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## I. Introduction

In May 1913, Leo M. Frank, a Jewish manufacturer in Atlanta, Georgia, was charged with the rape-murder of a Christian employee named Mary Phagan.[1] The facts surrounding his trial leave no doubt that an anti-Semitic mob created an extremely volatile climate surrounding the courtroom, including a clear potential for violence. The threats of violence were so real that the judge ordered both Mr. Frank and his attorney to be absent from the courtroom during part of the trial to avoid the "probable danger of violence."[2] Mr. Frank was convicted on August 25, 1913 and sentenced to death the following day.[3]

A majority of the United States Supreme Court denied Frank the habeas relief he sought on collateral appeal after his direct appellate efforts failed.[4] The majority opinion, noting that the petitioner's "mob domination" claim had been rejected by the Georgia Supreme Court,[5] concluded that the Georgia courts "upon a full review" had decided that Frank's allegations were unfounded.[6] Therefore, Frank's constitutional claim could not be relitigated by way of habeas corpus regardless of the claim's merit. Within a few months of the Supreme Court's decision, a lynch mob seized Frank from jail and hanged him. Sixty-seven years later, Frank was found innocent of the crime.[7]

In Arkansas, on September 30, 1919, a group of gun-toting white men attacked and shot at blacks meeting in their church.[8] One of the white men was shot and killed in the disturbance which followed. Five black men were charged, convicted, and sentenced to death.[9] As in the

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1. Frank v. Mangum, 237 U.S. 309, 311 (1915).

2. *Id.* at 315. The mob-dominated atmosphere which prevailed at the time of Frank's trial caused an eyewitness to the murder to refuse to come forward to testify to Frank's innocence. This same witness later identified another man as the murderer.

3. *Id.* at 312.

4. *Id.* at 344. This "full review" would later become a talismanic standard for denying federal habeas review in Stone v. Powell, 428 U.S. 465 (1976) and its progeny. *See infra* notes 63-67 and accompanying text.

5. *See* Frank v. State, 80 S.E. 1016 (Ga. 1914).

6. Frank v. Mangum, 237 U.S. at 335. In his dissent, Justice Holmes refers to "lynch law . . . practiced by a regularly drawn jury," and insists upon the federal courts' "power to secure fundamental rights" through habeas corpus, which power "becomes a *duty*" once "resort to the local tribunal . . . has been had in vain." *Id.* at 348-50 (Holmes, J., dissenting).

7. *See* Wendell Rawls, Jr., *After 69 Years of Silence, Lynching Victim is Cleared*, N.Y. TIMES, March 8, 1982, at A12. Leo Frank was issued an unconditional posthumous pardon by the Georgia Board of Pardons and Paroles in 1986. *Georgia Pardons Victim 70 Years After Lynching*, N.Y. TIMES, March 12, 1986, at A16.

8. Moore v. Dempsey, 261 U.S. 86, 87 (1923).

9. Shortly after the defendants' arrest, a lynch mob marched on the jail where they were

*Frank* case, the defendants claimed that a mob atmosphere prevailed during both the grand jury and petit jury proceedings.[10] The defendants sought habeas relief in the federal courts after state appeals failed.

Justice Holmes wrote the Supreme Court decision this time, and the "full review" language that had sent an innocent Leo Frank to his death was given much more exacting scrutiny. The Court preceded its analysis by stressing the following:

> (1) Blacks having been systematically excluded, the defendants' trial before an all-white jury was expedited;
>
> (2) A court-appointed lawyer was appointed to represent all five defendants;
>
> (3) Counsel had no preliminary consultation with his clients and called no witnesses in their defense even though such witnesses were available;
>
> (4) The entire trial consumed about forty-five minutes, and the jury rendered a verdict of guilty of first-degree murder in less than five minutes.[11]

Justice Holmes concluded from these and related facts in the record before the Court that "there never was a chance for the petitioners to be acquitted; no juryman could have voted for an acquittal and continued to live in Phillips County and if any prisoner by any chance had been acquitted by a jury he could not have escaped the mob."[12]

But how was the Court to deal with the procedural "fact" that the "Moore Five" had been granted "full review" in the Arkansas state courts? The majority opinion of the Court declared that where, as here, "the whole proceeding is a mask . . . neither perfection in the machinery for correction nor the possibility that the trial court and counsel saw no other way of avoiding an immediate outbreak of the mob can prevent this Court from securing to the petitioners their constitutional rights."[13] Perhaps the most succinct capsule of the

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being held and were prevented from lynching the prisoners only by the presence of federal troops and the "promise" by a number of "leading officials" of the State that "if the mob would refrain . . . they would execute those found guilty in the form of law." *Id.* (quoting from petitioners' supporting affidavits). The Arkansas officials made good on their "promise" by calling several "colored witnesses and having them whipped and tortured until they would say what was wanted . . . ." *Id.* at 89.

10. *Id.*
11. *Id.* at 89.
12. *Id.* at 89-90.
13. *Id.* at 91.

principle laid down in *Moore* was this comment by Justice Black thirty years later: "*Moore v. Dempsey* . . . stand[s] for the principle that it is never too late for courts in habeas corpus proceedings to look straight through procedural screens in order to prevent forfeiture of life or liberty in flagrant defiance of the Constitution."[14]

Within seventy years of *Moore* and eighty years of *Frank* we have witnessed a reversion to the "logic" in *Frank* that is breathtaking both in its scope and its speed. The Nixon, Reagan, and Bush[15] appointees to the Supreme Court have eviscerated the essence of the Great Writ, culminating in the Court's decision in *Herrera v. Collins*.[16]

Leonel Herrera was convicted of capital murder by a Texas jury in January 1982 and sentenced to death. His arrest and trial grew out of the shooting homicide of a police officer in September 1981.[17] The officer, who survived the shooting for nine days, identified Herrera as his assailant, as did the officer's civilian passenger. On appeal, Herrera challenged these identifications as unreliable and improperly admitted.[18]

Herrera unsuccessfully challenged his conviction on direct appeal[19] and in two collateral proceedings.[20] He also filed a federal habeas corpus petition which was denied.[21] A second habeas petition was filed in the state court, this time based on newly discovered evidence tending to prove Herrera's "actual innocence." Not unlike the infamous *Frank* case, in which innocence rather than procedural irregularity or a constitutional violation was at issue, Herrera sought to obtain habeas relief so that his case might be reopened for the introduction of new exculpatory evidence. The evidence in question had not surfaced until 1984, several years after Herrera's trial and

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14. Brown v. Allen, 344 U.S. 443, 554 (1953) (Black, J., dissenting).

15. In 1991, after repeated efforts by the Reagan and Bush Administrations to restore the status quo ante of *Moore v. Dempsey*, the Senate passed a "Crime Bill" by a vote of 58-42, barring federal habeas corpus review of constitutional violations if the issue "has been fully and fairly adjudicated in State proceedings." VIOLENT CRIME CONTROL ACT, S. REP. NO. 1241, 102d CONG., 1ST SESS. 9999 (1991). Fortunately, the House version of this bill (H.R. 3371) went down to defeat.

16. 113 S. Ct. 853 (1993) (Blackmun, J., dissenting).

17. The facts of the case are set forth in detail in Chief Justice Rehnquist's opinion. *Id.* at 856-58.

18. *Id.* at 857-58.

19. The Texas Court of Criminal Appeals affirmed in Herrera v. State, 682 S.W.2d 313 (1984).

20. *Ex parte* Herrera, No. 12, 848-02 (Tex. Crim. App. Aug. 2, 1985).

21. Again, Herrera challenged the reliability and admissibility of the highly incriminating identification evidence against him. Herrera v. Collins, 904 F.2d 944 (5th Cir.), *cert. denied*, 498 U.S. 925 (1990).

conviction. In that year, a former cellmate of Herrera's brother, Raul, and an attorney who had represented Raul, executed affidavits attesting to the fact that Raul, who had recently died, had told them both that he, and not Leonel, had committed the murder.[22]

Herrera's second federal habeas petition protested his innocence, proffered additional supporting affidavits, and claimed that his execution would thus violate the Eighth and Fourteenth Amendments. The district court, while dismissing most of petitioner's claims as an "abuse of the writ,"[23] nonetheless granted his request for a stay of execution "out of a sense of fairness and due process."[24] The Court of Appeals vacated the stay,[25] holding that petitioner's claim of "actual innocence" was not cognizable in habeas corpus because "the existence *merely* of newly discovered evidence *relevant to the guilt* of a state prisoner is not a ground for relief on federal habeas corpus."[26] The United States Supreme Court affirmed, and Herrera was executed on May 12, 1993.

Speaking for a 5-1-3 majority,[27] Chief Justice Rehnquist, stressing the fact that habeas corpus performs a different function than a direct appeal, declared that the facts establishing guilt or innocence cannot be reviewed in collateral proceedings.[28] While assuming "for the sake of argument" that a "truly persuasive demonstration of 'actual innocence' made after trial would render the execution of a defendant unconstitutional," warranting habeas relief, the Rehnquist majority opinion set the threshold showing "extraordinarily high" and found that Herrera fell short.[29]

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22. *Herrera*, 113 S. Ct. at 858. The attorney's affidavit states that while he was representing Raul Herrera on a charge of attempted murder, Raul told him that he, Leonel, their father, and several officers were involved in drug trafficking. *Id.* at 858 n.2. Raul insisted that he, *not* his brother, had shot the officer for which Leonel stood convicted as a capital murderer. *Id.* Raul had said nothing about his role in the murder because he assumed his brother would be acquitted. *Id.* Other affidavits attesting to petitioner's innocence and his brother Raul's guilt were filed by Raul's cellmate, Raul's son, and a schoolmate of the Herrera brothers. *Id.* at 858.

23. *Id.* at 859 (citing the case as No. M-92-30 (S.D. Tex. Feb. 17, 1992)).

24. *Id.* Petitioner raised a claim under Brady v. Maryland, 373 U.S. 83 (1963), alleging that both the State's withholding of exculpatory information and Texas's 60-day limit for filing a claim for a new trial based on newly discovered evidence constituted violations of due process. These assertions were rejected out of hand in the federal habeas proceedings as well as by the Supreme Court. *Herrera*, 113 S. Ct. at 865-66.

25. Herrera v. Collins, 954 F.2d 1029 (5th Cir. 1992).

26. *Id.* at 1034 (emphasis added) (quoting Townsend v. Sain, 372 U.S. 293, 317 (1963)).

27. Justice White filed an opinion concurring in the judgment. *Herrera*, 113 S. Ct. at 875.

28. *Id.* at 859-60.

29. *Id.* at 869. In habeas proceedings, the Chief Justice argued, the linch-pin is *procedural* due process rather than substantive due process. *Id.* "Federal habeas review of

In his dissenting opinion, Justice Blackmun stated that "[n]othing could be more contrary to contemporary standards of decency or more shocking to the conscience than to execute a person who is actually innocent."[30] He had to remind his colleagues that the execution of an innocent person "epitomizes 'the purposeless and needless imposition of pain and suffering.'"[31]

A complete chronicle of developments in habeas corpus law covering the past seven decades will not be attempted within the confines of this article. However, in order to comprehend the metamorphosis of what is probably the most precious of all our constitutional liberties into its present, nearly emasculated form, a decisional "rear-view mirror" is essential. How else can we understand how we got from there to here?[32] How else can we explain a decision such as *Herrera* in which, paraphrasing one of its present occupants, the Supreme Court majority may well have engaged in an act of "high-tech lynching"?

The analysis which follows leads directly to the following conclusions:

(1) That the law of habeas corpus and of capital punishment are inextricably intertwined; it is impossible to comprehend and evaluate habeas jurisprudence without parallel examination of capital punishment law.

(2) That the Constitutional guarantees of habeas corpus and the fundamental rights of life and liberty can only be protected under a system of judicial review which is strict in capital cases and, at a minimum, intermediate in non-capital cases.

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state convictions has traditionally been limited to claims of constitutional violations occurring in the course of the underlying state criminal proceedings. Our federal habeas cases have treated claims of 'actual innocence,' not as an independent constitutional claim, but as a basis upon which a habeas petitioner may have an independent constitutional claim considered on the merits, even though his habeas petition would otherwise be regarded as successive or abusive." *Id.*

30. *Id.* at 876 (citations omitted) (Blackmun, J., dissenting).

31. *Id.* at 877 (quoting Coker v. Georgia, 433 U.S. 584, 592 (1977)). As to the significance of the "actual innocence" claim in habeas proceedings, as distinguished from "legal innocence," see Sawyer v. Whitley, 112 S. Ct. 2514, 2518-20 (1992); McCleskey v. Zant, 111 S. Ct. 1454, 1474 (1991); and Murray v. Carrier, 477 U.S. 478, 496 (1986).

32. While this article was in the course of preparation, several major legislative proposals were being put forward in the name of habeas corpus reform. *See, e.g.*, the "Habeas Corpus Reform Act of 1993" introduced by Senator Joseph Biden on August 6, 1993. S. 1441, 103d CONG., 1ST SESS. § 2 (1993) [hereinafter the Biden Bill].

(3) That the growing emphasis by the Supreme Court on "actual innocence" and "innocence of death" in recent habeas law is not an "escape hatch" for death-row prisoners, but a trap for the unwary and a "Catch 22" for the wary.

## II. A Brief Look Backwards

The writ of habeas corpus is traceable to the common law, well before the founding of this nation. The framers of the Constitution took it for granted[33] that federal courts were authorized to issue the writ of *habeas corpus ad subjiciendum*.[34] Indeed, the "Great Writ" has been aptly termed "the greatest of the safeguards of personal liberty embodied in the common law . . ."[35]

Under Article I, Section 9, Clause 2 of the United States Constitution: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the Public Safety may require it." This provision mirrors the commitment of the Framers to individual rights, as well as an ancient principle of Anglo-American law dating back to the Magna Carta.[36]

The Judiciary Act of 1789 included a grant of federal jurisdiction to issue writs of habeas corpus according to the "usages and principles

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33. This assumption was based on the powers extended to Congress by the "necessary and proper" clause, U.S. CONST., art. I, § 8, the "inferior Courts" clause, U.S. CONST., art. III, § 1, and the appellate jurisdiction clause, U.S. CONST., art. III, § 2. Felix Frankfurter & James M. Landis, *Power of Congress Over Procedure in Criminal Contempts in "Inferior" Federal Courts — A Study in Separation of Powers*, 37 HARV. L. REV. 1010, 1016-23 (1924).

34. According to former Chief Justice Marshall, the phrase "habeas corpus" is actually a kind of shorthand for the common law writ of *habeas corpus ad subjiciendum*, known as the "Great Writ." *Ex parte* Bollman, 8 U.S. (4 Cranch) 75, 95 (1807). Blackstone has uncovered four other forms of habeas corpus in addition to its function as a remedy for illegal detention, namely: *habeas corpus ad respondandum; ad satisfaciendum; ad prosequendum, testificandum et deliberandum*; and *ad faciendum et recipiendum*. *See* Fay v. Noia, 372 U.S. 391, 399 n.5 (1963) (citing 3 WILLIAM BLACKSTONE, COMMENTARIES 129-32).

35. LEGISLATIVE REFERENCE SERVICE, LIBRARY OF CONGRESS, THE CONSTITUTION OF THE UNITED STATES ANALYSIS AND INTERPRETATION 312 (Edward S. Corwin ed., 1953). Rooted in the English common law, habeas corpus "is perhaps the most important writ known to the constitutional law of England, affording as it does a swift and imperative remedy in all cases of illegal restraint or confinement. It is of immemorial antiquity, an instance of its use occurring in the thirty-third year of Edward I." Secretary of State for Home Affairs v. O'Brien, 1923 App. Cas. 603, 609 (appeal taken from Ir.), *quoted in* Fay v. Noia, 372 U.S. at 400.

36. "No free man shall be taken, imprisoned, disseised, outlawed, banished, or in any way destroyed, nor will We proceed against or prosecute him, except by the lawful judgment of his peers and by the law of the land." MAGNA CARTA para. 39 (quoted in DOCUMENTS OF AMERICAN CONSTITUTIONAL & LEGAL HISTORY 4 (Melvin I. Urofsky ed. 1989)).

of law."[37] While the writ originally extended only to federally-held prisoners,[38] it was extended to state prisoners by Act of Congress on February 5, 1867.[39] The statute required that the court inquire into the facts and "dispose of the party as law and justice require."[40] Since both the 1789 and the 1867 statutes merely authorized the federal courts to issue writs of habeas corpus, the writ's scope was, in accordance with common law, limited to examination of the jurisdiction of the sentencing tribunal.[41]

The scope of the writ was expanded as the Court stretched the meaning of the term "jurisdiction." As Justice Powell points out in *Stone v. Powell*,[42] one of the main reasons for this expansion was the fact that, for all practical purposes, there was no appellate review in federal criminal cases prior to 1889. Therefore, pressure built up for expansion of the scope of habeas corpus "to reach otherwise unreviewable decisions involving fundamental rights."[43]

It is arguable that the expansive language of the 1867 statute, which extended the writ of habeas corpus to state prisoners "restrained of [their] liberty in violation of the constitution, or of any treaty or law . . .,"[44] opened the door to an expansive application of the writ to persons convicted after trial. Thus, in *Ex parte Lange*,[45] the Court held that the constitutionality of a statute could be reviewed on habeas on the theory that an unconstitutional deprivation meant that the trial court lacked jurisdiction. Other cases subsequent to *Lange* expanded the want-of-jurisdiction rationale.[46]

The modern contours of the writ began to emerge with the Court's decision in *Frank v. Mangum*.[47] Although Frank's contentions were considered and rejected by the federal district court as well as by the

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37. Ch. 20, § 14, 1 Stat. 73, 81 (1789).

38. *Id.*

39. Ch. 27, 14 Stat. 385 (1867) (current version now incorporated in 28 U.S.C. §§ 2241 *et seq.* (West 1994)) [hereinafter Habeas Corpus Act of 1867]. The statute authorized federal courts to grant relief in all cases "where any person may be restrained of his or her liberty in violation of the Constitution, or of any treaty or law of the United States . . . ." *Id.*

40. *Id.*

41. *See* Pettibone v. Nichols, 203 U.S. 192 (1906); *In re* Wood, 140 U.S. 278 (1891); *Ex parte* Watkins, 28 U.S. (3 Pet.) 193 (1830).

42. 428 U.S. 465 (1976).

43. *Id.* at 475 n.7. *See, e.g., Ex parte* Siebold, 100 U.S. 371, 376-77 (1880); FELIX FRANKFURTER & JAMES M. LANDIS, THE BUSINESS OF THE SUPREME COURT 109-27 (1928).

44. Habeas Corpus Act of 1867, *supra* note 39.

45. 85 U.S. (18 Wall.) 163 (1874).

46. *See, e.g., In re* Nielsen, 131 U.S. 176 (1889); *In re* Snow, 120 U.S. 274 (1887); *Ex parte* Wilson, 114 U.S. 417 (1885).

47. 237 U.S. 309 (1915). *See supra* notes 1-7 and accompanying text.

Supreme Court, the latter noted by way of dictum that if the state appellate courts failed to provide adequate "corrective process" for full consideration of any denial of the prisoner's rights, *whether or not* "jurisdictional," the court could properly examine the merits to determine if a detention is lawful.[48] As already noted, the minority view expressed in Holmes's dissenting opinion later became the prevailing view of the Court in *Moore v. Dempsey*.[49]

With its landmark decision in *Brown v. Allen*,[50] the Supreme Court ushered in the modern era of habeas corpus. In *Brown*, the petitioner argued that his indictment should have been quashed on the grounds that grand jurors had been discriminatorily selected and that certain confessions had been improperly admitted into evidence. While the state supreme court had fully adjudicated these issues on appeal,[51] the United States Supreme Court nevertheless held that: (1) Brown was entitled to a full reconsideration of his constitutional claims on federal habeas corpus, even though those claims had been fully and fairly adjudicated at the state court level; and (2) the federal district court's redetermination should consider issues both of law and fact.[52]

*Fay v. Noia*,[53] decided in 1963, represents the high-water mark of federal habeas corpus relief. In this coerced confession case, the federal trial court held that Noia's failure to appeal barred federal habeas review.[54] The Court of Appeals reversed, and the Supreme Court upheld the issuance of the writ, holding that federal courts should consider constitutional claims on habeas corpus review, even if the

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48. *Id.* at 333-36.

49. 261 U.S. 86 (1923). *See supra* notes 8-14 and accompanying text.

50. 344 U.S. 443 (1953). *Brown* was clearly foreshadowed by Moore v. Dempsey, 261 U.S. 86 (1923). In the view of one authoritative commentary, "*Moore* marked the abandonment of the Supreme Court's deference, founded upon considerations of comity, to decisions of state appellate tribunals on issues of constitutionality and the proclamation of its intention no longer to treat as virtually conclusive pronouncements by the latter that proceedings in a trial court were fair . . ." CONGRESSIONAL RESEARCH SERVICE, LIBRARY OF CONGRESS, THE CONSTITUTION OF THE UNITED STATES ANALYSIS AND INTERPRETATION 1454 (Lester S. Jayson et al. eds., 1972). This should be contrasted with the current Court's reassertion of such "deference" under the guise of the "federalism" doctrine. *See* discussion *infra* part V.B.

51. State v. Brown, 63 S.E.2d 99 (N.C.), *cert. denied*, 341 U.S. 943 (1951).

52. *Brown*, 344 U.S. at 466-76. See also the companion case of Daniels v. Allen, 344 U.S. 458, 486 (1953), where a similar petition was rejected because the papers were not timely filed, and the Court refused to grant habeas relief by overriding the state's "legitimate" procedural rules.

53. 372 U.S. 391 (1963).

54. *Id.* at 396. This decision was in line with the rule laid down in Sunal v. Large, 332 U.S. 174 (1947), that habeas corpus and its statutory counterpart, 28 U.S.C. § 2255 (1982), "will not be allowed to do service for an appeal." *Sunal*, 322 U.S. at 178.

petitioner failed to raise them by way of state appellate procedures, if at the time the constitutional issue was raised in the federal court the petitioner could no longer raise it in the state courts.[55] Since Noia had not deliberately bypassed state appellate relief, he was not precluded from securing federal habeas relief. With its decision in *Fay v. Noia*, the Court appeared to have removed the final barrier to broad collateral review of state criminal convictions by establishing the "deliberate bypass" test for the cognizability of claims on which petitioners procedurally defaulted in state proceedings.[56]

The Supreme Court's trend toward expanding habeas corpus relief continued six years later with the decision in *Kaufman v. United States*,[57] overruling a majority of the federal courts of appeal[58] and holding that search and seizure claims were cognizable under 28 U.S.C. § 2255.[59] In *Kaufman*, the Court noted that federal habeas "extends to state prisoners alleging that unconstitutionally obtained evidence was admitted against them at trial."[60] Therefore, under § 2255, it made little or no sense to restrict "access by *federal* prisoners with illegal search-and-seizure claims to federal collateral remedies, while placing no similar restriction on access by *state* prisoners."[61]

The tide continued to flow toward widening the scope and application of habeas corpus until 1976. In that year, the Court decided *Stone v. Powell*.[62] Suddenly, the tide began to ebb and the "Great Writ" began to appear as something less than "great."

