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# Procedural Labyrinths and the Injustice of Death: A Critique of Death Penalty Habeas Corpus (Part Two)

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# ARTICLES

## PROCEDURAL LABYRINTHS AND THE INJUSTICE OF DEATH: A CRITIQUE OF DEATH PENALTY HABEAS CORPUS (PART TWO)

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*The following is part two of a two-part article that critiques death penalty habeas corpus. Part one of this article included discussions of the ineffective assistance of counsel and the federal habeas corpus exhaustion requirement. 29 U. RICH. L. REV. 1327 (1995). Part two of this article, which follows, discusses issues related to retroactivity in habeas corpus proceedings and procedural default.*

### IV. RETROACTIVITY IN HABEAS CORPUS PROCEEDINGS: THE RULE IN *TEAGUE V. LANE*

#### A. *Introduction*

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1. The Rule of Nonretroactivity

One of the most restrictive new procedural devices judicially legislated by the Rehnquist Court is the doctrine of nonretroactivity. This doctrine is crucial to the interaction of the federal habeas courts with the state courts. State-court adherence to federal constitutional norms is, in part, a function of the supervision that the federal habeas courts are able to exert over the state criminal justice system. If the federal habeas courts can overrule cramped interpretations of constitutional law by state courts, then state courts must apply the spirit of the law or risk reversal. The lower the risk of reversal, the less a court need concern itself with scrupulous adherence to precedent. The Supreme Court's massive docket prevents it from effectively policing the fifty state criminal justice systems. Thus, the question of when a federal habeas court can apply a Supreme Court decision retroactively to a state criminal conviction is inextricably bound up with the question of how faithful state supreme courts must be toward Supreme Court precedent.

In 1989, the Supreme Court, in a clear break with precedent,[1] decided, subject to two narrow exceptions, to prohibit retroactive application of new constitutional rules in habeas corpus proceedings.[2] *Teague v. Lane* came unheralded: the issue was not briefed by the parties to the controversy,[3] and was considered sua sponte.[4]

The *Teague* plurality decided that new constitutional rules should not ordinarily be applied or announced retroactively in cases on collateral review except that: (1) "a new rule should be applied retroactively if it places 'certain kinds of primary, pri-

1. In Linkletter v. Walker, 381 U.S. 618 (1965), the Supreme Court established a balancing test for determining when new rules of constitutional criminal law would be retroactively applied. *Id.* at 628-629. The "*Linkletter* standard" balanced the purpose served by the new rule, the extent of law enforcement's reliance on the old standard, and the effect on the administration of justice. *Id.*

2. Teague v. Lane, 489 U.S. 288 (1989).

3. *Id.* at 330 (Brennan, J., dissenting) ("Astonishingly, the plurality adopts this novel precondition to habeas review without benefit of oral argument on the question and with no more guidance from the litigants than a three-page discussion in an amicus brief.").

4. *Id.* at 299.

vate individual conduct beyond the power of the criminal law-making authority to proscribe'"[5] and, (2) retroactive application is permitted for "watershed rules of criminal procedure"[6] that are "central to an accurate determination of innocence or guilt."[7] Justice O'Connor's plurality opinion purported to borrow this formula from former Justice Harlan,[8] with one modification that added the accuracy element to the second exception. The rule, as formulated and subsequently applied, bears little resemblance to the late Justice Harlan's conception of retroactivity.[9]

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5. *Id.* at 311 (citation omitted).

6. *Id.*

7. *Id.* at 313.

8. The plurality in *Teague* explained that Justice Harlan believed that new rules of constitutional law should not ordinarily be applied retroactively by a federal habeas court. *Id.* at 305. This, he thought, should be subject to two exceptions. *Id.* at 307. The first exception, which *Teague* adopts, comes directly from Justice Harlan's opinion in Mackey v. United States, 401 U.S. 667, 692 (1971) (involving "certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe").

The second exception is an amalgamation of two of Justice Harlan's ideas. In his dissent in Desist v. United States, 394 U.S. 244 (1969), Justice Harlan focused on the accuracy-enhancing function of habeas corpus. *Id.* at 262 (Harlan, J., dissenting). However, in *Mackey* he rejected this formulation and instead focused on whether a particular new procedure "alter[ed] our understanding of the *bedrock procedural elements* that must be found to vitiate the fairness of a particular conviction." 401 U.S. at 693 (emphasis added). Thus, Justice Harlan rejected a focus on innocence and instead focused on what might be called a fundamental fairness exception for the retroactive application of new procedural rules. Justice Harlan viewed these two formulations of the second exception as mutually exclusive. Nonetheless, the Supreme Court in *Teague* joined these two separate strands into a single, much more restrictive test requiring that before a new procedural rule could qualify under this exception and be applied retroactively on habeas corpus, it must be both a watershed rule of criminal procedure and designed to enhance the accuracy of the trial. Teague, 489 U.S. at 312.

9. *See, e.g.*, Barry Friedman, *Habeas and Hubris*, 45 VAND. L. REV. 797, 811 (1992) ("[T]he *Teague* decision resembles Justice Harlan's views much like a kidnapping note pasted together from stray pieces of newsprint resembles the newspaper from which it came."). Critics complain that by adding the innocence component to the second exception, and by construing the ambit of a "new rule" far more broadly than Justice Harlan, *Teague* operates to exclude issues from review far more broadly than would have been the case under Justice Harlan's conceptions of nonretroactivity. *See* Larry W. Yackle, *The Habeas Hagioscope*, 66 S. CAL. L. REV. 2331, 2385 (1993)("At the same time, however, this Court defines 'new rules' and the exceptional circumstances in which they should be invoked quite differently from Harlan.").

## 2. The Questions and Complexities Raised by Teague

Habeas corpus admits of few issues more complex or controversial[10] than the nonretroactivity bar of *Teague*. Despite the apparent simplicity of the rule—no new law on habeas—questions abound. The rule has been called a "jurisprudential morass,"[11] and courts of appeal have found that "[t]he lines are fuzzy."[12] Even *Teague's* author, Justice O'Connor, admits that "[t]his Court's retroactivity jurisprudence has become somewhat chaotic in recent years."[13]

The rule remains in flux.[14] From 1989 to February 1994 the issue has played a major part in a large number of cases.[15] There is no indication that this trend is at an end. Capturing the essence of a quickly changing concept is difficult. Nonetheless, it is important for habeas litigators, particularly where life itself is at stake, to acquire a basic working knowledge of the

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10. Most of the law review articles addressing *Teague* have been critical. *See, e.g.*, Friedman, *supra* note 9; Steven M. Goldstein, *Chipping Away At the Great Writ: Will Death Sentenced Federal Habeas Corpus Petitioners Be Able to Seek and Utilize Changes in the Law?* 18 N.Y.U. REV. L. & SOC. CHANGE 357 (1990-91); Eliot F. Krieger, *The Court Declines in Fairness*—Teague v. Lane, 25 HARV. C.R.-C.L. L. REV. 164 (1990); James S. Liebman, *More Than "Slightly Retro:" The Rehnquist Court's Rout of Habeas Corpus Jurisdiction in* Teague v. Lane, 18 N.Y.U. REV. L. & SOC. CHANGE 537 (1990-91); Yackle, *supra* note 9. For a more positive view, see, Patrick E. Higginbotham, *Notes On* Teague, 66 S. CAL. L. REV. 2433 (1993).

11. Robert Weisberg, *A Great Writ While It Lasted*, 81 J. CRIM. L. & CRIMINOLOGY 9, 28 (1990). Weisberg also notes the incongruity of "the conceptually impossible distinction between a ruling that follows ineluctably from precedent and one which concededly expands precedent . . . in a judicial world where courts rarely acknowledge that they do any more than draw ineluctable conclusions from precedent." *Id.* at 22-23.

12. Taylor v. Gilmore, 954 F.2d. 441, 445 (7th Cir. 1992), *rev'd,* 113 S. Ct. 2112 (1993).

13. Harper v. Virginia Dep't of Taxation, 113 S. Ct. 2510, 2526 (1993) (O'Connor, J., dissenting). *Harper* was a civil case in which the Court discussed the evolution of retroactivity law in both civil and criminal contexts.

14. *See* 2 JAMES S. LIEBMAN AND RANDY HERTZ, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE §§ 25.1 to .8 (2d ed. 1994).

15. *See, e.g.*, Caspari v. Bohlen, 114 S. Ct. 948 (1994); Schiro v. Farley, 114 S. Ct. 783 (1994); Godinez v. Moran, 113 S. Ct. 2680 (1993); Gilmore v. Taylor, 113 S. Ct. 2112 (1993); Graham v. Collins, 113 S. Ct. 892 (1993); Lockhart v. Fretwell, 113 S. Ct. 838 (1993); Wright v. West, 112 S. Ct. 2482 (1992); Stringer v. Black, 503 U.S. 222 (1992); Sawyer v. Smith, 497 U.S. 227 (1990); Collins v. Youngblood, 497 U.S. 37 (1990); Saffle v. Parks, 494 U.S. 484 (1990); Butler v. McKellar, 494 U.S. 407 (1990); Penry v. Lynaugh, 492 U.S. 302 (1989); Zant v. Moore, 489 U.S. 836 (1989).

nonretroactivity rule and its exceptions. This article sketches out the essentials, but its brevity prevents consideration of the many interesting historical and institutional issues generated by the *Teague* rule.[16] The major questions raised by *Teague* and its progeny divide generally into three categories: (1) how is a new rule defined? (2) to what and how does the rule apply? and (3) how and when do the exceptions operate? Much is subsumed within these imprecise lines of inquiry. Because the "new rule" doctrine of *Teague* is complex and subtle, it will be easier to consider the exceptions first and then exclude them from the discussion. The narrowness of these exceptions will make clear the importance of the "new rule" doctrine.

### B. *The Exceptions to Nonretroactivity*

#### 1. The First *Teague* Exception: The Constitutionality of Criminal Conduct

The first *Teague* exception arises when the rule in question holds that the accused's conduct was not criminal. It applies to "an actor's primary conduct"[17] as addressed by the substantive law. In *Penry v. Lynaugh*,[18] the Court extended the exception to the capital sentencing proceeding. The Court extended the rule, that was arguably limited to situations where conduct itself was decriminalized to the capital sentencing arena, where the issue was not whether the conduct was proscribed, but rather whether the conduct was such that the death penalty could constitutionally be imposed. This enlargement of the exception followed obliquely from *Coker v. Georgia*,[19] in which the Court held that the death penalty for rape violated the Eighth Amendment "cruel and unusual punishment" proscription.[20] *Coker* established that certain types of conduct were placed beyond the reach of death penalty statutes by the Eighth Amendment. *Ford v. Wainwright*,[21] in which the Court

16. Three articles that raise the institutional and historical issues well are Friedman, *supra* note 9; Liebman, *supra* note 10; and Yackle, *supra* note 9.

17. *Teague*, 489 U.S. at 311.

18. 492 U.S. 302 (1989).

19. 433 U.S. 584 (1977).

20. *Id.* at 592.

21. 477 U.S. 399 (1986).

prohibited the execution of prisoners who are insane at the time of execution, also supplied an applicable analogy. Both conduct and status could be placed beyond capital punishment's reach. Applying this concept to the first *Teague* exception made a nice, symmetrical fit. Conduct could be proscribed yet not merit the death penalty; this was sufficiently analogous to decriminalization of conduct to warrant application to the first *Teague* exception.

### 2. The Exception to Nonretroactivity for Watershed Rules of Criminal Procedure Without Which the Likelihood of an Accurate Conviction Is Seriously Diminished

The second exception was phrased in terms of watershed rules of criminal procedure. This test has two elements: (1) the rule must be fundamental to the fairness of the proceeding (hence the metaphor "watershed rules") and (2) the new procedure must enhance the accuracy of the process.[22] Since *Teague*, it seems that no case can satisfy both. Where a case has involved the accuracy or integrity of the process,[23] the Court has found that the procedural rule was not sufficiently "implicit in the concept of ordered liberty"[24] to constitute a "watershed rule[] of criminal procedure."[25]

In other cases, the new rule cannot meet the requirement that a new rule implicates the accuracy of the proceeding. *Teague* itself supposedly fell within this rubric,[26] although one

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22. Teague v. Lane, 489 U.S. 288, 311-13 (1989).

23. Sawyer v. Smith, 497 U.S. 227 (1990), involved a prosecutor who mislead the jury into thinking that they had less responsibility for the sentencing decision than they actually had. This violated the rule in Caldwell v. Mississippi, 472 U.S. 320 (1985). *See infra* section IV.C. The *Sawyer* Court said:

> It is . . . not enough under *Teague* to say that a new rule is aimed at improving the accuracy of trial. More is required. A rule that qualifies under this exception must not only improve accuracy, but also 'alter our understanding of the *bedrock procedural elements*' essential to the fairness of a proceeding.

*Sawyer*, 497 U.S. at 242 (quoting *Teague*, 489 U.S. at 311) (emphasis added). This watershed or bedrock procedural rule talisman seems malleable enough to allow the Supreme Court to deny this second *Teague* exception to virtually any new rule that the Court crafts.

24. *Teague*, 489 U.S. at 311 (quoting Mackey v. United States, 401 U.S. 667, 692 (1971)).

25. *Id.* at 311.

26. Justice O'Connor ruled that Teague could meet neither prong of the test.

can question whether that was necessarily so. The petitioner in *Teague* was "a black man . . . convicted by an all-white jury" of attempted murder, armed robbery and aggravated battery.[27] The prosecutor used all of his peremptory challenges to strike only persons of African-American descent. His explanation that "he was trying to achieve a balance of men and women on the jury"[28] "was transparent,"[29] a palpable subterfuge. The Supreme Court's dismissal of the claim as not implicating the accuracy of the process is either naive or cynical. The racial composition of a jury can have a profound effect on the outcome.[30] One commentator has observed that "[t]he conviction [was] tainted with overt racial discrimination."[31] Thus, the Supreme Court utilized a restricted conception of procedures that affect the accuracy of the process, as well as a narrow view of what constitutes a bedrock procedural rule, to achieve the result in *Teague*.

The second *Teague* exception's narrow compass becomes explicable with the Court's opinion in *Saffle v. Parks*.[32] The Court in *Saffle* emphasized that "although the precise contours of this exception may be difficult to discern, we have usually cited Gideon v. Wainwright, 372 U.S. 335 (1963), holding that a defendant has the right to be represented by counsel in all criminal trials for serious offenses, to illustrate the type of rule

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> Because the absence of a fair cross section on the jury venire does not undermine the fundamental fairness that must underlie a conviction or seriously diminish the likelihood of obtaining an accurate conviction, we conclude that a rule requiring that petit juries be composed of a fair cross section of the community would not be a 'bedrock procedural element' that would be retroactively applied under the second exception we have articulated.

*Teague*, 489 U.S at 315.

27. *Id.* at 292.

28. *Id.* at 293.

29. Friedman, *supra* note 9, at 808.

30. For example, racial discrimination in death sentences has been well documented. *See, e.g.*, David C. Baldus et al., *Arbitrariness and Discrimination in the Administration of the Death Penalty*, 15 STETSON L. REV. 133 (1986); Samuel R. Cross & Robert Mauro, *Patterns of Death: An Analysis of Racial Disparities in Capital Sentencing and Homicide Victimization*, 37 STAN. L. REV. 27 (1984); Ronald J. Tabak, *The Execution of Injustice: A Cost and Lack-Of-Benefit Analysis of the Death Penalty*, 23 LOY. L.A. L. REV. 59, 89-93 (1989).

31. Friedman, *supra* note 9, at 808-809.

32. 494 U.S. 484 (1990).

coming within the exception."[33] This illustration is so restrictive that it is no wonder the *Teague* plurality felt it was "unlikely that many such components of basic due process have yet to emerge."[34] Other Supreme Court cases dealing with the second *Teague* exception run in the same vein.[35]

The Fourth Circuit Court of Appeals has held that the rule invalidating state rules that require jury unanimity on a capital defendant's mitigating evidence was such a bedrock procedural rule as to fall within the second *Teague* exception.[36] Because a denial of certiorari implies nothing concerning the merits of a lower court decision,[37] it is difficult to evaluate the importance of this case.

The cases demonstrate that the two *Teague* exceptions are narrow indeed. Very few cases could qualify under either exception. This makes the focus on what constitutes a "new rule" for the purpose of determining when to apply *Teague* a critical inquiry.

### C. *The Definition of "New Rule"*

By far the most difficult problem in dealing with the habeas corpus nonretroactivity doctrine is the determination of whether resolution of a claim requires the application of a new rule of law. Can the petition be resolved by applying old law, or must a new rule be fashioned? The answer to this is not as simple as it might at first seem. Much depends on how broadly or narrowly a rule is read, and that depends on the criteria for decid-

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33. *Id.* at 495.

34. Teague v. League, 489 U.S. 288, 313 (1989).

35. *See, e.g.*, Gilmore v. Taylor, 113 S. Ct. 2112 (1993); Caspari v. Bohlen, 114 S. Ct. 948 (1994).

36. Williams v. Dixon, 961 F.2d. 448 (4th Cir.), *cert. denied*, 113 S. Ct. 510 (1992). Douglas Williams, Jr. sought habeas corpus seeking relief from his death sentence on the ground that he lacked the requisite mental capacity (because of organic brain damage). After his case became final, the Supreme Court held in McKoy v. North Carolina, 494 U.S. 433 (1990) that the jury instruction, also given in the *Williams* case, requiring jury unanimity before they could consider a defendant's mitigating evidence, was unconstitutional. *McKoy* constituted a new rule but was entitled to retroactive application because it fell within the second *Teague* exception. *Williams*, 961 F.2d. at 453; *see also* Mills v. Maryland, 486 U.S. 367 (1988).

37. ROBERT L. STERN ET AL., SUPREME COURT PRACTICE § 5.5, 234-36 (7th ed. 1993).

ing whether the claim comes within the ambit of an old rule. "While there can be no dispute that a decision announces a new rule if it expressly overrules a prior decision, 'it is more difficult . . . to determine whether we announce a new rule when a decision extends the reasoning of our prior cases.'"[38]

The difficulty begins with *Teague* itself which is offered as one test but which is clearly two differing[39] tests for determining whether a rule is new:

> It is admittedly often difficult to determine when a case announces a new rule, and we do not attempt to define the spectrum of what may or may not constitute a new rule for retroactivity purposes. In general, however, *a case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government.* To put it differently, *a case announces a new rule if the result was not dictated by precedent existing at the time the defendant's conviction became final.*[40]

As Professor Liebman points out, the first criterion that "a 'new rule' is one that 'breaks new ground or imposes a new obligation'—tends towards the end of the spectrum of 'new rule' definitions occupied by relatively rare overrulings . . . and announcements of rules to govern newly arisen procedural innovations."[41]

If that were all that the *Teague* plurality had said, the case would have affected only a few habeas cases. Justice Brennan's dissent focused on the problem created by the "dictated by precedent" language:

> Few decisions on appeal or collateral review are "dictated" by what came before. Most such cases involve a question of law that is at least debatable, permitting a rational judge to resolve the case in more than one way. Virtually no case

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38. Graham v. Collins, 113 S. Ct. 892, 897 (1983) (quoting Saffle v. Parks, 494 U.S. 484, 488 (1990)).

39. One commentator goes further, calling these "conflicting characterizations." Professor Liebman, *supra* note 14, at 244. While this perhaps overstates the matter, there is at least a pronounced tension in Justice O'Connor's varying attempts to formulate a general test for determining when a rule is new for retroactivity analysis.

40. Teague v. Lane, 489 U.S. 288, 301 (1989) (citations omitted) (emphasis added).

41. Liebman, *supra* note 14, at 244-45.

> that prompts a dissent on the relevant legal point, for example, could be said to be "dictated" by prior decisions. By the plurality's test, therefore, a great many cases could only be heard on habeas if the rule urged by the petitioner fell within one of the two exceptions the plurality has sketched. Those exceptions, however, are narrow. Rules that place "'certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe'" . . . are rare. And rules that would require "new procedures without which the likelihood of an accurate conviction is seriously diminished" . . . are not appreciably more common . . . The plurality's approach today can thus be expected to contract substantially the Great Writ's sweep.[42]

The next decision to address the *Teague* nonretroactivity doctrine, *Penry v. Lynaugh*,[43] ran headlong into the problem of determining the contours of the "new rule" doctrine. Johnny Paul Penry was a moderately retarded death row inmate with, according to one clinical psychologist, the mental age of a six and one-half year old.[44] His case presented two distinct retroactivity problems stemming from two substantive issues: (1) whether the Eighth Amendment prohibits the execution of the mentally retarded; and (2) whether the death sentence violated the Eighth Amendment "because the jury was not adequately instructed to consider all of his mitigating evidence"[45] in imposing its sentence. The first issue—the claimed unconstitutionality of executing the mentally retarded—would, if resolved in favor of Penry, create a new rule coming within the first *Teague* exception insofar as it took mentally retarded persons out of the class of individuals who would be eligible for the death penalty.[46] Because the case fell within the first *Teague* exception, the Court addressed the merits and resolved them against Penry.[47]

The second issue—the failure of the jury instructions to consider and give effect to the mitigating evidence of retarda-

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42. Teague, 489 U.S. at 334 (Brennan, J., dissenting).
43. 492 U.S. 302 (1989).
44. *Id.* at 302.
45. *Id.*
46. *Id.* at 330.
47. *Id.*

tion—provided the more interesting retroactivity problem.[48] Justice O'Connor restated the rule without noting the potential difficulty inherent in the "dictated by precedent" language. Joined by two dissenters and two concurrences from *Teague*, the new majority held that the rule sought by Penry was controlled by *Lockett v. Ohio*[49] and *Eddings v. Oklahoma*,[50] which held that a capital sentencer must be allowed to consider all available mitigating evidence.[51] The mitigating evidence offered by the defense included Penry's evidence of retardation. The jury instructions prevented consideration of this evidence.[52] Since it did not constitute a new rule, but merely applied an old rule established prior to Penry's conviction becoming final, he benefited from it and received relief.[53]

This result seems unexceptional. The evidence penetrated the heart of capital case mitigation evidence, and thereby comports well with modern post-*Furman* notions of due process in capital sentencing. However, it is difficult to conceive that *Penry* was dictated by the *Lockett/Eddings* line of cases. The Texas capital sentencing scheme, which included the precise special issues[54] addressed by Penry's jury, had been held to be facially constitutional in *Jurek v. Texas*.[55] *Penry's* holding that the Texas statute was unconstitutional as applied to Johnny Penry "wiped out a good part of the effect . . . of *Jurek* and reversed a huge state

48. For many, the Court's treatment of the constitutionality of executing retarded persons or, alternatively, the right to have their mental disabilities considered at the sentencing proceeding, constituted the most important issues in *Penry*. However, the complexity of the "new rule" analysis, and the draconian nature of a broad sweep in application, renders this analysis extremely significant to habeas litigators confronted with the defense that a claim is new, not falling within one of the exceptions, and therefore, unavailable.

