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THE GATE IS OPEN BUT THE DOOR IS LOCKED— HABEAS CORPUS AND HARMLESS ERROR

BENNETT L. GERSHMAN*

State prisoners challenging their confinement through the writ of habeas corpus must first pass through the gate of the federal court system.¹ The Supreme Court's "new habeas" jurisprudence² has imposed a variety of procedural obstacles to block that gate. Defaulted claims,³ successive claims,⁴ new claims,⁵ and Fourth Amendment claims⁶ are generally barred.⁷ Even a claim of actual innocence ordinarily does not gain entry,⁸ although it may serve as a precondition to consideration of otherwise barred claims.⁹

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1. I use the metaphors of the "gate" and the "door" to distinguish between threshold questions on federal habeas review and the merits of the claim. *See Wright v. West*, 112 S. Ct. 2482, 2500 (1992) (Souter, J., concurring) (noting that Court should decide threshold questions in favor of petitioner before addressing merits of claim). The Court similarly has employed these metaphors to describe this distinction. *See Herrera v. Collins*, 113 S. Ct. 853, 862 (1993) (stating that "claim of 'actual innocence' is not itself a constitutional claim, but instead a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits"); *Stone v. Powell*, 428 U.S. 465, 520 (1976) (Brennan, J., dissenting) (stating that past decisions were "reasoned decisions that those policies were an insufficient justification for shutting the federal habeas door to litigants with federal constitutional claims").

2. Kathleen Patchel, *The New Habeas*, 42 HASTINGS L.J. 941 (1991). The author describes how the Burger and Rehnquist Courts have "developed a series of purportedly discretionary limits on the federal courts' exercise of their habeas jurisdiction which have de facto altered that jurisdiction beyond recognition." *Id.* at 1062. Professor Patchel concludes that "by altering the process by which constitutional adjudication takes place—by moving from a system of dialectical federalism to one of deference to state court constitutional determinations—those Courts necessarily have altered the future shape of the substantive content of constitutional doctrine as well." *Id.* at 1062-63.

3. *Coleman v. Thompson*, 111 S. Ct. 2546 (1991); *Murray v. Carrier*, 477 U.S. 478 (1986); *Wainwright v. Sykes*, 433 U.S. 72 (1977).

4. *McCleskey v. Zant*, 111 S. Ct. 1454 (1991); *Kuhlmann v. Wilson*, 477 U.S. 436 (1986) (plurality opinion).

5. *Butler v. McKellar*, 110 S. Ct. 1212 (1990); *Teague v. Lane*, 489 U.S. 288 (1989).

6. *Stone v. Powell*, 428 U.S. 465 (1976).

7. The bar may be lifted when the petitioner can demonstrate "cause" and "prejudice" for the procedural default. *See Keeney v. Tamayo-Reyes*, 112 S. Ct. 1715 (1992); *Murray v. Carrier*, 477 U.S. 478 (1986); *Engle v. Isaac*, 456 U.S. 107 (1982).

8. *Herrera v. Collins*, 113 S. Ct. 853 (1993). The Court left the door slightly ajar for such a claim:

We may assume, for the sake of argument in deciding this case, that in a capital case a truly persuasive demonstration of "actual innocence" made after trial would render the execution of a defendant unconstitutional, and warrant federal habeas relief if there were no state avenue open to process such a claim.

Id. at 869.

9. *Sawyer v. Whitley*, 112 S. Ct. 2514, 2518-19 (1992) (petitioner otherwise subject to defenses of abusive or successive use of writ and who cannot meet cause and prejudice standard nevertheless may have his federal constitutional claim considered on merits if he makes proper showing of "actual innocence," so that failure to hear his claims would constitute "miscarriage of justice").

When an unbarred claim is brought, a petitioner may enter the gate unimpeded, at least to allow a court to consider his constitutional claim on the merits. And if the claim has merit, a court has discretion to grant the writ.¹⁰ However, even with unbarred claims a petitioner ordinarily confronts another obstacle to prevailing on the merits. Just as reviewing courts may overlook constitutional errors that are harmless,¹¹ the federal courts on collateral review traditionally have applied harmless error principles to preserve state convictions despite constitutional error.¹² Prior to *Brecht v. Abrahamson*,¹³ the federal courts typically applied the same harmless error standard for collateral review of constitutional errors as they applied on direct appeal, namely, whether the constitutional error was harmless beyond a reasonable doubt.¹⁴ The issue in *Brecht* was whether courts should apply the constitutional harmless error standard for direct appeal on collateral review, or whether courts should apply a more rigorous standard. A majority of the Court, in an opinion by Chief Justice Rehnquist, held that courts should use a more onerous test, one that requires the petitioner to show not that the error resulted in the possibility of harm but, rather, that the error caused actual and substantial harm. Under *Brecht*, the habeas petitioner could enter the gate, but he might find the courtroom doors locked and his otherwise meritorious petition denied.

Brecht is a paradigm of the Rehnquist Court's result-oriented approach to habeas corpus and harmless error. The decision purports to be a principled application of the policies of finality, federalism, and judicial economy that underlay the Court's new habeas and harmless error jurisprudence. It is, in fact, an unwarranted and unprincipled extension of those policies. Depending on how the lower federal courts interpret and implement the decision, *Brecht* could have a devastating impact on the way state prosecutors and judges administer criminal justice, as well as the ability of state prisoners to redress constitutional violations.

I. BACKGROUND

A. Facts and Lower Court Findings

Todd Brecht, an ex-convict, resided with his sister and her husband, Roger Hartman, in their Wisconsin home.¹⁵ There was some tension in the

10. 28 U.S.C. § 2243 (1988) (judge required to "dispose of the matter as law and justice require"); *Stone*, 428 U.S. at 478 n.11 (reaffirming equitable nature of writ and emphasizing that "discretion is implicit in the statutory command"); Patchel, *supra* note 2, at 964 ("This focus on discretionary limits on habeas jurisdiction subsequently became a hallmark of the Court's decisions limiting the scope of habeas review.').

11. *Chapman v. California*, 386 U.S. 18, 22 (1967).

12. See *infra* note 14 (discussing *Chapman* standard).

13. 113 S. Ct. 1710 (1993).

14. *Chapman*, 386 U.S. at 24 ("beneficiary of a constitutional error [required] to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained").

15. *State v. Brecht*, 421 N.W.2d 96, 98-99 (Wis. 1988), *rev'd sub nom.* *Brecht v. Abrahamson*, 944 F.2d 1363 (7th Cir. 1991), and *aff'd*, 113 S. Ct. 1710 (1993).

household because Hartman, a local district attorney, did not approve of Brecht's drinking habits and homosexual orientation. When the Hartmans were away, Brecht broke into a liquor cabinet and began drinking. He found a rifle and began shooting cans in the backyard. When Hartman returned home from work, Brecht shot him in the back and sped off in Mrs. Hartman's car. Brecht drove the car into a ditch, and when a police officer stopped to offer help, Brecht told him that his sister knew about the mishap and had summoned a tow-truck. Brecht then hitched a ride to Winona, Minnesota, where he was stopped by police, identified, and arrested for the shooting. He told the police that it was a "big mistake." He was returned to Wisconsin, arraigned, and given his *Miranda* rights. Roger Hartman died, and Brecht was charged with first-degree murder.