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55. Fay, 372 U.S. at 398-99.

56. *Id.* at 438-39. Having been convicted of murder in the New York courts, Noia failed to appeal his conviction. *Id.* at 394-95. Later, he sought relief from his conviction by pursuing a state remedy of *coram vobis*, but relief was denied on the grounds that his failure to pursue a direct state appeal precluded collateral inquiry into the voluntariness of his confession. *Id.* at 396 n.3. The deliberate bypass principle was a significant element in his ultimate success by way of federal habeas corpus proceedings. The Court found that Noia had not deliberately bypassed state appellate relief. *Id.* at 439-40. If Noia had been guilty of deliberate bypass, this would have afforded an adequate state ground sufficient to foreclose relief.

57. 394 U.S. 217 (1969).

58. *See, e.g.*, United States v. Re, 372 F.2d 641 (2d Cir.), *cert. denied*, 388 U.S. 912 (1967); Thornton v. United States, 368 F.2d 822 (D.C. Cir. 1966); Eisner v. United States, 351 F.2d 55 (6th Cir. 1965).

59. Under 28 U.S.C. § 2255 (1982), *federal* prisoners seek post-conviction relief by means of a motion to vacate judgment. United States v. Hayman, 342 U.S. 205 (1952), held that the federal statute and habeas corpus were equivalent. Claims cognizable under one are cognizable under the other. *Kaufman*, 394 U.S. at 217. Similarly, 28 U.S.C. § 2254 (1982) (claims brought by *state* prisoners by way of an application for a writ of habeas corpus) represents a statutory analogue to the constitutional provision for the "Great Writ."

60. Kaufman, 394 U.S. at 225.

61. *Id.* at 226 (emphasis added).

62. 428 U.S. 465 (1976).

## III. Habeas Corpus in Decline

In his dissenting opinion in *Stone v. Powell*, Justice Brennan predicted that the Court's holding in that case "portend[ed] substantial evisceration of federal habeas corpus jurisdiction . . . ."[63] His dire forecast proved prophetic. Floyd Powell and David Rice, who were state prisoners in California and Nebraska respectively, had sought and obtained a writ of habeas corpus at the court of appeals level. Relief was granted on the ground that evidence obtained through an unconstitutional search and seizure was wrongfully admitted at their trial.[64] Applying a cost/benefit analysis to the respondents' contentions, Justice Powell, writing for a 6-3 majority, ruled that the state courts had provided an opportunity for the full and fair litigation of the prisoners' Fourth Amendment claims, thus precluding habeas relief to re-litigate the issue.[65]

Aside from the fact that *Stone v. Powell* was a clear harbinger of the gradual erosion of the exclusionary rule during the late 1970s and throughout the decade of the 1980s, this milestone case represented a storm warning for future habeas petitioners. The specific question presented was "whether state prisoners — who have been afforded the opportunity for full and fair consideration of their reliance upon the exclusionary rule with respect to seized evidence by the state courts at trial and on direct review — may invoke their claim again on federal habeas corpus review."[66] Weighing the "benefit" of the exclusionary rule against the "costs" of extending it to habeas review of search-and-seizure claims, Justice Powell answered the question in the negative.[67]

Perhaps the most insidious element in the majority opinion in *Stone v. Powell* is its emphasis on the concept — nowhere supported in the Constitution or the English common law — that resort to habeas corpus should be limited primarily to protect the *innocent*. The Court said that the purpose and focus of a criminal trial and the "central concern in a criminal proceeding" is "the ultimate question of guilt or

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63. *Id.* at 503.
64. *Id.* at 471, 473-74.
65. *Id.* at 489-96.
66. *Id.* at 489.
67. *Id.* at 489-96. This same "balance-sheet" approach to the Fourth Amendment, weighing "costs" against "benefits," reached its apex of constitutional evisceration eight years later in the "good-faith" case of United States v. Leon, 468 U.S. 897 (1984). In *Leon*, the Court held that any rule such as the exclusionary rule "bear[s] a heavy burden of justification and must be carefully limited to the circumstances in which it will *pay its way* by deterring official lawlessness." *Id.* at 908 n.6 (emphasis added) (quoting Illinois v. Gates, 462 U.S. 213, 257-58 (1983) (White, J., concurring)).

innocence . . ."[68] Furthermore, Justice Powell declared that the physical evidence that the defendant sought to suppress and exclude "[was] typically reliable and often the most probative information bearing on the guilt or innocence of the defendant."[69]

In its haste to convict the "guilty," the majority in *Stone* undermined a major cornerstone of habeas corpus doctrine. It should be noted that the majority did not take issue with the fact that the habeas petitioners were convicted on the basis of unconstitutionally obtained evidence which was nevertheless admitted against them at trial. Thus, the Justices agreed that the defendants were deprived of their Fourth Amendment rights. However, this constitutional right vanishes[70] under *Stone v. Powell* once the state appellate process is exhausted, so long as this process is "full and fair." In his dissenting opinion, Justice Brennan noted that instead of honoring the constitutional command that the federal courts should be the final arbiters of enforcement of federal constitutional principles, "[t]he Court . . . simply ignores the settled principle that for purposes of adjudicating constitutional claims Congress, which has the power to do so under Art[icle] III of the Constitution, has effectively cast the district courts sitting in habeas in the role of surrogate Supreme Courts."[71]

In the wake of *Stone*, habeas corpus was soon to become a matter of judicial discretion rather than constitutional imperative. Some constitutional violations might sufficiently impugn the integrity of the judicial process; others might not. The cost/benefit approach taken by the Court's majority signaled a pinched view of habeas corpus whereby, to paraphrase George Orwell, some constitutional rights are more equal than others.

The Court's 1977 decision in *Wainwright v. Sykes*[72] signaled a full retreat from the "deliberate bypass" test laid down in *Fay v.*

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68. *Stone*, 428 U.S. at 490.

69. *Id.* "Application of the rule thus deflects the truthfinding process and *often frees the guilty*." *Id.* (emphasis added). Chief Justice Burger, concurring, decried the rejection of "trustworthy evidence of guilt, at the expense of setting obviously guilty criminals free to ply their trade." *Id.* at 500. *But see* discussion *infra* part VIII.

70. "Today's opinion itself starkly exposes the illogic of the Court's seeming premise that the rights recognized in *Mapp* somehow suddenly evaporate after all direct appeals are exhausted." *Stone*, 428 U.S. at 512-13 (Brennan, J., dissenting). The *Stone* majority reasoned that the Fourth Amendment exclusionary rule was designed to deter future police violation of Fourth Amendment rights, and that its application in federal habeas proceedings many years after the fact would, at best, provide only marginal deterrence. *Id.* at 493-94.

71. *Id.* at 511-12 (Brennan, J., dissenting).

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

*Noia*.[73] Sykes was a state prisoner who claimed that he had not validly waived his Miranda rights as to certain inculpatory statements introduced at his trial. This claim was not made at trial as required by a state contemporaneous objection rule, nor was suppression sought by way of a pre-trial motion. The Supreme Court held that the deliberate bypass rule was inapplicable here because the contemporaneous objection rule merited "greater respect."[74] In the view of the Burger Court majority, the *Fay v. Noia* deliberate bypass test tends to "encourage 'sandbagging' on the part of defense lawyers, who may take their chances on a verdict of not guilty in a state trial court with the intent to raise their constitutional claims in federal habeas court if their initial gamble does not pay off."[75] In rejecting Sykes's federal collateral appeal, the Court sharply reduced the reach of *Fay v. Noia*, effectively barring habeas relief unless the state prisoner could demonstrate both "cause" for his failure to assert a claim and "actual prejudice" resulting directly from the alleged constitutional deprivation.[76]

Within three years of *Stone v. Powell*, and two years following *Sykes*, the Court held that an error of law did not provide a basis for habeas relief under 28 U.S.C. § 2255 unless it constituted "a fundamental deficit which inherently results in a complete miscarriage of justice."[77] That same year, the Court restricted habeas relief only to those cases in which there were "extreme malfunctions in the state criminal justice systems."[78]

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73. 372 U.S. 391, 438-39 (1963). Actually, Sykes did not even attempt to meet his deliberate-bypass burden under *Fay* (*see Sykes*, 433 U.S. at 99 (White, J., concurring)), and three concurring Justices did not consider *Sykes* to be inconsistent with *Fay*. *Id.* at 91, 94, 97-98 (Burger, J., White, J., and Stevens, J., concurring).

74. *Sykes*, 433 U.S. at 87-91.

75. *Id.* at 89.

76. *Id.* at 87. The "cause and prejudice" rule in *Sykes* was foreshadowed by the Court's earlier decision in Davis v. United States, 411 U.S. 233 (1973). Davis was a *federal* prisoner who had defaulted an identical federal claim under Rule 12(b)(2) of the Federal Rules of Criminal Procedure at the trial court level. *Id.* at 234-36. The Supreme Court held that, on collateral review, the federal habeas court was barred from hearing Davis' claim unless he could show "cause" for his failure to challenge the composition of the grand jury before trial, as well as "actual prejudice" as a result of this unconstitutional grand jury selection. *Id.* at 242-45. *See also* Francis v. Henderson, 425 U.S. 536, 542 (1976) (a very similar case involving a grand jury challenge, with a similar denial of habeas relief grounded on "cause and prejudice").

77. United States v. Timmreck, 441 U.S. 780, 783 (1979) (quoting Hill v. United States, 368 U.S. 424, 428 (1962)).

78. Jackson v. Virginia, 443 U.S. 307, 332 n.5 (1979) (Stevens, J., concurring).

In 1982, the Court proceeded to define the *Sykes* "cause" and "prejudice" standards more precisely, having declined to define those terms in *Sykes* itself. In two decisions handed down simultaneously in its 1982-83 term, the Court held that jury instructions to which there was no objection at trial could not furnish the basis for federal habeas relief. In *Engle v. Isaac*,[79] the jury was instructed that the burden of proof on the issue of self-defense was to be placed on the capital defendant rather than on the state, contrary to the principle laid down in *Mullaney v. Wilbur*.[80] In *United States v. Frady*,[81] a federal prisoner convicted of first-degree murder sought to overturn his conviction on the ground that the trial jury instructions on the issue of malice — given without defense objection — blurred the distinction between manslaughter and second-degree murder.

Applying the "cause" and "actual prejudice" standards of *Sykes*, the Supreme Court in *Engle* found the absence of the "cause" prong to be fatal.[82] The petitioner's contention that his failure to object to the trial court's jury instructions on the self-defense burden of proof occurred several months before *Mullaney* was decided was found to be unpersuasive. After all, the Court reasoned, the tools for the assertion of *Mullaney* claims were known and available to defense practitioners before that case was decided — hence, there was no valid "cause" for the failure to object.[83]

In the *Frady* case, the Court upheld the denial of habeas relief because the petitioner failed to show "actual prejudice."[84] A mere possibility of prejudice to the defendant was insufficient; rather, the instructional error had to work "to his *actual* and substantial disadvantage, infecting his entire trial with error of constitutional dimensions."[85] At this point, the *Stone-Sykes* burden on the habeas petitioner began to approach Sisyphus-like proportions. The Court

79. 456 U.S. 107 (1982).

80. 421 U.S. 684, 703-04 (1975). *Mullaney v. Wilbur* actually involved a heat-of-passion defense which, under Maine law, required the defendant to bear the burden of proof by a preponderance of the evidence.

81. 456 U.S. 152 (1982).

82. *Engle*, 456 U.S. at 130-34.

83. *Id.* at 133. "Cause" has been narrowly construed ever since its "definition" in *Engle*, the only exception to the exception being the case where barring habeas review would result in a "fundamental miscarriage of justice." *Id.* at 135.

84. *Frady*, 456 U.S. at 170-72.

85. 456 U.S. at 170 (emphasis in original). "Federal intrusions into state criminal trials frustrate both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights." *Engle*, 456 U.S. at 128.

recognized this when it declared in *Barefoot v. Estelle*[86] that "[t]he role of federal habeas proceedings, while important in assuring that constitutional rights are observed, is secondary and limited. Federal courts are not forums in which to relitigate state trials."[87]

Out of a professed concern for finality, federalism, and conservation of judicial resources, the Court issued an unholy trinity of habeas decisions in 1986, shifting its focus away from constitutional deprivations and toward fact-based inquiries into the petitioner's guilt or innocence. In *Kuhlmann v. Wilson*,[88] the Court held in a plurality opinion that the "miscarriage of justice" exception to the "cause and prejudice" requirement would allow for successive claims to be heard only if the petitioner "establish[es] that under the probative evidence he has a colorable claim of factual innocence."[89] The standard for determination of factual innocence was expressed in these terms:

> [T]he prisoner must "show a fair probability that, in light of all the evidence, including that alleged to have been illegally admitted (but with due regard to any unreliability of it) and evidence tenably claimed to have been wrongly excluded or to have become available only after the trial, the trier of the facts would have entertained a reasonable doubt of his guilt."[90]

In *Murray v. Carrier*,[91] actual innocence was declared to be an exception to the preclusionary rule in habeas cases normally applicable to procedurally defaulted claims. In *Carrier*, the Court held that in cases 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

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86. 463 U.S. 880 (1983).

87. *Id.* at 887. Barefoot was executed on October 30, 1984.

88. 477 U.S. 436 (1986).

89. *Id.* at 454.

90. *Id.* at 455 n.17 (quoting Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142, 160 (1970)). Conveniently omitted by the plurality opinion is Judge Friendly's emphasis on the principle that there are many situations where, irrespective of the issue of "reasonable doubt," constitutional violations undermine the "fundamental fairness" of the criminal process itself. Friendly, *supra*, at 151-54. This is quintessentially true in capital sentencing cases because the death penalty is qualitatively and morally different from any other form of criminal punishment. "It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, *and appear to be*, the consequence of *scrupulously fair* procedures." Smith v. Murray, 477 U.S. 527, 545-46 (1986) (Stevens, J., dissenting) (emphasis added).

91. 477 U.S. 478 (1986).

procedural default."[92] Denial of habeas review under such circumstances would create a "fundamental miscarriage of justice."[93]

The third of this trio of 1986 decisions was *Smith v. Murray*.[94] There, in the context of capital sentencing, the Court failed to find any "miscarriage of justice" in the failure of the lower court to examine the merits[95] of the petitioner's procedurally defaulted claims. Smith's inculpatory statements, in clear violation of his Fifth Amendment rights, had led to the jury's finding of the aggravated circumstance of "future dangerousness,"[96] directly paving the way to his sentence of death. Since Smith was unable to demonstrate "cause" for his procedural default and because he had not made a substantial showing (in the Court's view) that the constitutional violation "undermined the accuracy of the guilt or sentencing determination,"[97] his Fifth Amendment claim was never addressed and he was executed shortly after the decision came down.[98]

A year later, in 1987, the Court held that, unlike a direct appeal, a habeas petitioner has no "right to counsel when mounting collateral attacks."[99] Far more serious, however, was its 1989 decision in *Teague v. Lane*[100] holding that new constitutional rules will not be applied retroactively to invalidate final state convictions on federal habeas review. With this decision the Court appeared to embark upon a course leading to virtually complete abandonment of the principle that federal habeas corpus must be available to enforce *all* constitutional rights.[101]

Frank Teague, an African American, was convicted of armed robbery and attempted murder by an all-white jury in Illinois. During his trial, Teague's two motions for mistrial, based on the state's

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92. *Id.* at 496 (emphasis added).

93. *Id.*

94. 477 U.S. 527 (1986).

95. *Id.* Smith's claim was that the introduction of his inculpatory statements made to a court-appointed psychiatrist violated his Fifth Amendment privilege since he had not been informed of his right to remain silent or that his statements might be used against him. *Id.* at 531-32.

96. *Id.* at 538.

97. *Id.* at 539.

98. NAACP LEGAL DEFENSE AND EDUCATION FUND, DEATH ROW, U.S.A. 5 (1993) [hereinafter DEATH ROW, U.S.A.].

99. Pennsylvania v. Finley, 481 U.S. 551, 555-56 (1987). Douglas v. California, 372 U.S. 353 (1963), had long since established a constitutional right to counsel on direct appeal.

100. 489 U.S. 288 (1989) (5-4 decision).

101. Perhaps indicative of the luke-warmth of the fifth vote of the *Teague* 5-4 majority, Justice White opined: "If we are wrong in construing the reach of the habeas corpus statutes, Congress can of course correct us; . . ." *Id.* at 317.

exclusion of blacks from the jury, were denied.[102] Following unsuccessful state appeals and denial of certiorari, Teague filed a petition for writ of habeas corpus in the federal district court, which subsequently denied relief.[103] A divided en banc panel of the Seventh Circuit Court of Appeals affirmed, holding that Teague had not been deprived of his Sixth Amendment rights by reason of the prosecutorial use of peremptory challenges that resulted in the selection of a non-representative jury.[104] The court of appeals held that the new constitutional rule laid down by the Supreme Court in *Batson v. Kentucky*[105] was not retroactively applicable on habeas.[106] The court of appeals also held that the "fair cross-section of the community" requirement[107] was applicable only to the jury *pool* from which the petit jury was selected, and not to the trial jury ultimately empaneled.[108] From the standpoint of habeas doctrinal analysis, the first prong of the *ratio decidendi* was critical and the Supreme Court affirmed on that basis.[109]

Prior to *Teague*, the Court had ignored any distinction on the issue of retroactivity as between direct and collateral (i.e., habeas) review, even in cases where the new constitutional rule at issue constituted a "clear break" with the past.[110] *Teague*, the first case to draw a sharp distinction between the two forms of review, barred the retroactive application of such a "new rule" to all cases on collateral review. Relying on the principle of finality, Justice O'Connor, in her plurality opinion, declared that a "habeas court need only apply the constitutional standards that prevailed at the time the original proceedings took place."[111]

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102. Brief for Petitioner at 2, Teague v. Lane, 489 U.S. 288 (1989) (No. 87-5259).

103. See *Teague*, 489 U.S. at 293.

104. 820 F.2d 832 (1987). The Court of Appeals hearing was delayed pending the Supreme Court's decision in Batson v. Kentucky, 476 U.S. 79 (1986). *Teague*, 820 F.2d at 833 n.1. In *Batson*, the Court held that the Equal Protection Clause barred the use of peremptory challenges based on race in a criminal proceeding.

105. 476 U.S. 79 (1986).

106. *Teague*, 820 F.2d at 836 (citing Allen v. Hardy, 478 U.S. 255 (1986)). *Allen*, decided just two months after *Batson*, held that *Batson* did not apply retroactively on collateral review of convictions which became (like *Teague*) "final" before *Batson* was announced.

107. *See* Taylor v. Louisiana, 419 U.S. 522, 529 (1975); Smith v. Texas, 311 U.S. 128 (1940).

108. *Teague*, 820 F.2d at 837-43.

109. *Teague*, 489 U.S. at 300-01.

110. Griffith v. Kentucky, 479 U.S. 314, 328 (1987); Stovall v. Denno, 388 U.S. 293, 300 (1967).

111. *Teague*, 489 U.S. at 306 (quoting Desist v. United States, 394 U.S. 244, 262-63 (1969) (Harlan, J., dissenting)). Though variously interpreted, the Court has held that "a

The *Teague* Court reserved the question of whether its holding should be applied to capital cases. Later in the same year that *Teague* was decided, the Court settled that issue by subjecting a capital case to the same test.[112] The issue before the Court was whether the death penalty for a mentally retarded adult was categorically prohibited by the Eighth Amendment and, if not, whether the defendant was entitled to a jury instruction as to the mitigating effect of mental retardation. Writing for the majority, Justice O'Connor acknowledged the applicability of *Teague* in capital cases, but nonetheless declared that the governing rule as to mitigation here could be found in prior case law.[113]

In the face of *Teague* and its progeny, habeas petitioners now have little choice but to couch their petitions as though fully governed by prior constitutional precedent, avoiding arguments grounded on "new rules." The success of the habeas petition may well depend less on its merits than on whether it can persuade the court that relief is "dictated by precedent."[114]

Perhaps the crowning blow to habeas corpus practitioners generally and capital defense lawyers in particular was struck on April 16, 1991, with the Supreme Court's decision in *McCleskey v. Zant*.[115] There, the Court found that McCleskey, a death-row prisoner in Georgia, was guilty of "abuse of the writ" by omitting from his prior state habeas petitions and his first federal petition his claim that, under *Massiah v.*

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decision announces a new rule 'if the result was not *dictated* by precedent existing at the time the defendant's conviction became final.'" Butler v. McKellar, 494 U.S. 407, 412 (1990) (quoting *Teague*, 489 U.S. at 301 (emphasis in original)). Quære: How many habeas cases are likely to be "dictated" by prior case law? And what of the habeas petitioner on death row whose life may turn on whether his petition is "dictated" by the state of constitutional law at the time of his trial? *See* Penry v. Lynaugh, 492 U.S. 302 (1989).

112. *Penry*, 492 U.S. at 329.

113. *Id.* at 314-19 (citing Eddings v. Oklahoma, 455 U.S. 104, 113-14 (1982); Lockett v. Ohio, 438 U.S. 586, 604 (1978)).

114. In a dire prediction, one commentator wrote:

> Today, Frank Teague is in prison, perhaps convicted unconstitutionally by an all-white jury. His right to inquire into the constitutionality of his conviction has been barred due to a procedural quibble that depends upon nothing more substantial than a slippery notion of what constitutes a new rule. But Frank Teague is not the only loser. The *Teague* bar may effectively slam the door on most federal review of state criminal cases and permanently stunt the evolution of constitutional jurisprudence.

Elliot F. Krieger, Recent Developments, *The Court Declines in Fairness* — Teague v. Lane, 25 HARV. C.R.-C.L. L. REV. 164, 181-82 (1990). For the most recent application of *Teague*, applying the "new rule" doctrine so as to deny federal habeas relief, see Gilmore v. Taylor, 113 S. Ct. 2112 (1993).

115. 111 S. Ct. 1454 (1991).

*United States*,[116] the state's use of a jailhouse informant to elicit inculpatory information[117] against him violated his Sixth Amendment right to counsel.[118] Among other responses, the State of Georgia contended that McCleskey's presentation of a *Massiah* claim for the first time in his second federal petition was an abuse of the writ barred under the governing statute and rules.[119]

Despite the wording of the habeas corpus statute, the fact that the issue was never litigated in either the district court or the court of appeals, the total absence of briefing by the parties, and the fact that the respondent never even sought such a ruling, the Supreme Court handed down an extraordinary decision. In the case of multiple habeas petitions, the doctrine of "abuse of the writ" would now be governed by the "cause and prejudice" standard of *Wainwright v. Sykes*.[120] The *Sykes* standard henceforth would be "incorporated" into the abuse-of-the-writ doctrine inasmuch as they "implicate nearly identical

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116. 377 U.S. 201 (1964).

