CRIMINAL LAW — RIGHT TO A FAIR TRIAL — SEVENTH CIRCUIT HOLDS THAT A CODEFENDANT'S REPEATED AND VIOLENT OUTBURSTS, COUPLED WITH INTIMIDATION FROM THE GALLERY, DENIED DEFENDANT A FAIR TRIAL. — *United States v. Mannie*, 509 F.3d 851 (7th Cir. 2007).

Approximately one-third of all federal criminal defendants are prosecuted in the same trial as other defendants.[1] In the background of this common practice lies a tension between the economic exigencies of joinder and the constitutional demands of due process. Due process requires that each criminal defendant receive a fair trial, but it also threatens to undermine the ways in which joinder facilitates the modern criminal justice system.[2] Recently, in *United States v. Mannie*,[3] the Seventh Circuit explored this delicate balance, holding that the defendant was denied a fair trial because the trial judge's limiting instructions and extensive voir dire were insufficient to overcome the prejudice caused by a codefendant's repeated and violent outbursts and by potential intimidation from the gallery.[4] The fair trial deprivation in *Mannie* resulted directly from the joint nature of the trial, yet courts do not analyze joinder under the constitutional fair trial right standard. Despite this doctrinal disconnect, joinder and fair trial cases implicate fundamentally similar concerns; thus, courts should treat the review of joinder as a subset of the fair trial right by using the fair trial potential prejudice standard for both inquiries.

Mark Mannie's longtime friend and codefendant, Aaron Patterson, was a community organizer and, according to the government, a gang leader.[5] From April to August 2004, federal agents repeatedly observed Patterson selling illegal drugs to a member of another gang who was working as an undercover informant.[6] On one occasion, Patterson arranged to trade his drugs for firearms, and he enlisted Mannie as a courier.[7] Mannie was given an unopened package of Patterson's marijuana to exchange for the firearms.[8] Upon completion of the ex-

---

[1] Andrew D. Leipold & Hossein A. Abbasi, *The Impact of Joinder and Severance on Federal Criminal Cases: An Empirical Study*, 59 VAND. L. REV. 349, 351 (2006).

[2] *Cf. id.* at 398 ("[A]ny proposal with the potential to significantly multiply the number of trials [is] a likely non-starter.").

[3] 509 F.3d 851 (7th Cir. 2007).

[4] *Id.* at 857.

[5] *Id.* at 852. Patterson was convicted of double murder in 1989 on the strength of "perjured testimony coerced by the government"; he was pardoned in 2003. *Id.*

[6] *Id.* at 852–53.

[7] *Id.* at 853.

[8] *Id.* Mannie claimed to believe that the guns were replicas. *Id.*

change, Mannie was arrested and charged with various drug- and gun-related crimes.[9] He and Patterson were tried together.[10]

This unexceptional crime and unexceptional arrest gave rise, according to the Seventh Circuit, to a truly "exceptional" trial.[11] Indignant about what he perceived as his public persecution, Patterson "had no intention of peacefully cooperating during the [joint] trial."[12] During his first courtroom appearance, Patterson warned the court to "get used to" his repeated disruptions.[13] He used jury selection, according to the trial court, "as a forum to invite members of the audience to engage in civil disobedience."[14] After Patterson refused in protest to attend the trial, spectators, presumed by some jurors to be gang members, created disturbances in his absence. One juror witnessed what some jurors believed to be the exchange of gang signs between Mannie and members of the gallery, and an onlooker was barred from the courthouse for staring disturbingly at the jury.[15] After jurors complained, Judge Pallmeyer performed extensive voir dire and dismissed any jurors who equivocated about their ability to weigh the evidence impartially.[16]

When Patterson returned to the trial, the proceedings degenerated even further. During the cross-examination of a government witness, Patterson yelled at Mannie's lawyer and "accused the defense attorneys of setting him up for a fall."[17] He then assaulted his two attorneys in full view of the jury, knocking one down and grabbing the other by his tie, throwing him to the ground.[18] At that point, Mannie moved — for the first time — for a mistrial or severance.[19] The trial judge again conducted voir dire and dismissed the only juror who expressed doubts about her ability to be fair; the judge then denied Mannie's motion.[20] Patterson used his own time on the stand to decry the proceedings as a "legal lynching."[21] Mannie again moved for a

---

[9] *Id.* The indictment contained thirteen counts; only three — conspiracy to possess marijuana with intent to distribute, distribution of marijuana, and possession of a machine gun — were against Mannie. Brief of the United States at 2, *Mannie*, 509 F.3d 851 (No. 06-1353).