At his trial, Brecht admitted shooting Hartman but claimed it was an accident. He testified that when he saw Hartman pulling into the driveway, he ran to replace the gun but tripped on the stairs, causing the gun to fire the fatal shot. Seeing what he had done, Brecht panicked and drove away. The prosecution offered circumstantial evidence to prove that the shooting was intentional: forensic proof of the bullet's somewhat horizontal trajectory, the location outside the house where the rifle was found, and proof of Hartman's hostility toward Brecht as the motive for the shooting. In addition, the prosecutor pointed out that Brecht had failed to tell anyone that the shooting was an accident—the officer who first encountered him beside the ditch, or the Winona police who arrested him.¹⁶ During his cross examination of Brecht, and over defense counsel's objection, the prosecutor asked Brecht whether he had ever told anyone prior to trial that the shooting was an accident, to which Brecht replied "No."¹⁷ During his closing argument, the prosecutor also made several references about Brecht's pretrial silence to the

16. The prosecutor made extensive use of Brecht's silence both before and after he was given *Miranda* warnings. The Wisconsin Supreme Court found that the prosecutor's references to Brecht's pre-*Miranda* silence were permissible and did not violate Brecht's constitutional rights. *Brecht*, 421 N.W.2d at 103; see *Jenkins v. Anderson*, 447 U.S. 231, 238-40 (1980) (holding Fifth Amendment not violated when testifying defendant impeached with his pre-arrest silence). The federal district court on habeas review agreed with this conclusion. *Brecht v. Abrahamson*, 759 F. Supp. 500, 507 (W.D. Wis. 1991), *rev'd*, 944 F.2d 1363 (7th Cir. 1991), *and aff'd*, 113 S. Ct. 1710 (1993).

17. The prosecutor's cross-examination of Brecht included the following:

Q. In fact the first time you have ever told this story is when you testified here today was it not?

....

A. You mean the story of actually what happened?

Q. Yes.

A. I knew what happened, I'm just telling it the way it happened, yes, I didn't have a chance to talk to anyone, I didn't want to call somebody from a phone and give up my rights, so I didn't want to talk about it, no sir.

The prosecutor on re-cross examination inquired:

Q. Did you tell anyone about what had happened in Alma?

A. No I did not.

Brecht, 421 N.W.2d at 103.

jury, insinuating that Brecht tailored his newly-fabricated claim to mesh with the state's proof.¹⁸ The jury returned a guilty verdict, and Brecht was sentenced to life imprisonment.

The Wisconsin Court of Appeals reversed the conviction.¹⁹ The court found that the prosecutor's references to Brecht's post-*Miranda* silence violated due process under *Doyle v. Ohio*,²⁰ and that the error was sufficiently prejudicial to require reversal.²¹ The court emphasized the "frequency" and "vigorous nature" with which the prosecutor assailed Brecht's silence, the closeness of the proof on the issue of intent, and the "critical" role of Brecht's credibility in the outcome.²²

The Wisconsin Supreme Court reinstated the conviction.²³ The court agreed that the prosecutor had committed constitutional error but concluded that the error was harmless beyond a reasonable doubt. The court noted that the improper references were relatively brief, comprising less than two pages of a nine hundred page transcript, and that the evidence of guilt was "strong."²⁴

Brecht petitioned the federal district court for a writ of habeas corpus, reasserting the *Doyle* violation. The district court set aside the conviction.²⁵ The court concluded that the error violated due process, and that under the standard for constitutional error formulated in *Chapman v. California*,²⁶ the

18. During closing argument, the prosecutor urged the jury to "remember that Mr. Brecht never volunteered until in this courtroom what happened in the Hartman residence . . .;" "He sits back here and sees all of our evidence go in and then comes out with this crazy story . . .;" "I know what I'd say [had I been in the defendant's shoes], I'd say 'hold on, this was a mistake, this was an accident, let me tell you what happened,' but he didn't say that did he. No, he waited until he hears our story." *Id.*

19. *State v. Brecht*, 405 N.W.2d 718 (Wis. Ct. App. 1987), *rev'd*, 421 N.W.2d 96 (Wis. 1988) and *rev'd sub nom.* *Brecht v. Abrahamson*, 944 F.2d 1363 (7th Cir. 1991), and *aff'd*, 113 S. Ct. 1710 (1993).

20. 426 U.S. 610 (1976). *Doyle* recognized that a suspect's silence after being given *Miranda* warnings may be nothing more than an exercise of rights guaranteed by those warnings and therefore "insolubly ambiguous." *Id.* at 617. The Court found it fundamentally unfair for the state to implicitly assure a suspect that prosecutors would not use his silence against him, and then turn around and use that silence for impeachment. *Id.* at 618. "[T]he use for impeachment purposes of petitioners' silence, at the time of arrest and after receiving *Miranda* warnings, violated the Due Process Clause of the Fourteenth Amendment." *Id.* at 619.

21. *Brecht*, 405 N.W.2d at 723. "In a first-degree murder prosecution in which intent is established solely by circumstantial evidence and the defendant's credibility is a critical issue, impermissible comments that attack credibility heighten the danger of prejudice. . . . Because the defense relied heavily upon Brecht's credibility and because the prosecutor's comments were clearly improper, we conclude that the comments on Brecht's post-arrest, post-*Miranda* silence were prejudicial.

22. *Id.* at 722-23.

23. *State v. Brecht*, 421 N.W.2d 96, 106 (Wis. 1988) *rev'd sub nom.* *Brecht v. Abrahamson*, 944 F.2d 1363 (7th Cir. 1991), and *aff'd*, 113 S. Ct. 1710 (1993).

24. *Id.* at 104.

25. *Brecht v. Abrahamson*, 759 F. Supp. 500, 510 (W.D. Wis. 1991), *rev'd*, 944 F.2d 1363 (7th Cir. 1991), and *aff'd*, 113 S. Ct. 1710 (1993).

26. 386 U.S. 18, 24 (1967).

state failed to demonstrate that the error was harmless beyond a reasonable doubt. Reviewing *de novo* the state court's determination that the error was harmless,²⁷ the district court found that the evidence of guilt was not "overwhelming," and that the prosecutor's references were "crucial" because Brecht's defense turned on his credibility.²⁸ According to the district court, "the state's remarks that [Brecht] simply concocted a 'crazy story' at the time of trial may have been determinative."²⁹

The Court of Appeals for the Seventh Circuit reversed.³⁰ The Seventh Circuit agreed that the prosecutor violated *Doyle*,³¹ but differed with the district court on the nature of the violation and on the applicable harmless error standard.³² The circuit court construed *Doyle* not as a constitutional right, but as a "prophylactic rule . . . to protect another prophylactic rule [*Miranda*] from erosion or misuse."³³ Having determined that a *Doyle* violation is not a constitutional error, the circuit court applied the harmless error standard for nonconstitutional errors found in *Kotteakos v. United States*³⁴—whether the error "had substantial and injurious effect or influence in determining the jury's verdict."³⁵ Applying this standard, the circuit court concluded that given the otherwise proper references to Brecht's pretrial silence, the petitioner could not contend with a "straight face" that the prosecutor's references had a "substantial and injurious effect" on the jury's verdict.³⁶

B. *Brecht v. Abrahamson and the Supreme Court*

The Supreme Court granted certiorari to resolve the question which the Court failed to reach five years earlier in *Greer v. Miller*³⁷—whether the traditional standard for constitutional harmless error applies on collateral review of *Doyle* violations.³⁸ The majority opinion by Chief Justice Rehnquist, joined by Justices Stevens, Scalia, Kennedy, and Thomas, initially disagreed with the Seventh Circuit's characterization of the *Doyle* rule as a non-constitutional rule.³⁹ *Doyle*, the majority explained, "was not simply a further extension of the *Miranda* prophylactic rule. Rather, as we have discussed, it

27. *United States v. Flannigan*, 884 F.2d 945, 950-51 (7th Cir. 1989) (federal court not bound by state court's ruling that constitutional error is harmless), *cert. denied*, 497 U.S. 1027 (1990).

