HARMLESS ERROR — *HABEAS CORPUS* — THE STANDARD FOR DETERMINING THE HARMFULNESS OF A CONSTITUTIONAL TRIAL ERROR ON COLLATERAL REVIEW IS WHETHER THE ERROR HAD A SUBSTANTIAL AND INJURIOUS EFFECT OR INFLUENCE IN DETERMINING THE JURY'S VERDICT — *Brecht v. Abrahamson*, 113 S. Ct. 1710 (1993).

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I. INTRODUCTION

As violent crime continues to permeate every segment of the population, the public's call for justice grows louder. Today, more people devote time and energy to ensuring that criminals pay their debt to society. Against this tide of accountability swims federal *habeas corpus*, a post-conviction remedy which has recently been under attack.[1]

Concerns over the scope of *habeas* review include guarding against the imprisonment of innocent persons, examining the social costs of retrials, and investigating whether a conviction may have been unjust.[2] Among the factors associated with granting or denying *habeas* relief is the possibility that a petitioner actually committed the crime for which he was convicted.[3] This issue of factual guilt is currently viewed as invading constitutional law, possibly at the expense of some defendants' due process rights.[4]

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[1]*See* Frank J. Remmington, *Restricting Access to Federal* Habeas Corpus*: Justice Sacrificed on the Altars of Expediency, Federalism, and Deterrence*, 16 N.Y.U. REV. L. & SOC. CHANGE, 339 (1992) (recognizing that the availability of federal *habeas corpus* for state prisoners is on the decline). *Habeas corpus* relief is the remedy by which a prisoner, restrained of his liberty in violation of due process, may be released from unlawful confinement. BLACK'S LAW DICTIONARY 709 (6th ed. 1990).

[2]Graham Hughes, *Sandbagging Constitutional Rights: Federal* Habeas Corpus *and the Procedural Default Principle*, 16 N.Y.U. REV. L. & SOC. CHANGE, 321, 321-22 (1992) (illustrating the arguments for and against the use of procedural default to bar federal *habeas corpus*).

[3]Irene M. Rosenberg & Yale L. Rosenberg, *Guilt: Henry Friendly Meets the MaHaRal of Prague*, 90 MICH. L. REV. 604, 605 (1991) (stating that the issue of factual guilt often serves as the basis for denying *habeas corpus* relief while colliding with guarantees set forth in the Bill of Rights).

[4]*Id.* at 605.

Recently, the United States Supreme Court diminished the possibility of vacating a conviction based upon the violation of an individual's rights. In *Brecht v. Abrahamson*,[5] the Court adopted a relaxed standard, to be applied on collateral review, for determining whether the infringement upon a constitutional right was harmless.[6] The Court rejected the defendant's argument that would have required the state to prove a federal constitutional error harmless beyond a reasonable doubt.[7] Accordingly, the Court shifted the burden from the state to the individual and determined that an individual would not be entitled to *habeas* relief unless he could prove that an error had a substantial and injurious effect or influence upon the jury's verdict.[8]

In 1985, Todd Brecht, a convicted felon, shot and killed his brother-in-law, Roger Hartman, in Alma, Wisconsin.[9] As Mr. Hartman crawled to a neighbor's house for help, Brecht fled the scene in his sister's automobile.[10] After a failed attempt to conceal his identity, Brecht was arrested in Winona, Minnesota, where he told police that the shooting was a "big mistake" and requested to speak with somebody who would understand him.[11] Later, Brecht was returned to Wisconsin and advised of his *Miranda* rights upon being arraigned.[12]

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[5]113 S. Ct. 1710 (1993). Chief Justice Rehnquist filed the majority opinion. *Id.* at 1713. Justice Stevens filed a concurring opinion. *Id.* at 1723. Justice White filed a dissenting opinion in which Justice Blackmun joined and Justice Souter joined in part. *Id.* at 1725. Justice Blackmun, Justice O'Connor, and Justice Souter filed separate dissenting opinions. *Id.* at 1728, 1732.

[6]*See Id.* at 1721-22.

[7]*See Id.* at 1717-22.

[8]*Id.* at 1722.

[9]*Id. at* 1714. At the time, Brecht was living with the victim and his wife. *Id.* Brecht had been serving time in a Georgia prison for felony theft when the Hartmans made restitution for his crime and took custody of him. *Id.*

[10]*Id.*

[11]*Id.*

[12]*Id.* According to Miranda v. Arizona, 384 U.S. 436 (1965), when an individual is taken into custody and is subject to questioning, he must be warned that he has a right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney, one will be appointed to represent him. *Id.* at 478-79.

While on trial in Buffalo County for first-degree murder, Brecht testified that the shooting of his brother-in-law was accidental.[13] During cross-examination and over his defense attorney's objection, the prosecutor obtained a negative response from Brecht when he asked if the defendant had told anyone that the shooting was an accident prior to the trial.[14] During closing arguments, the prosecutor made several references to Brecht's pre-trial silence concerning his accidental shooting defense.[15] Subsequently, Brecht was found guilty and sentenced to life in prison.[16]

On appeal, the Wisconsin Court of Appeals found the State's references to Brecht's post-*Miranda* silence violated the rule enunciated in *Doyle v. Ohio*,[17] and further found the error sufficiently prejudicial to require reversal.[18]

The Wisconsin Supreme Court also found the State's use of Brecht's post-*Miranda* silence was in error.[19] The state supreme court, however,

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[13]Brecht v. Abrahamson, 113 S.Ct. 1710, 1714 (1993). Brecht testified that the rifle he was carrying discharged when he tripped attempting to put the gun away before his brother-in-law found him in possession of it. *Id.*

[14]*Id.* at 1715.

[15]*Id.*

[16]*Id.*

[17]426 U.S. 610 (1975). There, the Court found that an arrested person's post-arrest, post-*Miranda* silence cannot be used to impeach any testimony offered by him at trial. *Id.* at 618. For a detailed discussion of *Doyle*, see notes 57-65 and accompanying text.

[18]State v. Brecht, 405 N.W.2d 718, 723 (Wis. Ct. App. 1987).

[19]State v. Brecht, 421 N.W.2d 96 (1988).

found that the error was harmless beyond a reasonable doubt[20] and reinstated Brecht's conviction.[21]

Reasserting his *Doyle* claim, Brecht subsequently filed a *habeas corpus* petition in the United States District Court for the Western District of Wisconsin.[22] The district court agreed with the state courts and concluded that the use of Brecht's pre-trial silence violated *Doyle*.[23] Nevertheless, the district court did not find that the error was harmless beyond a reasonable doubt and granted the writ of *habeas corpus*.[24]

On appeal, the Seventh Circuit Court of Appeals applied a less onerous standard of review to the *Doyle* error and reversed the district court's decision.[25] Characterizing the requirements of *Miranda* and *Doyle* as prophylactic rules designed to protect individual rights from erosion,[26] the circuit court determined that the error did not have the necessary "substantial and injurious effect or influence" to support a writ of *habeas corpus*.[27]

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[20]*Id.* at 104. The Wisconsin Supreme Court applied the harmless error analysis set forth in Chapman v. California, 386 U.S. 18 (1967), which states that before a constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt. *Id.* at 24. The Wisconsin Supreme Court found the *Doyle* violation which occurred in Brecht's trial was harmless because the prosecutor's references to Brecht's silence were infrequent and because the State's evidence of guilt was compelling. *See Brecht*, 421 N.W. 2d at 104.

[21]*Id.* The Wisconsin Supreme Court found the improper references to Brecht's silence were harmless because they comprised only a few minutes of a four day trial, and the State's evidence of guilt was compelling. *Id.*

[22]Brecht v. Abrahamson, 759 F. Supp. 500 (W.D. 1991).

[23]*Id.* at 501.

[24]*Id.* at 508. The district court based its conclusion on the fact that Brecht's defense hinged upon the credibility of his testimony and that the State's circumstantial evidence proving petitioner's intent was not overwhelming. *Id.*

[25]Brecht v. Abrahamson, 944 F.2d 1363 (7th Cir. 1991). The circuit court applied the standard set forth in Kotteakos v. United States, 328 U.S. 750 (1946), which held that an error would be considered harmless unless it had a substantial and injurious effect or influence in determining the jury's verdict. *Id.* at 776.

[26]Brecht, 944 F.2d at 1370.

[27]*Id.* at 1376.

The United States Supreme Court granted *certiorari* to determine the proper standard of review to be applied during collateral review of *Doyle* violations.[28]

II. THE RIGHT TO REMAIN SILENT

The Fifth Amendment provides that persons shall not be compelled to serve as witnesses against themselves in any criminal case.[29] This privilege operates to limit the government's power and to ensure an accusatory system of justice.[30] In addition, it is a far cry from the harsh realities once endured by our English ancestors.[31]

Until the seventeenth century, English courts maintained an inquisitorial system of justice whereby those accused of criminal acts were forced through oath or compulsion to give evidence against themselves or to confess their delinquencies.[32] This *ex-officio* oath was perhaps the most despised instrument of oppression wielded against the Puritans,[33] and in 1637, during the trial of John Lilburne, the affirmations' "death knell" had begun to sound.[34] Appearing before the Court of Star Chamber, Mr. Lilburne refused to take the oath of truthfulness and was subsequently whipped and pilloried.[35] Pointing to the brutality of the court's action, Lilburne petitioned Parliament, claiming the court's actions were

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[28]Brecht v. Abrahamson, 113 S. Ct. 1710, 1716 (1993).

[29]U.S. CONST. aMEND. V.

