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## NOTES

# TRIAL OF ERROR: THE OMISSION OF ELEMENTS IN JURY INSTRUCTIONS REQUIRES AUTOMATIC REVERSAL ON HABEAS REVIEW

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### I. INTRODUCTION

On the afternoon of September 13, 1981, police observed Kenneth Roy and Jesse McHargue riding away from a liquor store with acquaintances Archie Mannix and James Clark. Two hours later, officers found their truck nose down in a ditch, accompanied only by Mannix and Clark's stabbed bodies floating nearby. Roy and McHargue had disappeared, and both bodies were missing their wallets. At 3 a.m. the next morning, California Highway Patrol officers found Roy and McHargue in a local restaurant carrying two bloody knives, \$170 in cash and wearing Mannix's vest, shoes and their own wet, muddy and bloodstained clothes.

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\* Class of 2000, University of Southern California Law School; B.A., 1997, Connecticut College. I would like to thank several people for their helpful advice with this Note: Professors Jody Armour and Erwin Chemerinsky, Maggie Brandow and for her help and support, Amy McNamee. In the summer of 1998, I was fortunate to be a judicial extern in the chambers of the Honorable Thomas P. Smith, U.S. Magistrate Judge for the District of Connecticut. While assisting Judge Smith, one of my research projects involved the habeas corpus petition of Edward Gilchrist. Among Gilchrist's numerous grounds for habeas relief was the omission of an element from the jury instructions at his trial. *Gilchrist v. Kupec*, 3:93CV1718 (PCD)(TPS) (D. Conn 1998). Research for that opinion prompted me to write this Note.

At trial, Roy claimed that McHargue suddenly decided to rob Mannix and Clark, which provoked a knife fight between McHargue and Mannix. Roy claimed to be a bystander until Clark moved to help Mannix. At that time, Roy attacked Clark with a knife and fatally wounded him. McHargue then killed Mannix and took some of his clothes and money. In contrast to Roy's story, the state claimed that he was no innocent bystander. Instead, the state argued that he hatched a plot with McHargue to lure the other men into a secluded area and rob them. The court instructed the jury on two theories of Roy's involvement in Mannix's death: premeditated murder and felony murder.<sup>1</sup> The jury found Roy guilty of Mannix's first degree murder and based their verdict on felony murder, with aiding and abetting as the underlying felony.<sup>2</sup> As the murder conviction could not stand if the jury did not find aiding and abetting, that finding would therefore become the lynchpin of any direct appeal or collateral attack brought by Roy.

As chance would have it, the jury instructions for aiding and abetting were flawed.<sup>3</sup> The trial court omitted an element of the crime of aiding and abetting from the jury instructions.<sup>4</sup> The State of California requires the jury to find that defendants have both knowledge and intent to encourage or facilitate the underlying felony,<sup>5</sup> yet the intent element did not appear in the jury instruction at Roy's trial.<sup>6</sup> Accordingly, Roy appealed, challenged his first-degree murder conviction on appeal.

The California Court of Appeals recognized the trial judge's error, found the error harmless<sup>7</sup> and affirmed the jury's verdict.<sup>8</sup> Upon the California Supreme Court's denial of certiorari in 1989,<sup>9</sup> the United States District Court for the Eastern District of California summarily denied

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1. In California, "a felon is held strictly liable for *all* killings committed by him or his accomplices in the course of the felony." *People v. Stamp*, 82 Cal. Rptr. 598, 603 (Ct. App. 1969).

2. Although the record is unclear, it does not appear as though the State pursued any convictions premised on accomplice liability that would stand apart from the felony murder conviction. Given that the jury found no premeditation in Roy's involvement in the murder of Clark, the jury must have based their verdict of first-degree murder on felony murder. Also, given that Roy was acquitted of all robbery charges, the underlying felony must have been aiding and abetting McHargue's robbing of Mannix. *See Roy v. Gomez*, 81 F.3d 863, 865 (9th Cir. 1996) (en banc).

3. *See id.*

4. Hereinafter, the omission of any element from a jury instruction will be referred to as an "error of omission" or a "Roy error."

5. *See People v. Beeman*, 674 P.2d 1318, 1326 (Cal. 1984).

6. *See Roy*, 81 F.3d at 866.

7. *See id.*

8. *See id.*

9. *See Roy v. Gomez*, 55 F.3d 1483, 1485 (9th Cir. 1995).

relief<sup>10</sup> on Roy's habeas corpus petition.<sup>11</sup> Sitting en banc, the Ninth Circuit found the error not harmless,<sup>12</sup> basing its holding on Justice Scalia's opinion in *Carella v. California*.<sup>13</sup> The following year, in *California v. Roy*,<sup>14</sup> the Supreme Court found the Ninth Circuit's reversal unwarranted. The Court ruled that the proper standard to determine when an error is not a "structural defect[] in the constitution of the trial mechanism"<sup>15</sup> is "whether the error 'had substantial and injurious effect or influence in determining the jury's verdict.'"<sup>16</sup> The Court did not explain why the *Roy* error is not a structural defect, but instead declared that "[n]o one claims that the error at issue here [requires automatic reversal]."<sup>17</sup> On remand, the Ninth Circuit offered no explanation in finding the error to have neither a substantial nor injurious effect on the verdict.

This Note will critique the Supreme Court's decision in *California v. Roy* by arguing that omitting an element from jury instructions is an error requiring automatic reversal on habeas review. Part II explores the formal distinction between errors that merit automatic reversal and errors subject to mere harmless error review. In response, Part III presents an abbreviated sortie in the overall argument by examining other Supreme Court precedents which require automatic reversal of *Roy* error convictions on direct appeal. The Supreme Court's brevity in *Roy* requires Part III to speculate on the reasons for denying state habeas petitioners the automatic reversal that federal defendants are granted. After rounding up the usual suspects that may justify limiting habeas corpus rights, Part III shows that these justifications are inapplicable to the proposal espoused herein. Because Part III is a call for parity between direct review and habeas corpus review, it assumes that the *Roy* error is an error that merits automatic reversal.

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10. *See id.* at 1485 (citing the District Court's decision which found that, given its other findings in the case, no "rational juror" could find Roy innocent of aiding and abetting).

11. 28 U.S.C. § 2254 (1994) provides for habeas corpus relief. "[The federal courts] shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." *Id.*

12. *See Roy*, 81 F.3d 865, 867-68 (9th Cir. 1996) (en banc).

13. 491 U.S. 263 (1989). The Ninth Circuit described the standard as follows: "the omission is harmless only if review of the facts found by the jury establishes that the jury *necessarily* found the omitted element." *Roy*, 81 F.3d at 867 (internal quotes and citations omitted).

14. 519 U.S. 2 (1996) (per curiam).

15. *Id.* at 338 (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 629 (1993)).

16. *Id.* (quoting *Brecht*, 507 U.S. at 637 (quoting, in turn, *Kotteakos v. United States*, 328 U.S. 750, 776 (1946))).

17. *Id.* at 339.

Part IV supports this assumption by offering a justification for automatically reversing convictions stemming from errors of omission. Building on a particular definition of “element,” Part IV demonstrates how a trial judge’s omission violates the Ex Post Facto Clause of the Constitution since the criminal defendant’s conviction will result in either sanctions for actions that were legal *when* performed or an increase in punishment *after* the commission of the offense.

It is also helpful to discuss what this Note will not critique, especially given the vast quantity of literature the topic of habeas corpus harmless error review has inspired. Unlike several recent works, this Note will not argue against the hastily constructed monolith of harmless error review.<sup>18</sup> Instead, this critique operates from within the paradigm established by recent decisions and calls for the Supreme Court to take the principles it has announced therein seriously. In so doing, it must find that the *Roy* error merits automatic reversal.

## II. STRUCTURAL ERRORS AND TRIAL ERRORS EXPLAINED

When the Supreme Court declared that the error in *Roy* required reversal only if it had a harmful and injurious effect on the verdict, it was labeling the *Roy* error a trial error instead of a structural error. This distinction is vital for collateral and direct review because courts classify all errors as either trial errors or structural errors.

Trial errors and structural errors<sup>19</sup> were initially distinguished with great care in *Arizona v. Fulminante*.<sup>20</sup> In *Fulminante*, the Court held that

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18. The “substantial and injurious effect” standard devised prior to, and used in, *Roy*, has been challenged on many fronts. Most commentators echo *Roy*’s enigmatic concurrence, in which Justices Scalia and Ginsburg argue that “a criminal defendant is constitutionally entitled to a *jury verdict* that he is guilty of the crime, and absent such a verdict [finding the defendant guilty of all elements of the crime] the conviction must be reversed.” *Roy*, 519 U.S. at 7 (Scalia & Ginsburg, JJ., concurring). These commentators argue that the Sixth Amendment forecloses the Supreme Court from engaging in any harmless error analysis, as doing so would naturally lead to usurping the role of the jury. *See, e.g.*, Jason S. Marks, *Postscript: Harmless Error, Habeas Corpus and a Constitutional Eclipse*, CRIM. JUST., Fall 1993, at 30. Other commentators have pointed to the shifting of the burden of proof from the party most competent to handle it (the state) to the party least capable of handling it (the petitioner). *See, e.g.*, J. Thomas Sullivan, *The “Burden” of Proof in Federal Habeas Litigation*, 26 U. MEM. L. REV. 205 (1995). Still others attack the distinction between structural and trial errors as arbitrary and illogical. *See, e.g.*, David McCord, *The “Trial”/“Structural” Error Dichotomy: Erroneous, and Not Harmless*, 45 U. KAN. L. REV. 1401 (1996) (stating “[c]ommentators before me have noted the speciousness of the dichotomy, and have used this as a springboard for their ideological objections to the dichotomy as part and parcel of the conservative Court’s efforts to denigrate the rights of criminal defendants”); Charles J. Ogletree, Jr., *Comment: Arizona v. Fulminante: The Harm of Applying Harmless Error to Coerced Confessions*, 105 HARV. L. REV. 152 (1991). McCord, *supra* at 1401.

19. A possible third category exists:

“[t]he common thread connecting [trial errors is that the errors] occurred during the presentation of the case to [the] jury, and [] may therefore be quantitatively assessed in the context of other evidence presented, in order to determine whether its admission was harmless.”<sup>21</sup> On the other hand, structural errors are “defects in the constitution of the trial mechanism” of sufficient magnitude to render the criminal process itself unable to “reliably serve its function as a vehicle for determination of guilt or innocence.”<sup>22</sup> Structural errors require automatic reversal “because they infect the entire trial process.”<sup>23</sup> *Fulminante* provides five examples of structural errors,<sup>24</sup> including “deprivation of the right to counsel at trial”<sup>25</sup> and “a judge who was not impartial,”<sup>26</sup> and the error at issue in *Fulminante*, a coerced confession, was also a trial error.<sup>27</sup>

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[o]ur holding does not foreclose the possibility that in an unusual case, a deliberate and especially egregious error of the trial type, or one that is combined with a pattern of prosecutorial misconduct, might so infect the integrity of the proceeding as to warrant the grant of habeas relief, even if it did not substantially influence the jury’s verdict.