28. *Brecht*, 759 F. Supp. at 508.

29. *Id.*

30. *Brecht v. Abrahamson*, 944 F.2d 1363, 1376 (7th Cir. 1991), *cert. granted*, 112 S. Ct. 2931 (1992), *and aff'd by* 113 S. Ct. 1710 (1993).

31. *Id.* at 1368.

32. *Id.* at 1375.

33. *Id.* at 1370.

34. 328 U.S. 750 (1946).

35. *Kotteakos v. United States*, 328 U.S. 750, 776 (1946).

36. *Brecht*, 944 F.2d at 1376.

37. 483 U.S. 756 (1987).

38. *Greer v. Miller*, 483 U.S. 756, 761 n.3, 765 (1987).

39. *Brecht v. Abrahamson*, 113 S. Ct. 1710, 1717 (1993).

is rooted in fundamental fairness and due process concerns.”⁴⁰ Having determined that a *Doyle* violation is a constitutional error, the Court further decided that a *Doyle* violation “fits squarely into the category of constitutional violations which we have characterized as ‘trial error,’” and is therefore “amenable to harmless error analysis” under the standard formulated in *Chapman v. California*.⁴¹ The Court observed, however, that the *Chapman* standard applies to direct review, and “we have yet squarely to address its applicability on collateral review.”⁴² The habeas corpus statute, the Court noted, is silent on the standard of review of constitutional error.⁴³ The Court proceeded to “fill the gap[]” by examining “the considerations underlying our habeas jurisprudence,” and “whether the proposed rule would advance or inhibit these considerations by weighing the marginal costs and benefits of its application on collateral review.”⁴⁴

The Court commenced this portion of its discussion by reiterating that “collateral review is different from direct review.”⁴⁵ Because of this difference, the Court observed, different rules have been prescribed for habeas than have been applied on direct review.⁴⁶ These standards are considerably more restrictive than similar standards pertaining to direct review, the Court noted, and they serve to confine habeas corpus to a “secondary and limited” role that is reserved only to those “persons whom society has grievously wronged.”⁴⁷ The Court explained that considerations of finality, federalism, and comity have traditionally supported such disparate treatment.⁴⁸ “State courts are fully qualified to identify constitutional error and evaluate its prejudicial effect,” and often are in a superior position to make such determinations.⁴⁹ Thus, “it scarcely seems logical 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.”⁵⁰

40. *Id.*

41. *Id.*

42. *Id.* at 1718. The Court cited the following several cases in which it had applied the *Chapman* standard on habeas review: *Yates v. Evatt*, 500 U.S. 391 (1991); *Rose v. Clark*, 478 U.S. 570 (1986); *Milton v. Wainwright*, 407 U.S. 371 (1972); *Anderson v. Nelson*, 390 U.S. 523 (1968) (per curiam).

43. *Brecht*, 113 S. Ct. at 1718. The federal habeas corpus statute directs the court to “dispose of the matter as law and justice require.” 28 U.S.C. § 2243 (1988). The proposed Habeas Corpus Reform Act does not specify any particular standard of review, but does state: “[T]he Federal courts, in reviewing an application under this section, shall review de novo the rulings of a State court on matters of federal law, including the application of federal law to facts.” S. 1441, 103d Cong., 1st Sess. § 2257(b) (1993).

44. *Brecht v. Abrahamson*, 113 S. Ct. 1710, 1719 (1993).

45. *Id.*

46. *Id.* at 1720. Examples of such disparate treatment, the Court noted, include rules governing retroactivity, *Teague v. Lane*, 489 U.S. 288 (1989), the right to counsel, *Pennsylvania v. Finley*, 481 U.S. 551 (1987), the “plain error” rule, *United States v. Frady*, 456 U.S. 152 (1982), and Fourth Amendment claims, *Stone v. Powell*, 428 U.S. 465 (1976).

47. *Brecht*, 113 S. Ct. at 1719 (quoting *Fay v. Noia*, 372 U.S. 391, 440-441 (1963)).

48. *Id.* at 1720.

49. *Id.* at 1721.

50. *Id.*

The Court discounted the suggestion that easing the *Chapman* standard on collateral review would undermine the interest of deterring states from relaxing their enforcement of constitutional rights.⁵¹ In any event, the Court stated, “the costs of applying the *Chapman* standard on federal habeas outweigh the additional deterrent effect, if any, which would be derived from its application on collateral review.”⁵² Moreover, retrying defendants whose convictions are set aside imposes significant “social costs,” which militate in favor of applying a more rigorous standard on habeas review.⁵³

Thus, although disagreeing with the theoretical basis upon which the Seventh Circuit’s decision rested, the Court nevertheless agreed with, and substantially broadened, the Seventh Circuit’s conclusion that the *Chapman* standard should not be applied on collateral review of *Doyle* violations. The Court agreed that the *Kotteakos* standard for nonconstitutional error is “better tailored to the nature and purpose of collateral review, and more likely to promote the considerations underlying our recent habeas cases.”⁵⁴ Under this test, habeas petitioners can obtain relief for *any* constitutional trial error if “they can establish” that the error “had substantial and injurious effect or influence in determining the jury’s verdict.”⁵⁵ Petitioners have the burden of establishing, in other words, “that [the constitutional trial error] resulted in ‘actual prejudice.’”⁵⁶ The Court, in a footnote, left the door slightly ajar for “an unusual case, a deliberate and especially egregious error of the trial type, or one that is combined with a pattern of prosecutorial misconduct,” even though the misconduct did not substantially influence the jury’s verdict.⁵⁷

Justice Stevens provided the crucial fifth vote for the Court’s decision.⁵⁸ He wrote a concurring opinion cautioning lower federal courts against an unduly broad interpretation, and emphasizing that the Court’s new standard “is appropriately demanding.”⁵⁹ Disagreeing with the assertion in the majority opinion that the burden of proof rests on the petitioner, Justice Stevens

51. *Id.* at 1721. “Absent affirmative evidence that state-court judges are ignoring their oath, we discount petitioner’s argument that courts will respond to our ruling by violating their Article VI duty to uphold the Constitution.” *Id.*

52. *Id.*

53. *Id.* Such costs include “expenditure of additional time and resources,” “erosion of memory” and “dispersion of witnesses,” and “the frustration of society’s interest in the prompt administration of justice.” *Id.*

54. *Id.* at 1722.