[30]Wayne R. Gross, Note, *Erosion of the Fifth Amendment Through the Use of Defense Counsel as Witness,* 39 HASTINGS L.J., 927, 930 (1988) (illustrating the reasons for inserting the privilege against self-incrimination into the Bill of Rights).

[31]*Id.* at 929.

[32]R. Carter Pittman, *The Colonial and Constitutional History of the Privilege Against Self-Incrimination in America,* 21 VA. L. REV., 763, 770 (1935) (reviewing the absence of a privilege against self-incrimination in England before the seventeenth century).

[33]*Id.*

[34]Gross, *supra* note 30, at 930 (illustrating the origin of the privilege against self-incrimination in the common law).

[35]*Id.* at 929 (citing E. GRISWOLD, THE FIFTH AMENDMENT TODAY 3 (1955)).

improper.[36] The House of Commons agreed with Lilburne and ordered a payment of damages.[37] This series of events marked the origin of the privilege against self-incrimination at common law.[38]

Early American Colonial law reflected the settlers' opposition to an inquisitorial system,[39] and after great struggle, the privilege against self-incrimination was incorporated into the Bill of Rights.[40] Nevertheless, because the Fifth Amendment is aimed at maintaining an adversarial, as well as an accusatorial system of justice,[41] the Supreme Court has endured great hardship in determining the methods which may be utilized by police while interrogating an accused.[42]

The Supreme Court first applied a standard to the admissibility of confessions in *Brown v. Mississippi*.[43] In *Brown*, the Court employed a test of voluntariness, based upon whether the circumstances preceding a confession deprived a defendant of his power to resist. Accordingly, the brutalization of an accused during an interrogation was deemed a violation of due process.[44] This test, however, did not provide any guidelines for

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[36]*Id.*

[37]*Id.* at 929-30; *see also* Miranda v. Arizona, 384 U.S. 436, 459 (1965).

[38]Gross, *supra* note 30, at 930.

[39]Prior to 1789, the privilege against self-incrimination had been inserted into the Constitutions or Bills of Rights of seven American states including Virginia, Pennsylvania, Maryland, North Carolina, Vermont, Massachusetts, and New Hampshire. Pittman, *supra* note 32, at 764-65 (citing POORE'S CONSTITUTIONS AND CHARTERS).

[40]*See* Miranda, 384 U.S. at 459 (citing Pittman, *supra* note 32).

[41]An adversarial system of justice involves opposing parties who contend against each other for a result favorable to themselves, while an accusatorial procedure requires the government to bear the burden of proving a person guilty of a crime. BLACK'S LAW DICTIONARY 22, 53 (6th ed. 1990).

[42]Gross, *supra* note 30, at 932.

[43]297 U.S. 278 (1936).

[44]*Id.* at 281-82. The *Brown* Court found that confessions obtained by police through the torture of three defendants violated the Due Process Clause because the admissions were not voluntary. *Id.*

acceptable police conduct and forced judges to make fact-based determinations when resolving confession claims.[45]

In *Massiah v. United States*,[46] the Court deviated from the voluntariness standard and held that deliberately elicited, post-indictment admissions transmitted to government agents violated the Sixth Amendment.[47] In *Massiah*, the Court recognized that the constitutional guarantee of a right to counsel at trial also applies to police interrogations occurring in extra-judicial proceedings.[48] Subsequently, in *Escobedo v. Illinois*,[49] the Court expanded the role of attorneys in effectuating the privilege against self-incrimination by holding that individuals who are the focus of police investigations may not be denied access to a lawyer if a request for consultation is made.[50]

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[45]Gross, *supra* note 30, at 933.

[46]377 U.S. 201 (1964).

[47]*Id.* In *Massiah*, two individuals were charged with murder and released on bail. Prior to trial, one defendant, cooperating with law enforcement authorities, engaged the accused in a conversation during which damaging statements were made. These statements were then transmitted to nearby agents who then testified about them at trial. *Id.* at 202-203.

[48]*Id.* at 204. (quoting Spano v. New York, 360 U.S. 315, 326 (1959) (Douglas, J., concurring)).

[49]378 U.S. 478 (1964).

[50]*Id.* at 485. In *Escobedo*, police denied a defendant access to his attorney and then obtained damaging statements from him after approximately four hours of questioning. *Id.* at 481-82.

In *Miranda v. Arizona*,[51] the Court held that the privilege of self-incrimination was applicable to custodial interrogations.[52] Furthermore, the Court established a rule requiring that, when an individual has been taken into custody and is questioned, he must be warned that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney and that if he cannot afford an attorney one will be appointed for him prior to questioning.[53] In formulating this procedural device, the majority placed the entire burden upon the government to ensure that the privilege against self-incrimination would be fully protected.[54]

Despite the clarity of the rule announced in *Miranda*, a question remained concerning a prosecutor's right to attack the credibility of a defendant who chooses to testify by introducing evidence of his post-arrest silence.[55] The Court's first decision regarding this impeachment issue, announced in *Raffel v. United States*,[56] held that a prosecutor could impeach a defendant who testified at his second trial by pointing to his failure to testify at his first trial.[57] Approximately fifty years later, however, the

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[51]384 U.S. 436 (1965). The *Miranda* decision actually resulted from the combined consideration of four cases involving defendants whose convictions may have been attributed to their own admissions to police. In each of these four cases, the court found that the police's actions violated the Constitution. *See* Westover v. United States, 342 F.2d 684 (9th Cir. 1965) (defendant interrogated by both local and federal officials after which he signed inculpatory statements); People v. Vignera, 207 N.E.2d 527 (N.Y. 1965) (defendant made oral admissions to police and signed inculpatory statement before a district attorney later the same day); People v. Stewart, 400 P.2d 97 (Cal. 1965) (police obtained confession after holding defendant for five days and interrogating him on nine separate occasions); State v. Miranda, 401 P.2d 721 (Ariz. 1962) (police secured a confession from defendant after taking him to special interrogation room following his arrest).

[52]*Miranda*, 384 U.S. at 460-461.

[53]*Id.* at 478-79. The Court in *Miranda* also declared that these rights must be afforded throughout an interrogation, and any evidence obtained as a result of interrogation must follow a demonstration by the prosecution that the defendant waived these rights. *Id.* at 479.

[54]*Id.*

[55]J.W.A. II, Note, *Protecting Doyle Rights After* Anderson v. Charles*: The Problem of Partial Silence*, 69 VA. L. REV. 155, 158-59 (1983).

[56]271 U.S. 494 (1926).

[57]*Id.* at 499.

Court revisited the question concerning the constitutionality of impeaching a defendant through reference to his silence and arrived at a different conclusion.[58]

In *Doyle*, two individuals were arrested for selling marijuana.[59] After being advised of their *Miranda* rights, they chose to remain silent.[60] At trial, both defendants testified and attempted to exculpate themselves by claiming they were framed.[61] To impeach their credibility, the prosecutor asked each defendant why their story, if true, was not immediately related to police.[62] Although the defendants' counsel made timely objections to this line of questioning, the cross-examination concerning the defendants' post-arrest silence was allowed, and they were ultimately convicted.[63] Following a denial of review by the Ohio Supreme Court, the United States Supreme Court granted *certiorari* to determine whether impeaching a defendant's testimony by pointing to his post-arrest silence violated any provision of the Constitution.[64]

The Court, in a six to three decision, ruled that the use of a defendant's post-arrest silence for impeachment purposes was constitutionally impermissible.[65] Writing for the majority, Justice Powell opined that silence following an arrest, and in the wake of *Miranda* warnings, is "insolubly ambiguous" because it may be nothing more than an exercise of *Miranda* rights.[66] Furthermore, the Court determined that because *Miranda*

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[58]*See* Doyle v. Ohio, 426 U.S. 610 (1976).

[59]*Id.* at 611.

[60]*Id.* at 611-12.

[61]*Id.* at 613.

[62]*Id.* at 613-14.

[63]*Id.* at 614.

[64]*Id.* at 616. The Court previously addressed this issue in United States v. Hale, 422 U.S. 171 (1975) and decided, on federal evidentiary grounds, that a prosecutor's introduction of a defendant's post-arrest silence impermissibly was prejudicial. *Id.* at 180. *Hale*, however, involved a federal offense, and the Court's ruling applied only to federal trials. *Id.* at 181. *See also* J.W.A. II, *supra* note 55, at 159-61 (illustrating the limitations of the rule set forth in *Doyle*).

[65]Doyle v. Ohio, 426 U.S. 610, 611 (1976).

[66]*Id.* at 617.

warnings impliedly assure that silence will not be penalized, it would be fundamentally unfair to allow an arrested person's silence to be used to impeach subsequent explanations offered at trial.[67]

Although the *Doyle* rule has been construed narrowly by the Court in recent decisions,[68] it remains a formidable tool in protecting the privilege against self-incrimination, and as such, formed the basis of the *habeas corpus* petition entertained by the Court in *Brecht v. Abrahamson*.[69]

III. *HABEAS CORPUS*

Habeas corpus[70] is a chief means by which persons sentenced to custodial terms for criminal offenses can have their punishment vacated.[71] Developed in England,[72] the Great Writ was used by the central courts to compel the appearance of unwilling prisoners.[73] Simultaneous to the prisoner being summonsed, the central court would attempt to correct any

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[67]*Id.* at 617-18. *See Also* Johnson v. United States, 318 U.S. 189 (1943).

[68]*See* Jenkins v. Anderson, 447 U.S. 231, 238 (1979) (holding that impeachment of a defendant's credibility through his pre-arrest silence does not violate the Fifth Amendment); Fletcher v. Weir, 455 U.S. 603, 607 (1981) (holding that due process is not violated when a defendant is cross-examined concerning his post-arrest silence so long as *Miranda* warnings had not been given).