*Brecht*, 507 U.S. at 638 n.9. This category is known as “Footnote Nine Error” because of its location in the *Brecht* opinion.

20. 499 U.S. 279 (1991).

21. *Id.* at 307-08.

22. *Id.* at 310 (internal citation omitted).

23. *Brecht*, 507 U.S. at 630. Given the Court’s (current) willingness to overturn convictions when certain errors occur, it is not surprising that many habeas petitions attempt to shoehorn their petitions into one or more of these categories of error. In the alternative, petitioners argue for the creation of new structural errors. However, attempts to recharacterize errors have been largely unsuccessful. *See, e.g.*, *Plascencia v. Estelle*, No. 95-56710, 1996 U.S. App. LEXIS 15634, at \*5 (9th Cir. June 26, 1996) (admission of coerced confession); *Williams v. Calderon*, 52 F.3d 1465, 1476 (9th Cir. 1995) (instructional error not involving a deficient reasonable doubt instruction); *Hegler v. Borg*, 50 F.3d 1472, 1477 (9th Cir. 1995) (defendant’s absence at reading of certain trial testimony); *Tapia v. Roe*, No. C95-0607, 1996 U.S. Dist. LEXIS 18316, at \*23-\*24 (N.D. Cal. Dec. 4, 1996) (imprecise jury instruction); *Moore v. Ponte*, 924 F. Supp. 1281, 1295 (D. Mass. 1996) (confining defendant to “prisoner’s dock” during entire proceedings); *Simmons v. Blodgett*, 910 F. Supp. 1519, 1527 (W.D. Wash. 1996) (jury’s exposure to facts not in evidence).

24. The structural errors listed are:

Total deprivation of the right to counsel at trial

An impartial judge

Unlawful exclusion from a grand jury of members of the defendant’s race

Denial of the right to self-representation at trial

Denial of the right to a public trial

*Fulminante*, 499 U.S. at 309-10 (internal citations omitted).

25. *Id.* at 309 (citing *Gideon v. Wainwright*, 372 U.S. 335 (1963)).

26. *Id.* (citing *Tumey v. Ohio*, 273 U.S. 510 (1927)).

27. *See id.* *Fulminante* was pressured into confessing by a fellow prison inmate who was instructed by the Federal Bureau of Investigation to offer *Fulminante* protection from other inmates who had threatened him, in exchange for his confession. *See id.* at 283.

Commentators and courts have divined disparate definitions of trial error from *Fulminante*.<sup>28</sup> First, the Court defines trial error as an event a reviewing court can quantitatively assess in the context of other evidence. With this “evidentiary definition,”<sup>29</sup> the Court appears to limit trial errors to errors committed in admitting evidence for the prosecution or excluding evidence for the defendant. Yet, this definition should be disregarded, as a “full half of the sixteen string cited cases [i.e., the trial errors listed by *Fulminante*] used by the majority to define the trial error category do not involve erroneous admission or exclusion of evidence—six involve jury misinstruction.”<sup>30</sup> Second, the Court defines trial error as an error that does not affect “the framework within which the trial proceeds, [but instead is] simply an error in the trial process itself.”<sup>31</sup> This definition makes the distinction between trial errors and structural errors appear stillborn, since

[t]he key thing to note about this approach is that it constitutes no change from *Chapman*, the law that governed pre-*Fulminante*, when whether an error was reversible per se or subject to harmless error analysis was an issue-by-issue proposition not governed by purported categories like trial and structural error.<sup>32</sup>

Despite the predictions of scholars and academics that the trial error/structural error dichotomy would collapse under the weight of its own incoherence,<sup>33</sup> the distinction clearly still guides the Court’s analysis.

Regardless of which harmless error definition the Court relies on in the future, the cursory treatment of the error in *Roy* remains unsupported. The error of omission differs substantially from the archetypal trial error of admitting inadmissible evidence.<sup>34</sup> Proper evidence may counter evidence admitted erroneously—the erroneous evidence is but one weight on the scale that the reviewing court may discount or remove. Further, improper evidence does not foreclose the defendant from putting on an affirmative defense<sup>35</sup> or challenging aspects of the prosecution’s case. An error of

28. See, e.g., *Rice v. Wood*, 77 F.3d 1138, 1139 (9th Cir. 1995) (en banc), cert. denied, 519 U.S. 2 (1996); McCord, *supra* note 18, at 1412.

29. McCord, *supra* note 18, at 1412-13.

30. *Id.* at 1414.

31. *Fulminante*, 499 U.S. at 310.

32. McCord, *supra* note 18, at 1416.

33. See *id.* at 1428-29.

34. Erroneous admission of evidence is the archetypal trial error because it fits all three definitions: (1) it is evidentiary in nature; (2) occurs in the presentation of the case to the jury; and (3) is in accordance with the fact intensive scrutiny advocated by *Chapman*.

35. Affirmative defenses may be foreclosed by *Roy* errors. See, e.g., *Gilchrist v. Kupec*, 3:93CV1718 (PCD)(TPS) (D. Conn 1998), where the error was the omission of the mens rea requirement of self-defense that the prosecution must disprove.

omission, however, is a defect in the scale itself, and appellate courts can only repair the result by replacing the scale entirely.

### III. THE MYTH OF THE “SPECIAL FUNCTIONS OF HABEAS COURTS”

In addition to considering the nature of the error when deciding whether it merits automatic reversal, the Court also seems to consider the procedural posture of the review. The Court determined that the *Roy* error does not merit automatic reversal in the context of the habeas corpus petition, but that it does merit automatic reversal on direct review. This Part will outline the reasoning behind the Court’s decisions to reverse *Roy* error convictions on direct review. It will then consider, and ultimately reject, the most likely justifications the Court would put forward to support its disparate treatment of habeas corpus petitions.

On direct review of federal criminal cases, the Court automatically reverses verdicts that stem from *Roy* errors. Consider *United States v. Gaudin*,<sup>36</sup> where Michael Gaudin, a real estate developer, was convicted of falsifying loan applications to the Department of Housing and Urban Development and the Federal Housing Administration. The Ninth Circuit’s interpretation of the relevant statutes required the Government to prove, and the jury to find, that the false statements made were “material to the activities and decisions of HUD.”<sup>37</sup> Inexplicably, the district judge instructed the jury that materiality was an element for the court to decide. After his conviction, Gaudin appealed to the Ninth Circuit,<sup>38</sup> which found the omission to be a violation of the Fifth and Sixth Amendments<sup>39</sup> of the United States Constitution. The Supreme Court granted certiorari<sup>40</sup> and Justice Scalia, writing for the majority, offered a very simple and thorough analysis:

[T]he resolution of the question before us seems simple. The Constitution gives a criminal defendant the right to demand that a jury find him guilty of all elements of the crime with which he is charged;

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36. 515 U.S. 506 (1995).

37. *Id.* at 508.

38. *See United States v. Gaudin*, 997 F.2d 1267 (9th Cir. 1993), *aff’d*, 28 F.3d 943 (9th Cir. 1994) (en banc).

39. The Sixth Amendment states, inter alia, that “in all criminal prosecutions, the accused shall enjoy the right to . . . an impartial jury.” U.S. CONST. amend. VI. The Sixth Amendment is incorporated through the Fourteenth Amendment. *See Irvin v. Dowd*, 366 U.S. 717 (1961).

40. *See United States v. Gaudin*, 513 U.S. 1071 (1995).

one of the elements in the present case is materiality; respondent therefore had a right to have the jury decide materiality.<sup>41</sup>

Justice Scalia concluded that

[t]he Constitution gives a criminal defendant the right to have a jury determine, beyond a reasonable doubt, his guilt of every element of the crime with which he is charged. The trial judge's refusal to allow the jury to pass on the "materiality" of Gaudin's false statements infringed that right. The judgement of the Court of Appeals is affirmed.<sup>42</sup>

In contrast to *Gaudin's* straightforward constitutional analysis, the earlier decision in *Sullivan v. Louisiana*<sup>43</sup> explains why harmless error review cannot be applied to some types of errors in jury instructions. Justice Scalia, again writing for the majority, explains that the question posed by harmless error analysis is:

not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error. That must be so, because to hypothesize a guilty verdict that was never in fact rendered—no matter how inescapable the findings to support that verdict might be—would violate the jury-trial guarantee.<sup>44</sup>

Thus when no verdict is provided, that is, when the jury's conclusion is flawed at its base, "the entire premise of [harmless error] review is simply absent. . . . [T]he question whether the *same* verdict of guilty-beyond-a-reasonable-doubt would have been rendered absent the constitutional error is utterly meaningless."<sup>45</sup> The review would have no meaning because reviewing courts cannot determine the effect of the error on the verdict if that verdict is incomplete. As Justice Scalia continues, "the most an appellate court can conclude is that a jury *would surely have found* petitioner guilty . . . . [T]hat is not enough."<sup>46</sup>

Yet, this is exactly the row habeas courts have been forced to hoe since *Roy* was decided. For example, the Second Circuit infers missing elements by gauging from the record, *ex post*, the plausibility of the testimony offered during criminal trials.<sup>47</sup> This course of action, mandated

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41. *Gaudin*, 515 U.S. at 511.

42. *Id.* at 522–23.

43. 508 U.S. 275 (1993).

44. *Id.* at 279.

45. *Id.* at 280.

46. *Id.*

47. *See* *Peck v. United States*, 106 F.3d 450, 457 (2d Cir. 1997) (holding that petitioner "Peck's testimony 'oscillated between the implausible and the preposterous[.]'" and "the jury's verdict

by *Roy*, is inconsistent with the holdings of *Sullivan* and *Gaudin*<sup>48</sup> and especially troubling given the axiom that appellate courts have inferior access to the facts of the case.<sup>49</sup>

Perhaps the Court relied on the general premise that habeas corpus petitions are not an opportunity to relitigate state trials.<sup>50</sup> Thus, the Court discourages relitigation by refusing to extend the reasoning of *Gaudin* and *Sullivan* to collateral attacks. As a result, the constitutional protections afforded federal defendants, like *Gaudin*, or state defendants fortunate enough to have certiorari granted by the United States Supreme Court, like *Sullivan*, are greater than those afforded to prisoners seeking collateral relief. But when the Supreme Court first claims a substantive difference in law between the two forums in *Brecht v. Abrahamson*,<sup>51</sup> it fails to point out a single supporting precedent. Instead, the Court cites the following differences: (1) an attorney must be provided on direct appeal but not on collateral review, (2) claims under *Mapp v. Ohio*<sup>52</sup> may not be brought on collateral attack, (3) beneficial changes in law are retroactive and may be cited on appeal but not on collateral attack, and (4) violations of prophylactic rules may not be grounds for collateral attack.<sup>53</sup> Each of these differences is procedural rather than substantive in nature, regulating what claims may be brought, by whom and with what assistance. In addition, no precedents before *Brecht* examine the merits of a collateral attack any differently than those presented on a direct appeal once it clears the procedural hurdles and arrives properly before the court.