[10] *Mannie*, 509 F.3d at 853.

[11] *Id.* at 852.

[12] *Id.* at 853.

[13] *Id.* (internal quotation mark omitted). Patterson disrupted multiple pretrial hearings, prompting the judge to remove him from the courtroom several times. *Id.* at 853–54.

[14] *Id.* at 854. Patterson's lawyer asked to withdraw rather than "be a part of this circus" — a circus that resulted in the dismissal of two panels of jurors. *Id.*

[15] *Id.* at 854–55.

[16] *Id.*

[17] *Id.* at 855.

[18] *Id.*

[19] *Id.*

[20] *Id.*

[21] *Id.*

mistrial, which was denied.[22] After each of Patterson's outbursts, the court instructed the jury not to "consider Patterson's courtroom behavior as evidence against either Defendant and certainly [not] against Mr. Mannie."[23] At the close of trial, the judge gave specific limiting instructions that included direction to the jurors to evaluate each defendant individually.[24] The jury convicted both defendants,[25] and Mannie moved for a new trial on the ground that the court erred in denying his previous motions.[26] The judge denied the motion, intimating that her voir dire and limiting instructions had been sufficient.[27]

The Seventh Circuit reversed. Writing for a unanimous panel, Judge Flaum[28] took the "unique set of circumstances" as an opportunity "to return to first principles and ascertain what the right to a fair trial truly means."[29] Although the parties' briefs addressed both the potential mistrial and the potentially improper denial of severance of the defendants,[30] the court did not address the joint prosecution claim directly. Instead, its limited analysis focused on the *Holbrook v. Flynn*[31] standard for inherent prejudice: a defendant is denied a fair trial when "an unacceptable risk is presented of impermissible factors coming into play."[32] The court listed several cases in which courtroom misconduct was deemed to create prejudice so pervasive that "little stock need be placed in jurors' claims to the contrary."[33] The court concluded that "[t]he combination of what the jury was exposed to in this case . . . amount[ed] to prejudice."[34] Although the court stated its preference for "[c]autionary instructions and jury interviews [as] the

---

[22] *Id.*

[23] United States v. Mannie, No. 04-CR-705-3 (N.D. Ill. Dec. 16, 2005) [hereinafter Minute Order] (minute entry denying new trial).

[24] *Mannie*, 509 F.3d at 855.

[25] Brief of the United States, *supra* note 9, at 27.

[26] *Mannie*, 509 F.3d at 855.

[27] Minute Order, *supra* note 23. The judge suggested that Mannie had not initially sought severance in order to "deflect[] attention from the evidence against [him] or generate[] sympathy for [himself] on the part of the jury," *id.*, and implicitly refused to allow Mannie "two bites of the [strategy] apple," Brief of the United States, *supra* note 9, at 39 (quoting United States v. Wertz, 492 F. Supp. 1027, 1029 (D.S.C. 1979), *aff'd*, 625 F.2d 1128 (4th Cir. 1980)).

[28] Judge Flaum was joined by Judge Posner and Judge Williams.

[29] *Mannie*, 509 F.3d at 856.

[30] *See* Brief and Required Short Appendix of Defendant-Appellant Mark Mannie at 19–26, *Mannie*, 509 F.3d 851 (No. 06-1353); Brief of the United States, *supra* note 9, at 30–47.

[31] 475 U.S. 560 (1986).

[32] *Mannie*, 509 F.3d at 856 (quoting *Holbrook*, 475 U.S. at 570) (internal quotation marks omitted).

[33] *Id.* at 857 (quoting *Holbrook*, 475 U.S. at 570) (internal quotation marks omitted).