117. McCleskey's *Massiah* claim was centered on a 21-page signed statement by the informant, including alleged statements by McCleskey not only admitting, but boasting, about the killing of an off-duty policeman which occurred in the course of a robbery. *McCleskey*, 111 S. Ct. at 1459-60. After considerable effort and "piecing together the circumstances under which the statement had been transcribed," McCleskey's counsel finally located one of the jailers to testify to the fact that the informant "had been planted in the cell adjoining McCleskey's." *Id.* at 1488 (Marshall, J., dissenting).

118. *Id.* at 1457. The federal district court granted habeas relief but was reversed by the Eleventh Circuit. McCleskey v. Zant, 890 F.2d 342 (11th Cir. 1989). The Court of Appeals' decision was based on petitioner's "deliberate abandonment" of the *Massiah* claim which, having been included in his first state petition, was omitted from his first federal habeas petition only to be reasserted in the second. *McCleskey*, 111 S. Ct. at 1461. The court adopted this rationale in the teeth of the district court's findings that "at the first petition stage McCleskey knew neither the existence of the [informant's] statement nor the identity of [the jailer] . . . ." *Id.* at 1461.

119. *Id.* at 1460 (citing 28 U.S.C. § 2244(b) (1982) and Rule 9(b) of the "Rules Governing § 2254 Cases," 28 U.S.C. § 2254 (1982)). Section 2244(b) requires that the application for the writ must be entertained whenever "the application alleges and is predicated on a factual or other ground not adjudicated on the hearing of the earlier application for the writ," provided that the petitioner has not "deliberately withheld the newly asserted ground" on the earlier application or "otherwise abused the writ." Rule 9 reads as follows:

> A second or successive petition may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ.

As for the proposed changes to Section 2244 contained in the Biden Bill, *supra* note 32, *see infra* note 188.

120. *McCleskey*, 111 S. Ct. at 1468.

concerns . . ."[121] Not surprisingly, McCleskey never made it past the "cause" test.[122]

With its decision in *McCleskey*, the zeal of the Rehnquist majority to erect major roadblocks in the path of habeas corpus petitioners became transparent. The facts found by the federal district court remained essentially undisturbed.[123] They clearly reflect direct government complicity in deception and withholding of the very information essential to the crafting of a proper petition based on a clear Sixth Amendment violation. Far from illustrating abuse of the writ, the facts in *McCleskey* reflect abuse of governmental power[124] and the rewarding of such abuse by encouraging law enforcement authorities and state officials to conceal the very evidence that might enable a habeas petitioner to avoid the pitfalls of the new *Sykes* strict-liability standard.

In a recent decision, the Court took the opportunity to constrict the applicability of habeas relief still further. In *Brecht v. Abrahamson*,[125] a razor-thin 5-4 majority of the Court (with Justice Stevens surprisingly concurring) declared that constitutional error of the trial type may be "harmless" even if the habeas court does not deem it harmless beyond

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121. *Id.* For their part, the dissenting Justices (Marshall, Blackmun, and Stevens) found ample cause *and* prejudice in the form of the State's "deceit," "disinformation," and "veil of deception." *Id.* at 1487-88 (Marshall, J., dissenting).

122. *Id.* at 1474.

123. The Kennedy opinion gratuitously attacks the jailer's testimony as somewhat self-contradictory on the facts essential to petitioner's *Massiah* claim. *Id.* at 1488 n.12. In fact, the District Court found that he never wavered on the key issue of the removal of the informant to the cell next to McCleskey. *Id.*

124. The dissenting Justices' opening statement reflects the juridical "aftershock" of this seemingly seismic change:

> Today's decision departs drastically from the norms that inform the proper judicial function. Without even the most casual admission that it is discarding longstanding legal principles, the Court radically redefines the content of the "abuse of the writ" doctrine, substituting the strict-liability "cause and prejudice" standard of Wainwright v. Sykes, 433 U.S. 72 (1977), for the good-faith "deliberate abandonment" standard of Sanders v. United States, 373 U.S. 1 (1963). This doctrinal innovation, which repudiates a line of judicial decisions codified by Congress in the governing statute and procedural rules, was by no means foreseeable when the petitioner in this case filed his first federal habeas application. Indeed, the new rule announced and applied today was not even *requested* by respondent at any point in this litigation. Finally, rather than remand this case for reconsideration in light of its new standard, the majority performs an independent reconstruction of the record, disregarding the factual findings of the District Court and applying its new rule in a manner that encourages state officials to *conceal* evidence that would likely prompt a petitioner to raise a particular claim on habeas.

*Id.* at 1477 (emphasis in original).

125. 113 S. Ct. 1710 (1993).

a reasonable doubt.[126] The prosecutor's references to Brecht's silence after being given *Miranda* warnings were found by the federal habeas trial court to have violated *Doyle v. Ohio*.[127] As a "trial error," the *Doyle* violation was viewed by the Court as unworthy of *Chapman* analysis on habeas review since such a standard intrudes too much on states' interests, not the least of which is "the finality of convictions that have survived direct review within the state court system."[128]

The bleak and deteriorating picture of this habeas corpus retrospective would not be complete without reference to *Coleman v. Thompson*,[129] which was decided on June 24, 1991. Coleman's volunteer lawyers, unfamiliar with Virginia appellate procedure, filed their notice of appeal one day late. Without reaching the merits, the Virginia Supreme Court issued its terse order dismissing the appeal because of the attorneys' procedural mistake.[130] The Supreme Court treated defense counsel's procedural oversight, clearly grounded in state law, as sufficient to bar habeas corpus relief despite the complete absence of any "full and fair hearing" on the merits of the appeal. The 6-3 majority opinion by Justice O'Connor emphasizes the respect that federal courts owe the states and the states' procedural rules.[131] On this non-constitutional and non-federal basis, the Court extended complete deference to Virginia's procedural appellate procedure, and, in so doing, sealed Mr. Coleman's fate on death row. This new

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126. The rule of Chapman v. California, 386 U.S. 18 (1967), establishing the "harmless-beyond-a-reasonable-doubt standard" was held no longer applicable to cases on collateral review, even though it remains the constitutional standard on direct review. Speaking for the majority, Chief Justice Rehnquist declared: "The principle that collateral review is different from direct review resounds throughout our jurisprudence." *Brecht*, 113 S. Ct. at 1719.

127. 426 U.S. 610 (1976).

128. *Brecht*, 113 S. Ct. at 1720 (citing *Wainwright v. Sykes* and *McCleskey v. Zant* as support).

129. 111 S. Ct. 2546 (1991). Coleman, a coal-miner, was convicted of rape and capital murder. His grounds for appeal were persuasive, including evidence that one of his trial jurors had said that he wanted to sit on the case so that he could "nail" the defendant. *See* Coleman v. Thompson, 895 F.2d 139 (4th Cir. 1990).

130. *See Coleman*, 111 S. Ct. at 2553. The Virginia Supreme Court dismissed Coleman's notice of appeal from the state habeas court as untimely under Rule 5:9(a) of the Virginia Supreme Court Rules, which provided for a thirty-day limitation period "after entry of final judgment or other appealable order . . . ." *See Coleman*, 895 F.2d at 142 (citing VA. S. CT. R. 5:9(a)). The habeas writ was denied on September 4, 1986, and the Clerk recorded the Order on September 9, 1986. *Id.* Coleman filed his notice of appeal on October 7, 1986. *Id.* The state habeas court refused to correct the date of the "judgment" to September 9, 1986, insisting that final judgment was entered on September 4, 1986. *Id.* On appeal, the Supreme Court of Virginia ruled: "[T]he motion to dismiss is granted and the petition for appeal is dismissed." *Id.*

131. *Coleman*, 111 S. Ct. at 2564-65.

"federalism" was denounced by Justice Blackmun as bearing "little resemblance to that adopted by the framers of the Constitution."[132] He lamented what he characterized as the Court's ongoing "crusade to erect petty procedural barriers in the path of any state prisoner seeking review of his federal constitutional claims" and its transformation of "the duty to protect federal rights into a self-fashioned obligation."[133]

In summary, *Wainwright v. Sykes* left open the question of whether the "deliberate bypass" standard still applied to a fact-pattern such as that presented in *Fay*, in which the failure to make a suppression claim based on a *Miranda*-rights violation led to the loss of appeal rights.[134] The *Sykes* court nonetheless condemned "the sweeping language of *Fay v. Noia*, going far beyond the facts of the case eliciting it."[135] The Court's decision in *Coleman* removed whatever doubt may have lingered as to the continued efficacy of the rule in *Fay v. Noia* after *Sykes*.[136] Stressing the point that *Fay* was based on a misconception of federal/state relations that undervalued the importance of state procedural rules, the *Coleman* Court held:

> We now make it explicit: In all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice.[137]

With its decisions in *Coleman* and *Stone v. Powell*, the Court added another lock on the federal courthouse door, barring access to federal habeas corpus. In *Stone v. Powell* in 1976, the Court stressed the principle of a "full and fair hearing" on the merits in the state appellate courts as a basis for precluding relitigation of these issues in federal collateral proceedings.[138] With its decision in *Coleman v. Thompson* fifteen years later, the Court treated the inadvertent *failure* of the prisoner to obtain a "full and fair hearing" on the merits as a basis for preclusion as well.[139] In the vernacular, this is known as a

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132. *Id.* at 2569, 2571 (Blackmun, J., dissenting).
133. *Id.*
134. 433 U.S. at 88 n.12.
135. *Id.* at 87-88.
136. *See also* Murray v. Carrier, 477 U.S. 478, 490-91 (1986). *See supra* text accompanying notes 88-93.
137. *Coleman*, 111 S. Ct. at 2565.
138. Stone v. Powell, 428 U.S. 465, 494 (1976).
139. *Coleman*, 111 S. Ct. at 2565.

"lose-lose" situation, and it is a highly costly one for death-row petitioners in particular.

## IV. Habeas Corpus: Some Bright Spots

While the foregoing clearly demonstrates the recent increasing constriction of habeas corpus, a more complete "balance sheet" reflects some signs of continued vitality of the Great Writ, at least in egregious criminal cases. Thus, the Burger-Rehnquist Court has found it appropriate, sometimes even unanimously, to grant habeas relief in the following situations: a Fourteenth Amendment due process claim of insufficient evidence to support a conviction;[140] a prisoner on death row who was convicted on information obtained from him by a state-employed psychiatrist in the absence of counsel;[141] a petitioner who was sentenced to life imprisonment for cashing a $100 fraudulent check;[142] a death-row prisoner who was sentenced by a jury instructed that it need not find the accused guilty beyond a reasonable doubt in order to convict;[143] a prisoner whose conviction resulted from his claiming his right to remain silent after the police repeatedly advised him of his constitutional right and assured him that he could refuse to talk to them without fear of consequences;[144] a defendant who was indicted by a grand jury from which blacks were excluded;[145] a capital prisoner who was sentenced by a jury that was erroneously instructed by the trial judge that, in passing the death sentence, it could not consider the defendant's brain damage, his cooperation with the police, or his potential for rehabilitation;[146] a defendant who was incompetently represented at trial;[147] and a capital prisoner who was sentenced to die by a jury where the jury commissioner, on instructions from the district attorney, had intentionally excluded women and African-Americans.[148]

Perhaps the most significant positive decision since *Stone v. Powell* is *Kimmelman v. Morrison*,[149] a case in which ineffective

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140. *See* Jackson v. Virginia, 443 U.S. 307 (1979).
141. *See* Estelle v. Smith, 451 U.S. 454 (1981).
142. *See* Solem v. Helm, 463 U.S. 277 (1983).
143. *See* Francis v. Franklin, 471 U.S. 307 (1985).
144. *See* Wainwright v. Greenfield, 474 U.S. 284 (1985).
145. *See* Vasquez v. Hillery, 474 U.S. 254 (1985).
146. Hitchcock v. Dugger, 481 U.S. 393 (1987). *See also* Penry v. Lynaugh, 492 U.S. 302 (1989).
147. Kimmelman v. Morrison, 477 U.S. 365 (1986). *See* discussion *infra* notes 149-56 and accompanying text.
148. Amadeo v. Zant, 486 U.S. 214 (1988).
149. 477 U.S. 365 (1986).

representation of counsel was the core issue. Having failed to conduct any pretrial discovery, counsel for a rape defendant neglected to make a timely suppression motion.[150] After exhausting his state court appellate remedies, the defendant sought habeas relief in the federal courts, claiming violation of his Sixth Amendment right to effective counsel in that his attorney's incompetence permitted the introduction of illegally-seized evidence against him.[151] After modest success in the lower federal courts, the Supreme Court affirmed, rejecting the government's argument that the *Stone v. Powell* rationale would apply equally to a Sixth Amendment claim based on the failure of defense counsel to litigate a Fourth Amendment claim competently.[152] It is one thing, the Court held, to release the states from the burden of the "costs" of the exclusionary rule under the *Stone* analysis;[153] it is something very different where Sixth Amendment requirements have not been met, in which case the very legitimacy of our criminal justice system is put at risk as a result of constitutionally-deficient counsel, even given a "full and fair" hearing before state courts.[154] In the course of its opinion, the Court in *Kimmelman* explained that, unlike the Fourth Amendment which confers no "trial right," the Sixth Amendment confers a "fundamental right" upon criminal defendants, a right which "assures the fairness, and thus the legitimacy, of our adversary process."[155] The Court reasoned that since a Sixth Amendment violation would often go unremedied except on habeas corpus review, "restricting the litigation of some Sixth Amendment claims to trial and direct review would seriously interfere with an accused's right to effective representation."[156]

Shortly after its decision in *Kimmelman*, the Court once again relaxed the bar against habeas relief in an ineffective representation case. In *Murray v. Carrier*,[157] which reaffirmed the "cause and prejudice" test[158] as a prerequisite for federal habeas relief, the Court held that while counsel's ignorance or inadvertence is not adequate

150. *Id.* at 369.

151. *Id.* at 371.

152. *Id.* at 374.

153. *Stone* was distinguishable because the exclusionary rule at issue there was viewed purely as a prophylactic measure rather than as a constitutional right. *See id.* at 375-80.

154. *Kimmelman*, 477 U.S. at 378, n.3 (citing *Stone*, 428 U.S. at 494).

155. *Id.* at 374 (citing Gideon v. Wainwright, 372 U.S. 335, 344 (1963)).

156. *Id.* at 378.

157. 477 U.S. 478 (1986).

158. *See* Wainwright v. Sykes, 433 U.S. 72 (1977). *See supra* text accompanying notes 72-76.

"cause," ineffective assistance of counsel is.[159] The Court recognized that "the principles of comity and finality that inform the concepts of cause and prejudice must yield to the imperative of correcting a fundamentally unjust incarceration."[160] The majority opinion goes a step further and declares: "Accordingly, we think that in an extraordinary case, 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."[161]

Other cases attest to the fact that, as with Mark Twain, the reputed death of habeas corpus is greatly exaggerated; it has shown some significant signs of life, even vitality. The Court in *Jackson v. Virginia*[162] refused the opportunity presented to apply *Stone* so as to bar habeas corpus review of a due process denial grounded on a claim of insufficient evidence. In contrast to the exclusionary rule at issue in *Stone*, the issue in *Jackson* was deemed to be "central to the basic question of guilt or innocence."[163] Similarly, in *Rose v. Mitchell*,[164] the Court declined to extend the rule in *Stone* to preclude habeas review of an equal protection claim of racial discrimination in the process of grand-jury foreman selection. Here, again, the Court's majority resisted the government's argument that the *Stone* analysis was equally applicable to other judge-made rules, and restricted *Stone* to its narrow, exclusionary-rule context. To do otherwise, the Court said, would be incompatible with the controlling habeas law.[165]

In *Boyde v. California*,[166] the Court clarified the standard for reviewing a habeas claim that a single jury instruction was ambiguous and therefore subject to an erroneous interpretation, impermissibly restricting the jury's consideration of "constitutionally relevant evidence."[167] Boyde argued that the trial court's instruction on California's "catch-all" factor for determining the death penalty excluded certain mitigating evidence from the jury's consideration.[168] The Court agreed, emphasizing that "[t]he Eighth Amendment requires

159. *Murray*, 477 U.S. at 488.
160. *Id.* at 495 (citing Engle v. Isaac, 456 U.S. 107, 135 (1982)).
161. *Id.* at 496.
162. 443 U.S. 307 (1979).
163. *Id.* at 323.
164. 443 U.S. 545 (1979).
165. *Id.* at 562-64.
166. 494 U.S. 370 (1990).
167. *Id.* at 380.
168. *Id.* at 376.

that the jury be able to consider and give effect to all relevant mitigating evidence," and that such evidence was clearly "constitutionally relevant."[169]

As recently as April 1993, the State of Michigan failed in its attempt to insulate *Miranda* violations against federal habeas review. In *Withrow v. Williams*,[170] the majority of the Court held that the bar of *Stone v. Powell* would not be extended to claimed *Miranda* errors at trial. The facts in *Withrow* were compelling — a police sergeant threatened to "lock up" defendant Williams during a stationhouse interrogation about a double murder, whereupon Williams made a number of incriminating statements.[171] After being given his *Miranda* rights, he made more inculpatory statements.[172] The federal district court granted habeas relief, concluding that all of Williams' inculpatory statements, both before and after his receipt of the *Miranda* warnings, should have been suppressed as involuntary under the Due Process clause of the Fourteenth Amendment.[173] The court of appeals affirmed.[174] The question on which the Supreme Court granted certiorari was the following: Assuming a finding of a *Miranda* violation, where the petitioner has had one full and fair opportunity to raise the *Miranda* claim in state court, should collateral review of the same claim on a habeas corpus petition be precluded? Speaking for the majority, Justice Souter answered in the negative, holding that the *Miranda* prophylactic rule is enforceable by way of habeas corpus despite *Stone*'s restriction.[175] By the narrowest of margins, the Court refused to extend *Stone*'s limitation on the availability of habeas relief to Withrow's claim that his conviction rested on statements obtained in violation of the *Miranda* safeguards. The majority reasoned that the *Stone* rule was based on prudential concerns counseling against applying

169. *Id.* at 377-78. While Chief Justice Rehnquist seeks to confine the *Boyde* standard to capital cases, it should be noted that Estelle v. McGuire, 112 S. Ct. 475 (1991), makes the Rehnquist position untenable in that this later decision reaffirmed the *Boyde* standard in a *non*-capital case. In *McGuire*, the Court majority found that the particular erroneous instruction at issue did not in fact give rise to a constitutional violation. But "the very fact that the Court scrutinized the instruction belies any assertion that erroneous instructions can violate due process only in capital cases." Gilmore v. Taylor, 113 S. Ct. 2112, 2121 (1993) (O'Connor, J., concurring).

170. 113 S. Ct. 1745 (1993).

171. *Id.* at 1748-49.

172. *Id.*

173. *See id.* at 1749.

174. 944 F.2d 284 (6th Cir. 1991).

175. *Withrow*, 113 S. Ct. at 1751-55.

the Fourth Amendment exclusionary rule on habeas review.[176] On the other hand, the *Miranda* (Fifth Amendment) rule, while similarly "prophylactic" in nature, safeguards "a fundamental trial right"[177] and embodies "principles of humanity and civil liberty . . ."[178] While the exclusionary rule in *Mapp v. Ohio*[179] is intended to deter *future* search and seizure violations, *Miranda* protects a defendant's Fifth Amendment privilege against self-incrimination, is personal to the defendant, and applies presently and immediately at trial.[180] In addition, the *Withrow* majority noted that whereas the exclusionary rule has the effect of precluding the use of evidence which is generally reliable, the exact opposite is true where statements are obtained from unwarned defendants in the inherently coercive atmosphere of police custody.[181]

The foregoing review of cases in which federal habeas relief was granted leads inexorably to the conclusion that such relief is being confined to cases where there has been no procedural default, where the cause-and-prejudice test has been met, or where there is a colorable claim of actual innocence. Newly discovered evidence and intervening changes in the law do not suffice. Habeas successes have clearly become the exception, not the rule.[182]

## V. "Finality," "Federalism" and "Scarce Judicial Resources": Rationale or Pretext?

In his dissenting opinion in *Brecht v. Abramson*, Justice White stated:

> Our habeas jurisprudence is taking on the appearance of a confused patchwork in which different constitutional rights are treated according to their status, and in which the same constitutional right

176. *Id.* at 1750.

177. United States v. Verdugo-Urquidez, 110 S. Ct. 1056 (1990).

178. *Withrow*, 113 S. Ct. at 1751-55 (citing Bram v. United States, 168 U.S. 532, 544 (1897)).

179. 367 U.S. 643 (1961).

180. *Withrow*, 113 S. Ct. at 1750, 1753.

181. *Id.* at 1753 (citing Stone v. Powell, 428 U.S. 465, 490 (1976)).

182. In a burst of optimism totally unwarranted by recent case law, Justice Kennedy found the habeas corpus glass "half-full": "With the exception of Fourth Amendment violations that a petitioner has been given a full and fair opportunity to litigate in state court, . . . the writ today appears to extend to all dispositive constitutional claims presented in a proper procedural manner . . . ." *McCleskey*, 111 S. Ct. at 1462 (citing Brown v. Allen, 344 U.S. 443 (1953); Wainwright v. Sykes, 433 U.S. 72 (1977)). Writing for the majority in *McCleskey*, Justice Kennedy affirmed the denial of the writ below on grounds of "abuse of the writ," the need for "finality," and the need to conserve "scarce federal judicial resources." *Id.* at 1467-70. *See supra* text accompanying notes 115-24.

> is treated differently depending on whether its vindication is sought on direct or collateral review. I believe this picture bears scant resemblance either to Congress' design or to our own precedents.[183]

Terming the crazy-quilt pattern of recent habeas corpus law "a confused patchwork" is a masterpiece of understatement. In fact, the Supreme Court has persisted in demeaning the constitutional etiology and high purpose of the Great Writ. In lieu of a robust bulwark of individual freedom and justice, the Writ has been reduced to a kind of "Maginot Line" which has been easily and regularly breached by a veritable blitzkrieg of assaults by Burger-Rehnquist Court majorities. In a pattern reminiscent of Justice Potter Stewart's memorable language in *Furman v. Georgia*,[184] the Court's habeas decisions raise the spectre of being "wantonly and . . . freakishly imposed."[185] The bottom line is that habeas corpus proceedings have all too often resulted in "habeas corpse."[186]

The reason for this constitutional metamorphosis is not difficult to identify. In direct response to the resuscitation and proliferation of the death-penalty by the state legislatures after *Furman*, criminal defense practitioners have increasingly and, sometimes repeatedly, resorted to habeas corpus proceedings as a means of preserving their clients' lives. Most of the cases reviewed above were brought on behalf of death-row prisoners, some of them protesting factual as well as "legal" innocence.[187] The defense of these capital cases, usually on a *pro bono* basis, has frequently reflected the highest standards of the criminal defense bar. But these efforts have proven unavailing in the face of the Court's increasingly rigid adherence to policy objectives having little in common with the spirit and letter of the Writ.