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demonstrated ‘an evident and well founded disbelief of Peck’s testimony’” as the basis for denying collateral relief). The facts of Peck are discussed below. *See infra* text accompanying note 124.

48. In fact, a minority on the court seems to recognize this. For example, see *Roy*’s enigmatic concurrence, in which Justices Scalia and Ginsburg argue that “a criminal defendant is constitutionally entitled to a *jury verdict* that he is guilty of the crime, and absent such a verdict [finding the defendant guilty of all elements of the crime] the conviction must be reversed.” *Roy*, 519 U.S. 2, 7 (1996) (per curiam) (Scalia and Ginsburg, JJ., concurring). This statement would seem to support my contention in this Note, yet it concurs in the judgment. This has led to no shortage of confusion in the circuits. See, for example, *Peck v. United States*, 102 F.3d 1319 (2d Cir. 1996) (Newman, J., concurring), for a thoughtful plea by Chief Judge Newman that the Supreme Court clarify its *Roy* decision.

49. Harry T. Edwards, Chief Judge of the D.C. Circuit, stated in his Madison Lecture to New York University School of Law that “[a]n appellate judge’s view of the trial is limited to the record, and, as any observer of the judicial process is aware, many events of trial pass without casting so much as a shadow upon the printed transcript.” Harry T. Edwards, *To Err is Human, But Not Always Harmless: When Should Legal Error Be Tolerated?*, 70 N.Y.U. L. REV. 1167, 1193 (1995).

50. *See Brecht v. Abrahamson*, 507 U.S. 619, 635 (1993).

51. *Id.* at 635.

52. 367 U.S. 643 (1961) (holding that the Fourteenth Amendment requires the exclusionary rule be applied by the states.)

53. *See Brecht*, at 634-35.

Nevertheless, the distinction made in *Brecht*, which is one of substance and not procedure, is illogical as well as inconsistent with precedent. *Brecht* attempts to lay out a justification along these lines: “[t]he reason most frequently advanced in our cases for distinguishing between direct and collateral review is the State’s interest in the finality of convictions that have survived direct review within our state court system. . . . We have also spoken of comity and federalism.”<sup>54</sup> In *Roy*, however, the Supreme Court is not so explicit. Instead, it merely invokes the “special function of habeas courts”<sup>55</sup> as justification for its classification of the *Roy* error. It is probably safe to assume that the phrase “special function of habeas courts” is meant to invoke the arguments relied on in *Brecht*. Yet, as seen below, “unless we are to accept the proposition that denying relief whenever possible is an unalloyed good, the [arguments] the Court identifies cannot by themselves justify the lowering of [the habeas] standards announced” in *Brecht*.<sup>56</sup> As demonstrated below, arguments based on federalism, certainty, finality and hypertechnical results do not justify the holding in *Roy*, as demonstrated below.

#### A. FEDERALISM

First, concerns of federalism and comity do not support the holding of *Roy*, despite the Supreme Court’s invocation of those arguments by referring to “the special functions of habeas courts.” Federalism argues that state courts adequately protect the rights of criminal defendants.<sup>57</sup> This argument typically rests on the assumption that state courts and federal courts are composed of equally competent judges, or in other words, that parity exists between the parallel judiciaries.<sup>58</sup> Without evaluating the merits of this assumption or its application to habeas corpus,<sup>59</sup> it is clear that the competence of the state courts is not presently at issue.<sup>60</sup> As the

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54. *Id.* at 635.

55. *California v. Roy*, 519 U.S. 2, 7 (1996) (per curiam).

56. *Brecht*, 507 U.S. at 651 (O’Connor, J., dissenting).

57. The federalism argument often provokes “critics of habeas corpus review [to] argue that such relief is generally unnecessary because state courts should be trusted to adequately protect federal constitutional rights.” ERWIN CHEMERINSKY, *FEDERAL JURISDICTION* 781 (2d ed. 1994) (citing Paul Bator, *The State Courts and Federal Constitutional Litigation*, 22 WM. & MARY L. REV. 605, 623–27 (1981)).

58. *See id.*

59. For a critique of the federalism argument as it pertains to habeas corpus, see, for example, Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977).

60. Justice White pointed out that the federalism argument in *Brecht* lacks internal cohesion, regardless of whether the state courts are equals of the federal courts, “[e]ither state courts are faithful to federal law, in which case there is no cost in applying the [same standard as used in direct appeal]; or

Supreme Court's decisions in *Gaudin* and *Sullivan* demonstrate, even the highest federal court in the land cannot perform harmless error review on a conviction stemming from an error of omission; harmless error requires a verdict while the *Roy* error precludes one. Even if state courts are the equals of federal courts, it would be likewise impossible for them to perform a harmless error analysis.

#### B. UNCERTAINTY

Second, reclassifying the *Roy* error as a structural error requiring reversal will not introduce uncertainty into state court convictions. Only the introduction of federal review of *trial* errors can increase uncertainty, due to the nebulous standard trial error standard. Trial errors require courts to determine if the trial error “had substantial and injurious effect or influence in determining the jury’s verdict.”<sup>61</sup> Yet, this determination could vary even among judges who share a strong sense of duty toward protecting the rights of the accused. Such variation would cause confusion among state trial courts that must decide the proper limits of criminal defendants’ rights. On the other hand, because of their knee-jerk nature, automatic reversals engender no uncertainty. In fact, redefining a trial error as a structural error increases the level of certainty in the criminal system—the redefined error will *certainly* result in collateral relief. The new structural error would operate much like the rule established in *Gideon v. Wainwright*,<sup>62</sup> which requires states to provide attorneys to criminal defendants in all cases where there is a possible prison sentence. No uncertainty has developed from *Gideon* because a defendant convicted without the benefit of counsel receives a new trial.<sup>63</sup> A conviction in a trial where no attorney was provided *is always* overturned, and the state courts can accordingly modify their procedures with certainty. The same would hold true if the *Roy* error was a structural error. There would be no

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they are not, and it is precisely the role of habeas corpus to rectify that situation.” *Brecht*, 507 U.S. at 649 (White, J., dissenting).

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

62. 372 U.S. 335 (1963).

63. Detractors may point to the wealth of litigation pertaining to claims of “ineffective assistance of counsel,” a phenomenon unheard of prior to *Gideon*, as evidence of increased uncertainty in state criminal trials. However, if the right secured by *Gideon* were to be reclassified as a trial error, the reviewing court would still be required to determine whether counsel effectively assisted the defendant. Then, the reviewing court would be forced to take the extra step of determining whether the lack of effective assistance resulted in a substantial and injurious effect; a step that consumes more resources and opens the door to more uncertainty. This last stage is what is saved by reclassifying errors as structural.

uncertainty because a missing element would *always require* granting the petition.

### C. FINALITY

Third, the state's interest in finality of state court convictions fails to justify not applying *Gaudin* to habeas corpus petitions. First, fiscal and societal costs as opposed to finality drive the Supreme Court's reticence to apply *Gaudin* to habeas petitions. Like any judicial endeavor, state courts must devote considerable pecuniary and nonpecuniary resources toward achieving a high degree of finality. For example, adequate funds must be appropriated for salaries to attract qualified judges and support staff. Likewise, public defender programs must be established and maintained for indigent defendants. Costs often extend beyond the judiciary: Police and prosecutors must receive adequate training in the Constitution's requirements regarding legal searches and confessions.

Proliferation of grounds for granting habeas petitions imposes additional costs on the states. For example, the Supreme Court's decision in *Gideon* required states to provide public defender programs despite their great cost to the public. Note, however, that after the states adjusted to this requirement, convictions are no less final than they were pre-*Gideon*.<sup>64</sup> In fact, classification of errors as structural errors *saves* resources because rigid categorical rules eliminate the need for courts to engage in case by case balancing tests. Finality may be compromised over the long term only when states are unsure what will trigger collateral relief because an error is subject to harmless error analysis.

Given that the costs of compliance with per se rules are what drive finality concerns, the Supreme Court must have assumed that considerable costs would accompany classifying the *Roy* error as structural. Yet, compliance costs will be minimal if states follow three simple steps to avoid convictions tainted by *Roy* errors. First, states could compose comprehensive jury instructions for each crime. Such an activity would not impose unbearable costs on the states, as evidenced by the fact that several states and the federal courts already produce model instructions. Second, the states could update those instructions to comply with changes in state and federal laws.<sup>65</sup> Third, the appellate courts could give short shrift to any

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64. See *supra* note 63.

65. Failure to update jury instructions contributed to the error in *Roy*. The California Jury Instructions Code failed to include an instruction on the intent element of aiding and abetting, although

trial judge who chooses to vary from the preestablished jury instructions. Appellate courts would greet creative embellishments with careful scrutiny, but verdicts stemming from instructions which were read or paraphrased by the trial court would pass appellate review.<sup>66</sup> After all, the criminal trial is not the appropriate forum for judicial creativity. Should the *Roy* error be classified as a structural error, these three acts would be all that is necessary to prevent state prisoners from being freed on habeas petitions based on *Roy* errors.

#### D. HYPERTECHNICAL REVERSALS

Fourth and finally, hypertechnical reversals would not flow from classifying the *Roy* error as a structural error. A hypertechnical reversal is a reversal so slavishly focused on procedure that it overlooks substantive issues by myopically reversing convictions that stem from trials with minute flaws. Critics fearful of hypertechnical reversals summon forth ghosts of jurisprudence past, citations to darker days when criminal courts were paralyzed by fear of error.<sup>67</sup> Before *Chapman v. California*,<sup>68</sup> appellate courts exercised only one remedy for error regardless of how trivial the error: automatic reversal. Because criminal trials are often rife with minor errors, automatic reversals often lead to frustrating results. Justice Traynor wrote of a case in which the California Court of Appeals reversed a conviction because the indictment omitted the letter “n” from the word larceny.<sup>69</sup>

The evils of hypertechnical<sup>70</sup> reversals typically include a chilling of rigorous police and prosecutorial work. In essence, this argument asks for leniency on the part of reviewing courts for the understandable mistakes

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the California Supreme Court required the element in an earlier decision. See *People v. Beeman*, 35 Cal.3d 547, 547 (1984).

66. In fact, composing jury instructions and enforcing their use may decrease overall finality costs to the state. Appellate courts could develop presumptions that favor the state on appeals that attack the preestablished jury instructions, which might ultimately discourage frivolous appeals. In addition, trial courts that adopt preestablished jury instructions wholesale would be saved from reinventing the wheel for each defendant.

67. See, e.g., Benjamin Rosenberg, *The Effect of Sullivan v. Louisiana on Harmless Error of Jury Instructions That Omit An Element of the Offense*, 29 RUTGERS L.J. 315, 328 (1998).

68. 386 U.S. 18 (1967).

