Ingram v. United States*, 272 F.2d 567, 570 (4th Cir. 1959)).

\(^80\) Id. (quoting *McElroy v. United States*, 164 U.S. 76, 81 (1896)).
Schaffer v. United States81 as implying "that the harmless error rule is applicable to questions of improper joinder when it observed that the rule was not reached there because 'the joinder was proper under Rule 8(b)' and no error was shown."82 Finding that the jury had been carefully instructed and that the Government could have proved at separate trials that both Granello and Levine had acquired income, the court concluded "no prejudice from the joinder could have occurred."83

The implication drawn by the Second Circuit from Schaffer, that the harmless error rule applies to questions of improper joinder, is not illogical. However, further analysis suggests that it is not the only, or even necessarily the correct, implication to be drawn.

The Supreme Court in Schaffer dealt with multiple defendants brought to trial for offenses only properly joined by the inclusion of a conspiracy count in the indictment. At the close of the Government's case, the conspiracy count was dismissed for failure of proof. The defendants immediately moved for dismissal of the substantive counts for misjoinder. The motions were denied on the ground that joinder was not prejudicial. The case was appealed and ultimately the Supreme Court affirmed. In doing so, the Court stated that the issue of harmless error was not reached in the case since the initial joinder, prior to the dismissal of the conspiracy count, was proper under rule 8(b).84 Consequently, the Court viewed the case purely in terms of whether there had been an abuse of discretion by the trial judge in denying the defendants' motion to sever under rule 14. The Court, in a 5-4 decision, held that no prejudice had been found by the trial court or by the court of appeals and "[w]e cannot say to the contrary on this record."85

The inference which the Granello court drew from the Schaffer decision, that harmless error applies to misjoinder, is appealing because to argue against it appears to assert that an error can affect "substantial rights" under rule 52(a) and yet not constitute an abuse of discretion by the trial court under rule 14.86 However, this in-

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83. Id.
84. Id.
86. Id. at 516.
86. For error not to be harmless under rule 52(a), it must affect substantial rights. Difficult as the abuse of discretion standard of review is to meet, certainly an
ference ignores the major rationale for finding prejudice per se once misjoinder is established—the indeterminability of the resulting prejudice. The Supreme Court in Schaffer examined joinder under rule 14, not under rule 8. Arguably, the Court found itself incapable of determining the extent to which defendants had been prejudiced by joinder. Consequently, the Court was unable to find an abuse of the trial court’s discretion under rule 14.\textsuperscript{87} Had it found joinder initially improper under rule 8, that same inability to determine the extent of the resulting prejudice might well have led the Court to reject application of the harmless error rule, as a majority of the courts of appeals have done.\textsuperscript{88}

Thus, while the inference drawn by the Granello court from Schaffer may be quite logical, that an equally plausible and contrary inference can also be drawn from Schaffer indicates that the Granello court’s reliance on Schaffer may well be misplaced. Moreover, it may be that the opposite conclusion should have been drawn from that reached by the Granello court. It has been suggested that in disposing of the appeal in a manner which managed to avoid consideration of the harmless error rule, the Schaffer majority implicitly recognized that misjoinder under rule 8 was prejudicial per se.\textsuperscript{89}

Regardless of any implication to be drawn from Schaffer, in distinguishing Ingram and McElroy, the Granello court failed even to address the indeterminability argument. The court indicated merely that the same evidence would have been admissible at separate trials as was presented at the joint one. However, while this “same evidence” test is a major rationale for applying the harmless error rule, it leaves important questions unanswered, principally those raised by the indeterminability issue.

As Granello illustrates, the circuits which apply rule 52(a) to find a particular misjoinder harmless rely heavily on the fact that had separate trials been granted, virtually the same evidence offered to prove the charge that should have been severed would,

\textsuperscript{87} The Court in Schaffer stated: “Nor can we fashion a hard-and-fast formula that, when a conspiracy count fails, joinder is error as a matter of law.” Schaffer v. United States, 362 U.S. 511, 516 (1960). However, joinder might still have been proper initially if the offenses had been part of the same series of acts or transactions.

\textsuperscript{88} See, e.g., Ingram v. United States, 272 F.2d 567 (4th Cir. 1959). See text accompanying notes 57-59 supra. For a general description of the split between the circuits and an indication of where the various courts of appeals stand on the issue, see note 5 supra.

\textsuperscript{89} 8 Moore’s Federal Practice ¶ 8.06[3], at 8-41 n.51 (2d rev. ed. 1977).
nevertheless, have been admissible at a separate trial of the offense with which it was initially misjoined. 90 Several recent cases demonstrate not only the application of this “same evidence” rationale but some of the rationale’s inherent problems.