49. 438 U.S. 586 (1978).

50. 455 U.S. 104 (1982).

51. *Penry*, 492 U.S. at 315.

52. *Id.* The special issues to be answered at the conclusion of a capital sentencing proceeding in Texas at the time of Penry's trial were: (1) Whether the defendant's conduct which caused the death was committed deliberately and with a reasonable expectation that a death would result; (2) Whether there was a probability that the defendant would commit criminal acts of violence that constitute a continuing threat to society; and, (3) If raised by the evidence, whether the conduct of the defendant in killing the deceased was an unreasonable response to the provocation, if any, by the deceased. TEX. CODE CRIM. PROC. ANN. art. 37.071(b) (West 1981 & Supp. 1989).

53. *Penry*, 492 U.S. at 315.

54. TEX. CODE CRIM. PROC. ANN. art. 37.071(b) (West 1981 & Supp. 1989).

55. 428 U.S. 262 (1976).

and lower federal court jurisprudence that *did* in fact hold that *Jurek* permitted the practices the Court disapproved in *Penry*."[56] If any case seemed to conservative jurists not to be "dictated by precedent" it was Penry's case. Perhaps this explains why none of the plurality in *Teague* joined Justice O'Connor in the *Penry* decision. In a bitter riposte, Justice Scalia, joined by Chief Justice Rehnquist and Justices White and Kennedy, observed: "[i]t is rare that a principle of law as significant as that in *Teague* is adopted and gutted in the same Term."[57]

It is hardly surprising that the Supreme Court's conservative members were unhappy with the outcome in *Penry*. "[A]nxious to speed the pace of executions"[58] and unhappy with the criminal and habeas jurisprudence of the Warren Court,[59] these judicial conservatives sought the elimination of most habeas cases.[60] The "dictated by precedent" formulation of a new rule was the perfect subterfuge for eliminating habeas corpus without directly confronting the Habeas Corpus Statute and without overturning directly the broad substantive rights accorded by the Warren Court.[61] Coupled with the statutory presumption of correctness for state fact-finding,[62] the nonretroactivity rule would, if strictly applied, permit only the rarest habeas case to be heard on the merits in federal court (for example, where a state court had flagrantly ignored or misapprehended clear controlling precedent). *Penry* appeared to undercut the "dictated by precedent" portion of the *Teague* "new rule" criteria.

However, in 1990, "dictated by precedent" came back, acquiring fresh force in a novel formulation, in *Butler v. McKellar*,[63]

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56. Liebman, *supra* note 14, at 248.

57. *Penry*, 492 U.S. at 353 (Scalia, J., dissenting).

58. Friedman, *supra* note 9, at 800.

59. *Id.* at 820-26.

60. *See, e.g.*, Liebman, *supra* note 10 *passim* (arguing that *Teague* represents an assault on habeas corpus).

61. *See, e.g.*, Kathleen Patchell, *The New Habeas*, 42 HASTINGS L.J. 939, 982 (1991) ("With the development of this new retroactivity doctrine, proponents of the new habeas at last found a means of limiting the substantive scope of habeas without directly attacking the substance of rights.").

62. 28 U.S.C. § 2254(d) (1988).

63. 494 U.S. 407 (1990).

*Saffle v. Parks*,[64] and *Sawyer v. Smith*.[65] *Butler* is difficult to distinguish from *Penry*. It presents an even stronger case for the application of "old" precedent, hence available on habeas, and yet it came to the opposite conclusion.

Horace Butler was arrested and invoked his right to retain counsel, but was unable to make bond and stayed in jail. While in jail, he was informed that he was a suspect in an unrelated murder. Butler made incriminating statements, and was ultimately convicted of capital murder and sentenced to death. His lawyers preserved the claim that his confession violated his rights under *Edwards v. Arizona*,[66] which required police to refrain from all interrogation once an accused had invoked the right to counsel. It is only a slight extension to apply this rule to one who is in continuous custody under a different charge, and that is exactly what the Supreme Court did in *Arizona v. Roberson*.[67] The rule in *Roberson* came after Butler's case had become final and was therefore subject to retroactivity analysis. The Court in *Roberson* said that Roberson's case was directly controlled by *Edwards*. Horace Butler sought application of this rule that was directly controlled by a rule in effect before his conviction had become final. Thus, *Butler* effected less an extension of existing precedent than did *Penry*. If *Penry* had controlled the retroactivity analysis, Horace Butler would have received relief from his death sentence; however, Butler lost. The majority held that a rule is dictated by precedent if it "was susceptible to debate among reasonable minds."[68]

Here was a formulation of the "new rule" that would, if consistently applied, devour habeas corpus. As long as reasonable jurists could disagree, a rule was new and unavailable to habeas petitioners. The dissent was unusually bitter:

> Today, under the guise of fine-tuning the definition of "new rule," the Court strips state prisoners of virtually any meaningful federal review of the constitutionality of their incarceration. A legal ruling sought by a federal habeas

64. 494 U.S. 484 (1990).
65. 497 U.S. 227 (1990).
66. 451 U.S. 477 (1981).
67. 486 U.S. 675 (1988).
68. *Penry*, 494 U.S. at 415.

> petitioner is now deemed "new" as long as the correctness of the rule, based on precedent existing when the petitioner's conviction became final, is "susceptible to debate among reasonable minds." Put another way, a state prisoner can secure habeas relief only by showing that the state court's rejection of the constitutional challenge was so clearly invalid under then-prevailing legal standards that the decision could not be defended by any reasonable jurist. With this requirement, the Court has finally succeeded in its thinly veiled crusade to eviscerate Congress' habeas corpus regime.[69]

The dissent explained:

> State courts essentially are told today that, save for outright "illogical" defiance of a binding precedent precisely on point, their interpretations of federal constitutional guarantees—no matter how cramped and unfaithful to the principles underlying existing precedent—will no longer be subject to oversight through the federal habeas system. State prosecutors surely will offer every conceivable basis in each case for distinguishing our prior precedents, and state courts will be free to "disregard the plain purport of our decisions and to adopt a let's-wait-until-it's-decided [by the Supreme Court] approach."[70]

This "new rule" criterion, which defined an "old" rule as that which *all* reasonable jurists in the country would find to be dictated by precedent, stood—for 1990. *Saffle v. Parks*[71] held that petitioner's contention that the *Lockett/Eddings* line of cases[72] required that the jury be able to base its decision on the sympathy that the jury feels toward the defendant after hearing the mitigating evidence would, if adopted, constitute a new rule. It was, therefore, unavailable to a habeas petitioner. *Sawyer v. Smith*,[73] involved prosecutorial misconduct at the

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69. *Id.* at 417 (Brennan, J., dissenting, joined by Marshall, J., and joined as to parts I, II, and III by Blackmun and Stevens, JJ.) (citation omitted).

70. *Id.* at 423.

71. 494 U.S. 484 (1990).

72. The Lockett/Eddings line of cases requires the sentencer in a capital case to be able to consider in assessing the appropriate sentence any facts in mitigation that the defendant proffers. *See, e.g.*, Eddings v. Oklahoma, 455 U.S. 104 (1982); Lockett v. Ohio, 438 U.S. 586 (1978).

73. 497 U.S. 227 (1990).

capital trial sentencing stage. *Caldwell v. Mississippi*,[74] held that a prosecutor's argument at the sentencing phase that diminished the jury's sense of responsibility, by telling them that their decision in imposing death was not final and could be overridden, violated the Eighth Amendment. This error (now frequently called "Caldwell error") was held to constitute a new rule and therefore unavailable on federal habeas corpus. *Teague*, as modified by *Butler*, was now effective to screen out most claims on habeas corpus.

Given the *Butler, Saffle, Sawyer* trio, *Stringer v. Black*,[75] is surprising. Justice Kennedy wrote for a six to three majority that included Chief Justice Rehnquist, and Justices White and O'Connor. The Court changed direction again and substantially narrowed the scope of the "new rule" standard. The petitioner in *Stringer* had received a death sentence under a jury instruction that allowed the jury to impose death if it found that the murder was "especially heinous, atrocious or cruel."[76] A similar instruction involving the "vileness" predicate[77] had been held unconstitutionally vague in *Godfrey v. Georgia*,[78] which predated *Stringer*. The rule in *Godfrey* had not been applied to the precise language "heinous, atrocious or cruel" until *Maynard v. Cartwright*,[79] and this rule had not been applied to a weighing state[80] until *Clemons v. Mississippi*.[81] Both *Cartwright* and

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74. 472 U.S. 320 (1985).

75. 112 S. Ct. 1130 (1992).

76. *Id.* at 1134.

77. The "vileness" predicate used in many capital punishment states is the functional equivalent of the "heinous, atrocious or cruel" predicate of other capital punishment states. Each told the jury at the sentencing phase that the death penalty could be imposed if the jury found that the murder in question were particularly vile (or heinous).

78. 446 U.S. 420 (1980). The Court in *Godfrey* held that all murders are vile so that allowing a jury to impose a death sentence because the murder was especially vile did not serve to meaningfully distinguish between those few murderers that deserved execution from the many more ordinary murderers that did not. Thus, the instruction invited arbitrary decision making and was unconstitutionally vague. Most states, after the *Godfrey, Cartwright, and Clemons* line of cases, provided the jury with narrowing definitions that were designed to cure the vagueness problems associated with these types of penalty phase instructions. These issues continue to be aggressively litigated because the narrowing constructions themselves give rise to questions. *See, e.g.*, Jones v. Murray, 976 F.2d. 169 (4th Cir. 1992).

79. 486 U.S. 356 (1988).

80. A weighing state is one in which the jury at the sentencing phase of a capital trial is required to weigh the aggravating and mitigating circumstances in deter-

*Clemons* were decided after the petitioner's case in *Stringer* had become final.

Two circumstances favored a determination that extension of *Godfrey* to these facts constituted a new rule that would therefore be unavailable to petitioner. First, "prior to *Clemons*, the issue decided favorably to the defendant in *Clemons* had been 'express[ly] . . . left open.'"[82] Second, before *Clemons* the Fifth Circuit had "concluded that *Godfrey* did not apply to Mississippi."[83] It was certainly possible for a reasonable jurist to distinguish *Godfrey* on the basis that the issue in Mississippi remained open at least until *Clemons*. The supposedly reasonable jurists of the Fifth Circuit Court of Appeals had in fact made precisely that distinction in ruling against death-sentenced petitioners on the merits. Yet the Court reversed, finding that extension of *Godfrey* to *Stringer* did not create a new rule, but merely applied the old rule. The Court made short work of the contrary Fifth Circuit precedent:

> The Fifth Circuit's pre-*Clemons* views are relevant to our inquiry, but not dispositive. The purpose of the new rule doctrine is to validate reasonable interpretations of existing precedents . . . The short answer to the State's argument is that the Fifth Circuit made a serious mistake in [the *Evans* and *Johnson* cases].[84]

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mining whether the defendant is to be executed. Mississippi is such a weighing state, whereas Georgia is not. In a non-weighing state, such as Georgia or Virginia, the jury is simply told to consider the aggravating and mitigating circumstances in determining whether the sentence is to be life or death, but it is not told to weigh those circumstances to determine if aggravators outweigh mitigators or vice-versa. This may seem an inconsequential difference, but conceptually a weighing state is different in that the failure to properly give meaning to a mitigating circumstance could tip the scales of justice in favor of the state.

81. 494 U.S. 738 (1990).

82. Liebman, *supra* note 14, at 251 (citations omitted).

83. Stringer v. Black, 112 S. Ct. 1130, 1140 (1992) (citing Evans v. Thigpen, 809 F.2d. 239 (5th Cir.), *cert. denied*, 483 U.S. 1033 (1987); Johnson v. Thigpen, 806 F.2d. 1243 (5th Cir. 1986), *cert. denied*, 480 U.S. 951 (1987)).

84. *Id.* at 1140. The consequence of the Fifth Circuit's "serious mistake" is that both Connie Ray Evans and Edward Earl Johnson were executed. NAACP Legal Defense and Educational Fund, Inc., Death Row U.S.A. (Summer, 1993) (unpublished manuscript, on file with the *University of Richmond Law Review*) [hereinafter *Death Row USA*].

Unfortunately for those who seek to understand the Supreme Court's habeas corpus retroactivity jurisprudence, the Court continues to reverse direction. If any case appeared to be controlled by the ruling in *Penry v. Lynaugh*, it was *Graham v. Collins*.[85] Given the Supreme Court's flailing about between extremes, it is not surprising that Gary Graham lost while Horace Penry won. The meaning and application of "new rule" remains elusive.[86]

Graham received a death sentence in Texas from a jury that was given the same penalty phase instructions that were given in Penry's case.[87] The only distinction between the two cases lies in the type of mitigating evidence presented by the two defendants. Penry had adduced his mental incapacity as a mitigating circumstance, and the Court had held that the Texas special instructions failed to allow jury consideration of this evidence. Graham presented evidence of his youth and good character prior to the short-lived crime spree that placed him on death row.[88] The majority distinguished *Penry* on the basis that the Texas special instructions failed to permit any consideration of Penry's retardation, while Gary Graham's youth, relatively good prior character, and the short duration of his

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85. 113 S. Ct. 892 (1993).

86. A badly fractured court in Wright v. West, 112 S. Ct. 2482 (1992) dealt with the *Teague* nonretroactivity doctrine at length in the dicta in the many opinions. The question presented but not decided was whether the *Teague* retroactivity doctrine created a requirement of general deference by habeas courts to all reasonable state court decisions applying federal law to the facts of particular cases. The Court found it unnecessary to decide this question. The different opinions dealt with the issue of the difference between pure legal rules and the application of legal rules to the facts of particular cases—the issue of mixed questions of law and fact and whether a federal habeas court should defer to state findings as to such mixed questions of law and fact. The case is important primarily as an indication of a direction that three justices would take if they could garner the votes. Chief Justice Rehnquist and Justices Thomas and Scalia are prepared to adopt a general rule of deference to state application of law to issues of fact. If that view were to be adopted, habeas corpus as we know it would be entirely ended. All questions ultimately become mixed questions of fact and law. A general rule of deference to state court application of law to new sets of facts would leave federal habeas corpus with no room in which to operate. Even outright defiance of Supreme Court precedent could be hidden behind factual predicates, rendering any state court virtually unreviewable. For an excellent exposition of *Wright v. West* see James S. Liebman, *Apocalypse Next Time?: The Anachronistic Attack On Habeas Corpus/Direct Review Parity*, 92 COLUM. L. REV. 1997 (1992).

87. *See supra* note 52.

88. Graham was 17 at the time of the crimes for which he was convicted and received the death penalty. *Graham*, 113 S. Ct. at 896.

crime spree, could all be considered by the jury in its deliberations on the future dangerousness instruction.[89] This distinction sufficed to characterize Graham's claim as new and therefore unavailable on habeas corpus.[90] The dissent, which included Justices Souter, Blackmun, Stevens, and the author of *Teague*, Justice O'Connor, saw no meaningful distinction between the two cases and would have granted relief.[91] The distinction between the zero scope for consideration of Penry's claim and the de minimis scope in Graham's, allowing consideration of youth and character to be limited to the issue of whether a person will likely remain dangerous, appears ephemeral.[92]

Defendants continue to lose in the Supreme Court on the *Teague* "new rule" issue. In *Gilmore v. Taylor*,[93] a noncapital case, the Supreme Court held that the Seventh Circuit's ruling in *Falconer v. Lane*[94] was not dictated by precedent.[95] Therefore the holding was new, and hence unavailable to the peti-

89. *Id.* at 901. It was argued that retardation, far from being a consideration under the Texas special instructions, actually harmed Penry because under the future dangerous predicate the retardation would likely be seen as making Penry potentially less likely to be able to conform his future behaviour to the law and therefore more likely to be dangerous. *Id.* at 901. This appears to be the strongest argument for distinguishing *Penry* from *Graham*.

90. *Id.* at 902.

91. *Id.* at 917 (Souter, J., dissenting).

92. The majority opinion appears to be little aware of, or unsympathetic to, the exigencies of trial advocacy in the capital sentencing phase trial. This limitation on the use of the defendant's youth and background limits the advocate in her effective representation of the defendant on what often may be the crucial issues of the case. *See, e.g.*, Alan W. Clarke, *Virginia's Capital Murder Sentencing Proceeding: A Defense Perspective*, 18 U. RICH. L. REV. 341 (1984).

93. 113 S. Ct. 2112 (1993).

94. 905 F.2d. 1129 (7th Cir. 1990) (holding that jury instructions regarding murder and voluntary manslaughter violated constitutional strictures because they allowed the jury to return a guilty of murder verdict without considering whether defendant possessed the requisite mental state).

95. *Gilmore*, 113 S. Ct. at 2116 ("[P]ut meaningfully for the majority of cases, a decision announces a new rule 'if the result was not *dictated* by precedent existing at the time the defendant's conviction became final.'" (citations omitted)).

tioner on habeas corpus.[96] Recently, in *Caspari v. Bohlen*[97] the Court ruled that the extension of the rule in *Bullington v. Missouri*[98] would, if applied in a non-capital case, constitute a new rule that would be unavailable to a petitioner on federal habeas corpus. Not surprisingly, lower federal courts have experienced difficulty in applying the *Teague* "new rule" criterion.[99] Lawyers working in this area can find recent precedent to support almost any position.

## D. Teague *Applied*

### 1. The Types of Cases Subject to the Nonretroactivity Bar

The converse of the nonretroactivity bar in collateral review obtains on direct review where new constitutional rules are applied to all cases that are not final as of the decision announcing the new rule.[100] In *Johnson v. Texas*,[101] the Court

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96. The majority in *Gilmore* said: "Outside of the capital context, we have never said that the possibility of a jury misapplying state law gives rise to federal constitutional error." 113 S. Ct at 2117. One report points out that *Gilmore v. Taylor* by rejecting petitioner's attempt to use a rule at too great a "level of generality" creates a dilemma for a habeas petitioner. WILLIAM J. STUNTZ & JOSEPH L. HOFFMAN, ISSUES IN CAPITAL PUNISHMENT (1993) (prepared for The United States Court of Appeals for the Fourth Circuit).

> If a petitioner who tries to rely on an "old" decision describes its "rule" too narrowly, then the habeas court may conclude that the decision does not really "dictate" the result the petitioner seeks in his own case . . . if the petitioner describes the "rule" more broadly, so as to clearly encompass his own claim, then (as in *Taylor*) the habeas court may conclude that the description is too "general" to provide "meaningful guidance" for *Teague* purposes.

STUNTZ & HOFFMAN, *supra*, at 185.

97. 114 S. Ct. 948 (1994).

98. 451 U.S. 430 (1981). Bullington held "that a defendant sentenced to life imprisonment following a trial-like capital sentencing proceeding is protected by the Double Jeopardy Clause against imposition of the death penalty if he obtains reversal of his conviction and is retried an reconvicted." *Caspari*, 114 S. Ct. at 951.

99. After reviewing many dozens of lower court decisions, Professor Liebman concluded that "[a] review of circuit court decisions applying *Teague* reveals little to distinguish the rules that have been denominated 'new' from those deemed to be 'dictated by precedent.'" Indeed, it is becoming increasingly commonplace to find inter- or intra-circuit conflicts as to whether a particular rule is or is not 'new'." Liebman, *supra* note 14, at 258-60.

100. Griffith v. Kentucky, 479 U.S. 314 (1987). Justice Powell, concurring in *Griffith*, presaged the rule in *Teague*: "It is to be hoped that the Court . . . will adopt the Harlan view of retroactivity in cases seeking relief on habeas petitions." *Id.* at

confronted the issue left open because of the nonretroactivity bar in *Graham v. Collins*[102]—whether the Texas special instructions[103] violated the Eighth and Fourteenth Amendments by allowing insufficient consideration of a capital defendant's youth and background. Because the issue arose on direct review the *Teague* "new rule" retroactivity bar did not apply. In a five to four decision the Court ruled that the Texas statute passed constitutional muster.[104] *Penry's* rule invalidating the Texas special jury instructions as applied, and requiring that mitigating evidence of mental retardation be considered in a capital sentencing proceeding, was narrowly limited to its facts.[105] In *Powell v. Nevada*,[106] the majority found on direct appeal that the rule requiring that a judicial probable cause hearing generally be held within forty-eight hours of a warrantless arrest, while new, would be applied retroactively, and the case was remanded to the state court for further proceedings. Thus, *Teague's* retroactivity bar applies only to habeas corpus petitions; it does not apply to cases on direct review.

