1993

The Writ of Habeas Corpus: A Complex Procedure for a Simple Process

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In Greek mythology, Zeus condemned Sisyphus to roll a boulder up a hill for eternity. As Sisyphus neared the top, the boulder always fell back, requiring him to begin his labors anew.[1] Futile labors of men are often likened to this parable.

This Article explores whether pursuit of federal habeas corpus has turned into a Sisyphean task for both courts and litigants.[2] The major testing ground for this analysis is death penalty litigation. My concern focuses on federal habeas corpus as

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* The Chief Judge of the United States Court of Appeals for the Eighth Circuit from 1980 through 1992, Judge Lay is now the James A. Levee Professor of Criminal Procedure Law at the University of Minnesota Law School and a senior judge on the federal court of appeals. This article is an expanded and annotated version of the lecture Judge Lay gave on April 2, 1992 to inaugurate the James A. Levee Professorship. During the course of the past year, the Eighth Circuit has reviewed several appeals in habeas corpus cases involving state prisoners. In passing upon those appeals, Judge Lay's law clerks, Daniel Oberdorfer and Carolyn Brue, have worked with him. As a consequence, they have made several contributions and provided technical assistance to him in preparation of this article. Judge Lay wishes to acknowledge his deep indebtedness to them for their assistance.

1. BULFINCH'S MYTHOLOGY 238 (Richard P. Martin ed., 1991); 24 ENCYCLOPEDIA AMERICANA 851 (Int'l ed. 1984).

2. At least one other circuit judge likens the current state of federal habeas law to this parable. *See* Johnson v. Hargett, 978 F.2d 855, 861 (5th Cir. 1992) (Brown, J., dissenting). In *Johnson*, the petitioner claimed that prosecutors had withheld exculpatory material during discovery. *Id.* at 857. The court of appeals, however, upheld the trial judge's determination that Johnson could not raise the violation because he had failed to include it in an earlier habeas petition. *Id.* at 859. The appeals court did not consider his claim that his first habeas lawyer provided deficient representation, violating his Sixth Amendment right to effective assistance of counsel, and asserted that Johnson had no constitutional right to representation. *Id.* Judge Brown, in dissent, concluded that the case "cries out for correction." *Id.* at 861. He wrote:

> The frustrations of Tantalus pale in comparison to the exasperation Hosey Johnson must have felt as, time and again, his Sisyphean pleas fell on unhearing (or at least unlistening) ears, a result of the shortcomings of those charged with seeing to it that Johnson received fairness under our system of justice. As his odyssey through the state and federal courts unfolds below, a picture emerges of step after inept step, fostered by hypertechnicalities, producing a series of hollow

it relates to divisions within the United States Supreme Court and to the discontent of federal and state judiciaries, state defender groups, state prosecutors, prisoners sitting on death row, and perhaps most important, the American people.

Without question, something is wrong with the process. Not only is it not improving, but if anything, dissatisfaction continues to grow, because of conflicting tensions.[3] The delay in bringing about finality of judgment (execution, in capital cases) is a continuing problem.[4] Dissatisfaction results in part because so much controversy surrounds the death penalty and impedes substantive resolution.

Both sides hold strong views. Thirty-six states have the death penalty in their laws.[5] Since the Court decided *Furman v. Georgia*[6] in 1972, 189 state prisoners have been executed.[7] Courts have vacated death sentences in 1,268 cases.[8] There can be little question that if the states were to ban the death penalty, a large amount of litigation would disappear. The savings to state government would be enormous[9]—not only in sentenc-

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"days in court," devoid of real substance, never considering the merits of Johnson's facially meritorious claims.

Id.

3. AD HOC COMM. ON FEDERAL HABEAS CORPUS IN CAPITAL CASES, JUDICIAL CONFERENCE OF THE UNITED STATES, COMM. REPORT AND PROPOSAL 1 (1989) [hereinafter POWELL COMM. REP.]. The Supreme Court's recent decisions blocking review of three death penalty cases, Herrera v. Collins, 113 S. Ct. 853 (1993); Graham v. Collins, 113 S. Ct. 892 (1993), and Lockhart v. Fretwell, 113 S. Ct. 838 (1993), have prompted a spate of newspaper editorials attacking the Court's obsession with clearing its docket, especially in capital cases. *See Deadly Injustice*, N.Y. TIMES, Feb. 1, 1993, at A12; *Death Row: Justice Takes a Back Seat to Docket Considerations*, DET. FREE PRESS, Jan. 29, 1993, at 8A; *Perilously Close to Murder*, ST. LOUIS POST DISPATCH, Jan. 29, 1993, at 2C; *see also* Tom Teepen, *A Death-Penalty Ruling that Puts Procedure over Justice*, STAR TRIB. (Mpls.), Feb. 3, 1993, at 15A.