69. See ROGER J. TRAYNOR, *THE RIDDLE OF HARMLESS ERROR* 3-4 (1970) (citation omitted).

70. This argument is really a critique of the existence of any structural errors, any of which bear the risk of yielding hypertechnical results. For example, it is possible that a *Gideon* error could have no effect on a conviction. Thus, it would be hypertechnical to overturn such a conviction without examining the facts. Although this argument attacks the very existence of the *Fulminante* dichotomy, it is included here because, in a limited incarnation, it could argue against expanding *Fulminante*'s list of structural errors.

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and errors in judgment that arise from the incredible caseload of the state trial courts. This is the principle behind the axiom that a defendant is entitled to a fair trial, not a perfect trial. Great frustration lies inherent in letting the offender, who may deserve punishment, go free because the police blundered.<sup>71</sup> Thus, it is the fear of inhibiting lawfully aggressive actions by police and prosecutors to secure convictions and do the law's work that provokes critics of habeas corpus to cry hypertechnical reversals when trial court decisions are overturned. With hypertechnical reversals, society will suffer from overcautious police and prosecutors, forced to walk on eggshells to achieve secure convictions.

These arguments, however, are ultimately unconvincing in the context of the omitted element from a jury instruction. The blunder here is not committed by over-zealous police or prosecutors, but instead by the judge, the supposed ultimate arbiter and champion of defendant's rights. The judge benefits from impartiality, the opportunity to engage in at least minimal thoughtful reflection and input from both the prosecutor and defendant when it is time to compose jury instructions. These are benefits that the police and the prosecutor do not enjoy: Their work is partisan and they may be forced to act quickly to ensure conviction and seize important evidence. The police especially have little time for thoughtful reflection prior to action. These occupational characteristics help explain or perhaps excuse errors on the part of the police and prosecutors.

These pressures, however, are largely absent from the judge's work, and there seems to be little reason to encourage hasty and partisan decisions by the judiciary, especially decisions that require careful deliberation. After all, the defendant and the prosecutor will still be in court the next day, whereas the incriminating evidence a police officer considers apprehending may not be. Further, the remedy to this error is exceedingly simple—it merely requires the use of uniform jury instructions that completely and fully describe the crimes of the state. Adding a creative gloss to the jury instructions amounts to assuming the risk of a reversible error. Thus, given that the source of the error is either the judge's carelessness or creativity, the risk of hypertechnical reversals is minute. The judge should be held to a higher standard than the police and negligence in any aspect of the judge's important task should be chilled.

In sum, the Supreme Court favors brevity over depth in declaring that the *Roy* error does not merit automatic reversal. Since the Court analyzes the error of omission under a different standard on direct review, it must be

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71. See *People v. Defore*, 150 N.E. 585, 587 (N.Y. 1926).

the case that the procedural posture is what differentiates the *Roy* error from the errors in *Gaudin* and *Sullivan*. The typical arguments justifying different results on collateral attack appear less applicable to the *Roy* error. The federalism argument that there is parity between federal and state courts cannot justify the difference as state courts are equally unable to overcome the dilemma outlined in *Sullivan* and *Gaudin*. Concerns about certainty in convictions are unpersuasive as reclassification of any trial error as a structural error actually increases a conviction's certainty. Concerns about finality are equally unpersuasive given the minor costs that would be involved in avoiding *Roy* errors if they were structural. Finally, fears that hypertechnical results will unduly chill the vigorous fight against crime are unfounded as the pressures that excuse prosecutorial and police errors are simply absent from trial judge errors. As such, the Supreme Court's rhetoric invoking the "special functions of habeas courts" in *Roy* is unconvincing.

#### IV. THE EX POST FACTO CLAUSE AND ITS APPLICATION TO THE OMISSION OF ELEMENTS

##### A. DEFINITION OF "ELEMENT"

Before demonstrating the relationship between the *Roy* error and the Ex Post Facto Clause, I must first delve into the definition of an "element" of an offense and clarifying its role at trial. Conspicuously few cases or statutes define element, although such a definition would aid the discussion further. The Supreme Court attempted a definition by establishing that the prosecution must demonstrate "proof beyond a reasonable doubt of every fact necessary to constitute the crime."<sup>72</sup> The Model Penal Code adds only a little more by distinguishing between elements of the offense and material elements of the offense.<sup>73</sup> Professors LaFave and Scott define an element

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72. *In re Winship*, 397 U.S. 358, 364 (1970).

73. The Code defines the former as

- (i) such conduct or (ii) such attendant circumstances or (iii) such a result of conduct as
- (a) is included in the description of the forbidden conduct in the definition of the offense, or
- (b) establishes the required kind of culpability; or
- (c) negatives an excuse or justification for such conduct; or
- (d) negatives a defense under the statute of limitations; or
- (e) establishes jurisdiction or venue;

MODEL PENAL CODE §1.13(9) (Official Draft 1962). In contrast, the latter is an element that does not relate exclusively to the statute of limitations, jurisdiction, venue, or any other matter similarly unconnected with (i) the harm or evil, incident to conduct, sought to be prevented by the law defining the offense, or (ii) the existence of a justification or excuse for such conduct.

MODEL PENAL CODE §1.13(10) (Official Draft 1962).

of a crime as “a specified act or omission, usually a concurring specified mental state, and often specified attendant circumstances and a specified harmful result caused by the conduct.”<sup>74</sup>

A suitable definition of an element is any phrase that describes a mental state (such as malice aforethought), a physical action (such as pulling a trigger), result of said action (such as death within one year) or other circumstance (such as occurrence in a federally insured bank). In addition, an element also has the following characteristics: (1) when several different descriptive phrases are aggregated, said aggregation describes some illegal action; (2) when each descriptive phrase in an aggregate is satisfied (meaning proved by the prosecution) conviction may result; and (3) the aggregate connotes some lesser offense or non-offense when any descriptive phrase is absent. In other words, each element of the crime separates the crime from other crimes or from legal action.

Mathematically, if crime A is composed of descriptive phrases X, Y and Z, it might be displayed as  $A=X+Y+Z$ . Should Z not occur, then A did not occur. Otherwise,  $A=X+Y$  and  $A=X+Y+Z$ . Element Z would then be a non-thing, that is, not an element.<sup>75</sup> In these abstract examples, the element Z is necessary for conviction of A. Should Z be missing, then no A occurred, and instead we may have some other action, which is either a lesser crime or a non-crime.

In a less abstract example, consider the common law crime of burglary, often described as the (1) unauthorized (2) entry (3) into the dwelling (4) of another (5) with intent to commit a felony therein.<sup>76</sup> Each

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74. WAYNE R. LAFAVE & AUSTIN W. SCOTT, CRIMINAL LAW §1.8 (2d ed. 1986).

75. Note that if  $A=X+Y+Z$  and some other crime also was composed of  $X+Y+Z$ , then simultaneous conviction of both crimes would be barred by the double jeopardy clause. The same would be true if crime  $A=X+Y+Z$  and crime  $Q=X+Y+Z+W$ , so that  $A+W=Q$ . A would therefore be a lesser included offense of Q, and simultaneous conviction of both A and Q would be banned by the Double Jeopardy Clause. See *Blockburger v. United States*, 284 U.S. 299, 304 (1932) (holding that “where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not”). This is true even if no additional punishments adhered to the second conviction. See *Ball v. United States*, 470 U.S. 856, 864–65 (1985) (holding that a “second conviction, whose committant sentence is served concurrently, does not evaporate simply because of the concurrence of the sentence [as it] has potential adverse collateral consequences that may not be ignored”). The Court recognized societal stigma, diminished eligibility for parole, possibility of increased sentence under a recidivism statute and decreased credibility in future trials as adverse consequences accompanying a second conviction for the same crime, even if the sentences are served concurrently.

76. Adapted from MODEL PENAL CODE §221.1 (Official Draft 1962). Clearly, these elements could be broken down into further detail. For example, element five could be divided into “intent to

element is necessary for burglary. Absent element (1) the described activity would not be a burglary: The *authorized* entry into a dwelling of another with the intent to commit a felony therein might be committed by a dinner guest who harbors resentment toward the host and intends to start a fire in the garage. Likewise, if element (5) is missing, the activity described might be a lesser offense, perhaps breaking and entering, committed by fraternity pranksters who want to rearrange the furniture in a neighboring sorority house. This activity is also not burglary. When the jury receives its charge, it receives this checklist of descriptive phrases, and assuming these jurors are competent and conscientious, they will compare the events that occurred, according to the testimony provided, with this checklist. The jury returns a guilty verdict if the elements in their entirety describe the actions of the defendant. The jury returns an acquittal if the facts do not match the description.

With this definition of element and an idea of how it functions, two possible results will occur when a jury charge omits an element. First, the judge may describe the crime in such a way that the elements the jury hears, when aggregated, describe some legal act. The jury might then find that the *authorized* entry into the dwelling of another with the intent to commit a felony therein constitutes a burglary. Second, the judge may describe the crime in such a way that the elements the jury hears, when aggregated, describe some lesser crime. The jury might then find that the unauthorized entry into the dwelling of another *without* the intent to commit a felony therein also constitutes a burglary. Thus, at trial either the fraternity prankster or the resentful dinner guest could face greater punishment than they deserve.<sup>77</sup>

A fair description is that the omission of the trial court retroactively criminalized an action that was previously legal. In the case of our resentful dinner guest, a burglary conviction might adhere although the act was not within the definition of burglary at the time of its commission. Thus, the trial court is enlarging the definition of burglary to include an act legal when committed. On the other hand, our frolicsome fraternity boys unquestionably committed a crime. Yet, if the trial court allowed the penalty and stigma of a burglary conviction to adhere, the penalty they are

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commit a felony” and “therein,” as surely a defendant who seeks to commit a felony elsewhere, after the unauthorized entry is completed, did not commit a burglary as defined here.

77. It may be that both of these individuals deserve criminal sanctions of some sort. My attention focuses on legal desert, as defined by the legislatures of the several states and Congress. Extra-legal culpability may very well attach to Roy, no matter what the jury found his involvement in the deaths of Mannix and Clark to be. Yet, insofar as he was convicted of a crime the jury did not find he committed, he does not deserve the corresponding punishment.

subject to increases dramatically after the commission of their crime. Thus, the penalty and stigma is more severe after the fraternity boys' committed their prank than it was before the prank took place. As demonstrated below, both retroactive creation of a crime and enhancement of the penalty attached to an existing crime violates the Ex Post Facto Clause of the United States Constitution, which expressly forbids such expansions.<sup>78</sup>

## B. EX POST FACTO CLAUSE AND ITS APPLICATION TO THE JUDICIARY

An ex post facto law is “[e]very law that makes an action, done before the passing of the law, and which was *innocent* when done, criminal” and “[e]very law that *aggravates a crime* or makes it *greater* than it was, when committed.”<sup>79</sup> All ex post facto laws are prohibited by Article I of the Constitution, which applies to both Congress and the states.<sup>80</sup>

The prohibition of ex post facto laws seems such a necessary part of any scheme of justice that it hardly needs justification. However, it is necessary to explain the principles undergirding the Ex Post Facto Clause in order to demonstrate why they apply equally to the judiciary.