*Teague* left open the question of whether the nonretroactivity bar would apply to capital cases.[107] *Penry v. Lynaugh*,[108] applied the rule to death penalty cases "without the benefit of briefing or oral argument."[109]

A number of problems in applying the nonretroactivity rule remain unresolved. The rule's application to new statutory criminal rulings and application to federal prisoner proceedings under 28 U.S.C. § 2255 have not been resolved.[110] The rule

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329 (Powell, J. concurring) (citation omitted).

101. 113 S. Ct. 2658 (1993).

102. 113 S. Ct. 892 (1993).

103. *See supra* note 52.

104. Johnson, 113 S. Ct. 2658 (1993). Once again Justice O'Connor, who had prevailed in *Teague* and *Penry*, dissented. *Id.* at 2672 (O'Connor, J., dissenting).

105. *Id.* at 2667-68.

106. 114 S. Ct. 1280 (1994).

107. Justice O'Connor's plurality opinion stated: "Because petitioner is not under sentence of death, we need not, and do not, express any views as to how the retroactivity approach we adopt today is to be applied in the capital sentencing context." *Teague*, 489 U.S. at 314 n.2.

108. 492 U.S. 302 (1989).

109. *Id.* at 342 (Brennan, J., concurring in part and dissenting in part, joined by Marshall, J.).

110. *See, e.g.*, Liebman, *supra* note 14, at 214-16.

was cited in a civil case which held that a new rule must be given retroactive effect to all cases still open on direct review.[111] This leads one to speculate what, if any, application *Teague* may have in civil cases.

2. At What Point Must Retroactivity Analysis be Conducted?

The plurality in *Teague* stated that "[r]etroactivity is properly treated as a threshold question, for, once a new rule is applied to the defendant in the case announcing the rule, evenhanded justice requires that it be applied retroactively to all who are similarly situated."[112] Critics of the approach take pains to point out that this was not a holding of the Court because it was not joined by the concurring fifth vote of Justice White, and that there are many good reasons for not treating retroactivity analysis as a threshold question.[113] The Supreme Court, however, has treated the matter as decided and ordinarily has applied the nonretroactivity bar as a threshold matter.[114] It seems reasonable to assume that retroactivity analysis will continue to be treated as a threshold matter.

3. Is *Teague* Itself Retroactive?

*Teague* was retroactively applied not only to the petitioner in *Teague*, but also to the petitioners in *Penry v. Lynaugh*, *Zant v. Moore*, *Butler v. McKellar*, *Saffle v. Parks*, and *Sawyer v. Smith*.[115] Retroactive application of the nonretroactivity rule has itself been criticized for "[v]iolating their own expressions of

111. Harper v. Virginia Dep't of Taxation, 113 S. Ct. 2510 (1993).

112. 489 U.S. at 300.

113. Liebman, *supra* note 14, at 231-42.

114. Graham v. Collins, 113 S. Ct. 892, 897 (1993). ("Because this case is before us on Graham's petition for a writ of federal habeas corpus, we must determine, as a threshold matter, whether granting him the relief he seeks would create a 'new rule' of constitutional law." (citations omitted)); *see also* Collins v. Youngblood, 497 U.S. 37, 40 (1990) ("Generally speaking, '[r]etroactivity is properly treated as a threshold question' . . . ").

115. Liebman, *supra* note 14, at 284 n.3 (citing Sawyer v. Smith, 497 U.S. 227 (1990), Saffle v. Parks, 494 U.S. 484 (1990), Butler v. McKellar, 494 U.S. 407 (1990), Penry v. Lynaugh, 492 U.S. 302 (1989), and Zant v. Moore, 489 U.S. 836 (1989)).

concern that similarly situated habeas corpus petitioners should not be treated differently,"[116] and for creating a novel rule that could not have been anticipated by either petitioners or their lawyers when drafting pleadings.

### 4. Can the State Waive *Teague?*

In *Teague*, *Penry* and *Saffle v. Parks*, the Court raised the retroactivity issue sua sponte,[117] thus stimulating the question of whether, and if so when, the issue of retroactivity analysis could be waived or forfeited by the state. In *Collins v. Youngblood*,[118] the Court held that the nonretroactivity rule was not jurisdictional and, therefore, where the state chooses not to rely on the doctrine, the Court has no duty to raise and decide the issue sua sponte. The Court made the rule explicit in *Godinez v. Moran*,[119] which said:

> Although this case comes to us by way of federal habeas corpus, we do not dispose of it on the ground that the heightened competency standard is a 'new rule' for purposes of *Teague v. Lane* . . . because petitioner did not raise a *Teague* defense in the lower courts or in his petition for certiorari.[120]

*Godinez* was anticipated by the Circuit Courts of Appeal.[121]

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116. *Id.* at 284.

117. STUNTZ & HOFFMAN, *supra* note 96, at 198.

118. 497 U.S. 37, 41 (1990).

119. 113 S. Ct. 2680 (1993).

120. *Id.* at 2685 n.8 (citations omitted).

121. *See, e.g.*, Epperly v. Booker, 997 F.2d. 1, 9 n.7 (4th Cir. 1993) ("Apparently for the first time on this appeal, the state proposes that Epperly's *Brady* claim, and his prosecutorial misconduct claim . . . are barred by *Teague v. Lane*. . . . The *Teague* defense appears nowhere in the governments pleadings. . . . Consequently, we deem the defense waived." (citations omitted)); *See also* Williams v. Dixon, 961 F.2d. 448 (4th Cir. 1992)

> This case also presents the question of whether a state's failure to raise *Teague* in the court below waives it as a defense. Our reading of the Court's statements of the role of *Teague*, our consideration of the holdings of our sister circuits, and our recent decision . . . lead us to conclude that *Teague's* retroactivity analysis is not jurisdictional in nature and is an affirmative defense that must be asserted below or else be waived.

*Id.* at 456. *Contra* Hopkinson v. Shillinger, 888 F.2d. 1286 (10th Cir. 1989).

The two most recent cases involving a state's failure to raise and preserve the nonretroactivity issue create a mixed signal from the Supreme Court. In *Schiro v. Farley*,[122] the Court held that where the state failed to raise the *Teague* argument either in the lower courts or in its brief in opposition to the petition for a writ of certiorari, the issue was waived. The Court proceeded to address the merits.[123] A state may not wait until the case is before the Court on the merits before raising the doctrine. The Court in *Caspari v. Bohlen*[124] treated the nonretroactivity issue as a necessary predicate to the issue presented in the petition for certiorari even though it was not explicitly raised therein. The state had argued the nonretroactivity principle in the courts below and in the briefs on the merits. The majority addressed the issue despite the arguable violation of the Court's Rule 14.1(a). Justice Stevens, in dissent, noted the "harsh rules regarding waiver and claim forfeiture [rules used to] defeat substantial constitutional claims"[125] and concluded that the state's failure to comply with the Supreme Court's Rules ought to have been as fatal to the state as a similar misstep would have been to a prisoner petitioner.[126] While a state's failure to raise and preserve the *Teague* issue may cause it to lose the claim, the state will not be treated as harshly as other litigants.

### 5. Finality

Ordinarily a claim is final for retroactivity analysis when "the time for filing a petition for certiorari from the judgment affirming [the] conviction [has] expired."[127] If petitioner seeks certiorari in the Supreme Court, the case is not final until the Court denies certiorari.[128] This rule is comprehensible enough in the ordinary case. However, certain claims, such as a claim of ineffective assistance of counsel,[129] cannot effectively be

122. 114 S. Ct. 783 (1994).

123. Petitioner, who was death sentenced, lost on the merits of his double jeopardy argument.

124. 114 S. Ct. 948 (1994).

125. *Id.* at 957 (Stevens, J., dissenting).

126. *Id.*

127. Graham v. Collins, 113 S. Ct. 898, 892 (1993).

128. Johnson v. Texas, 113 S. Ct. 2658, 2674 (1993) (O'Connor, J., dissenting).

129. *See* Alan W. Clarke, *Procedural Labyrinths and the Injustice of Death: A Cri-*

raised until after the direct appeals have run their course and the petitioner has had an opportunity to raise the claim in the postconviction process. The issue of whether the ordinary rule of finality applies in these cases has not been addressed by the Supreme Court. Professor Liebman argues persuasively that there are a number of such claims that cannot, and should not be treated as final for retroactivity analysis until after the petitioner has had a full and fair opportunity to litigate the claims.[130] Another situation untouched by *Teague* would be where the new rule was established by the Supreme Court before the case became final in the state court system. In that instance a federal habeas court would be free to apply the new rule to the petitioner's case notwithstanding the outcome in the state court system.

6. Does *Teague* Apply to the State?

*Teague* is a one-way street; its harsh bar applies only to prisoners. *Lockhart v. Fretwell*[131] involved a claim of ineffective assistance of counsel for failure to raise an issue that would have been good at the time of petitioner's trial. The substantive rule changed after the conviction had become final. The district court and the Eighth Circuit Court of Appeals found that counsel's failure to assert the rule at trial and on direct appeal constituted ineffective assistance of counsel. This put the state in the awkward position of having to argue for the application of a new rule on appeal to the Supreme Court. Justice Rehnquist, writing for the majority, held that, while counsel had been ineffective in failing to assert the favorable rule, no prejudice flowed from that failure.[132] This prompted Justices Stevens and Blackmun to assert in dissent:

> An even-handed approach to retroactivity would seem to require that we continue to evaluate defendants' claims under the law as it stood at the time of trial. If, under

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*tique of Death Penalty Habeas Corpus* (pt.1), 29 U. RICH. L. REV. 1327 (1995) (explaining the meaning of ineffective assistance of counsel) [hereinafter Clarke (pt.1)].

130. Liebman, *supra* note 14, at 270-76.

131. 113 S. Ct. 838 (1993). For a full exposition of this case see Clarke (pt. 1), *supra* note 129, at 1356.

132. *Lockhart*, 113 S. Ct. at 841.

> *Teague*, a defendant may not take advantage of subsequent changes in the law when they are favorable to him, then there is no self-evident reason why a State should be able to take advantage of subsequent changes in the law when they are adverse to his interests.[133]

The dissent went on to charge:

> A rule that generally precludes defendants from taking advantage of post-conviction changes in the law, but allows the State to do so, cannot be reconciled with this Court's duty to administer justice impartially. Elementary fairness dictates that the Court should evaluate respondent's ineffective assistance claim under the law as it stood when he was convicted and sentenced. . . .[134]

The majority responded to this by asserting that the finality concerns upon which *Teague* was based are not concerns in which the petitioner has any interest, and therefore the reasons underpinning the nonretroactivity rule did not apply when the state was asserting the new rule. Justice Rehnquist rejoined that "[t]his result is not, as the dissent would have it, a 'windfall' for the State, but instead is a perfectly logical limitation of *Teague* to the circumstances which gave rise to it. *Cessnante ratione legis, cessat et ipsa lex.*"[135]

### E. *Conclusion*

The Supreme Court has fashioned a highly restrictive procedural barrier in its nonretroactivity rule that threatens to end habeas corpus. The rule has not been consistently applied and has led to unjust results. It is not compelled by precedent and appears to be contrary to the spirit of Congress' habeas corpus regime.

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133. *Id.* at 852 (Stevens, J., dissenting).

134. *Id.* at 853.

135. *Id.* at 844. One ought to question whether the Latin phrase means anything in this context.

# V. PROCEDURAL DEFAULT

## A. *Part One: The Basics*

### 1. Introduction

#### a. The Problem—Forfeiture of Constitutional Claims in Federal Habeas Corpus Because of the Failure to Timely Assert a Claim in a State Criminal Proceeding

Most state criminal justice systems utilize procedural rules designed to force early resolution of issues. The contemporaneous objection rule is an example; it requires counsel to state objections at the point of the alleged error. The penalty for failure to timely assert an objection is forfeiture of the issue.[136] For example, if one party elicits objectionable hearsay, the opposing side must promptly object, or lose the objection. This rule aids in the orderly presentation of evidence, prevents defense counsel from attempting to create error in the record by "sandbagging" with objections, and it allows a court to promptly cure error.

Another example of such a procedural rule posits that only error assigned on appeal will be heard. The general rubric

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136. For example, in Wainwright v. Sykes, 433 U.S. 72 (1977), the Supreme Court confronted a procedural default caused by counsel's failure to contemporaneously object to the admission of inculpatory statements allegedly made in violation of the Miranda rule. The prisoner Sykes attacked his conviction for the first time on state post-conviction review, alleging that his confession had been involuntarily obtained. The state of Florida refused to entertain Syke's belated claims in state post-conviction proceedings, apparently because of the violation of the state's contemporaneous rule—the claim had not been presented to the trial court at the appropriate point in Syke's trial. The Fifth Circuit Court of Appeals ordered the state courts to hear the merits of the contention. The state appealed that order and the Supreme Court rejected the *Fay v. Noia* deliberate by-pass rule in federal habeas corpus absent a showing of "cause" and "prejudice" (terms which are discussed in more detail below). The petitioner could not meet this more demanding standard in that he was not able to show either "cause" or "prejudice" for the default and was unable to obtain relief that may have been available under the less demanding rule of *Fay v. Noia*. While these rules are common in the U.S., they are apparently unknown in Canada, where counsel's failure to object is only one of several factors taken into account in determining whether to grant an appeal. Interview with Professor Allan Manson, Faculty of Law, Queen's University in Kingston, Ontario (May 1, 1994). This undercuts the argument that such rules are necessary to promote the finality of judgments and the corresponding efficiency of the judicial process.

"procedural default" covers all such forfeitures; an issue is procedurally defaulted (forfeited) if not timely and properly asserted.

Different states enforce forfeiture rules with varying degrees of force in capital cases.[137] To what extent must a federal habeas court honor a state's procedural-default rule and refuse to adjudicate the merits? The problem, while not peculiar to the death penalty, has particular force where someone is executed notwithstanding constitutional errors which cannot be reviewed on the merits because counsel failed to raise and preserve the issue.

b. Background to Procedural Default

Two historical trends coalesced to make this issue important: (1) the expansion of federal habeas corpus to reach constitutional claims by state prisoners, and (2) the expansion of the Due Process clause incorporating the first eight amendments of the Bill of Rights. *Brown v. Allen*[138] held that all constitutional claims made applicable to state prisoners under the Fourteenth Amendment are cognizable on federal habeas corpus, once the claims have been exhausted in the state court system. This expanded the scope of federal habeas corpus to reach many state prisoners with federal constitutional claims. In turn, this made acute the problem of when, and to what extent, a state court's refusal to address the merits of a constitutional issue because of a procedural default would also bar the federal habeas court from addressing those same merits.

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137. Virginia, for example, has extremely stringent procedural-default rules that apply with equal force in both capital and noncapital cases. *See, e.g.*, Smith v. Murray, 477 U.S. 527 (1986). *Smith v. Murray* was a death penalty case where a constitutional issue was raised at trial, but omitted on appeal. Counsel relied on an aberrant Supreme Court of Virginia decision and failed to appreciate the merit of the issue, involving a confession made to a psychiatrist which was later used at the penalty phase to prove future dangerousness. The error was raised on appeal only by amici curiae, and was thereby forfeited. See also Coleman v. Thompson, 111 S. Ct. 2546 (1991), where a one-day late appellate filing by counsel who misunderstood an ambiguous rule constituted a procedural default in a capital appeal. In contradistinction, Kentucky allows appellate review of unpreserved issues in death penalty cases unless trial counsel failed to object for reason of trial tactics. Ice v. Commonwealth, 667 S.W. 671, 674 (Ky. 1984).

138. 344 U.S. 443 (1953).

In 1963, the Court in *Fay v. Noia*[139] held that the "adequate and independent" state law ground preventing direct Supreme Court review of a state court judgment would not be extended to federal habeas corpus.[140] Federal habeas corpus could reach constitutional claims arising from state criminal proceedings notwithstanding a procedural default—except where the prisoner had deliberately by-passed the state courts. Unless the state prisoner had made a tactical decision not to raise a constitutional issue in the state court system, the federal habeas court could entertain the issue. Inadvertent defaults were not fatal to the constitutional claim on habeas corpus, but knowing waivers were fatal.

The Warren Court's expansion of substantive criminal rights was given meaning through the habeas corpus remedy. Not everyone was happy with these developments, and political pressure built to appoint more conservative Justices to the Supreme Court. With the more conservative judicial philosophy of the Burger and then Rehnquist Court came pressure to reduce the ambit of the Warren Court's decisions. The Court did this, not by directly confronting the Warren Court's substantive rights creation, but by limiting those rights by eliminating the procedural remedy. *Fay's* deliberate by-pass standard for excusing a procedural default became one of the first and most important of the Warren Court's procedural innovations to fall.

### 2. The More Restrictive "Cause and Prejudice" Standard for Excusing a Procedural Default Replaces the "Deliberate By-Pass" Standard

Deliberate by-pass did not expire at once; it was replaced in evolutionary stages by a rule that required a habeas petitioner

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139. 372 U.S. 391 (1963) *overruled* by Coleman v. Thompson, 501 U.S. 722 (1991).

140. *Id.* at 428-430. The Supreme Court in its certiorari review of state appellate decisions declines "to review state court judgments which rest on independent and adequate state grounds, notwithstanding the copresence of federal grounds." *Id.* at 428. Thus, Noia's default, "if deemed adequate and independent . . . would cut off review by this Court of the *coram nobis* proceeding in which the New York Court of Appeals refused him relief." *Id.* at 429. The Court in *Fay v. Noia* reasoned that this only applied to the Supreme Court in its appellate function and not to the lower federal habeas courts or the Supreme Court in review of those lower federal habeas courts.

to show cause for the default and prejudice stemming therefrom. *Fay v. Noia*[141] involved the failure to appeal a life sentence, obtained through a coerced confession, where a successful appeal resulting in a new trial might ultimately have netted petitioner a death sentence. Because of this "grisly choice," these facts permitted a narrow construction, but *Fay's* broad language appeared applicable to all procedural defaults.

In 1975, the Court carved exceptions to "deliberate by-pass" but did not explicitly replace the rule. *Francis v. Henderson*[142] extended the rule requiring federal prisoners seeking collateral relief to show cause and prejudice for failure to timely challenge grand jury composition[143] to state prisoners seeking federal habeas corpus.[144] Accordingly, challenges alleging failure to follow either a state or the federal rule concerning grand jury composition could not proceed unless the claim met the cause and prejudice standard. *Estelle v. Williams*[145] denied relief where neither petitioner nor counsel objected to petitioner's wearing jail garb in a jury trial. However, there was evidence that the trial judge would have granted a request for defendant to be tried while wearing ordinary clothing. This made the failure to object appear particularly inexcusable, thus allowing one to interpret the case as a narrow exception to *Fay v. Noia*. *Estelle* may have seemed fact-bound, but it presaged more sweeping changes. Again, the standard applied was "cause and prejudice."

*Wainwright v. Sykes*[146] took a larger chunk out of *Fay* because it involved a violation of Florida's contemporaneous objection rule (failure to timely challenge the voluntariness of a confession).[147] The Court rejected "the sweeping language of

141. 372 U.S. 391 (1963).

142. 425 U.S. 536 (1975).

143. Davis v. United States, 411 U.S. 233 (1973) (failure to timely challenge grand jury composition forfeits collateral relief absent cause for relief).

144. Justice Brennan foretold *Fay v. Noia's* demise: "this holding portends one of two inevitable consequences—either the overruling of *Fay* or the denigration of the right to a constitutionally composed grand jury." *Francis*, 425 U.S. at 546 (Brennan, J., dissenting).

145. 425 U.S. 501 (1975).

146. 433 U.S. 72 (1977).

147. *Id.* at 74.

*Fay*" and held that federal habeas review was barred because of the procedural default "absent a showing of 'cause' and 'prejudice.'"[148] *Sykes* did not define "cause and prejudice," stating "only that it is narrower than the standard set forth in dicta in *Fay v. Noia*."[149] *Sykes* also enigmatically created a "miscarriage of justice" exception to the cause and prejudice rule, but refused to define this further, saying only that petitioner did not qualify.[150] Later cases have limited "miscarriage of justice" to require a showing that a constitutional violation has resulted in the conviction of one who is actually innocent.[151]

*Engle v. Issac*[152] involved a violation of Ohio's contemporaneous objection rule; it cemented the *Sykes* "cause and prejudice" rule by rejecting petitioner's proposed limitation "to cases in which the constitutional error did not affect the truth-finding function of the trial."[153] *Engle v. Issac* also refused to "replace or supplement the cause-and-prejudice standard with a plain-error inquiry."[154] Even clear error fails to circumvent the rigid *Sykes* cause and prejudice rule, nor does it constitute a miscarriage of justice.[155] Because the petitioners in *Engle v. Issac* had failed to show cause for the default, the Court found it unnecessary to address prejudice.[156]

In 1991, the Court finally overruled *Fay v. Noia* in *Coleman v. Thompson*.[157] The current standard for evaluating application of a state's procedural bar in federal habeas corpus employs *Sykes* cause and prejudice test supplemented by a limited "miscarriage of justice" (actual innocence) test.