[69]113 S. Ct. 1710 (1993).

[70]*Habeas corpus* literally means "you have the body." BLACK'S LAW DICTIONARY 709 (6th ed. 1990).

[71]In 1992, 12,839 *habeas corpus* applications were filed in the various district courts. Federal Judicial Workload Statistics, March 31, 1993.

[72]The precise origin of the writ is not clear. Kevin E. Teel, *Federal* Habeas Corpus: *Relevance of the Guilt Determination Process to Restriction of the Great Writ*, 37 Sw. L.J. 519, 522 (1983) (outlining the development of the writ of *habeas corpus*). *See also*, Jenks, *The Story of* Habeas Corpus, 18 L. Q. REV. 64 (1902) (lamenting that a writing which accounts the origin of *habeas corpus* in succinct and intelligible form is generally not available).

[73]*See* Teel, *supra* note 72, at 522; Donna Duffy and Michael Mello, *Suspending Justice: The Unconstitutionality of the Proposed Six-Month Time Limit on the Filing of* Habeas Corpus *Petitions by State Death Row Inmates*, 18 N.Y.U. REV. L. & SOC. CHANGE, 451, 462 (1990) (citing W. DUKER, A CONSTITUTIONAL HISTORY OF *HABEAS CORPUS* 12 (1980)).

injustices through an inquiry into the cause of detention.[74] Originally known as *habeas corpus cum causa*, the writ then became a tool utilized by the English Superior Common Law Courts to combat infringements upon their jurisdiction by equity and ecclesiastical courts and various councils.[75] After a trial and conviction, and without regard to guilt or innocence, a subject could be released, based upon a conclusion that a committing court was without proper jurisdiction.[76] As a result of Parliament's desire to protect the public from arbitrary imprisonment by the King, the common law writ, *habeas corpus ad subjiciendum*, was eventually supplemented by the *Habeas Corpus* Act of 1679.[77] Provided solely for persons detained in response to minor crimes,[78] this Act primarily focused upon the due process rights of individuals by forbidding imprisonment without formal charge, and by requiring bail or trial within a specified period.[79]

The common law writ of *habeas corpus* or a statutory writ modeled after the 1679 Act was adopted by all of the individual states prior to 1787.[80] Recognizing the importance of the Great Writ, the framers of the Constitution arranged for its continued existence by allowing it to be

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[74]See Duffy and Mello, *supra* note 73, at 462.

[75]*Id.*

[76]*Id.* at 462-63.

[77]Book Note, 95 HARV. L. REV. 1186, 1187 (1982) (reviewing WILLIAM DUKER, A CONSTITUTIONAL HISTORY OF *HABEAS CORPUS* (1980)); The *Habeas Corpus* Act of 1679 is viewed as remedying the abuses of the common law, rather than supplanting it. *See* Duffy and Mello, *supra* note 73, at 463 (describing the English origins of the writ of *habeas corpus*).

[78]Excepted from the *Habeas Corpus* Act of 1679 were persons detained for felony or treason, or those convicted by legal process. Duffy and Mello, *supra* note 73, at 463 (describing the effect of the *Habeas Corpus* Act of 1679).

[79]*See* Oaks, Habeas Corpus *in the States*, 32 U. CHI. L. REV. 243, 244-45 (1965) (recognizing that the common law and the *Habeas Corpus* Act of 1679 were used to ensure that a person was not held without formal charges and that once charged, he was either bailed or brought to trial within a specified time).

[80]Duffy and Mello, *supra* note 73, at 463 (introducing the history of federal *habeas corpus* in the United States).

suspended only in cases of rebellion or invasion or where the needs of public safety so required.[81]

Federal courts were first granted power to engage in *habeas* review through the Judiciary Act of 1789.[82] Although originally interpreted to include only matters related to the competence of a sentencing court's jurisdiction,[83] the Supreme Court gradually expanded *habeas corpus* under the Act to include claims beyond those traditionally characterized as jurisdictional.[84] For example, in *Ex Parte Lange*,[85] the Court ordered a prisoner released after he was sentenced to a term in excess of the legal

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[81]U.S. CONST. ART. 1, § 9, cl. 2 states: "The privilege of the writ of *habeas corpus* shall not be suspended, unless when in cases of rebellion or invasion, the public safety may require it." *Id.* The draft of the federal constitution first reported by the Committee of Detail did not contain a *habeas corpus* provision. This omission, however, soon was corrected by Charles Pinckney of South Carolina, and after limited debate concerning the correct phrase, the current version of the Suspension Clause was approved. Duffy and Mello, *supra* note 73, at 463-64 (illustrating the framers' concern for the inclusion of *habeas corpus* within the Constitution).

[82]Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 73 (codified at 28 U.S.C. § 1-1631 (1982)). Section 14 of the Judiciary Act provides in part: "Either of the justices of the Supreme Court as well as the judges of the district courts, shall have the power to grant writs of *habeas corpus* for the purpose of an inquiry into the cause of commitment." *Id.*

[83]*See* Ex Parte Watkins, 28 U.S. 193 (1830) (holding that *habeas* review could not be utilized to impeach the judgment of a federal court of competent jurisdiction).

[84]Teel, *supra* note 72, at 525 (describing the Supreme Court's expansion of *habeas corpus* under the Judiciary Act).

[85]85 U.S. 163 (1873). In *Ex Parte Lange*, the defendant was found guilty of stealing mail bags and appropriating them for his own personal use. *Id.* at 164. The statute he was convicted of violating provided for a term of imprisonment of not more than one year or a fine of between $10.00 and $200.00. *Id.* The defendant was sentenced to one year in prison and a $200.00 fine which he paid before being incarcerated. *Id.* The prisoner then applied for *habeas corpus* relief on the grounds that he was punished twice for the same offense. *Id.* The Supreme Court held that because the prisoner had suffered one of two alternative punishments, his incarceration was unlawful and *habeas corpus* relief was granted. *Id.* at 176.

maximum,[86] while in *Ex Parte Siebold*,[87] the constitutionality of certain election laws were examined before *habeas corpus* relief was denied.[88]

Federal *habeas corpus* continued to evolve from a remedy available only to those held in federal custody to one which also could be obtained by state prisoners.[89] Commencing with the Act of March 2, 1833,[90] which allowed state prisoners who were held pursuant to the authority of the United States to litigate their claims in federal courts,[91] the scope of federal *habeas corpus* was widened to protect the constitutional rights of state prisoners.[92] Through the *Habeas Corpus* Act of 1867,[93] federal courts were authorized to grant post-conviction relief to any person "who may be restrained of his or her liberty in violation of the Constitution, or of any treaty or law of the United States."[94] Normally, the 1867 Act was only utilized to inquire into

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[86]*Id.* at 164-65.

[87]100 U.S. 371 (1879). In *Ex Parte Siebold*, five election judges were convicted of various offenses committed within their precincts and sentenced to a fine and imprisonment. *Id.* at 373. Each official filed a petition for a writ of *habeas corpus*. *Id.* The petitions questioned Congress's authority to enact the statutes which the prisoners allegedly violated. *Id.* at 374. The Court found that the election statutes were within Congress's power to enact and denied the petitions. *Id.* at 398-99.

[88]*Id.* at 374.

[89]For a discussion concerning the history of the federal writ in the United States, see DUKER, *supra* note 77, at chs. 3-5.

[90]Act of Mar. 2, 1833, ch. 57, § 7, 4 Stat. 634.

[91]*Id.* The Act of 1833 empowered federal courts to: "grant writs of *habeas corpus* in all cases of a prisoner or prisoners in jail by any authority or law, for any act done . . . in pursuance of a law of the United States." *Id.*

[92] Duffy and Mello, *supra* note 73, at 469 (discussing state inmates' right to federal *habeas corpus*).

[93]Federal *Habeas Corpus* Act of 1867, ch. 28, § 1, 14 Stat. 385 (now codified at 28 U.S.C. § 2241-2255 (1982)).

[94]*Id.* Section 2254(a) of the Federal *Habeas Corpus* Act states:

> The Supreme Court, a justice thereof, a circuit judge, or a district court shall entertain an application for a writ of *habeas corpus* in behalf of any person in custody pursuant to the judgment of a state court only on the ground that he is in custody in violation of the Constitution, law, or treaties of the United States.

the jurisdiction of the state court.[95] This limitation on jurisdictional review began to erode, however, as the Court made federal *habeas* relief available in cases where a state failed to provide for full and fair litigation of federal claims.[96]

In *Waley v. Johnston*,[97] the Supreme Court further expanded *habeas* review, observing that it is available in situations where a petitioner claims that his constitutional rights were violated and that it is the only means by which the alleged violated rights can be preserved.[98] Later, in *Brown v. Allen*,[99] a landmark decision based on discrimination in jury selection,[100] the scope of the writ was held to include federal *habeas* review of state rulings on all federal constitutional claims.[101] Consequently, federal constitutional issues could always be reexamined by federal courts on

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28 U.S.C. § 2254(a) (1982).

[95]*See* Stone v. Powell, 428 U.S. 465, 475 (1976). For other examples of this limited inquiry conducted by the federal courts, see In re Wood, 140 U.S. 278 (1891); In re Rahrer, 140 U.S. 545 (1891); Andrews v. Swartz, 156 U.S. 272 (1895); Pettibone v. Nichols, 203 U.S. 192 (1906).

[96]*See* Frank v. Mangum, 237 U.S. 309 (1915) (holding that inquiring into the merits of a case to determine the lawfulness of detention was proper where a state failed to provide for the full and fair litigation of federal claims).