4. POWELL COMM. REP., *supra* note 3, at 1 (noting that current system "has led to piecemeal and repetitive litigation, and years of delay").

5. For a list of these death penalty states, see DEATH ROW, U.S.A. (NAACP Legal Defense and Educ. Fund, Inc./Capital Punishment Project, New York, N.Y.), Winter 1992, at 1. In addition, federal law and military statutes allow capital punishment for certain crimes. *Id.*

6. 408 U.S. 238 (1972).

7. DEATH ROW, U.S.A., *supra* note 5, at 1. This statistic was current as of January 15, 1993.

8. *Id.* This figure includes decisions by state courts as well as by federal courts reviewing habeas corpus petitions. It also includes cases in which the courts have reversed the underlying conviction. The governor of Texas has commuted the sentence of a few additional inmates after the inmates won favorable court decisions. In all, 58 inmates nationwide have had their capital sentences commuted. *Id.*

9. The State of Florida, for example, spent at least $6 million on legal

ing proceedings and post-conviction processes in both the state and federal courts, but also in the guilt or innocence phase of trials. The fact remains, however, that for various reasons, retribution undoubtedly being paramount, thirty-six states favor the death penalty.

Regardless of rhetoric that death penalty cases should receive the same review on habeas corpus as imprisonment cases,[10] capital punishment is unique because it is irrevocable once performed. Therefore, it is incumbent upon a civilized society to make judicial procedures for capital punishment fundamentally fair, nondiscriminatory, and nonarbitrary.[11] At least since *Furman*, the Court has directed state legislatures to do just that.[12] Judicial review of death sentences must provide a studied examination of any violations of those standards.[13]

On these principles, there should be little disagreement. Yet, our judicial processes of review, at least in federal court, have engendered great scrutiny and criticism both from within the judiciary and from without.[14] The chief justice of a large

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proceedings in executing Ted Bundy. *See Cost of Executing Bundy Was at Least $6 Million*, ST. PETERSBURG TIMES, Mar. 3, 1989, at 2B.

10. *See* Herrera v. Collins, 113 S. Ct. 853, 863-64 (1993) (quoting Murray v. Giarratano, 492 U.S. 1, 8-10 (1989) (opinion of Rehnquist, C.J.) (citing Smith v. Murray, 477 U.S. 527, 538 (1986))). *But see* Strickland v. Washington, 466 U.S. 668, 715-17 (1984) (Marshall, J., dissenting) (noting instances in which the Court has required "stricter adherence to procedural safeguards" in capital cases).

11. *See, e.g.*, Sawyer v. Whitley, 112 S. Ct. 2514, 2520 (1992); Gregg v. Georgia, 428 U.S. 153, 188-89 (1976); Furman v. Georgia, 408 U.S. 238, 255-57 (1972) (Douglas, J., concurring).

12. *Sawyer*, 112 S. Ct. at 2520 (describing the impact of *Furman*).

13. As the Eighth Circuit has noted:

> The severity and finality of the death penalty requires the utmost diligence and scrutiny of the court. In capital cases the law is uniquely complex and difficult to understand. No judge can digest, retain, or apply these principles to a voluminous state court record without reflective study and analysis. . . . As long as federal habeas review exists, it is the duty of federal judges to make certain that an individual does not forfeit his life at the hands of the state unless the state process lawfully rendered the punishment, it complied with federal constitutional standards, and the defendant was furnished with competent and effective representation within the norms required by the sixth amendment. Regardless of how heinous the crime, no one may reasonably question that a predicate to carrying out a death sentence is careful review of the constitutionality of the defendant's conviction and sentence.

Mercer v. Armontrout, 864 F.2d 1429, 1431-32 (8th Cir. 1988).