55. *Id.* (emphasis added). The Court cited *United States v. Lane*, 474 U.S. 438, 449 (1986), as authority for this holding. *Lane* did apply the “actual prejudice” standard to a non-constitutional error. *Lane*, however, did not place the burden of proving harm upon the defendant, and the Court’s citation for that novel rule is misplaced. The Habeas Corpus Reform Act would place the burden of proving harmlessness upon the State. *See supra* note 43 (discussing Habeas Corpus Reform Act); *infra* note 83 (same).

56. *Brecht v. Abrahamson*, 113 S. Ct. 1710, 1722 (1993).

57. *Id.* at 1722 n.9.

58. Justice Stevens had concurred in *Greer v. Miller*, 483 U.S. 756 (1987), but would have reached the question left open by the Court, and held that a federal court on habeas review should apply a more relaxed harmless error standard in reviewing *Doyle* violations. *Id.* at 768.

59. *Brecht*, 113 S. Ct. at 1723.

explicitly stated that the burden of showing the error's harmlessness rests on the government.⁶⁰ Moreover, the reviewing court must evaluate the error under the Court's "longstanding commitment to the *de novo* standard of review of mixed questions of law and fact in habeas corpus proceedings."⁶¹ Justice Stevens also emphasized the portion of Justice Rutledge's opinion in *Kotteakos* concerning the methodology for judicial review of harmless error. He admonished federal judges not to speculate upon probable reconviction, or upon whether the reviewing court believed the defendant to be guilty.⁶² Quoting a familiar passage in *Kotteakos*, Justice Stevens emphasized

that the question is *not* were they [the jurors] right in their judgment, regardless of the error or its effect upon the verdict. It is rather what effect the error had or reasonably may be taken to have had upon the jury's decision. The crucial thing is the impact of the thing done wrong on the minds of other men, not on one's own, in the total setting.

60. Justice Stevens asserted that the majority opinion "is correct" because that opinion, among other things, "places the burden on prosecutors to explain why those errors were harmless." *Id.* One wonders, therefore, why Justice Stevens joined the majority opinion when there existed such a substantial difference concerning the party bearing the burden of proof on the issue of harm, as well as the rigorousness with which lower courts should evaluate the impact of the error. Given Justice Stevens' concurring opinion explicitly dissociating himself from the majority's placement of the burden on the defendant, it would appear that a majority of the Court (Justice Stevens and the four dissenters) endorses the traditional rule imposing the burden on the prosecutor to prove harmlessness, as well as an approach to harmless error analysis considerably more demanding than the approach taken by the plurality. Several circuit courts that have employed the new *Brecht* standard have placed the burden on the petitioner to prove substantial harm. See *Jeffries v. Blodgett*, 5 F.3d 1180, 1190 (9th Cir. 1993) (stating petitioner must show that alleged error had substantial and injurious effect on jury's verdict), *cert. denied* 62 U.S.L.W. 3615, 62 U.S.L.W. 3623 (U.S. Mar. 21, 1994) (No. 93-971); *Tague v. Richards*, 3 F.3d 1133, 1140 (7th Cir. 1993) (stating that petitioner not entitled to habeas relief unless petitioner can establish that error resulted in actual prejudice); *Henry v. Estelle*, 993 F.2d 1423, 1427 (9th Cir. 1993) (stating burden is on petitioner to show error had significant inculpatory impact); *Cumbe v. Singletary*, 991 F.2d 715, 724 (11th Cir.) (stating that relevant habeas corpus inquiry was whether petitioner could prove actual prejudice), *cert. denied*, 114 S. Ct. 650 (1993). By contrast, some circuit courts have placed the burden on the government to prove lack of substantial harm. See *Stoner v. Sowders*, 997 F.2d 209, 213 (6th Cir. 1993) (stating that prosecutor bears burden of proof to demonstrate that error did not have substantial and injurious effect on jury's verdict); *Lowery v. Collins*, 996 F.2d 770, 773 (5th Cir. 1993) (stating that burden of sustaining verdict rested on prosecutor to demonstrate error was harmless). Some circuit courts that have applied the standard have not indicated which party bears the burden of proof. See *Shaw v. Collins*, 5 F.3d 128 (5th Cir. 1993) (citing *Lowery* in applying *Brecht* standard to videotaped testimony of victim); *Duest v. Singletary*, 997 F.2d 1336, 1338 (11th Cir. 1993) (citing *Cumbe* in applying *Brecht* standard), *cert. denied*, 114 S. Ct. 1126 (1994); *McKinney v. Rees*, 993 F.2d 1378, 1385 (9th Cir.) (applying *Brecht* standard), *cert. denied*, 114 S. Ct. 622 (1993); *Pemberton v. Collins*, 991 F.2d 1218, 1226 (5th Cir.) (same), *cert. denied*, 114 S. Ct. 622 (1993).

61. *Brecht v. Abrahamson*, 113 S. Ct. 1710, 1724 (1993). The standard "requires a habeas court to review the entire record *de novo* in determining whether the error influenced the jury's deliberations." *Id.* at 1723.

62. *Id.* at 1724. The standard requires courts to engage in the "discrimination . . . of judgment transcending confinement by formula or precise rule." *Id.* (quoting *Kotteakos v. United States*, 328 U.S. 750, 761 (1946)).

This must take account of what the error meant to them, not singled out and standing alone, but in relation to all else that happened. And one must judge others' reactions not by his own, but with allowance for how others might react and not be regarded generally as acting without reason. This is the important difference, but one easy to ignore when the sense of guilt comes strongly from the record.⁶³

"In the end," Justice Stevens wrote, "the way we phrase the governing standard is far less important than the quality of the judgment with which it is applied."⁶⁴

Justice White wrote a dissenting opinion in which Justices Blackmun and Souter joined. Justice White found it "inexplicable" that to obtain relief based upon a constitutional error that is harmful under the *Chapman* standard, a petitioner must bear the burden of proving actual prejudice.⁶⁵ Moreover, because *Arizona v. Fulminante*⁶⁶ subjects virtually all constitutional trial errors to harmless error analysis, "a state court determination that a constitutional error . . . is harmless beyond a reasonable doubt has in effect become unreviewable by lower federal courts by way of habeas corpus."⁶⁷ Further, to the extent that the availability of habeas relief deters prosecutors and judges from violating their constitutional responsibilities, the Court's decision undermines this purpose.⁶⁸ Justice White summarized the issue in this way:

Ultimately, the central question is whether States may detain someone whose conviction was tarnished by a constitutional violation that is not harmless beyond a reasonable doubt. *Chapman* dictates that they may not; the majority suggests that, so long as direct review has not corrected this error in time, they may.⁶⁹

Justice O'Connor filed a separate dissenting opinion. Justice O'Connor's dissent assailed the majority for ignoring what she contended was the central goal of the criminal justice system—to provide accurate determinations of guilt and innocence.⁷⁰ Habeas corpus is an equitable remedy, Justice O'Connor wrote, and the ultimate equity on the habeas petitioner's side is the "possibility that an error may have caused the conviction of an actually innocent person."⁷¹ The *Chapman* harmless error standard is "inextricably intertwined" with the goal of reliable determinations of guilt.⁷² A verdict that is found to be harmless beyond a reasonable doubt "sufficiently restores confidence in

63. *Id.* (quoting *Kotteakos v. United States*, 328 U.S. 750, 764 (1946)) (emphasis in original).