In United States v. Turbide, 91 decided in June 1977 by the Second Circuit, defendants Turbide and Perez were charged in a two-count indictment. Count one charged Turbide alone with possession with intent to distribute and distribution of cocaine on July 17, 1974. Count two charged both Turbide and Perez with distribution and possession with intent to distribute cocaine on February 18, 1975. Perez moved to sever the two counts. This motion was denied and Turbide was found guilty on count one. Both defendants were convicted on count two. Perez appealed claiming misjoinder under rule 8(b). The court of appeals found that even had severance been granted, “similar act” evidence with appropriate limiting instructions would still have been admissible against Turbide at a joint trial of Turbide and Perez on count two. 92 As “appropriate” limiting instructions had been given at trial, the court, citing Granello, held that “no prejudice from the joinder of offenses per se could have occurred.” 93 Moreover, “any error arising from misjoinder was harmless beyond a reasonable doubt.” 94

Initially, it must be observed that the court’s reliance on Granello was misplaced. The Granello court attempted to avoid the indeterminability question raised by Ingram and McElroy by distinguishing both those cases as involving offenses “in no way connected” and “distinct and independent transactions.” 95 Yet, “offenses in no way connected” and “distinct and independent transactions”

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90. See cases cited note 5 supra (applying rule 52(a) to joinder improper under rule 8).
92. Id. at 1061-62.
93. Id. at 1062.
94. Id. at 1063.
95. United States v. Granello, 365 F.2d 990, 995 (2d Cir. 1966), cert. denied, 386 U.S. 1019 (1967). Despite the Granello court’s efforts to avoid the problem by distinguishing Ingram and McElroy, the inability of courts to determine the prejudice resulting from misjoinder remains an issue in Granello-type situations. See text accompanying notes 99-120 infra. This is so even in cases where exactly the same evidence would have come in at joint or separate trials. The demeanor of codefendants and their counsel at the joint trial and the absence of both had severance been granted are important factors in determining the prejudice to which an objecting defendant was exposed by misjoinder. Yet, the extent of such prejudice is incapable of determination. See text accompanying notes 112-120 infra (discussing United States v. Weiss, 491 F.2d 460 (2d Cir.), cert. denied, 419 U.S. 833 (1974)).
were precisely what were involved in *Turbide*. Consequently, the *Turbide* court relied on a decision which had distinguished precisely the facts of *Turbide*.

Second, if joinder of what are only similar acts, as in *Turbide*, is harmless error, this construes rule 8(a) in conjunction with 8(b) as a matter of law. The Second Circuit ostensibly rejected this construction of rule 8 in *Granello*\(^96\) and again in *Turbide*.\(^97\) However, the “same evidence” rationale, adopted in *Granello* and followed in *Turbide*, can predicate no other result. Trial courts will have no incentive to read rules 8(a) and 8(b) separately, but rather will have a strong interest, based on economy and encouraged by appellate acceptance, to read them together: The concern of the *Ingram* court with “mass trials”\(^98\) does not seem ill-founded.

The major problem inherent in the “same evidence” test is that it is underinclusive. Its premise is that evidence presented at the joint trial would be admissible at separate trials under rule 404(b) of the Federal Rules of Evidence.\(^99\) However, in the *Turbide* situation, it is unlikely that all evidence of the misjoined solo offense presented against one defendant but not against the other at their joint trial would be admissible at a separate trial of the joint offense.\(^100\) For example, had a severance of counts one and two been granted in *Turbide*, it is unlikely that all evidence of the July 1974 transaction (count one) which was presented against Turbine at the joint trial of both counts would have been admissible at a separate trial of Turbine and Perez on the February 1975 transaction (count two). Evidence of the July 1974 transaction could have been offered only to show motive, intent, or knowledge\(^101\) on the part of Turbine with respect to the February 1975 transaction. It could not have been offered as proof on the merits of the July 1974 transac-


\(^{97}\) United States v. Turbine, 558 F.2d 1053, 1061 n.7 (2d Cir.), cert. denied, 98 S. Ct. 421 (1977).

\(^{98}\) See text accompanying note 62 supra.

\(^{99}\) Fed. R. Evid. 404(b) provides:

> Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident.

\(^{100}\) If the severance were of defendants rather than of offenses, the evidence would have no relevance and would not be admissible at all.

\(^{101}\) See note 99 supra.
tion itself. Consequently, as detailed proof of count one as would be presented at a trial on the merits of that charge would likely be barred as overly prejudicial or collateral.102

This reasoning was recognized by the Ninth Circuit shortly before Turbide in United States v. Satterfield,103 where the court rejected the “same evidence” rationale. In Satterfield defendants Satterfield and Merriweather were joined in a single indictment. The charges related to five bank robberies committed in the same area within a three-month period. The indictment charged that Merriweather alone had committed the first, second, and fifth robberies, and that Merriweather and Satterfield had together committed the third and the fourth. It was never alleged that Satterfield was involved in the first, second, or fifth robberies, as a participant in a series of acts or transactions, a coconspirator or in any other manner. Satterfield’s motions for a separate trial were denied; both defendants were convicted as charged.104

Satterfield appealed claiming misjoinder. The Government argued, as the Second Circuit held in Turbide, that because evidence of all charges would have been admissible in a trial limited to the crimes in which both defendants allegedly participated, the convictions should stand.

