CHAPMAN V. CALIFORNIA: HARMLESS ERROR AND THE WARREN COURT'S PROGRESSIVE LEGACY

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I. INTRODUCTION

The Warren Court is rightly celebrated for its principled protection of individual liberty.[1] Consistent with the core values animating the Framers' adoption of the Bill of Rights,[2] it sought to ensure that criminal defendants are provided the full measure of constitutional rights when the state seeks to deprive them of life, liberty, or property.[3] The breadth and scope of its criminal procedure jurisprudence was so far reaching—over six hundred cases—that many have characterized it as a "revolution."[4]

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1. *See, e.g.*, Tracey L. Meares, *Everything Old Is New Again: Fundamental Fairness and the Legitimacy of Criminal Justice*, 3 OHIO ST. J. CRIM. L. 105 (2005). As Professor Meares states:

> In a retrospective of the Warren Court's work one must first celebrate. Under Chief Justice Earl Warren's leadership the Supreme Court rewrote the corpus of constitutional law—especially in the criminal procedure arena. . . . So here and now let me join the chorus of those who claim that the Warren Court's creative work rivals that of the eighteenth century Marshall Court's in scope and in vision.

Id. at 105–06.

2. As the Supreme Court expressed in Duncan v. Louisiana, 391 U.S. 145, 155 (1968), "[the Double Jeopardy Clause's] right to jury trial is granted to criminal defendants in order to prevent oppression by the Government." *See also* United States v. Martin Linen Supply Co., 430 U.S. 564, 569 (1977) ("At the heart of [the protection against Double Jeopardy] is the concern that permitting the sovereign freely to subject the citizen to a second trial for the same offense would arm Government with a potent instrument of oppression."); Turner v. United States, 396 U.S. 398 (1970).

3. *See, e.g.*, Miranda v. Arizona, 384 U.S. 436, 467 (1966) (holding that police interrogation of criminal defendants violates the Fifth Amendment unless there are procedural safeguards); Gideon v. Wainwright, 372 U.S. 335, 344 (1963) (holding that the guarantee of counsel to criminal defendants is a fundamental right).

4. *See, e.g.*, Corinna Barrett Lain, *Countermajoritarian Hero or Zero? Rethinking the Warren Court's Role in the Criminal Procedure Revolution*, 152 U. PA. L. REV. 1361, 1363–64 (2004) ("'Together, [the Warren Court's criminal procedure rulings] produced what is widely known as the 'criminal procedure revolution,' so vast were the protections afforded to unpopular and politically

Chapman v. California[5] seems at first blush to stand in stark contrast with this view of the Warren Court. The Court in *Chapman* held that violations of constitutional rights may be subject to harmless error analysis.[6] That is, some constitutional violations may be deemed so insignificant as to warrant denying relief. How is one to reconcile this seemingly callous indifference to the Constitution with the Warren Court's almost-decade-long effort to breathe constitutional life into the criminal justice world?

While some have concluded that *Chapman* should be seen as reflective of a different Warren Court, one that sought to retreat from its earlier protections of the rights of indigent defendants, this Article posits the opposite.[7] After first discussing the state of the law preceding *Chapman*, this Article deconstructs the Court's opinion in *Chapman*.[8] The Article then addresses *Chapman*'s legacy.[9] Acknowledging *Chapman*'s incomplete undertaking, it makes a claim that *Chapman* should be seen as an integral part of the Warren Court's progressive effort to make the Constitution more meaningful in criminal cases across the country.[10]

II. THE ROAD TO CHAPMAN V. CALIFORNIA*: CAN CONSTITUTIONAL ERRORS BE HARMLESS?*

On one level, it seems intuitive to require that appellate relief be granted whenever an error has occurred at trial. A trial is not an open-ended endeavor to ascertain guilt, free from restraint, where anything goes so long as the court gets to the truth of the matter.[11] Rather, it is a particular form of adjudication, one whose procedures must conform to

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powerless criminal defendants."); *id.* at 1365 n.25 (citing Francis A. Allen, *The Judicial Quest for Penal Justice: The Warren Court and the Criminal Cases*, 4 U. ILL. L.F. 518, 519 (1975)) ("In the sixteen years of Chief Justice Warren's tenure, the Supreme Court decided upwards of 600 criminal cases."); James A. Thomson, *Capturing the Future: Earl Warren and Supreme Court History*, 32 TULSA L.J. 843, 851 n.52 (1997) (listing scholars who have characterized the Warren Court's criminal procedure jurisprudence as a "revolution").

5. 386 U.S. 18 (1967).

6. *Id.* at 22.

7. *See, e.g.*, Charles J. Ogletree, Jr., Arizona v. Fulminante*: The Harm of Applying Harmless Error to Coerced Confessions*, 105 HARV. L. REV. 152, 157–58 (1991) ("[T]he extension of the harmless error analysis to constitutional errors in the landmark case of *Chapman* has allowed the Court to dilute the practical effect of many of these important [criminal procedure] protections."); Carol S. Steiker, *Counter-Revolution in Constitutional Criminal Procedure? Two Audiences, Two Answers*, 94 MICH. L. REV. 2466, 2468 (1996).

8. *Infra* pt. III.

9. *Infra* pt. IV.

10. *Infra* pt. IV.B.

11. Charles S. Chapel, *The Irony of Harmless Error*, 51 OKLA. L. REV. 501, 510 (1998).

prescribed rules and fundamental norms.[12] Ensuring that these twin goals—an accurate fact-finding through the use of a fair process—are met might suggest that when the process is compromised, a new trial must ensue. Not doing so not only undermines fidelity to process but has the potential to incentivize poor trial practice and perhaps even deliberate malfeasance.

Such reasoning was reflected in the approach toward appellate relief for almost half a century.[13] While the early English common law courts restricted appellate relief in criminal cases only to those cases where "upon all the evidence it appeared to the judges that the truth had thereby not been reached," in the 1830s, courts adopted the "Exchequer Rule."[14] Under this approach, appellate courts presumed that evidentiary error "caused prejudice and therefore required a new trial."[15] This approach, first developed in English courts, came to be widely accepted in the United States. By the early part of the 20th century, it had come to be adopted in the majority of jurisdictions.[16]

Over time it became clear that the "Exchequer Rule" was leading to a tyranny of process and was imposing unacceptable costs on the legal system.[17] Criminal trials were perceived as being transformed from adjudications of guilt into opportunities "for sowing reversible error in the record."[18] The rule was seen as delaying litigation, increasing its expense, and potentially causing counsel to deliberately commit mistakes in the hopes of obtaining reversal on appeal.[19]

It became widely acknowledged that error-free trials were unlikely and that appellate relief may not be warranted for every error that might have occurred at trial.[20] The underlying rationale for the harmless error rule was to foster economic and judicial efficiency by avoiding reversal

12. *Id.* at 509–10.