### 1. Policy Behind the Ex Post Facto Clause

The Court has isolated two principles that motivate the Ex Post Facto Clause. First, the Supreme Court has held consistently that fair notice of proscribed conduct must precede its punishment. As recently as 1987 the Court reiterated the concept that “legislative enactments [must] give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed.”<sup>81</sup> Only after fair notice is given can individuals be fairly expected to conform their behavior to the law and therefore be said to deserve punishment upon transgression. In addition, individuals must know what punishments attach to criminal transgressions. This knowledge allows the citizens to plan their course of affairs with complete knowledge of its consequences. It also enables “[an] indigent defendant engaged in

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78. It need not trouble us here that the disgruntled dinner guest and the frolicsome fraternity boys are convicted of a crime called burglary, a preexisting crime. The name of the crime is irrelevant—what matters is that their actions were subject to no punishment or less punishment when committed, and after their commission, that changed.

79. *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390 (1798) (also defining ex post facto laws as “[e]very law that *changes the punishment*, and inflicts a *greater punishment*, than the law annexed to the crime, when committed” and “[e]very law that alters the *legal rules of evidence*, and receives less, or different, testimony, than the law required at the time of the commission of the offence, *in order to convict the offender*”).

80. See U.S. CONST. art. I, § 9, cl. 3., §10, cl. 1.

81. *Miller v. Florida*, 482 U.S. 423, 430 (1987) (quotations omitted).

negotiations that may lead to an acknowledgment of guilt and suitable punishment<sup>82</sup> to rely on an existing legal framework. Denying this opportunity to those engaged in plea bargaining is akin to denying an automobile pricing guide to a consumer purchasing a used car from a dealer. Without any objective standards to rely upon, the resulting price will necessarily be arbitrary or based on an interested party's assessment of a fair deal.

The notice requirement has received considerable criticism in recent years, and some authors find the requirement accompanied by “[l]ittle apparent reason.”<sup>83</sup> The notice requirement suffers attack on two fronts. Often, critics contend that an offender's reliance interest should not be so stringently protected. Thus, whenever the citizen engages in conduct that poses a danger or threat to others, the citizen should not be spared criminal punishment even if that precise conduct had not previously been criminal. Supporters of this argument point to the fact that most crimes are *mala in se*<sup>84</sup> and rely on the oft quoted but rarely justified maxim: Ignorance of the law is no excuse. Yet, it appears as though this critique's conclusion does not follow from its initial premise. It is one thing for the private citizen to voluntarily disregard the laws of the land and assume the risk of engaging in proscribed activity, but it is another thing entirely for the government to prevent citizens from learning the laws of the land if they so choose.

Second, critics of the notice justification argue that an offender often has no reliance interest in a certain criminal punishment.<sup>85</sup> The theory here could be fairly dubbed the Casino Theory of Criminal Punishment. Specifically, these authors contend that once a crime is committed, the offender is consenting to a punitive role of the dice—any crime could and should result in any punishment. Yet, this conclusion also does not follow from its initial premise that “[m]ost members of society do not learn the criminal code and could not in any event understand statutory or regulatory

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82. *Lynce v. Mathis*, 519 U.S. 433, 440 (1997).

83. Harold J. Krent, *Should Bouie Be Buoyed?: Judicial Retroactive Lawmaking and the Ex Post Facto Clause*, 3 ROGER WILLIAMS U. L. REV. 35, 45 (1997).

84. *Mala in se* laws make criminal acts that are so obviously repugnant to societal values that their inclusion in penal codes is largely redundant. Murder is the archetypal *mala in se* crime. *Mala prohibita* crimes, on the other hand, cannot appeal to common morality for their justification, and instead rely on administrative convenience or some variety of collective action problem as justification. The requirement that a motorist drive on the right side of the road is a good example: It would not offend the average person's sensibilities if the law required driving on the left side of the road, as is done in parts of Europe. Despite its obvious danger, driving on the left is not *mala in se* because there is no inherently proper side to drive on, so long as everyone drives on the same side.

85. See, e.g., John C. Jeffries, Jr., *Legality, Vagueness and the Construction of Penal Statutes*, 71 VA. L. REV. 189 (1985).

requirements without considerable legal help.”<sup>86</sup> The supporting evidence cited by proponents of this view fails to remedy the logical flaws in this argument. Proponents argue, for example, that few criminals are Bayesians<sup>87</sup> who entertain a risk analysis calculation before acting.<sup>88</sup> Further, even if offenders were so inclined, the “myriad of overlapping criminal provisions of both the federal and state sovereign” and “the prosecutor’s choice of charges, the labyrinthine operation of sentencing guidelines and the availability of complex good time credit programs within prisons”<sup>89</sup> prevent an accurate assessment of the variables in their Bayesian equation. However, empirical difficulties aside, this argument disregards the fact that it is largely attorneys who “understand statutory or regulatory requirements”<sup>90</sup> and can therefore advise their clients as they shepherd them through the criminal justice system.

In addition to notice, the Supreme Court has forwarded a second principle supporting the Ex Post Facto Clause: the prevention of arbitrary changes in law that seek to isolate a single individual for punishment. As the Supreme Court declared, the Ex Post Facto Clause “restricts governmental power by restraining arbitrary and potentially vindictive legislation.”<sup>91</sup> Put another way, “[t]he specific prohibition on *ex post facto* laws is . . . one aspect of the broader constitutional protection against arbitrary changes in the law.”<sup>92</sup> This protection seems essential to protect citizens from the legislature, which may be subject to pressures from constituents or donors to react harshly to a single but well popularized crime<sup>93</sup> or the “crime epidemic” and “crime on the streets.”<sup>94</sup> This

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86. Krent, *supra* note 83, at 45.

87. Sir Thomas Bayes is largely regarded as the father of modern statistics.

88. Jeffries, *supra* note 85, at 189.

89. Krent, *supra* note 83, at 47.

90. *Id.* at 45.

91. *Weaver v. Graham*, 450 U.S. 24, 29 (1981).

92. *Lynce v. Mathis*, 519 U.S. 433, 440 (1997).

93. In 1982, Jon Hinckley attempted to assassinate President Ronald Reagan, and was subsequently acquitted on the ground of insanity. *See United States v. Hinckley*, 525 F. Supp. 1342 (D.D.C. 1981), *aff'd*, 672 F.2d 115 (D.C. Cir 1982). In response to the public outcry, Congress and several states reduced or eliminated the insanity defense altogether. *See, e.g.*, IDAHO CODE § 18-207; MONT. CODE ANN. § 46-14-102; UTAH CODE ANN. § 76-2-305(1); *People v. Skinner*, 704 P.2d 752 (Cal. 1985). It is conceivable that these states could have responded to the “crisis” by drafting their statutes such that they applied retroactively.

94. Judge Edwards claims that “nationwide problems of drug use and drug trafficking and the often-related scourge of random violence” has had adverse effects as “[m]any judges are undoubtedly influenced by the perceived exigencies of the government’s ‘war on drugs’ when they confront a defendant who clearly appears to be guilty of a drug-related crime, yet whose trial included a significant legal error.” Edwards, *supra* note 49, at 1191. However, the Department of Justice’s Uniform Crime Reports indicate a decrease in criminal activity in the United States in recent years. The

emphasis on the rule of law is essential to avoid politically motivated sanctions. Without such a limitation, popular politicians would have an extremely powerful tool with which to quash dissent or challenges by imprisoning the dissenters and opponents.

2. *Policy Supporting the Application of the Ex Post Facto Clause to the Judiciary*

Given the principles supporting the Ex Post Facto Clause, it seems clear that the identity of the actor, be it judicial or legislative, is insignificant. Yet, when the Supreme Court first examined the Ex Post Facto Clause, it held that the Clause applied only to the laws passed by the states' legislatures through section 10 and by Congress through section 9. In fact, several justices in the *Calder* Court opined that *because* the Connecticut General Assembly acted in a judicial capacity, its actions did not violate the Ex Post Facto Clause. Justice Iredell noted that "the Legislature of [Connecticut] has been . . . exercising a general superintending power over its courts of law, by granting new trials" and that such an activity was "judicial in its nature . . . an exercise of judicial, not of legislative authority."<sup>95</sup> Justice Paterson noted that "if the power, thus exercised, comes more properly within the description of a judicial [rather] than of a legislative power . . . [then that] militates against the Plaintiffs in error . . ."<sup>96</sup> Justice Cushing concluded the opinion by stating that "[i]f the act is a judicial act, it is not touched by the Federal Constitution . . ."<sup>97</sup>

From the viewpoint of the accused, however, the damage done by retroactive punishment is not lessened when it is the judge who creates the new crime. After all, the interpretive activities that judges engage in have the same impact on the accused as a new legislative enactment resulting in either the criminalization of a previously legal action or the increase in punishment of a preexisting criminal action.

Despite these similarities, the Supreme Court has never applied the Ex Post Facto Clause to the judiciary of its own force.<sup>98</sup> Although the

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Department found that crimes on average decreased 3.2% from 1996 to 1997, and 10.2% from 1993 to 1997. U.S. DEP'T OF JUST., FBI, CRIME IN THE UNITED STATES: 1997 UNIFORM CRIME REPORTS, 5-8 (1998). In addition, violent crimes, defined as murder, non-negligent homicide, rape, robbery and aggravated assault, decreased 4% from 1996 to 1997, and 18.2% from 1993 to 1997. *See id.* at 11-13.

95. *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 398 (1798) (Iredell, J.).

96. *Id.* at 395-96 (Paterson, J.).

97. *Id.* at 400 (Cushing, J.).

98. Some states have held that the ex post facto prohibition of the federal constitution applies to the judiciary to the same extent as it does to the legislature. *See, e.g.,* *People v. Farley*, 53 Cal. Rptr. 2d

judiciary does not pass laws, judicial decisions may have the effect of creating new law, either by extending punishments to that which was formerly unpunishable or increasing the severity of the penalty for preexisting crimes. Interpretation is not a mechanical exercise, but instead allows judges considerable discretionary room for enlarging the scope of prohibitive laws.<sup>99</sup> Thus, judicial constructions often seem like conventional law making. When judicial constructs reach a sufficient level of similarity to legislative enactments, they should be subject to the same restraints as legislative enactments.<sup>100</sup> Judges who are free to change the substantive definition of a crime can imperil liberty to the same extent as legislative ex post facto change, and there seem to be no compelling reasons for excluding judicial overreaching from constitutional scrutiny.