[97]316 U.S. 101 (1942).

[98]*Id.* at 104-05.

[99]344 U.S. 443 (1953).

[100]In *Brown*, three individuals filed *habeas corpus* application on grounds that the racial composition of their respective juries violated the Equal Protection Clause of the Fourteenth Amendment. *Id.* at 452-53. The Supreme Court held that a reexamination of *habeas corpus* applications based on federal constitutional issues was permissible when no adequate state remedy for the violation of the federal right existed. *Id.* at 458. Furthermore, the Court stated that *res judicata* is not applicable to state adjudications of federal constitutional issues. *Id.* Despite these pronouncements, the Supreme Court denied the *habeas corpus* applications. Two applications were denied because the requisite showing of discrimination in the selection of the prisoners' juries was not made. *Id.* at 466-74, 477-82. In the third application, federal *habeas corpus* relief was barred because of the petitioner's failure to make timely use of an available remedy provided by the state. *Id.* at 482-87.

[101]*Id.* at 485-86.

collateral review notwithstanding the consideration given to the issue by the state court.[102]

Ten years after *Brown,* the Supreme Court removed a major procedural obstacle to *habeas* relief. Although 28 U.S.C. § 2254 mandates that a state prisoner exhaust his remedies in the state courts before applying to a federal court for a writ of *habeas corpus*,[103] in *Fay v. Noia*,[104] the Court held that a procedural default would not bar federal *habeas* review unless the petitioner deliberately bypassed state procedures.[105]

In the 1970's, the availability of *habeas* relief began to decrease. For example, in *Schneckloth v. Bustamonte*,[106] several Justices urged that collateral review of Fourth Amendment claims should be limited to questions of whether or not a petitioner was given a fair opportunity to raise and litigate the issue in state court.[107] Although not followed at first,[108] this

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[102]*See* Teel, *supra* note 72, at 530 (noting the consequences of the Court's decision in *Brown v. Allen*).

[103]28 U.S.C. § 2254(b) states: "An application for a writ of *habeas corpus* in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State." *Id.*

[104]372 U.S. 391 (1963). In *Fay*, the defendant was convicted of committing murder during the robbery of a store. *Id.* at 394. Rather than appeal his conviction, the defendant applied for a writ of *habeas corpus* on the grounds that his confession to police had been coerced. *Id.* at 395. The Supreme Court rejected the argument that the defendant's failure to appeal his conviction operated as a bar to *habeas corpus*. *Id.* at 398-99.

[105]*Id.* at 438.

[106]412 U.S. 218 (1973).

[107]*Id.* at 250 (Powell, J., concurring). Justice Powell recognized that claims of illegal search and seizure do not impugn the integrity of a trial and, consequently, Fourth Amendment claims should not be a subject of federal *habeas corpus* petitions. *Id.* at 251.

[108]*See* Lefkowitz v. Newsome, 420 U.S. 283, 293 (1975) (stating that a defendant should have an opportunity to litigate Fourth Amendment claims in *habeas corpus* proceedings when the claim was not litigated in the trial court because of a plea agreement); Cady v. Dombrowski, 413 U.S. 433, 449-50 (1973) (upholding a warrantless seizure of evidence from inside an automobile); Cardwell v. Lewis, 417 U.S. 583, 597 (1974) (Powell, J., concurring) (stating that warrantless searches should not give rise to *habeas corpus* relief where there has been a full opportunity to litigate the issue at trial).

view was accepted by a majority of the Court in *Stone v. Powell*.[109] Furthermore, in *Wainwright v. Sykes*,[110] the Court held that *habeas corpus* relief would not be granted because of a state procedural default unless a prisoner could demonstrate cause for and prejudice resulting from the default.[111]

The restriction upon the availability of collateral review has continued into this decade. In *Coleman v. Thompson*,[112] the Supreme Court overruled *Faye*, holding that federal *habeas* relief would be denied when a state prisoner forfeited federal claims pursuant to an independent and adequate state procedural rule.[113] Also, in *McCleskey v. Zant*,[114] the Court determined that an individual could be prevented from filing successive or subsequent *habeas* petitions unless he could demonstrate that an outside cause prevented him from asserting the claim and that he was actually prejudiced by the omission.[115]

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[109]428 U.S. 465, 481-82 (1976) (holding that where the state has provided an opportunity for full and fair litigation of a Fourth Amendment claim, the Constitution does not require that a state prisoner be granted federal *habeas corpus* relief on the ground that evidence obtained in an unconstitutional search and seizure was introduced at his trial).

[110]433 U.S. 72 (1977).

[111]*Id.* at 90-91.

[112]111 S. Ct. 2546, *reh'g denied,* 112 S. Ct. 27 (1991).

[113]*Id.* at 2565. The Court in *Coleman* added that the rule would not apply unless an individual can demonstrate cause for the default and prove that actual prejudice resulted from the violation of federal law, or who can demonstrate that a miscarriage of justice would occur if a federal court refused to hear his claims. *Id.* at 2564-65.

[114]111 S. Ct. 1454 (1991).

[115]*Id.* at 1467-71.

IV. HARMLESS CONSTITUTIONAL ERROR

Although every criminal defendant is entitled to a fair trial,[116] the Constitution does not require that a proceeding be entirely free of error.[117] Where convictions are sought to be overturned because of mistakes which occurred during trial, the success of direct appeals and *habeas corpus* petitions depends upon whether the error is deemed harmless.

Parliament's response to the overcrowding of English courts[118] serves as the basis for American harmless error jurisprudence.[119] In response to a problem of endless retrials,[120] Congress, in 1919, enacted a statute requiring federal appellate courts "to give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties."[121] Today, in addition to Congress, all fifty states have statutes which preclude reversal of a conviction for errors which are unlikely to have changed the result of a trial.[122]

Initially, harmless error rules did not distinguish between federal constitutional errors and errors of state or federal laws and rules.[123]

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[116]Note, *Sounds of Silence in the Second Circuit: Procedural Default and Fundamental Rights*, 52 BROOK. L. REV. 767, 790 (1986) (recognizing that minute errors may not impinge upon the fairness of a trial) [hereinafter *Sounds of Silence*].

[117]United States v. Hastings, 461 U.S. 499, 508-09 (1983) (stating that "there can be no such thing as as error free, perfect trial and . . . the Constitution does not guarantee such a trial").

[118]Note, Arizona v. Fulminante: *Extending Harmless Error Analysis to the Erroneous Admission of Coerced Confessions*, 66 TUL. L. REV. 581, 582 (1991) [Hereinafter *Coerced Confessions*]. Originally English Courts were governed by the Exchequer Rule which presumed that prejudice resulted from any error committed at trial and provided for automatic reversal. *Id.* In 1873, "Parliament enacted legislation that prohibited reversal in civil cases unless a substantial wrong or miscarriage had been thereby occasioned on the trial." *Id.* at 582-83.

[119]*Id.* at 582.

[120]*Id.* at 583.

[121]28 U.S.C. § 2811 (1988). *See also* FED. R. CRIM. PROC. 52(a) which states that "Any error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded."

[122]Chapman v. California, 386 U.S. 18, 22 (1967).

[123]*Sounds of Silence*, *supra* note 116, at 790.

Today, however, constitutional errors are subject to harmless error analysis,[124] but are distinguished from other types in that they are governed by the Due Process Clause of the Fifth and Fourteenth Amendments,[125] and, therefore, require the application of a stricter standard when adjudicating their harmlessness.[126]

The Supreme Court first alluded to a possible harmless-error analysis of constitutional errors in *Kotteakos v. United States*.[127] In *Kotteakos*, the defendant sought reversal of his conspiracy conviction on the grounds that only one conspiracy was charged when in reality eight separate conspiracies existed, each utilizing one central figure.[128] In assessing the government's failure to bring eight separate indictments, the Court concluded that a conviction could not stand where an error substantially influenced or affected the rights of a party.[129] Although *Kotteakos* involved a technical error,[130] the Court distinguished constitutional and non-constitutional errors. The Court indicated that verdicts and judgments should be left undisturbed where errors did not influence the jury or had a slight effect, except in cases of departure from constitutional norms or congressional commands.[131]

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[124]*Chapman*, 386 U.S. at 24.

[125]*See* United States v. Lane, 474 U.S. 438, 460 (1986) (holding that misjoinder of defendants is subject to harmless error analysis and is not reversible error *per se*).

[126]*Id.* Justice Brennan illustrated the distinction between the tests applied to constitutional error (prosecution must prove harmlessness beyond a reasonable doubt) and non-constitutional error (error will be found harmless unless it had a substantial influence on the outcome or leaves one in grave doubt as to whether it had such affect). *Id.* (quoting *Chapman*, 386 U.S. at 24; Kotteakos v. United States, 328 U.S. 750, 765 (1946)).

[127]328 U.S. 750 (1946).

[128]*Id.* at 752.

[129]*Id.* at 765. The Court noted that the error must be judged according to the "character of the proceeding, what is at stake upon its outcome, and the relation of the error asserted to casting the balance for decision on the case as a whole." *Id.* at 762.

[130]The error asserted by the defendant was the government's failure to bring eight separate conspiracy charges and the trial court's finding that the evidence presented could amount to a finding that one single conspiracy existed. *Id.* at 752, 755.

[131]*Id.* at 764.