13. In the 1830s, the courts followed the approach of the "Exchequer Rule," which required automatic reversal whenever there was an error in the trial court. However, the courts' approach to appellate relief began to shift in the late 1890s first with Bram v. United States, 168 U.S. 532 (1897), and then with Motes v. United States, 178 U.S. 458 (1900). Nolan E. Clark, Note, *Harmless Constitutional Error*, 20 STAN. L. REV. 83, 83–85 (1967).

14. *Id.* at 83 (quoting 1 JOHN HENRY WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 21, 365 (3d ed. 1940)).

15. Daniel Epps, *Harmless Errors and Substantial Rights*, 131 HARV. L. REV. 2119, 2127 (2018) (quoting WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 27.6, 1298 (4th ed. 2004)).

16. *Id.* at 2127–28.

17. *See, e.g.*, Kotteakos v. United States, 328 U.S. 750, 759 (1946) (citation omitted) ("[C]ourts of review, 'tower above the trials of criminal cases as impregnable citadels of technicality.'").

18. *Id.*

19. Clark, *supra* note 13, at 83–84.

20. *E.g.*, United States v. Hasting, 461 U.S. 499, 508–09 (1983) (citing Brown v. United States, 411 U.S. 223, 231–32 (1973)).

of "convictions for small errors or defects that have little, if any, likelihood of having changed the result of the trial."[21]

In response to this criticism, every state adopted a harmless error rule either by statute or judicial opinion.[22] The same move away from the "Exchequer Rule" was true in federal cases.[23] In 1919, Congress adopted a harmless error rule in Section 269 of the revised Judicial Code.[24] This provision restricted federal courts from granting relief to only cases "where the substantial rights of the parties were adversely affected at trial."[25] This "substantial rights" approach focused on the impact of the error on the verdict, with relief being given only for those errors significant enough to affect the outcome.

California rejected the "Exchequer Rule" through a constitutional provision approved by voters in 1911.[26] This provision stated that "[n]o judgment shall be set aside . . . unless, after an examination of the entire [case], including the evidence, the court shall be of the opinion that the error complained of has resulted in a *miscarriage of justice*."[27] Five decades later, it was readopted in the state's revised Constitution with one minor change—the word "case" was replaced with "cause."[28]

While California's constitutional provision did not define the phrase "miscarriage of justice," in 1956 the California Supreme Court held that "a 'miscarriage of justice' should be declared only when the court, 'after an examination of the entire cause, including the evidence,' is of the 'opinion' that it is *reasonably probable* that a result more favorable to the appealing party would have been reached in the absence of the error."[29] The Court added that this standard "must necessarily be based upon reasonable probabilities rather than upon mere possibilities; otherwise the entire purpose of the constitutional provision would be defeated."[30]

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21. Chapman v. California, 386 U.S. 18, 22 (1967). *See also Hasting*, 461 U.S. at 509 (citation omitted) ("The goal [of harmless error review] is 'to conserve judicial resources by enabling appellate courts to cleanse the judicial process of prejudicial error without becoming mired in harmless error.'").

22. Clark, *supra* note 13, at 84.

23. *Id.* at 83–85 (citing Bram v. United States, 168 U.S. 532 (1897) and Motes v. United States, 178 U.S. 458 (1900)).

24. Epps, *supra* note 15, at 2128.

25. Sam Kamin, *Harmless Error and the Rights/Remedies Split*, 88 VA. L. REV. 1, 10 (2002); Kotteakos v. United States, 328 U.S. 750, 760 (1946).

26. C. Elliot Kessler, *Death and Harmlessness: Application of the Harmless Error Rule by the Bird and Lucas Courts in Death Penalty Cases—A Comparison & Critique*, 26 U.S.F. L. REV. 41, 46 (1991).

27. *Id.* (emphasis in original).

28. *Id.* at n.14.

29. *Id.* at 47 (quoting People v. Watson, 299 P.2d 243, 254 (Cal. 1956) (en banc)).

30. *Id.*

Applying this test, California courts focused on the weight of the remaining evidence (after excising the erroneously admitted evidence), denying relief where there was "overwhelming evidence" against the defendant.[31]

For several decades after these harmless error tests were adopted by state and federal governments, it was widely assumed that they were limited to non-constitutional errors.[32] Indeed, until *Chapman*, the Supreme Court itself had not applied harmless error analysis in resolving a constitutional claim (with two exceptions).[33] This vast body of cases to which the Supreme Court had not applied harmless error for over 150 years after ratification of the Constitution, and even for almost 50 years after adoption of the federal harmless error statute, covered almost every constitutional provision implicated in criminal cases.[34] This included the seminal cases during the pre-Warren Court era that marked the birth of modern constitutional criminal procedure.[35]

Not only was harmless error simply absent from most of the Court's pre-*Chapman* jurisprudence, but the Court on more than one occasion specifically rejected harmless error analysis. For example, in *Payne v. Arkansas*, the Court stated:

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31. Chapman v. California, 386 U.S. 18, 23 (1967).

32. Clark, *supra* note 13, at 86 (citations omitted); Kamin, *supra* note 25, at 10; Note, *The Harmless Error Rule Reviewed*, 47 COLUM. L. REV. 450, 461 (1947).

33. Charles F. Campbell, Jr., *An Economic View of Developments in the Harmless Error and Exclusionary Rules*, 42 BAYLOR L. REV. 499, 506 (1990) ("Until the *Fahy* decision, no federal constitutional error had ever been found to be harmless."). *But see* Fahy v. Connecticut, 375 U.S. 85, 91–92 (1963) (holding that the admission of unconstitutionally obtained evidence was not harmless error); Motes v. United States, 178 U.S. 458 (1900). In *Motes*, while the Court granted relief to several co-defendants, it denied relief to Motes because he had confessed on the stand. The Court explained that "[i]t would be trifling with the administration of the criminal law to award him a new trial because of a particular error committed by the trial court, when in effect he has stated under oath that he was guilty of the charge preferred against him." *Id.* at 475–76. *Fahy* and *Motes* thus are the two exceptions to the observation that the Supreme Court had not used harmless error analysis in resolving constitutional claims prior to *Chapman*.

34. *See, e.g.*, Miranda v. Arizona, 384 U.S. 436 (1966) (involving the Fifth Amendment's privilege against self-incrimination); Sheppard v. Maxwell, 384 U.S. 333 (1966) (involving the Sixth Amendment's right to an impartial jury); Brady v. Maryland, 373 U.S. 83 (1963) (involving the Fourteenth Amendment's Due Process clause); Fong Foo v. United States, 369 U.S. 141 (1962) (involving the Fifth Amendment's Double Jeopardy provision); Travis v. United States, 364 U.S. 631 (1961) (implicating the venue provision in Article III, Section 2); Stirone v. United States, 361 U.S. 212 (1960) (involving the Fifth Amendment's grand jury indictment provision); Dusky v. United States, 362 U.S. 402 (1960) (involving defendant's competence to stand trial and the Fifth Amendment's Due Process clause); United States v. Provoo, 17 F.R.D. 183 (D. Md. 1955) (involving the Sixth Amendment's speedy trial provision), *aff'd*, 350 U.S. 857 (1955) (per curiam).