[34] *Id.* "This is especially true," the court noted, because the prosecution stressed "that Patterson and Mannie were dangerous members of a street gang." *Id.* One might argue that a codefendant's violent outbursts are less likely to undermine the fairness of a trial for nonviolent crimes. The court did not develop this argument, apparently leaving open the question of whether the government's theory of the case should influence the fair trial decision.

primary weapons against improper jury bias," it found those tools insufficient in this case.[35]

Mannie exposes a disturbing tangle of constitutional and procedural standards. Courts require actual prejudice to invalidate a joinder decision, but they only review alleged violations of the right to a fair trial for potential prejudice. Perhaps counterintuitively, a defendant seems to be able to demonstrate that his trial was constitutionally unfair more easily than he can invalidate joinder. Although these two standards are semantically different, under each the courts are essentially engaging in a very similar fundamental fairness inquiry: both doctrines deal with the jury's consideration of impermissible evidence, and both serve to guarantee fair trials. Yet courts and commentators alike have failed to justify the application of two nominally different standards to two functionally identical claims. The potential prejudice standard currently used to evaluate fair trial claims should also be the standard used to evaluate the necessity of severance.

The Sixth Amendment and the Due Process Clauses of the Fifth and Fourteenth Amendments guarantee every criminal defendant a fair trial in which guilt is adjudicated solely on the basis of the admissible evidence and not on that of "other circumstances not adduced as proof at trial."[36] In *Turner v. Louisiana*,[37] which established the constitutional fair trial standard, two key prosecution witnesses, both deputy sheriffs, engaged in conversations with several jurors during the course of the trial.[38] The Court held that, even in the face of a distinct possibility that the deputies had never improperly discussed the case with any juror, "this continual association throughout the trial . . . undermined the basic guarantees of trial by jury," and invalidated the subsequent conviction.[39] In order to win a fair trial right challenge, a defendant need not "prove with particularity wherein he was prejudiced";[40] rather, under *Holbrook*, he must demonstrate only "an unacceptable risk . . . of impermissible factors coming into play."[41]

The law of joinder, in contrast, is rooted in the Federal Rules of Criminal Procedure.[42] The Rules permit any relief from prejudicial

---

[35] *Id.*

[36] *Holbrook*, 475 U.S. at 567 (quoting Taylor v. Kentucky, 436 U.S. 478, 485 (1978)) (internal quotation mark omitted).

[37] 379 U.S. 466 (1965).

[38] *Id.* at 467–68, 473.

[39] *Id.* at 473–74.

[40] Estes v. Texas, 381 U.S. 532, 544 (1965).

[41] *Holbrook*, 475 U.S. at 570 (quoting Estelle v. Williams, 425 U.S. 501, 505 (1976)) (internal quotation marks omitted).

[42] *See* FED. R. CRIM. P. 8(b) (allowing joinder if defendants "participated in the same act or transaction, or in the same series of acts or transactions, constituting an offense or offenses").

joinder "that justice requires,"[43] although "[n]o . . . theory exists, at least in the case law," to tell judges "[w]hat kinds of prejudice [to] look for in deciding severance motions."[44] As a result, it is "firmly established" that "[t]he danger of prejudice to the least guilty . . . is in all but the most unusual circumstances considered outweighed by the economies of a single trial."[45] In other words, severance is available only where prejudice is "severe or compelling."[46] The First Circuit, for example, has not required severance even where one defendant was named in only ten percent of "the overt acts charged" in a conspiracy indictment[47]: severance is required only where "there is a *serious risk* that a joint trial would compromise a specific trial right of one of the defendants."[48] Although the "claimed 'efficiency' of a joint trial can be a surrogate for the reality that a joint trial of multiple defendants is simply to the advantage of the government,"[49] "the mere presence of a spillover effect does not ordinarily warrant severance."[50]

The "serious risk" of the *Zafiro v. United States*[51] joinder test and the "unacceptable risk" of the *Holbrook* fair trial test might seem substantially the same, but they are not.[52] Defendants who challenge their joint trials solely on the grounds of erroneous failure to sever must demonstrate actual prejudice.[53] In contrast, defendants who

---

43 FED. R. CRIM. P. 14(a).

44 RONALD JAY ALLEN ET AL., COMPREHENSIVE CRIMINAL PROCEDURE 1110 (2d ed. 2005).

45 United States v. Velasquez, 772 F.2d 1348, 1352 (7th Cir. 1985). *But see* Zafiro v. United States, 506 U.S. 534, 539 (1993) ("[E]vidence of a codefendant's wrongdoing in some circumstances erroneously could lead a jury to conclude that a defendant was guilty."); Krulewitch v. United States, 336 U.S. 440, 454 (1949) (Jackson, J., concurring) ("It is difficult for the individual to make his own case stand on its own merits in the minds of jurors who are ready to believe that birds of a feather are flocked together.").