64. *Id.* at 1725.

65. *Id.* at 1727.

66. 499 U.S. 279 (1991).

67. *Brecht v. Abrahamson*, 113 S. Ct. 1710, 1727 (1993).

68. *Id.*

69. *Id.* at 1728.

70. *Id.* at 1729.

71. *Id.*

72. *Id.* at 1730.

the verdict's reliability that the conviction may stand despite the potentially accuracy impairing error."⁷³ By contrast, Justice O'Connor argued, the *Kotteakos* standard does not offer an adequate assurance of the verdict's reliability.⁷⁴ "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."⁷⁵ Justice O'Connor offered the cynical observation that the only explanation for the Court's adoption of a more onerous harmless error standard for collateral review is "that denying [habeas] relief whenever possible is an unalloyed good."⁷⁶

II. THE CONTINUING DECLINE OF HABEAS CORPUS

Brecht v. Abrahamson fuses two major goals of the Burger and Rehnquist Courts: restricting habeas corpus and expanding harmless error. Although the Courts substantially achieved both goals prior to *Brecht*, that case merged these objectives under the rhetoric of finality, federalism, and judicial economy. This familiar rhetoric has been the hallmark of the new habeas jurisprudence, in much the same way that it has formed the linchpin for the Court's broadened application of harmless error. The Court's aggressive result-oriented approach to both habeas corpus and harmless error has countered and displaced much of the Warren Court's expansive constitutionalization of criminal procedure.

One cannot neatly summarize the "new habeas." Each Term seems to bring several new decisions that further restrict the availability of the writ. Clearly, the habeas of *Brown v. Allen*⁷⁷ and *Fay v. Noia*⁷⁸ is a far cry from the habeas of *Teague v. Lane*,⁷⁹ *McCleskey v. Zant*,⁸⁰ *Coleman v. Thompson*,⁸¹ and *Brecht v. Abrahamson*.⁸² In the absence of legislation amending the

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.* at 1732.

77. 344 U.S. 443, 508 (1953) ("The State court cannot have the last say when it, though on fair consideration and what procedurally may be deemed fairness, may have misconceived a federal constitutional right.").

78. 372 U.S. 391, 418 (1963) (finding that federal habeas corpus statute manifests "clear congressional policy of affording a federal forum for the determination of the federal claims of state criminal defendants"), *overruled by* *Kenney v. Tamayo-Reyes*, 112 S. Ct. 1715 (1992).

79. 489 U.S. 288 (1989) (habeas unavailable if constitutional violation "new rule" announced subsequent to petitioner's conviction).

80. 499 U.S. 467 (1991) (habeas unavailable if constitutional violation not raised in previous habeas petition).

81. 111 S. Ct. 2546 (1991) (habeas unavailable if constitutional violation not preserved in state appellate proceedings).

82. 113 S. Ct. 1710 (1993) (habeas unavailable if constitutional violation did not actually prejudice petitioner's rights).

federal habeas corpus statute,⁸³ the Court has shown an extraordinarily activist bent to federal criminal procedure by recasting the habeas statute in a manner markedly different from the interpretation of the Court a generation ago.

Virtually all of the Court's recent decisions have imposed procedural barriers to invoking the writ. These restrictions are grounded on principles of federal abstention to the exercise of state power. In one instance, however, the Court has actually imposed a substantive limitation by removing from habeas coverage a specific constitutional claim. In *Stone v. Powell*,⁸⁴ the Court held that when the state provides a full and fair opportunity to litigate a Fourth Amendment claim, the Constitution does not require that the prisoner be granted habeas relief on the ground that evidence obtained in an unconstitutional search and seizure was used at his trial. Although *Stone* represents a significant reduction in constitutional protection, the Court has resisted further opportunities to remove other substantive constitutional claims from habeas review.⁸⁵ However, in no case prior to *Brecht* has the Court imposed a different substantive standard for reviewing the same constitutional violation, depending on whether the claim was reviewed on direct appeal or collateral review.⁸⁶ By formulating a more rigorous harmless error standard for habeas review, and inexplicably shifting the burden of proof from the government to the petitioner, the *Brecht* Court has imposed as formidable a substantive barrier to prevailing on meritorious constitutional claims as any that the Court has ever erected.

Prior to *Brecht*, a federal court was precluded from granting habeas relief with respect to constitutional trial errors unless three conditions were met: first, that a non-Fourth Amendment constitutional violation was committed; second, that the petitioner was not procedurally barred from having his claim heard on the merits; and third, that the state reviewing court concluded,

83. The Habeas Corpus Reform Act (known as the "Biden Bill") presently being considered by Congress would amend the habeas corpus act in some respects, although largely incorporating several of the Supreme Court's most restrictive rulings. With regard to *Brecht*, the bill requires the state to bear the burden of proving harmlessness, and also requires de novo review by federal courts of state court rulings on matters of federal law. See S. 1441, 103d Cong., 1st Sess. § 2257(b) (1993); see also Daniel Wise, *House, Senate Diverge On Altering Habeas Law*, N.Y.L.J., Nov. 9, 1993, at 1.

84. 428 U.S. 465, 489-496 (1976).

85. See *Withrow v. Williams*, 113 S. Ct. 1745 (1993) (Miranda claims); *Kimmelman v. Morrison*, 477 U.S. 365 (1986) (Sixth Amendment claims of ineffective assistance of counsel); *Rose v. Mitchell*, 443 U.S. 545 (1979) (equal protection claims involving grand jury discrimination); *Jackson v. Virginia*, 443 U.S. 307 (1979) (due process claims of insufficient evidence).

86. Harmless error is more appropriately classified as a substantive rule than a procedural rule. See ROGER J. TRAYNOR, *THE RIDDLE OF HARMLESS ERROR* 39-40 (1970) ("[A] harmless-error rule could hardly be deemed procedural. It has nothing to do with regulating the methods by which the facts are made known to the court. It does not come into play until all the facts are known, the area of dispute is defined, and the materials have been presented for the determination of rights and duties. Far from being procedural, a harmless-error rule is of a piece with substantive rules, for it too is a mandate to the judge, at this stage the appellate judge, calling for the last word on the legal effect of the findings."); see also Edmund M. Morgan, *Rules of Evidence: Substantive or Procedural?*, 10 VAND. L. REV. 467, 468 (1957).

erroneously, either that no constitutional violation occurred, or notwithstanding the violation, that no reasonable possibility existed that the violation contributed to the result.⁸⁷ Only if all three of these conditions were met would a federal court have the discretionary authority to vacate the conviction.⁸⁸ Moreover, when these conditions are met, as in *Brecht*—when the state has committed a constitutional violation and then arguably failed to correct it—then a federal judicial policy of nonintervention, or diminished opportunity for intervention, requires “some reasoned institutional justification” for restricting redetermination on the merits.⁸⁹ By limiting federal redetermination in instances of acknowledged constitutional violations, and under circumstances in which review is not procedurally barred, the majority in *Brecht* authorized a radical departure from settled practice without any principled justification for such a result.