35. *See, e.g.*, Brown v. Mississippi, 297 U.S. 278 (1936) (coerced confession); Mooney v. Holohan, 294 U.S. 103 (1935) (use of perjured testimony); Norris v. Alabama, 294 U.S. 587 (1935) (jury discrimination); Powell v. Alabama, 287 U.S. 45 (1932) (counsel in capital cases); Tumey v. Ohio, 273 U.S. 510 (1927) (financially biased judge).

> Respondent suggests that, apart from the confession, there was adequate evidence before the jury to sustain the verdict. But where, as here, a coerced confession constitutes a part of the evidence before the jury and a general verdict is returned, no one can say what credit and weight the jury gave to the confession. And in these circumstances this Court has uniformly held that even though there may have been sufficient evidence, apart from the coerced confession, to support a judgment of conviction, the admission in evidence, over objection, of the coerced confession vitiates the judgment because it violates the Due Process Clause of the Fourteenth Amendment.[36]

Thus, prior to *Chapman*, while harmless error analysis was used widely to resolve non-constitutional errors, the Supreme Court had rarely endorsed its use for constitutional errors. On the contrary, on more than one occasion it had expressly rejected harmless error analysis, and its consistent practice had been to grant relief whenever there was a showing that a defendant had been denied a constitutional right.[37]

III. DECONSTRUCTING CHAPMAN V. CALIFORNIA

A. The Trial for the Killing of Billy Dean Adcock

On October 17, 1962, Ruth Chapman and Thomas Teale checked into a motel in Fresno, California.[38] They paid for their room with what later turned out to be a bad check.[39] That night they drove over 100 miles away to Lodi, California.[40] After spending three hours drinking at one bar, Chapman was heard telling Teale, "Let's go, we are not going to do anything here," or "We can't do anything here, let's go."[41] The two then went to another bar in town, the Spot Club.[42] The bartender, Billy Dean

36. 356 U.S. 560, 567–68 (1958); *see also* Lynumn v. Illinois, 372 U.S. 528, 537–38 (1963); Spano v. New York, 360 U.S. 315, 324 (1959).

37. Chapman v. California, 386 U.S. 18, 42 (1967) (Stewart, J., concurring) (observing that "in a long line of cases, involving a variety of constitutional claims . . . this Court has steadfastly rejected any notion that constitutional violations might be disregarded on the ground that they were 'harmless'"); *see also* Spano v. New York, 360 U.S. 315, 324 (1959); Payne v. Arkansas, 356 U.S. 560, 568 (1958); Malinski v. New York, 324 U.S. 401, 404 (1945).

38. People v. Teale, 404 P.2d 209, 212 (Cal. 1965), *rev'd sub nom.* Chapman v. California, 386 U.S. 18 (1967).

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

Adcock, was the only other person at the bar.[43] Shortly after arriving around 2 a.m., the three left together.[44]

The next morning, the owner of the Spot Club found the bar in disarray, with papers scattered about and routine closing-time housekeeping tasks not having been performed.[45] In addition, the cash register had been broken into, and some money was missing.[46] Later that morning, Adcock's body was found partly submerged in an open ditch by the side of a road in a remote area north of town.[47] He had been shot three times in the head.[48] Numerous items belonging to Adcock were found near his body, including his wallet from which some money was missing.[49] Police also found a check for two dollars bearing a stamp, "Refer to Maker," which had been signed by Chapman.[50]

Forensic analysis showed the time of death to be about 3 a.m.[51] Two of the three gunshots had been fired from close range, entering the same wound on the left side of Adcock's head from a gun held about two inches away.[52] From a gun held about eighteen inches away, the third bullet entered the back of his head.[53] Although the murder weapon was not found, the bullets were determined to have been fired from a .22 caliber weapon, which was similar to one of two guns Chapman had purchased six days before the killing.[54]

Significant forensic evidence pointed to Adcock having been in Chapman and Teale's car and having been killed in it.[55] Serological and blood spatter evidence tied Chapman and Teale to the killing.[56] Adcock was determined to have Type A blood, and this same Type blood was found spattered in Chapman and Teale's car on the front floor mat, on the overhead fabric liner, on the dome light, and on the clothes rack in the back-seat area.[57] Type A blood was also found spattered on

43. *Id.*
44. *Id.*
45. *Id.*
46. *Id.*
47. *Id.*
48. *Id.*
49. *Id.*
50. *Id.*
51. *Id.*
52. *Id.*
53. *Id.*
54. *Id.*
55. *Id.*
56. *Id.*
57. *Id.*

Chapman's fur stole, dress, blouse, skirt, and shoes.[58] Blood of the same Type was also found spattered on Teale's shirt and jacket.[59] Adcock's presence in Chapman and Teale's car was also confirmed by forensic pattern analysis, which showed that numerous fibers taken from Adcock's shoes matched those found in the car, as did the red paint found both in the car and on Adcock's shoe.[60] Finally, hair matching that of Adcock was found in the car.[61]

Eight days later, Chapman was arrested by FBI agents in Missouri.[62] She spoke to the agents and denied involvement in Adcock's killing, giving conflicting accounts about her whereabouts on the day of the killing.[63] Contrary to both accounts she gave, investigators found a motel registration card, which showed that a few hours after the killing, a couple had checked into a motel about fifty miles away under the names of "Mr. and Mrs. T. L. Rosenthal."[64] The handwriting on the registration card was found to match Chapman's writing.[65] The clerk of the motel later testified that the registrant gave a false license number and that the car the motel guests were driving matched Chapman and Teale's car.[66]

When she was brought back to California, Chapman was not arraigned for several days, nor was an attorney appointed for her during that time.[67] Instead, at the prosecutor's request, she was taken to a psychiatrist who evaluated her for several hours regarding the crime.[68] Prior to the examination, Chapman was not advised of her right to counsel nor of her right to remain silent.[69] Chapman made a detailed eighty-four-page-long statement to the psychiatrist, which later became the subject of court testimony when the psychiatrist was called as a witness by the prosecution.[70]

A week after Chapman's arrest, Teale was arrested in New Orleans.[71] The police found him with a second gun that Chapman had

58. *Id.*
59. *Id.*
60. *Id.*
61. *Id.*
62. *Id.* at 213.
63. *Id.*
64. *Id.*
65. *Id.*
66. *Id.*
67. Brief for the Petitioners at 5, *Chapman v. California*, 386 U.S. 18 (1967) (No. 95) [hereinafter Pet'r's Br.].
68. *Id.* at 5–6.
69. *Id.* at 6.
70. *Id.*
71. *Teale*, 404 P.2d at 213.

purchased the same day she had allegedly purchased the missing murder weapon.[72] Teale was found with the car that he and Chapman had been driving at the time of Adcock's killing.[73]

After his return to California, Teale allegedly made statements to a fellow inmate that implicated Chapman in the killing.[74] According to the inmate, Teale admitted knowing Adcock and claimed to have not wanted the events to unfold as they did.[75] Teale allegedly related that, on the day of the murder, he and Chapman had been arguing about money all afternoon.[76] Teale proposed robbing Adcock but did not intend for it to go beyond that.[77] Teale, according to the inmate's account, had stopped the car after the robbery and was going to let Adcock out when Chapman suddenly shot Adcock in the back of the head and then two more times after Adcock had fallen to the ground.[78]