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148. *Id.* at 87.
149. *Id.*
150. *Id.* at 91.
151. Murray v. Carrier, 477 U.S. 478, 495-96 (1986). This also includes the odd concept of innocence of the death penalty. *See infra* section V.A.6.b.; Sawyer v. Whitley, 112 S. Ct. 2514 (1992). The standard of proof for an innocence claim is "by clear and convincing evidence." *Sawyer*, 112 S. Ct. at 2525.
152. 456 U.S. 107 (1982).
153. *Id.* at 129.
154. *Id.* at 134.
155. The miscarriage of justice exception is discussed below in section VI.A.6.6.
156. 456 U.S. at 133.
157. 501 U.S. 722 (1991).

### 3. The Meaning of "Cause"

In *Murray v. Carrier*[158] the Supreme Court defined "cause" in two ways. First, attorney negligence not amounting to ineffective assistance of counsel[159] does not constitute cause to avoid the bar of a procedural default.[160] Second, "cause" can be established if petitioner can show "some external impediment preventing counsel from constructing or raising the claim."[161] Neither test could be met by petitioner where his lawyer had failed to include the claim on appeal.[162]

While ineffective assistance of counsel constituted a well developed, if restrictive, doctrine, by 1986 the other avenue for establishing cause—that an "objective factor external to the defense impeded counsel's efforts"[163]—remained ill-defined:

> Without attempting an exhaustive catalog of such objective impediments to compliance with a procedural rule, we note that a showing that the factual or legal basis for a claim was not reasonably available to counsel . . . or that "some interference by officials" . . . made compliance impracticable, would constitute cause under this standard.[164]

### 4. The Prejudice Prong

*United States v. Frady*[165] is the only issue forfeiture case to turn[166] on the meaning of "prejudice."[167] Joseph Frady col-

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158. 477 U.S. 478 (1986).

159. The test for ineffective assistance of counsel was established by Strickland v. Washington, 466 U.S. 668 (1984). *See* Clarke (pt. 1), *supra* note 129, at 1356 (explaining the doctrine of ineffective assistance of course).

160. *Murray*, 477 U.S. at 488.

161. *Id.* at 492.

162. These tests were applied to capital cases in Smith v. Murray, 477 U.S. 527 (1986).

163. *Murray*, 477 U.S. at 488.

164. *Id.* (quoting Brown v. Allen, 344 U.S. 443, 486 (1953)) (citations omitted). Both methods of establishing cause are discussed below in section V.A.6.

165. 456 U.S. 152 (1982).

166. Other Supreme Court cases to discuss the term "prejudice" did not turn directly on the point. *See, e.g.*, Murray v. Carrier, 477 U.S. 478, 484 (1986) (finding an absence of cause and following *Engle v. Issac* in rejecting the proposition that actual prejudice could permit relief in the absence of cause); Reed v. Ross, 468 U.S. 1, 12

laborated on a brutal murder, denied complicity at trial, and was sentenced to death upon overwhelming evidence. He escaped electrocution in a five to four decision by the District of Columbia Court of Appeals that left Frady resentenced to life imprisonment. Now a federal prisoner,[168] he "began a long series of collateral attacks"[169] under the federal prisoner habeas corpus statute.[170] The Court of Appeals applied the "plain error" standard of review[171] to an erroneous jury instruction and remanded for a new trial or entry of a conviction of a lesser offense. The Supreme Court reversed, holding that the correct standard for reviewing a federal prisoner's defaulted claim on collateral attack was the *Sykes* "cause and prejudice" standard rather than the "plain error" standard.[172]

The Court felt no need to address cause "because [it was] confident he [had] suffered no actual prejudice sufficient to justify collateral relief 19 years after his crime."[173] A petitioner must show "not merely that the errors . . . created a possibility of prejudice, but that they worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions."[174] The jury instruction in Frady's case erroneously defined "malice," which prevented the possibility of a manslaughter conviction; thus, Frady had not defended on the basis of a lesser offense involving an absence of malice—he had denied complicity despite overwhelming evidence of guilt.[175] Thus, the erroneous instruction could not have prejudiced Frady.

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(1984) (conceding the existence of prejudice).

167. The prejudice concept is also used with ineffective assistance of counsel claims. One can look to this for other applications of the prejudice prong of cause and prejudice.

168. The District of Columbia is not within any state and is therefore subject solely to federal law and federal court jurisdiction.

169. United States v. Frady, 456 U.S. 152, 157 (1982).

170. 28 U.S.C. § 2255 (1988).

171. The plain error rule, FED. R. CRIM. p. 52(b), applies to direct federal prisoner appeals and allows "courts of appeals the latitude to correct particularly egregious errors on appeal regardless of a defendant's trial default: 'Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.'" *Frady*, 456 U.S. at 163 (quoting FED. R. CRIM p. 52(b)).

172. *Frady*, 456 U.S. at 166.

173. *Id.* at 167.

174. *Id.* 170.

175. *Id.* at 171.

The *Sykes* prejudice prong was narrowly construed. In another formulation of the standard, the *Frady* Court adopted language from a dissent by Justice Stevens, which summarized the degree of prejudice necessary for obtaining collateral relief from an erroneous jury charge as "'whether the ailing instruction by itself so infected the entire trial that the resulting conviction violated due process,' not merely whether 'the instruction is undesirable, erroneous, or even universally condemned.'"[176] In *Murray v. Carrier*[177] the Court narrowly confined "pervasive actual prejudice" to a "showing that prisoner was denied 'fundamental fairness' at trial."[178]

Few issues which have been procedurally defaulted can escape forfeiture under the dual cause and prejudice tests.[179] Failure to meet either test bars the claim.[180] *Engle v. Issac*[181] found cause lacking and therefore did not address prejudice, while *Frady* only addressed prejudice.[182]

### 5. The Plain Statement Rule—How a Federal Habeas Court Determines Whether State Courts Have Enforced a Procedural Bar

Deciding whether a state court has barred merits review of a constitutional claim under its procedural rules is easy when the state's highest appellate court expressly relies on a procedural rule to avoid addressing the merits. In that circumstance, the federal habeas court need only read the state court's opinion to determine the existence of a procedural default. Issue preclusion follows, absent an exception.

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176. *Id.* at 169 (quoting Henderson v. Kibbe, 431 U.S. 145, 154 (1974) (Stevens, J., dissenting)).

177. 477 U.S. 478 (1986).

178. *Id.* at 494.

179. A few lower court decisions finding sufficient prejudice to meet the *Sykes* standard are collected in IRA P. ROBBINS, HABEAS CORPUS CHECKLISTS § 12.05 at 12-44 to 12-45 (1994).

180. Murray v. Carrier, 477 U.S. 478, 494 (citing Engle v. Issac, 456 U.S. 107, 134 n.43 (1982)).

181. 456 U.S. 107 (1982).

182. United States v. Frady, 456 U.S. 152, 167 (1982).

The problem becomes more difficult when the federal habeas court confronts an ambiguous or silent state court order. The Supreme Court stated in *Harris v. Reed*[183] that "a procedural default does not bar consideration of a federal claim unless the last state court rendering a judgment in the case 'clearly and expressly states that its judgment rests on a state procedural bar.'"[184] This was the "plain statement" rule of *Michigan v. Long*,[185] translated from its direct appeal context to collateral review. While state reliance on a procedural default must be explicit, it need not be exclusive; alternative holdings that rely on a procedural bar and reject the federal claim on the merits suffice to preclude merits review.[186] State prisoners, including death row inmates, sought to avoid issue preclusion where summary or formulary state court denials of appeal failed to specify grounds. The Supreme Court responded by limiting the plain statement rule. In *Coleman v. Thompson*,[187] state habeas counsel failed to perfect the appeal by missing a filing deadline. The state's Attorney General moved to dismiss, arguing that the missed deadline violated a state procedural rule. The Supreme Court of Virginia dismissed the appeal in a one sentence order. The United States Supreme Court distinguished *Harris v. Reed*, finding that even though the order did not plainly state its reliance on procedural default, it appeared to be predicated on state law because it came in response to the state's motion seeking dismissal on that basis. Justice Blackmun in dissent argued:

> One searches the majority opinion in vain, however, for any mention of petitioner Coleman's right to a criminal proceeding free from constitutional defect or his interest in finding a forum for his constitutional challenge to his conviction and sentence of death. . . . Rather, displaying obvious exasperation with the breadth of substantive habeas doctrine and the expansive protection afforded by the Fourteenth Amendment's guarantee of fundamental fairness in state criminal proceedings, the Court today continues its crusade to erect petty procedural barriers in the path of any state

183. 489 U.S. 255 (1989).
184. *Id.* at 263 (quoting Caldwell v. Mississippi, 472 U.S. 320, 327 (1985)).
185. 463 U.S. 1032 (1983).
186. *Harris*, 489 U.S. at 264 n.10.
187. 501 U.S. 722 (1991).

> prisoner seeking review of his federal constitutional claims. Because I believe that the Court is creating a byzantine morass of arbitrary, unnecessary, and unjustifiable impediments to the vindication of federal rights, I dissent.[188]

*Ylst v. Nunnemaker*[189] further limited the plain statement rule. In *Ylst,* a lower state court applied a procedural bar, and later appellate courts affirmed without stating grounds. The Supreme Court held that "where . . . the last reasoned opinion on the claim explicitly imposes a procedural default, we will presume that a later decision rejecting the claim did not silently disregard that bar and consider the merits."[190]

Although not directly related to this point, *Teague* also addressed the plain statement rule. The plain statement rule assumes that the state court had "the opportunity to address a claim that is later raised in a federal habeas proceeding. It is simply inapplicable . . . where the case was never presented to the state courts."[191] The petitioner may, however, have failed to exhaust the claim.

While *Colemnan, Ylst,* and *Teague*, limit the plain statement rule, if a state chooses to address the merits of a claim despite a procedural default then the federal habeas court will also address the merits.[192] Thus, a federal habeas court may address a procedurally defaulted issue wherever the state has overlooked the default and addressed the merits.

6. Are There Avenues of Relief from Procedural Default?

a. Ineffective Assistance of Counsel

Ineffective assistance of counsel supplies cause for a procedural default[193] and constitutes an independent Sixth Amend-

188. 501 U.S. at 758 (Blackmun, J., dissenting).
189. 501 U.S. 797 (1991).
190. *Id.* at 803.
191. Teague v. Lane, 489 U.S. 288, 299 (1989).
192. Harris v. Reed, 489 U.S. 255, 265 n.12 (1989).
193. Murray v. Carrier, 477 U.S. 478 (1986).

ment violation under *Strickland v. Washington*[194] that carries its own prejudice component.[195] If counsel were constitutionally ineffective in procedurally defaulting a claim, petitioner would be entitled to relief. Relief is seldom granted on this ground.[196] A death-sentenced prisoner with potentially meritorious but defaulted claims, loses little by claiming that lawyer incompetence caused the default.[197]

One issue—the double or compound procedural default—arises only in the procedural default area. In *Justus v. Murray*,[198] defense counsel defaulted a number of claims on direct appeal. Habeas counsel attempted unsuccessfully, among other things, to cure the defaulted claims by alleging that ineffective assistance of counsel created the defaults. Habeas counsel neglected to appeal the ineffective assistance claim, thereby defaulting it. The now defaulted ineffective assistance claim could no longer supply cause for the earlier trial defaults.

Ineffective assistance of counsel is often brought for the first time at state post-conviction proceedings. This allows a state trial court to hear evidence concerning original trial counsel's acts, omissions, and her reasons (or lack thereof) for those actions. The failure to appeal adverse findings on the ineffective-assistance claim can create a double default; defaulted trial issues cannot be cured via later-defaulted ineffective-assistance claims stemming from the state habeas appeal. This rule creates a trap for the unwary habeas counsel in an area that, in any event, rarely affords relief from the issue-preclusion bar of procedural default.

b. Innocence of the Death Penalty

The "miscarriage of justice" exception to *Sykes'* cause and prejudice rule became a narrow requirement that a habeas petitioner prove actual innocence. Other types of constitutional

194. 466 U.S. 668 (1984).

195. *Id.* at 693.

196. *See, e.g.*, Turner v. Williams, 812 F. Supp. 1400 (E.D. Va. 1993) (holding that the assistance of counsel was not sufficiently ineffective to cure a procedural default).

197. This issue, not discussed here, is addressed in part one of this article. *See* Clarke (pt. 1), *supra* note 129, at 1356.

198. 897 F.2d. 709 (4th Cir. 1990).

error, regardless of the importance of the constitutional value, or how clear the error, are insufficient. *Murray v. Carrier*, while rejecting petitioner's claimed innocence, provided the new formulation of "miscarriage of justice": "where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default."[199]

This innocence exception occurs in the noncapital setting when "the State has convicted the wrong person"[200] where "it is evident the law has made a mistake."[201] The Court acknowledged that the concept of actual, as distinct from legal, innocence "does not translate easily into the context of an alleged error at the sentencing phase of trial on a capital offense."[202]

*Sawyer v. Whitley*[203] involved successive and abusive claims,[204] but the Court indicated that its analysis applied to procedurally defaulted claims as well.[205] The Court rejected petitioner's contention that innocence of the death penalty[206] could be established by a showing "of additional mitigating evidence which was prevented from being introduced as a result of claimed constitutional error."[207] Establishment of innocence of the death penalty requires a petitioner to "show by clear and convincing evidence that but for a constitutional error, no reasonable juror would have found him eligible for the death penalty under the applicable state law."[208]

This is a very difficult standard to meet. First, the "no reasonable juror" formulation will be nearly impossible to meet

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199. Murray v. Carrier, 477 U.S. 478, 496 (1986).
200. Sawyer v. Whitley, 505 U.S. 333, 340 (1992).
201. *Id.* at 340-41.
202. *Id.* at 340 (quoting Smith v. Murray, 477 U.S. 524, 537 (1986)).
203. 505 U.S. 333 (1992).
204. The issue of successive and abusive claims is discussed more fully in Clarke (pt. 1), *supra* note 129, at 1356.
205. *Sawyer*, 505 U.S. at 338.
206. In *Sawyer v. Whitley*, the Court uses the phrase "actual innocence" and "innocent of the death penalty" throughout. *See, e.g., id.* at 540.
207. *Id.* at 346.
208. *Id.* at 336.

except in those rare cases where the constitutional error results in excluding all credible evidence on the point. If any credible evidence remains, however weak, supporting the point in question, then a hypothetical reasonable juror could find it dispositive. Second, *Sawyer* requires a showing that, but for the constitutional error, petitioner would not have been eligible for death.[209] This limits a death row petitioner to attempting to prove the absence of aggravating circumstances[210]—that is, the absence of factors at the sentencing phase that made petitioner eligible for death. The failure to adduce mitigating evidence at trial, however compelling, and under whatever circumstances, will fail to excuse a default. This "miscarriage of justice" exception is so narrowly constructed that few claims can meet the test.[211]

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209. *Id.* at 346.

210. The point here is innocence of the death penalty. Thus, "innocence" in the ordinary sense of "innocence of the underlying crime" is ignored.

211. Justice Blackmun, writing separately, said:

> I believe that the Court today adopts an unduly cramped view of "actual innocence." I write separately not to discuss the specifics of the Court's standard, but instead to reemphasize my opposition to an implicit premise underlying the Court's decision: that the only "fundamental miscarriage of justice" in a capital proceeding that warrants redress is one where the petitioner can make our a claim of "actual innocence."

505 U.S. at 351 (Blackmun, J., concurring). Justice Blackmun continued: "[T]he Court's focus on factual innocence is inconsistent with Congress' grant of habeas corpus jurisdiction, pursuant to which federal courts are instructed to entertain petitions from state prisoners who allege that they are held 'in custody in violation of the Constitution or laws or treaties of the United States.'" *Id.* at 355. Justice Blackmun entertains a broader conception of the "miscarriage of justice" exception that would allow redress in many more cases than allowed by the majority's test. Even where a petitioner can make a colorable claim of innocence, the majority's standard will be difficult to meet. *See, e.g.*, Herrera v. Collins, 113 S. Ct. 853 (1993) (rejecting claim of innocence in a different context from *Sawyer*, where the petitioner's only constitutional claim was that it would violate the Eighth Amendment ban on cruel and unusual punishment to execute an innocent person). While the context in *Herrera* was quite different, it does indicate the difficulty of petitioner's burden.

c. The Objective Factors External to the Defense as Cause for a Procedural Default

i. Interference By State Officials

Criminal defense lawyers rarely learn about state officials' misconduct, even where it directly affects criminal proceedings. When discovered, it can sometimes cure a procedural default. *Amadeo v. Zant*[212] produced a rarity for death penalty cases—a unanimous Supreme Court. After Tony Amadeo had been tried and sentenced to death, an unrelated civil action disclosed a handwritten memorandum establishing a policy causing systematic underrepresentation of minorities and women in the jury pool. When the challenge was raised for the first time on direct appeal, the Georgia Supreme Court ruled that it "comes to late."[213] The Supreme Court found that the discrimination claim was unavailable at trial, and therefore, the default was excused.[214] The district court's factual determinations were critical. The memorandum was not "intended for public consumption,"[215] and was not "readily discoverable"[216] but rather had been "concealed by county officials."[217] Default apparently will be excused where the petitioner is prevented from developing a meritorious claim by the deliberate interference of state officials.

The result is different where official intent to interfere is less clear and where the petitioner had some way of knowing about the suppression of evidence by officials. Warren McCleskey[218] had a similar claim to that of Amadeo, this time in the abuse of the writ context.[219] McCleskey had what appeared to be a

212. 486 U.S. 214 (1988).

213. *Id.* at 218 (quoting Amadeo v. State, 255 S.E.2d 718, 720 (Ga.), *cert. denied*, 444 U.S. 974 (1979)).

214. *Id.* at 224.

215. *Id.*

216. *Id.*

217. *Id.* at 220.

218. McCleskey v. Zant, 499 U.S. 467 (1991).

219. Sawyer v. Whitley, 505 U.S. 333 (1992), equated abuse of the writ, successive petitions and procedural default in that they all are subject to the same cause and prejudice standard. Thus, it is reasonable to use abuse of the writ cases in analyzing procedural default even thought the two concepts are different. *See id.* at 338.

meritorious *Massiah*[220] claim which was not discovered until his second (hence abusive) federal habeas corpus proceeding. The *McClesky* Court distinguished *Amadeo*:

> This case differs from *Amadeo* in two crucial respects. First, there is no finding that the State concealed evidence. And second, even if the State intentionally concealed the 21-page document, the concealment would not establish cause here because, in light of McCleskey's knowledge of the information in the document, any initial concealment would not have prevented him from raising the claim in the first federal petition.[221]

Here "state officials deliberately had elicited inculpatory admissions . . . in violation of his Sixth Amendment rights and had withheld information he needed to present his claim for relief."[222] Where there is no finding that state officials *deliberately* withheld information, and petitioner had some knowledge of the facts, cause for avoiding a procedural default is not established. *Amadeo* has been so narrowly limited that few cases could meet this standard. So long as state officials are clever enough not to leave written evidence proving misconduct, it is difficult to see how a claim under this exception could succeed.

ii. Novelty of the Claim

*Engle v Issac*[223] hinted that the novelty of a claim could excuse the failure to properly raise and preserve it. *Reed v. Ross*[224] recognized this exception by holding "that where a

220. Massiah v. United States, 377 U.S. 201 (1964) (invalidating admission of incriminating statements made to a confederate who was acting in direct concert with state officials).

221. 499 U.S. 467, 502 (1991).

222. Sawyer v. Whitley, 505 U.S. at 359 (Blackmun, J., concurring while commenting on the McCleskey case: "That the Court permitted McCleskey to be executed without ever hearing the merits of his claims starkly reveals the Court's skewed value system, in which finality of judgments, conservation of state resources, and expediency of executions seem to receive greater solicitude than justice and human life." (citations omitted)).

223. 456 U.S. 107 (1982). The petitioner in *Engle* had attempted to excuse his default by asserting the novelty of the claim. The Court responded: "Where the basis of a constitutional claim is available, and other defense counsel have perceived and litigated that claim, the demands of comity and finality counsel against labelling alleged unawareness of the objection as cause for a procedural default." *Id.* at 134.

224. 468 U.S. 1 (1984).

constitutional claim is so novel that its legal basis is not reasonably available to counsel, a defendant has cause for his failure to raise the claim in accordance with applicable state procedures."[225]

A novel claim will also be a new rule for retroactivity analysis under *Teague v. Lane*.[226] This renders new constitutional rules unavailable to habeas petitioners whose cases were final when the new rule was announced. The only novel claims that can now escape *Teague's* nonretroactivity bar in order to excuse a procedural default are: (1) those new rules that are established prior to petitioner's case becoming final; or, (2) claims that fall within one of *Teague's* two narrow exceptions allowing retroactive application where: (a) the new rule places conduct "beyond the power of the criminal law-making authority to proscribe"[227] or, (b) where the new rule adopts a watershed rule of criminal procedure that is "central to an accurate determination of innocence or guilt."[228] It is unlikely that there will be many, if any, cases that can qualify under this stringent standard.

d. The Legitimacy of the State's Procedural-Default Rule

A state's procedural bar must be consistently or regularly applied by the state. If not so applied, it will not constitute an adequate and independent ground for affirming petitioner's conviction, and the federal habeas court will be able to address the merits of the constitutional claim.[229] In *Johnson v. Mississippi*[230] the State inconsistently applied its procedural- default rule to post-conviction requests for relief where the defendant had received an enhanced penalty because of a prior conviction that had later been vacated on appeal. Earlier, in *Phillips v. State,*[231] the Mississippi Supreme Court had "held that the re-

225. *Id.* at 16.

226. 489 U.S. 288 (1989); *see also supra* section IV for an explanation of the nonretroactivity rule.

227. *Teague*, 489 U.S. at 307 (citation omitted).