The Court’s failure to provide a reasoned analysis is graphically illustrated by its cursory reference to the policy of finality as one of the principal grounds for its decision. To be sure, the rhetoric of finality has been the driving force behind the Court’s restriction of habeas review.⁹⁰ The rationale usually attributed to finality in habeas litigation is to accord conclusiveness to a presumptively correct state judgment that has survived direct review within the state court system. The Court in *Brecht* simply asserted, without any further elaboration, that a state court should be permitted to rely on the policy of finality to protect its judgment from collateral attack. The Court cited three habeas decisions for that assertion.⁹¹ Unlike *Brecht*, none of those cases involved a petition for collateral review to remedy a conceded constitutional violation that the state review process arguably failed to correct under the federal harmless error standard. There is no presumption of correctness to such a judgment, nor any institutional justification for according conclusiveness to that judgment. To be sure, the interest in finality is implicated whenever a judgment is challenged collaterally. However, if finality

87. *Brecht* does not address whether its new standard applies if the state court never considered the harmless error issue because it found no constitutional error. The Court’s emphasis in *Brecht* on the illogic of requiring a federal court to engage in the identical harmless error analysis review that *Chapman* requires state courts to engage suggests that the new approach to harmless error review under *Brecht* would not be applicable when the state court did not review the constitutional error under the *Chapman* standard. For a recent circuit court decision adopting this approach, see *Orndorff v. Lockhart*, 998 F.2d 1426, 1430 (8th Cir. 1993).

88. The Court has consistently asserted that habeas is an equitable remedy and that a court always has the discretion to grant or deny the writ. See *Fay v. Noia*, 372 U.S. 391, 438 (1963) (describing discretionary nature of granting habeas corpus writ).

89. Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 451 (1963).

90. Patchel, *supra* note 2, at 943. Professor Bator’s functional analysis of habeas review has been one of the most influential philosophical justifications for the Court’s new restrictive approach to habeas review. See generally Bator, *supra* note 89 (discussing and analyzing Court’s functional analysis).

91. *Brecht v. Abrahamson*, 113 S. Ct. 1710, 1720 (1993) (citing *Wright v. West*, 112 S. Ct. 2482 (1992)); *McCleskey v. Zant*, 111 S. Ct. 1454, 1468-69 (1991); *Wainwright v. Sykes*, 433 U.S. 72, 90 (1977).

could be invoked to justify restricting the availability of habeas relief when a state judgment concededly is marred by constitutional error, as in *Brecht*, then federal courts could use finality to justify restricting habeas conceivably in every context. Congress could hardly have intended such a construction when it enacted the Habeas Corpus Act.

The Court's reliance on the policies of federalism and comity suffers from the same instrumentalism. The Court merely reiterated the familiar rhetoric of federalism and comity: "States possess primary authority for defining and enforcing the criminal law";⁹² states "hold the initial responsibility for vindicating constitutional rights";⁹³ and federal interference with such state duties "frustrate[s] both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights."⁹⁴ However, invoking the rhetoric of judicial deference in the context of a conceded deprivation of a fair trial is patently disingenuous. Indeed, one might reasonably view such a context as the paradigmatic occasion for collateral review under habeas corpus, rather than a cause for indiscriminate deference to state constitutional derelictions.

Moreover, the Court argues that federal review of constitutional errors under *Chapman* is unnecessary because no evidence shows that states are failing to protect federal constitutional rights. This argument goes too far. In essence, taken to its logical conclusion, the Court seems to suggest that habeas review is unnecessary because states are satisfactorily protecting constitutional rights. In addition, this argument also misconceives the role of habeas as a deterrent to unconstitutional state action. The writ, although substantially weakened, is nonetheless the only recourse, save for certiorari to the Supreme Court, for federal redress of state constitutional violations that have gone uncorrected in state proceedings. *Brecht* ignores this point: the prosecutor in *Brecht* engaged in deliberate and fundamentally unfair conduct that violated the defendant's due process right to a fair trial. Every reviewing court agreed on this point; their disagreement was over the extent of the prejudice. One can hardly doubt that foreclosing a federal court from applying longstanding federal harmless error doctrine to measure the extent of that prejudice and substituting instead a virtually unreachable standard would serve the interests of federalism and comity. However, such action would also fail to protect federal constitutional rights from encroachments by state prosecutors and judges.

Indeed, *Brecht's* impact will not likely be lost on state officials. Prosecutors now know that a conviction marred by constitutional trial error that survives state review will be further insulated from collateral attack. State appellate courts now know that an affirmance of a conviction despite constitutional error is more secure under *Brecht* than ever before.

92. *Brecht v. Abrahamson*, 113 S. Ct. at 1720 (quoting *Engle v. Isaac*, 456 U.S. 107, 128 (1982)).

93. *Id.*

94. *Id.*

The Court's reliance on federalism and comity arguably is relevant in other contexts. For example, when state prisoners have defaulted on state claims, have otherwise abused process, or have invoked new constitutional principles that were not apparent when their conviction was obtained, state courts may be acting reasonably and in good faith in reviewing, or declining to review, constitutional claims. Indeed, unless a petitioner can advance a sufficient claim of actual innocence, a petitioner would be hard put to demonstrate that the equities favor federal intervention. However, one cannot make a similar argument for federal restraint when: (1) the state itself has defaulted in upholding constitutional rights; (2) the petitioner has made a good-faith attempt to litigate her constitutional claims in the state courts; and (3) the state's judgment is being assailed for failing to vindicate the violation of the petitioner's constitutional rights. The equities in such circumstances plainly favor the petitioner, not the state, and federal abstention, or diminished opportunity for correction, in Justice White's view, is "inexplicable."⁹⁵

Thus, the majority has no support when it asserts that "it scarcely seems logical to require federal courts to engage in the identical approach to harmless-error review that *Chapman* requires state courts to engage in on direct review."⁹⁶ It is no more illogical to require de novo review of the state's harmless error determination than to require de novo review by federal courts as to whether a state constitutional error was committed at all.⁹⁷ Indeed, it is both illogical and unfair to deny de novo federal review of constitutional errors under the federal standard when the state court arguably has not accorded a petitioner a full and fair review. To be sure, federal courts accord state courts considerable deference, particularly with respect to state fact-finding determinations.⁹⁸ However, federal courts never accord deference for erroneous applications of federal law. An erroneous application of *Chapman's* federal standard has never been entitled to a deferential standard of review.

Moreover, it is beside the point for the Court to assert that state courts "occupy a superior vantage point from which to evaluate the effect of trial error" and "are fully qualified to identify constitutional error and evaluate its prejudicial effect on the trial process."⁹⁹ The undeniable fact is that the prosecutor in *Brecht* committed a constitutional transgression, and the state appellate court arguably failed in its constitutional obligation to evaluate that violation correctly. When the state defaults in protecting constitutional rights, either in committing the violation or failing to correct it, it is neither principled nor logical to suggest that federalism and comity prevent a federal court from

95. *Id.* at 1727 (White, J., dissenting).

96. *Id.* at 1721.

97. *Id.* at 1710 (Stevens, J., concurring).

98. See 28 U.S.C. § 2254(d) (1988) (stating that state court findings of fact are entitled to presumption of correctness and are reversible only when found to be clearly erroneous); *Sumner v. Mata*, 449 U.S. 539, 546-547 (1981) (discussing § 2254(d)).