Under the general rubric of "abuse of the Writ,"[188] the Court has

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183. *Brecht*, 113 S. Ct. at 1728 (White, J., dissenting).

184. 408 U.S. 238 (1972).

185. *Id.* at 310 (Stewart, J., concurring).

186. *See* David Bruck & Leslie Harris, *Habeas Corpse: The Right to Appeal Under Fire*, THE NEW REPUBLIC, July 15 & 22, 1991, at 10.

187. *See, e.g.*, Hugo Adam Bedau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21, 23, 36 (1987) (concluding that some twenty-three innocent defendants have been executed in the United States in this century, including one, James Adams, who was executed in Florida on May 10, 1984). For a rebuttal to this study, see Stephen J. Markman & Paul G. Cassell, *Protecting the Innocent: A Response to the Bedau-Radelet Study*, 41 STAN. L. REV. 121 (1988).

188. This term was first used by the Court in Sanders v. United States, 373 U.S. 1, 10-11 (1963). It is now codified as part of 28 U.S.C. § 2244(b) (1982). *See supra* note 119. On August 6, 1993, Senator Joseph Biden introduced "A Bill to Reform Habeas Corpus." Biden

developed a habeas jurisprudence replete with minefields such as "cause and prejudice," non-retroactivity of new constitutional principles, and proof of "actual innocence." The rational for its departure from longstanding habeas principles and doctrine has been candidly set forth in several of its more recent decisions. The reasons most frequently given for the Court's retreat from its earlier supportive and expansive view of the Great Writ are "finality," "federalism," and the burden upon "scarce federal resources." Each of these rationales merits separate attention.

*A. Finality*

The finality argument is, facially at least, the most persuasive. "Without finality, the criminal law is deprived of much of its deterrent effect."[189] In the words of Justice Kennedy, "[o]ne of the law's very objects is the finality of its judgments. Neither innocence nor just punishment can be vindicated until the final judgment is known."[190]

The principle of finality has found its way into a number of Supreme Court decisions where habeas relief was denied.[191] The common practice of federal reexamination of state convictions — the very *raison d'etre* of habeas corpus, both in terms of Article I, Section 9, and its statutory expansion in 1867 — was characterized in *Murray v. Carrier* as "frustrat[ing] . . . 'both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights.'"[192]

Finality of convictions is also advanced as the main reason for distinguishing between direct and collateral review. Direct review, of course, is the principal means for challenging a conviction. The federal

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Bill, *supra* note 32. This proposed legislation, for the first time, limits prisoners to filing a *single* federal habeas appeal within a time limit of six months, subject to certain exceptions. What is striking about this new strict time limit is the fact that *more* exceptions are provided in cases of a sentence other than death than in cases of death-row prisoners. The Biden Bill has received the "strong support" of the Clinton Administration. *See* Remarks Announcing the Anti-Crime Initiative and an Exchange with Reporters, 29 WEEKLY COMP. PRES. DOC. 1602 (Aug. 11, 1993). The pertinent portions of the Biden Bill are set forth in Appendix A, *infra*.

189. Teague v. Lane, 489 U.S. 288, 309 (1989). "It is, I believe, a matter of fundamental import that there be a visible, litigable aspect of the criminal process. Finality in the criminal law is an end which must always be kept in plain view." Mackey v. United States, 401 U.S. 667, 690 (1971) (Harlan, J., concurring and dissenting in part) (citations omitted).

190. *McCleskey*, 111 S. Ct. at 1468.

191. *See, e.g.*, Reed v. Ross, 468 U.S. 1, 10 (1984); Engle v. Isaac, 456 U.S. 107, 127 (1982); Wainwright v. Sykes, 433 U.S. 72, 90 (1977).

192. *Murray*, 477 U.S. at 487 (citing *Engle*, 456 U.S. at 128).

courts, according to this view, are "not forums in which to relitigate state trials."[193] The Supreme Court has stated:

> When the process of direct review — which, if a federal question is involved, includes the right to petition this Court for a writ of certiorari — comes to an end, a presumption of finality and legality attaches to the conviction and sentence. The role of federal habeas proceedings, while important in assuring that constitutional rights are observed, is secondary and limited.[194]

The rule barring retroactivity in habeas cases which was announced in *Teague v. Lane*[195] is tied directly to the finality principle. The "new rule" doctrine laid down in *Teague* "validates reasonable good-faith interpretations of existing precedents made by state courts . . . and thus effectuates the States' interest in the finality of criminal convictions and fosters comity between federal and state courts."[196] Thus, finality, "the rule of law," "comity," and federalism are joined in a single judicial-policy package.

Finality in criminal justice is certainly a laudable goal. Few would argue against it. But the fact that "finality" has risen to the dominant and controlling position that it now occupies in our habeas corpus framework serves to create a (perhaps intended) chilling effect on habeas practitioners. As the finality objective has risen to the apex of the habeas pyramid over the past decade and a half, such heretofore bedrock constitutional principles of fundamental fairness, equity,[197] and the integrity of the criminal justice system have receded in

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193. Barefoot v. Estelle, 463 U.S. 880, 887 (1983).

194. *Id.* "Perpetual disrespect for the finality of convictions disparages the entire criminal justice system." *McCleskey*, 111 S. Ct. at 1469.

195. *See supra* text accompanying notes 100-11. Subject to two very narrow exceptions, a "new rule" of constitutional law which is announced after a judgment of conviction is final cannot provide a basis for federal relief. The *Teague* exceptions to non-retroactive application of new constitutional rules include: (1) cases where the defendant's conduct is "beyond the power of the criminal-law making authority to proscribe;" and (2) cases involving the absence of a "procedure without which the likelihood of an accurate conviction is seriously diminished." *Teague*, 489 U.S. at 311, 313 (citing *Mackey*, 401 U.S. at 692).

196. *Gilmore*, 113 S. Ct. at 2116 (citing Butler v. McKellar, 110 S. Ct. 1212, 1217 (1990)).

197. "[H]abeas corpus has traditionally been regarded as governed by equitable principles." *Fay*, 372 U.S. at 438. *See also* Kuhlmann v. Wilson, 477 U.S. 436, 447 (1985). The "deliberate bypass" rule of *Fay*, *see supra* notes 53-56 and accompanying text, is a clear reflection of the core equitable principle of "unclean hands." Even in the face of abusive or successive use of the writ, however, the Court professes adherence to a "miscarriage of justice exception" which is grounded in the "equitable discretion" of a habeas court to see to it "that federal constitutional errors do not result in the incarceration of innocent persons." Herrera v. Collins, 113 S. Ct. 853, 862 (1993).

importance in habeas jurisprudence. Indeed, in some cases, they have all but disappeared.

In the capital sentencing context, the policy interest in making convictions "final" is not only inapplicable,[198] it is also highly inappropriate and potentially barbaric. The perceived need for "finality" in the context of capital cases does more than put an end to the "litigation;" it puts an end to the litigator. If there is any area of our law wherein the principle of fundamental fairness should be paramount above all others, certainly well above the purely pragmatic objective of "ending the litigation,"[199] it is in capital punishment cases or, indeed, in any case where the liberty of the petitioner hangs in the balance. At the heart of the Great Writ is our system of criminal justice which is committed to suspending "[c]onventional notions of finality of litigation . . . where life or liberty is at stake and infringement of constitutional rights is alleged."[200]

In the name of "finality," a habeas petitioner is no longer free to assert newly discovered evidence (*Herrera*), new law (*Teague*), or even ineffective representation by counsel (*Coleman*). Justice Kennedy, speaking for the majority in *McCleskey v. Zant*, was forced to concede that "[m]uch confusion exists . . . on the standard for determining when a petitioner abuses the writ."[201] He continued in a similar vein:

> Although the standard is central to the proper determination of many federal habeas corpus actions, we have had little occasion to define it. Indeed, there is truth to the observation that we have

198. *See Teague*, 489 U.S. at 321 n.3 (Stevens, J., concurring in part and concurring in the judgment).

199. The following observation by Justice Harlan (in dissent) in Sanders v. United States, 373 U.S. 1, 24-25 (1963) (Harlan, J., dissenting), is often quoted by the pro-finality Justices:

> Both the individual criminal defendant and society have an interest in insuring that there will at some point be the certainty that comes with an end to litigation, and that attention will ultimately be focused not on whether a conviction was free from error but rather on whether the prisoner can be restored to a useful place in the community.

*See also Engle*, 456 U.S. at 127. Ten years later, Justice Powell opined similarly:

> At some point, the law must convey to those in custody that a wrong has been committed, that consequent punishment has been imposed, that one should no longer look back with the view to resurrecting every imaginable basis for further litigation but rather should look forward to rehabilitation and to become a constructive citizen.

Schneckloth v. Bustamonte, 412 U.S. 218, 262 (1973) (Powell, J., concurring). For the prisoner on death row, such arguments are totally meaningless and clearly inappropriate.

200. *Sanders*, 373 U.S. at 8.

201. *McCleskey*, 111 S. Ct. at 1461.

> defined abuse of the writ in an oblique way, through dicta and denials of certiorari petitions or stay applications.[202]

It would be difficult to conceive of a more stinging commentary on the Court's recent efforts at re-writing the common-law of habeas corpus, particularly coming as it does from a Court majority which has been a major architect of the confusion. Definition here has hardly been "oblique;" it has been ad hoc and case-by-case. In its efforts to avert and deter "abuse of the writ," the present Court has *itself* abused the writ most sorely.[203]

*B. Federalism*

The federalism (or comity) argument springs from the familiar doctrine that federal as well as state courts are equally obligated to enforce and protect rights secured by the Constitution. Since it would be "unseemly" for a federal court to upset a state court conviction in our dual system of government, the "comity principle" comes into play, and "teaches that one court should defer action on causes properly within its jurisdiction until the courts of another sovereignty with concurrent powers, and already cognizant of the litigation, have had an opportunity to pass upon the matter."[204] The concern here is that a state prisoner incarcerated pursuant to a state court judgment can only be released when a federal court, in effect, "nullifies" the judgment.[205]

However, from as far back as the passage of the Habeas Corpus Act of 1867,[206] problems concerning the relationship between federal

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202. *Id.* (citing Witt v. Wainright, 470 U.S. 1039, 1043 (1985) (Marshall, J., dissenting).

203. In the course of engrafting the *Wainwright v. Sykes* "cause and prejudice" rule on the abuse-of-the writ preclusionary rule, the Court majority in *McCleskey* (Chief Justice Rehnquist and Justices White, Scalia, O'Connor, Kennedy, and Souter) quoted from the Court's earlier pronouncement in Woodward v. Hutchins, 464 U.S. 377 (1984) (per curiam) with obvious approval: "Federal Courts should not continue to tolerate — even in capital cases — this type of abuse of the writ of habeas corpus." *McCleskey*, 111 S. Ct. at 1471. This is followed, somewhat anomalously, by reiteration of the axiomatic proposition that "[t]he writ of habeas corpus is one of the centerpieces of our liberties." This, in turn, is followed by an almost predictable "but," namely: "But the writ has potentialities for evil as well as for good." *Id.* (quoting in part from dictum in Brown v. Allen, 344 U.S. 443, 512 (1953) (opinion of Frankfurter, J.)).

204. Darr v. Burford, 339 U.S. 200, 204 (1950), *overruled by Fay*, 372 U.S. at 435-36, to the extent that that decision may be said to stand for the proposition that federal habeas relief is barred to a state prisoner who has failed timely to seek certiorari in the U.S. Supreme Court from an adverse state decision.

205. "In habeas . . . ordering the prisoner's release invalidates the judgment of conviction and renders ineffective the state rule relied upon to sustain that judgment." *Fay*, 372 U.S. at 469.

206. *See supra* note 39.

and state courts have been clearly foreseeable. Indeed, such tension emerged quickly. In *Ex parte Bridges*,[207] Justice Bradley, sitting as a Circuit Justice, ruled that a convicted state prisoner who had sought neither direct appellate nor habeas relief in the Georgia state courts was eligible for habeas relief if he could prove the unconstitutionality of his conviction.[208] This broad view of habeas relief was later specifically adopted by the full Court in *Ex Parte Royall*,[209] in which habeas was sought in advance of trial. The Court, speaking through the first Justice Harlan, held:

> [W]here a person is in custody, under process from a State court of original jurisdiction, for an alleged offence against the laws of such State, and it is claimed that he is restrained of his liberty in violation of the Constitution of the United States, the Circuit Court has a discretion whether it will discharge him, upon habeas corpus, in advance of his trial . . .[210]

The Court nevertheless demonstrated restraint and cautioned against the exercise of its broad habeas powers until the state court proceedings were exhausted. This was probably the first example, in the context of habeas corpus law, of judicial restraint in the name of comity. *Royall* and succeeding cases[211] created a pattern of federal deference to state criminal trial and appellate proceedings which had to be exhausted before federal habeas corpus would be entertained. The principle was ultimately codified by Congress as 28 U.S.C. § 2254.[212]

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207. 4 F. Cas. 98 (C.C.N.D. Ga. 1875) (No. 1862).

208. *Id.* Justice Bradley held open this possibility even though Bridges' judgment was not "final" under the state's criminal procedure. Bridges was discharged on the grounds that the charge of which he stood convicted (perjury) was one which was exclusively cognizable in the federal courts.

209. 117 U.S. 241 (1886).

210. *Id.* at 252-53. Both *Bridges* and *Royall* require historical perspective. The Habeas Corpus Act of 1867, *supra* note 39, which extended federal habeas corpus to state prisoners must be understood against the background of the post-Civil War period. The Reconstruction Congress was seeking to supervise the former states of the Confederacy with the strictest of scrutiny. Indeed, this historical perspective informs as to the breadth intended by the Act, whose "expansive language and imperative tone, viewed against the background of post-Civil War efforts in Congress to deal severely with the States of the former Confederacy, would seem to make inescapable the conclusion that Congress was enlarging the habeas remedy as previously understood, not only in extending its coverage to state prisoners, but also in making its procedures more efficacious." *Fay*, 372 U.S. at 415.

211. *See also* Pettibone v. Nichols, 203 U.S. 192 (1906); Reid v. Jones, 187 U.S. 153 (1902); Whitten v. Tomlinson, 160 U.S. 231 (1895); Pepke v. Cronan, 155 U.S. 100 (1892); Cook v. Hart, 146 U.S. 183, 194-95 (1892).

212. Under the statute, a habeas petitioner must have "exhausted the remedies available in the courts of the State . . . [unless] there is either an absence of available State corrective process" or circumstances are such as to render such process "ineffective to protect the rights

As stressed by the Court itself, however, comity does not require the removal or denial of judicial power; rather, the exhaustion precondition is merely "one which relates to the appropriate *exercise* of power."[213] It is a rule of deferral, not of abstention. Clearly, the common law of habeas corpus leaves no doubt that neither federalism nor comity dictates that a state court's determination of the merits of a criminal case is entitled to conclusivity.[214]

With its decision in *Wainwright v. Sykes*,[215] in which the Court began its retreat from its expansive reading of habeas corpus, the federalism/comity principle became an increasingly dominant factor in its decisionmaking. *Sykes* reflected the Court's concern that liberal construction of the writ's application would tend to dilute the significance of the criminal trial itself. The *Sykes* majority reasoned that the trial focuses upon one time and place "in order to decide, within the limits of human fallibility, the question of guilt or innocence."[216]

Despite its continued recognition of the fact that the writ of habeas corpus "holds an honored position in our jurisprudence,"[217] within five years after *Sykes* the Court was bemoaning its "special costs on our federal system."[218] Starting from its major premise that primary authority for defining and enforcing the criminal law lies with the states which bear the initial responsibility for vindicating constitutional rights, the Court sounded the following warning note: "Federal intrusions into state criminal trials frustrate both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights."[219]

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of the prisoner." 28 U.S.C.A. § 2254(b) (West Supp. 1994).

213. Bowen v. Johnston, 306 U.S. 19, 27 (1939) (emphasis added); *see also* Darr v. Burford, 339 U.S. 200 (1950).

214. The closest the Court came to this approach was in the now discredited decision in Frank v. Mangum, 237 U.S. 309 (1915).

215. *See supra* text accompanying note 72.

216. *Sykes*, 433 U.S. at 90. Procedural default, which was targeted in *Sykes*, as well as the Court's abuse-of-the-writ jurisprudence, are directly implicated in the overriding federalism argument. Both "seek to vindicate the State's interest in the finality of its criminal judgments." *McCleskey*, 111 S. Ct. at 1470.

217. *Engle*, 456 U.S. at 126.

218. *Id.* at 128. "We must also acknowledge that writs of habeas corpus frequently cost society the right to punish admitted offenders." *Id.* at 127.

219. *Id.* at 128 (citing Schneckloth v. Bustamonte, 412 U.S. 218, 263-65 (Powell, J., concurring)). Justice O'Connor, writing for herself and four other Justices, carries the argument even further by contending that the "ready availability of *habeas corpus*" may well serve to *diminish* the sanctity of the criminal defendant's constitutional safeguards "by suggesting to the trial participants that there may be no need to adhere to those safeguards

In the setting of abuse-of-the-writ, the Court is, or ought to be, striking a proper balance between federalism and fair review of constitutional deprivations. In the typical habeas claim, the petitioner will surely have raised his constitutional claims on direct appeal. Why not? Why delay relief and his own release from custody? The abuse-of-the-writ doctrine *presupposes* that the habeas petitioner has raised *all* such claims in his (state) direct appeal. If one or several of his claims were omitted from a state habeas petition, this hardly undermines the federalism/comity doctrine.

The "abuse" principle is aimed at claims withheld from a prior *federal* habeas proceeding. In that context, the balance sought to be struck between the goals of "finality" and fair collateral review makes "federalism" irrelevant. The issue is whether a federal court should hear a claim that was withheld from another federal court. Within this framework, the principle of comity is totally irrelevant.

Only in the case where a constitutional claim has been omitted from the *state* appeal process or where a *state* procedural default has occurred, whether by reason of excusable or inexcusable oversight, is federalism clearly implicated. Ostensibly, in order to reduce federal "intrusions into state trials," which only serve to "frustrate the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights,"[220] the Court has adopted the cause-and-prejudice test so as to assure federal deference.[221] Under this increasingly rigid rule,[222] the Court has invariably barred habeas review where a procedural default has occurred and the state court's decision rested on "independent and adequate" state grounds.[223]

In fact, the interests of true federalism, as set forth in our constitutional framework, are badly served by this heavy emphasis on

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during the trial itself." *Id.* at 127. Such a Machiavellian suggestion carried the federalism argument to, and possibly beyond, its credible limits.

220. *Id.* at 128.

221. *See Sykes*, 433 U.S. at 87. "We believe the adoption of the . . . rule in this situation will have the salutary effect of making the state trial on the merits the 'main event,' so to speak, rather that a 'tryout on the road' for what will later be the determinative federal habeas hearing." *Id.* at 90.

222. In order to overcome the *Sykes* bar, the state prisoner must demonstrate *both* "cause" for the default *and* "prejudice" as a result of the unconstitutional violation.

223. *See* Engle v. Isaac, 456 U.S. 107 (1982); Murray v. Carrier, 477 U.S. 478 (1986); Smith v. Murray, 477 U.S. 527 (1986); Coleman v. Thompson, 111 S. Ct. 2546 (1991). By 1991, the Court had all but overruled the "deliberate bypass" test laid down in *Fay v. Noia*. "*Fay* was based on a conception of federal/state relations that undervalued the importance of state procedural rules. The several cases after *Fay* that applied the cause and prejudice standard to a variety of state procedural defaults represent a different view." *Coleman*, 111 S. Ct. at 2565.

cost-effectiveness thinly disguised as "federalism." The judicial principle of federalism was never intended to insulate state courts from federal intervention, regardless of how legitimate that intercession might be. To the contrary, federalism was developed as a judicial doctrine the purpose of which was to protect the constitutional rights of all citizens — particularly, but not solely, Fourteenth Amendment rights — *against* the states.[224]

The co-equality of the branches of government does not have an equivalent "separation of powers" *within* the judiciary, federal and state. The driving engine of our federal system is set forth in unmistakable terms in Article VI of the United States Constitution: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land: and the *Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.*"[225] The adoption of the Thirteenth, Fourteenth, and Fifteenth Amendments enhanced federal authority still further at the clear expense of the states. The passage of these Constitutional Amendments, taken in conjunction with the nearly concomitant passage of the 1867 habeas statute and the Civil Rights Acts,[226] created a wholly different "federalism." This statutory admixture, aimed directly at safeguarding *federal* rights, was clearly intended to "interpose the federal courts between the States and the people, as guardians of the people's federal rights — to protect the people from unconstitutional action."[227]

The *Sykes-Engle-Coleman* trilogy reflects more of a zealous attempt to reduce the burgeoning docket of habeas claims and appeals than a doctrinal analysis of Constitutional federalism. The Court's readiness to find grounds for abstention in the name of prismatic views of "federalism" does not wash. History and the Court's own case law teach the contrary.[228]

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224. LAWRENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 330-50 (2d ed. 1988); GERALD GUNTHER, CONSTITUTIONAL LAW 882-93 (12th ed. 1991). In Cohens v. Virginia, 19 U.S. (6 Wheat) 264, 415-16 (1821), Chief Justice Marshall observed that if state courts were the final jurisdiction over federal causes of action, the result would be a "hydra in government, from which nothing but contradiction and confusion can proceed."

225. U.S. CONST. art. VI (emphasis added).

226. 42 U.S.C. §§ 1981 and 1982 (West Supp. 1994); 42 U.S.C. § 1983 (West Supp. 1994); 42 U.S.C. § 1985 (West Supp. 1994). Sections 1983 and 1985(3) are derived directly from the Ku Klux Klan Act of 1871, 17 Stat. 13.