228. *Id.* at 313.

229. Johnson v. Mississippi, 486 U.S. 578, 589 (1988); Ulster County Court v. Allen, 442 U.S. 140, 152 (1979).

230. 486 U.S. 578 (1988).

231. 421 So. 2d 476 (Miss. 1982).

versal of a Kentucky conviction that had provided the basis for an enhanced sentence pursuant to Mississippi's habitual criminal statute justified postconviction relief."[232] Johnson had been sentenced to death based in part upon a prior New York felony conviction that had been vacated after his case became final. Mississippi denied relief on collateral review, and the Supreme Court, noting the inconsistency, reversed.

A state cannot create a procedural rule after defendant's trial and then apply it retroactively to create a procedural default.[233] But a state court's mandatory time limit for the filing of a notice of appeal, enforced by barring late appeals, will be honored by a federal habeas court even though the state court periodically grants extensions or other special dispensations.[234] Thus, Virginia's periodic grant of leave to file a late appeal in noncapital cases will not prevent its rigid enforcement of time limits in capital habeas corpus cases.[235]

### B. *Part Two: Injustice and the Death Penalty*

Executions—the deliberate extinction of human life as punishment for wrongdoing—cannot be compared with other penalties. Ideally the death penalty is reserved for the few most heinous murderers. Under our constitution "the determination of whether a human life should be taken or spared . . . must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action."[236] Yet in practice, dra-

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232. *Johnson*, 486 U.S. at 586.

233. Ford v. Georgia, 498 U.S. 411 (1991).

234. Wise v. Williams, 982 F.2d. 142 (4th Cir. 1992), *cert. denied*, 113 S. Ct. 2940 (1993).

235. Coleman v. Thompson, 501 U.S. 722 (1991) (upholding Virginia's enforcement of a procedural default stemming from a late appeal in a capital habeas corpus case). Roger Coleman's appeal was filed three days after the mandatory thirty-day time limit; the author successfully procured leave to appeal a first degree murder conviction resulting in a life sentence over four years after the expiration of the filing date. Cole v. Commonwealth, No. 920528 (Va. Sup. Ct. Mar. 18, 1991). The author was advised by the Attorney General's office that these extensions were routine in noncapital cases where a habeas corpus petition claims that petitioner was denied the right to appeal. The only difference between the two cases besides the imposition of the death penalty in Coleman, was that the Coleman default occurred in the state habeas appeal whereas the Cole default forgiven by the court occurred on direct appeal.

236. Gregg v. Georgia, 428 U.S. 153, 189 (1976).

conian procedural-default rules reward the states "for providing inadequate counsel,"[237] and create a new level of arbitrariness that is wholly unrelated to moral culpability. Underpaid,[238] inexperienced,[239] overworked,[240] and uncaring,[241] court-appointed lawyers who fail to understand and raise meritorious constitutional claims simply grease the skids to death row. The moral deserts of the defendant have little relationship to the punishment where the lawyering is incompetent. The present procedural-default rules lead to unjust and arbitrary results. Similarly situated capital defendants are treated differently and disproportionately—depending on the luck of the draw of court-appointed counsel. Procedural-default rules create a death penalty jurisprudence that imposes death "not for committing the

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237. *See* Stephen B. Bright, *Death By Lottery—Procedural Bar of Constitutional Claims In Capital Cases Due To Inadequate Representation of Indigent Defendants*, 92 W. VA. L. REV. 679 (1990).

> The state obtains two benefits from the poor representation the defendant receives: the likelihood of obtaining the death sentence is increased and any constitutional deficiencies that occur in the process may be insulated from review. Ironically, the result of *Sykes* and *Strickland* is that, so long as counsel is not so bad as to fall below the *Strickland* standard, the poorest
> level of representation at trial receives the least scrutiny in post-conviction review.

*Id.* at 691-92 (citations omitted).

238. *See* Marcia Cole et al., *Fatal Defense: Trial and Error in the Nation's Death Belt*, 12 THE NAT'L L.J. 32 (June 11, 1990). The article discloses that, in capital cases, court-appointed defense lawyers receive: (1) Alabama—$40/hr. in-court, $20/hr. out-of-court; (2) Georgia—generally $30/hr. in-court, $20/hr. out-of court; (3) Mississippi—average $11.75/hr., maximum $1000; (4) California—$40-$100/hr; (5) Ohio—$50/hr in-court, $40/hr. out-of-court. *Id.*

239. *See id.* at 40. Only 42.4% of lawyers surveyed who had been appointed to a capital case practiced criminal law 80% or more of the time. Most had never handled a capital case prior to assignment. Approximately one-third lacked co-counsel on the case. *Id.*

240. *See id.* (quoting an Alabama court appointed attorney: "Most attorneys taking these cases are sole practitioners who've got to pay the light bill and don't have time to keep up with all the federal cases." Another from Mississippi said: "Its a tradition in the rural South to give the cases to younger lawyers who couldn't make a living doing criminal work in these towns." *Id.*

241. *See* Esther F. Lardent & Douglas M. Cohen, *The Last Best Hope: Representing Death Row Inmates*, 23 LOY. L.A. L. REV. 213, 214 (1989) (citing Lane, *Pro Bono and Death Row*, 19 A.L.I., A.B.A., CLE REV., at 4-5 (Dec. 23, 1986). "In one case the former Imperial Wizard of the local Klan represented a black defendant charged with raping and murdering a white woman, referred to his client as 'a nigger boy' in conversations, fell asleep during meetings with the [district attorney], and interposed both an insanity defense and a general denial defense simultaneously." *Id.*

worst crime, but for being assigned the worst lawyer."[242] A few examples suffice to illustrate the relationship between poor lawyering, procedural-default rules, and capricious imposition of the death penalty.

1. *Smith v. Murray*[243]

Michael Marnell Smith received a death sentence based on constitutionally inadmissible psychiatric testimony.[244] Smith's lawyer requested a court-appointed psychiatric examination. Defense counsel was aware that under Virginia law at the time the psychiatric record would be forwarded to the prosecution and would be admissible evidence.[245] Counsel failed to specifically advise Smith not to discuss prior crimes with the psychiatrist. At trial the prosecution called as its witness the same defense-requested psychiatrist so as to prove future dangerousness as an aggravating circumstance. That psychiatrist testified over the defense's objection that Smith was a "sociopathic personality" who had admitted in the psychiatric interview to having attempted to rape a young girl.[246] One can hardly imagine more damaging testimony on the issue of future dangerousness; the jury found that Smith was likely to be dangerous in the future and imposed the death penalty. Although defense counsel had objected to the introduction of this psychiatric testimony at trial, he failed to include the claim in the assignments of

242. Bright, *supra* note 237, at 695.

243. 477 U.S. 527 (1986).

244. *See* Estelle v. Smith, 451 U.S. 454 (1981) (psychiatric testimony based upon prior examination of the defendant is inadmissible unless defendant has validly waived Fifth and Sixth Amendment rights prior to the examination). This rule has been held to be retroactive. *See* Jones v. McCotter, 767 F.2d. 101 (5th Cir. 1985), *cert. denied*, 474 U.S. 947 (1986); Muniz v. Procunier, 760 F.2d. 588 (5th Cir. 1985).

245. *See* Gibson v. Commonwealth, 219 S.E.2d 845, 847 (Va. 1975), *cert. denied*, 425 U.S. 994 (1976).

246. *Smith*, 477 U.S. at 529.

error on appeal,[247] thus defaulting the issue. In deciding to omit this issue on appeal,[248] defense counsel relied on an aberrant Virginia Supreme Court precedent[249] that was subsequently invalidated by the Fourth Circuit Court of Appeals[250] while Smith's direct appeal was still pending. The majority refused relief on habeas corpus because Smith had failed to excuse the procedural default. The dissent pointed out that this death sentence survived "despite serious Fifth and Eighth Amendment violations that played a critical role in the determination that death [was the] appropriate penalty."[251] Counsel for a party amicus curiae before the Virginia Supreme Court, Richard Bonnie,[252] (who had attempted unsuccessfully to raise the issue) points out the capricious series of errors and fortuitous circumstances that led to Smith's death sentence and the unsuccessful attacks thereon:

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247. Smith v. Commonwealth, 248 S.E.2d 135, 139 n.1 (Va. 1978) (arguments raised at trial but not comprehended by the petitioner's assignments of error "will not be noticed by this Court" despite fact that the issues had been briefed by a party amicus curiae).

248. In its opinion, the court noted:

> Here the record unambiguously reveals that petitioner's counsel objected to the admission of Dr. Pile's testimony at trial and then consciously elected not to pursue that claim before the Supreme Court of Virginia. The basis for that decision was counsel's perception that the claim had little chance of success in the Virginia courts. With the benefit of hindsight, petitioner's counsel in this Court now contends that this perception proved to be incorrect.

*Smith*, 477 U.S. at 534 (citations omitted). The court continued: "Nor can it seriously be maintained that the decision not to press the claim on appeal was an error of such magnitude that it rendered counsel's performance constitutionally deficient under the test of Strickland v. Washington, 466 U.S. 668 (1984)." *Smith*, 477 U.S. at 535.

249. *See* Gibson v. Commonwealth, 219 S.E.2d 845 (Va. 1975).

250. Gibson v. Zahradnick, 581 F.2d 75 (4th Cir.), *cert. denied*, 439 U.S. 996 (1978).

251. 477 U.S. at 540 (Stevens, J. dissenting, joined by Marshall, Blackmun, and Brennan J.J.) The majority does not take issue with this characterization of the case. Later, Justice Stevens states that it is "absolutely clear that the introduction of this evidence . . . violated the Fifth Amendment." *Id.* at 551.

252. Richard J. Bonnie acted as counsel amicus curiae for the Post-Conviction Assistance Project of the University of Virginia Law School. Professor Bonnie's integrity is demonstrated by his confession of error in failing to seek to persuade trial counsel to amend the assignments of error to include this issue. Professor Bonnie also acted as Smith's co-counsel in the federal habeas proceedings.

> It is clear that the psychiatrist's testimony was constitutionally inadmissible and that, if the claim had not been defaulted, Smith's death sentence would have been set aside. Yet, notwithstanding nine years of post-conviction litigation, the claim was never reviewed on its merits by any court. Smith was executed under a constitutionally defective death sentence because the Virginia Supreme Court chose to ignore the error even though it was raised in an amicus brief. The perversity of the outcome in Michael Smith's case is amply demonstrated by noting the cumulative series of omissions that sealed his fate:
>
> Michael Smith's death sentence would have been set aside if the second-year law student who assisted in the appeal had researched federal law or had realized that *Gibson v. Commonwealth* was an aberrant decision.
>
> Michael Smith's death sentence would have been set aside if his lawyer had been aware of the federal dimension of the claim or had assigned the error anyway, simply to preserve the issue for federal review.
>
> Michael Smith's death sentence would have been set aside if the attorney who filed the amicus brief in the Virginia Supreme Court, and who *was* aware of the federal law, had simply picked up the phone to suggest that Smith's lawyer amend his assignment of error. I [Richard Bonnie] was that amicus attorney.
>
> Michael Smith's death sentence would have been set aside if his lawyer had read the amicus brief, had realized that the claim should have been preserved, had tried to amend the assignments of error, and had been permitted to do so.
>
> Michael Smith's death sentence would have been set aside if the Virginia Supreme Court had taken note of the alleged error, *sua sponte*, as many state courts would have done.[253]

Errors and fortuitous circumstances led to Michael Marnell Smith's execution.[254] In *Estelle v. Smith*,[255] Ernest Smith had precisely the same claim. His lawyers raised and preserved the

253. Richard J. Bonnie, *Preserving Justice In Capital Cases While Streamlining the Process of Collateral Review*, 23 U. TOL. L. REV. 99, 111 (1991).

254. Michael Smith was executed on July 31, 1986. He was the fifth person executed in Virginia under the modern post-*Furman* death penalty statute, and the 62nd in the United States. *Death Row, U.S.A.*, *supra* note 84.

255. Estelle v. Smith, 451 U.S. 454 (1981).

issue, and his death sentence was overturned. This is "death by lottery,"[256] and it demonstrates that a lawyer's error in procedurally defaulting a meritorious claim often means death in capital case litigation. Can a system be just that turns directly on attorney omissions rather than the merits of the case or the moral culpability of the perpetrator?

### 2. *Dugger v. Adams*[257]

It can be argued that the error in *Smith v. Murray* did not undermine the trial's truth-finding function; on the contrary, one might argue that the psychiatric testimony, although clearly inadmissible, enhanced the trial's reliability insofar as it placed relevant evidence of past violent behavior before the jury on the issue of future dangerousness. One might attempt to justify the rigid enforcement of the procedural default in *Smith v. Murray* on the basis that the error, though serious, did not corrupt the accuracy of the proceedings. This argument devalues constitutional commandments long thought to be essential to a fair trial. It places constitutional values in a peculiar hierarchy that values the result over all other values. Even assuming that this glorification of guilt or innocence over other values in the Constitution has merit, this argument fails to address the injustice in *Dugger v. Adams.*

The trial judge in Aubrey Dennis Adams, Jr's. capital trial instructed prospective jurors that their role was merely advisory, and regarding sentencing, that "[t]he ultimate responsibility for what this man gets is not on your shoulders. It's on my shoulders."[258] Counsel failed to object to this instruction, despite having a state law basis for such an objection.[259]

While Adams' case was being collaterally reviewed, the Supreme Court in *Caldwell v. Mississippi*[260] held that it was a violation of the Eighth Amendment to mislead the jury into believing that the responsibility for determining the appropri-

256. Bright, *supra* note 237 (coining the phrase "death by lottery" to illustrate the capriciousness of the death penalty).
257. 489 U.S. 401 (1989).
258. *Id.* at 403.
259. *Id.* at 408.
260. 472 U.S. 320 (1985).

ateness of a death sentence rests elsewhere. Because Adams' lawyer had failed to raise this issue, it was procedurally defaulted, and he was not entitled to relief.

Justice Blackmun, dissenting in *Dugger v. Adams*, pointed out the pervasiveness of the trial judges error by saying that "the Judge drummed this misinformation into the jurors' heads by repeatedly telling them that 'the most important thing . . . to remember' was the nonbinding nature of their recommendation and that the capital sentencing decision was not on their 'conscience' but on his."[261] The dissent then connected the pervasiveness of this error directly to the accuracy function of a capital sentencing proceeding:

> The alleged error in this case was severe: the incorrect instructions may well have caused the jury to vote for a death sentence that it would not have returned had it been accurately instructed. . . .
>
> Thus, it is plain that respondent has presented a "substantial claim that the alleged error undermined the accuracy of the . . . sentencing determination" at his trial. Indeed, the very essence of a *Caldwell* claim is that the accuracy of the sentencing determination has been unconstitutionally undermined. . . .
>
> The alleged error thus is global in scope: it necessarily pervades the entire sentencing process. Indeed, the alleged error in this case, if true, could not help but pervert the sentencing decision.[262]

The procedural default in *Dugger v. Adams* led directly to error that went to the heart of capital-sentence decision-making. Caldwell's lawyer raised the issue and procured relief; Adams' lawyer missed the point and his client was executed[263] despite a flawed sentencing proceeding, the accuracy of which is open to serious question. Furthermore, the Supreme Court's result orientation and desire to speed executions along even in

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261. *Dugger*, 489 U.S. at 422 (Blackmun, J., dissenting).

262. *Id.* at 422-23 (citations omitted).

263. Aubrey Adams was executed by the State of Texas on May 4, 1989. He was the 108th person executed in the United States under the modern post-*Furman* death penalty statute. *Death Row, U.S.A.*, *supra* note 84.

the face of unreliable decision-making is evident in the Court's rationale. The majority reasoned that an unreliable death sentence could not result in a miscarriage of justice because, if it did, it "would turn the case in which an error results in a fundamental miscarriage of justice, the 'extraordinary case,' into an all too ordinary one."[264] Kathleen Patchel observes that this

> is a blatant exercise in instrumentalism. The existence of an unacceptable level of unreliability in the sentencing decision when a *Caldwell* violation has occurred does not result in a miscarriage of justice because, if the Court held that it did, that would allow federal habeas courts to hear too many defaulted claims.[265]

Can such a rationale be just? Professor Patchel asks "how can any case be ordinary when it involves an unacceptable level of unreliability as to the decision to execute a human being."[266]

### 3. Other Examples of Procedural Perversity

John Eldon Smith, aka Tony Machetti, and Rebecca Adkins Smith Machetti were sentenced to death by juries that were systematically, and unconstitutionally underrepresented by women.[267] Rebecca's lawyers raised the claim and procured relief-she now serves a life sentence. Smith's lawyers procedurally defaulted the issue and he was executed. If anything, John Eldon Smith was the least culpable of the three who committed the murders that landed him on death row.[268] Capability of counsel rather than culpability of the defendants dictated the outcome. The doctrine of procedural default operates like a game of chance rather than a rule of justice.

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264. *Dugger*, 489 U.S. at 412 n.6 (citation omitted).

265. Kathleen Patchel, *The New Habeas*, 42 HASTINGS L.J. 939, 976 (1991).

266. *Id.* at 976 n.226.

267. The cases of John Eldon Smith, aka Tony Machetti, and Rebecca Adkinns Smith Machetti are set out in Clarke (pt. 1), *supra* note 129, at 1356.

268. The third person, John Maree, struck a deal with the government and received a life sentence. *See* Clarke (pt. 1), *supra* note 129, at 1356.

Warren McCleskey, it will be recalled,[269] was executed despite an apparently meritorious Fifth Amendment *Massiah*[270] claim that was never heard on the merits. Again the cause and prejudice standard erected an impenetrable barrier to a hearing on this constitutional error. The perversity of McCleskey's case is exacerbated by the fact that the state withheld evidence necessary for the construction of the claim. McCleskey could not prove deliberate official misconduct in the withholding of the evidence; absent proof that the state officials engaged in intentional misconduct the penalty for the failure to timely assert the claim was placed on McCleskey. That the circumstances surrounding the state's withholding of documents might appear suspiciously intentional is legally irrelevant—such was not proved—so the fault was McCleskey's.

4. The Problem of Innocence

Some might argue that while all of these examples involved important claims of constitutional error, none involved true claims of innocence; that is, none involved a claim that the wrong person was convicted. This argument ignores the sheer capriciousness of our capital punishment system and it devalues all constitutional claims that do not directly impugn the accuracy functions of a trial result. Nonetheless, this argument has popular appeal and cannot be summarily dismissed. Those who see innocence as the only value worth constitutional protection must be particularly troubled by the conviction and execution of innocent persons.

Procedural default, and its closely related concept, ineffective assistance of counsel, combine to make it much less likely that the wholly innocent, and those who are "innocent of the death penalty," will receive a hearing, much less an effective hearing. The narrowly constrained criteria for establishing innocence by

269. *See supra* section V.A.6.c.i.

270. In Massiah v. United States, 377 U.S. 201 (1964) the police bugged a car in which the defendant had a conversation with a former confederate who was secretly working undercover for the police. The Court held that this violated defendant's Sixth Amendment right to counsel.

clear and convincing evidence[271] insures that few substantial claims of innocence can be vindicated by the courts. That, in turn, insures that, human institutions being what they are, more, rather than less, innocent people will be executed. A part of the safety net designed to reduce error has been eroded.

Earl Washington's death sentence from Virginia for rape and murder provides a case on point.[272] Evidence from specimens from the crime scene were subjected to DNA testing long after Washington's conviction had become final. These tests excluded Washington as the secretor. He could not have raped the victim who, before she died, had said that there was only one assailant. The wrong person was convicted, and would have been executed but for a gubernatorial pardon commuting the sentence to life imprisonment. Washington, who is probably innocent, continues to serve out a life sentence. Because the evidence comes too late, and is thus defaulted,[273] he lacks an effective legal mechanism and cannot be released under Virginia law.

While holding an innocent person in prison can be criticized,[274] had there been a less sympathetic and courageous governor, he might well have been executed despite his proba-

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271. The innocence standard of Sawyer v. Whitley, 112 S. Ct. 2514 (1993) is discussed in *supra* section V.A.6.b.

272. Washington v. Commonwealth, 323 S.E.2d 577 (Va. 1984), *cert. denied*, 471 U.S. 1111 (1985).

273. Rule 1:1 of the Rules of the Supreme Court of Virginia provides that final judgments remain under the trial court's jurisdiction for only 21 days and may be modified, vacated, or suspended only during that narrow period. Once the trial court loses jurisdiction, it cannot enter any further orders. *See, e.g.*, LEIGH B. MIDDLEDITCH, JR., & KENT SINCLAIR, VIRGINIA CIVIL PROCEDURE § 10.2 at 430 (2d ed. 1992). In a criminal case even after- discovered evidence of perjury by a government witness is not ordinarily sufficient to secure habeas relief. Fitzgerald v. Bass, 366 S.E. 615 (Va. App. 1988). In the criminal context, the interplay between Hawks v. Cox, 175 S.E.2d 271 (Va. 1970) which bars relitigation of issues that were raised in the trial court, and Slayton v. Parrigon, 205 S.E.2d 680 (Va. 1974) which precludes raising issues on habeas that were not raised (that is, were defaulted) in the trial court, has limited Virginia habeas corpus to jurisdictional issues and to claims of ineffective assistance of counsel. Walker v. Mitchell, 299 S.E.2d 698 (Va. 1983). These rules apply to death penalty cases. *See, e.g.*, Correll v. Commonwealth, 352 S.E. 2d 352 (Va. 1987). As a result, there is no effective legal mechanism to address Washington's claim of innocence under Virginia law.