14. *See, e.g.*, POWELL COMM. REP., *supra* note 3, at 2-3 (identifying "serious problems" with present system); REPORT OF THE ABA TASK FORCE ON DEATH PENALTY HABEAS CORPUS (1989), *reprinted in* Ira P. Robbins, *Toward a More Just and Effective System of Review in State Death Penalty Cases*, 40 AM. U.

western state recently told me that when his state's death penalty cases reach the level of federal habeas review, they disappear down a "big black hole." The public's constant outcry concerns the "endless appeals" that death row litigants may pursue before their executions are carried out.[15]

In a succession of cases in recent years, the Supreme Court has announced new rules relating to federal habeas review. These concern successive petitions,[16] abusive petitions,[17] nonretroactivity of new rules,[18] exhaustion of remedies,[19] and cause and prejudice.[20] The Court has also introduced rigid definitions of actual innocence for reviewing errors in the guilt phase of criminal trials[21] and in the sentencing phase of capital cases.[22]

In doing so, the Court has perhaps consciously created procedural hurdles that make the writ less accessible to litigants, prompting sharp dissents over the lack of fundamental fairness.[23] The majority of the justices has sacrificed constitutional fairness to reinforce its present concern over the finality of the state judgment.[24]

This Article demonstrates that federal habeas review can maintain respect for finality of state court judgments yet provide expeditious review and, most importantly, reinstate principles of fundamental fairness. To obtain these goals, however, the procedural rules under which federal habeas review now la-

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L. REV. 1 (1990) [hereinafter ABA TASK FORCE REPORT]; Vivian Berger, *Justice Delayed or Justice Denied? — A Comment on Recent Proposals to Reform Death Penalty Habeas Corpus*, 90 COLUM. L. REV. 1665 (1990).

15. *See, e.g.*, Andrew H. Malcolm, *The Wait on Death Row, Legal Delays Thwart Death Penalty*, N.Y. TIMES, July 23, 1990, at A1 (describing capital appeals process as a "legal game" designed to cause "delay, delay, delay").

16. Kuhlman v. Wilson, 477 U.S. 436, 454 (1986) (narrowing reviewability of successive petitions to cases where petitioner "supplements his constitutional claim with a colorable showing of factual innocence").

17. McCleskey v. Zant, 111 S. Ct. 1454 (1991) (requiring a petitioner to demonstrate cause and prejudice when asserting claims not included in earlier writs).

18. Teague v. Lane, 489 U.S. 288 (1989) ("New constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced.").

19. Rose v. Lundy, 455 U.S. 509 (1982) (requiring "total exhaustion" and dismissing habeas petition asserting both exhausted and unexhausted claims).

20. Wainwright v. Sykes, 433 U.S. 72 (1977); *see also* United States v. Frady, 456 U.S. 152 (1982); Engle v. Isaac, 456 U.S. 107 (1982).

21. Sawyer v. Whitley, 112 S. Ct. 2514, 2518-23 (1992).

22. *Id.* at 2523-25.

23. *See, e.g., id.* at 2530 (Stevens, J., dissenting); Coleman v. Thompson, 111 S. Ct. 2546, 2569 (1991) (Blackmun, J., dissenting).

24. *See, e.g.*, McCleskey v. Zant, 111 S. Ct. 1454, 1468 (1991) (emphasizing finality's importance to the deterrent effect of the criminal law).

bors must be radically altered. Without change, we will continue to toil under a procedural system that breeds judicial inefficiency, delay, public misunderstanding, and fundamental unfairness.

I. THE WRIT'S PROCEDURAL INEFFICIENCY

A. HISTORICAL BACKGROUND

Article I, Section 9 of the Constitution reads: "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."[25]

Thomas Jefferson criticized the framers of the Constitution for not setting forth affirmative constitutional provisions on habeas corpus.[26] In *Ex Parte Dorr*,[27] the Supreme Court held that the federal common law writ of habeas corpus did not extend to state prisoners.[28] Not until 1867, in the reconstruction era, did Congress pass the Judiciary Act, which gave state prisoners, held in violation of the Federal Constitution or federal law, the opportunity to challenge their confinement in federal court.[29] Thus, *Ex Parte Dorr* was overruled. In *Ex Parte Royall*, the Court mandated that a state prisoner exhaust his state court remedies,[30] a requirement now codified at 28 U.S.C. § 2254(b).