Further, judicial constructs have the potential for even more pernicious effects than legislative enactments. Judges are more able to create law in such a way as to reach intuitively pleasing or personally motivated results in the matter before them, and thereafter distinguish that case from subsequent similar cases. With no constitutional ban on judicial action, judges may be motivated by the facts of the case before them to, either subconsciously or consciously, misapply the law as it stands, especially if it requires acquitting a particularly objectionable defendant.<sup>101</sup> In contrast, legislatures may at least offer a prospective justification for an

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702 (Ct. App. 1996); *Commonwealth v. Roy*, 647 N.E.2d 1179 (1995). As discussed below, the Supreme Court's work around solution showed considerable potential to extend ex post facto limitations to judicial constructions. However, in reality, the limitations extended have lacked force. See *infra* text accompanying notes 106–28.

99. See also T. Alexander Aleinikoff, *Updating Statutory Interpretation*, 87 MICH. L. REV. 20, 22 (1988) (describing traditional approaches to interpretation as aiming to “excavat[e] statutory meaning” through either textualism or intentionalism, and defending newer methods that take account of changed circumstances and values); *id.* at 57 (“Interpreters [of statutes] are not reporters or historians, searching out the facts of the past. They are creators of meaning.”); Nicholas S. Zeppos, *Legislative History and the Interpretation of Statutes: Toward a Fact-Finding Model of Statutory Interpretation*, 76 VA. L. REV. 1295, 1323 (1990) (“Statutory language has no single or objective meaning. It, like legislative history, is subject to ‘manipulation’ (or, perhaps more accurately, interpretation).” (footnote omitted)); *id.* at 1366 (stating that “there is no denying the policy component of statutory interpretation” (footnote omitted)). See generally WILLIAM N. ESKRIDGE, JR., *DYNAMIC STATUTORY INTERPRETATION* (1994). But see, e.g., ANTONIN SCALIA, *A MATTER OF INTERPRETATION* 14-37 (1997); Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989) (arguing for a textualist approach to statutory interpretation).

100. This functional argument, advocates treating actions as if they were what they appear to be. After all, if a “rose [b]y any other name would smell as sweet,” WILLIAM SHAKESPEARE, *ROMEO AND JULIET* act 2, sc.2, then a judge's creation of an ex post facto law is no less odious than the same creative act in the legislature.

101. See, e.g., *Bouie v. City of Columbia*, 378 U.S. 347 (1964).

action, and must be careful not to draft foolish laws whose impact will be felt not only for generations to come, but also during the next election.<sup>102</sup>

C. *BOUIE* AND ITS PROGENY: DUE PROCESS DRIVEN  
BY EX POST FACTO REASONING

Given the lack of meaningful distinction between lawmaking by legislatures and lawmaking by judges, it seems clear that the Ex Post Facto Clause should limit judges' actions. Indeed, the Supreme Court recognizes this and has applied ex post facto reasoning to judicial activity in the past. Most significantly, the Court applied the ex post facto reasoning during the height of the Civil Rights Movement of the 1960s, in response to Southern judges' use of novel and unexpected interpretations of existing state law to impose criminal sanctions on demonstrators.<sup>103</sup> However, as the story unfolds, it becomes clear that the Court is attempting a full retreat from its previously strong stance.

The seminal case is *Bouie v. City of Columbia*,<sup>104</sup> in which two African-American college students refused to leave a department store restaurant when a no trespassing sign was posted near their table immediately after their arrival. Arrests for breach of peace, resisting arrest and criminal trespass followed, although only the latter stuck to Simon Bouie and his friend Talmadge Neal.<sup>105</sup> The students challenged their conviction in the Supreme Court, which granted certiorari in 1964.

Bouie and Neal's claims were based on both the Equal Protection Clause and Due Process Clause, but the Court based its decision solely on the latter. The due process claim was based on a lack of fair warning that the conduct petitioners were convicted of was criminal. The trespassing statute forbade only "entry upon the lands of another . . . after notice from

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102. In addition to facing the temptation of passing an ex post facto law, legislatures may be tempted to pass another type of law that does not impact the populace at large. For example, if the legislature wishes to penalize a particularly vocal dissenter, it would be foreclosed from making the dissenter's past actions criminal retroactively by the Ex Post Facto Clause. A crafty legislature, however, may try to declare the future actions of just the dissenter illegal, and thus avoid the inconvenience and loss of political capital associated with enacting and then repealing a law. Such a law, called a bill of attainder, is also prohibited by the Constitution. *See* U.S. CONST. art. I, §§ 9, 10.

103. *See, e.g.,* *Henry v. Mississippi*, 379 U.S. 443 (1965) (addressing state court application of procedural requirements during criminal trials); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958) (addressing new state procedural requirements to prevent the NAACP from raising constitutional claims).

104. *See Bouie*, 378 U.S. 347 (1964).

105. *See id.* at 349.

the owner or tenant prohibiting such entry,”<sup>106</sup> and both parties conceded that the South Carolina Supreme Court on direct review “construed the statute to cover not only the act of entry on the premises of another after receiving notice not to enter, but also the act of remaining on the premises of another after receiving notice to leave.”<sup>107</sup> Because the students were invitees of the store, which was integrated in all departments except for the restaurant, the South Carolina Supreme Court would have been unable to affirm Bouie and Neal’s conviction without its creative interpretation.

The Supreme Court, in examining the state court’s decision, held that an unforeseeable judicial enlargement of a criminal statute, applied retroactively operates precisely like an ex post facto law, such as Art. I, § 10, of the Constitution forbids. An ex post facto law has been defined by this Court as one “that makes an action done before the passing of the law, and which was *innocent* when done, criminal; and punishes such action,” or “*that aggravates a crime*, or makes it *greater* than it was, when committed.” If a state legislature is barred by the Ex Post Facto Clause from passing such a law, it must follow that a State Supreme Court is barred by the Due Process Clause from achieving precisely the same result by judicial construction.<sup>108</sup>

In so ruling, the Supreme Court attempted to restrain the state courts from adopting creative or unforeseeable retroactive judicial constructions so as to specially punish an offender before the court.<sup>109</sup>

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106. The Court gives the exact language of the statute as  
[e]very entry upon the lands of another where any horse, mule, cow, hog or any other livestock is pastured, or any other lands of another, after notice from the owner or tenant prohibiting such entry, shall be a misdemeanor and be punished by a fine not to exceed one hundred dollars . . . .

*Id.* at 349 n.1.

107. *Id.* at 350.

108. *Id.* at 353–54 (citations omitted).

109. “[L]ower courts have extended the Supreme Court’s due process analysis to unforeseeable judicial changes in sentencing structure as well . . . .” Krent, *supra* note 83, at 55–56 (citing Dale v. Haberlin, 878 F.2d 930 (6th Cir. 1989); Knapp v. Cardwell, 667 F.2d 1253 (9th Cir. 1982); Foster v. Barbour, 613 F.2d 59 (4th Cir. 1980)). It is important to note that *Bouie* did not apply the Ex Post Facto Clause to the case before it. Instead, the Court used a type of incorporation, using the Fourteenth Amendment Due Process Clause as a vehicle for limiting actions by one section of government through invoking constitutional limits on other parts of government. This process is similar to the incorporation of limits on federal agents to apply to state actors through the Fourteenth Amendment. See *Mapp v. Ohio*, 367 U.S. 643 (1961). See also *Washington v. Davis*, 426 U.S. 229 (1976) (applying equal protection to federal government through the Fifth Amendment). In *Bouie*, the Court performs a similar incorporation, but it is more horizontal than vertical in nature, insofar as it applies a limit on the actions of state legislatures toward state judiciaries. In accordance with popular language, this Note will refer to the reasoning in *Bouie* as ex post facto analysis, just as claims made under *Mapp v. Ohio* are referred to as Fourth Amendment claims, although both *Mapp* and *Bouie* actually use the Fourteenth Amendment to limit state action.

Future cases revealed progress in this endeavor. For instance, in *Douglas v. Buder*,<sup>110</sup> a truck driver failed to report a traffic citation in a time manner when his probation conditions required the immediate report of any arrests to his probation officer.<sup>111</sup> Judge Buder, respondent in this case, found that a traffic citation was not an arrest under Missouri law, but further found that Douglas' failure to report it "displayed poor attitude toward his probation' and was not in 'strict compliance with the terms of the probation[]' . . . ."<sup>112</sup> Subsequently, Buder sentenced Douglas to two years in jail.<sup>113</sup> On appeal, the Missouri Supreme Court divided 4–3 on the due process ramifications of revoking Buder's probation without any warning, and eventually held that no violation had occurred.<sup>114</sup> The Supreme Court reversed, however, in a per curiam opinion that cited *Bowie* and concluded "that [the] same principle of due process is fully applicable in the context of the case before us."<sup>115</sup>

Unfortunately, *Bowie* and its immediate progeny, like *Douglas*, did not herald a new age of constitutionally enforced judicial conservatism. The Supreme Court has not invalidated a judicial action under *Bowie* in the last twenty years.<sup>116</sup> In fact, in its most recent *Bowie* decision, the Supreme Court found no violation when Tennessee Judge David Lanier was convicted under 18 U.S.C. § 242,<sup>117</sup> on the ground that he violated the "rights and privileges which are secured and protected by the Constitution and the laws of the United States, namely the right not to be deprived of liberty without due process of law, including the right to be free from wilful [sic] sexual assault[]"<sup>118</sup> when he sexually assaulted five women in chambers. The Supreme Court was unconvinced by the Sixth Circuit's en banc reasoning, which recognized that since no Supreme Court decision had adjudged whether freedom from sexual assault was a right protected by the Constitution or Laws of the United States, "[t]he indictment in this case for a previously unknown, undeclared and undefined constitutional crime

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110. 412 U.S. 430 (1973).

111. *Id.* at 431.

112. *Id.*

113. *See id.*

114. *See State ex rel. Douglas v. Buder*, 485 S.W.2d 609, 610 (Mo. 1972).

115. *Douglas*, 412 U.S. at 432.

116. *See Krent, supra* note 83, at 57 (citing *Marks v. United States*, 430 U.S. 188 (1977) as the last invalidation).

117. Section 242 has been called "perhaps the most abstractly worded statute among the more than 700 crimes in the federal criminal code. . . . It criminalizes without any further definition the 'willful deprivation of any rights . . . protected by the Constitution' committed by any person under 'color of any law.'" *United States v. Lanier*, 73 F.3d 1380, 1382 (6th Cir. 1996) (quotations omitted).

118. *United States v. Lanier*, 520 U.S. 259, 262 (1997) (quotations and citations omitted).

cannot be allowed to stand.”<sup>119</sup> The Court declared that the novelty of the application of § 242 was not the proper query vis-à-vis the *Bouie* analysis. Instead, the “touchstone is whether the statute, either standing alone or as construed, made it reasonably clear at the relevant time that the defendant’s conduct was criminal.”<sup>120</sup> In other words, criminal liability may develop from activity of which “the unlawfulness . . . [is] apparent’,”<sup>121</sup> and that apparent unlawfulness may stem from lower court decisions, from different districts, with disparate facts.