274. Eric M. Freedman, *In Virginia, Innocent Man Stays in Prison*, N.Y. TIMES, Jan. 28, 1994, at A26.

ble innocence. Governor Wilder of Virginia, the nation's first Black American governor, commuted three death sentences during his four year term of office; the prior two governors did not grant a single commutation.[275] Each person receiving a commutation, Joe Giarratanno, Herbert Bassett, and Earl Washington, had substantial claims of innocence—that their convictions were wrongful; each came close to execution without any relief from any court; each serves a life sentence because one governor had the courage to do an otherwise politically unpopular thing by commuting their death penalties.[276] The decline of executive clemency nationwide has been well documented.[277] As both the courts and governors reduce effective avenues for relief, the likelihood of executing the innocent increases.

Shabaka Sundiata Waglini of Florida,[278] Walter McMillian of Alabama,[279] and Randall Adams of Texas,[280] were all on death row; all were later proved to have been totally innocent. Although it is not possible to know the precise number of innocent persons who have been executed, scholars believe that the

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275. John F. Harris, *Death Penalty Case Thrusts Virginia Into Center of Debate Again*, THE WASH. POST, May 15, 1992, at D1.

276. *Id.*

277. *See* Hugo Adam Bedau, *The Decline of Executive Clemency in Capital Cases*, 18 N.Y.U. REV. L. & SOC. CHANGE 255 (1990-91).

278. Symposium, *Politics and the Death Penalty: Can Rational Discourse and Due Process Survive the Political Pressure?* 21 FORDHAM URB. L.J. 239, 247 (1994) (remarks by Shabaka Sundiata Waglini, a former death row inmate).

279. *Id.* 253 (remarks by Brian Stevenson, Walter McMillian's habeas lawyer).

280. That Randall Adams survived death row at all was entirely fortuitous. His original death sentence was reversed because of constitutional error in the selection of the jury. Adams v. Texas, 448 U.S. 38 (1980). The Texas Court of Criminal Appeals then ordered a new trial, but in the interim the Governor commuted Adams' sentence to life imprisonment. Adams ultimately sought and received a writ of habeas corpus from the Texas Court of Criminal Appeals granting a new trial. Among other things, that court found that the use of perjured testimony at trial could be imputed to the prosecutor, and that the failure to correct the perjured testimony, the failure to disclose a misidentification, and improper coaching of a witness violated Adams' right to a fair trial. *Ex Parte* Adams, 768 S.W.2d 281, 293-94 (Tex. Crim. App. 1989). Adams was ultimately exonerated. Zolton Ferency, *Adams v. Texas*, 36 N.Y.L. SCH. L. REV. 719-726 (1991) (reviewing RANDALL D. ADAMS, ET AL., ADAMS V. TEXAS (1991)). Had the United States Supreme Court not given him time by its initial reversal on grounds wholly unrelated to his innocence claim, the evidence of his innocence might never have materialized. Indeed, it seems almost a miracle that the prosecutorial and police misconduct that put Randall Adams on death row was ever uncovered. How many more innocent Randall Adams are on death row?

risk of erroneous executions are much higher than has been commonly supposed.[281] Rigid procedural-default rules and minimal requirements for the effective assistance of counsel combine to increase that risk. Reliance on executive clemency, given present day political realities, is unrealistic. In a number of states in the deep South, governors regularly run election campaigns on a get-tough-on-crime braggadocio that centers on how many execution orders that the candidate has signed.[282] In Alabama a gubernatorial candidate made a pledge to "fry them 'till their eyes pop out."[283] Should our nation's federal courts be abdicating their responsibilities in this political climate? Should life itself hang on the mercy of a state elected official who would "fry them 'till' their eyes pop out"?

I take issue with those who see innocence as the sole constitutional virtue. In order for the values contained within our Bill of Rights to have meaning, there must be effective and practical ways to assert those rights. States have little incentive to enforce constitutional commands when the only oversight of their actions comes with rarely exercised certiorari review in the Supreme Court. Circumscribing habeas corpus reduces access to rights-rights that are a part of our notions of fundamental fairness. Those who remain of a different view—those who exalt innocence over all other types of claims—however, are unlikely to be swayed by these concerns. All must, however, be profoundly troubled at how often our modern due process capital punishment system gets it wrong. Rigid enforcement of procedural default in the capital punishment arena increases the opportunity for error, thus contributing to the arbitrariness and capriciousness of the system. It assumes that indigent capital defendants all have access to good lawyers who timely make the correct claims. Nothing could be more wrong. So long as the

281. Hugo A. Bedau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21 (1987).

282. *Symposium, supra* note 278, at 246 (comments of Professor James Coleman); *see also*, Richard Cohen, *Playing Politics With the Death Penalty*, THE WASH. POST, Mar. 20, 1990, at A19 ("In Texas, everyone in the gubernatorial race favors the death penalty. Former governor, Mark White ran an ad in which he walked along a panel of huge photos of men executed during his term as governor. 'I made sure they received the ultimate penalty: death.'").

283. *Symposium, supra* note 278, at 254 (comments of Bryan Stevenson).

quality of justice received by capital defendants turns on the sheer chance of who gets the worst state appointed lawyer in a system designed to attract the least successful, and least capable, lawyers, rigid enforcement of procedural default will continue to produce unjust results.

5. The Perversion of Habeas Corpus

Stringent federal procedural-default rules encourage strict state enforcement of preclusion rules. State courts can avoid federal habeas oversight of criminal convictions simply by applying a state procedural-default rule and then refusing to address the merits of the claim. They can insure that there will be many defaults of meritorious constitutional issues by appointing the least knowledgeable and least effective lawyers. As a result of stringent federal enforcement of state procedural defaults following *Wainwright v. Sykes*, both Georgia and Mississippi have adopted stringent state default rules:

> The true motivation for stricter state procedural bars is often a desire to preclude the federal courts from reviewing (and their more likely upholding) meritorious constitutional claims. The state of Mississippi expressly articulated this motivation in urging the Mississippi Supreme Court to bar all claims that were not timely raised at trial and on direct appeal. The state said it was advocating this "not because such would promote the interests of justice, but rather [because] such would pull the rug out from under [the petitioner] when he ultimately seeks federal review of his case.[284]

Stringent federal procedural-default rules encourage stricter state enforcement of state procedural-preclusion rules, that in turn reduces the probability that a serious claim will be heard on the merits by any court at any level. This in turn allows death penalty proponents to play a public shell game. At the cusp of an impending execution, they can and do comment publicly on the numbers of courts that have reviewed a con-

284. Ronald J. Tabak & J. Mark Lane, *Judicial Activism and Legislative "Reform" of Federal Habeas Corpus: A Critical Analysis of Recent Developments And Current Proposals*, 55 ALB. L. REV. 1, 42 (1991).

demned person's case and refused relief.[285] Yet the public is never told that few, if any, of the prisoner's claims were ever heard by any court on the merits.[286] The public is given the impression that great lengths are gone to insure that justice is done, when in fact courts at every level repeatedly dodge the merits of the claims. The complexity of these issues make it nearly

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285. An example of this can be found in Republican State Representative Dalton Smith's editorial: *Gary Graham Has Been Treated Fairly, But People of Texas Haven't Been*, THE HOUS. CHRON., May 1, 1994, at 4, where the author lists all of the many court proceedings that reviewed and denied Graham's death sentence without pointing out that his innocence claim had not been heard by any court on the merits, nor would any court have heard that claim had not the Texas Court of Criminal Appeals intervened. Also, Gary Graham's claim that the Texas jury that sentenced him was unable to consider his youth and relatively good background was never heard on the merits because it constituted a new rule under *Teague v. Lane*. Graham v. Collins, 113 S. Ct. 892 *reh'g denied*, 113 S. Ct. 1406 (1993). *See, supra* section IV for an exposition of *Graham v. Collins*.

286. Michael Marnell Smith's case constitutes another example of how courts time after time refuse to address a death sentenced inmates meritorious but defaulted claims. The procedural history of his case is instructive:

(1) On direct appeal the Virginia Supreme Court refused to address meritorious but defaulted Estelle error that was raised by amicus curiae but not raised by trial counsel. Smith v. Virginia, 248 S.E.2d 135, 139 n.1 (Va. 1978).

(2) The Supreme Court denied certiorari to a petition that again failed to raise the *Estelle* issue (one wonders what trial
counsel was thinking by this time since he by now had been apprized of the issue by amicus counsel). Smith v. Virginia, 441 U.S. 967 (1979).

(3) On state habeas the trial court refused to consider the *Estelle* error finding that it had been procedurally defaulted. *See* Smith v. Murray, 477 U.S. 527, 532 (1986).

(4) The Virginia Supreme Court "declined to accept the appeal." *Id.*

(5) The Supreme Court again denied certiorari. Smith v. Virginia, 454 U.S. 1128 (1981).

(6) The federal habeas court in an unpublished order found that the Estelle error had been defaulted and refused to address the merits. *See* Smith v. Murray, 477 U.S. 527, 532 (1986).

(7) The Fourth Circuit Court of Appeals affirmed on different grounds, apparently believing that because the jury had relied on two aggravating circumstances, the error as to only one—the future dangerousness predicate—did not suffice to invalidate the death penalty. This was as close as petitioner came to a merits determination of the issue. *Id.*

(8) The Supreme Court affirmed on the ground that the issue was procedurally defaulted. *Id.* at 533.

As Professor Bonnie says, "notwithstanding nine years of post-conviction litigation, the claim was never reviewed on its merits by any court. Bonnie, *supra* note 253, at 111. The Supreme Court rendered its decision on June 26, 1986, and Michael Marnell Smith was executed a month later on July 31. *Death Row U.S.A., supra* note 84.

impossible for other voices to be heard or understood in thirty to sixty second sound bites on the local news.

While this state of affairs may be minimally acceptable in noncapital cases, it is perverse and unjust under our present capital punishment system, and it is at war with the purpose of habeas corpus. Justice Holmes, dissenting in *Frank v. Mangum*,[287] argued that "*habeas corpus* cuts through all forms and goes to the very tissue of the structure. It comes in from the outside, not in subordination to the proceedings, and although every form may have been preserved opens the inquiry whether they have been more than an empty shell."[288] Eight years later Holmes' view of habeas corpus became the majority view in *Moore v. Dempsey*.[289] Rigid procedural-default rules cast aside the justice done in *Moore v. Dempsey*, and, together with the other restrictive procedural rulings of the Rehnquist Court,[290] return habeas corpus to the injustice of *Frank v. Mangum*. Procedural-default rules, like the holding in *Frank v. Mangum* (which sanctioned a mob dominated death verdict on the ground that due process required no more than that the Georgia Supreme Court review the claim) refuse to address injustice on the merits. Indeed, they refuse to address injustice at all; they prefer a mechanical rule designed to avoid having to look at the justice of a claim. Procedural-default rules choose finality over fairness. The federal rules sanction hypertechnical state pleading rules that create traps for the unwary. Procedural default remains the crown jewel of the Supreme Court's "[b]yzantine morass of arbitrary, unnecessary, and unjustifiable impediments to the vindication of federal rights. . . ."[291] Amelioration of rigid procedural-default rules in capital cases would be salutary and just.

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287. 237 U.S. 309 (1915).

288. *Id.* at 346 (Holmes, J., dissenting).

289. 261 U.S. 86 (1923).

290. For other examples of the Rehnquist court's restrictive procedural rules in federal habeas corpus, see Clark (pt. 1), *supra* note 129, at 1356 (discussing the exhaustion of remedies requirement of federal (habeas corpus); Clarke (pt. 1), *supra* note 169, at 1366) (discussing ineffective assistance of counsel); *supra* section IV (discussing retroactivity in hasbeas proceedings).

291. Coleman v. Thompson, 501 U.S. 722, 758 (1991) (Blackmun, J., dissenting).

## C. *Part Three: A Comparative Analysis of the Procedural-Default Rules of Kentucky and Virginia in Death Penalty Jurisprudence*

### 1. Introduction: Impetus for the Study

The Rehnquist Court's doctrinal basis for promulgating rigid procedural rules limiting access to federal habeas corpus turns on the asserted interest that state criminal-justice systems have in the finality of judgments and the concomitant efficiency of process fostered thereby. Comity, it is argued, requires federal habeas courts to avoid unduly trenching on state criminal proceedings. Retroactivity analysis,[292] the doctrine of complete exhaustion,[293] and strictly enforced procedural default requirements,[294] all share the common justification of arguably promoting finality and efficiency of state criminal justice systems.

Professor Bonnie has persuasively shown the inefficiency of exhaustion requirements in death penalty habeas-corpus litigation which can have the effect of bouncing cases and issues back and forth between the federal and state systems.[295] The injustice of overly rigid retroactivity analysis has been commented upon,[296] but it is difficult to see how efficiency or finality issues could be successfully analyzed in this area until retroactivity jurisprudence becomes more stable and predictable.

Procedural default, on the other hand, now constitutes a relatively stable body of law. The extent to which procedural-

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292. Teague v. Lane, 489 U.S. 288, 309, *reh'g denied*, 490 U.S. 1031 (1989) (retroactive application of rules "undermines the principle of finality" and is therefore less efficient).

293. Rose v. Lundy, 455 U.S. 509, 518-20 (1982) (doctrine of total exhaustion encourages petitioners to seek full relief in state courts, "giving those courts the first opportunity to review all claims," which arguably promotes efficiency by allowing the state courts to winnow out the less serious claims, and by requiring all claims to be asserted in one proceeding).

294. Wainwright v. Sykes, 433 U.S. 72, 89-90, *reh'g denied* 434 U.S. 880 (1977) (deliberate by-pass rule of *Fay v. Noia* "may encourage 'sandbagging' on the part of defense lawyers," thus giving rise to inefficient treatment of state criminal trials as a "tryout on the road" to federal habeas corpus).

295. Bonnie, *supra* note 253, at 113-14.

296. *See supra* section IV.

default rules contribute to the finality and efficiency values of a judicial system can be determined and analyzed. The numbers of cases involving procedural defaults in death penalty cases can be objectively determined; the types of issues involved can be analyzed; and, most importantly, jurisdictions with differing procedural-default rules in capital cases can be compared. This allows assessment of the impact of differing procedural-default rules on the efficiency of a state's criminal justice system. It also allows one to predict the probable effect on efficiency that a change in the rigidity of a state's procedural-default rules would have. This, in turn, allows assessment of the "fairness" versus "efficiency" arguments that dominate the debate in this part of death-penalty habeas jurisprudence.

Procedural-default rules are particularly good candidates for this kind of comparative analysis because the procedural rules in question are peculiarly those of the individual states. In this area of the law (unlike, for example, retroactivity analysis) the federal habeas court must determine and then follow the law of the individual state from which a particular death sentence emanates. The various death-penalty states have differing rules that can be effectively compared, with contrasting results noted, in a context that matters. Life and death can turn on the happenstance of how a particular state utilizes its procedural-default rules.

Virginia and Kentucky are good states for this type of comparison. Both states have death rows that are sufficiently large for a useful body of death-penalty jurisprudence to have devel-

oped,[297] yet are small enough to make this project attainable. These two states stand at opposite poles in their enforcement of procedural defaults in death-penalty cases. Virginia has been among the most rigid in its enforcement of procedural-default rules in capital cases.[298] Kentucky, in contrast relaxes enforcement of its contemporaneous objection rule in death penalty cases. Unlike Virginia, the Kentucky Supreme Court states that "[w]here the defendant's life is at stake, technical rules of procedure must give way to the more lofty aim that justice may be done."[299]

By comparing the way in which procedural-default rules actually work in post-*Furman* death-penalty cases in both states, we can make a reasonably reliable estimate of the frequency with which forgiveness of procedural defaults would likely cause retrials. From this, subject to the limitations stated below, we can determine the degree to which procedural-default rules contribute to efficiency and finality in death-penalty cases.

It is important to determine whether the factual predicates upon which procedural rules are based are empirically verifiable. To the extent that the asserted factual predicates support-

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297. According to *Death Row U.S.A.*, *supra* note 84, Kentucky had 27 on its death row and Virginia had 48 on its death row. One significant difference is that as of the summer of 1993 Kentucky had no executions while Virginia had 20. It appears that Kentucky has been slower to execute, which from a superficial view might appear to signal inefficiency. However, in light of the few cases found in which a procedurally defaulted issue resulted in a reversal of a death sentence in Kentucky, that issue is almost certainly not the cause of this difference. This does account for one difference, however, that is significant for the purposes of this study. There are relatively few Kentucky death sentences that have found their way into the federal habeas corpus system. Thus, we lack a significant body of federal jurisprudence addressing Kentucky's relaxed procedural-default rules in death sentence cases. Since it is the state rules, and the state supreme court's treatment of its own procedural rules that is determinative in both the federal and state systems, this difference should not make any significant difference—a study of how the two state supreme court's deal with procedural default is useful regardless of whether federal habeas cases can be compared. Thus, federal cases will not be extensively addressed by this study, and will only be used for illustrative purposes. Once a larger body of federal habeas law develops out of Kentucky, this lacunae can be addressed, and, of course, other states can be studied for comparison in other studies of this issue.

298. *See, e.g.*, Coleman v. Thompson, 501 U.S. 722 (1991); Smith v. Murray, 477 U.S. 527 (1986); Murray v. Carrier, 477 U.S. 478 (1986); *see also*, Wise v. Williams, 982 F.2d 142 (4th Cir. 1992), *cert. denied*, 113 S. Ct. 2940 (1993) (Virginia strictly and regularly enforces time limit for notice of appeal).

299. Ice v. Commonwealth, 667 S.W.2d 671, 674 (Ky. 1984).

ing these rules are lacking, it indicates that other unstated values are the real issues to be confronted. Thus, this study attempts to ascertain the extent to which the stated goals of finality and efficiency support rigidly enforced procedural-default rules in death-penalty cases. It does this by comparing cases from a strict enforcement state—Virginia—with those of a state with more relaxed procedural-default rules in death penalty cases—Kentucky. This section concludes by finding that relaxation of strict procedural-default rules would have little, if any, adverse effect on judicial efficiency. The relatively few reversals of death-penalty cases that would occur but for issues that were otherwise procedurally defaulted would cause little, if any, loss of efficiency. There is even a probable net gain in judicial efficiency to be had from relaxation of strict procedural-default rules, given the enormous amount of time and energy now devoted to litigating the issue of whether or not issues have been procedurally defaulted. Relaxing procedural-default rules in death penalty cases will not open the flood-gates, but it will reduce wrangling over the procedural issues that now consume the courts. This leads one to take a more serious look at the injustice done when the meritorious claims of a death-sentenced prisoner are not addressed on the merits.

### 2. Methodology

Attempts were made to locate all post-*Furman* death sentences reviewed on appeal[300] by the Kentucky and Virginia Supreme Courts utilizing traditional library and computer assisted methods, including both Lexis and Westlaw. Cases thus found were correlated with other data bases[301] such as the *Death*

300. Both direct appeals and post-conviction cases were included from both states. There were only a few of these from each state. This yields a few more cases than death-sentenced prisoners because those on death row with a reported post-conviction case will have two reported cases, including the direct appeal. However, any distortion created by this tends to balance out, and in any event the numbers of prisoners from each state with multiple reported cases was small. Thus, this does not skew the data, and has the advantage of including all reported cases in which a procedural default could potentially be found.

301. Since gaps were found in both data bases, it was necessary to run all search terms through both data bases so that one could act as a check on the other. In addition, some cases were manually Shepardized, and since each state maintains lists of death sentences for proportionality purposes these lists were checked to attempt to

*Row U.S.A.* statistics compiled by the NAACP Legal Defense and Educational Fund. These cases, already divided by state, were subdivided into those affirming death sentences and those reversing death sentences (or the underlying conviction). This made possible the determination of the further subset of cases involving reversals stemming from issues that were procedurally defaulted at trial.

Once it was confirmed that Virginia had never looked past a procedural-default to reverse a death sentence,[302] a further step was taken with respect to Virginia. Using Lexis and Westlaw, all death-sentence cases that involved invocation of Rule 5:21 and its successor Rule 5:25 of the Rules of the Supreme Court of Virginia were located. These rules bar appellate notice of error to which no contemporaneous objection was made.[303] While it may be possible that the Virginia Supreme Court has on some occasion noted a defaulted claim without citing Rule 5:21 or 5:25, no such example was discovered in reviewing the cases in this study. Thus, this procedure yielded substantially all of the subset of affirmed death sentences in which the Virginia Supreme Court rejected merits review of an issue on appeal as procedurally defaulted because of a contemporaneous-rule violation. The contemporaneous-objection rule was found to be the largest and most important group of procedurally defaulted issues in the cases reviewed.

This analysis, therefore, omits a few procedurally defaulted issues not involving the contemporaneous-objection rule, such as the default in *Coleman v. Thompson*,[304] which involved a default stemming from the failure to timely file a notice of appeal from a denial of relief from an adverse state habeas decision. This omission is not significant given that the direct comparison with Kentucky revolves around reversals (not affirmances) where the salient issue has been defaulted. The attempt to find

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find all of the relevant cases. The KENTUCKY DEATH PENALTY MANUAL (1990) was also consulted.

302. *See infra* section V.C.5.a. Virginia did, however, reverse a capital conviction resulting in a life sentence in Ball v. Commonwealth, 273 S.E.2d 790 (Va. 1981) despite a procedural default of the only meritorious issue where the elements of the capital crime were never proved.