99. *Brecht v. Abrahamson*, 113 S. Ct. 1710, 1721 (1993).

redressing that violation under the self-same federal standard that the state court misapplied initially.

For similar reasons, the majority's reliance on "social costs" for replacing the *Chapman* standard on habeas review is illogical and perverse. To the Court, these costs outweigh the benefits of correcting constitutional errors, including the benefits of deterring state prosecutors and judges from violating constitutional rights and of providing judicial relief to a person whom society has wronged. Once again, if carried further, this justification would abolish collateral review. Every form of collateral review necessitates expenditure of time and resources, frequently involves erosion of memory and dispersion of witnesses, and may frustrate society's interest in the prompt administration of justice. The Court has consistently invoked these "costs" as one of the principal justifications to restrict habeas review in other contexts, notably defaulted claims,¹⁰⁰ Fourth Amendment claims,¹⁰¹ and abuses of the writ.¹⁰²

However, as Justice O'Connor observed, "such costs are inevitable whenever relief is awarded."¹⁰³ Moreover, there is a significant difference between computing social costs when the equities favor the state and when the equities favor the petitioner. Plainly, if the prosecutor in *Brecht* had been sensitive to the accused's rights and behaved ethically and professionally, the prosecutor would not have violated a well-established constitutional rule. Clearly, the prosecutor in *Brecht* knew exactly what he was doing. The prosecutor measured his conduct not against a legal or ethical norm, but against a prediction that the appellate court would view the extra mileage gained from violating the defendant's due process rights as harmless. Of course, if the prosecutor had not engaged in such calculated misconduct, no court, federal or state, would have had occasion to invoke the rhetoric of social costs. The state appellate court would have affirmed the conviction, and federal review would have been unavailable and unnecessary.

By the same token, if the state appellate court had correctly evaluated the prosecutor's constitutional violation in the first place and found under the *Chapman* standard that the defendant deserved a new trial, the party responsible for that burden properly would have borne the costs of litigation. Indeed, these costs would have been viewed as the price the Constitution imposes on the state for violating a defendant's constitutional rights. By contrast, costs that the state originally avoided by defaulting in its duty to provide prompt and effective relief should not later provide the so-called "prudential" basis¹⁰⁴ for imposing on the other party whose rights were violated a new and more stringent burden when that party seeks collaterally to vindicate his constitutional rights.

Moreover, *Brecht* does not reduce the number of federal petitions or relieve the federal courts of the burden of habeas litigation. Petitioners will

100. *Coleman v. Thompson*, 111 S. Ct. 2546, 2558-59 (1991).

101. *Stone v. Powell*, 428 U.S. 465, 478 n.11 (1976).

102. *McCleskey v. Zant*, 111 S. Ct. 1454, 1468-69 (1991).

103. *Brecht*, 113 S. Ct. at 1732 (O'Connor, J., dissenting).

104. *Withrow v. Williams*, 113 S. Ct. 1745, 1758 (1993) (O'Connor, J., dissenting).

raise the same constitutional challenges as before or seek to wedge their arguments into the narrow exception for "deliberate and egregious" misconduct.¹⁰⁵ The federal court must still review the entire record *de novo*, although it now must evaluate the constitutional error under a more exacting standard. Justice O'Connor noted that *Kotteakos* is a much more lenient, if not more precise, standard than *Chapman*: "[I]t will permit more errors to pass uncorrected It does not decrease the burden of identifying those cases that warrant relief."¹⁰⁶

A hypothetical closely resembling one that Justice White offered in *Stone v. Powell* illustrates the illogic of the Court's double standard.¹⁰⁷ Suppose that two defendants, A and B, are jointly indicted for murder, are tried separately, and are convicted on the same evidence. Each brings a state appeal, arguing that the prosecutor made a constitutionally impermissible reference to their failure to testify. The state appellate court agrees that constitutional error was committed, but that under *Chapman* the error was harmless. A seeks certiorari to the Supreme Court; B does not. The Supreme Court grants A's petition and reverses A's conviction, concluding that the error was not harmless under the *Chapman* standard. B then brings a habeas petition in federal court. The court, consistent with the Supreme Court's determination, concludes that constitutional error was committed and that the error was not harmless under *Chapman*. However, the writ is denied because under the new *Brecht* standard, the error is found harmless because B did not prove that the error caused actual and substantial prejudice. Although A and B were convicted on the same evidence and assert the same constitutional error, A obtains relief because the error was not harmless beyond a reasonable doubt, while B does not because B could not demonstrate that the self-same error caused actual prejudice. As Justice White observed: "I cannot believe that Congress intended this result."¹⁰⁸

III. THE EXPANSION OF HARMLESS ERROR

The scope and the standards governing appellate review of trial errors have undergone a revolution under the Burger and Rehnquist Courts. The harmless error rule authorizes appellate courts to sustain convictions when the defendant's guilt is sufficiently clear, even though errors may have produced an unfair trial.¹⁰⁹ The rule originally developed as an appellate

105. *Brecht v. Abrahamson*, 113 S. Ct. 1710, 1731 (1993) (O'Connor, J., dissenting).

106. *Id.*

107. *Stone v. Powell*, 428 U.S. 465, 536-37 (1976) (White, J., dissenting). I thank my colleague, Don Doernberg, for suggesting this variation.

108. *Id.* at 537.

109. *Rose v. Clark*, 478 U.S. 570, 588-89 (1986) (Stevens, J., concurring) ("An automatic application of harmless-error review in case after case, and for error after error, can only encourage prosecutors to subordinate the interest in respecting the Constitution to the ever-present and always powerful interest in obtaining a conviction in a particular case.").

Essentially, three different standards exist for appellate review of trial errors: the standard for constitutional error formulated in *Chapman v. California*, 386 U.S. 18 (1967), the standard

mechanism to prevent “the mere etiquette of trials” or the “minutiae of procedure” from upsetting a verdict.¹¹⁰ The rule has evolved into the most powerful judicial weapon to preserve convictions whenever an appellate tribunal, sitting as a “super-jury,” concludes that the defendant is clearly guilty or that the error has not resulted in substantial prejudice. The most perverse byproduct of the new harmless error jurisprudence is its corrosive impact on the administration of criminal justice. The awareness that sufficient proof of guilt will insulate a conviction from appellate reversal encourages prosecutors and trial judges to overlook or deliberately violate constitutional rights or engage in other evidentiary and procedural violations because reviewing courts will find such errors to be harmless.¹¹¹ As Judge Jerome Frank observed, to the extent that appellate courts routinely affirm convictions despite serious violations, they can be viewed as condoning lawlessness, and themselves promoting disrespect for the law.¹¹² By further insulating state convictions from habeas review through the creation of a more relaxed harmless error test, *Brecht* encourages state officials—prosecutors, trial judges, and appellate judges—to overlook constitutional norms, or take them less seriously.