As evidenced in *Lanier*, the limitations on *Bouie* are significant. Although a petitioner may cite *Bouie* when a judge oversteps his bounds, that petitioner carries a difficult burden. The petitioner must demonstrate that the construction was such that the defendant could not be reasonably clear as to the legality of his actions. Yet, the term “reasonably clear” is so expansive that it seems nearly unrecognizable. The next section demonstrates how this hurdle may yet be surmountable.

#### D. THE APPLICATION OF THE EX POST FACTO CLAUSE TO OMISSION ERRORS IN JURY INSTRUCTIONS

Despite the limitations placed on *Bouie*, most notably by *Lanier*, errors of omission are the sort of changes in law relative to the case at bar which the “state legislature is barred by the Ex Post Facto Clause from passing.”<sup>122</sup> It therefore is of the same constitutional import as the other structural errors the Court has found.<sup>123</sup> The *Roy* error is the functional equivalent of criminalizing an action after its commission or increasing the punishment of a preexisting crime after its commission. As such, it should invoke the due process/ex post facto hybrid analysis espoused by *Bouie*, and should therefore be a structural error requiring automatic reversal. Yet, considerable hurdles remain between my critique of the decision in *California v. Roy* and the holding in *Bouie*. First, it is questionable whether

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119. *Lanier*, 73 F.3d at 1394, *rev'd*, 520 U.S. 259 (1997).

120. *Lanier*, 520 U.S. at 267. Of course, having framed the issue this way, the Court affirmed *Lanier*’s conviction.

121. *Id.* at 271-72. The exact holding in this case is somewhat unclear, insofar as the Court alternates between measuring *Lanier*’s actions against the fair warning requirements required by due process for all criminal actions and comparing *Lanier*’s actions with the fair warning requirements required by the 11th Amendment and qualified immunity. To some extent, the Court puts this confusion to rest by describing the relationship between qualified immunity fair warning and criminal conduct fair warning: “in effect[,] the qualified immunity test is simply the adaptation of the fair warning standard to give officials . . . the same protection from civil liability and its consequences that individuals have traditionally possessed in the face of vague criminal statutes.” *Id.* at 270-71.

122. *Bouie*, 378 U.S. at 353.

123. *See supra* note 24.

an omission is sufficiently akin to the changes in law contemplated by *Bouie* and the Ex Post Facto Clause. Second, it is unclear whether negligent action by the judge, as opposed to deliberate action, is sufficient to invoke a *Bouie* claim. Third, the omission of an element from jury instructions must be an enlargement of the preexisting law such that the unlawfulness of the action resulting in conviction was not apparent. Each of these conditions receives detailed treatment below.

1. *Is an Omission a Change of Law?*

At first blush, it does not appear that the omission of an element from jury instructions works a change in the law for two reasons. First, any change stemming from an error of omission is limited in effect to the defendant currently before the court. Second, any change stemming from the error of omission is necessarily of short duration. These two characteristics may prevent the error of omission from being a true change in the law. Thus, the next defendant in California who stands trial for aiding and abetting will not necessarily receive the same erroneous instructions that Roy's jury received.<sup>124</sup> A similar scenario arose in *Peck v. United States*,<sup>125</sup> in which defendant Peck was convicted of two counts of structuring cash transactions to evade reporting requirements.<sup>126</sup> The elements of these offenses include the requirement that the defendant be knowledgeable of the illegality of the transactions.<sup>127</sup> The element of knowledge was omitted from the jury instructions in Peck's trial, but the Second Circuit held that the error was harmless subsequent to the Supreme

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124. In Roy, there was some dispute over the culpability of the trial judge, given that [a]fter Roy's case was tried, the California Supreme Court held in *People v. Beeman* that an instruction identical to the one given in Roy's case was flawed because an aiding and abetting conviction requires proof not merely of knowing aid but also that the defendant intended to encourage or facilitate the offense with which the principal was charged.

Roy v. Gomez, 81 F.3d 863, 865 (9th Cir. 1996) (en banc) (citation and footnote omitted). Therefore, I include two cases from the Second Circuit to illustrate the point more forcefully. Further these cases help illustrate how lower courts have reconciled Roy's concurrence with the per curiam opinion, i.e., by largely disregarding it.

125. 73 F.3d 1220 (2d Cir. 1995), *reh'g en banc denied per curiam*, 102 F.3d 1319 (2d Cir. 1996), *vacated*, 106 F.3d 450 (2d Cir. 1997).

126. See 31 U.S.C. §§ 5324(3), 5313(a), 5322 (1999).

127. This requirement seems somewhat unique to this offense, as defendants generally need not know that their actions are crimes before they may be punished for them. The revered American tradition of dodging tax liability would be greatly hampered if, in this particular crime the U.S. Attorney did not have to prove that the defendant knew he was violating the statute. Presumably, it would be politically infeasible to make this sort of accounting creativity criminal without allowing the defendant to plead actual ignorance as a defense. See, e.g., *Gregory v. Helvering*, 293 U.S. 465 (1935) (holding that taxpayers have the "legal right . . . to decrease the amount of what otherwise would be his taxes, or altogether avoid them, by means which law allows").

Court's decision in *Roy*.<sup>128</sup> Yet, the trial court's error cannot fairly be said to have invalidated the requirement of knowledge, and there is no reason to suspect that the next defendant charged with this particular tax fraud scheme will not be entitled to the instructions on the knowledge requirement.<sup>129</sup> As a final example, the petitioner in *Gilchrist v. Kupec*,<sup>130</sup> whose attempted murder and assault trial was contaminated by an omitted instruction on the subjective duty to retreat,<sup>131</sup> was denied habeas corpus relief by the District Court of Connecticut following the holdings of *Roy* and *Peck*. Yet, defendants in future assault and attempted murder cases in Connecticut should receive this instruction. In fact, in both *Roy* and *Gilchrist*, the state appellate courts recognized or assumed this omission was an error.<sup>132</sup> These examples show that the impact of a *Roy* error is limited in duration and scope to the defendant presently before the court.

Yet, it is a misinterpretation of the true purposes behind the Ex Post Facto Clause to conclude that the omission does not work a change in the law simply because it has limited impact. Fair warning requires more than just notice of any impending change in the text of the criminal code. Instead, it requires warning of any deviation, under any guise, that may have a substantial impact on the criminal defendant. Thus, despite the fact that the negligent errors committed by the judges in *Roy*, *Peck* and *Gilchrist*, as well as the racist error committed in *Bowie*, did not change the law in a formal sense, the errors were deviations that substantially altered the defendants' criminal liability.

Likewise, the rule of law is compromised by judges who negligently or deliberately omit elements from jury instructions despite the fact that society writ large will never encounter the change in the law.<sup>133</sup> As the

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128. See *Peck*, 106 F.3d at 450.

129. Unlike *Roy*, *Peck* was convicted initially in federal court. However, his claim was filed as federal habeas corpus relief. Given the similarity between the state habeas statute, 28 U.S.C. § 2254, and the federal habeas statute, 28 U.S.C. § 2255, *Peck*'s collateral attack is still illustrative. Further, the court cites to the usual suspects in analyzing *Peck*'s claim: *Roy*, *Brecht*, *Fulminante* and *Kotteakos*.

130. No. 3:93CV1718 (PCD)(TPS) (D. Conn. Sept. 1, 1998).

131. While this is an aspect of self-defense, the State of Connecticut carries the burden of disproving self-defense once raised by the defendant. See *State v. Gilchrist*, 591 A.2d 131, 136 (Conn. Ct. App. 1991) (holding that it "is well established that the defense of self-defense, when asserted, requires the state to disprove such a defense beyond a reasonable doubt"). Therefore, the defense fits the definition of "element" as described above. See *supra* text accompanying notes 72-80.

132. See *Roy v. Gomez*, 81 F.3d 863, 865 (9th Cir. 1996) (en banc) (noting that the "California court of appeal concluded error had occurred but was harmless beyond a reasonable doubt"); *Gilchrist*, 591 A.2d at 137 (holding that "we assume that this language failed to convey to the jury that the defendant must have had actual knowledge of his ability to retreat").

133. Society will not encounter the change for two reasons. First, the typical citizen is not likely to be arrested for a serious crime that will proceed to trial. Second, for the small minority of citizens

Supreme Court stated in *Calder v. Bull*, the focus of the Ex Post Facto Clause is individualistic in nature because it creates an “*additional bulwark in favour of the personal security of the subject*, to protect his person from *punishment by legislative acts*, having retrospective operation.”<sup>134</sup> In a more recent opinion, the Supreme Court described the Ex Post Facto Clause as a reinforcement of the “first essential of due process of law . . . that [n]o one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes.”<sup>135</sup> From the defendant’s perspective, the area of effect is irrelevant. The change in the law that has limited effect is fully within the bailiwick of the Ex Post Facto Clause, which is designed to protect the individual defendant from abuse of the states’ power.

Second, the expected duration of the change in the law is irrelevant to the analysis. For example, in *Lynce v. Mathis*,<sup>136</sup> the Supreme Court invalidated the retroactive application of legislation designed to deny early release credits to incarcerated prisoners. Absent from the Court’s analysis was the length of time it expected the legislation to last, a notable fact given Florida’s history of volatile and mercurial public reactions to early release programs.<sup>137</sup> In *Bouie*, the trial court would probably not apply the novel interpretation of the trespassing law to the next defendant, especially if white, given the obvious racial animus that motivated the trial court. The Supreme Court, however, still found the reinterpretation of the trespass statute to be a change in the law, and overturned the conviction accordingly. No matter the duration of the law passed by the legislature, its impact is always narrowed to those individuals who suffer consequences from its retrospective application. Thus, the retroactive impact of the *Roy* error should receive scrutiny in light of its effect on the defendant currently before the court. The potential duration of the change in law is therefore irrelevant.

Clearly, an omission of an element from a jury instruction changes the law that applies to the defendant who is to be judged by those instructions. The error of omission may, for example, radically alter a crime when an element is omitted. This happened to the defendants in the *Peck* and *Gilchrist* cases, whose juries found them “guilty” of non-crimes according

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who find themselves as criminal defendants before a jury, it is unlikely that the trial judge would make a *Roy* error when charging the jury. The appellation of “error” indicates that the omission is infrequent.

134. *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390 (1798) (Chase, J.) (second emphasis added).

135. *Bouie v. City of Columbia*, 378 U.S. 347, 351 (1964) (quotations omitted).

136. 519 U.S. 433 (1997).

137. *See id.*

to their instructions, but who were then punished as if they had committed preexisting crimes. On the other hand, the *Roy* error may rebadge a lesser crime as a greater crime. This happened to the defendant in *Roy*, who was “guilty” of a lesser crime as per the erroneous instructions, but who was sentenced as if he had committed a higher crime. In *Peck* and *Gilchrist*, the court created a new crime after its commission, and in *Roy* the Court increased the penalty attached to a preexisting crime after its commission. Under either scenario, the shortened duration and impact of the change does not mitigate the impact it had on the defendants subject to the faulty instructions.