Holding this reasoning unpersuasive,105 Judge Kennedy pointed out that evidence offered to prove an offense on the merits will “generally be more extensive, and thus more damaging, than that which would be adduced to establish a prior crime as proof of such matters as motive or intent.”106 In addition, the court in Satterfield found it important that

where evidence of prior criminal acts is proffered, the trial court has discretion to limit, or even to exclude, such evidence if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless

102. The probative value of the evidence not offered on the merits is much more likely to be “substantially outweighed” by the danger of unfair prejudice to both defendants. See Fed. R. Evid. 403; C. McCormick, Evidence § 185, at 438-39 (2d ed. 1972).
103. 548 F.2d 1341 (9th Cir. 1977).
104. Id. at 1343.
105. Id. at 1346.
106. Id. While Judge Kennedy’s remarks were directed toward showing that Satterfield had in fact been prejudiced by the joint trial, they apply equally to a discussion of the “same evidence” rationale.
presentation of cumulative evidence . . . Where multiple offenses are charged in an indictment, however, a trial judge must permit the prosecution to establish each of those offenses beyond a reasonable doubt.\footnote{107}

The Ninth Circuit had previously found rule 52(a) applicable to misjoinder under rule 8.\footnote{108} The court in \textit{Satterfield} did not explicitly break from its prior decisions. However, the language and reasoning of the opinion, as well as the court's finding that \textit{Satterfield} was prejudiced by being misjoined, indicate that the court may now be questioning its previous position.

In sum, in any case in which the "same evidence" rationale is underinclusive, the defendant is subjected to a degree of prejudice at a joint trial which would not have been present had severance been granted. Even if all that can be said of the rationale is that it is generally, but not always, underinclusive, it is inescapable that in cases where the rationale is underinclusive, the courts' ability to determine the resulting prejudice is once again an issue. To dismiss the question by flat statements that "no prejudice . . . could have occurred"\footnote{109} indicates a flawed analysis, or worse, a callous disingenuousness if the courts are deliberately ignoring this issue.

Even assuming that in a given case the "same evidence" rationale is not underinclusive, that is, that precisely the same evidence would have been admitted at a trial of the severed count as was admitted at the joint trial, further questions are raised. The court in \textit{Turbide}, for example, assumed that had severance been granted, it would have been of offenses rather than of defendants;\footnote{110} Turbide and Perez would have been tried jointly for the February 1975 transaction, the offense in which both allegedly participated; Turbide would have been tried separately for the July 1974 offense. Yet, if we accept as a premise that all evidence of Turbide's solo transaction of July 1974 which was adduced at the joint trial would have been admissible at a separate trial of the joint February 1975 offense, then, although having to prove the February 1975 transaction only once, the Government would have to prove the July 1974 transaction twice. But if the Government must prove one of

\footnote{107} Id. (citations omitted).
\footnote{108} United States v. Friedman, 445 F.2d 1076 (9th Cir.), cert. denied, 404 U.S. 958 (1971); United States v. Roselli, 432 F.2d 879 (9th Cir. 1970), cert. denied, 401 U.S. 924 (1971).
\footnote{110} See id.
the offenses twice in any event, the offense proved twice should be the joint one: Rather than severing offenses, there should be severance of defendants. This would significantly lessen the prejudice to which defendants would be exposed without substantial sacrifice of economy. The Government would still have to prove one offense twice, but, by severing defendants rather than offenses, the defendant who was charged only in the joint offense (Perez in the Turbide case) would avoid the cumulative prejudice of a trial of multiple offenses and defendants. The defendant charged with both the joint and solo offenses would face the prejudice inherent in joinder of similar offenses, permitted by rule 8(a), but would be spared the additional prejudice of a trial of multiple defendants.

The implications of severing defendants rather than offenses for the “same evidence” rationale are apparent. In cases where the rationale can be applied, it should not be. There should be a severance of defendants, creating a situation in which the rationale would have no application.

The “same evidence” rationale is equally subject to attack where the effect of severance, whether of offenses or of defendants, would be to try one of the defendants in a separate trial either alone or with fewer defendants than at the initial joint trial. Assuming again that the “same evidence” would be admitted at a separate trial as was admitted at the joint trial, the defendant would still experience a substantially different trial if granted severance. The trier of fact would not only view fewer defendants and attorneys, but the demeanor of codefendants and their lawyers would be absent as

111. It seems that it is the complexity of the facts, rather than the number of defendants, which will determine whether proof of a joint offense will require more or less time than proof of a solo offense. Proof of a joint offense is not inherently more time-consuming. Moreover, given the benefit to both defendants of avoiding prejudice, it would seem that in cases of misjoinder, the court should be precluded from justifying severance of offenses rather than of defendants based on the complexity of a given fact situation. In cases where the number of joint offenses exceeds the number of solo offenses, arguments for judicial economy will cut against severance of defendants. It is virtually inconceivable, however, that in such cases all the evidence of the solo offense would have been permitted at a separate trial of the joint offenses. Given the degree of prejudice already present in a trial of multiple defendants and multiple offenses, an offer of proof of the solo offense as complete as permitted on the merits would be barred as overly prejudicial under Fed. R. Evid. 403. Note, too, that in the Turbide situation prejudice can be potentially avoided by trying the defendant charged with the solo offense first, alone, on that offense. If he is acquitted, double jeopardy will bar evidence of the solo offense at a subsequent joint trial of both defendants on the joint offense. However, conviction on the solo offense should still give rise to severance of defendants.
well. Viewed in terms of possible prejudice, this is prejudice which would not have been present had severance been granted; the effect of this prejudice is necessarily indeterminable by an appellate court. Yet, courts relying on the "same evidence" rationale have consistently ignored this question.