227. Mitchum v. Foster, 407 U.S. 225, 242 (1972); *see also* Reed v. Ross, 468 U.S. 1, 10 (1984) (citing *Mitchum*).

228. It is worth recalling the opinion of one of the Court's more "deferential" Justices, Felix Frankfurter, who, in his separate opinion in *Brown v. Allen*, declared that federal habeas

The Court's recent federal habeas jurisprudence has transformed federalism into its opposite. In the short span of fifteen years, there has been a distinct tilt of the Burger-Rehnquist majority away from strict enforcement of the federal constitutional rights of criminal defendants and in favor of state courts' sovereignty and "finality." Decrying what he characterizes as the Court's creation of "a Byzantine morass of arbitrary, unnecessary, and unjustifiable impediments to the vindication of federal rights,"[229] Justice Blackmun (joined by Justices Marshall and Stevens) has declared:

> [D]isplaying obvious exasperation with the breadth of federal 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 prisoner seeking review of his federal constitutional claims.[230]

### *C. Scarcity of Resources*

Scarcity of resources is the least persuasive of the Court's rationales for narrowing availability of habeas relief. Readily reducible to a cost/benefit balance sheet, this rationale has more in common with prudential accounting than jurisprudential analysis. However, given the Court's repeated resort to this principle in its recent habeas jurisprudence, it merits serious attention.

With its growing emphasis on the "costs" of habeas review, the Court majority, speaking through Justice Kennedy, has declared that "[f]ederal collateral litigation places a heavy burden on scarce federal judicial resources, and threatens the capacity of the system to resolve primary disputes."[231] Justice Kennedy is quite correct. The burden is a heavy one. What he overlooks is fair attribution of the major source of this burden. Conveniently ignored by the Justices who rely upon a "scarce judicial resources" argument is their own direct responsibility for this pattern of squandering time and resources in the typical habeas case.

Consider the following "road-map." The highway leading to habeas relief, thanks to judicial activism (some might call it

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jurisdiction "is not a case of a lower court sitting in judgment on a higher court. It is merely one aspect of respecting the Supremacy Clause of the Constitution whereby federal law is higher than State law." Brown v. Allen, 344 U.S. 443, 510 (1953) (opinion of Frankfurter, J.).

229. *Coleman*, 111 S. Ct. at 2569 (Blackmun, J., dissenting).

230. *Id.*

231. *McCleskey*, 111 S. Ct. at 1469.

"legislation") by the Burger-Rehnquist Court, has become a veritable minefield of procedural booby traps clearly intended to bar hearings on the merits.[232] The present roadblocks and detours with respect to "cause and prejudice" analysis look something like this:[233]

1. A prisoner files a second or subsequent habeas petition.
2. The government then pleads "abuse of the writ."
3. The government meets its burden if, "with clarity and particularity,"[234] it lays out the prior habeas history of the case, identifies the claims that are raised for the first time, and sets forth the basis for its claim of abuse.
4. Before the burden shifts to the petitioner to explain his failure to raise his new claim earlier, however, the habeas court will be called upon to make the following findings of fact:
   (a) that the state procedure at issue is valid and applicable to the case;
   (b) that the state has invoked the rule in the appellate proceedings; and
   (c) that the state court "clearly and expressly"[235] relied on the state procedural rule in rejecting the prisoner's claim.

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232. This pattern has, of course, escalated under the leadership of Chief Justice Rehnquist who has repeatedly and quite openly expressed his disappointment at the fact that capital prisoners are not being executed with sufficient frequency and with all deliberate speed. Placing this judicial deficiency squarely at the door of "excessive" resort to habeas corpus review, the Chief Justice has urged "reform" of habeas review so as to substantially eviscerate its effectiveness and availability. *See, e.g.*, Marcia Coyle et al., *Rehnquist Is Still Hoping for Habeas Reform*, NAT'L L.J., Jan. 14, 1991, at 5; William H. Rehnquist, *Remarks*, A.B.A. Midyear Meeting (Feb. 6, 1989) (on file with the *Dickinson Law Review*); Linda Greenhouse, *Supreme Court Puts Sharp Curbs on Repeated Death-Row Appeals*, N.Y. TIMES, April 17, 1991, at A1.

233. The outline which follows is based on the Court's most recent articulation of this standard in *McCleskey*, 111 S. Ct. at 1470. In the course of restating the current presumption against adjudication on the merits both of claims defaulted in state court and claims defaulted in the "first round" of federal habeas, Justice Kennedy offers a short course on the procedural rabbit-warren for habeas petitioners developed by the present Court majority.

234. *McCleskey*, 111 S. Ct. at 1470.

235. *See* Harris v. Reed, 489 U.S. 255, 263 (1989) (a "procedural default does not bar consideration of a federal claim on either direct or habeas review unless the last state court rendering a judgment in the case clearly and expressly states that its judgment rests on a state procedural bar") (citations omitted). *But cf. Coleman*, 111 S. Ct. at 2557-59.

5. In addition to the foregoing, a diligent federal trial court might seek to determine the following:[236]

   (a) whether the state has consistently applied the particular procedural rule under similar circumstances;

   (b) whether the rule serves a legitimate state interest; and

   (c) whether the rule places the defendant in the dilemma of deciding whether to surrender one constitutional right in order to exercise another.

6. The burden then shifts to the petitioner to show cause (as defined in the *Sykes-Engle-Carrier* line of cases[237]) for the procedural default.

7. If the petitioner succeeds in establishing such cause, then the second *Sykes* prong of actual prejudice resulting

236. *See* 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, 54 (1991).

237. Both "cause" and "prejudice" have generally received pinched interpretation since *Sykes*. As to "cause," *see, e.g.*, Delo v. Stokes, 110 S. Ct. 1880 (1990) (court abused discretion in considering new claim which had been readily apparent and not raised until fourth federal petition); Woodward v. Hutchins, 464 U.S. 377, 379 (1984) (per curiam) (absence of explanation for asserting three claims in a second petition not raised in the first); and Antone v. Dugger, 465 U.S. 200 (1984) (claims presented for first time in second petition rejected where sought to be excused by counsel's lack of time to familiarize himself with case and to identify all the claims in first habeas case). *See also* Dugger v. Adams, 489 U.S. 401, 410 (1989); Kuhlmann v. Wilson, 477 U.S. 436, 444 n.6 (1986); Straight v. Wainwright, 476 U.S. 1132, 1132-33 (1986).

*directly* from the constitutional violation[238] must be demonstrated.

8. If the district court determines "as a matter of law"[239] that the petitioner cannot meet the *Sykes* standard for review, a habeas evidentiary hearing on cause and prejudice will be denied.[240]

In the course of its opinion abandoning the harmless error rule of *Chapman*[241] as a standard for federal habeas review in *Brecht v. Abrahamson*,[242] the Court undertook a cost/benefit analysis. Chief Justice Rehnquist, for the majority, reasoned that the "costs" of applying the *Chapman* standard "outweigh the additional deterrent effect, if any, which would be derived from its application on collateral review."[243] The retrial of defendants whose convictions have been set aside "imposes significant 'social costs,' including the expenditure of additional time and resources for all the parties involved . . ."[244]

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238. The case law on "actual prejudice" has been no less crimped. Recall that *United States v. Frady* added the qualifying words "actual and substantial." *Frady*, 456 U.S. at 171-72 (failure on Frady's part to present colorable claim that he acted without malice). *See also* William J. Stuntz & John C. Jeffries, Jr., *Ineffective Assistance and Procedural Default in Federal Habeas Corpus*, 57 U. CHI. L. REV. 679, 684 (1990), which defines *Sykes* "prejudice" as "some likelihood — greater than that sufficient to create a reasonable doubt but perhaps less than 'more likely than not' — that the error or default affected the outcome of the prosecution." In point of fact, the *Sykes* opinion expressly *declined* to define this vague precept. *Sykes*, 433 U.S. at 91. Since that decision the Court has only applied the term twice, once in the context of a *non*-constitutional jury challenge, which left "the import of the term in other situations . . . an open question," *Frady*, 456 U.S. at 168; and a second time recently in an ineffective assistance of counsel case involving failure to make a capital sentencing objection which was supported by a subsequently overruled decision. Lockhart v. Fretwell, 113 S. Ct. 838 (1993). For an analysis concluding that *Sykes* "prejudice" is even more stringent than the ineffective representation "prejudice" in Strickland v. Washington, 466 U.S. 668, 687-96 (1984), see Maria L. Marcus, *Federal Habeas Corpus After State Court Default: A Definition of Cause and Prejudice*, 53 FORDHAM L. REV. 663, 701-03 (1985).

239. *McCleskey*, 111 S. Ct. at 1470.

240. A theoretical "escape-hatch" is given lip-service by the *McCleskey* court — namely, that even absent a showing of cause and prejudice, a petitioner's procedural default may nonetheless be excused if a "fundamental miscarriage of justice" would likely result from the court's failure to entertain the claim. *Id.* "Fundamental miscarriage of justice," in the view of the Rehnquist majority, has been pared down to refer to one who is "actually innocent." *See, e.g., Engle*, 456 U.S. at 135; *Murray*, 477 U.S. at 495-96; *Harris*, 489 U.S. at 263.

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

242. 113 S. Ct. 1710 (1993).

243. *Id.* at 1721.

244. *Id.*

In *Withrow v. Williams*,[245] decided on the same day as *Brecht*, Justice O'Connor cited the imposition of "substantial costs" as sufficient reason for barring *Miranda* claims on habeas review. Whereas on direct review, Justice O'Connor contends, the damage to the truth-seeking function wrought by the *Miranda* rule is "an acceptable sacrifice" out of respect for constitutional values and deterrence, on collateral review the "balance between the costs and benefits shifts . . . compel[ling] *Miranda*'s exclusion from habeas."[246] Justice O'Connor concludes that, not unlike the exclusionary rule, "application of *Miranda*'s prophylactic rule on habeas consumes scarce judicial resources on an issue unrelated to guilt or innocence."[247]

The authority most frequently cited for the "scarcity of resources" rationale is Justice Powell's concurring opinion in *Schneckloth v. Bustamonte*.[248] In this federal habeas review of a search and seizure claim,[249] Justice Powell stressed the fact that Fourth Amendment petitioners are "usually guilty," and that the evidence obtained from searches and seizures, whether lawful or unlawful, is often "the clearest proof of guilt."[250] With this emphasis upon the "reliability" of the inculpatory evidence, the justness of the incarceration, the core societal value of protecting the "innocent," and the irrationality of a legal system that serves "mechanistic rules quite unrelated to justice in a particular case,"[251] it was but a short step to condemning the extension of habeas corpus as a drain upon limited judicial resources.

In the course of framing its "limited resources" argument, the Court correctly noted that at the point where a habeas petition reaches the federal court, the case has already been litigated in two or more tiers of state courts.[252] Since state courts are under no less a duty than federal courts to protect constitutional rights, the habeas court is

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245. 113 S. Ct. 1745 (1993).

246. *Id.* at 1759 (O'Connor, J., concurring and dissenting in part). Citing her own concurring opinion in Duckworth v. Eagan, 495 U.S. 195, 211 (1989), Justice O'Connor, reflecting considerable skepticism as to *Miranda*'s deterrent function, declared: "The awarding of habeas relief years after conviction will often strike like lightning, and it is absurd to think that this added possibility . . . will have any appreciable effect on police training or behavior." *Withrow*, 113 S. Ct. at 1760.

247. *Id.*

248. 412 U.S. 218, 250 (1973).

249. This case was a harbinger for Stone v. Powell, 428 U.S. 465 (1976), wherein Justice Powell, writing the majority opinion three years after *Schneckloth*, found the "costs" of litigating the exclusionary rule by way of habeas review too high and stated that habeas corpus should be limited primarily to protect the *innocent*.

250. *Schneckloth*, 412 U.S. at 258 (Powell, J., concurring).

251. *Id.* at 258-59.

252. *Id.* at 259.

being called on to perform a task that should have been performed at the state-court level. Why, then, repeat the process unnecessarily, taxing limited federal judicial resources which are so sorely needed not only in civil actions, but also in criminal trials and appeals "which deserve our most careful attention"?[253] It strains credulity to believe that our highest court would raise the scarcity of federal judicial resources to such a level as to require federal habeas courts to compromise their core function of protecting constitutional rights, but it is impossible to read the *Schneckloth-Powell-McCleskey* line of cases otherwise.

Despite the current ubiquity of habeas corpus petitions,[254] access to a full and fair determination of constitutional issues in federal courts cannot fall victim to cost/benefit crassness. Even Justice Harlan, a strong advocate of the finality-federalism principle whose dissents in *Fay* and *Sanders* are often cited by the present Supreme Court majority,[255] considered habeas corpus to be the fundamental "safeguard against unlawful custody," requiring the federal courts to address the same question: "[I]s the detention complained of 'in violation of the Constitution or laws or treaties of the United States'?"[256]

The responsibility of the federal courts is to apply the habeas corpus "safeguard" against violations of the Constitution, federal law, and treaties. The Constitution says nothing about the "costs" of safeguarding personal liberty. Even the staunchest habeas corpus revisionist will look long and hard for *constitutional* support for the proposition that the hard judicial currency of the Great Writ may be debased on the grounds of inadequate judicial resources. "Scarcity of resources" — federal, state, or municipal — has never been accepted by federal courts as a justification for failure to meet constitutional requirements.[257] Four decades of litigation of civil rights, voting

253. *Id.* at 260.

254. In 1990, more than 12,000 petitions were filed in federal courts compared to 127 in 1941. *See* L. RALPH MECHAM, ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 191 (1991). An entire volume of the U.S. Code Annotated is now devoted exclusively to reports of federal habeas decisions adjudicating the constitutional rights of state prisoners. It consists of 1,169 pages, plus a cumulative supplement ("pocket part") comprising an additional 245 pages. 28 U.S.C.A. § 2254 (1993).

255. *See, e.g.*, Sanders v. United States, 373 U.S. 1, 24-25 (1963).

256. *Fay v. Noia*, 372 U.S. at 449 (Harlan, J., dissenting), quoting from the language of 28 U.S.C. § 2254, which has remained unchanged since 1867.

257. The strict scrutiny standard of judicial review which is presented *infra* part VII as the only appropriate standard for habeas review in capital cases would require a showing of a "compelling governmental interest." This interest can never be established on the basis of

rights, prison overcrowding, children's rights, and the segregation cases all bear ample witness to this axiomatic principle.

As a practical matter, those prisoners who actually succeed in obtaining their freedom by way of federal habeas corpus have been few and far between. Those fortunate few who prevail in their habeas petitions are "persons whom society has grievously wronged and for whom belated liberation is little enough compensation. Surely no fair-minded person will contend that those who have been deprived of their liberty without due process of law ought nevertheless to languish in prison."[258] Unfortunately, there are indeed such "fair-minded persons" who have contended precisely that. What is most unfortunate is the fact that they presently occupy a majority of the seats on our Supreme Court.

## VI. The Capital Punishment Nexus

In the view of one commentator, "[t]he Supreme Court has taken upon itself the task of interpreting *habeas corpus* out of existence."[259] In their analysis of recent developments in the "Rehnquist Era Court," Messrs. Tabak and Lane point out that the Burger-Rehnquist Court has enacted "reforms" which have effectively "eliminate[d] the writ of habeas corpus for many death row inmates," converting it "into an immensely complex morass of procedural rules and legal obstacles."[260] That the Court has been actively engaged in judicial legislating in recent years is no longer open to serious question. This was candidly acknowledged recently by Chief Justice Rehnquist in a case in which *Chapman* harmless error was, in effect, "legislated" out of existence in collateral appeals.[261] This was done on the theory that, "[i]n the absence of any express statutory guidance from Congress, it remains for this Court to . . . fill the gaps of the habeas corpus statute . . ."[262]

Two important legal consequences flow from this candid statement by the Court. First, and most important, as with any "legislation,"

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economy concerns. *See* Memorial Hospital v. Maricopa County, 415 U.S. 250, 263 (1974); Shapiro v. Thompson, 394 U.S. 618, 632-33 (1969).

258. *Fay*, 372 U.S. at 441.

259. Marcia Coyle, *Habeas: Results Over Principles? Court Curtails Appeals*, NAT'L L.J., Mar. 19, 1990, at 3 (quoting Professor Ira P. Robbins).

260. Tabak & Lane, *supra* note 236, at 4-5.

261. Brecht v. Abrahamson, 113 S. Ct. 1710 (1993).

262. *Id.* at 1719 (citing McCleskey v. Zant, 111 S. Ct. 1454 (1991); Wainwright v. Sykes, 433 U.S. 72 (1977); Sanders v. United States, 373 U.S. 1 (1963); Townsend v. Sain, 372 U.S. 293 (1963)).

judicial "legislation" is open to review on grounds of constitutionality, inasmuch as fundamental constitutional rights (due process, cruel punishment, and habeas corpus itself) are directly implicated. Second, as the sole constitutional repository of the power to legislate, Congress has the authority to restore that which the Supreme Court has seen fit to take away. The advocate for habeas reform cannot fail to take into account the respective and different roles of the Court and Congress as laid down in Articles I and III of the Constitution and to frame recommendations for change accordingly.

The Court's repeated references to such code words as "finality" and "deference"[263] thinly disguise its clear result orientation. Unless defense practitioners are willing to examine root causes and deal with the hard questions posed by the Supreme Court's recent habeas jurisprudence, both the viability and accessibility of habeas corpus are bound to become increasingly more problematic. No disease has ever been cured without discovery and careful study of its cause and transmission. The progressive degeneration of habeas corpus is no exception.

A careful review of the recent habeas case law reveals a splintered Supreme Court haunted by the growing proliferation and application of capital punishment statutes. The bulk of the Court's habeas decisionmaking has come from *capital* habeas cases. This should come as no surprise. Ever since the resumption of executions in 1977,[264] thirty-five states as well as the federal and United States military authorities have adopted capital punishment statutes.[265] The past sixteen years have witnessed a growing pattern among the states to apply the death penalty, and capital punishment has been meted out randomly at best, and discriminatorily at worst.[266]

The tortuous trail of habeas corpus law — from *Powell* to *Sykes* to *Teague* to *McCleskey* to *Brecht* — if at all comprehensible, can be

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263. Such deference to state court proceedings was not invented by the Burger-Rehnquist Court. *See* Walter V. Schaefer, *Federalism and State Criminal Procedure*, 70 HARV. L. REV. 1 (1956).

264. Furman v. Georgia, 408 U.S. 238 (1972), brought all executions in this country to a temporary halt.

265. DEATH ROW, U.S.A., *supra* note 98, at 1.

266. As of July 1993, a total of 210 executions had been carried out (with an additional 37 suicides of death-row prisoners), starting with the execution of Gary Gilmore on January 17, 1977. Of these, 114 (54.28%) of those executed were white, 82 (39.05%) were black, and 13 (6.19%) were Latino. *Id.* at 4. As of April 20, 1993, there were 2,750 death-row inmates "known" to the NAACP Legal Defense and Education Fund, of whom 1,097 (39.89%) were black and 194 (7.05%) were Latino or Latina. *Id.* at 1. In a span of just three months, the death-row population rose by 21 and the number of executions by 11.

understood better as *effect* than cause. The developing malaise of habeas corpus is directly traceable to the states' increasing resort to the death penalty as a means of criminal punishment. Modern habeas law is inextricably interconnected with the law of capital punishment. It is historically and jurisprudentially significant that *Stone v. Powell*, the first major retreat in habeas jurisprudence, was announced in the same year (1976) in which the Court held that capital punishment was no longer unacceptably "cruel"[267] and was not constitutionally impermissible.[268] This "constitutionalization" of the death penalty was accompanied by the imposition of various procedural safeguards to guarantee that the states' imposition of the death penalty was neither arbitrary nor capricious. Having erected the procedural safeguards, as in *Lockett v. Ohio*,[269] the Court then proceeded to introduce restrictive principles such as "full and fair" hearing, "cause and prejudice," "procedural default" and non-retroactivity of "new" constitutional principles, in a thinly disguised effort to stem the tide of capital habeas petitions.[270]

The direct link between capital punishment and the "ever-shrinking authority" of the federal courts to apply habeas corpus so as to enforce the Court's own procedural safeguards in capital cases was clearly recognized by Justice Blackmun in *Sawyer v. Whitley*:[271]

> Since Gregg v. Georgia, the Court has upheld the constitutionality of the death penalty where sufficient procedural safeguards exist to ensure that the State's administration of the penalty is neither arbitrary nor capricious . . . At the time those decisions issued, federal courts possessed much broader authority than they do today to address claims of constitutional error on habeas review and, therefore, to examine the adequacy of a State's capital scheme and the fairness and reliability of its decision to impose the death penalty in a particular case. The more the Court constrains the federal courts' power to reach the constitutional claims of those

267. Furman v. Georgia, 408 U.S. 238 (1972). While *Furman* technically was a per curiam decision that only alluded briefly to the cruel-and-unusual punishment clause of the Eighth Amendment, *id.* at 239-40, there were nine separate opinions written.

268. Gregg v. Georgia, 428 U.S. 153 (1976); Proffitt v. Florida, 428 U.S. 242 (1976); Jurek v. Texas, 428 U.S. 262 (1976); Woodson v. North Carolina, 428 U.S. 280 (1976); Roberts v. Louisiana, 428 U.S. 325 (1976). No single opinion was joined in by a majority of the Justices. The five cases produced a grand total of twenty-four opinions.

269. 438 U.S. 586 (1978).

270. *See supra* Part III.

271. 112 S. Ct. 2514 (1992) (Blackmun, J., concurring).

sentenced to death, the more the Court undermines the very legitimacy of capital punishment itself.[272]

The movement of the Court away from *Furman* in 1972 to the quintet of decisions four years later "constitutionalizing" the death penalty owed its justification to the Court's willingness to accept state laws providing for so-called "guided discretion" for the sentencing authority.[273] The theory embraced two facially contradictory principles: (1) the need to *narrow* the class of death-eligible persons, and (2) the need to *broaden* the scope of the relevant evidence both as to the crime and the sentencing. The dialectic is completed in the form of a synthesis whereby these two "opposites" are merged to serve the socio-juridical objective of making capital punishment palatable and seemingly rational.[274] These changes, more often than not purely cosmetic, have provided a transparent veneer covering a system which is, by its very nature, replete with impermissible arbitrariness.[275]

It is axiomatic that the defense of a capital defendant is an enormously difficult and demanding responsibility.[276] A capital case

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272. *Id.* at 2530. The *Gregg* decision, while removing the bar to capital punishment, laid down the core proposition that the death penalty may not be imposed "under sentencing procedures that create[] a substantial risk that [the death penalty] would be inflicted in an arbitrary and capricious manner." *Gregg*, 428 U.S. at 188 (opinion of Justices Stewart, Powell, and Stevens). The decision in *Lockett v. Ohio* added the further condition that the sentencing authority must "not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." Lockett v. Ohio, 438 U.S. 586, 604 (1978) (opinion of Chief Justice Burger) (emphasis in original).

273. The sentencing scheme had to "genuinely narrow the class of persons eligible for the death penalty." Zant v. Stephens, 462 U.S. 862, 877 (1983).

274. Justice Stevens, joined by Justices Blackmun and O'Connor, sees these twin processes as "ensuring that a capital sentence is the product of individualized and reasoned moral decisionmaking." Sawyer v. Whitley, 112 S. Ct. 2514, 2534 (1992) (Stevens, J., concurring).