2. *Is a Negligent Judicial Action Sufficient to Invoke Bouie?*<sup>138</sup>

Because the Ex Post Facto Clause is analyzed from the perspective of the individual defendant who faces the retrospective change in the definitions of crimes, the judge’s mental state when the omission occurs, be it negligence or intent, is irrelevant to the defendant. Either way, the defendant, subject to the whims of the state, suffers the loss of fair notice of the change in the law.

In fact, many Ex Post Facto Clause cases result from challenges to laws that have unintentional retrospective impact. For example, in *Lynce*, the Florida legislature sought to respond to popular pressure to *return to its previous system* of good time credits.<sup>139</sup> The legislature showed no malice toward prisoners who already earned good time credits under the new program from the legislature. The prisoners who lost their good time credit were a tangential casualty of Florida’s prison reform fever. However, lack of malicious intent did not preclude the Supreme Court from striking down retroactive application of the law to those prisoners. Furthermore, the Supreme Court has held that even a law motivated by leniency toward convicted criminals violates the Ex Post Facto Clause when it features any provisions to extend the sentences of those already convicted. The Supreme Court struck down Florida’s 1978 reformulation of its good time credit program, which had the purpose and aggregate effect of increasing the accessibility of credits, on the ground that no “provision for extra gain time compensates for the reduction of gain time available solely for good

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138. I assume that the actions of the judges in *Roy*, *Peck* and *Gilchrist* were the result of negligence or at worst deliberate indifference toward the elements of the crimes. Of course, a deliberate omission would merely cement my point more securely, as an omission motivated by personal animus would be even more repugnant to both due process and the notion of the rule of law. *See, e.g., Bouie*, 378 U.S. at 351.

139. *Lynce*, 519 U.S. at 433.

conduct . . . [and t]his result runs afoul of the prohibition against *ex post facto laws*.”<sup>140</sup>

The precedents clearly indicate that retrospective changes in crimes or punishments, be they accidental or part of a scheme intended to effect an overall change toward a more lenient criminal justice system, are sufficient to invoke the Ex Post Facto Clause. Therefore, the fact that the omissions in *Roy*, *Peck* and *Gilchrist* were the result of unintentional negligence does not mitigate their ex post facto implications.

### 3. *Is the Roy Error a Reasonably Clear Change in the Law?*

The fact that reviewing courts in *Roy* and *Gilchrist* acknowledged that errors occurred speaks strongly toward their unforeseeability. The term “error” implies an unexpected or atypical result that ought not to recur.<sup>141</sup>

The Supreme Court and the circuits, however, have been incredibly forgiving of judges’ creative constructions, finding defendants’ actions “apparently unlawful” almost without fail. These courts have allowed the inherent ambiguity of a statute<sup>142</sup> and precedents from other jurisdictions or lower courts<sup>143</sup> to stretch apparent unlawfulness to unrecognizable dimensions. Consider two cases. In *Smith v. United States*,<sup>144</sup> the defendant was convicted under 18 U.S.C. § 942(c)(1) requiring the imposition of enhanced penalties if the defendant, “during and in relation to . . . any drug trafficking crime, uses . . . a firearm . . .”<sup>145</sup> Although the defendant did not use the “gun” in the way that word is commonly

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140. *Weaver v. Graham*, 450 U.S. 24, 35–36 (1981).

141. One troubling possibility is if the error was endemic to a particular court or district, such that the court became a pocket of consistent deviation from the official laws, making the error foreseeable. Two responses to this are possible. First, the reviewing court could rely on the stated law of the land, resting in appellate court decisions, and invalidate the conviction. Second, the reviewing court could invoke the common law exception to the Ex Post Facto Clause ban on the creation of new laws. Although criminal common law is largely moribund in the federal courts, several courts have recognized that “unless the common law development represents a marked departure from precedent, retroactive application is permitted.” *Krent, supra* note 83, at 63. *See also* *United States v. Burnom*, 27 F.3d 283, 284 (7th Cir. 1994) (holding that *Bouie* does not apply “to the resolution of uncertainty that marks any evolving legal system”).

142. *See* *McSherry v. Bloc*, 880 F.2d 1049 (9th Cir. 1989), *cert. denied*, 499 U.S. 493 (1991) (holding that statute that forbade loitering after being asked to leave was ambiguous enough to include loitering without being asked to leave, and therefore gave fair warning consistent with *Bouie*).

143. *See* *United States v. Lanier*, 520 U.S. 259, 259 (1997)

144. 508 U.S. 223 (1993).

145. *Id.* at 223.

understood, specifically to coerce, intimidate, injure or kill or attempt any of these,<sup>146</sup> Justice O'Connor, writing for the Court, concluded that

[s]urely petitioner's treatment of his [gun] can be described as "use" within the everyday meaning of the term. Petitioner "used" his [gun] in an attempt to trade it for cocaine. . . . Petitioner's handling of the [gun] in this case falls squarely within those definitions [such as "to make use of," "employ," or "derive service from."]. . . . [I]t is both reasonable and normal to say that petitioner "used" his [gun] in his drug trafficking offenses by trading it for cocaine . . . ."<sup>147</sup>

In an equally baffling opinion, the Montana Supreme Court, in *State v. Mummey*,<sup>148</sup> held that a man who assaulted another outside a bar by kicking him with a pair of sneakers was guilty of assault with a weapon "readily capable of being used to produce death or serious bodily injury."<sup>149</sup> Although this was not appealed to the Supreme Court, given Justice O'Connor's appeal to the "everyday meaning" of the meaning of words in statutes, it seems unlikely that this future barefooted offender will prevail on appeal.

Given these rather loose and airy definitions of reasonably clear changes in the law, what hazards lie in wait for the *Bouie* claim from defendants convicted by juries who receive incomplete instructions? Given the hostility to *Bouie* claims generally,<sup>150</sup> the defendant appears to be doomed from the start. Yet, the errors in *Roy*, *Peck* and *Gilchrist* differ qualitatively from the judicial enlargements in *Smith* and *Mummey*. These latter decisions make conviction easier by shoehorning factual scenarios into the preexisting elements of the crime. In *Mummey*, gym shoes were included in the category of "deadly weapon," while in *Smith*, the Court stuffed the sale of a gun into the category of "use of a gun." When a judge omits an element of the offense, however, the prosecutor's burden is eased through the elimination of the category itself. This is a more pernicious change, as "when a statute on its face is vague or overbroad, it at least gives a potential defendant some notice, by virtue of this very characteristic, that

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146. The dissent uses the terms "discharged, brandished, displayed and possessed." *Id.* at 230 (quotations omitted).

147. *Id.* at 228-30. The casual reader wonders: If a parent allowed a son or daughter to use the family car on a Sunday, would the parent be nonplussed to find a bag of cocaine sitting in the driveway come Monday morning?

148. See *State v. Mummey*, 871 P.2d 868, 871 (Mont. 1994).

149. MONT. CODE ANN. § 45-2-101(71) (1994).

150. "[A]n admittedly imperfect survey further reveals the ostensible dearth of successful *Bouie* claims. In 1996, only two challenges relying on *Bouie* succeeded in the nation's entire [federal] legal system in addition to the Sixth Circuit's [overturned] decision in *Lanier*. Three successful challenges occurred in 1986, and two in 1976." Krent, *supra* note 83, at 58 (footnotes omitted).

a question may arise as to its coverage, and that it may be held to cover his contemplated conduct.”<sup>151</sup> Thus, the very inclusion of the terms “use” and “deadly weapon” in the statute provide some warning that they could *possibly* cover the defendants’ actions.<sup>152</sup> Yet, the omission of an element, insofar as it is a category in and of itself, is not a plausible fact that could fit within a preexisting category. Thus, it gives no opportunity for even reducing the astonishment of the defendant. Even the most lax definition of “foreseeable change in the law” should find the judge’s omission completely unexpected, regardless of its factual context.

#### E. THE EX POST FACTO CLAUSE REQUIRES THE OMISSION OF AN ELEMENT TO BE A STRUCTURAL ERROR

Since the *Roy* error has the practical effect of criminalizing previously legal conduct or increasing the penalty for a preexisting crime after its commission, it clearly implicates the ex post facto reasoning underlying the due process violation found in *Bouie*. Because it is an error of serious constitutional magnitude, the *Roy* error should be a structural error on habeas corpus review. In fact, the omission of an element is more pernicious than the judicial constructs restrained by *Bouie* and its progeny. If it is true that “in applying *Bouie*, courts have departed from the ex post facto paradigm . . . [and in] protecting due process concerns pursuant to *Bouie* in effect look to the underlying intent of the judicial change,”<sup>153</sup> then it is clear that an omission is more violative of the ex post facto limit on judges. After all, the *Roy* error is a judicial change with no intent, that is, a negligent change, and when a change in the law is motivated by carelessness rather than responsible jurisprudence, it clearly violates the Ex Post Facto Clause as incorporated through the Due Process Clause.

#### V. CONCLUSION

In sum, the *Roy* decision seems completely unjustified. The reader wonders whether the specious decision is merely part and parcel of the conservative Court’s efforts to denigrate the rights of criminal defendants. Yet, this Note has not presented a radical or iconoclastic critique of the Court’s decision in *Roy*. Instead, it asks that the Court take seriously the principles invoked in *Roy*. The paradigm *Roy* implicates, as developed in

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151. *Bouie*, 378 U.S. at 352.

152. The best restatement of this argument is that *Bouie* intended to forbid only exceedingly surprising enlargements, not merely moderately surprising enlargements.

153. Krent, *supra* note 83, at 77.

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*Brecht* and *Fulminante*, is a reasonable approach to limiting habeas corpus petitions to those errors that have serious impact on the criminal defendant. Unfortunately, it appears as though appellate courts are swept up in the moment when confronted with the *Roy* error: Constitutional rights seem to pale in comparison to the vivid wrong done by the defendant. Often a grievous wrong has occurred, and the defendant by all appearances seems responsible and deserves punishment. Although the desire to reach the “correct” substantive result may seem to eclipse the constitutional rights of the defendant, “it is an abuse to deal too casually and too lightly with rights guaranteed by the Federal Constitution, even though they . . . may be invoked by those morally unworthy.”<sup>154</sup>

This abuse leads to an infringement of personal liberties. For each element that the jury is not instructed on, the appellate court is given license to decide that element for itself. Courts trade away results in individual cases in their pursuit of the goal of punishing the guilty because of a firm belief that the *Roys* of the world are guilty of the crimes for which they were convicted. The inequity is heightened in the case of the frolicsome fraternity boys, the disgruntled dinner guest or the college students in *Bowie*. Although these individuals did not commit the crimes they were found guilty of, the *Roy* Supreme Court seemingly would allow these convictions to stand in the hopes of preserving convictions against those who are morally unworthy. Surely the Constitution does not permit the habeas courts, blinded by society’s thirst to exact vengeance, to act on this dangerous myopia.

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154. *Brown v. Allen*, 344 U.S. 443, 498 (1953) (opinion of Frankfurter, J.).