Illustrative is the decision by the Second Circuit in United States v. Weiss.\footnote{491 F.2d 460 (2d Cir.), cert. denied, 419 U.S. 833 (1974).} Defendants Leon Weiss, his wife, Ethel Weiss, Melco International, Inc., and its wholly owned subsidiary, Melco International, Ltd., were charged in a nineteen-count indictment with submitting false invoices and documents to the Army and Air Force Exchange Service of the Department of Defense; defendants were also charged with conspiracy to commit these offenses and mail fraud in furtherance of this scheme (counts one through eighteen). Ethel Weiss was charged only in count nineteen. Count nineteen charged her and her husband with obstruction of justice by failing to produce documents subpoenaed by the grand jury investigating the scheme. Defendants were convicted on all counts. Ethel Weiss appealed, claiming among other errors that she had been improperly joined.\footnote{Id. at 462.} The key question was whether she had participated in the "same series of acts or transactions constituting an offense or offenses."\footnote{Id. at 467.} However, the court of appeals found it unnecessary to decide this "difficult question" on the ground that the Government would have been allowed to introduce "most if not all" of the proof put in at trial had she been tried separately; thus, any error was without prejudice.\footnote{Id.}

In reaching its decision, the court entirely ignored the prejudice arising from the demeanor of both the codefendants with whom she was tried and their lawyers. In the Weiss trial, this factor was important. Evidently, the feelings of the defense attorneys and the judge for one another were neither complimentary nor left unexpressed. The judge threatened on more than one occasion to hold counsel in contempt of court and indeed did order one defense attorney to be held in contempt,\footnote{Id.} although this order was later vacated. The court of appeals found that "[m]any of the trial judge's comments, characterizations, and castigations of counsel would have been better left unexpressed, since they not only failed to serve any useful purpose but raised serious doubts as to the
court's impartiality and judicial detachment." 117 Nevertheless, the 
trial judge's conduct was excused for the most part as "only hu-
man. [Judges] do not possess limitless ability, once passion is 
aroused, to resist provocation." 118

While the court examined the trial at length in its opinion, it 
did so in the context of whether prejudicial conduct on the part of 
the trial judge denied all defendants a fair trial, not in the context 
of possible prejudice to Ethel Weiss from improper joinder. The 
inability to determine the prejudicial effect that the demeanor of 
the codefendants and their counsel had had upon the jury was 
ignored by the court: The issue was never considered in conclud-
ing that any error of misjoinder had been without prejudice. 119 
This inability was poignantly, albeit inadvertently, illustrated in 
the opinion by the Second Circuit when it stated in a footnote: "[W]e 
have no way, absent videotape and sound recording, of appraising 
appellants' statement that 'no trial day was completely free from 
shouting or near shouting . . . ." 120

The problems outlined above indicate the major difficulties 
with application of rule 52(a) to misjoinder. These difficulties are 
not lessened by the courts' refusal to go beyond simply labelling 
their result "harmless error" and to address the real issue: whether 
"substantial rights" are affected by misjoinder.

Courts, such as the Second Circuit in Granello and Turbine, 
which base their application of rule 52(a) on a finding that "no prej-
udice from the joinder could have occurred," 121 are simply incor-
correct. Misjoined defendants are always subject to prejudice beyond 
that to which they would otherwise have been exposed. 122

Several other courts applying rule 52(a) use less absolute lan-
guage. These courts employ phrases such as "it is difficult to see" 123 
that the defendant was prejudiced or "[w]e think it highly

117. Id. at 468.
118. Id.
119. See id. at 467.
120. Id. at 468 n.2.
121. This phrase appears in both United States v. Turbine, 558 F.2d 1053, 1062 
(2d Cir.), cert. denied, 98 S. Ct. 421 (1977), and United States v. Granello, 365 F.2d 
990, 995 (2d Cir. 1966), cert. denied, 386 U.S. 1019 (1967). See also Baker v. United 
122. When courts state "no prejudice could have occurred," they are referring 
to additional prejudice to defendant beyond that permitted by rule 8. See King v. 
United States, 355 F.2d 700, 704 (1st Cir. 1966).
123. See United States v. Payden, 536 F.2d 541, 543 (2d Cir.), cert. denied, 429 
U.S. 923 (1976); See also United States v. Roselli, 432 F.2d 879, 901 (9th Cir. 1970), 
unlikely"\textsuperscript{124} that the prejudice affected the verdict. Yet, these courts, too, appear subject to criticism because such phrases dismiss the question too easily. If the defendant is prejudiced, but the extent of the prejudice is indeterminable, this should be addressed as a threshold matter before a decision as to "whether the error itself had substantial influence"\textsuperscript{125} is reached. Given a defendant facing imprisonment because of the possibly substantial effect of his misjoinder, that these courts have not dealt with a major variable in the logic of their argument renders their conclusion uncertain if not invalid.