275. It is certainly arguable that the need for effective federal habeas corpus litigation, preceded by state-court review which, "though adequate in theory, [is] . . . not available in practice," Monroe v. Pape, 365 U.S. 167, 174 (1961), is as crucial today as it was in the days of Frank v. Mangum, 237 U.S. 309 (1915) and Moore v. Dempsey, 261 U.S. 86 (1923). *See supra* text accompanying notes 1-14.

276. Counsel must not only be able to deal with the most serious crime — homicide — in the most difficult circumstances, but must also be thoroughly knowledgeable about a complex body of constitutional law and unusual procedures that do not apply in other criminal cases. Bifurcated capital cases involve two trials with two different sets of issues. Investigation must often be undertaken in several states and, in some cases, in foreign countries. And penalty phase preparation requires extensive and generally unparalleled investigation into personal and family history.

Report of A.B.A. Task Force on Death Penalty Habeas Corpus, *reprinted in* Ira P. Robbins, *Toward a More Just and Effective System of Review in State Death Penalty Cases*, 40 AM. U.

invariably is tried in a state trial court. At this crucial proceeding, defense counsel must function competently and "effectively" to see to it that the defendant receives a fair and speedy trial. The facts surrounding the offense must be skillfully and carefully investigated. This requires preparation and diligence to ensure that the jury is fairly composed and peremptory challenges are not employed for race-exclusionary purposes; that full discovery is pursued; that the state does not conceal exculpatory material, relevant evidence, or witnesses; that requests to charge the jury are prepared and timely filed; that the actual jury instructions given by the court are carefully examined for constitutional or statutory error; and that all post-conviction remedies are exhausted. Errors of constitutional magnitude often occur in capital cases,[277] and their effect can be fatal not just to the outcome of the trial, but fatal in fact to the accused.

Conviction is followed by direct and, if habeas corpus is pursued, collateral appeals.[278] The quality of the lawyering at each appellate stage is often crucial to the outcome. Numerous studies[279] have marshalled extensive, frequently dramatic, testimony to support the proposition that competent and experienced counsel are *not* provided to the typical indigent defendant charged with a capital crime. What is most noteworthy about these studies is their near unanimity in the conclusion that less-than-competent and inexperienced trial counsel in

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L. REV. 1, 64 (1990).

277. This proposition is illustrated by the remarkable number of *unanimous* grants of habeas relief which have issued even from the Burger-Rehnquist Court. *See, e.g.*, Maynard v. Cartwright, 486 U.S. 356 (1988) (unconstitutionally vague and overbroad statute); Amadeo v. Zant, 486 U.S. 214 (1988) (jury commissioner's intentional exclusion of blacks and women from jury); Hitchcock v. Dugger, 481 U.S. 393 (1987) (exclusion of mitigating factors from sentencing jury's consideration); Wainwright v. Greenfield, 474 U.S. 284 (1985) (conviction on basis of exercise of right to silence); Estelle v. Smith, 451 U.S. 454 (1981) (conviction on basis of information derived by state-appointed psychiatrist from unrepresented defendant).

278. Justice Brennan points out that a habeas petition does not implicate appellate jurisdiction at all. "Habeas lies to enforce the right of personal liberty; when that right is denied and a person is confined, the federal court has the power to release him. Indeed, it has no other power; it cannot revise the state court judgment; it can act only on the body of the petitioner." *Fay*, 372 U.S. at 430-31 (quoting *In re* Medley, 134 U.S. 160, 173 (1890)).

279. By way of recent examples, *see* Vivian Berger, *The Chiropractor as Brain Surgeon: Defense Lawyering in Capital Cases*, 18 N.Y.U. REV. L. & SOC. CHANGE 245 (1991); Tabak & Lane, *supra* note 236, at 29-35; Anthony Paduano & Clive A. Stafford Smith, *The Unconscionability of Sub-Minimum Wages Paid Appointed Counsel in Capital Cases*, 43 RUTGERS L. REV. 281 (1991). *See also* Statement of John J. Curtin, Jr. and James S. Liebman, on behalf of the American Bar Association, before the Subcommittee on Civil and Constitutional Rights of the Judiciary Committee of the U.S. House of Representatives concerning Fairness and Efficiency in Habeas Corpus Administration 29-40 (July 17, 1991) (manuscript on file with the *Dickinson Law Review*), citing the findings of the A.B.A. Task Force appointed in 1989 to study death-penalty habeas reform.

death-penalty trials and post-conviction proceedings are the rule far more than the exception. This well-documented phenomenon is a direct result of the inadequate, often grotesquely insufficient, resources available for indigent defendants at trial and at all post-conviction stages.[280]

This phenomenon is the real explanation for the ubiquitous "squandering of scarce judicial resources"[281] which the Supreme Court has pointed to as one of the reasons for the escalation of its offensive in recent years against the "abuse" of habeas relief. The *reality* is that the expanded resort to habeas corpus by capital defendants has less to do with "abuse of the writ" than with the serious weakness of the criminal justice system precisely at the point where it should be at its maximum "reliability"[282] — when the government

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280. At least six States have a maximum fee of $1,500 or less for appointed counsel to try a capital case — a fee that many lawyers would find insufficient to permit adequate representation in routine drunk-driving cases. Only one or two States provide full compensation . . . . Typically, counsel handling State postconviction petitions receive *no* remuneration. Poor compensation almost inevitably means that virtually the only lawyers who are available to handle capital cases are inexperienced and ill-prepared and that the few more competent lawyers who become involved cannot develop any expertise because they are financially unable to handle more than one capital case. Not surprisingly, the inexperienced and inexpert counsel who handle many of the cases frequently conduct inadequate factual investigations, are unable to keep abreast of the complex and constantly changing legal doctrines that apply in capital litigation, and mistakenly fail to make timely objections to improper procedures. Indeed, the Task Force heard overwhelming evidence of incompetent representation in death cases — ignorance of death penalty law, overlooked objections, failure to present mitigating evidence, failure to file briefs on appeal, and similar deficiencies.

Curtin & Liebman, *supra* note 279, at 30 (emphasis in original). As of 1991, Arkansas, Louisiana, and Mississippi had set a statutory upper limit on compensation to capital defense lawyers of $1,000; Illinois and Kentucky were more generous, setting their fee cap at $1,250; Georgia, Alabama, and Arkansas provided little or no compensation. Paduano & Smith, *supra* note 279, at 349-53 ("Table A"). Several of the States designated above happen to have a disproportionately large number of death-row populations: Alabama (117); Illinois (153); Georgia (107); Mississippi (52); Louisiana (47); and Arkansas (33). DEATH ROW, U.S.A., *supra* note 98, at 10-25. The funding available for expert witnesses borders on the farcical. *See* Tabak & Lane, *supra* note 236, at 32.

281. *See supra* part V.C.

282. The Court has recognized the unique nature of capital punishment. In McCoy v. North Carolina, 494 U.S. 433 (1990), it held that the Eighth Amendment requires maximum reliability of the process by which capital punishment may be imposed. More than just reliability in the sentencing process, "[i]t also mandates a reliable determination of guilt" because "death is a different kind of punishment from any other which may be imposed in this country . . . . From the point of view of the defendant, it is different both in its severity and its finality." Beck v. Alabama, 447 U.S. 625, 637 (1980) (quoting Gardner v. Florida, 430

exercises its ultimate authority and deliberately takes the life of one of its own citizens.

Nor can it be said that the writ is being abused in the face of the following dramatic statistic presented in July 1991 by John J. Curtin, Jr., then-president of the American Bar Association: "The high level of constitutional error implanted in capital trials and appeals by uncompensated, inexpert, and ill-prepared counsel has required the federal courts to overturn and order retrials of more than 40 percent of the post-1976 death sentences that they have reviewed in habeas corpus proceedings."[283]

These studies undermine all three legs of the Court's tripod which are cited as justification for the dramatic retrogression of its habeas jurisprudence. Given the practical and harsh realities of the capital defense bar, the commands of "federalism" (read deference to state court decisions) and "finality" become at best irrelevant to the high purpose of the Great Writ, and at worst cruel hoaxes. The harsh reality of ineffective representation by frequently inexperienced counsel combined with the pattern of constitutional error in current habeas

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U.S. 349, 357 (1977)).

283. Curtin & Liebman, *supra* note 279, at 31. In sharp contrast, constitutional violations were "found in only 1 to 5 percent of noncapital habeas corpus proceedings" in the A.B.A. Task Force study. *Id.* at n.98. To its credit, the Biden Bill, *supra* note 32, is largely devoted to the provision of qualified counsel through mandatory specific mechanisms in capital cases. These include, *inter alia*, the following: a "State Counsel Certification Authority" (to establish "standards governing qualifications of counsel"); statutorily defined "Minimum Counsel Standards," (including "procedural rules regarding timeliness of filings and procedural default," as well as qualifying trial experience generally, *capital* trial experience in particular, and appellate experience); specific and relatively high standards to qualify as counsel in capital post-conviction proceedings; and, most significantly, a requirement that the highest state court having criminal jurisdiction "*shall*, after notice and comment, establish a schedule of hourly rates for the compensation of attorneys appointed pursuant to this section that are *reasonable in light of the qualifications of attorneys appointed and the local practices for legal representation in cases reflecting the complexity and responsibility of capital cases.*" Biden Bill, *supra* note 32, at 16-28 (emphasis added). Failure of the state court system to make such provisions would give rise to the granting of injunctive or declaratory relief in the federal courts. *Id.* at 14, 28. Funding for the program called for in the Biden Bill contemplates federal assistance by way of grants through the Bureau of Justice Assistance. *Id.* at 31-34 ("Part R — Grants for State Capital Litigation"). Unfortunately, the bill also contains the following contradictory and confusing language, which hopefully will be amended and clarified in Committee:

> Nothing in this section changes the constitutional standard governing claims of ineffective assistance of counsel pursuant to the sixth amendment to the Constitution of the United States. A determination of noncompliance with this section (as opposed to the facts which support such a determination) shall not provide a basis for a claim of constitutionally ineffective assistance of counsel.

*Id.* at 29.

litigation (disregarding those cases in which the error was found to be "harmless"[284]) make expensive and time-consuming pressures on federal courts inevitable. Were the situation otherwise, there would be strong reason to suspect that the principles of "fundamental fairness" and relief for those whom society has "grievously wronged" — principles of criminal justice to which all of the present and prior occupants of the Supreme Court (at minimum) give lip-service — have become hollow and devoid of substance. As for the third leg of the "tripod" referred to above, namely, the "squandering of scarce federal resources," the short answer is that saving the lives of *factually* or *legally* innocent prisoners is not a luxury, but a necessity. A constitutional error rate of forty percent is appalling. Small wonder that enormous amounts of resources are spent (but surely not "squandered") in federal habeas litigation in order to examine, review, and, if necessary, re-review the results of all-too-common poor lawyering.[285]

Symbolic of the present Court-majority's blindness to the real world of capital defense litigation is its 1989 decision in *Murray v. Giarratano*.[286] This case epitomizes the Rehnquist majority's obsession with "cost/benefit" analysis leading invariably to the short-weighing of fundamental constitutional rights so as to skew the scales of criminal justice and cheapen the value of human life. *Giarratano*[287] stands for two propositions, equally insidious and

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284. Chapman v. California, 386 U.S. 18 (1967). The constitutional error, which had to be shown to be harmless beyond a reasonable doubt, was recently relaxed for the state on habeas review in contrast to direct appellate review. Thanks to its 5-4 decision in Brecht v. Abramson, 113 S. Ct. 1710 (1993), the Court has lessened the habeas burden on the government in the case of errors of the "trial type." The Court substituted the rule in Kotteakos v. United States, 328 U.S. 750 (1946), for the less stringent *Chapman* standard such that the government need not prove that the error was harmless beyond a reasonable doubt, but merely that the error did not have "substantial and injurious effect or influence in determining the jury's verdict." *Kotteakos*, 328 U.S. at 776.

285. The A.B.A. Task Force calls this "without doubt the single largest cause of delay in capital litigation." *See* Curtin & Liebman, *supra* note 279, at 32.

286. 492 U.S. 1 (1989).

287. *Giarratano* is the product of a razor-thin 5-4 majority. Justice Kennedy provided a fifth, albeit somewhat indecisive, vote. He did not share the Chief Justice's "majority" view that there is no federal constitutional right to counsel in state collateral review proceedings. *Id.* at 14-15. Even more interesting is his comment that for *death-row prisoners* "collateral relief proceedings are a central part of the review process . . ." *Id.* at 14. By reason of the fact that Giarratano had a volunteer lawyer, Justice Kennedy felt that the right-to-counsel issue need not have been reached. If one adds to this the fact that Justice Ruth Bader Ginsburg has replaced Justice White (who voted with the majority in *Giarratano*, not to mention *Sykes, Teague, McCleskey*, and *Sawyer*), the possibility of overturning *Giarratano* may not be that remote. *See also* the Biden Bill, *supra* note 32, which, if passed, will serve to remove the worst features of *Giarratano* by Congressional legislation.

highly destructive of the fundamental fairness which lies at the heart of habeas corpus. The first proposition is that there is no right to counsel in collateral appellate proceedings.[288] This dramatic piece of judicial legislation in the form of an opinion by Chief Justice Rehnquist ignores the realities of present-day habeas litigation and only serves to exacerbate the ineffective representation syndrome described at length above. It constitutes a major obstacle to genuine progressive reform of habeas jurisprudence, which must begin at the source. That source, of course, is the defense bar which labors in the habeas vineyards. To declare that they are constitutionally dispensable in collateral proceedings can only serve to make a bad situation worse.

The A.B.A. "Task Force on Death Penalty Habeas Corpus" has adopted a "Report" which points in the right direction, calling for state-appointed *qualified* counsel to be provided to habeas petitioners — counsel who would be adequately compensated at all stages of capital proceedings.[289] Most significantly, the A.B.A. Report proposes significant, practical incentives and sanctions in the event of failure by a state to make provision for such "adequately compensated," presumably qualified, attorneys and ancillary resources. A state which fails or refuses to fund such programs would lose the benefit of several procedural barriers to federal habeas review, such as the exhaustion and procedural bar doctrines and even the presumption of correctness of trial court findings of fact.[290] Such opportunities for leveling the habeas playing field are irretrievably lost, or certainly chilled, under *Giarratano*.

*Giarratano* contains yet a second fatal flaw which disserves the interest of habeas reforms. Giarratano had claimed that he was entitled to habeas relief because, being a death case, the government should

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288. Compare the milestone cases of Gideon v. Wainwright, 372 U.S. 335 (1963) and Douglas v. California, 372 U.S. 353 (1963) (constitutional right to counsel in state appellate proceedings). In Gregg v. Georgia, 428 U.S. 153, 204-06 (1976), the Court held that state appellate review was required as a precondition before capital punishment could be imposed. The *Giarratano* decision by the Supreme Court overruled a lower court decision, Giarratano v. Murray, 847 F.2d 1118 (4th Cir. 1988) (en banc), which held that the right to counsel was constitutionally required in habeas proceedings, particularly in the case of death-row prisoners whose cases are frequently complex. *Giarratano* is cited with approval in Coleman v. Thompson, 111 S. Ct. 2546, 2566-67 (1991) for the proposition that, even in capital cases, there is no right to counsel in state postconviction proceedings.

289. *See* Robbins, *supra* note 276, at 14-15. In addition, the A.B.A. Report recommends that states be required to provide "sufficient resources for investigation, expert witnesses and other services, at all stages of capital punishment litigation." *Id.* at 9.

290. *Id.* at 10.

have been held to a higher standard of proof.[291] The Court's plurality opinion rejected that argument, refusing to accept the principle that "the fact that a death sentence has been imposed requires a different standard of review on federal habeas corpus."[292] However, imposition of a death sentence *should* require a different standard. There can be no greater "miscarriage of justice" than to execute a person who is actually *or* legally innocent.[293] The capital punishment cases which permitted imposition of the death penalty mandated that death-penalty states adopt procedural safeguards to protect against arbitrary and capricious imposition of this draconian punishment.[294] The fact is, however, that the death penalty continues to be meted out in ways that are not merely "arbitrary" or "capricious," but truly "wanton" and "freakish."[295] It is no less true now than at the time *Furman* was decided that death is "truly an awesome punishment" and that "[t]he calculated killing of a

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291. *Id.* at 8.

292. *Id.* at 9.

293. *See infra* part VIII for a more detailed review of these different forms of innocence, as well as a third category, "innocent of the death penalty."

294. *See* Gregg v. Georgia, 428 U.S. 153 (1976); Proffitt v. Florida, 428 U.S. 242 (1976); Jurek v. Texas, 428 U.S. 262 (1976); Woodson v. North Carolina, 428 U.S. 280 (1976); Roberts v. Louisiana, 428 U.S. 325 (1976).

295. Furman v. Georgia, 408 U.S. 238, 310 (1972) (Stewart, J., concurring). Consider the following set of facts: John Eldon Smith and Rebecca Machetti were charged with murder. Machetti was Smith's "common law" wife. A double-murder took place which was masterminded by Machetti. Both were tried and convicted by Georgia juries drawn from the same jury pool, which was unconstitutionally drawn in that women were discriminatorily underrepresented. Machetti v. Linahan, 679 F.2d 236, 239-41 (11th Cir. 1982); Smith v. Kemp, 715 F.2d 1459, 1469 (11th Cir. 1983). By way of a "procedural default," defense counsel in *both* cases failed to file their jury composition objections under Taylor v. Louisiana, 419 U.S. 522 (1975), before trial as required under Georgia state law. Machetti's *Taylor* claim succeeded before the Court of Appeals (*Machetti*, 679 F.2d at 241-42); while Smith's identical claim before the same Court of Appeals foundered on the *Sykes* procedural bar principles (*Smith*, 715 F.2d at 1469-70). Machetti, "the mastermind in this murder . . . had her conviction overturned . . . had a new trial, and . . . received a life sentence." *Smith*, 715 F.2d at 1476 (Hatchett, J., dissenting). Smith was electrocuted on December 15, 1983. More recently, the Supreme Court itself became a major actor, if not an accomplice, in carrying out the death penalty against Roger Coleman. *See supra* notes 129-33 and accompanying text. Coleman was executed despite serious credible evidence (never submitted at his trial) that someone else had committed the murder. The Court also helped to carry out the death penalty against Robert Sawyer, who claimed that (*Brady*) constitutional error prevented true mitigating evidence from reaching the jury on both the issue of "actual innocence" of the crime and "innocence of the death penalty," Sawyer v. Whitley, 112 S. Ct. 2514, 2521-25 (1972); and against Warren McCleskey, *see supra* notes 115-22 and accompanying text, where expediency of execution seemed to receive greater attention than a flagrant (*Massiah*) constitutional violation. Roger Coleman was electrocuted on May 22, 1992. Robert Sawyer was executed by lethal injection on March 5, 1993. Warren McCleskey was electrocuted on September 24, 1991. *See generally*, M.L. RADELET ET AL., IN SPITE OF INNOCENCE: ERRONEOUS CONVICTIONS IN CAPITAL CASES (1992).

human being by the State involves, by its very nature, a denial of the executed person's humanity."[296] In practically every western industrial country but our own, the death penalty is an anachronism.[297] It defies logic, fairness, and humanity for the Court to continue to "shrug off" capital cases as meriting the same standard of review in federal habeas corpus as noncapital cases.

## VII. Reform Through Review: The Case for Strict Scrutiny

If the reality of the quality of legal representation is the starting point for substantive habeas reform, the standard for reviewing habeas decisions by state and federal courts is its procedural counterpart. In the case of death-row petitioners, that standard must be strict scrutiny. It is axiomatic that there is no more "fundamental right" than the right to life. Life is a specifically guaranteed right in the Fourteenth Amendment of which no person may be deprived without due process of law.[298] The fundamental quality of this right is linked to and strengthened by the Great Writ which preceded the passage of the Fourteenth Amendment by hundreds of years, adding the right to life as part of its "constitutional cargo."[299]

It is too late in the day to argue that capital habeas cases merit any lesser level of scrutiny. We have now had more than half a century of experience in which the Court has seen fit to accord special scrutiny to protect fundamental constitutional rights — indeed even "fundamental liberties" *not* tied to specific constitutional guarantees.[300] Can it

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296. *Furman*, 408 U.S. at 290 (Brennan, J., concurring).

297. As of July 1992, twenty-eight European countries had abolished the death penalty either in law or in practice. It was abolished in Great Britain (except for treason) in 1971; France abolished it in 1981; Canada in 1976. HUGO ADAM BEDAU, THE CASE AGAINST THE DEATH PENALTY 22 (1992). The United States is joined in its continued widespread resort to the death penalty by such countries as China, Iraq, Iran, South Africa, and the former Soviet Union. ROGER HOOD, THE DEATH PENALTY: A WORLD-WIDE PERSPECTIVE (1989); AMNESTY INTERNATIONAL, WHEN THE STATE KILLS . . . THE DEATH PENALTY: A HUMAN RIGHTS ISSUE (1989).

298. U.S. CONST. amend. XIV, § 1.

299. Over 350 years of the history of the Writ reflect the fact that "the vessel of *habeas corpus* has not changed over that period; only its constitutional cargo has changed, as standards of decency and due process have evolved and become more enlightened by a humane justice." 1 LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 2.2 at 11 (1988).

300. *See* Skinner v. Oklahoma, 316 U.S. 535 (1942). In that case, the Court struck down Oklahoma's "Habitual Criminal Sterilization Act." What is particularly interesting about the Court's approach to the compulsory sterilization punishment at issue in that case was its professed concern for what Justice Douglas describes as "one of the basic civil rights of man," the fact that there is "no redemption" for the individual punished by this law, and the fact that sterilization causes "irreparable injury" in that the defendant is "forever deprived of a basic liberty." *Id.* at 541. The Douglas argument applies *a fortiori* to capital punishment, which is

seriously be argued that a fundamental right *specified* in the Fourteenth Amendment and made *specifically* applicable to the individual States is entitled to a lesser level of scrutiny than the "penumbra of rights" creating a right of privacy,[301] the right to integrated marriage,[302] the rights to child-rearing and education,[303] the right to abortion[304] or the right to travel?[305] The fact that federal habeas corpus petitioners have their lives or liberty at stake places their "fundamental rights" at the very top of the hierarchy of constitutionally protected liberties. It is but a short step from that irrefutable proposition to the conclusion that no standard of review short of strict scrutiny is appropriate in federal habeas cases.

"Strict scrutiny" refers to a standard for judicial review which allows a reviewing court to strike down political outcomes as constitutionally deficient, "either for their looseness of fit between means and ends, or for the weakness of the interest they purport to serve."[306] Strict scrutiny is constitutionally indispensable to review those "political outcomes challenged as injurious to those groups in society which have occupied, as a consequence of widespread, insistent prejudice against them, the position of perennial losers in the political struggle."[307] The classic "perennial losers" in recent American "political struggles" have been capital defendants.