Despite the *Kotteakos* Court's implication that constitutional errors may be subject to harmless error analysis,[132] state courts were still without guidance as to the appropriate standard of review.[133] Generally, federal courts presumed that constitutional error was always harmful and required automatic reversal of cases where such errors occurred.[134] Subsequently, in *Fahy v. Connecticut*,[135] the Supreme Court addressed the permissibility of applying the harmless error rule where evidence was illegally seized.[136] The Court, however, examined only the specific error, finding it harmful,[137] and did not decide whether all constitutional errors could be amenable to harmless error analysis.[138]

Four years later, in *Chapman v. California*,[139] the Supreme Court rejected the argument that federal constitutional errors are always deemed harmful.[140] Responding to a finding that petitioner's Fifth Amendment rights were violated,[141] the Court in *Chapman* concluded that before a

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[132]*Id.* at 764-5.

[133]*Coerced Confessions*, *supra* note 118, at 583 (noting that state courts had no guidance with respect to applying harmless error analysis to federal constitutional errors until the 1960's).

[134]*See, e.g.*, Klopfer v. North Carolina, 386 U.S. 213 (1967); Gideon v. Wainwright, 372 U.S. 335 (1963); Haynes v. Washington, 373 U.S. 503 (1963).

[135]375 U.S. 85 (1963).

[136]*Id.* at 86.

[137]*Id.*

[138]*Id.* at 91.

[139]386 U.S. 18 (1966).

[140]*Id.* at 22. The Court stated "some constitutional errors which in the setting of a particular case are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless, not requiring automatic reversal of a conviction." *Id.*

[141]During their trial for robbery, murder, and kidnapping, the petitioners chose not to testify. *Id.* at 19. In response, the State's prosecutor made numerous references to their silence and inferences of guilt resulting from their failure to speak. *Id.* The state supreme court admitted that the petitioners' Fifth Amendment Rights had been violated in light of Griffin v. California, 380 U.S. 609 (1965) (holding that Art. I, § 13, of California's Constitution, which allowed a court and counsel to comment upon a defendant's failure to

constitutional error could be held harmless, a court must determine that it was harmless beyond a reasonable doubt.[142] Furthermore, the Court placed the burden on the prosecution to "prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained."[143] The Court tempered its rejection of the automatic reversal rule in cases of constitutional error by recognizing that certain rights exist which are so basic to a fair trial that their infraction can never be treated as harmless.[144] The Court asserted that these structural defects,[145] requiring automatic reversal because of their effect on the trial process, lie at the opposite end of the constitutional spectrum of trial error,[146] which is characterized as being amenable to harmless error analysis.[147]

Decisions following *Chapman* seemed to express support for the application of the "beyond a reasonable doubt" standard to constitutional trial error. For example, in *Milton v. Wainwright*,[148] the Court rejected a *habeas corpus* petition based upon alleged violations of the Fifth and Sixth Amendments.[149] In this case, without addressing the merits of the claim,

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testify and which allowed a court and jury to take the failure into consideration, violated the Fifth Amendment because it penalized a person who exercised his right not to be compelled to be a witness against himself).

[142]*Chapman*, 386 U.S. at 24.

[143]*Id.*

[144]*Id.* at 23. The Court deferred to prior cases which indicated that certain constitutional infractions never could be considered harmless, such as the right to counsel, the admissibility of a coerced confession, and the right to be heard by an impartial judge. *Id.* at 23, n.8.

[145]The Court in Arizona v. Fulminante, 111 S. Ct. 1246, 1265 (1991), characterized errors which infect the entire trial process as structural defects. *Id.*

[146]*Id.* at 1264. Trial errors are constitutional violations which occur during the presentation of a case to a jury. *Id.*

[147]*Id.* Trial error is viewed as capable of being quantitatively "assessed in the context of other evidence presented in order to determine the effect it had on the trial." *Id.*

[148]407 U.S. 371 (1972).

[149]*Id.* In *Milton*, petitioner was arrested for manslaughter, indicted, and confined to a county jail. *Id.* at 373. A police officer, posing as a prisoner, became petitioner's cellmate and elicited various incriminating statements from him. *Id.* at 375. The police officer then testified to the statements during Milton's trial. *Id.* at 376.

the Court concluded that overwhelming evidence of guilt presented in the state court caused the admission of a challenged confession to be harmless beyond a reasonable doubt.[150] Furthermore, in *United States v. Hastings*,[151] the Court stated that harmless errors, including most constitutional violations, should be ignored by a reviewing court after consideration of the trial record as a whole.[152] Moreover, in *Rose v. Clark*,[153] the Court held that constitutional errors to which *Chapman* did not apply were considered the exception, not the rule.[154]

Recently, confessions obtained in violation of the Fourteenth Amendment were expressly held subject to harmless-error analysis. In *Arizona v. Fulminante*,[155] the defendant appealed his conviction based upon the admission of a coerced confession.[156] Although the defendant's statements were found to be a product of coercion,[157] the Court held that the conviction must stand if the act which precipitated the confession was determined harmless beyond a reasonable doubt.[158]

Although the *Chapman* standard is applicable on direct review of constitutional error[159] and has been utilized in a number of federal *habeas*

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[150]*Id.* at 377-78. The overwhelming evidence referred to by the Court consisted of a recorded oral confession, two written confessions, photographs of the reconstructed crime, and other circumstantial evidence. *Id.* at 379.

[151]461 U.S. 499 (1983) (holding that a Fifth Amendment violation should not lead to reversal of a conviction where the violation could be characterized as harmless error).

[152]*Id.* at 509.

[153]478 U.S. 570 (1985) (holding that jury instructions which shifted the burden of proof of a defendant's intent away from the state were unconstitutional).

[154]*Id.* at 578.

[155]111 S. Ct. 1246 (1991).

[156]While in prison on weapons charges, Fulminante became the subject of harassment by other inmates who heard that he killed his eleven year old stepdaughter. *Id.* at 1250. An FBI informant offered him protection in exchange for the truth concerning the murder. *Id.* Consequently, Fulminante confessed to the murder and the confession was admitted as evidence in his trial. *Id.* at 1250-151.

[157]*Id.* at 1253.

[158]*Id.* at 1250.

[159]*See* Brecht v. Abrahamson, 113 S. Ct. 1710, 1718 (1993).

cases,[160] the question concerning its applicability on collateral review of state court decisions remained unanswered until recently, as the issue was resolved in *Brecht v. Abrahamson.*[161]

V. *BRECHT v. ABRAHAMSON* — RESTRICTING HARMLESS CONSTITUTIONAL ERROR

A. CHIEF JUSTICE REHNQUIST'S OPINION FOR THE MAJORITY

In *Brecht v. Abrahamson,* Chief Justice Rehnquist, writing for a five to four majority,[162] held that *habeas* relief should be granted in light of a *Doyle*[163] violation when the error "had substantial and injurious effect of influence in determining the jury's verdict."[164] Chief Justice Rehnquist began by restating the rule laid down in *Doyle*, noting specifically that fundamental fairness and due process concerns are infringed upon when post-arrest, post-*Miranda* silence is used as a source to impeach an individual's testimony.[165]

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[160]*See, e.g.*, Rose v. Clark, 478 U.S. 570 (1986); Milton v. Wainwright, 407 U.S 371 (1972); Anderson v. Nelson, 390 U.S. 523 (1968).

[161]113 S. Ct. 1710 (1993).

[162]*Id.* at 1713. Chief Justice Rehnquist was joined by Justices Stevens, Scalia, Kennedy, and Thomas. *Id.* Justice Stevens filed a concurring opinion. *Id.* at 1723. Justice White filed a dissenting opinion in which Justice Blackmun joined and Justice Souter joined in part. *Id.* at 1725. Justice O'Connor filed a separate dissent. *Id.* at 1728.

[163]*See supra* notes 58-68 and accompanying text (discussing the use of a defendant's silence for impeachment purposes).

[164]Brecht v. Abrahamson, 113 S. Ct. 1710, 1714 (1993).

[165]*Id.* at 1717 (holding that using a defendant's silence at the time of arrest and after receiving *Miranda* warnings for impeachment purposes violates the Due Process Clause of the Fourteenth Amendment (citing Doyle v. Ohio, 426 U.S. 610, 619 (1976))). *See also* Wainwright v. Greenfield, 474 U.S. 284, 291 (1986) (stating that the *Doyle* rule rests on the fundamental unfairness of implicitly assuring a suspect that his silence will not be used against him and then using his silence to impeach an explanation subsequently offered at trial).

Objecting to the appellate court's characterization of *Doyle*,[166] Chief Justice Rehnquist classified the blunder as constitutional error of the trial type.[167] Moreover, the Chief Justice recognized that the error at hand was a proper subject of harmless-error analysis because its effect on the trial's outcome could be ascertained after an inspection of all the other evidence presented.[168] After distinguishing between trial error and a structural defect in the trial mechanism,[169] the majority explained that the Constitution does not require automatic reversal in the face of constitutional error.[170] In support of its position, the majority alluded to *Chapman v. California*,[171] which imposed a "beyond a reasonable doubt" standard upon the review of federal constitutional error.[172] Chief Justice Rehnquist, however, observed that *Chapman* reached the Court on direct review[173] and declared the Court free to determine whether the same standard should be applied on collateral examination of constitutional issues.[174] The majority initially rejected Brecht's *stare decisis* argument[175] that was founded upon the Court's application of the *Chapman* standard to a handful of recent

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[166]The court of appeals characterized *Doyle* as a prophylactic rule designed to protect another prophylactic rule, *Miranda*, from erosion or misuse. Brecht v. Abrahamson, 944 F.2d 1363, 1370 (7th Cir. 1991).

[167]*Brecht*, 113 S. Ct. at 1717.