303. VA. SUP. CT. R. 5:25 (1995).

304. 501 U.S. 722 (1991).

cases affirming a death sentence where one or more issues were defaulted was made to assess the kinds of issues being defaulted to see if the comparison with Kentucky would be rendered invalid because of differences in Virginia law. Locating the largest and most important group of procedural-defaults in these cases sufficed for this purpose. As will be seen, this data tends to support the analysis herein advanced.[305]

This study is limited to cases occurring under Kentucky and Virginia's modern post-*Furman* death penalty statutes.[306] Cases arising under the older, unconstitutional legislation were not considered regardless of when the decision was actually reported. This study ends with *Bussell v. Commonwealth*,[307] decided by the Kentucky Supreme Court on April 21, 1994. This study is limited to published opinions in death sentence cases; no unpublished cases, other than summary denials on state habeas corpus, have been found either in Kentucky or Virginia.[308]

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305. The date for this comparison was derived from cases that were grouped into specific categories. The lists for these cases, which are not reproduced here, are appendices to the original manuscript of this article, and now are on file with the *University of Richmond Law Review*. Although the appendices are not reproduced here, it is helpful to understand how the cases were categorized into the individual appendices.

The Virginia death penalty cases affirming death sentences are found in Appendix Va.1. Cases in which a single death row inmate had more than one reported case from the Virginia Supreme Court, and a synopsis of the reasons therefore, are found in Appendix Va.2. Virginia reversals of death sentences are found in Appendix. Va.3., and procedural defaults stemming from contemporaneous objection rule violations are found in Appendix Va.4.

Kentucky Supreme Court affirmance of death sentences are found in Appendix Ky.1, multiple cases attributable to a single inmate are found in appendix Ky.2, reversals are found in appendix Ky.3. Procedurally defaulted claims which nonetheless resulted, in whole or in part, in a reversal of a death sentence are found in appendix Ky.4.

306. For example, Hudson v. Commonwealth, 597 S.W.2d 610 (Ky. 1980) is omitted from this study because the crime occurred before Kentucky's post-*Furman* death-penalty statute had become applicable and the Kentucky Supreme Court held that the revised death penalty statute could not under state law be retroactively applied.

307. 882 S.W.2d 111 (Ky. 1994).

308. There are no unpublished death penalty opinions from the Kentucky Supreme Court. Letter from Jeffry C. Hoehler, attorney with the Kentucky Capital Litigation Resource Center, to the author (Nov. 8, 1993) (on file with the author). Likewise, there are no unpublished death penalty cases from Virginia on direct appeal. The Virginia Supreme Court has routinely denied habeas appeal summarily in unpublished one sentence orders. Without reviewing the briefs and motions filed in each such case, it is impossible to determine whether or not, and if so, to what extent, procedurally defaulted issues have been raised in these unreported summary denials.

### 3. Limitations of the Study and Indications for Future Research

Kentucky, unlike Virginia, has had relatively few cases reach federal habeas corpus.[309] Thus, it was not possible to compare the incidence of procedural-defaults in federal habeas corpus. This could potentially change the estimate somewhat of retrials that would be required under a more relaxed procedural-default rule. However, there is no reason to suspect that the Kentucky federal district courts or the Sixth Circuit Court of Appeals would be any more forgiving of procedurally defaulted claims than the Kentucky Supreme Court is.[310] Thus, while this is an unavoidable weakness in the data, the overall incidence of procedural-defaults that result in reversals is not likely to change significantly from federal habeas corpus review. The data thus obtained is suggestive rather than determinative.

The fact that the Virginia Supreme Court does not publish opinions in most of its denials of habeas corpus appeals is another unavoidable potential weakness in the data. However, given the nature of claims that can be litigated at this level (essentially they are limited to ineffective-assistance-of-counsel claims[311]) this is not likely to be a fertile source of new procedural-defaults, although additional defaults made by original trial counsel could be identified at this level.

Further research can mitigate these problems. Kentucky will indubitably soon have many more federal habeas corpus death penalty cases for comparison with Virginia. This would eliminate the largest potential source of error in this study. Furthermore, there are other states with active death penalty statutes

309. *See* THE KENTUCKY DEATH PENALTY MANUAL (1990) (reporting only two death row inmates with three published opinions in the federal courts).

310. The care with which Kentucky supervises its trial courts in death penalty cases is shown by its high reversal rate. It is unlikely that the federal habeas courts will reverse many cases that have survived the Kentucky Supreme Court's meticulous review. And because the better issues will have been winnowed out by the Kentucky Supreme Court, the federal habeas court will likely have an easier time with the issues that it does review. This is an added efficiency that does not appear to have been considered by the courts.

311. *See supra* note 273 and accompanying text.

that have procedural-default rules that are more relaxed than Virginia's. Louisiana, for example, has a large death row, and its execution frequency is almost identical to that of Virginia.[312] As in Kentucky, Louisiana's procedural-default rules are somewhat relaxed in death penalty cases.[313] A summary review of the federal habeas jurisprudence suggests that Louisiana has had comparable numbers of death sentences that have reached federal habeas review. Anecdotal evidence, including discussions with attorneys that are familiar with Louisiana's capital punishment jurisprudence, review of the execution rates, and unsystematic review of Louisiana case law on the point, suggests that Louisiana's experience with procedurally defaulted issues in capital cases is similar to that of Kentucky—only a few cases are reversed and remanded for retrial because of meritorious claims that were defaulted. Thus, Louisiana would be a prime candidate for a systematic comparative study. The more comparisons that can be made, the greater the confidence in the result.

There is a theoretical problem with the data as well. The justice/efficiency tension arguably colors all appellate reviews in capital cases, not only those including defaulted claims. One could argue that Kentucky's higher reversal rate in capital cases suggests that the Kentucky Supreme Court is more in-

312. Virginia and Louisiana are among the states that most often execute, as is shown by the following table. The population statistics are from the 1992 population estimates from the U.S. Bureau of Census as reported in the Statistical Abstract of the United States 1993 by the U.S. Department of Commerce. The execution data is from *Death Row U.S.A.*, *supra* note 84.

| State | Population | Number of Executions | Percentage of Total | Executions per Million |
|---|---|---|---|---|
| Texas | 17,656,000 | 74 | 31.90% | 4.2 |
| Florida | 13,488,000 | 32 | 13.79% | 2.4 |
| Virginia | 6,377,000 | 23 | 9.91% | 3.6 |
| Lousiana | 4,287,000 | 21 | 9.05% | 4.9 |
| Kentucky | 3,755,000 | 0 | 0 | 0 |

313. *See, e.g.*, State v. Clark, 492 So. 2d 862 (La. 1986).

clined to accept less efficiency in death penalty cases. If Kentucky has a lower threshold for reversal in capital cases, it would make it seemingly more difficult to single out the procedural-default issue. However, the fact that so few of these cases actually turned on issues that were procedurally defaulted suggests that the procedural-default component of the justice/efficiency tension within the judicial process in Kentucky remains quite low. It seems reasonable to assume that, even if Kentucky were considered to be somewhat more tolerant of judicial inefficiency, the cause is not its position on procedural-default which has affected few death penalty cases.

4. A Short Summary of the Procedural-Default Regimes of Virginia and Kentucky

a. Virginia

The Virginia Supreme Court refuses to notice alleged error "unless objection was stated with reasonable certainty at the time of the ruling, except for good cause shown or to enable this Court to attain the ends of justice."[314] This is Virginia's formulation of the contemporaneous objection rule; it precludes merits review of trial errors not contemporaneously objected to, unless one of the exceptions, "good cause shown" or "ends of justice" applies.

The "good cause shown" exception has not been found to apply to any cases and was only once discussed, and that in 1927.[315] It is thus of little utility to modern litigators. Despite broad dicta emanating from an early case,[316] the "ends of justice" exception is narrowly limited. It has only been applied where the evidence of the crime proved by the prosecution (viewing the evidence most favorably to the prosecution) fails to establish the statutory charge.

For example, although the Virginia Supreme Court has never looked past a procedural-default to reverse a death sentence, it

314. VA. SUP. CT. R. 5:25 (formerly R. 5:21) (1995).
315. Owens v. Commonwealth, 136 S.E. 765, 768 (Va. 1927).
316. Shocket v. Silberman, 165 S.E.2d 414 (Va. 1969).

did reverse a life sentence in a capital case despite a procedural-default in *Ball v. Commonwealth*.[317] There the prosecution's evidence "construed in the light most favorable to the Commonwealth showed that [the victim] was killed during an attempted robbery, rather than the actual commission of robbery."[318] Since capital murder required the commission of a robbery as a necessary predicate, proof merely of an attempted robbery failed to meet the statutory definition; hence, the Virginia Supreme Court reversed despite counsel's failure to properly raise the issue at trial. Similarly, in *Jimenez v. Commonwealth*,[319] a non-capital fraud case, it was clear from the face of the record that an essential element of the crime was missing. Thus, while the language "ends of justice" might be susceptible to a broad construction, the Virginia Supreme Court has effectively limited this exception to a narrow class of cases—only prosecutions that fail on the face of the record to adduce any credible proof of a statutory element of the crime have been reversed despite a procedural-default. Virginia's procedural-default rules are strictly applied in death penalty cases.[320]

b. Kentucky

Kentucky rule RCr 9.22 requires a party to "make[] known to the court the action which he desires the court to take or his objection to the action of the court."[321] This is Kentucky's version of the contemporaneous objection rule, and absent "manifest injustice," which is rarely found, the rule is rigorously enforced in non-capital cases, and even in capital convictions where no death sentence was imposed.[322] Failure to make timely objection is generally fatal to an issue on appeal in cases where a death sentence was not imposed. However, the rule is different in death-penalty cases. There, "every prejudicial error must be considered, whether or not an objection was made in

317. 273 S.E.2d 790 (Va. 1981).
318. *Id.* at 792.
319. 402 S.E.2d 678 (Va. 1991).
320. *See supra* note 298.
321. KY. R. CRIM. PROC. 9.22 (1994).
322. *See, e.g.*, Harris v. Commonwealth, 793 S.W.2d 802 (Ky. 1990); West v. Commonwealth, 780 S.W.2d 600 (Ky. 1989); Davis v. Commonwealth, 795 S.W.2d 942 (Ky. 1990); Shannon v. Commonwealth, 767 S.W.2d 548 (Ky. 1988).

the trial court."[323] Only an intentional failure to object "for reasons of trial tactics"[324] will prevent consideration of prejudicial error. Thus, Kentucky continues to hew to a rule, at least where death sentences are involved, similar to that of *Fay v. Noia*,[325] although the Kentucky rule predates *Fay*.[326]

In effect, Kentucky's rule, although not directly tied to the federal rule in any way (the Kentucky cases rarely cite federal precedent for this rule, and this is not surprising since the Kentucky rule is older) dispenses with the "cause" prong of *Wainwright v. Sykes*.[327] And the cases studied do not appear to employ an unduly restrictive notion of prejudice. This has allowed the Kentucky Supreme Court to grant relief in death-sentence cases despite procedural-defaults that would have prevented the Virginia Supreme Court from entertaining the same issue on appeal.

5. The Findings

a. Virginia

The Virginia Supreme Court has affirmed death sentences in eighty-four cases since *Smith v. Murray*,[328] the first appeal under the modern statute. It has reversed (usually with a remand for resentencing) in six for an affirmance rate of more than ninety-three percent. Virginia has never looked past a procedural-default in a death-sentence case.[329] It has affirmed

323. Ice v. Commonwealth, 667 S.W.2d 671, 674 (Ky. 1984).

324. *Id.*

325. 372 U.S. 391 (1963).

326. *See, e.g.*, Smith v. Commonwealth, 366 S.W.2d 902 (Ky. 1963); Bowman v. Commonwealth, 290 S.W.2d 814 (Ky. 1956); Edwards v. Commonwealth, 182 S.W.2d 948 (Ky. 1944).

327. 433 U.S. 72 (1977).

328. 248 S.E.2d 135 (Va. 1978).

329. *See* Ira P. Robbins, *Toward A More Just And Effective System Of Review In State Death Penalty Cases*, 40 AM. U. L. REV. 1, 31 n.54 (1990) (statement of Richard Bonnie and others). The Robbins article indicates that Virginia had never looked past a procedural default to reverse a death sentence. This statement was corroborated in three different ways. First, all Virginia Supreme Court death penalty cases reported were read. Second, the subset of procedural defaults in death penalty cases was identified and reviewed independently, and all reversals of death sentences were reviewed. Finally, all cases annotated under the "ends of Justice" or "good cause shown" exceptions to Rule 5:25 and its predecessor Rule 5:21 were reviewed. Thus, the fact that

death sentences in fifty-one cases where the reported decision notes that one or more issues were defaulted as a result of a violation of the contemporaneous-objection rule of Rule 5:25 or its predecessor Rule 5:21. Thus, in ninety-one reported death-sentence cases, the Virginia Supreme Court has never forgiven a procedurally defaulted claim, regardless of how egregious the error or how great the injustice done.[330]

b. Kentucky

The Kentucky Supreme Court affirmed twenty-seven of fifty-two death-sentence cases and reversed twenty-five under the 1976 legislation reinstituting the death penalty.[331] This yields an affirmance rate of 51.9%[332] for the period under study. The Kentucky Supreme Court reversed four death penalties in whole or in part upon issues that had been procedurally defaulted.[333] Thus, only four of fifty-two cases (or 7.7%) of the reversals in Kentucky came in cases where a procedural-default

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Virginia had never looked past a procedural default to reverse a death penalty was confirmed. It did reverse a capital conviction resulting in life imprisonment in Ball v. Commonwealth, 273 S.E.2d 790 (1981).

330. *See supra* section V.B. (for discussion and examples of unjust results stemming from procedurally defaulted issues).

331. KY. REV. STAT. ANN. § 532.025-.140 (Baldwin 1990 & Cum. Supp. 1994). The first death sentence to reach the Kentucky Supreme Court under this statute was reversed because of trial error. Smith v. Commonwealth, 599 S.W.2d 900 (Ky. 1980). The first affirmed death sentence occurred in Gall v. Commonwealth, 607 S.W.2d 97 (Ky. 1980).

332. If only direct appeals are considered, then, in Kentucky, there were for the study period 23 affirmed death sentences out of 49 direct appeal cases involving a death sentence for an affirmance rate of 46.9%.

333. *See* Appendix Ky.4, *supra* note 305. The case Cosby v. Commonwealth, 776 S.W.2d 367 (Ky. 1989) involved two defendants (Teddy Cosby and Christopher Walls) who were tried together and who both received death sentences. Both had a number of procedurally defaulted issues on appeal. Cosby's case was reversed because of error that was defaulted, but Wall's case was reversed as a result of error that was not defaulted. Both cases also involved a defaulted double jeopardy issue that the court reached because the cases were remanded for trial. However, it is not clear that this error was prejudicial. Both defendants had received double death sentences (one for kidnapping and one for the murder). Thus, reversing the kidnapping death sentence would have left the death sentence for murder intact. For this reason this issue is not included in the Kentucky analysis. If included it would bring to five the number of meritorious procedurally defaulted cases that were reversed in part because of the defaulted issue. The number of cases where the sole meritorious issue was defaulted would remain at two.

would have precluded review in Virginia. Procedurally defaulted issues were unsuccessfully asserted in three other cases in which death sentences were affirmed.[334] Since at least two of the cases involving procedurally defaulted issues also contained meritorious claims that were not defaulted,[335] it can be contended that Kentucky reversed only two death sentences solely as a result of error that had not been objected to and preserved at trial. This yields a 3.8% reversal rate (one case in 26.5) of death sentences where the only meritorious error was defaulted. The first post-*Furman* death penalty cases reached the Kentucky Supreme Court in 1980. Thus, Kentucky reversed only two cases in nearly fourteen years where the sole meritorious error was procedurally defaulted. Where the Kentucky Supreme Court addressed and disposed of alleged error that was procedurally defaulted, it often did so cursorily in a short paragraph stating that the error was not prejudicial.[336]

### 6. Analysis and Conclusion

Procedures governing the orderly presentation of cases and appeals are necessary—no system of justice could long operate without such procedures. However, any efficiency enhancing procedural device within a legal system must be balanced against its effect on justice. Procedures designed to promote efficiency have a cost; to the extent that they deprive a litigant

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334. Because the Kentucky Supreme Court does not identify or discuss issues on appeal that it finds to be frivolous or completely without merit, it is impossible to determine the number of times that procedurally defaulted issues were found to be without merit, by the Kentucky Supreme Court. The Virginia Supreme Court has strictly enforced procedural default at least 51 times. The three cases found in which the Kentucky Supreme Court overlooked the procedural default only to determine the issue adversely to petitioner were Simmons v. Commonwealth, 746 S.W.2d 393 (Ky. 1988); Stanford v. Commonwealth, 734 S.W.2d 781 (Ky. 1987); Gall v. Commonwealth, 607 S.W. 2d 97 (Ky. 1980).

335. Sanborn v. Commonwealth, 754 S.W.2d 534, 542 (Ky. 1988) ("Here, the errors taken collectively mandate reversal, eliminating the need to quibble over individual questions of preservation."); Moore v. Commonwealth, 634 S.W.2d 426 (Ky. 1982).

336. *See, e.g.*, Sanders v. Commonwealth, 801 S.W.2d 665, 675 (Ky. 1990), *cert. denied*, 502 U.S. 831 (1991) (complaint that a victim of a prior shooting sat in courtroom in a wheelchair disposed of in one paragraph that concluded: "We therefore see no appreciable possibility that the jury was affected by her presence, or that the defendant suffered prejudice to his substantial rights.").

of a hearing on the merits they erode public and private perceptions of fairness. Indeed, they undercut fairness itself.

While balancing justice against efficiency may appear to compare incomparables, it is possible, nevertheless, to assess a particular rule's efficiency—its relative contribution to the overall efficiency of the system of justice. One can determine how change providing more merits resolutions of claims would likely affect a system of justice by (1) evaluating a rule's performance in actual cases over time, and (2) comparing it with the workings of variant rules from another similar jurisdiction with otherwise comparable cases.

Few could argue with the proposition that death-sentenced prisoners provide the most compelling case for merits resolution of claims. However one strikes the balance between efficiency and justice, death row cases surely remain the one area of law where efficiency arguments carry the least weight. They are the one area where society most demands accurate determinations of fact and law. They are, therefore, the types of cases where it is most important to determine the relative efficiency or inefficiency of procedural rules intended to enhance efficiency.

Procedural-default rules act as a gatekeeper, cutting off claims without resolution of the merits. This arguably promotes finality; claims thus procedurally extinguished cannot be remanded for redetermination. Thus, finality is seen to promote efficiency—one case is disposed of, and others can take its place. The cost to justice of refusing to decide potentially meritorious claims in death-penalty cases is in the execution of persons whose cases might have been decided otherwise but for the ignorance or negligence of their lawyers in failing to properly raise and preserve the appropriate claims. This is indeed a high cost and makes it particularly appropriate to evaluate the actual efficiency of these rules as balanced against the cost to justice. The data suggests that Virginia's rigid procedural-default rules fail to measurably increase the efficiency of the system of justice in death penalty cases. Indeed these rules spawn countervailing inefficiencies in the litigation over whether or not an issue has been defaulted, and if defaulted, whether excuse for the default exists.

Although Virginia reports fifty-one cases in which issues were procedurally defaulted, analysis of those cases reveals many in which the issues were clearly without merit. For example, *Mueller v. Commonwealth*[337] offered up a potpourri of motions to set aside the verdict and objections to trial evidence that would have been clearly within the discretion of the trial judge. It would have been just as easy for the Virginia Supreme Court to have rejected these claims on the merits as it was to list them and to note that they had been procedurally defaulted. Virginia could have written one short paragraph on these claims on the merits the same way that Kentucky does when confronted by meritless issues. It would serve no purpose to go laboriously through all of the issues that were procedurally defaulted, but yet could have been easily decided as contrary to existing precedent or otherwise without merit within the group of fifty-one cases studied. Suffice it to say that the vast majority of claims would have fit that description. If Virginia were to adopt the Kentucky policy of not even discussing most meritless issues, the job would be even simpler. Indeed, it appears that the only reason for the Virginia Supreme Court's fastidiousness in listing and discussing every issue raised by a death-sentenced appellant is to note all those that have been defaulted. It is likely that far from seeking to do justice, the Virginia Supreme Court seeks to list all possible procedural-defaults in order to foreclose federal habeas review.[338]

The most compelling reason to think that relaxation of procedural-default would be unlikely to open the floodgates is the experience that Kentucky has had with a far more lenient policy. Only two of twenty-five reversals were solely attributable to

337. 422 S.E.2d 380 (Va. 1992).

338. The plain statement rule of Harris v. Reed, 489 U.S. 255 (1989), forecloses federal habeas review of procedurally defaulted claims if, and only if, the state's last appellate court clearly and expressly states that its judgment rests on a state procedural bar. Thus, the Virginia Supreme Court's listing seriatim of all procedurally defaulted issues in all death penalty cases is designed to foreclose federal review of all such issues. Because Kentucky's procedural-default rules are more relaxed, it can afford to simply ignore any issues that it deems meritless, thus conserving appellate time and resources. And because Kentucky carefully scrutinizes death penalty appeals, reversing more often than Virginia, it appears unlikely that the federal habeas courts will often reverse Kentucky death sentences. Thus, it is arguable that, in the long run, the Kentucky judicial system is more efficient than is Virginia's in handling death-sentence appeals.

issues that were procedurally defaulted. This affected two out of fifty-two death sentences. Kentucky jurisprudence is hardly less efficient than Virginia's as a result of it attempting to do justice in death penalty cases. If Kentucky, with its much higher reversal rate in death penalty cases than Virginia, found only two of fifty-two (or four of fifty-two if one includes all meritorious defaulted claims) to be the reason for reversing death sentences, then Virginia with its lower reversal rate is likely to find that it would only need to reverse very few cases where the meritorious issue was procedurally defaulted.