Indeed, the Supreme Court has specifically recognized the "fundamental importance" of habeas corpus in our constitutional scheme[308] because it "directly protect[s] our most valued rights."[309] As the Great Writ, it has become a major bulwark protecting individual

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profoundly more "irredeemable" and "irreparable."

301. *See* Griswold v. Connecticut, 381 U.S. 479 (1965).

302. *See* Loving v. Virginia, 388 U.S. 1 (1967).

303. *See* Pierce v. Society of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923).

304. *See* Roe v. Wade, 410 U.S. 113 (1973).

305. *See* Aptheker v. Secretary of State, 378 U.S. 500 (1964).

306. TRIBE, *supra* note 224, at 1453. "Often, for example, the *governmental interest in efficiency, convenience, or cost-saving* may be cited in support of a challenged rule: strict scrutiny would include judicial wariness of interests such as these which can so easily and indiscriminately be invoked, and which almost never point uniquely to a challenged political choice." *Id.* (emphasis added).

307. *Id.* at 1453-54. According to Professor Gunther, strict scrutiny is "strict" in theory and usually "fatal" in fact. Gerald Gunther, *The Supreme Court, 1971 Term — Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972). In the context of capital punishment, strict scrutiny would presumably remain "strict" in theory and *non*-fatal in fact.

308. Johnson v. Avery, 393 U.S. 483, 485 (1969).

309. Bounds v. Smith, 430 U.S. 817, 821 (1977) (due process case granting to prisoners a constitutional right of access to the courts).

freedom.[310] It is totally at odds with any infringement of a death-row prisoner's right to a habeas review of a claimed constitutional violation which has infected either his trial or his death sentence.[311] Rational relationship to, or even a "significant interest" in, "federalism" as generously interpreted by the Rehnquist majority[312] cannot be a legitimate basis for decisions such as *Powell, Sykes, Teague, McCleskey, Coleman,* and their progeny. It cannot be argued, nor did the Court contend, as would have been required under standard strict-scrutiny analysis,[313] that the principles laid down in those cases have been "narrowly tailored" to fulfill a "compelling" governmental interest. To the contrary, the *Sykes* line of cases, with their "cause and prejudice" exception, are tailored for an entirely different purpose. A careful examination of the leading cases applying the rules in *Sykes* and *Teague* makes their true purpose crystal-clear: to enable federal courts to deny review of federal cases that they do not consider habeas-worthy.

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310. The original view of a habeas corpus attack upon detention under a judicial order was a limited one. The relevant inquiry was confined to determining simply whether or not the committing court had been possessed of jurisdiction. But, over the years, the writ of habeas corpus evolved as a remedy available to effect discharge from any confinement contrary to the Constitution or fundamental law, even though imposed pursuant to conviction by a court of competent jurisdiction. Thus, whether the petitioner's challenge to his custody is that the statute under which he stands convicted is unconstitutional; that he has been imprisoned prior to trial on account of a defective indictment against him; that he is unlawfully confined in the wrong institution; that he was denied his constitutional rights at trial; that his guilty plea was invalid; that he is being unlawfully detained by the executive or the military; or that his parole was unlawfully revoked, causing him to be reincarcerated in prison — in each case his grievance is that he is being unlawfully subjected to physical restraint, and in each case habeas corpus has been accepted as the specific instrument to obtain release from such confinement.

Preiser v. Rodriguez, 411 U.S. 475, 486-87 (1973).

311. Under Eighth Amendment principles, the Court has required a higher level of reliability in the *process* by which capital punishment may be imposed. McCoy v. North Carolina, 494 U.S. 433 (1990); Eddings v. Oklahoma, 455 U.S. 104 (1982) (mitigating evidence cases).

312. *See supra* part V.B.

313. *See* GUNTHER, *supra* note 224, at 491-583 (12th ed. 1991). For an interesting attack on the *Sykes* procedural bar doctrine based on equal protection principles, see Laura Gaston Dooley, *Equal Protection and the Procedural Bar Doctrine in Federal Habeas Corpus*, 59 FORDHAM L. REV. 737 (1991). Professor Dooley argues persuasively that the procedural bar scheme laid down in *Sykes* is necessarily geographically discriminatory by reason of the great variety of state procedural practices and the kind of failure or neglect which triggers a "default." Absent a "knowing and intentional" waiver, she argues, federal collateral review should be granted on the merits. *Id.* at 768-72.

The strict scrutiny standard of review, aside from being consistent with constitutional principles governing "fundamental rights," would serve to end the current confusion, anomalies, and, above all, the ease with which death-row prisoners are delivered to their executioners.[314] Strict scrutiny would help to clear the air and force the federal courts to end the current charade of refusing habeas to prisoners who, from a state procedural standpoint, are "a day late or a dollar short." Further, this standard would discontinue the present "crusade to erect petty procedural barriers in the path of any state prisoner seeking review of his federal constitutional claim."[315] Removal of the *Sykes* bar would not mean open season for successive petitions and abuse of collateral appeals. Rather, it would, within the broad judicial scope of review which inheres in strict scrutiny, enable the federal courts on a basis consistent with true "fundamental fairness" to separate capital habeas "wheat" from "chaff."[316]

The A.B.A. Task Force proposals governing successor petitions are totally consistent with the strict scrutiny standard of review proposed herein. Its report urges that federal habeas courts should consider any claimed constitutional violation on its merits where the petitioner's failure to raise the issue in state court was "due to the ignorance or neglect of the prisoner or counsel or if the failure to consider such a claim would result in a miscarriage of justice."[317] To punish prisoners for their lawyers' mistakes has nothing in common with what (in another Constitutional context) is called "the evolving standards of decency that mark the progress of a maturing society."[318] Where the attorneys concede error, whether from ignorance or neglect, the strict

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314. Capital punishment in this country is clearly on the rise. The rate of executions has risen from five in 1983 to eleven in 1988 to thirty-one in 1992. In 1993, twenty-two death-row prisoners were executed by July. DEATH ROW, U.S.A., *supra* note 98, at 4.

315. Coleman v. Thompson, 111 S. Ct. 2546, 2569 (1991) (Blackmun, J., dissenting).

316. Compliance with state procedural requirements, while certainly not to be ignored, should be de-emphasized in favor of focusing squarely on the *substance* of the defaulted claim. If the court's consideration of the defaulted claim presents "a realistic possibility of correcting an unjust conviction or sentence of death . . . procedural barriers should be swept aside and collateral review should be available." Jeffries & Stuntz, *supra* note 238, at 680. Unfortunately, while condemning "the increasing proceduralization of habeas law," these authors' focus is on "factual innocence" with the burden on the petitioner to show "reasonable probability" of such "innocence" in the broad sense of a "factually erroneous conviction" or "an unjustified sentence of death." *Id.* at 691.

317. Robbins, *supra* note 276, at 10.

318. Trop v. Dulles, 356 U.S. 86, 101 (1958). These "evolving standards of decency" can never be reconciled with a system of "justice" in which death-row prisoners have been unconstitutionally tried, sentenced, and ultimately executed, because of the "ignorance or neglect" of defense counsel.

scrutiny doctrine would require that the court reach the merits of the claim.[319] Such currently cherished principles as "procedural bar" and "cause and prejudice" would occupy a very different place in such a constitutional scheme.

*McCleskey v. Zant*[320] has, of course, exacerbated the effects of *Sykes* by extending its reach.[321] Hoisting itself by its own (quite new) bootstraps, the majority declared that "by failing to raise a claim through inexcusable neglect . . . a petitioner can abuse the writ by raising a claim in a subsequent petition that he could have raised in his

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319. The A.B.A. recommendation to the U.S. House Judiciary Committee addressed this issue frontally. Where attorneys' mistakes, ignorance, or neglect is established, the courts must examine the issue on its constitutional merits, reasoning as follows:

> The intense concern that some partisans in the death penalty debate have expressed about this type of provision is misplaced, overdrawn, and based upon faulty premises. The concern is misplaced to the extent that it proceeds from the belief that constitutional violations should go unremedied. The concern is overdrawn because adoption of measures such as those in the ABA recommendations would render attorney "ignorance and neglect" a rare exception — not the rule — in capital cases.
>
> Most importantly, the concern is based upon faulty premises to the extent that it proceeds from the assertion that, unless criminal defendants are punished for their lawyers' mistakes, those lawyers will intentionally commit procedural defaults in their clients' "behalf." In making recommendations on habeas corpus, the Task Force and Association took very seriously their responsibility to consider the factual bases for this contention. Considerable time during the Task Force's lengthy hearings was devoted to exploring this factual question with participants on all sides of the habeas corpus debate. The Task Force found — with *no* exceptions — that procedural defaults are not committed by strategically astute (if unethical) lawyers who intentionally "sandbag" the state courts in service of their clients, but rather by ill-prepared, inexperienced, and ignorant lawyers who inadvertently do so to the great detriment of their clients. Accordingly, to penalize defendants because of defaults committed by their lawyers all too often adds the insult of "forfeiture" of a remedy for a constitutional violation to the injury of conviction and capital sentence at a trial plagued by inadequate representation.
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> Taking seriously its special responsibility to identify and attempt to cure the failings of the bar, the Association thus has concluded after careful examination that the bar's failing lies not with sandbagging but instead with (no less inexcusable) ignorance and neglect. Notwithstanding this finding, the Association's recommendations on this issue proceed cautiously. Against the possibility that sandbagging, although undocumented, nonetheless occurs, the Association's recommendations place a heavy burden of proof upon the prisoner to *disprove* sandbagging before securing relief on a defaulted claim. Against the reality of ill-preparedness and inexperience, the Association proposes the short-term remedy of an "ignorance and neglect" safety valve for unconstitutionally convicted defendants and the more significant long-term remedy of procedures capable of assuring informed and responsible representation in the first place.

Curtin & Liebman, *supra* note 279, at 45-47.

320. 111 S. Ct. 1454 (1991).

321. The Court held, without the benefit of briefs on the issue by the parties, that abuse of the writ would be judged by the "cause and prejudice" standards of *Sykes*. *Id.* at 1475.

first . . ."[322] This radical and retrogressive change in the standard of collateral review in the law of habeas corpus — in the name of federalism, finality, and limited resources — might just barely escape rational relationship analysis. It does not, however, even begin to meet the compelling-state-interest standard required by strict scrutiny.

The corollary to the strict-scrutiny standard, indeed the font from which it springs, is the bedrock proposition that the constitutional mandate of habeas corpus as expanded by statute and case law is the admonition to the court that it must effect the discharge from custody of prisoners (state and federal) whenever their confinement violates the Constitution or "fundamental law." Put another way, "*the federal habeas corpus remedy — for capital as well as noncapital prisoners — should be as broad as the fundamental individual rights that the Federal Constitution confers.*"[323]

Assuming, purely *arguendo*, that an *intermediate* level of scrutiny is more appropriate in *non*-capital cases, the sharp constriction of habeas relief in the name of such Golden Calves as federalism and finality cannot withstand constitutional analysis. In order to meet the constitutional requirements inherent in habeas corpus review as a "fundamental right" available to anyone claiming unconstitutional

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322. *Id.* at 1468.

323. Curtin & Liebman, *supra* note 279, at 28 (emphasis in original). It cannot be doubted that the filing of repeated successor habeas petitions in certain situations, where they are repetitive and grounded in specious argument, may indeed be abusive and should not be tolerated. Bearing in mind the fact that there is no statutory, let alone Constitutional, basis for restricting the number of petitions that a prisoner might bring, *some* reasonable limitation on such successor petitions *consistent with strict scrutiny* analysis is in order. One scholar has suggested a blend of *Fay* (deliberate bypass) and *Johnston v. Zerbst* (waiver) coupled with a categorization of those constitutional rights which are cognizable on federal collateral review. Dooley, *supra* note 313, at 770. Once it has identified these claims, the Supreme Court "should direct federal courts to review the merits of those claims in all cases, regardless of the state courts' treatment of the prisoners' procedural behavior." *Id.* On the other hand, Tabak & Lane, *supra* note 236, at 80-81, support the legislative approach recommended by the A.B.A. Task Force whereby some reasonable limitations on successive petitions would be imposed, limiting them to claims that "(a) concern grounds that were unavailable previously due to state action; (b) rely upon a new, retroactive decision not available previously, or upon facts that were not reasonably discoverable with the exercise of due diligence; (c) undermine confidence in the guilt of the petitioner; or (d) are so significant that the failure to consider it would constitute a miscarriage of justice." *See* Curtin & Liebman, *supra* note 279, at 48-49. Practically speaking, this legislative proposal spells out, and makes more juridically palatable, the successive-petitions limitation. Additionally, it is consistent with the traditional authority of the federal courts to dismiss a "same-claim" petition where "the ends of justice" do not dictate otherwise. The A.B.A. language is reminiscent of Sanders v. United States, 373 U.S. 1 (1963), from which the "abuse of the writ" language in 28 U.S.C. 2244(b) was taken, but subject to the significant qualification "as law and justice require." *See* 28 U.S.C. § 2243, retaining this phrase from the original Habeas Corpus Act of 1867, *supra* note 39.

incarceration, a court's denial of a hearing on the merits of the alleged constitutional violations must *at minimum* satisfy intermediate-standard-of-review scrutiny[324] — i.e., it must serve "important" governmental objectives and be "substantially related" to the achievement of those objectives.

The recent dismemberment of the body of habeas corpus law cannot pass intermediate scrutiny review. Neither finality nor federalism meet even this lower standard of review requirement for showing an important governmental interest. As to the former, the Court itself has laid this issue to rest, having declared: "Conventional notions of finality of litigation have no place where life or liberty is at stake and infringement of constitutional rights is alleged."[325] It has already been demonstrated that the federalism argument is either a hollow vessel or serves to turn both federalism and habeas upside down.[326] Federalism and comity call for an initial deference to state courts in criminal trial and appellate procedure. At the core of judicial federalism is the axiomatic principle that the Constitution and numerous federal statutes have placed the federal courts at center-stage in the ongoing process of protecting the people from unconstitutional state action.[327] The Constitutional "buck" stops there, even though it does not start there. No governmental interest — "important" or even "compelling" — can supersede the Supremacy Clause of the U.S. Constitution.

The federalism-finality-resources rationale for cutting back on habeas relief is most persuasive in those cases such as *Stone v. Powell*,[328] where the constitutional error clearly has not affected the truth-finding process at trial. If there is any category of habeas cases

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324. *See generally* TRIBE, *supra* note 224, at 1601-18. As the Court noted in Stanley v. Illinois, 405 U.S. 645, 656 (1972), the "establishment of prompt efficacious procedures to achieve legitimate state ends is a proper state interest worthy of cognizance in constitutional adjudication. But the Constitution recognizes higher values than speed and efficiency."

325. Sanders v. United States, 373 U.S. 1, 8 (1963). The Court spoke in similar terms in Fay v. Noia, 372 U.S. 391, 424 (1963), where it concluded that "conventional notions of finality in criminal litigation cannot be permitted to defeat the manifest federal policy that federal constitutional rights of personal liberty shall not be denied without the *fullest opportunity* for *plenary judicial review*." (emphasis added). *See also* analysis of pretextual quality of finality as an "important" governmental interest, *supra* part V.A.

326. *See supra* part V.B.

327. As "a fundamental safeguard against unlawful custody," habeas corpus requires the court to address the question which "has always been the same: in the language of the present statute, on the books since 1867, is the detention complained of 'in violation of the Constitution or laws or treaties of the United States'?" Withrow v. Williams, 113 S. Ct. 1745 (1993) (quoting *Fay*, 372 U.S. at 449 (Harlan, J., dissenting)).

328. 428 U.S. 465 (1976).

which is suitable for intermediate-level review as a matter of finality, federalism, and *fairness*, it is this one.[329] But even here, the essentials of intermediate scrutiny must not be compromised. The "importance" of the governmental interest served by the demands of federalism and comity, properly defined, cannot overcome the expansive protection of our habeas statutes. Because of its exalted place in our constitutional system and its subsequent embellishment by Congress, the Great Writ creates a competing and compelling governmental interest of overwhelming importance: to guarantee a full, fair, and meaningful habeas hearing and remedy for violation of the federal rights of all incarcerated persons. The Court itself has declared that "there is no higher duty than to maintain [habeas corpus] unimpaired."[330]

By adopting a strict scrutiny level of review in capital cases, there is a far greater likelihood that prisoners will not be executed, as they are now,[331] despite lower federal court decisions that their convictions or death sentences are unconstitutional. If an intermediate level of scrutiny were adopted in non-capital cases, a prisoner who presents a bona-fide claim of constitutional error at his trial or sentencing would be entitled to a federal hearing on the merits of a successor habeas petition, subject to three conditions: (1) that the prisoner has not deliberately withheld the claim from a previous petition;[332] (2) that the prisoner has not intentionally and knowingly waived the claim; and (3) that the prisoners is not abusing the privilege of the writ purely for purposes of harassment, vexation, or delay.[333] In the event of a claim by the prisoner, capital or noncapital, that the omission or default in a prior petition was the direct result of an attorney's ignorance or neglect, the burden of proof would rest with the prisoner. If met, the prisoner would be entitled to a hearing on the merits. With standards of review thus clarified, there is far greater likelihood of realizing the goal of a

329. Interestingly, *Stone v. Powell* has not been extended to other cases where the "truth finding process" was only slightly implicated, if at all. *See, e.g.*, Withrow v. Williams, 113 S. Ct. 1745 (1993); Kimmelman v. Morrison, 477 U.S. 365 (1986); Rose v. Mitchell, 433 U.S. 545, 562-63 (1979) (equal protection claim of racial discrimination in selection of grand-jury foreman).

330. Bowen v. Johnston, 306 U.S. 19, 26 (1939).

331. *See, e.g.*, Herrera v. Collins, 113 S. Ct. 853 (1993); McCleskey v. Zant, 111 S. Ct. 1454 (1991); Dugger v. Adams, 489 U.S. 401 (1989).

332. 28 U.S.C. § 2244(b) (1993); *see also* "deliberate bypass" rule in Fay v. Noia, 372 U.S. 391 (1963).

333. *See* Hon. Louis E. Goodman, *Use and Abuse of the Writ of Habeas Corpus*, 7 F.R.D. 313 (1948).

functioning, nondiscriminatory habeas jurisprudence, particularly for the prisoner who is facing execution.[334]

## VIII. Actual Innocence: "Escape Hatch" or "Death Trap"?

Notwithstanding its undisguised determination to remove as many obstacles as possible to the efficient and expeditious termination of capital punishment litigation, the Rehnquist majority has had difficulty in circumventing the bedrock barrier of actual innocence. Even in those cases involving procedurally defaulted, "abusive," or successive-claim petitioners, or those who can demonstrate neither "cause" nor "prejudice," the Court has felt obliged to create an escape hatch for the *innocent* prisoner. Whether in the name of "fundamental miscarriage of justice"[335] or under the more general "ends of justice"[336] rubric, the Court has been increasingly stubbing its collective toe on the petitioner who protests his innocence.

The traditional understanding of the phrase "fundamental miscarriage of justice" was that such a miscarriage occurs whenever a conviction or sentence is the end-result of a violation of a federal constitutional right. The 1986 trio of habeas decisions (*Wilson*, *Carrier*, and *Smith*)[337] "shifted the focus of federal habeas review of procedurally defaulted, successive, or abusive claims away from the preservation of constitutional rights to a fact-based inquiry into the petitioner's innocence or guilt."[338] This complete shift in emphasis away from measuring the effect of constitutional violations upon the

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334. "The Association believes that, in the interest of the [sic] maintaining basic liberties, as well as in the interest of dispatch and public comprehensibility, capitally sentenced prisoners should be entitled to have *some* federal court address the merits of every nonfrivolous constitutional claim they present." Curtin & Liebman, *supra* note 279, at 33-34.

335. *See* Dugger v. Adams, 489 U.S. 401, 412 n.6 (1989); Murray v. Carrier, 477 U.S. 478, 495-96 (1986); Smith v. Murray, 477 U.S. 527, 537-38 (1986).

336. Kuhlmann v. Wilson, 477 U.S. 436, 455 (1986) (plurality opinion). Factual innocence first begins to emerge as an exception to the *Sykes* (cause and prejudice) exception in this case under the "ends of justice" exception, to the effect that a federal court should entertain same-claim successor petitions only when the petitioner "supplements his constitutional claim with a colorable showing of factual innocence." *Id.* at 454. Thus, a plurality of the Court reversed a *Sanders* dictum to the effect that the "ends of justice" exception was not intended to be limited to claims of factual innocence. *See* Sanders v. United States, 373 U.S. 1, 16-17 (1963).

337. For greater detail, *see supra* text accompanying notes 88-98. These cases were foreshadowed by United States v. Timmreck, 441 U.S. 780, 783 (1979) ("complete miscarriage of justice").

338. Sawyer v. Whitley, 112 S. Ct. 2514, 2526 (1992). *Kuhlmann v. Wilson* refers to "a colorable showing of factual innocence," 477 U.S. at 454; *Carrier* speaks of "one who is actually innocent," 477 U.S. at 496; and *Smith*, 477 U.S. at 539, addresses "the accuracy of the guilt or sentencing determination."

trial or sentencing and toward assessment of actual innocence received the formal imprimatur of the Rehnquist Court in *Sawyer v. Whitley*.[339] Writing for the majority, Chief Justice Rehnquist framed the issue as follows: "The issue before the Court is the standard for determining whether a petitioner bringing a successive, abusive, or defaulted federal habeas claim has shown he is 'actually innocent' of the death penalty to which he has been sentenced so that the court may reach the merits of the claim."[340] In the course of the opinion (in which Justices White, Scalia, Kennedy, Souter and Thomas joined), the terms "miscarriage of justice" and "actual innocence" are treated as though synonymous.[341] On the other hand, "actual innocence" and "innocence of death" are not.[342]

*Sawyer* carried the 1986 cases to their furthest extreme, without benefit of any statutory authority and totally ignoring the equitable nature of habeas corpus proceedings. Later, in *Herrera v. Collins*, the Court declared that the claim of "actual innocence" is "not itself a constitutional claim, but instead a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits."[343] The court went on to state that the

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339. 112 S. Ct. 2514 (1992). Robert Sawyer was convicted of murder and exhausted all of his Louisiana state appeals. The reported appeal to the Supreme Court was based on a second federal habeas petition containing, in Chief Justice Rehnquist's words, "successive and abusive claims." *Id.* at 2517.

340. *Id.*

341. *Id.* at 2518-19.

342. *Id.* at 2519. "Demonstrating that an error is by its nature the kind of error that might have affected the accuracy of a death sentence is far from demonstrating that an individual defendant probably is 'actually innocent' of the sentence he or she received." Dugger v. Adams, 489 U.S. 401, 412 n.6 (1989).