Viewed historically, harmless error review was never intended to override unfair process. In *Bollenbach v. United States*,¹¹³ the Court stated that “the question is not whether guilt may be spelt out of a record, but whether guilt has been found by a jury according to the procedure and standards appropriate for criminal trials in the federal courts.”¹¹⁴ The Court’s more recent approach appears to equate a determination of guilt with a determination of fairness. In *Rose v. Clark*,¹¹⁵ the Court wrote: “Where a reviewing court can find that the record developed at trial establishes guilt beyond a reasonable doubt, the interest in fairness has been satisfied and the judgment should be affirmed.”¹¹⁶ The intensity with which courts throughout the country have invoked harmless error to preserve convictions despite serious constitutional, evidentiary, and procedural violations inevitably invites the cynical response

for nonconstitutional error formulated in *Kotteakos v. United States*, 328 U.S. 750 (1946), and the outcome-determinative standard for constitutional error formulated in *Strickland v. Washington*, 466 U.S. 668 (1984). See generally Michael T. Fisher, Note, *Harmless Error, Prosecutorial Misconduct, and Due Process: There’s More to Due Process Than the Bottom Line*, 88 COLUM. L. REV. 1298 (1988) (arguing that prosecutorial misconduct should not be examined using outcome-derivative test).

110. *Bruno v. United States*, 308 U.S. 287, 294 (1939).

111. See Steven H. Goldberg, *Harmless Error: Constitutional Sneak Thief*, 71 J. CRIM. L. & CRIMINOLOGY 421, 440 (1980) (arguing that harmless error tempts prosecutors to use evidence or techniques they would otherwise avoid because of potential appellate reversal).

112. *United States v. Antonelli Fireworks, Co.*, 155 F.2d 631, 662 (2d Cir.) (Frank, J., dissenting), cert. denied, 329 U.S. 742 (1946).

113. 326 U.S. 607 (1946).

114. *Bollenbach v. United States*, 326 U.S. 607, 614 (1946).

115. 478 U.S. 570 (1986).

116. *Rose v. Clark*, 478 U.S. 570, 579 (1986).

that "if [a defendant] is obviously guilty as charged, he has no fundamental right to be tried fairly."¹¹⁷

The harmless error rule has been described as "chaotic,"¹¹⁸ "wayward,"¹¹⁹ and "insidious"¹²⁰ due to its standardless and ad hoc application by appellate judges who purport to be making precise quantitative and qualitative calculations of the impact of errors based on the "cold black and white of a printed record."¹²¹ Under the new harmless error jurisprudence, the trial's outcome transcends the process. The reviewing court's apparent unwillingness to appreciate that many errors cannot be quantified, and its inability to measure accurately the distorting impact that such errors can have on the truth-finding process, is increasingly evident, but increasingly deemed irrelevant.¹²²

Brecht offers a striking example of the essential absurdity of harmless error review. Prior to the Supreme Court's review, three state appellate judges and a federal district court concluded that the prosecutor's misconduct was sufficiently harmful to require a new trial. Another state appellate court, consisting of six judges, found the prosecutor's misconduct insufficiently harmful. Another panel of three federal judges found the misconduct harmless under the much more relaxed standard for nonconstitutional errors.

However, the most pernicious effect of *Brecht* is not that it will inevitably prevent many constitutional violations from being corrected, although that effect is an inevitable byproduct. Rather, *Brecht* provides an attractive inducement to state officials either to disregard constitutional rights entirely, or to view the violation of the right less seriously than would be the case if effective federal oversight were available. Under the *Brecht* standard, a federal court on habeas review could conclude that a constitutional error was committed and that the error was harmful under the *Chapman* standard, but nevertheless deny the writ because the petitioner failed to prove that the violation caused actual and substantial prejudice to his case. Furthermore, even though *Arizona v. Fulminante*¹²³ subjects virtually every type of constitutional violation to harmless error review, *Brecht* effectively locks the door to meaningful habeas review of most constitutional trial violations.¹²⁴

117. Note, *Prosecutor Indiscretion: A Result of Political Influence*, 34 IND. L.J. 477, 486 (1959).

118. Stephen A. Saltzburg, *The Harm of Harmless Error*, 59 VA. L. REV. 988, 998 (1973).

119. TRAYNOR, *supra* note 86, at 13.

120. Goldberg, *supra* note 111, at 421.

121. *United States v. Grunberger*, 431 F.2d 1062, 1067 (2d Cir. 1970) (quoting *United States v. Ah Kee Eng*, 241 F.2d 157, 161 (2d Cir. 1957)).

122. For several examples of the courts' refusal to recognize harmful conduct, see Bennett L. Gershman, *The New Prosecutors*, 53 U. PITT. L. REV. 393, 428 n.226 (1992).

123. *Arizona v. Fulminante*, 499 U.S. 279 (1991).

124. Some federal courts have adopted Justice Stevens' cautionary approach in reviewing constitutional violations under the new *Brecht* standard, suggesting that the new standard may not have locked the courthouse doors entirely. For cases upholding the grant of the writ under the new standard, see *Shaw v. Collins*, 5 F.3d 128 (5th Cir. 1993) (Sixth Amendment confrontation violation for prosecutor to refuse to call complaining witness); *Duest v. Singletary*, 997 F.2d

IV. CONCLUSION

Brecht v. Abrahamson strikes a heavy blow to effective federal oversight of state constitutional violations. *Brecht* does not prevent a petitioner from entering the federal courthouse gate to have his petition considered on the merits, but it locks the courtroom doors to meaningful review of those merits. The Court reached a confusing and illogical result in an unprincipled manner. Having granted certiorari to examine whether a discrete constitutional rule—a *Doyle* violation—should be analyzed on collateral review under a more relaxed harmless error standard, the Court concluded that every constitutional claim involving trial error should be similarly evaluated. The Court justified this ruling by invoking the rhetoric of finality, federalism, and judicial economy that traditionally has been associated with institutional concerns over protecting judgments that were fairly obtained or when the complaining party engaged in procedural default or abuse of the writ. *Brecht* is the first case to insulate from effective federal habeas review state judgments that are unconstitutionally obtained, but nevertheless have been upheld following potentially flawed state appellate review. Although purporting to be based on valid institutional considerations, *Brecht v. Abrahamson* is an illogical and perverse extension of the Rehnquist Court's campaign to rid the federal courts of habeas corpus.

1336 (11th Cir. 1993) (Eighth Amendment violation to allow jury to consider vacated conviction when deciding whether to impose death sentence), *cert. denied*, 114 S. Ct. 1126 (1994); *Stoner v. Sowders*, 997 F.2d 209 (6th Cir. 1993) (Sixth Amendment confrontation violation to use videotape deposition testimony instead of live witness testimony); *Lowery v. Collins*, 996 F.2d 770 (5th Cir. 1993) (Sixth Amendment confrontation violation to use videotaped interview of complaining witness); *Standen v. Whitley*, 994 F.2d 1417 (9th Cir.) (due process violation to allow withdrawn guilty plea to be used as substantive evidence against defendant), *cert. denied*, 114 S. Ct. 579 (1993); *Henry v. Estelle*, 993 F.2d 1423 (9th Cir. 1993) (due process violation to admit evidence of uncharged crime); *McKinney v. Rees*, 993 F.2d 1378 (9th Cir. 1993) (due process violation to use character evidence to show propensity), *cert. denied*, 114 S. Ct. 622 (1993); *Cumbie v. Singletary*, 991 F.2d 715 (11th Cir. 1993) (Sixth Amendment confrontation violation to allow complaining witness to testify outside courtroom and outside defendant's presence), *cert. denied*, 114 S. Ct. 650 (1993).