Early application of the Judiciary Act confined the federal court's reach to questions of whether a court of competent jurisdiction had jurisdiction to try the prisoner.[31] In *Frank v. Mangum*, the Court denied a writ because the state court had given full review, but it recognized in dicta that a federal court could look beyond the jurisdictional question to see if the state

25. U.S. CONST. art. I, § 9, cl. 2.

26. *See* WILLIAM F. DUKER, A CONSTITUTIONAL HISTORY OF HABEAS CORPUS 133 n.52 (1980).

27. 44 U.S. (3 How.) 103 (1845).

28. *Id.* at 105. In 1833, Congress provided that a judicial officer in state custody for acts committed in furtherance of federal law could bring a petition for habeas corpus. Act of Mar. 2, 1833, ch. 57, § 7, 4 Stat. 632, 634-35 (current version at 28 U.S.C. § 2241(c)(2) (1988)); *see also In re* Neagle, 135 U.S. 1, 40-41 (1890); Clifton v. Cox, 549 F.2d 722, 724-25 (9th Cir. 1977).

29. Judiciary Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385, 385 (current version at 28 U.S.C. § 2241(c)(3) (1988)).

30. 117 U.S. 241, 252-53 (1886).

31. *See Ex parte* Siebold, 100 U.S. 371 (1879) (unconstitutional statute); *see also Ex parte* Wilson, 114 U.S. 417 (1885) (finding jurisdiction lacking when there was no grand jury indictment).

proceeding had exceeded constitutional boundaries.[32] Finally in *Waley v. Johnston*, the Court held that a jurisdictional defect was not necessary for a state prisoner to obtain federal habeas review.[33] The landmark decision of *Brown v. Allen* overruled *Frank* and held that federal constitutional challenges by state prisoners could be reviewed even though state courts had reviewed the merits of a prisoner's constitutional claims.[34] In *Brown*, Justice Jackson prophesied:

> [T]his Court has sanctioned progressive trivialization of the writ until floods of stale, frivolous and repetitious petitions inundate the docket of the lower courts and swell our own. Judged by our own disposition of habeas corpus matters, they have, as a class, become peculiarly undeserving. It must prejudice the occasional meritorious application to be buried in a flood of worthless ones. He who must search a haystack for a needle is likely to end up with the attitude that the needle is not worth the search. Nor is it any answer to say that few of these petitions in any court really result in the discharge of the petitioner. That is the condemnation of the procedure which has encouraged frivolous cases. In this multiplicity of worthless cases, states are compelled to default or to defend the integrity of their judges and their official records, sometimes concerning trials or pleas that were closed many years ago.[35]

Despite Justice Jackson's prophecy, Justice Frankfurter's analysis carried the day in *Brown*. He wrote that the "[s]tate court cannot have the last say when it, though on fair consideration and what procedurally may be deemed fairness, may have misconceived a federal constitutional right."[36] Justice Frankfurter concluded that federal habeas jurisdiction "is not a case of a lower court sitting in judgment on a higher court" but rather "one aspect of respecting the Supremacy Clause of the Consti-

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32. 237 U.S. 309, 335-36 (1915). The *Frank* Court stated that habeas corpus is available when a state, "supplying no corrective process, deprives the accused of his life or liberty without due process of law." *Id.*

33. 316 U.S. 101, 104-05 (1942) (per curiam).

34. 344 U.S. 443, 487 (1953). In Moore v. Dempsey, 261 U.S. 86 (1923), the Court, contrary to *Frank*, permitted federal habeas proceedings on claims of mob domination of a trial. *Moore* is generally not thought to have overruled *Frank* but has been viewed as a comment on the state appellate court's perfunctory review. *See* Fay v. Noia, 372 U.S. 391, 457-58 (1963) (Harlan, J., dissenting). Justice Harlan determined that *Moore* "is sufficiently ambiguous that it seems to have meant all things to all men." *Id.* at 457. He asserted that *Brown* was a clear break from prior habeas doctrine. *Id.* This view is widely shared. *See, e.g.*, ERWIN CHEMERINSKY, FEDERAL JURISDICTION 712 (1989).