[168]*Id.* (stating that trial error is amenable to harmless-error analysis because it may be quantitatively assessed in the context of other evidence presented in order to determine the effect it had on the trial (citing Arizona v. Fulminante, 111 S. Ct. 1246, 1249 (1991))).

[169]*Brecht*, 113 S. Ct. at 1717. The Court defined trial error as that which occurs during the presentation of the case to the jury, while noting that structural defects require automatic reversal of a conviction because they infect the entire trial process. *Id.*

[170]*Id.*

[171]386 U.S. 18 (1967).

[172]*Id.* at 24 ("[B]efore a federal constitutional error can be held harmless, the court must be able to declare that it was harmless beyond a reasonable doubt.").

[173]*Brecht*, 113 S. Ct. at 1718.

[174]*Id.*

[175]*Id.*

federal *habeas* petitions.[176] Moreover, the majority noted that the federal *habeas corpus* statute is silent regarding the standard of review to be employed.[177] The Court further opined that freedom to determine the applicable harmless error standard on collateral review of the *Doyle* claim is partly derived from Congress's failure to provide any statutory guidance.[178]

Relying upon recent opinions of Justices Thomas,[179] O'Connor,[180] and Harlan,[181] the majority professed that collateral and direct review are not alike.[182] The Court, observing the limited role of federal *habeas* proceedings, noted that the writ is available only for persons who have suffered a grievous wrong and should not be used as a tool for the relitigation of a state trial.[183] Accordingly, Chief Justice Rehnquist recognized that an error may be viewed differently depending upon whether it is being directly or collaterally attacked.[184]

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[176]*Id.* *See, e.g.*, Anderson v. Nelson, 390 U.S. 523, 525 (1967) (applying the *Chapman* standard in granting *habeas* relief when prosecution asks a jury to draw an inference of guilt from a defendant's failure to testify); Milton v. Wainwright, 407 U.S. 371, 372 (1972) (rejecting a *habeas* petition based upon statements admitted in violation of the Fifth and Sixth Amendments and applying the *Chapman* standard); Rose v. Clark, 478 U.S. 570, 582 (1985) (applying the *Chapman* standard and rejecting a *habeas* petition based upon erroneous jury instruction).

[177]*Brecht*, 113 S. Ct. at 1718.

[178]*Id.* at 1719.

[179]Wright v. West, 112 S. Ct. 2482, 2484 (1992).

[180]Teague v. Lane, 489 U.S. 289, 310 (1988) (stating that distinctions between collateral and direct review require new constitutional rules of criminal procedure not applicable to cases that have become final before the new rules are announced).

[181]Mackey v. United States, 401 U.S. 667, 682 (1970) (Harlan, J., concurring) (stating that "the Court's function in reviewing a decision allowing or disallowing a writ of *habeas corpus* is, and always has been, significantly different from its role in reviewing on direct appeal" that analyzes the validity of non-final criminal convictions).

[182]Brecht v. Abrahamson, 113 S. Ct. 1710, 1719 (1993) (noting the difference between collateral and direct review resounds throughout the Court's *habeas* jurisprudence).

[183]*Id.* (quoting Barefoot v. Estelle, 463 U.S. 880, 887 (1983)).

[184]*Brecht*, 113 S. Ct. at 1720 ("[I]t hardly bears repeating that an error which may justify reversal on direct appeal will not necessarily support a collateral attack on final judgment." (citing United States v. Frady, 456 U.S. 152, 165 (1982))).

After illustrating the difference between direct and collateral review, the Court furnished examples of situations not involving harmless error, in which different standards of analysis were applied to the same issue.[185] Among these were the retroactive application of new rules to criminal cases on direct, but not in *habeas* proceedings,[186] and the absence of a right to counsel when a collateral attack is mounted.[187]

In an effort to defend the adoption of the less stringent *Kotteakos* standard of review, the majority pointed to the states' interests in finality, concerns of comity and federalism, and a desire to avoid degrading the prominence of a trial through liberal allowance of *habeas corpus* writs.[188] Citing the ability of state courts to identify and evaluate the effect of trial error,[189] the majority opined that it would be illogical to require federal *habeas* courts to engage in the identical approach to harmless error review that *Chapman* requires state courts to engage in on direct review.[190] Furthermore, the Court expressed confidence that a less onerous standard of review on *habeas* would not affect the diligence with which lower courts will perform their duties.[191] Finally, the majority acknowledged that the sovereignty a state possesses over criminal matters,[192] as well as the

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[185]*Brecht*, 113 S. Ct. at 1720.

[186]*Compare* Griffith v. Kentucky, 479 U.S. 314, 328 (1986) (holding new rules for the conduct of criminal prosecutions must be applied retroactively to all cases on direct review) *with* Teague v. Lane, 489 U.S. 288, 310 (1988) (holding that unless a certain exception exists, new rules of criminal procedure will not be applied on collateral review).

[187]*Compare* Douglas v. California, 372 U.S. 353, 355-56 (1962) (holding that the Constitution guarantees the right to counsel on direct appeal) *with* Pennsylvania v. Finley, 481 U.S. 551, 555 (1986) (holding that no right to counsel exists during a collateral attack upon a conviction).

[188]*Brecht*, 113 S. Ct. at 1720-21.

[189]*Id.* at 1721 (holding that factual findings arising out of a state's post-trial hearings are entitled to a presumption of correctness (citing Rushen v. Spain, 464 U.S. 114, 120 (1983))).

[190]*Id.*

[191]*Id.*

[192]*Id.*

historic meaning of *habeas corpus*[193] as well as the social costs attendant to retrying defendants whose convictions have been set aside,[194] all weigh against application of the *Chapman* standard on collateral review in favor of the "substantial and injurious effect" standard supplied by *Kotteakos*.

After analyzing Brecht's pre-arrest conduct, as well as evidence presented by the State at trial, the majority concluded that the references to the petitioner's post-*Miranda* silence did not substantially influence the jury's verdict.[195] Consequently, the Court concluded that Brecht was not entitled to *habeas corpus* relief.[196]

B. JUSTICE STEVENS'S CONCURRING OPINION

In a concurring opinion, Justice Stevens[197] acknowledged that no test exists which can guarantee a grant or denial of *habeas* relief by all judges who are faced with similar circumstances.[198] Justice Stevens, however, agreed with the majority's contention that due process violations vary in significance[199] and characterized the *Kotteakos* standard as appropriately demanding the confinement of collateral relief to situations in which the trial's fairness has been compromised.[200] Next, addressing the validity of the standard adopted by the majority, Justice Stevens recognized that the rule

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[193]*Id.* (noting that *habeas corpus* exists to afford relief to those persons whom society has grievously wronged).

[194]*Id.* The Court noted that the expenditure of time and resources of all parties, the dispersion of witnesses, the erosion of memory, and society's interest in the prompt administration of justice are all costs attendant to the retrial of defendants whose convictions have been set aside. *Id.*

[195]*Id.* at 1721-22. The Court alluded to the infrequent references to petitioner's silence as compared to the length of the trial transcript, as well as physical evidence, including the path of the bullet, and the location where the shotgun was found in analyzing the effect of the *Doyle* error on the trial. *Id.*

[196]*Id.* at 1722-23.

[197]*Id.* at 1723 (Stevens, J., concurring).

[198]*Id.*

[199]*Id.*

[200]*Id.*

leaves considerable latitude for the exercise of judgement by federal courts,[201] and noted that Congress, in response to the federal courts becoming "impregnable citadels of technicality," provided for the same level of analysis in enacting the 1919 harmless error statute.[202]

After defending the "substantial and injurious effect" standard, Justice Stevens proceeded to explain the manner in which harmless error analysis must be performed.[203] Noting that the harmless error statute requires evaluation of an error in the context of the entire trial record, the Justice concluded that *Kotteakos* fulfills the Court's commitment to the *de novo*[204] standard of review of mixed questions of law and fact in *habeas* proceedings.[205] Next, after explaining that a review of the entire record allows for consideration of the various ways an error can infect a trial,[206] Justice Stevens counseled against a single-minded focus concerning the relationship between a trial error and a jury verdict.[207] Justice Stevens then concluded that the question which should be posed by a reviewing court is not whether a conviction would have resulted in the absence of a constitutional error, but whether the error substantially swayed or influenced a judgment.[208]

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[201] *Id.* Justice Stevens also noted that the *Kotteakos* standard accords with the statutory rule for reviewing other trial errors that affect substantial rights, places the burden upon prosecutors to explain why those errors were harmless, and requires a *habeas* court to review the entire record *de novo* in determining whether the error influenced the jury's deliberations. *Id.*

[202] *Id.* Justice Stevens noted that Congress has issued a general command to treat error as harmless unless its natural effect is to prejudice a litigant's substantial rights. *Id.*

[203] *Id.*

[204] A *de novo* hearing involves trying a matter anew the same as if it had not been heard before and as if no decision had been previously rendered. BLACK'S LAW DICTIONARY 721 (6th ed. 1990).

[205] Brecht v. Abrahamson, 113 S. Ct. 1710, 1723 (1993).