**THE BROADENING OF RULE 8**

While many of the provisions of rule 8 contain terms of flexible meaning,\textsuperscript{126} the one which has given courts the greatest opportunity for liberal joinder is the phrase "series of acts or transactions."\textsuperscript{127} Perhaps the seminal definition of "series" in this context was that put forth by the First Circuit in *King v. United States*.\textsuperscript{128} Defendant King and his codefendant McKenney were jointly indicted on two counts of narcotics violations. Each count alleged a separate transaction, each in violation of the same statute and on the same date. A second indictment, in which McKenney alone was charged, was consolidated with the first one for trial. The second indictment charged McKenney with identical violations of the statute occurring on two other occasions. King was convicted and appealed, challenging the joinder under rule 8 of the charges against him with the charges against McKenney contained in the second indictment.\textsuperscript{129}

Correctly analyzing the joinder under rule 8(b), the court concluded that the counts were properly joined only if the transactions

\textsuperscript{124} See United States v. Friedman, 445 F.2d 1076, 1083 (9th Cir.), cert. denied, 404 U.S. 958 (1971).

\textsuperscript{125} Kotteakos v. United States, 328 U.S. 750, 765 (1946).

\textsuperscript{126} The treatment of the word "transaction" by the Fourth Circuit in *Cataneo v. United States*, 167 F.2d 820 (4th Cir. 1948), is illustrative: "[A]n interpretation of the word 'transaction' frequently involves the balancing of conflicting interests: (1) speed, efficiency and convenience in the functioning of the federal judicial machinery; against (2) the right of the accused to a fair trial . . . ." Id. at 823.

\textsuperscript{127} See, e.g., *Scheve v. United States*, 184 F.2d 695 (D.C. Cir. 1950). Joinder of one count charging three defendants with keeping a gaming table with a second and third count charging one of their number with assault with intent to kill and assault with a deadly weapon was upheld as part of the "same series of acts or transactions." Id. at 696.

\textsuperscript{128} 355 F.2d 700 (1st Cir. 1966). For discussion of this case in the context of prejudice per se resulting from misjoinder, see text accompanying notes 63-72 *supra*.

\textsuperscript{129} King v. United States, 355 F.2d 700, 702-03 (1st Cir. 1966).
alleged were part of the same "series" under the rule.\textsuperscript{130} Writing for the court, Chief Judge Aldrich defined "series" in terms of the benefits derived by the court from joinder in a particular case:

Rule 8(b) is not limited to situations in which proof of the other criminal transaction would be admissible in a separate trial. It goes beyond, to others, the excuse being the benefit to the court. . . . [T]his possibility of benefit should explicitly appear from the indictment or from other representations by the government before trial. Classic examples of such a benefit are when there is an overlapping of issues, as, for example, when some defendants are charged with transporting stolen goods in interstate commerce, and others are charged with receiving the goods, so stolen and transported, . . . or when defendants are charged with conspiracy to conceal a crime that part of their number are charged with committing . . . . Where, however, there are no presumptive benefits from joint, proof of facts relevant to all the acts or transactions, there is no "series," Rule 8(b) comes to an end, and joinder is impermissible.\textsuperscript{131}

Applying this test to the facts in \textit{King}, the court found no "series."\textsuperscript{132} Consequently, the counts contained in the second indictment were held to have been misjoined.\textsuperscript{133}

The \textit{King} test for "series" can be construed to permit quite liberal joinder.\textsuperscript{134} Yet, several courts seem to be expanding its scope.\textsuperscript{135}

\textsuperscript{130} \textit{Id.} at 703.

\textsuperscript{131} \textit{Id.} at 704 (citations and footnote omitted). The statement: "Rule 8(b) is not limited to situations in which proof of the other criminal transaction would be admissible in a separate trial," \textit{Id.}, is somewhat misleading. It implies that rule 8(b) permits joinder of similar acts, acts proof of which is more likely to be admissible in a separate trial than is proof of dissimilar acts. See \textit{Fed. R. Evid.} 404(b). However, the rule does not permit such joinder unless the acts are part of the same transaction or series of transactions. See text accompanying notes 30 & 31 supra. The court in \textit{King} declares this elsewhere in the opinion: "A 'series' is something more than mere 'similar acts.'" \textit{King v. United States}, 355 F.2d 700, 703 (1st Cir. 1966). Evidently, the court meant only to suggest that rule 8 permits even dissimilar acts or transactions to be joined simply by virtue of being in the same series. It is the joinder of such dissimilar acts which Chief Judge Aldrich finds a presumptively less appropriate basis for joinder than "similar acts," \textit{Id.} at 704, and which is justified only by an explicit appearance of benefit to the court.

\textsuperscript{132} \textit{King v. United States}, 355 U.S. 700, 705 (1st Cir. 1966).

\textsuperscript{133} \textit{Id.}

\textsuperscript{134} The court, for example, failed to indicate how much benefit to the court must appear before a "series" can be discerned. The court intended that the "presumptive benefits" from joinder be more than simply an increased likelihood of conviction; otherwise, the court would not have reached the result it did. The test requires that for joint proof to be a presumptive benefit, it must relate to all the acts or transactions. \textit{Id.} at 704.