After the State presented its case at trial, including the extensive forensic evidence mentioned above, Chapman offered the testimony of a psychiatrist to show that she lacked mental capacity to form mens rea because she suffered from a "disassociative reaction" and that Chapman would "'black out' by simply not knowing" when she found herself in an uncontrollable situation.[79] The psychiatrist testified that, in his opinion, Chapman suffered a "hysterical alcoholic type of amnesia" after Teale allegedly beat her earlier that night. Chapman's past employers and her daughter also testified about Chapman's previous mental breakdown and drinking habits.[80]

In rebuttal, the prosecution called the psychiatrist who had examined Chapman upon her arrest.[81] The psychiatrist testified that Chapman could have had an attack of amnesia, and if it actually occurred, it took place at the time she shot Adcock—after the time of the robbery at the bar.[82] Defense counsel apparently was not permitted to cross-examine the psychiatrist.[83]

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72. *Id.*
73. *Id.*
74. *Id.*
75. *Id.*
76. *Id.*
77. *Id.*
78. *Id.*
79. *Id.* at 217.
80. Brief for the Respondent at 11, *Chapman v. California*, 386 U.S. 18 (1967) (No. 95) [hereinafter Resp't's Br.].
81. *Id.* at 11.
82. *Id.*
83. Pet'r's Br., *supra* note 67, at 7.

Neither Chapman nor Teale testified at trial.[84] However, in keeping with a provision in the California Constitution, the prosecutor made numerous references during closing argument to their failure to testify.[85] For example, with respect to who shot Adcock, the prosecutor argued,

> So you can see that whichever one of these defendants shot him, and once again, ladies and gentlemen, here is an area that I don't know who shot him, and you don't know who shot him, because we have had no testimony from that witness stand to tell you who shot him, and the only two persons in this courtroom that could tell you which one of them it was that shot him are the two defendants; but once again, they have both decided that they will not get up and raise their right hand and testify in this regard and subject themselves to cross-examination, so all we know is that one of them shot him.[86]

The prosecutor similarly drew attention to Chapman and Teale's silence when discussing Adcock's torn clothing, money in Teale's possession, Chapman's purchase of the two guns, Chapman and Teale's presence at the bar and at the scene of the murder, Chapman and Teale's drinking on the night of the crime, the false information on the motel registration card, a letter written by Chapman, Teale's possession of a loaded weapon when he was arrested, Teale's statement about having been in Lodi, the manner in which Adcock was shot, blood found on Chapman's clothing when she was arrested in Missouri, boxes that may have been mailed by the defendants, and Chapman's pre-trial statements.[87]

The prosecutor not only drew attention to Chapman and Teale's silence, but he urged the jury to make affirmative inferences of guilt from that silence. For example, he argued,

> Now, I will comment throughout my entire opening argument to you in reference to the fact that neither one of these defendants has seen fit to go up, raise their right hand, take that witness stand, tell you ladies and gentlemen of the jury exactly what did occur, explain to you any facts or details within their knowledge so that you would know. You would not have to—by His Honor's instructions you can draw an adverse inference to any fact within their knowledge that

84. *Teale*, 404 P.2d at 220.
85. Chapman v. California, 386 U.S. 18, 19 (1967).
86. *Id.* at 30–31.
87. *Id.* at 25.

> they couldn't testify to, and they have not subjected themselves, either one or both, to cross-examination.[88]

The trial court then gave the jury instructions, charging that the jury could draw adverse inferences from Chapman and Teale's failure to testify.[89] The instructions, also drawing on Article I, Section 13 of the California Constitution, told the jury

> that the failure of defendants to testify from facts within their knowledge in explanation of incriminating evidence, may be deemed as tending to indicate the truth of such incriminating evidence and "that among the inferences that may be reasonably drawn therefrom those unfavorable to the defendant are the more probable."[90]

The jury convicted Chapman and Teale of first-degree murder, kidnapping, and first-degree robbery.[91] Teale was given the death penalty while Chapman was sentenced to life imprisonment.[92]

B. The State Appellate Proceeding

Subsequent to trial, but before the California Supreme Court heard Chapman and Teale's appeal, the United States Supreme Court decided *Griffin v. California*.[93] In *Griffin*, the defendant had chosen to not testify at trial (although he testified in the sentencing proceedings), and the trial judge had instructed the jury that it could make adverse inferences from that silence.[94] The prosecutor too had drawn the jury's attention to the defendant's silence and had urged the jury to make adverse inferences from it.[95]

Finding that these comments on the failure to testify in *Griffin* violated the defendant's Fifth Amendment privilege against self-incrimination, the Court observed that even innocent persons may choose to not testify in a criminal case:

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88. *Id.* at 27.
89. *Id.* at 19.
90. People v. Teale, 404 P.2d 209, 220 (Cal. 1965), *rev'd sub nom.* Chapman v. California, 386 U.S. 18 (1967).
91. *Id.* at 209.
92. *Chapman*, 386 U.S. at 19.
93. 380 U.S. 609 (1965); *Chapman*, 386 U.S. at 19.
94. *Griffin*, 380 U.S. at 609–10.
95. *Id.* at 610–11.

> It is not every one [sic] who can safely venture on the witness stand, though entirely innocent of the charge against him. Excessive timidity, nervousness when facing others and attempting to explain transactions of a suspicious character, and offenses charged against him, will often confuse and embarrass him to such a degree as to increase rather than remove prejudices against him. It is not every one [sic], however, honest, who would therefore willingly be placed on the witness stand.[96]

Further, the Court deemed comments on a defendant's refusal to testify to be a remnant of the "inquisitorial system of criminal justice" and held that the Fifth Amendment "forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt."[97]

When Chapman and Teale's appeal came before the California Supreme Court, it was clear that the prosecutor and trial judge had infringed on their constitutional right to remain silent. The issue on appeal became whether to grant relief for this violation.[98] Applying California's harmless error rule, the court sought to determine whether "giving such instruction ha[s] resulted in a miscarriage of justice requiring a reversal of the judgment of conviction."[99]

With respect to Chapman, the court concluded that the comments and instruction on the failure to testify were harmless.[100] Evaluating the strength of the evidence against Chapman, the court acknowledged that Teale's statement was not admissible evidence against Chapman.[101] While it was a statement by a co-conspirator, it had not been made in furtherance of the conspiracy to rob Adcock.[102] Nevertheless, the court found that the other circumstantial evidence in the case was

96. *Id.* at 613.

97. *Id.* at 614–15.

98. People v. Teale, 404 P.2d 209, 220 (Cal. 1965), *rev'd sub nom.* Chapman v. California, 386 U.S. 18 (1967).

99. *Id.* (citing People v. Bostick, 402 P.2d 529, 531 (1965)).

100. *Id.* at 220–21.