46 United States v. Pherigo, 327 F.3d 690, 693 (8th Cir. 2003).

47 United States v. Flores-Rivera, 56 F.3d 319, 325 (1st Cir. 1995) (noting that a defendant requesting a separate trial needs to make "a strong showing of evident prejudice" and that "[t]he hurdle is intentionally high" (quoting United States v. O'Bryant, 998 F.2d 21, 25 (1st Cir. 1993))); *see also* United States v. Emond, 935 F.2d 1511, 1517 (7th Cir. 1991) (finding joinder appropriate even though defendant was "a bit player" at a trial where "she and her lawyer were spectators").

48 *Flores-Rivera*, 56 F.3d at 325 (quoting *Zafiro*, 506 U.S. at 539) (emphasis added); *see also Zafiro*, 506 U.S. at 538–39 ("Rule 14 does not require severance even if prejudice is shown . . . .").

49 United States v. Simmons, 374 F.3d 313, 318 (5th Cir. 2004).

50 *Id.* (quoting United States v. Pofahl, 990 F.2d 1456, 1483 (5th Cir. 1993)) (internal quotation marks omitted).

51 506 U.S. 534 (1993).

52 If anything, "unacceptable" seems like a more stringent standard than "serious."

53 *See, e.g.*, United States v. Snyder, 184 F. App'x 356, 359 (4th Cir. 2006) (upholding denial of motion to sever because defendant was "unable to prove any actual prejudice and only claim[ed] . . . potential prejudice" from spillover evidence relating to codefendant); United States v. Saadey, 393 F.3d 669, 678 (6th Cir. 2005) ("In order to prevail on a motion for severance, a defendant must show compelling, specific, and actual prejudice from a court's refusal to grant the motion to sever."); *cf.* United States v. Lane, 474 U.S. 438, 449 (1986) (holding that misjoinder "requires reversal only if the misjoinder results in actual prejudice because it 'had substantial and

challenge the constitutional fairness of their trials need to prove only potential prejudice,[54] despite the fact that "an individual is entitled to a fair trial — not a perfect one."[55] Although prejudicial joinder theoretically can subvert a fair trial,[56] the defendant arguing for severance still must demonstrate "actual prejudice" and not merely the "unacceptable risk . . . of impermissible factors coming into play" required in the usual fair trial right inquiry.[57] Whether or not these two nominally different standards[58] manifest themselves differently *in practice*,[59] potential prejudice, at least on paper, seems easier to prove.[60]

Despite employing nominally and theoretically different standards, the law of joinder and severance and the law of fair trials are in practice much more similar than the two different standards suggest. Joinder cases, even when they do not engage the constitutional fair trial right question, frequently utilize the language of fundamental fairness to determine whether severance is required.[61] Indeed, it is of-

---

injurious effect or influence in determining the jury's verdict'" (quoting Kotteakos v. United States, 328 U.S. 750, 776 (1946))).

[54] *See, e.g.*, Deck v. Missouri, 544 U.S. 622, 635 (2005) ("[T]he defendant need not demonstrate actual prejudice to make out a due process violation."); Holbrook v. Flynn, 475 U.S. 560, 570 (1986) (holding that "the question [is] not whether jurors actually articulated a consciousness of some prejudicial effect"); *id.* at 572 (holding that the fair trial question is one of inherent prejudice); Estelle v. Williams, 425 U.S. 501, 504–05 (1976) (holding that "possible impairment" of the fair trial right, combined with trial conditions that "*may* affect a juror's judgment," is sufficient to necessitate a new trial (emphasis added)); *cf.* Turner v. Louisiana, 379 U.S. 466, 474 (1965) (Clark, J., dissenting) (arguing against invalidating a guilty verdict "where no prejudice whatever is shown").