343. Herrera v. Collins, 113 S. Ct. 853, 862 (1993). This excerpt from the Chief Justice's opinion is true theater of the absurd. A claim of actual innocence is "not itself a constitutional claim," says Rehnquist, totally ignoring the strictures of the Eighth and Fourteenth Amendments. Can he be serious in his contention that an "actually innocent prisoner" must show some *other* constitutional violation to obtain release? "Actual innocence" gets the prisoner through the door; but the way out of the prison is by way of consideration of an "otherwise barred constitutional claim" on the merits. The majority opinion elsewhere declares that "a truly persuasive demonstration of 'actual innocence' made after trial would render the execution of a defendant unconstitutional . . ." *Id.* at 869. Unfortunately, the Biden Bill buys into this innocence trap in the section entitled "Limits on Successive Petitions." This provision would amend 28 U.S.C. § 2244(b) so as to mandate dismissal of successive habeas petitions unless the facts underlying the application, if proven and viewed in light of all the evidence, would be sufficient to:

> (i) undermine the court's confidence in the factfinder's determination of the applicant's guilt of the offense or offenses for which the sentence was imposed; or
>
> (ii) demonstrate that no reasonable sentencing authority would have found an aggravating circumstance or other condition of eligibility for a capital or noncapital

"threshold showing for such an assumed right would be extraordinarily high."[344] There is an almost brazen quality to the Court's grafting of this legislation upon settled principles of statutory habeas law. Over one hundred years ago, the Court declared: "As the writ of *habeas corpus* does not perform the office of a writ of error or an appeal, [the guilt of the petitioner] cannot be re-examined or reviewed in [a] collateral proceeding."[345] Justice Oliver Wendell Holmes could not have said it more plainly: "[W]hat we have to deal with [on habeas review] is not the petitioners' innocence or guilt but *solely the question whether their constitutional rights have been preserved.*"[346]

The present Court's inordinate emphasis on the question of "actual innocence" is incompatible with the letter and spirit of the Congressional grant of habeas jurisdiction. The statutes clearly direct the federal courts to accept petitions from state prisoners who are held "in custody in violation of the Constitution or laws . . . ."[347] There is no basis for an exception to an exception in the form of "actual innocence," which is a cruel-and-unusual punishment and due-process claim, *not* a habeas claim. In the words of Justice Blackmun:

> The accusatorial system of justice adopted by the Founders affords a defendant certain process-based protections that do not have accuracy or truth-finding as their primary goal. These protections — including the Fifth Amendment right against compelled self-incrimination, the Eighth Amendment right against the imposition of an arbitrary and capricious sentence, the Fourteenth Amendment right to be tried by an impartial judge, and the Fourteenth Amendment right not to be indicted by a grand jury or tried by a petit jury from which members of the defendant's race have been systematically excluded — are debased, and indeed, rendered largely irrelevant, in a system that values the accuracy of the guilt determination above individual rights.[348]

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sentence, or otherwise would have imposed a sentence of death.
Biden Bill, *supra* note 32, at 10.

344. *Herrera*, 113 S. Ct. at 869. This prompts the obvious question: How high is "extraordinarily high"? According to Justice O'Connor, the federal courts' "attention, efforts and energy" should be reserved for the "truly extraordinary case." *Id.* at 874 (O'Connor, J., concurring). In Justice Blackmun's view, shorn of its rhetoric, the Court's professed concern about "actual innocence" is more pretext than principle, meaning "that habeas relief should be denied whenever possible." *Id.* at 881 (Blackmun, J., dissenting).

345. *In re* Terry, 128 U.S. 289, 305 (1888). "[I]t is well settled that upon *habeas corpus* the court will not weigh the evidence." Hyde v. Shine, 199 U.S. 62, 84 (1905).

346. Moore v. Dempsey, 261 U.S. 86, 87-88 (1923) (emphasis added).

347. 28 U.S.C. § 2254(a) (1993).

348. Sawyer v. Whitley, 112 S. Ct. 2514, 2528 (Blackmun, J., concurring).

Guilt or innocence is irrelevant in habeas jurisprudence. As currently applied (one is tempted to use the word "abused") in habeas cases by the Court, it is much more a trap than an escape hatch.[349] Instead of adhering to its traditional judicial function on habeas review, adjudicating process-based claims of constitutional violations so as to guarantee that the ends of justice are served, the Court is seemingly obsessed with guilt or innocence. The metamorphosis of habeas jurisprudence into its current status as a legal obstacle course is no accident. Rather, it is a product of the Court's transparent determination to engage in a "self-fashioned abdication"[350] of its duty to protect federal rights.

"Actual innocence" as *the* escape hatch fits the present mold perfectly. Application of this principle in *Sawyer* and *Herrera* exposed it as a hoax. It is a game that the death-row petitioner can almost never win. If, as in *Herrera*, the petitioner has a more-than-credible claim to factual innocence, he is reminded by the court that "[f]ew rulings would be more disruptive of our federal system than to provide for federal habeas review of free-standing claims of actual innocence."[351] Since actual innocence is not a "constitutional claim," unless petitioner has *Sykes*-type procedural error undergirding an independent constitutional claim (the "gateway through which a habeas petitioner must pass"), the "mere" contention that newly discovered evidence probably proves that petitioner's conviction is factually incorrect does not suffice.

Given this constitutional jousting with the lives of death-row prisoners, the logic of Justice Blackmun's dissenting view becomes irrefutable:

> In other words, having held that a prisoner who is incarcerated in violation of the Constitution must show he is actually innocent to obtain relief, the majority would now hold that a prisoner who is actually innocent must show a constitutional violation to obtain relief. The only principle that would appear to reconcile these two

349. For a contrary view, see Jeffries & Stuntz, *supra* note 238, at 686-91, applauding the *Sykes* progeny's "escape hatches" such as "actual innocence." They would urge a much lower burden of proof, however, such as proof of a "reasonable possibility" of a factually erroneous conviction or sentencing. *Id.* at 691. *Cf. Sawyer*, 112 S. Ct. at 2517, containing the "clear and convincing evidence" standard such that "no reasonable juror would have found the petitioner eligible for the death penalty . . . ."

350. Coleman v. Thompson, 111 S. Ct. 2546, 2571 (1991) (Blackmun, J., dissenting).

351. *Herrera*, 113 S. Ct. at 861. After all, quoting Barefoot v. Estelle, 463 U.S. 880, 887 (1983): "Federal Courts are not forums in which to litigate state trials."

positions is the principle that habeas relief should be denied whenever possible.[352]

Even on the level of "innocence of death," the present Court majority's clear purpose is unmistakable. Recognizing the fact that the death penalty is qualitatively different from any other penalty, the Court declared: "It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, the consequence of scrupulously fair procedures."[353] Yet, in *Sawyer*, the Court managed to undermine the reliability and even legitimacy of the death penalty by simply *removing* one of the two bedrock principles undergirding capital-punishment jurisprudence. As a result, *Sawyer* stands for the anomalous proposition that the "fundamental miscarriage of justice" exception applies only to the prisoner's *eligibility*, not *ineligibility*, for the death penalty.[354]

With its decisions in *Sawyer* and *Herrera*, the Court has placed capital petitioners in a "lose-lose" situation. If they submit credible evidence of innocence, they are reminded that federal courts are not there to relitigate state trials, that guilt-innocence determinations on federal habeas review are disruptive, that actual innocence is only a "gateway" for consideration of some underlying constitutional violation, and that such a claim of innocence is not itself a constitutional claim. If their claimed escape from the *Sykes* procedural bar is not grounded on actual innocence at all, but is limited to innocence of death, they are reminded of the overriding importance of *actual* innocence (a total irrelevancy) and the fact that mitigating-factor evidence, which is directly on point on the issue of the death penalty, will not be considered on habeas review, but only *eligibility for death.*

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352. *Herrera*, 113 S. Ct. at 880-81 (Blackmun, J., dissenting). Justice Blackmun recognizes that the standard for relief on the merits of an actual-innocence claim must be higher than that for "the threshold standard for merely reaching that claim or any other claim that has been procedurally defaulted or is successive or abusive," and the petitioner "must show that he probably is innocent." *Id.* at 882. Once this threshold standard is met, the standard of review triggered thereby should be that of strict scrutiny, as argued in part VII, *supra*.

353. Smith v. Murray, 477 U.S. 527, 545-46 (1986) (Stevens, J., dissenting).

354. The habeas court must focus on aggravating factors only "and not on additional mitigating evidence which was prevented from being introduced as a result of a claimed constitutional error." *Sawyer*, 112 S. Ct. at 2523. As Justice Stevens points out, "the Court's impoverished vision of capital sentencing is at odds with both the doctrine and the theory developed in our many decisions concerning capital punishment." *Id.* at 2534 (Stevens, J., dissenting). So much for the cherished principle of "fundamental fairness" which is "the central concern of the writ of habeas corpus." Strickland v. Washington, 466 U.S. 668, 697 (1984).

The innocence escape-hatch is clearly insidious. It is subject to arbitrariness and manipulation. It is a trap. No one will "escape" and miscarriages of justice will continue. The equitable principles underlying habeas corpus have no place in the "innocence doctrine" laid out in *Sawyer*. Having introduced the concept of "miscarriage of justice," the Court must redefine it so as to inject it with fair and equitable substance. Failing that, Congress should take the issue in hand by formally restoring the "miscarriage of justice" principle contained in the prior statute.[355] The present scheme, which is replete with potential for condoning the execution of someone who is actually innocent,[356] is totally at odds with the letter and statutory purpose of habeas corpus.

## IX. Conclusion

While its exact origins are uncertain, habeas corpus dates back at least to the Magna Carta.[357] Historically, it has constituted the major barrier between government and the wrongful detention of any person. It has included within its parameters a penumbra of constitutional rights and liberties which are essential to prisoners claiming to be unlawfully detained and are of life-and-death importance to capital defendants.

The foregoing review of recent habeas jurisprudence demonstrates a pattern of ad hoc, case-by-case, result-oriented decisions. Whether the terminology is Justice White's "confused patchwork,"[358] Justice Kennedy's "much confusion,"[359] or Justice Marshall's "Byzantine morass of arbitrary, unnecessary, and unjustifiable impediments to the vindication of federal rights,"[360] the results have been increasingly fatal — both in the human sense and in the constitutional sense.

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355. "Miscarriage of justice" was traditionally understood as having no particular limitation, a phrase that should not be "too finely particularized." Sanders v. United States, 373 U.S. 1, 15-17 (1963). The "miscarriage of justice" phraseology was dropped from the statute in 1966. However, even though the statute no longer makes specific reference to this clearly paramount objective of habeas review, the Court has declared continued adherence to the principle that the federal courts must consider the "ends of justice" before dismissing a successive petition. Kuhlmann v. Wilson, 477 U.S. 436, 451 (1986).

356. It is important to recall Justice Blackmun's admonition in *Herrera*, 113 S. Ct. at 884 (Blackmun, J., dissenting): "The execution of a person who can show that he is innocent comes perilously close to murder."

357. *See supra* note 35. *See also* WILLIAM F. DUKER, A CONSTITUTIONAL HISTORY OF HABEAS CORPUS 17 (1980).

358. *Brecht*, 113 S. Ct. at 1728 (White, J., dissenting).

359. *McCleskey*, 111 S. Ct. at 1461.

360. *Coleman*, 111 S. Ct. at 2569 (Blackmun, J., dissenting).

The Supreme Court's decisions since *Stone v. Powell* have turned back the clock. The Court's newly-rediscovered zeal for finality, coupled with its perceived need to defer to state court decisions in the name of "federalism," has served the Rehnquist majority's transparently pragmatic objective: expedition and acceleration of capital punishment. The quintessential preconditions for a system of capital punishment that is "constitutional" — "scrupulously fair procedures,"[361] "reliability,"[362] "individualized moral judgments,"[363] and the like — have lost their positions of primacy in the prevailing capital punishment jurisprudence. The inflation of finality, federalism, and cost/benefit analysis has debased the currency of the core constitutional principles which are at the heart of both capital punishment and habeas corpus jurisprudence.

The sheer uniqueness of death as a form of punishment makes it different from all other forms of criminal punishments, "not in degree but in kind."[364] In its finality, the death penalty "is qualitatively different from a sentence of imprisonment, however long."[365] From this qualitative difference has emerged the principle of the indispensable need for "reliability" in every case of capital punishment. The corollary to reliability of the verdict and judgment in such cases is the concept of individualization[366] in the sentencing process.

The combination of the prerequisites of reliability and individualization cannot co-exist with the Court's recent approach to the filing of successive habeas petitions.[367] Blanket rules governing such petitions — including, but not limited to, preclusion of habeas relief in the face of procedural defaults and evidentiary errors by less than competent counsel — have little or nothing in common with the history and constitutional purpose of habeas corpus. Reliability and individualization require a heightened standard of judicial review to provide a habeas remedy for trial and appellate errors of constitutional magnitude during both guilt and sentencing proceedings. That standard

361. Smith v. Murray, 477 U.S. 527, 546 (1986) (Stevens, J., dissenting).

362. Beck v. Alabama, 447 U.S. 625, 638 n.13 (1980).

363. Roberts v. Louisiana, 428 U.S. 325, 333-34 (1976).

364. Furman v. Georiga, 408 U.S. 238, 306 (1972) (Stewart, J., concurring).

365. Woodson v. North Carolina, 428 U.S. 280, 305 (1976).

366. A capital sentencing statute must provide for the individualized "consideration of the character and record of the individual offender and the circumstances of the particular offense." *Id.* at 304; Eddings v. Oklahoma, 455 U.S. 104, 111-12 (1982); Sumner v. Shuman, 483 U.S. 66, 74-76 (1987). Death penalty jurisprudence "mandates an individualized assessment of the appropriateness of the death penalty." Penry v. Lynaugh, 492 U.S. 302, 317 (1989).

367. It is conceded that the writ may indeed be "abused" in certain cases, such as the *deliberate withholding* of a claim.

is strict scrutiny review, one which requires the state to justify its position and meet its burden by demonstrating that it is employing narrowly-tailored, necessary means to achieve a compelling government interest.

It was the Court's resort to a kind of balancing test that spawned the cause-and-prejudice requirement promulgated in *Wainwright v. Sykes* and its progeny. It simply weighed the competing interests of the habeas petitioner and the state and concluded that the petitioner's procedurally-defaulted claim could not be entertained absent proof of cause and prejudice. As a practical matter, such "balancing" by the Court has been essentially a standard of rationality review, a standard which facilitates and serves to promote deference to the state. According to this highly permissive form of review, the presumption is made in favor of the government's sentencing authority, and the habeas petitioner must show that his punishment is irrational.

The destructive consequences of the balancing test in *Sykes* were clearly demonstrated nine years later in *Kuhlmann v. Wilson*. In that case, Justice Powell declared that the prisoner's interests would outweigh those of the state only "where the prisoner supplements his constitutional claim with a colorable showing of factual innocence."[368] The balancing test of *Kuhlmann* has quickly become embedded in recent habeas corpus law. The emphasis on "factual innocence" is easily traceable to the Court's milestone decision in *Stone v. Powell*, wherein the majority held that resort to habeas corpus should be limited primarily to protect the innocent.[369] The line from *Stone* to *Sykes* to *Kuhlmann* to *Smith* to *Dugger* to *McCleskey*, and culminating in *Sawyer*, is a straight one. With balancing reduced to a rational relationship test as its standard of review, deference prevails, expediency wins, and cost/benefit analysis is the norm.[370]

The Court's adoption of this standard of review has thus led directly to its current emphasis upon "innocence." In turn, this has led the Rehnquist majority inexorably to the erroneous assumption that the sole purpose of federal habeas review is to ensure the reliability of the determination of guilt.[371] But, as pointed out by Justice Stevens,

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368. 477 U.S. at 454. *See also* McCleskey v. Zant, 111 S. Ct. 1454, 1470 (1991); Murray v. Carrier, 477 U.S. 478, 496 (1986).

369. 428 U.S. 465 (1976).

370. "Expediency may tip the scales when arguments are nicely balanced." Woolford Realty Co. v. Rose, 286 U.S. 319, 330 (1932).

371. The "Habeas Corpus Reform Act of 1993," or Biden Bill, *supra* note 32, falls into lock-step with the current Rehnquist majority in its proposed amendment to 28 U.S.C. 2244(b). The precondition for entertaining a claim which was not timely filed in a prior petition is that

"[o]ur criminal justice system, and our Constitution, protect other values in addition to the reliability of the guilt or innocence determination, and the statutory duty to serve law and justice should similarly reflect those values."[372]

Essential to the Court's return to its historical role as final arbiter of habeas review, which is to examine *all* claims of constitutional error, is recognition of the insidious nature of the balancing test in habeas jurisprudence. This balancing must be replaced with a standard of review which is consistent with the fundamental constitutional rights which are at issue — namely, the right to life and liberty. Any lesser standard than strict scrutiny in capital cases serves to undermine the historical purpose of the Great Writ as well as the constitutional legitimacy of capital punishment. Heightened reliability requires heightened scrutiny by the federal courts. If the Great Writ is to be restored to its position as a centerpiece of our liberties, the doors to the federal courthouse must remain open to those claiming its protection. As the Supreme Court declared in a different context:

> We yet like to believe that wherever the Federal courts sit, human rights under the Federal Constitution are always a proper subject for adjudication, and that we have not the right to decline the exercise of that jurisdiction simply because the rights asserted may be adjudicated in some other forum.[373]

The most fundamental of human rights under the Federal Constitution are the rights to life and liberty. Such precious rights can only be protected under a system of judicial review which applies strict-scrutiny in capital habeas cases and, *at minimum*, intermediate scrutiny in non-capital habeas cases. Nothing short of a maximum degree of reliability is acceptable so long as capital punishment continues to prevail in almost three-quarters of our jurisdiction and its toll of human lives continues to mount.[374]

The balancing test is a creature of the Burger-Rehnquist majority, by way of the *Stone-Sykes-Kuhlmann-Teague-McCleskey* line of decisions. It is a test which fewer and fewer habeas petitioners are able to pass. It has served to convert the Great Writ from a major avenue for the redress of constitutional violations to a narrow, treacherous roadway full of holes and tortuous turns. In the course of the Senate

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there *must* be evidence that would undermine the court's confidence either in the finding of factual guilt or the death-sentencing process. *See supra* note 343.

372. Smith v. Murray, 477 U.S. 527, 545 (1986) (Stevens, J., dissenting).

373. Zwickler v. Koota, 389 U.S. 241, 248 (1967).

374. *See generally* DEATH ROW, U.S.A., *supra* note 98.

Judiciary Committee hearings on her nomination, Judge (now Justice) Ruth Bader Ginsburg quoted the following eloquent passage from the writings of Justice Cardozo: "Justice is not to be taken by storm. She is to be wooed by slow advances."[375] If the Great Writ is to be restored to its central place in our constitutional system, it is long past time for some "slow advances" in the direction of serving the ends of justice.

375. SELECTED WRITINGS OF BENJAMIN NATHAN CARDOZO, THE CHOICE OF TYCHO BRAHE 245 (Margaret E. Hall ed., 1947).

## APPENDIX A

The following is an excerpt from the "Habeas Corpus Reform Act of 1993," S. 1441, 103d Cong., 1st Sess. § 2 (1993), also referred to in this Article as the "Biden Bill":

Sec. 2. *Filing Deadlines.*

(a) In General.—Section 2242 of Title 28, United States Code, is amended—

(1) by amending the heading to read as follows:

**"§ 2242. Filing of habeas corpus petition; time requirements; tolling rules"; . . .**

(3) by amending the third paragraph, as designated by paragraph (3), to read as follows:

"(3) Leave to amend or supplement the petition shall be freely given, as provided in the rules of procedure applicable to civil actions."; and

(4) by adding at the end the following new subsections:

"(b) An application for habeas corpus relief under section 2254 shall be filed in the appropriate district court not later than 180 days after —

"(1) the last day for filing a petition for writ of certiorari in the United States Supreme Court on direct appeal or unitary review of the conviction and sentence, if such a petition has not been filed within the time limits established by law;

"(2) the date of the denial of a writ of certiorari, if a petition for a writ of certiorari to the highest court of the State on direct appeal or unitary review of the conviction and sentence is filed, within the time limits established by law, in the United States Supreme Court; or

"(3) the date of issuance of the mandate of the United States Supreme Court, if on a petition for a writ of certiorari

the Supreme Court grants the writ and disposes of the case in a manner that leaves the sentence undisturbed.

"(c)(1) Notwithstanding the filing deadline imposed by subsection (b), if a petitioner under a sentence of death has filed a petition for post-conviction review in State court within 270 days of the appointment of counsel as required by section 2258, the petitioner shall have 180 days to file a petition under this chapter upon completion of the State court review.

"(2) The time requirements established by subsection (b) shall not apply unless the State has provided notice to a petitioner under sentence of death of the time requirements established by this section. Such notice shall be provided upon the final disposition of the initial petition for State post-conviction review.

"(3) In a case in which a sentence of death has been imposed, the time requirements established by subsection (b) shall be tolled —

"(A) during any period in which the State has failed to appoint counsel for State post-conviction review as required in section 2258;

"(B) during any period in which the petitioner is incompetent; and

"(C) during an additional period, not to exceed 60 days, if the petitioner makes a showing of good cause.

"(d)(1) Notwithstanding the filing deadline imposed by subsection (b), if a petitioner under a sentence other than death has filed —

"(A) a petition for post-conviction review in State court; or

"(B) a request for counsel for post-conviction review, before the expiration of the period described in subsection (b), the petitioner shall have 180 days to file a petition under this chapter upon completion of the State court review.

"(2) The time requirements established by subsection (b) shall not apply in a case in which a sentence other than death has been imposed unless —

"(A) the State has provided notice to the petitioner of the time requirements established by this section and of the availability of counsel as described in subparagraph (B); such notice shall be provided orally at the time of sentencing and in writing at the time the petitioner's conviction becomes final, except that in a case in which the petitioner's conviction becomes final within 30 days of sentencing, the State may provide both the oral and the written notice at sentencing; in all cases, the written notice to petitioner shall include easily understood instructions for filing a request for counsel for State post-conviction review; and

"(B)(i) the State provides counsel to the petitioner upon the filing of a request for counsel for State post-conviction review; or

"(ii) the State provides counsel to the petitioner, if a request for counsel for State post-conviction review is not filed, upon the filing of a petition for post-conviction review.

"(3) The time requirements established by subsection (b) shall be tolled in a case in which a sentence other than death has been imposed —

"(A) during any period in which the petitioner is incompetent; and

"(B) during an additional period, not to exceed 60 days, if the petitioner makes a showing of good cause.

"(e) An application that is not filed within the time requirements established by subsection (b) shall be governed by section 2244(b)."