101. *Id.* at 218. It bears noting that Chapman had raised on appeal the trial court's failure to instruct the jury that Teale's statement should not be used against Chapman. While it violated state law to fail to instruct the jury that a confessing co-defendant's statement should only be used against that defendant and not against the non-confessing defendant, the California Supreme Court rejected Chapman's claim due to the import of other instructions given to the jury. This issue is noteworthy because the year after it decided Chapman's case, the United States Supreme Court decided Bruton v. United States, 391 U.S. 123 (1968). In that case, the Court held that the use of a non-testifying co-defendant's confession in a joint trial violates the Sixth Amendment's Confrontation Clause despite the trial court's use of limiting instructions. *Id.* at 124–26.

102. *Teale*, 404 P.2d at 220 (noting that because the statement was made in jail, the conspiracy was over and, therefore, could not have been made in furtherance of it).

overwhelming.[103] After cursorily dismissing the expert evidence Chapman had offered about her lack of the ability to form the mens rea necessary for the crime, the court faulted Chapman for not rebutting any of the evidence that had been marshalled against her.[104] Finding no "miscarriage of justice" due to the comments and instructions on Chapman's silence, the court upheld her conviction and sentence.[105]

The court also found that the comments on Teale's silence were harmless because, while Teale may not have confessed to the crime, his pre-trial statements to the other inmate were so damaging that, when considered with the other evidence in the case, the proof of his guilt was overwhelming.[106] Chapman and Teale's appeal to the United States Supreme Court followed.[107]

C. The Supreme Court's Decision

The Supreme Court reversed the California Supreme Court's affirmance of Chapman's and Teale's convictions in an 8–1 decision.[108] The majority opinion was written by Justice Black, a champion of civil liberties[109] and the author of *Gideon v. Wainwright*,[110] one of the Warren Court's most prominent decisions protecting the rights of criminal

103. *Id.*
104. *Id.* at 220–21.
105. *Id.* at 221.
106. *Id.* at 220.
107. Chapman v. California, 386 U.S. 18, 18 (1967).
108. *Id.*
109. *See Justice Black, Champion of Civil Liberties for 34 Years on Court, Dies at 85*, N.Y. TIMES, Sept. 26, 1971, https://www.nytimes.com/1971/09/26/archives/justice-black-champion-of-civil-liberties-for-34-years-on-court.html. *See also* Lee Epstein, Andrew D. Martin, Kevin M. Quinn & Jeffrey A. Segal, *Ideological Drift Among Supreme Court Justices: Who, When, and How Important?*, 101 NW. U. L. REV. 1483, 1493 (2007) (noting that S. Sidney Ulmer's analysis of the voting pattern of Justice Black showed substantial change over time: after beginning his career on the Court as a relative moderate, Justice Black grew increasingly willing to support litigants alleging a violation of their rights, until his final years on the bench when his support tapered off).
110. 372 U.S. 335 (1963).

defendants.[111] While Justice Stewart wrote a concurring opinion,[112] Justice Harlan dissented.[113]

Since Chapman and Teale had been convicted in state court, the first question the Supreme Court addressed was whether state law or federal law governed the issue of harmless error.[114] The Court observed that if the underlying errors were grounded in state law or procedure, the application of harmless error analysis would have been a state question; where the underlying error was grounded in federal law, including federal constitutional law, the issue would be one of federal law.[115] Since the claim Chapman and Teale were raising was based on the Fifth Amendment's privilege against self-incrimination (and the Fourteenth Amendment's Due Process clause, which made that privilege applicable to state court proceedings), the Court was faced with a federal question.[116]

The Court then explained why, "in the absence of appropriate congressional action, it is our responsibility to protect by fashioning the necessary rule."[117] The Court noted that James Madison, who was instrumental in the adoption of the Bill of Rights, had expressed to Congress that it was the "'independent' federal courts [that] would be the 'guardians of those rights.'"[118] Indeed, the Court noted, given the federalist structure of government, it could not "leave to the States the formulation of the authoritative laws, rules, and remedies designed to protect people from infractions by the States of federally guaranteed rights."[119]

Having laid the ground for a federal approach to harmless error analysis of federal constitutional rights, the Court then turned to the first

111. Lain, *supra* note 4, at 1389–90.

112. Pointing to the Court's long-standing practice of not subjecting constitutional violations to harmless error analysis, Justice Stewart argued that the *Griffin* violation in Chapman and Teale's case should be resolved without subjecting their claims to harmless error analysis. *Chapman*, 386 U.S. at 42–45 (Harlan, J., dissenting). Notably, Justice Stewart did not object to the notion that some constitutional errors might be subject to harmless error analysis; his disagreement was directed at the use of harmless error analysis to the claims raised in this case.

113. Justice Harlan dissented not because he thought that constitutional errors should be immune from harmless error analysis. Rather, he argued that he would have affirmed the California Supreme Court's decision because "a state appellate court's reasonable application of a constitutionally proper state harmless-error rule to sustain a state conviction constitutes an independent and adequate state ground of judgment." *Id.* at 46 (Harlan, J., dissenting).

114. *Id.* at 20–21 (majority opinion).

115. *Id.* at 21.

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

substantive issue, namely whether constitutional rights could be subject to harmless error analysis at all. Given the Court's long-standing refusal to apply harmless error analysis to constitutional claims,[120] the brevity of the Court's answer to this question was stunning. Without citation to any authority, the Court stated simply, "[w]e decline to adopt any such rule [that would require an automatic reversal of convictions marred by constitutional error]."[121]

The only explanation the Court gave was the fact that Congress and all fifty states had adopted harmless error rules.[122] The Court noted that these statutory harmless error rules "serve a very useful purpose insofar as they block setting aside convictions for small errors or defects that have little, if any, likelihood of having changed the result of the trial."[123]

Why legislative action demanded the Court's rejection of its long-standing jurisprudence is not clear. While some have since suggested that harmless error doctrine could be grounded in statutory law,[124] others have observed that it might be seen as a constitutional rule that derives from the very rights being claimed in the case.[125] Answers to this question have proved wanting and have been the basis of continuing scholarly debate.[126]

Moreover, the Court's statement bears noting because of the cavalier manner in which it equated constitutional violations with "small errors or defects."[127] The Court was, after all, talking about the Constitution. Coming from an institution that has claimed for itself the sole prerogative of interpreting this founding creed,[128] the Court's claim was stunning. Even more stunning was the Court's subsequent

120. *See supra* pt. I.

121. *Chapman*, 386 U.S. at 21–22.

122. *Id.* at 22.

123. *Id.*

124. *See, e.g.*, Epps, *supra* note 15, at 2144–45 (discussing ROGER J. TRAYNOR, THE RIDDLE OF HARMLESS ERROR 8 (1970)).

125. *See, e.g.*, Philip J. Mause, *Harmless Constitutional Error: The Implications of* Chapman v. California, 53 MINN. L. REV. 519, 532 (1968). *See also* Craig Goldblatt, Comment, *Harmless Error as Constitutional Common Law: Congress's Power to Reverse* Arizona v Fulminante, 60 U. CHI. L. REV. 985, 1004 (1993).