[55] *Mannie*, 509 F.3d at 857.

[56] *Cf. Lane*, 474 U.S. at 446 n.8 ("[M]isjoinder would rise to the level of a constitutional violation only if it results in prejudice so great as to deny a defendant his Fifth Amendment right to a fair trial.").

[57] *Holbrook*, 475 U.S. at 570.

[58] *Cf., e.g.*, Davis v. Coyle, 475 F.3d 761, 777 (6th Cir. 2007) (affirming the actual, and not the potential, prejudice standard with respect to habeas corpus); United States v. Crouch, 84 F.3d 1497, 1500 (5th Cir. 1996) (citing United States v. Marion, 404 U.S. 307, 326 (1971)) (distinguishing between the actual and potential prejudice standards); 4 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 15.6(d), at 618–20 (3d ed. 2007) (differentiating between actual and inherent prejudice in the grand jury review context).

[59] *See Lane*, 474 U.S. at 460 (Brennan, J., concurring in part and dissenting in part) ("[T]he test for . . . constitutional error is stricter than its statutory counterpart.").

[60] Potential prejudice is certainly easier to satisfy than actual prejudice if the prejudice in the two inquiries is qualitatively the same.

[61] *See, e.g.*, United States v. Harris, 498 F.3d 278, 291–92 (4th Cir. 2007) (stating that severance of properly joined defendants is appropriate "only where the . . . decision to deny a severance deprives the defendants of a fair trial and results in a miscarriage of justice" (quoting Person v. Miller, 854 F.2d 656, 665 (4th Cir. 1988) (internal quotation marks omitted))); United States v. Olson, 450 F.3d 655, 677 (7th Cir. 2006) (requiring defendant claiming misjoinder to "demonstrate that the denial of severance caused him actual prejudice that deprived him of his right to a fair trial"); United States v. Burgos, 254 F.3d 8, 14 (1st Cir. 2001) (requiring defendant to "demonstrate that the allegedly improper joinder 'likely deprived [him] of a fair trial'" (alteration in original) (quoting United States v. Bartelho, 129 F.3d 663, 678 (1st Cir. 1997))); United States v. Throck-

ten difficult to distinguish this rhetoric from that of the constitutional fair trial cases.[62] In short, courts are likely writing about these cases in similar ways because they recognize that joint trial cases implicate many of the same concerns as fair trial cases. The facts of *Mannie* demonstrate the functional similarity between these doctrines. The distinction between evidence of Patterson's guilt that was introduced formally at trial, which implicates joinder concerns, and his behavior in front of the jury, which implicates the right to a fair trial, is elusive at best. Both categories of "evidence" — to use the term more loosely than did the *Turner* Court — reflect poorly on Patterson and may tend to persuade the jury of his guilt. Both types of "evidence," at least in theory, should not speak to Mannie's guilt or innocence. The same impermissible prejudice is at work in both contexts.

Courts seem to recognize this similarity, at least practically, through their use of the same trial management mechanisms to cure both errors. As in *Mannie*, courts typically use both limiting instructions and voir dire to cabin potential prejudice, whether it results from the "spillover effect"[63] or from courtroom disruptions.[64] Courts apparently think that similar fundamental fairness concerns lurk behind both doctrines.

Given the similarities between the issues implicated in fair trial right and joinder cases, courts should justify the disconnect between the standards; neither courts nor academics have adequately done so. The most common implicit justification is that joinder serves a number of legitimate goals, including the conservation of judicial resources[65] and the prevention of "inconsistent verdicts."[66] Commentators, however, have argued that courts may "have greatly exaggerated

---

morton, 87 F.3d 1069, 1072 (9th Cir. 1996) (finding that district court correctly denied severance because defendant failed to "establish that the prejudice he suffered . . . denied [him] a fair trial"); United States v. Nicely, 922 F.2d 850, 858 (D.C. Cir. 1991) (reversing convictions "[b]ecause the misjoinder [under Rule 8(b)] effectively deprived the appellants of a fair trial"); Hopkinson v. Shillinger, 866 F.2d 1185, 1199 (10th Cir. 1989) (rejecting claim of misjoinder because it did not affect "the fundamental fairness of the trial"). In all of these cases, the courts evaluated joinder under the standards established by the Rules, and not under constitutional standards.