\textsuperscript{135} \textit{But see United States v. Eagleston}, 417 F.2d 11 (10th Cir. 1969) (ex-
In *Haggard v. United States*,\(^{136}\) decided shortly after *King*, the Eighth Circuit moved considerably beyond *King* in finding transactions part of a series. Haggard, a banker, was alleged to have set up a number of loans to fictitious borrowers, defendants Martin and Sewell. In addition, he was alleged to have backed a scheme by which the bank discounted fictitious notes owed to a used car dealership run by defendant Alley. Either Alley or another defendant, Barnes, would cash the checks he received from the bank on the discounted notes. Haggard would receive a kickback. A large amount of money went into his own pocket with the balance going to the defendants who participated in each scheme. Haggard was charged with a total of five other defendants. The indictment was in fourteen counts. Counts thirteen and fourteen, involving Haggard and the fifth defendant, were severed prior to trial. Count one charged Haggard, Alley, and Barnes with conspiracy, but did not charge Martin and Sewell.\(^{137}\) The remaining counts charged the substantive offenses outlined above. Haggard was charged in each count. Alley and Barnes were not charged in any counts with Martin and Sewell and were not charged in the fictitious loan counts. Martin and Sewell were not charged in the counts involving the discounting scheme. The indictment alleged no common scheme, plan, or series of transactions involving Alley with Martin or Sewell. The defendants were each found guilty on at least one count. Alley appealed, claiming misjoinder under rule 8(b).\(^{138}\)

The court correctly stated the issue as whether Alley had participated in the same series of transactions as that involving the offenses of Martin and Sewell. However, the court found that the indictment demonstrated: (a) a common participant throughout all

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\(^{136}\) 369 F.2d 968 (8th Cir. 1966).

\(^{137}\) *Id.* at 971.

\(^{138}\) *Id.* at 971-73.
counts, (b) a similar scheme to defraud the same bank in all counts, (c) identical transactions in each instance,139 (d) the occurrence of all offenses within the time alleged in the conspiracy count of Alley and the others,140 and (e) the defendants as “aiders and abetters” to the common participant.141 The court of appeals then concluded that “[u]nder these circumstances one can imply a ‘clear discernible pattern of action’ involving Haggard and his accomplices in the ‘same series of acts or transactions,’ ”142 and therefore joinder was proper. Writing for the court, Judge Lay formalized this into the following test: “If the indictment invites ‘joint proof’ . . . or infers a common pattern of action, prima facie joinder is shown.”143 The court thus expanded upon King by permitting a finding of “series” by implication from merely similar acts linked by a common participant.

The Eighth Circuit appears to have reaffirmed this position in its most recent decision in this area, United States v. Roell,144 decided more than seven years after Haggard. The facts in Roell were remarkably similar to those in King, where the First Circuit found joinder improper.145 The two defendants, Roell and Manning, were charged in two counts of the four-count indictment with possession and sale of cocaine on September 22, 1972. Roell was charged alone in the remaining two counts with possession and sale of cocaine on a date three days after the sale alleged in the first two counts. No conspiracy was charged. Defendants were found guilty on all counts and Roell and Manning appealed, claiming error by the trial court in joining them in a single trial for both sales.146 The Eighth Circuit rejected this contention. The court found that the joinder had been proper, stating: “It is clear that Roell and Manning were involved in the same transaction on September 22, 1972 . . . . This is enough to satisfy Rule 8(b) of the Federal Rules of Criminal Procedure.”147 As in Haggard, the court thus permitted

139. The court somehow found the false loan applications and the forged notes in the discounting scheme “identical transactions.” Id. at 974.
140. The conspiracy count did not, however, include either Sewell or Martin.
141. Haggard v. United States, 369 F.2d 968, 974 (8th Cir. 1966) (footnotes omitted).
142. Id. (citations omitted).
143. Id. (citing King v. United States, 335 F.2d 700 (1st Cir. 1966)).
144. 487 F.2d 395 (8th Cir. 1973).
145. See text accompanying notes 128-133 supra.
147. Id. at 402.
joinder of what were merely similar offenses with a common participant.

The test set forth in Haggard and followed in Roell is tantamount to reading rules 8(a) and 8(b) in tandem so long as there is a common participant in each count. As indicated above, the "same evidence" test, applied by the courts finding rule 52(a) applicable to misjoinder, approaches the same result.\textsuperscript{148}

A test for "series" which has evolved in the Fifth Circuit has a similar effect. Three cases indicate its development from a rough application of the King test to a test which approaches the result in Haggard: Tillman v. United States,\textsuperscript{149} United States v. Marionneaux,\textsuperscript{150} and United States v. Levine.\textsuperscript{151}

The charges in Tillman stemmed from a protest against the war in Vietnam at an Armed Forces Entry and Examination Station. Appellants Moore and Simmons were joined in one count of a two-count indictment with four other defendants. The count charged the six with willfully injuring government property.\textsuperscript{152} A second count charged the four other defendants, not including Moore and Simmons, with interfering with administration of the Universal Military Training and Service Act.\textsuperscript{153} All defendants were convicted and appealed claiming, among other errors, misjoinder under rule 8.\textsuperscript{154}