126. *See* John M. Greabe, *Criminal Procedure Rights and Harmless Error: A Response to Professor Epps*, 118 COLUM. L. REV. ONLINE 118, 118–19 (2018); Epps, *supra* note 15, at 2120–21. Writing in dissent in *Chapman*, Justice Harlan argued that the majority's "harmless-error rule now established flows from what is seemingly regarded as a power inherent in the Court's constitutional responsibilities rather than from the Constitution itself." *Chapman*, 386 U.S. at 46 (Harlan, J., dissenting).

127. *Chapman*, 386 U.S. at 22 (majority opinion).

128. Marbury v. Madison, 5 U.S. 137, 138 (1803).

proclamation, confirming this seeming devaluation of the Constitution. The Court stated,

> We conclude that there may be 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 the automatic reversal of the conviction.[129]

The contrast between this pronouncement and the Court's earlier citation to James Madison could not have been starker, with Madison's clarion call—that federal courts would be an "impenetrable bulwark" and "resist every encroachment upon [these] rights"[130]—reverberating loudly.

Having established that harmless error analysis could be applied to constitutional errors, the Court next turned to the test itself. The Court identified the two different approaches that had been developed in state and federal courts: the "substantial rights"[131] approach and the "overwhelming evidence"[132] approach. As discussed earlier, the difference between these two approaches lay in how they assessed the harmfulness of an error.[133] Without elaborating, the Court simply stated that it preferred the "substantial rights" approach.[134]

The Court's failure to explain why it was making this choice has sown confusion in courts for the ensuing five decades about how to conduct harmless error analysis.[135] This confusion also was generated in part by the Court's seemingly different approach to harmless error analysis just two years after *Chapman*.[136] Since then, courts, including the Supreme Court itself, have vacillated between the "substantial rights" and "overwhelming evidence" approaches, with many courts

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129. *Chapman*, 386 U.S. at 22.

130. *Id.* at 21 n.4.

131. *Id.* at 23.

132. *Chapman*, 386 U.S. at 23; *see also supra* note 31 and accompanying text.

133. Under the former approach, the inquiry focuses on whether the error contributed to the verdict; and under the latter, the inquiry focuses on whether, after removing the improperly admitted evidence, the remaining evidence overwhelmingly justified conviction. *See supra* pt. II.

134. *Chapman*, 386 U.S. at 23.

135. Epps, *supra* note 15, at 2155–56; *see also* Daniel J. Kornstein, *A Bayesian Model of Harmless Error*, 5 J. LEGAL STUD. 121, 123 (1976) ("[T]he Court's attempt at elucidation led to confusion, not understanding. In later cases, *Chapman* meant different things to different Justices.").

136. In Harrington v. California, 395 U.S. 250, 252 (1969), a defendant alleged that the use of confessions by three non-testifying co-defendants in a joint trial violated his Sixth Amendment right of Confrontation as developed in Bruton v. United States, 391 U.S. 123 (1968). While the Supreme Court found that there was a constitutional violation, it denied relief because the error was harmless because of the "overwhelming" untainted evidence against him. *Harrington*, 395 U.S. at 254.

today "broadly search[ing] the record by asking whether independent evidence of guilt taken alone could support the conviction."[137]

After the Court signaled that it was adopting the "substantial rights" approach, it surprisingly (given the nature of its preceding reasoning) announced a strict standard for harmless error and altered the allocation of the burden for showing harmlessness.[138] Under the "substantial rights" approach, courts ask whether "the error had substantial and injurious effect or influence in determining the jury's verdict";[139] and courts have differed in terms of how the burden of proof is allocated, with some placing it on the government, some on the defendant, and some leaving it unassigned.[140] Instead of adopting this framework, the Court in *Chapman* placed the burden on the government and required it to show that the constitutional error was harmless beyond a reasonable doubt.[141]

Finally, the Court in passing acknowledged that in previous cases it had held that there are "some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error."[142] The Court, however, did not attempt to formulate a principle that would allow lower courts to distinguish between those constitutional errors that are subject to harmless error analysis and those that are not.[143] This silence also led to many years of confusion.[144] It was not until over two decades later that the Court finally provided guidance, explaining that harmless error analysis is inapplicable to "structural defect[s] affecting

137. Epps, *supra* note 15, at 2156–57 (quoting Brandon L. Garrett, *Innocence, Harmless Error, and Federal Wrongful Conviction Law*, 2005 WIS. L. REV. 35, 59). While many expected the Supreme Court to address these divergent approaches after it granted the petition for certiorari in Vasquez v. United States, 565 U.S. 1057 (2011), those hopes were dashed when the Court subsequently dismissed the petition as improvidently granted, Vasquez v. United States, 566 U.S. 376 (2012). *See* Anne Bowen Poulin, *Tests for Harm in Criminal Cases: A Fix for Blurred Lines*, 17 U. PA. J. CONST. L. 991, 993 (2015).

138. *Chapman*, 386 U.S. at 23–24.

139. Kotteakos v. United States, 328 U.S. 750, 776 (1945).

140. *See* Poulin, *supra* note 137, at 1006–08, 1012.

141. *Chapman*, 386 U.S. at 24. The Supreme Court later held that this standard is only applicable to constitutional claims heard by courts on direct appeal; courts in post-conviction proceedings must instead apply the *Kotteakos* test. *See* Brecht v. Abrahamson, 507 U.S. 619, 637–38 (1993).

142. *Chapman*, 386 U.S. at 23.

143. Tom Stacy & Kim Dayton, *Rethinking Harmless Constitutional Error*, 88 COLUM. L. REV. 79, 83–84 (1988) ("Commentators writing in *Chapman*'s immediate aftermath were uncertain whether most constitutional errors would be treated under a harmless error rule rather than a rule of automatic reversal.").

144. *See* Kornstein, *supra* note 135, at 125 ("[I]t is even unclear whether there is or should be a distinction between treatment of constitutional and non-constitutional error."); Stacy & Dayton, *supra* note 143, at 83–84.

the framework within which the trial proceeds"; "trial errors," on the other hand, are subject to harmless error analysis.[145]

Having adopted the applicable harmless error test, the Court concluded by addressing the error in Chapman and Teale's trial.[146] The Court found that given the extensive comments by the prosecutor and the judge's instructions, it had no doubt that the *Griffin* error was not harmless even though there was "a reasonably strong 'circumstantial web of evidence.'"[147] Given the "machine-gun"-like repetition of improper comments by the prosecutor and instructions by the trial court, the Court held that "[u]nder these circumstances, it is completely impossible for us to say that the State has demonstrated, beyond a reasonable doubt, that the prosecutor's comments and the trial judge's instruction did not contribute to petitioners' convictions."[148]

IV. CHAPMAN*'S LEGACY*

There are two competing ways in which one might understand *Chapman*. On the one hand, one might see it as representative of a broader move by the Warren Court in its later years to curtail the scope of its criminal procedure jurisprudence.[149] On the other hand, one might better understand *Chapman* as being consistent with the Warren Court's progressive effort to safeguard the liberties of all, including criminal defendants.[150] In fact, understanding *Chapman* in this latter manner might unlock its potential to positively impact the behavior of key actors in the criminal justice system.