62 *See, e.g.*, United States v. Tejeda, 481 F.3d 44, 50 (1st Cir. 2007) (stating that structural error exists only where "criminal defendants are denied basic protections which 'necessarily render a trial fundamentally unfair' such that 'no criminal punishment may be regarded as fundamentally fair'" (quoting Neder v. United States, 527 U.S. 1, 8–9 (1999))).

63 *See, e.g.*, J. Alexander Tanford, *The Law and Psychology of Jury Instructions*, 69 NEB. L. REV. 71, 98–99 (1990) (discussing the (ineffective) use of limiting instructions to reduce the "spillover effect" of joinder in "significantly increas[ing] conviction rates").

64 *See, e.g.*, United States v. Copeland, 51 F.3d 611, 613–14 (6th Cir. 1995) (describing the use of "cautionary instructions" to respond to threats by spectators).

65 *See, e.g.*, Bruton v. United States, 391 U.S. 123, 143 (1968) (White, J., dissenting) ("[J]oint trials are more economical and minimize the burden on witnesses, prosecutors, and courts.").

66 Richardson v. Marsh, 481 U.S. 200, 210 (1987).

the supposed efficiencies of joint trials,"[67] and the Supreme Court itself has held repeatedly that "[c]onsistency in the verdict is not necessary."[68] Furthermore, even if joinder is useful, "it seems strange that . . . one presumably innocent may be made to undergo something less than a fully fair trial simply to serve the convenience and efficiency of the judicial system."[69] Indeed, many criminal procedural protections might be considered inefficient,[70] but they are not as a result expendable. Efficiency and utility, therefore, do not adequately explain why joinder is not evaluated under the same standard as the right to a fair trial.

A distinction between constitutional rights such as the right to a fair trial and procedural rights such as the right to severance similarly does not justify the difference in standards. As the comparable decisional language demonstrates, the right to severance furthers the constitutional norm of fair trials, so it is not clear why these purported categories of rights are actually distinct in any meaningful way. To be sure, the difference between constitutional and nonconstitutional rights might matter where the procedural rule is unrelated to constitutional norms, but that is not the case with joinder.

Joinder and trial disruptions likely affect jurors in similar ways, and — as the language of the cases suggests — joinder and the right to a fair trial implicate the same fundamental fairness concerns. Courts have failed to justify the use of two different standards in these two strikingly similar contexts. At the least, this judicial obfuscation inhibits public engagement with the legal system.[71] At the worst, judges may not understand the counterintuitive interpretations at issue — the confusing standards may be confusing judges. Given the pervasive nature of joinder and the stakes for criminal defendants, such confusion has potentially grave results. To eliminate unnecessary confusion, and in recognition of the high stakes, courts considering motions for severance should apply the (at least nominally) more protective potential prejudice standard of fair trial right doctrine. While the Seventh Circuit properly recognized the unfairness of joinder in Mark Mannie's case, other defendants likely will not be so lucky.

---

[67] Robert O. Dawson, *Joint Trials of Defendants in Criminal Cases: An Analysis of Efficiencies and Prejudices*, 77 MICH. L. REV. 1379, 1381 (1979).

[68] United States v. Powell, 469 U.S. 57, 62 (1984) (quoting Dunn v. United States, 284 U.S. 390, 393 (1932)) (internal quotation mark omitted).

[69] 1A CHARLES ALAN WRIGHT & ANDREW D. LEIPOLD, FEDERAL PRACTICE & PROCEDURE § 141, at 5–6 (4th ed. 2008).

[70] *See, e.g.*, Rachel E. Barkow, *Originalists, Politics, and Criminal Law on the Rehnquist Court*, 74 GEO. WASH. L. REV. 1043, 1073 (2006).

[71] *Cf.* Smith v. Doe, 538 U.S. 84, 99 (2003) ("Transparency is essential to maintaining public respect for the criminal justice system, ensuring its integrity, and protecting the rights of the accused.").