Because issues that have been procedurally defaulted are not noticed by Virginia, and are therefore not discussed, it is impossible to be certain of the exact number of meritorious cases that would have warranted reversal but for a procedural-default. What is certain is that the number would indubitably be small. Only one case thus far seems certain to meet this criterion—*Smith v. Murray*.[339] *Coppola v Commonwealth*[340] and *Beavers v. Commonwealth*[341] both involved the kinds of error that could potentially affect the accuracy of the proceedings, but the facts are not sufficiently developed to know whether the error was prejudicial. Perhaps that is as far as the analysis need go. If only a very few cases would be affected by a relaxation of Virginia's procedural-default rules then efficiency cannot be much diminished by the change. Indeed, the sheer amount of litigation over the issue of procedural-default indicates that efficiency would be enhanced by rules, like Kentucky's, that relax procedural-default in death-penalty cases.

The fact that efficiency cannot be the sole basis for Virginia's strict procedural-default rule leads one to look elsewhere. Once we eliminate the stated purposes the real purpose must lie elsewhere.

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339. 447 U.S. 527 (1986). For a detailed discussion of this case, see *supra* section V.B.1.

340. 257 S.E.2d 797 (Va. 1979).

341. 427 S.E.2d 411 (Va. 1993).

## VI. THE DEREGULATION OF DEATH

Few contemporary issues are more divisive or hotly debated than the death penalty. Habeas corpus reform has been central to that debate. Those who criticize federal habeas corpus as obstructing lawful, democratically endorsed state penal policies typically emphasize the inefficiency and antidemocratic tendencies of overlaying a removed federal judiciary upon the state criminal justice system. These critics represent the political forces that would greatly constrain or end federal habeas jurisdiction over the state criminal justice system. They have, for the time being, won. Those who remain wary of state enforcement of constitutional values, and who lean toward abolition of capital punishment, protest the loss of the procedural remedy formerly provided by habeas corpus. My predilections are with the latter group. I recognize, however, that complete return to the habeas corpus of the Warren Court is, for the moment, politically naive. However, there are compromise positions worthy of consideration as an interim step in route to a fairer system.

In 1988 the American Bar Association convened a politically diverse group of Judges, scholars, a court administrator, prosecutors, and defense lawyers in the American Bar Association Task Force on Death Penalty Habeas Corpus. This group held public hearings in Atlanta, Dallas, and San Francisco, and heard from knowledgeable witnesses from all over the country. The resulting report was adopted by the American Bar Association House of Delegates as Association policy on February 13, 1990.[342] As with any compromise proposal on a politically sensitive topic developed by a committee, these ABA policy recommendations, by attempting to have something for everyone, succeeded in satisfying no one. Task force members from both sides of the debate dissented, and their dissents are included in the report.[343] The principal advantage of the ABA recommendations is that they, or something like them, may be politically feasible. While these proposals are flawed, they would be a step

342. The report is found in Robbins, *supra* note 329, at 9.

343. *Id.* at 195 (Appendix A to the ABA Report, containing separate statements of members of the task force).

toward a fairer system of capital punishment. As such, they deserve support.

On the positive side, the ABA recommendations relax procedural-default rules, rationalize the stay of execution procedures in capital cases, and loosen slightly some of the other demanding procedural barriers erected by the Rehnquist Court. The problem is that the proposals fail to do enough.

For example, the recommendations concerning the competency of counsel focus on criteria for determining qualifications of counsel, and with the training and recruitment of competent counsel.[344] While this may help, unless the performance standards of *Strickland* are modified, all too many cases of shoddy performance will continue to occur. There are several reasons for this.

For one, many of the criteria are based on experience. Thus, inept lawyers who have tried capital cases poorly will continue to qualify. The increase in attorney's fees in capital cases in some areas has already attracted less able lawyers who are interested in the higher fees without regard to their own lack of professional qualifications. Moreover, many rural areas lack public defender systems. In those areas trial judges routinely appoint defense lawyers for indigent defendants. Judges who select defense counsel will more likely appoint the most competent available lawyers if it is in their interest to so do. The realistic threat of reversal, where the conviction and death sentence is the product of incompetency of counsel, is the most effective incentive to induce the appointment of truly qualified counsel in these cases.

Thus, where money is lacking, competency standards applied post-conviction will induce reform; where money has become available to pay competent counsel, adequate post-conviction standards for evaluating counsel's performance post-trial induce trial judges to appoint the best people pre-trial. As a result, the performance standards that are applied in the post-conviction process are critical; without realistic federal oversight of counsel's performance, shoddy legal work in capital cases will

344. *Id.* at 9 (recommendations one, two, and three).

continue. Thus, the failure to address *Strickland* is a serious flaw in the ABA recommendations.

Furthermore, the relaxation of procedural-default rules in the ABA proposal fails to go far enough. In order to surmount the bar of a procedural default, the proposal requires the habeas petitioner to show that it was the result of counsel's ignorance or neglect, or that the imposition of the bar would result in a miscarriage of justice.[345] Putting the burden of proof on petitioner is unfair in this circumstance. The former trial counsel, whose judgment is being questioned, will have a strong incentive to try to cast her actions as strategic and not neglectful. This variant of the procedural-default rule would not reach the injustice of Michael Marnell Smith's case. There trial counsel raised at trial but foolishly failed to preserve on appeal meritorious *Estelle* error despite the issues having been raised by an appellate amicus brief. The ABA proposal, while a step in the right direction, fails to eradicate the injustice of the present system.

The ABA recommendations were made and adopted shortly after the *Teague* decision (1989) and before the full ramifications of that decision became apparent. It is, therefore, not surprising that the ABA dealt with the issue cursorily and, from the perspective of today, inadequately. The proposal is that "[t]he standard for determining whether changes in federal constitutional law should apply retroactively should be whether failure to apply the new law would undermine the accuracy of either the guilt or the sentencing determination."[346] As was previously argued, innocence is not the only value worth protection. The timing of a claim should not determine whether someone lives or dies. The ABA proposal goes far beyond what is necessary to protect the reliance interests of states in existing constitutional law. If *Teague* is not reversed, then it should at least be far more narrowly constrained than would be the case upon adoption of the ABA recommendations.

The failure to adequately address three of the most important issues facing federal death penalty habeas corpus—the effective assistance of counsel, procedural-default, and retroac-

345. *Id.* at 10 (recommendation seven).
346. *Id.* at 11 (recommendation fifteen).

tivity—render the ABA recommendations flawed. These recommendations are voluminous (the entire report including dissents and appendices is 296 pages). Many of the reforms address less important concerns. It would serve little purpose to outline here all of the proposals, or to attempt to criticize all the flaws. The report moves in the right direction and should thus become a part of the debate. The report is, however, only a practical step toward a more rational system of capital punishment; it should not be viewed as the end of the process.

The task of reforming the Rehnquist Court's reforms is long overdue. How might this best be accomplished? How can death be reregulated? First and perhaps foremost, if competent counsel with adequate resources were provided to indigent capital defendants, many of the injustices of the present capital punishment system would be significantly moderated. However, even competent counsel will find only the semblance and not the substance of justice if onerous procedural-default rules and overly rigid nonretroactivity rules continue to permit state courts to ignore, or unfaithfully apply, federal constitutional law. Thus, as was contended in the discussions of retroactivity and procedural-default, provisions for competent counsel must be supplemented by realistic incentives so that state courts faithfully follow federal constitutional commands. The rules governing retroactivity and procedural-default should be significantly relaxed, particularly in capital cases.

Finally, there is a pressing need to reduce the befuddling complexity of the present system. As we have seen in section III,[347] the rules concerning the exhaustion of remedies continually bounce prisoners back and forth between the state and federal court systems. Simplifying these rules will allow the courts to more easily and rapidly address the merits and will reduce the procedural wrangling inherent in the current system. In particular, the strict rules governing mixed petitions should be relaxed in death-penalty habeas corpus cases.

There have been proposals designed to tinker with the state criminal justice systems without addressing federal habeas corpus reform. More resources for capital cases, certification of

347. Clarke (pt. 1), *supra* note 129, at 1356.

counsel in capital cases, and pleas for a higher degree of professionalism, have all been proposed.[348] As desirable as each of these are, none, individually or collectively, will cure the present system without reform of habeas corpus.

Exhortations to the bar for better self-regulation always have limited impact, and in this situation have utterly failed. Further, no amount of pleas to state legislatures for money with which to pay for capital defense is likely to accomplish the needed change. The political climate for providing money for the defense of heinous criminals has never been favorable. State legislatures are only likely to seriously address these issues when they find that they must do so in order for the system to function; as long as they can scrape along stingily, they will.

Additionally, without resources, certification of capital defense specialists is doomed. Lack of resources, haphazard training and a failure to monitor the actual performance of counsel post-conviction are only compounded by the existence of weak criteria for the selection of counsel in capital cases. However, stronger criteria governing the selection of counsel in capital cases will not emanate from any legislature because it means that few willing lawyers will qualify. Here is the catch-22 of capital defense litigation. Without money the criteria will be weak. Without the threat of reversal when counsel is inept, the money will rarely flow. Even when states adequately compensate counsel, incentives are needed to insure that only competent lawyers are appointed to these cases. Trial judges often control the process of who is appointed to capital defense work and how much they are paid. The threat of a habeas reversal acts as a powerful incentive for the appointment of competent and adequately compensated counsel.

Federal habeas corpus, I contend, is uniquely positioned to accomplish all the needed reforms for several reasons: (1) The states would provide competent counsel and adequate resources if such were necessary for them to carry out executions. Federal

348. *See, e.g.*, Richard Klein, *The Emperor* Gideon *Has No Clothes: The Empty Promise of the Constitutional Right to Effective Assistance of Counsel*, 13 HASTINGS CONST. L.Q. 625 (1986). The author has worked on proposals for the certification of counsel in capital cases which were proposed to the Virginia legislature.

habeas corpus could provide the incentive if state decisions were realistically subject to reversal where competent counsel was not provided; (2) State courts would be more consistent in applying Supreme Court precedent on constitutional issues were there closer oversight of their decision-making than is possible solely with certiorari review at the Supreme Court level. Relaxation of retroactivity and procedural-default rules in capital punishment habeas cases could accomplish this by reinstituting federal habeas court oversight for this narrow class of cases; and (3) Only minor changes in the doctrine of exhaustion would be necessary in order to make the system more rational. Let us consider these and other reasons for returning federal habeas oversight of death penalty litigation in turn.

*Strickland v. Washington's*[349] flawed standard for evaluating the effective assistance of counsel ought to be scrapped. The standard for measuring counsel's competence in capital cases should be that of what is reasonable among capital defense lawyers in the nation as a whole.[350]

Senior Circuit Judge Elbert Tuttle of the U.S. Court of Appeals for the Eleventh Circuit has said that "placing the responsibility for knowing the complex body of constitutional law that governs capital trials upon lawyers in the rural South is 'expecting entirely too much.'"[351] While this may be true at present, it need not remain so. Were lawyers in the rural South adequately paid, provided with sufficient resources and reasonable training opportunities, then competent lawyers would no longer avoid these cases. It is unjust to continue to execute people while refusing to provide counsel reasonably conversant with the governing law.

The prejudice requirement in ineffective-assistance-of-counsel cases must also be relaxed. Once a defendant has made a prima facie showing of prejudice the burden should shift to the

349. 466 U.S. 668 (1984).

350. *See, e.g.* Clarke (pt. 1), *supra* note 129, at 1356 (proposals for changing ineffective assistance of counsel doctrine).

351. Robbins, *supra* note 329, at 28 (quoting Judge Tuttle). Speaking as a rural Southern lawyer, I entirely agree with Judge Tuttle. The reasons for the complexity of death penalty litigation, and the problems that rural generalists have with capital punishment litigation are detailed in Clarke (pt. 1), *supra* note 129, at 1356.

state to demonstrate that the defendant was not prejudiced by counsel's incompetence. It is too easy for a court, confronted by evidence that trial counsel was incompetent, to engage in a priori justifications of the result. The workings of juries remain a mystery. The fact that a jury convicted and sentenced a person to death upon one presentation of the facts does not dictate what might have happened upon a markedly better presentation. This is true regardless of the atrocity of the murder. The *Strickland* prejudice requirement permits a court to pretend that no matter how egregious counsel's errors the result would have been the same. Not only is this a leap of logic, this result is unjust. Juries *are* affected by how a case is presented, the evidence, and the arguments made in support thereof. Allocation of the burden of proof ought not provide the pretext to pretend otherwise.

The discussion of procedural-default in section IV *supra*, held that *Wainwright v. Syke's*[352] "cause and prejudice" standard for determining whether to enforce a state procedural bar should be replaced with the "deliberate by-pass" rule of *Fay v. Noia*.[353] This would have three beneficial effects.

First, as we have seen, the doctrine of procedural-default is inextricably linked to the competency of counsel issue.[354] Thus, relaxation of procedural-default rules would have the effect of encouraging the states to assure that competent counsel was available in all capital cases. Competent counsel, familiar with death penalty jurisprudence, will commit fewer defaults; hence the problem of dealing with defaulted issues on appeal will, on this proposal, become less significant.

Second, the relaxation of procedural-default rules in federal habeas corpus will inspire the state supreme courts to address the merits of constitutional issues rather than to simply cede the field to the federal habeas courts. It thereby invites a serious and searching review of those issues. The encouragement of state court sensitivity to federal constitutional issues is a worthwhile goal that has profound potential consequences for death-penalty jurisprudence.

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352. 433 U.S. 72 (1977).
353. 372 U.S. 391 (1963).
354. *See supra* section IV; Clarke (pt. 1), *supra* note 129, at 1356.

Thirdly, and most tellingly, the relaxation of procedural-default rules will allow important constitutional issues to be reviewed on the merits in death penalty cases, thus reducing the arbitrariness and capriciousness of the present system. Merits review of fundamental constitutional issues ought not to hinge on the quality of the lawyer appointed in a capital case. Who lives and who dies should relate directly to moral culpability, and not the happenstance of who got whom as a lawyer.

The rigid retroactivity rule of *Teague v. Lane*,[355] and progeny must be reversed or dramatically loosened. As our discussion of retroactivity revealed, simple reversal of this onerous concept would be the fairest proposal, at least as applied to death-sentenced prisoners. It is unduly harsh to execute someone whose trial was constitutionally and prejudicially flawed simply because of the timing of the claim. That the rule applies only one way—against criminal defendants, but in favor of the states—condemns it as uneven and discriminatory justice.

Short of outright reversal, the next best approach would be to narrow the scope of the definition of a "new rule" while, at the same time, making the exceptions more flexible. Even if one concedes the force of the argument that states should not be reversed by a federal habeas court where the reason for the reversal is a completely new and unanticipated rule of law, it does not follow that *Teague* constitutes the best remedy. State courts do have some reliance interest in the rules of constitutional law as enunciated by the Supreme Court at the time of a given trial. Steadfast adherence to constitutional norms should be rewarded. But, as we have seen, the state courts should not be invited to adopt unfaithful and unduly cramped interpretations of that law. A "new rule" adequately protects a state's reliance interest in current law when it is limited to direct reversals of existing precedent or complete breaks with prior law such that prediction of the new course would have been difficult or impossible. A "new rule" should be limited to decisions of the Supreme Court that create a rule that state jurists could not reasonably have been expected to have foreseen. Then, and only then, is the state's reliance interest such that retroactive application should be precluded.

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355. 489 U.S. 288 (1989).

Further, *Teague's* second exception[356] should be cast in the disjunctive, not the conjunctive. Either "watershed rules of criminal procedure" or procedures affecting the accuracy of the proceedings should suffice independently to allow even a new rule to be applied in a capital habeas proceeding. Where a procedural rule is truly watershed—that is, when it is found to be "implicit in the concept of ordered liberty"[357]—then it is important enough, without more, to apply to all death-sentenced prisoners. It does not need the addition of being an accuracy enhancing procedure if it is truly fundamental to ordered liberty. Conversely, accuracy is vitally important to capital sentencing procedures. A new procedure that enhances the accuracy of that process ought to apply to all under the threat or penalty of death. Were the concept of a "new rule" suitably narrow, and if *Teague's* second exception were more flexible, then the onerous nature of the rule of nonretroactivity would be greatly palliated. This would sufficiently recognize and protect the state criminal justice system's reasonable reliance on the continued existence and application of Supreme Court precedent.

The final proposal—resolution of the death row dilemma of the exhaustion of remedies doctrine—could be the easiest of all to solve. The exhaustion of remedies would not be such a problem if the federal habeas court could, and in the ordinary course did, order a stay of proceedings covering the state court post-conviction proceedings where state courts refused to issue an appropriate stay. The relaxation of procedural-default rules would solve the other exhaustion of remedies problem identified in section III.[358] Sending a case back to state court only to have that court invent, find, or otherwise enforce a new proce-

356. *Teague's* two exceptions allow new rules to be retroactively applied where: (1) it places certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe, and (2) it also permits retroactive application for watershed rules of criminal procedure that are central to an accurate determination of guilt or innocence. *See supra* section IV.B. It is this conjunction of "watershed rules of criminal procedure" with the notion of accuracy that, as we saw in section IV, makes the *Teague* exceptions so narrow as to be unavailable in most cases.

357. *Teague*, 489 U.S. at 311.

358. Clarke (pt. 1), *supra* note 129, at 1356.

dural bar makes no sense. But if procedural default were reformed then that problem would no longer be a part of the exhaustion-of-remedies doctrine.

Of course, the bouncing of cases back and forth between the state and federal courts remains inefficient. However, Professor Bonnie has suggested a salutary reform. Exhaustion of remedies would not be required in death penalty cases. Indeed, a death-sentenced prisoner could forego state proceedings entirely, and a state could (as did Arkansas) abolish post-conviction review entirely. If a death-sentenced prisoner were to utilize an available state post-conviction remedy, she would have to accept the adverse impact that decision might have on future federal proceedings. This would, if adopted, truncate proceedings without denying the prisoner a federal habeas forum.[359] This should satisfy those who are genuinely interested in efficiency. Those who hide a political agenda behind efficiency arguments will, of course, not be satisfied.

The story of the demise of habeas corpus is also the story of the deregulation of death. Like trucking, airlines, and banking, it seems, death is no different. Civil bureaucracies impede industry, and habeas corpus impedes executions. Both are swept away in the cause of greater efficiency. Execution may be "the most irremediable and unfathomable of penalties,"[360] but when treated as a matter of efficiency, death is reduced to the status of any other commodity. While federal habeas corpus remains in the U.S. Code,[361] it survives as an empty shell, stripped of substance and devoid of meaning. It has become a paper shuffling routine; no longer do archaic concepts like justice or fairness impede the greased rails to the death house. This legislative and political change was wrought, not by Congress, but by the Supreme Court. The erection of a succession of procedural barriers, procedural-default, nonretroactivity, the rule of complete exhaustion, and low standards for evaluating the effective assistance of counsel, combine to create an impenetrable and disingenuous morass, designed to give the appearance of justice without often, if ever, supplying a remedy.

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359. Bonnie, *supra* note 253, at 113-14.
360. Ford v. Wainwright, 477 U.S. 399, 411 (1986).
361. 28 U.S.C. § 2254 (1988).

Cover and Alienikoff, writing in 1977, were prescient: "[e]ventually [the Court] may achieve the quintessentially linear criminal process, devoid of all redundancy, virtually costless, and without meaning."[362] The Justices have succeeded. Death is now deregulated.

The hallmark of the Rehnquist Court jurisprudence has been an extremely conservative, result oriented ideology that is marked by a willingness to distort history and logic[363] in order to speed the pace of executions. Injustice is the result. As we have seen, Michael Marnell Smith and Aubrey Dennis Adams, Jr.'s cases were unjust. They were executed because their lawyers were not astute enough to raise the right issues at the appropriate times. Meritorious issues overlooked solely because of overly stringent retroactivity analysis is also unjust. Life and death should not hinge on mere matters of timing. Capital defendants represented by drug abusing, neglectful lawyers, suffer a shameful injustice—witness the cases of John Young, and John Sterling Gardner.[364] Most tellingly, any system that tolerates the execution of innocent persons and those that lack the requisite moral culpability is inequitable.

Capital punishment will always remain arbitrary and capricious. Unjust executions will continue. Human error being what it is, the system can never be made wholly fair. That is a good argument for the abolition of the death penalty. Until that time comes one can only attempt to work for a fairer and more rational system of capital punishment. Death must be reregulated. Federal habeas corpus remains the best vehicle for accomplishing that goal.

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362. Robert M. Cover & T. Alexander Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 YALE L.J. 1035, 1100 (1977).

363. While this thesis has attempted to demonstrate the inconsistency and incoherence of much of the Rehnquist Court's rulings, it has not attempted a systematic review of the logical fallacies of that Court. For a critique of Justice Rehnquist's illogic see Andrew Jaw McClurg, *Logical Fallacies and the Supreme Court: A Critical Examination of Justice Rehnquist's Decisions in Criminal Procedure Cases* 59 U. COLO. L. REV. 741 (1988). More impressionistic critiques abound. *See, e.g.*, Dugger v. Adams, 489 U.S. 401, 424-25 n.15. (Blackmun, J., dissenting) ("This incoherence in the Court's decisionmaking would be disturbing in any case, but is especially shocking in a capital case. . . . The Court both leaves the law in shambles and reinstates respondent's death sentence without ever bothering to determine what legal principle actually governs his case.").

364. *See* Clarke (pt. 1), *supra* note 129, at 1356.