The Fifth Circuit, stating that rule 8(a) should be read in conjunction with rule 8(b),\textsuperscript{155} found that "since it is apparent that the offenses . . . arose out of a connected series of acts . . . there was no error under rule 8(b) in trying the appellants together."\textsuperscript{156} Regardless of the meaning ascribed to "connected series of acts," which the court never defined, the decision in Tillman was at least arguably within the bounds of the "series" test set forth in King.\textsuperscript{157}

\textsuperscript{148} See text accompanying notes 95-98 supra.
\textsuperscript{149} 406 F.2d 930 (5th Cir. 1969).
\textsuperscript{150} 514 F.2d 1244 (5th Cir. 1975).
\textsuperscript{151} 546 F.2d 658 (5th Cir. 1977).
\textsuperscript{152} A glass door which the demonstrators had pushed on had been damaged. Tillman v. United States, 406 F.2d 930, 933 (5th Cir. 1969).
\textsuperscript{153} The count alleged that defendants had attempted to prevent an inductee from entering the induction center. Id.
\textsuperscript{154} Id.
\textsuperscript{155} Id. at 934. The court in Tillman cited King. The court in King, however, specifically stated: "Rule 8(b) is not to be implemented by Rule 8(a)." King v. United States, 355 F.2d 700, 704 (1st Cir. 1966) (emphasis added).
\textsuperscript{156} Tillman v. United States, 406 F.2d 930, 934 (5th Cir. 1969).
\textsuperscript{157} Proof of facts surrounding the demonstration and its goals was relevant to proof of the charges contained in both counts. Thus, the King requirement of
Two further cases decided recently by the Fifth Circuit, while ultimately finding defendants misjoined under rule 8(b), employed a test for "series" which goes far beyond even a broad reading of the King test. In United States v. Marionneaux and United States v. Levine, the Fifth Circuit defined the phrase "the same series of acts or transactions" as "requiring a 'substantial identity of facts or participants’ between two offenses to make rule 8(b) joinder proper." In each case, the court ultimately found that the defendants had been misjoined. The significance of the cases, however, lies in the test, not in the outcome. The facts in Levine well illustrate the implications of this new test for "series."

The seven defendants in Levine were charged in a five-count indictment alleging interstate transportation of pornography. Count one charged all defendants with conspiracy to commit the substantive offenses set out in the rest of the indictment. Counts two and three charged four of the defendants with interstate transportation of obscene film by common carrier and interstate transportation of obscene film for sale and distribution. Counts four and five charged three of these defendants, Levine, and another defendant, MPD Films, with offenses identical to those alleged in counts two and three, but arising from entirely different acts. Neither Levine nor MPD Films was charged in counts two and three. Levine and

"presumptive benefits from joint proof of facts relevant to all the acts or transactions," King v. United States, 355 F.2d 700, 704 (1st Cir. 1966), was arguably met. For a case somewhat analogous to Tillman but reaching a different result based on a much narrower reading of rule 8, see United States v. Eagleston, 417 F.2d 11 (10th Cir. 1969). For a discussion of Eagleston, see note 135 supra.

158. 514 F.2d 1244 (5th Cir. 1975).
159. 546 F.2d 658 (5th Cir. 1977).
160. Id. at 662 (emphasis added) (quoting United States v. Marionneaux, 514 F.2d 1244, 1248-49 (5th Cir. 1975)).
161. Levine is the most recent expression of the Fifth Circuit's "substantial identity of facts or transactions" test. In United States v. Marionneaux, 514 F.2d 1244, 1247 (5th Cir. 1975), a total of 11 defendants were joined in two counts of a single indictment. Each count alleged a conspiracy to obstruct justice. Id. at 1248. One defendant, Partin, was the only defendant common to each count. He was not tried with the others. Id. at 1247. Defendants Hugh and Don Marionneaux were named only in count one. Id. Defendants Sykes and Trantham were named only in count two. Id. While each conspiracy had as its objective interference with the criminal prosecution of Partin, the prevention of the appearance of a different witness was alleged as the goal of each conspiracy. Id. at 1247-48. Sykes, Trantham, and both Marionneaux were convicted and appealed, claiming misjoinder. The Fifth Circuit agreed and remanded defendants for a new trial. Id. at 1249. In finding the initial joinder improper, however, the court enunciated the following test: "Where . . . there is no substantial identity of facts or participants between the two offenses, there is no 'series' of acts under Rule 8(b)." Id.
MPD Films were found guilty on counts one, four, and five.\textsuperscript{162} They appealed claiming that they had been improperly joined. The Fifth Circuit found that the conspiracy charge could not reasonably have been made.\textsuperscript{163} Consequently, the court held that joinder had indeed been improper because the original indictment did not otherwise meet the test which requires “substantial identity of facts or participants” for a “series” to be found.\textsuperscript{164}

The importance of this test for “series” lies not in its requirement of substantial identity of facts,\textsuperscript{165} but rather in that it is disjunctive. This permits a finding of “series” and, consequently, proper joinder under rule 8(b) on a showing of substantial identity of participants regardless of any connection between the acts and transactions constituting offenses. This is not simply a reading of rule 8(b) in conjunction with rule 8(a), provided the participants are the same. This test goes beyond that simple reading and permits joinder in multiple defendant cases of completely unrelated offenses. In Levine, for example, provided the participants charged with each offense were “substantially” the same,\textsuperscript{166} this would have permitted joinder of all the substantive counts without a conspiracy count, an allegation of a common scheme, or an allegation that the offenses stemmed from the same series of acts or transactions. Moreover, the offenses themselves need not even be similar as they were in Levine. Provided that all, or substantially all, defendants were charged with each offense, Levine and his codefendants could have been joined in one indictment with transporting obscene films in interstate commerce as count one, and arson in count two, although the offenses were totally unrelated.