[206] *Id.*

[207] *Id.* at 1724 (Stevens, J., concurring). Justice Stevens maintained that *Kotteakos* would be misread if the Court endorsed only a single-minded focus on how an error may or may not have influenced a jury's verdict. *Id.*

[208] *Id.* (stating that the question is not whether the jurors were right in their judgment, but what effect the error had or reasonably may be taken to have upon the jury's decision (quoting Kotteakos v. United States, 328 U.S. 750, 764 (1946))). Justice Stevens

Despite defending the adoption of the *Kotteakos* standard and explaining its proper application, Justice Stevens tempered his support of the majority's position by asserting that the difference between the "beyond a reasonable doubt" and the "substantial and injurious effect" requirements are less significant than they seem.[209] In doing so, Justice Stevens opined that quality of judgment and the willingness to transcend a precise rule outweigh the importance of defining a governing phrase with which to control harmless error analysis.[210]

C. JUSTICE WHITE'S DISSENTING OPINION

In a scathing dissent, Justice White, joined by Justice Blackmun, and joined in part by Justice Souter,[211] criticized the majority's judgment as causing a state prisoner's freedom to become totally dependent upon a state court's proper application of the Federal Constitution and the Supreme Court's decision to grant *certiorari*.[212]

After rejecting the proposition that the individual states should shoulder the responsibility of protecting citizens against infringements upon federally guaranteed rights,[213] Justice White acknowledged that the source of the "reasonable doubt" harmless error standard was never identified by the Court

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recognized that a *habeas* court must decide whether an error influenced a jury or substantially swayed their judgment. *Id.*

[209]*Id.* Although the *Kotteakos* standard is less stringent than that supplied by *Chapman*, Justice Stevens asserted that faculty of judgment is an important factor in administering either standard and, therefore, lessens the difference between the two tests. *Id.* at 1724-25.

[210]*Id.* at 1725 (Stevens, J., concurring). Justice Stevens also agreed with the majority that the *Doyle* error in Brecht's trial did not have a substantial and injurious effect or influence in determining the jury's verdict. *Id.*

[211]*Id.* (White, J., dissenting).

[212]*Id.* The dissent noted that the constitutional violations associated with meeting the *Kotteakos* standard would cause reversal of a verdict upon appeal to the state courts or through *certiorari* in the Supreme Court. *Id.* The dissent argued, however, that if the state courts mistakenly concluded that no violation occurred and *certiorari* was not granted, relief on federal *habeas* review would be unavailable. *Id.*

[213]*Id.* at 1725-26 (White, J., dissenting) (recognizing that independent federal courts are the guardians of constitutional rights and whether a state has failed to accord federal constitutionally guaranteed rights is a federal question (quoting Chapman v. California, 386 U.S. 18, 21 (1966))).

in *Chapman*.[214] Justice White, however, dismissed this omission as irrelevant, noting that the federal courts are the guardians of individual liberties[215] and that the *Chapman* standard is essential to their safeguarding.[216] Based upon those observations and the Court's past practice,[217] the dissenting Justices characterized the majority's position as untenable and opined that individuals whose convictions have been upheld despite the occurrence of a constitutional violation are certainly prime candidates for *habeas* relief.[218]

Next, Justice White attacked the majority's distinction between the two methods by which a lower tribunal's ruling could be examined by noting that *Stone v. Powell*[219] was the only example mentioned in which a constitutional violation would entitle a state prisoner to relief on direct, but not collateral review.[220] Moreover, Justice White found that *Stone* and *Doyle* were clearly distinguishable on the grounds that the exclusionary rule, at issue in the former decision, was a prophylactic device invented to deter

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[214]*Id.* at 1726 (White, J., dissenting). Justice White, however, contended that the *Chapman* standard could be characterized as a necessary rule of federal law or quasi-constitutional doctrine. *Id.*

[215]*Id.* at 1725 (White, J., dissenting).

[216]*Id.* at 1726 (White, J., dissenting).

[217]*Id.* (citing the majority opinion which states that the *Chapman* standard has been applied to previous federal *habeas* cases).

[218]*Id.* The dissent maintained that a defendant whose conviction has been upheld despite a constitutional violation is certainly in custody in violation of the Constitution or laws of the United States as required by 28 U.S.C. § 2254(a). *Id.*

[219]428 U.S. 465 (1976)

[220]Brecht v. Abrahamson, 113 S. Ct. 1710, 1726 (1993) (White J., dissenting). In *Stone*, the Court held that where the state has provided an opportunity for full and fair litigation of a Fourth Amendment claim, the Constitution does not require that a prisoner be granted federal *habeas* relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial. *Stone*, 428 U.S. at 482. The Court reached its decision by concluding that application of the exclusionary rule often deflects the truthfinding process of a trial. *Id.* at 490. The Court found that allowing a guilty defendant to go free through application of the rule is contrary to the essential concept of proportionality and justice. *Id.*

Fourth Amendment violations by law enforcement personnel,[221] while the latter had already been characterized as a personal right rooted in concerns of fundamental fairness and due process.[222] Because the Court continued to rely on *Chapman* for the protection of constitutional rights, Justice White concluded that the denial of federal *habeas* relief in response to a *Doyle* violation was illogical.[223]

Addressing the consequences of the majority's decision, Justice White opined that state court determinations relating to the harmfulness of constitutional error had now become unreviewable by federal courts in *habeas* proceedings.[224] Expressing a belief that *habeas* review exists in part to deter the commitment of constitutional improprieties by both prosecutors and courts,[225] Justice White observed that state and federal courts are governed by the same duty to respect rights contained in the United States Constitution.[226] Justice White viewed that there is no cost in applying the *Chapman* standard on collateral review where state courts are faithful to federal law.[227] Accordingly, Justice White concluded that federal *habeas corpus* is responsible for correcting situations in which they are not.[228]

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[221]*Brecht*, 113 S. Ct. at 1726 (White, J., dissenting) (quoting Kimmelman v. Morrison, 477 U.S. 365, 392 (1986) (Powell, J., concurring)).

[222]*Id.* at 1726-27 (White, J., dissenting) (quoting the majority opinion).

[223]*Id.* at 1727 (White, J., dissenting). The dissent concluded that the majority did not disturb the notion that the *Chapman* harmless-error standard is required to protect constitutional rights. *Id.*

[224]*Id.* The dissent based its findings on the fact that the Court extended its ruling to apply to all constitutional errors of the trial type and that most constitutional errors are generally of this type. *Id.*

[225]*Id.* (stating that *habeas corpus* "serves as a necessary additional incentive for trial and appellate courts to conduct their proceedings in a manner consistent with established constitutional standards" (citing Desist v. United States, 394 U.S. 244, 262-63 (1969) (Harlan, J., dissenting))).

[226]*Id.* (holding that state and federal courts are under the same duty to respect constitutional rights (citing Brown v. Allen, 344 U.S. 443, 499-500 (1953)).

[227]*Id.* at 1728 (White, J., dissenting).

[228]*Id.*

Finally, Justice White described the current state of *habeas* jurisprudence as a confused patchwork, bearing scant resemblance to any precedent or Congressional design.[229] Drawing upon the Court's prioritization of constitutional rights, and the different treatment of liberties according to the nature of review undertaken,[230] Justice White urged a remand to the appeals court for the purpose of determining "whether the *Doyle* violation was harmless beyond a reasonable doubt."[231]

D. JUSTICE O'CONNOR'S DISSENTING OPINION

Justice O'Connor also authored a dissenting opinion,[232] agreeing with the majority's distinction between direct and collateral review,[233] but opining that alterations in the law affecting the ability of an individual to overcome unlawful custody must be made with great restraint.[234] Furthermore, Justice O'Connor concluded that faith in the criminal process and the assurance provided by *Chapman* requires a similar "beyond a reasonable doubt" harmless-error analysis on both direct and *habeas* review.[235]

Addressing the Court's total abandonment of the *Chapman* standard with respect to trial errors asserted on *habeas*, Justice O'Connor contended that the majority's decision was in contrast to the equitable principles

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[229]*Id.*

[230]*Id.* The dissent observed that different constitutional rights are being treated according to their status and that the same constitutional rights are treated differently depending upon whether direct or collateral review is undertaken. *Id.*

[231]*Id.*

[232]*Id.* at 1728 (O'Connor, J., dissenting).

[233]*Id.*

[234]*Id.* (stating that decisions concerning the Great Writ warrant restraint (citing Withrow v. Williams, 113 S. Ct. 1745, 1750 (1993) (O'Connor, J., concurring in part and dissenting in part))). *See also* Fay v. Noia, 372 U.S. 391, 449 (1963) (Harlan, J., dissenting) (stating that alterations of the "fundamental safeguard against unlawful custody" should not be taken lightly).

[235]*Id.* at 1728-29.

governing the federal courts' *habeas* powers.[236] Justice O'Connor stated that constitutional privileges can be categorized as either divorced from the truthfinding function of the criminal trial,[237] or critical to the reliability of the criminal process.[238] Justice O'Connor suggested that violations of rules existing in the latter category should, in the interest of fairness, give rise to *habeas* review.[239]

Next, after requesting a justification for the abandonment of the *Chapman* standard,[240] Justice O'Connor declared that an error's effect on the determination of guilt or innocence requires complete review of a prisoner's federal claim.[241] After implicitly acknowledging that the source of the *Chapman* standard has not been identified, Justice O'Connor argued that because the *Chapman* standard allows for accurate assessments of guilt or innocence, equitable principles favor its application on *habeas*.[242]

Justice O'Connor then opined that the harmless error analysis employed by a reviewing court is normally interwoven with the interest of reliability upon a verdict's accuracy.[243] Drawing upon the Court's opinion in *Fulminante*,[244] Justice O'Connor concluded that, with respect to matters

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[236]*Id.* at 1729. Justice O'Connor noted that the nature of a prisoner's claim concerns important equitable issues governing the federal courts' exercise of its *habeas* powers. *Id.*

[237]*Id.* Justice O'Connor stated that prophylactic rules are those which fall within this category. *Id.*

[238]*Id.*

[239]*Id.*

[240]*Id.* Justice O'Connor argued that a repudiation of *Chapman* to all trial errors asserted on *habeas* should be justified based upon the nature of the *Chapman* standard itself; however, the majority failed to discuss the basis of the *Chapman* standard. *Id.*

[241]*Id.* (asserting that the unifying theme of *habeas* jurisprudence and the possibility that an error may have caused the conviction of an innocent person is itself sufficient to permit plenary review of the prisoner's federal claim) (citing Withrow v. Williams, 113 S. Ct. 1745, 1757 (1993) (O'Connor, J., concurring in part and dissenting in part))).