A. *Chapman* as Representative of the Warren Court's Later Retrenchment

In recent years as scholars have looked back on the Warren Court, some have come to conclude that "there were in fact two Warren Courts—one liberal and the other more conservative—emblematically separated by *Terry* [in 1968]."[151] They explain, "[b]efore it disbanded,

145. Arizona v. Fulminante, 499 U.S. 279, 306–10 (1991).
146. *Chapman*, 386 U.S. at 24–26.
147. *Id.* (quoting People v. Teale, 404 P.2d 209, 220 (Cal. 1965), *rev'd sub nom.* Chapman v. California, 386 U.S. 18 (1967)).
148. *Id.* at 26.
149. *See infra* pt. IV.A.
150. *See infra* pt. IV.B.
151. Eric J. Miller, *The Warren Court's Regulatory Revolution in Criminal Procedure*, 43 CONN. L. REV. 1, 4 (2010); *see also* Terry v. Ohio, 392 U.S. 1 (1968).

the second (and less publicized) Warren Court had begun a process many associate only with its successor—a process of reexamination, correction, consolidation, erosion, or retreat, depending upon your viewpoint."[152] Under this view, *Chapman*, falling on the latter side of the timeline, is representative of a concerted move to pull back from the Court's earlier expansionist jurisprudence.[153]

To explain why the Warren Court's jurisprudence shifted so markedly, these scholars point out that "[t]he last years of the Warren Court constituted a period of social upheaval marked by urban riots, disorders on college campuses, ever-soaring crime statistics, ever-spreading fears of the breakdown of public order, and assassinations and near-assassinations of public figures."[154] This climate was exacerbated by "strong criticism of the Court by many members of Congress and by presidential candidate Richard Nixon, and [by] the obviously retaliatory provisions of the Omnibus Crime Control and Safe Streets Act of 1968 . . . ."[155]

This perspective has some intuitive appeal because, as discussed earlier, *Chapman*'s seemingly cavalier attitude toward constitutional violations stood in stark contrast to the Warren Court's earlier jurisprudence that extolled the role of the Constitution in safeguarding liberty.[156] After all, it was quite radical by some measures to pronounce that some constitutional violations can be so inconsequential as to be ignored.

However, as discussed below, this perspective inadequately accounts for the choice the Court made in *Chapman* to announce a standard—harmless beyond a reasonable doubt—that was more exacting than any that had been utilized in state and federal courts, and to place the burden on the government to meet this showing.[157]

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152. *Id.* at 9 n.37 (citing Yale Kamisar, *The Warren Court (Was It Really So Defense-Minded?), The Burger Court (Is It Really So Prosecution-Oriented?), and Police Investigatory Practices*, *in* THE BURGER COURT: THE COUNTER-REVOLUTION THAT WASN'T 62, 67 (Vincent Blasi ed., 1983)).

153. *See* Steiker, *supra* note 7, at 2468–69 (pointing to harmless error analysis as one of the "inclusionary rules" developed by the Supreme Court that had the effect of curtailing the Warren Court's criminal procedure jurisprudence without expressly overturning that Court's substantive rulings). *See also* Yale Kamisar, *The Warren Court and Criminal Justice: A Quarter-Century Retrospective*, 31 TULSA L.J. 1, 3–4 (1995) [hereinafter Kamisar, *Retrospective*].

154. Kamisar, *Retrospective*, *supra* note 153, at 3.

155. *Id.*

156. *See supra* pt. III.C.

157. *See infra* pt. IV.B.

B. *Chapman* as Part of the Warren Court's Progressive Project

A different, and perhaps more persuasive, account of *Chapman* is grounded in the view that the Warren Court's progressive, expansionist construction of constitutional rights involved making changes on multiple levels.

A court seeking to change the reach of laws has three variables at its disposal: substantive doctrine, remedial doctrine, and justiciability doctrine.[158] While one option might be to read a substantive right more broadly, another option might be to broaden the remedies available for breach of that right, and yet another option might be to adjust justiciability doctrines.[159] Or, the court may calibrate these three variables in any number of other combinations.[160]

The Warren Court's jurisprudence, some scholars argue, followed this pattern.[161] While sometimes it simultaneously recognized new substantive rights and adjusted justiciability doctrines to permit suits for enforcement,[162] other times it made equilibrating adjustments in remedial doctrine to make substantive innovation acceptable.[163]

Chapman, under this analysis, did not mark a retreat from the Warren Court's commitment to a robust reading of the Constitution, as much as a tactical shift in approach. As noted earlier, in its later years the Warren Court faced "hydraulic pressures"[164] of a dramatically changing social and political environment. In this environment, it was likely not feasible for the Court to continue reading constitutional rights expansively with the same vigor as it had done earlier in the decade. On the contrary, there would have been sustained pressure to curtail the broad reach of the substantive rights it had developed in prior years.

Chapman's harmless error analysis allowed the Court to mitigate these pressures. Consider, for instance, an appellate court that had

158. Richard H. Fallon, Jr., *The Linkage Between Justiciability and Remedies—And Their Connections to Substantive Rights*, 92 VA. L. REV. 633, 637 (2006).

159. *Id.* at 644–45 (describing justiciability doctrines to mean those "developed by courts to give content to Article III's limitation of federal jurisdiction to the adjudication of 'cases' or 'controversies'"). Justiciability doctrines include those such as standing, which addresses who is a proper party. They also include those such as ripeness and mootness, which address the timing of the adjudication. *Id.*

160. *Id.* at 645–46.

161. *Id.* at 687.

162. *Id.* (discussing Baker v. Carr, 369 U.S. 186 (1962) and Flast v. Cohen, 392 U.S. 83 (1968)).

163. *Id.* at 687–88 (discussing Brown v. Board of Education, 347 U.S. 483 (1954) and Brown v. Board of Education, 349 U.S. 294, 298–301 (1955)).

164. *See* George C. Thomas III, *Through A Glass Darkly: Seeing the Real Warren Court Criminal Justice Legacy*, 3 OHIO ST. J. CRIM. L. 1, 7 (2005).

determined that it wanted to deny a new trial in a particular case. Had the Court in *Chapman* held that harmless error analysis did not apply to constitutional errors, such a court could have prevented a new trial only by restricting the substantive scope of the constitutional right. By subjecting constitutional rights to harmless error analysis, *Chapman* permitted such a court to deny relief on a case-by-case basis without affecting the scope of the underlying right.

C. *Chapman*'s Unfulfilled Promise

Many of the Warren Court's seminal cases were those that affected the behavior of the key participants in the criminal justice system.[165] Two of the most notable of these were *Gideon v. Wainwright*[166] and *Brady v. Maryland*.[167] While *Gideon* recognized indigent defendants' right to counsel in felony cases,[168] *Brady* sought to ensure a fair trial by requiring prosecutors to disclose exculpatory and impeachment information.[169] Although each of these two landmark decisions had a profound impact, their legacy has remained unfulfilled. Had the Court used *Chapman* in these lines of cases, there arguably might have been greater progress in ensuring a more fair and just criminal justice system.