As indicated, the test for “series” enunciated in Marionneaux and Levine thus represents a substantial expansion of the King test. The implications of this test for criminal defendants are apparent: As the bounds of permissible joinder expand, there is a concomitant contraction in the number of situations in which questions of

\textsuperscript{162} United States v. Levine, 546 F.2d 658, 661 (5th Cir. 1977).
\textsuperscript{163} Id. at 666.
\textsuperscript{164} Id. at 662.
\textsuperscript{165} The requirement of substantial identity of facts seems quite narrow. Indeed, it is arguably narrower in this respect than the King requirement that joint proof be relevant to all acts or transactions in the series. The court in King did not indicate the extent of joint proof which was required. See note 134 supra and accompanying text.
\textsuperscript{166} Presumably, although “substantially” is not defined by the court, the test does not even require complete identity of participants.
misjoinder will arise. While appellants in circuits applying rule 52(a) may find claims of improper joinder dismissed as assertions of harmless error, in the Fifth and Eighth Circuits at least, these same appellants may find themselves without any error to assert.

CONCLUSION

The drafters of rule 8 intended the rule to delineate the limits of permissible joinder in federal criminal cases. A determination of improper joinder is a finding that these limits have been over-reached.

These boundaries should be recognized. Rule 52(a) is not an acceptable substitute for firmly establishing them; neither can it justify subjecting defendants to joinder beyond these limits.

The primary justification for applying rule 52(a) to cases of misjoinder, the "same evidence" rationale, does not provide sufficient grounds for finding improper joinder to be harmless error. It is inaccurate as a test for ascertaining the prejudice resulting from misjoinder because of the impossibility of determining the extent of that prejudice. Furthermore, the rationale is inherently inadequate because it fails to comprehend a second function of rule 8, the deterrence of "mass trials."

The implications of applying rule 52(a) to misjoinder have been ignored by the courts. A finding of harmless error in cases of misjoinder, particularly in situations similar to that in Turbine, encourages reading rules 8(a) and 8(b) in tandem. If the Fifth and Eighth Circuits indicate a trend, the circuits refusing to find harmless error in cases of misjoinder may well be approaching the same result by definitional expansion of the joinder rules. Ultimately, the result in both cases is broader permissible joinder.

167. King v. United States, 355 F.2d 700, 703 (1st Cir. 1966). The existence in the Federal Rules of both rule 8 and rule 14 permits no other conclusion. See note 65 supra.

168.  See text accompanying notes 99-120 supra.

169.  See text accompanying note 62 supra.


171.  See text accompanying notes 96-98 supra. Consequently, the criticism which has been directed at rule 8(a) seems equally applicable to the reading of rules 8(a) and 8(b) in conjunction. See text accompanying notes 19-28 supra.

172.  See text accompanying notes 126-166 supra.

173.  The effect of more liberal joinder is to increase the limits of prejudice to which we as a society are willing to expose potential defendants. It is not persuasive to raise the existence of rule 14 as a justification. Rule 14 has proved an ineffective recourse from prejudicial joinder. See note 14 supra.
To that extent, the gap between the circuits appears to be narrowing.

At issue, however, is not simply the effect of misapplication of rule 8 or whether broad or narrow definition of that rule is appropriate, but rather the nature of the rule itself. It is arguable that broadening permissible joinder, even to the point of reading rules 8(a) and 8(b) in conjunction with each other, is consistent with the drafters' intent. Yet, such a construction is contrary to the interpretation of the rule since its inception. If the fundamental nature of the rule, as construed by the courts, is to be altered, that alteration should be approached honestly and discussed openly: It should not emerge cloaked in the guise of harmless error and creative definition.

Such an alteration would be regrettable. Our judicial system already has its share of elements which present a defendant with inherently uncertain prospects for justice. It would be unfortunate to increase the disadvantages which those who encounter the system must face, particularly when the single justification for such a development is judicial economy. Efficiency and economy are attractive commodities; they are in scarce supply. Scarcity demands higher prices, but when the cost is expanded joinder in criminal cases, the price is too high.

Thomas C. Wales

174. See note 11 supra and accompanying text.
175. See note 12 supra and accompanying text.
176. The language employed by the Supreme Court in Kotteakos v. United States, 328 U.S. 750 (1946), discussing the avoidance of mass trials, is equally appropriate here: "[T]his may be inconvenient for prosecution. But our Government is not one of mere convenience or efficiency. It too has a stake, with every citizen, in his being afforded our historic individual protections, including those surrounding criminal trials. About them we dare not become careless or complacent . . . ." Id. at 773.