[242]*Id.*

[243]*Id.* at 1730 (O'Connor, J., dissenting).

[244]Arizona v. Fulminante, 111 S. Ct. 1246, 1252 (1991).

related to the truthfinding function of a trial,[245] confidence in the accuracy of a verdict is dependent upon the harmless error standard employed.[246] Justice O'Connor further found the *Kotteakos* standard failed to ensure reliability.[247] After acknowledging that neither the Constitution nor the *habeas corpus* statute requires the taking of every precaution,[248] Justice O'Connor declared that those mistakenly convicted because of a constitutional error affecting a verdict's accuracy are victims of a grievous wrong.[249] According to Justice O'Connor, faith in the criminal process can only be maintained in this situation by adhering to the *Chapman* standard.[250]

Alluding to the fact that harmless error inquiries will not always concern a verdict's accuracy,[251] Justice O'Connor next introduced the possibility of reserving the *Kotteakos* standard for situations in which confidence in the trial's result has not been impaired.[252] Justice O'Connor noted, however, that the majority refrained from distinguishing among trial errors to which *Kotteakos* would apply and admitted that to do otherwise would further complicate the *habeas* process.[253] Nevertheless, Justice

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[245]Brecht v. Abrahamson, 113 S. Ct. 1710, 1730 (1993) (O'Connor, J., dissenting). Justice O'Connor offered the right of a defendant to confront witnesses against him as a matter related to the truthfinding function of a criminal trial. *Id.*

[246]*Id.*

[247]*Id.*

[248]*Id.*

[249]*Id.* Justice O'Connor stated that those convicted mistakenly because of constitutional error fall squarely into the category of prisoners for whom *habeas* relief is reserved. *Id.*

[250]*Id.* Justice O'Connor asserted that the *Chapman* standard would require such proof as to ensure to a reasonable certainty that constitutional error did not affect the accuracy of a verdict. *Id.*

[251]*Id.*

[252]*Id.* at 1730-1731 (O'Connor, J., dissenting). The dissent stated that it would not be illogical to apply *Chapman* to errors which relate to a verdict's accuracy and reserve *Kotteakos* to errors which do not impair confidence in a trial's result. *Id.*

[253]*Id.* The dissent acknowledged that a rule requiring courts to distinguish between errors that affect a trial's accuracy and those which do not would open up a new frontier of litigation. *Id.* The dissent, however, observed that according to the majority, a grant of *habeas* relief is possible in response to deliberate and egregious errors of the trial type,

O'Connor contended that total reliance upon the *Kotteakos* standard fails to provide any benefit to the Court in conducting a harmless-error inquiry.[254] After recognizing that harmless-error analysis involves investigating the numerous possible effects an error may have, conducting a *de novo* review of the trial record, and deciding whether a verdict would have been the same absent the trial error,[255] Justice O'Connor opined that the less stringent standard adopted by the majority would reduce the number of writs granted, but would not decrease the difficulty of identifying situations in which relief is warranted.[256]

Finally, Justice O'Connor agreed with the majority's contention that the costs associated with *habeas* review[257] are appropriate considerations in granting or denying relief. However, after observing that questions of finality, infringements upon state sovereignty, and various social costs arise whenever *habeas* relief is awarded,[258] Justice O'Connor maintained that the lessening of the harmless error threshold can only be justified if the Court embraces a view that relief should be denied whenever possible.[259]

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even though the errors did not substantially influence the jury's verdict. *Id.* The dissent explained that this would also lead to a multitude of additional litigation. *Id.* (alluding to the majority opinion).

[254]*Id.* at 1731 (O'Connor, J., dissenting).

[255]*Id.*

[256]*Id.* The dissent maintained that the only thing the Court altered through its decision is the degree of confidence which is sufficient to conclude that an error did not contribute to the verdict obtained. *Id.*

[257]*Id.* at 1731-32 (O'Connor, J., dissenting). The dissent recognized that costs associated with *habeas* review include the effect on finality, the encroachment on a state's sovereignty, and social costs of retrial. *Id.*

[258]*Id.*

[259]*Id.* Justice O'Connor maintained that the Court's decision is not justified from the standpoint of fairness or judicial efficiency and professed that the issue should be remanded to the court of appeals and the error analyzed according to the *Chapman* standard. *Id.*

VI. CONCLUSION

In *Brecht v. Abrahamson*,[260] the United States Supreme Court substantially restricted state prisoners' access to federal *habeas* relief by requiring them to show that the violation of a federally guaranteed right had a substantial and injurious effect on or influence in determining the jury's verdict.[261] Although this decision is laudable from society's interest in punishing criminal offenders and the costs associated with retrials, it does raise serious concerns.

Constitutional rights are designed to protect individual interests ranging from privacy and dignity, to participation in government, and fair play in the criminal process.[262] In *Brecht*, the majority recognized a distinction between constitutional errors demanding automatic reversal and those whose harmfulness must be capable of adequate assessment.[263] For example, as the majority asserts, deprivation of the right to counsel requires automatic reversal of a conviction,[264] while Fifth Amendment violations are held amenable to harmless-error analysis.[265] This reasoning, however, obviously is flawed, as it effectively subordinates certain individual liberties. The United States Constitution does not create a hierarchy of values, and there is no reason to believe that the framers intended for some rights to carry more weight than others.[266]

While further restricting access to federal *habeas* relief, the Court pointed to such interests as finality, federalism, the difficulty of obtaining

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[260]*Id.* at 1710.

[261]*Id.* at 1722.

[262]Tom Stacy & Kim Dayton, *Rethinking Harmless Constitutional Error,* 88 COLUM. L. REV. 79, 89 (1988) (illustrating the roles played by various constitutional rights).

[263]Brecht v. Abrahamson, 113 S. Ct. 1710, 1717 (1993). The Court in *Brecht* identified two categories of constitutional error. These included trial error, that was said to be capable of being quantitatively assessed to determine the effect it had on a trial, and structural defects, that infect the entire trial process and defy harmless-error analysis. *Id.*

[264]*Id.* (citing Arizona v. Fulminante, 111 S. Ct. 1246 (1991)).

[265]*Brecht*, 113 S. Ct. at 1722.

[266]*See* Stacy & Dayton, *supra* note 262, at 90 (recognizing that the framers of the Constitution did not intend for rights having truth-furthering purposes to carry more weight than rights having other purposes).

convictions on retrial, and the prompt administration of justice.[267] Justifications such as these, however, are incapable of surviving careful scrutiny for a number of reasons.[268] First, federal *habeas* petitions filed by state prisoners comprise only a small percentage of the federal civil docket.[269] Also, federal-state relations are no longer considered a matter of great significance.[270] Furthermore, there is concern that limitations on the access to federal *habeas corpus* will detract from the effectiveness of state criminal justice systems.[271] The majority, however, presupposes that the interests served by restrictions upon *habeas* relief outweigh the importance of reliability in the criminal process. Reasoning such as this introduces the possibility of bringing about harsh results. As Justice O'Connor correctly stated, "by tolerating a greater probability that an error with the potential to undermine verdict accuracy was harmful, the Court increases the likelihood that a conviction will be preserved despite an error that actually affected the reliability of the trial."[272]

As recognized by Chief Justice Rehnquist and Justice O'Connor, *habeas corpus* exists to afford relief to those whom society has "grievously wronged."[273] Although some *habeas* petitions may be based upon frivolous claims, those who have been victimized by constitutional error, including trial error, fall squarely into the category of persons for whom *habeas* relief ought to be reserved. By adopting the more lenient *Kotteakos* standard,[274] the Court does nothing to reduce the difficulties inherent in *habeas corpus*. There is no indication that this decision will deter the filing of *habeas* petitions in the federal courts or help identify cases in which relief is

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[267]*Brecht*, 113 S. Ct. at 1721.

[268]*See* Remmington, *supra* note 1, at 340-41. The reasons advanced by the *Brecht* Court for restricting *habeas corpus* are similar to those set forth by other proponents of *habeas* limitations that include relieving the overworked federal judiciary, recognizing the significance of state courts in a federal system, reinvigorating the deterrent effect of state criminal justice systems, and encouraging prisoner rehabilitation. *Id.*

[269]*Id.* at 341.

[270]*Id.*

[271]*Id.*

[272]Brecht v. Abrahamson, 113 S. Ct. 1710, 1730 (1993) (O'Connor, J., dissenting).

[273]*Id.* at 1721, 1730.

[274]Kotteakos v. United States, 328 U.S. 750, 765 (1946).

warranted. Thus, because judicial efficiency is not improved through the Court's application of *Kotteakos*, the argument in support of the majority's position is further weakened.

In situations such as that which existed in *Brecht*, there can be no doubt that an application for *habeas* relief is based upon a colorable claim. At a minimum, rather than imposing a greater risk of uncertainty upon litigants, fairness requires that the harmfulness of constitutional error be assessed in a manner which will maintain the greatest confidence in a trial's result. This can only be accomplished through continued application of the more stringent "beyond a reasonable doubt" standard set forth in *Chapman v. California*.