With respect to the right to counsel, the continuing difficulties in ensuring the competence and effectiveness of counsel have been widely documented.[170] While lack of resources, inadequate training, and overwhelming workloads play a large role in explaining these

165. *See, e.g.*, Coleman v. Alabama, 399 U.S. 1, 9–10 (1970) (defense counsel); Katz v. United States, 389 U.S. 347, 358 (1967) (police); United States v. Wade, 388 U.S. 218, 237–38 (1967) (defense counsel); Miranda v. Arizona, 384 U.S. 436, 444 (1966) (police); Pate v. Robinson, 383 U.S. 375, 385 (1966) (judge's obligation regarding the defendant's competence); Parker v. Gladden, 385 U.S. 363, 364 (1966) (bailiff's comments); Sheppard v. Maxwell, 384 U.S. 333, 350–51 (1966) (judge's obligation to ensure fair trial); Griffin v. California, 380 U.S. 609, 613 (1965) (prosecutors' comments on defendant's silence); Escobedo v. Illinois, 378 U.S. 478, 485 (1964) (defense counsel); Brady v. Maryland, 373 U.S. 83, 88 (1963) (prosecutors); Douglas v. California, 372 U.S. 353, 355 (1963) (defense counsel); Gideon v. Wainwright, 372 U.S. 335, 343–45 (1963) (defense counsel); Mapp v. Ohio, 367 U.S. 643, 660 (1961) (police).

166. 372 U.S. 335 (1963).

167. 373 U.S. 83 (1963).

168. 372 U.S. at 335.

169. 373 U.S. at 83.

170. *See, e.g.*, Stephen B. Bright, *Neither Equal nor Just: The Rationing and Denial of Legal Services to the Poor When Life and Liberty Are at Stake*, 1997 ANN. SURV. AM. L. 783, 792; Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835, 1839 (1994).

difficulties,[171] the Supreme Court's doctrine too has played a key role.[172] In particular, by incorporating a prejudice requirement in its test for measuring the effective assistance of counsel, the Court diminished the ability of its jurisprudence to shape the behavior of attorneys in future cases.[173] If, instead, the Court had bifurcated the rights and remedies inquiry and used the *Chapman* harmless error analysis to address the latter, the Sixth Amendment right to counsel might have been more faithfully adhered to.[174]

With respect to the prosecutorial obligation to disclose exculpatory and impeachment evidence, difficulties continue in ensuring that this obligation is adhered to in every case. As one judge observed with regard to *Brady* violations, "'the greatest threat to justice and the Rule of Law in death penalty cases is state prosecutorial malfeasance—an old, widespread, and persistent habit.'"[175]

In part these difficulties can be traced to the Supreme Court's doctrine regarding the materiality requirement for *Brady* disclosures: the Court requires prosecutors to speculate *ex ante*, often without knowledge of the defense theory or evidence, whether there is a reasonable probability that, if the evidence is disclosed to the defense, the result of proceeding would be different.[176] Such an obligation seems fundamentally problematic in part because of concerns about prosecutors' cognitive bias.[177]

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171. *See, e.g.*, Sanjay K. Chhablani, *Chronically Stricken: A Continuing Legacy of Ineffective Assistance of Counsel*, 28 ST. LOUIS U. PUB. L. REV. 351, 383–89 (2009).

172. *See, e.g.*, Paul Marcus, *The United States Supreme Court (Mostly) Gives Up Its Review Role with Ineffective Assistance of Counsel Cases*, 100 MINN. L. REV. 1745, 1751 (2016).

173. *See, e.g.*, Sanjay K. Chhablani, *Disentangling the Right to Effective Assistance of Counsel*, 60 SYRACUSE L. REV. 1, 29 (2009).

174. *Id.* at 46–47.

175. Sanjay K. Chhablani, *Beyond* Brady*: An Eighth Amendment Right to Discovery in Capital Cases*, 38 N.Y.U. REV. L. & SOC. CHANGE 423, 423 (2014) (citing Judge Gilbert Stroud Merritt, Jr., *Prosecutorial Error in Death Penalty Cases*, 76 TENN. L. REV. 677 (2009)).

176. *Id.* at 435 (discussing United States v. Bagley, 473 U.S. 667 (1985)).

177. Recognizing this problem, some have argued that *Bagley*'s materiality requirement is an appellate standard and that at the trial level courts must instead use the approach outlined by Justice Marshall. For example, during oral argument in Smith v. Cain, 565 U.S. 73 (2012), Justice Kennedy, speaking to counsel for the government, stated:

> I think you misspoke when you . . . were asked what is the test for when *Brady* material must be turned over. And you said whether or not there's a reasonable probability . . . that the result would have been different. That's the test for when there has been a *Brady* violation. You don't determine your *Brady* obligation by the test for the *Brady* violation. You're transposing two very different things.

Tr. Oral Arg. 49, Nov. 8, 2011, Smith v. Cain, 565 U.S. 73 (2012) (No. 10-8145), *available at*

On the other hand, as Justice Marshall eloquently explained in his dissent in *Bagley*, the results might have been far different if the Court had used the *Chapman* harmless error analysis in conjunction with construing the materiality requirement as that term has been understood in the evidentiary context.[178]

Thus, part of *Chapman*'s legacy is its unfulfilled potential in breathing more life into underlying constitutional rights. Had the Supreme Court in the post-Warren Court years utilized *Chapman*'s harmless error framework as discussed above, it might have made a significant difference in improving the criminal justice system.

V. CONCLUSION

Not usually recognized as a landmark case of the Warren Court, *Chapman v. California* had the potential to play a key role in preserving the Warren Court's "revolutionary" criminal procedure jurisprudence. While at first blush its claim—that some constitutional errors might be so trivial as to ignore—might appear regressive, a closer look reveals it to be consonant with the Warren Court's progressive jurisprudence. The strict test for harmless error that it formulated, along with the assignment of burden of proof on the government, demonstrated the Court's continued commitment to a robust reading of constitutional rights. Had the Supreme Court in subsequent years been faithful to *Chapman*'s construct, it might well have reduced, at least in part, the continuing problems of ineffective assistance of counsel and prosecutorial misconduct that mar the criminal justice system.

https://www.supremecourt.gov/oral_arguments/argument_transcripts/2011/10-8145.pdf. This comment is striking because it is at odds with how lower courts have applied *Bagley*. *See, e.g*, Boyd v. United States, 908 A.2d 39, 59 (D.C. Cir. 2006) ("Whatever appeal such a position may have to judges of some other courts, this court is precluded by the Supreme Court's strictures in *Agurs*, *Bagley*, and *Kyles* from adopting it, at least in the form articulated above.").

178. *Bagley*, 473 U.S. at 692–99 (Marshall, J., dissenting).