35. *Brown*, 344 U.S. at 536-37 (Jackson, J., concurring) (footnotes omitted). Justice Jackson added: "There is no doubt that if there were a super-Supreme Court, a substantial proportion of our reversals of state courts would also be reversed. We are not final because we are infallible, but we are infallible only because we are final." *Id.* at 540.

36. *Id.* at 508.

tution whereby federal law is higher than State Law."[37]

There is no doubt, however, that Justice Jackson's prediction has rung true. At the time of *Brown*, there were only 541 petitions filed by state prisoners.[38] By 1961 there were 1,020[39] and by 1970 there were 9063.[40] In 1991, state prisoners filed 10,325 habeas petitions.[41]

In 1982, the Attorney General introduced legislation to restrict the scope of federal habeas proceedings to allow only a determination of whether the state petitioner received a full and fair opportunity to litigate in state court.[42] This legislative measure, if passed, would have constituted a return to the law of 1915, when the Supreme Court in *Frank* refused to review the constitutionality of a mob-dominated state trial simply because the constitutional question had received full review in the Georgia Supreme Court.[43]

Over the past few years, proponents of new limitations to

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37. *Id.* at 510.

38. *Id.* at 536 n.8 (citing 1952 statistics for habeas corpus petitions challenging state convictions filed in federal district court).

39. *See* Schneckloth v. Bustamonte, 412 U.S. 218, 260 n.14 (1973) (Powell, J., concurring) (citing 1972 DIRECTOR OF THE ADMIN. OFFICE OF THE UNITED STATES COURTS ANN. REP. II-5, II-22, II-28-32).

40. *Id.*

41. 1991 DIRECTOR OF THE ADMIN. OFFICE OF THE UNITED STATES COURTS ANN. REP. 191.

42. The legislation would have greatly broadened the Supreme Court's holding in Stone v. Powell, 428 U.S. 465 (1976), which limited habeas review of Fourth Amendment violations. *See The Habeas Corpus Reform Act of 1982: Hearing on S. 2216 Before the Senate Comm. on the Judiciary*, 97th Cong., 2d Sess. 9-15 (1982). After the hearings, Senator Thurmond reintroduced the proposal with clarifying amendments as S. 2838, 97th Cong., 2d Sess. (1982). *See* S. REP. NO. 226, 98th Cong., 2d Sess. 2 (1983); 128 CONG. REC. 24,430 (1982) (statement of Sen. Thurmond). Similar proposals were introduced in the House, but the House Judiciary Committee took no action. *See* S. REP. NO. 226, *supra*, at 2 n.3. The following Congress, the Senate Judiciary Committee held more hearings and reported the proposal to the full Senate. *See Comprehensive Crime Control Act of 1983: Hearings on S. 829 Before the Subcomm. on Criminal Law of the Senate Comm. on the Judiciary*, 98th Cong., 1st Sess. 3 (1983); S. REP. NO. 226, *supra*, at 31 & n.118; *see also* 128 CONG. REC. at 24,430; *Habeas Corpus Procedures Amendments Act of 1981: Hearings on S. 653 Before the Subcomm. on Courts of the Senate Comm. on the Judiciary*, 97th Cong., 1st Sess. 21-22 (1981) (similar bill precluding federal redetermination of factual issues given full and fair hearing by state courts). The Senate passed this proposal in 1984, *see* 130 CONG. REC. 1854-72 (1984), but the House chose to take no action on it. The proposal was revived again in the 99th Congress and, although hearings were held, the proposal was not reported out of committee. *See Habeas Corpus Reform: Hearing on S. 238 Before the Senate Comm. on the Judiciary*, 99th Cong., 1st Sess. 3-9 (1985).

43. *See* Frank v. Mangum, 237 U.S. 309 (1915).

habeas corpus have continued to pursue their agenda with proposals to the Congress. Of particular concern to the author was the Powell Committee, headed by former Associate Justice Lewis F. Powell, which recommended a six-month statute of limitations that would make habeas corpus a hollow remedy for many state prisoners. Part II of this Article discusses the Committee's proposal in detail.

Even without congressional direction, however, the Supreme Court has sharply restricted the scope of habeas. In 1976 in *Stone v. Powell*, the Supreme Court followed Justice Powell's suggestion from *Schneckloth v. Bustamonte*[44] and held that prisoners are precluded from using federal habeas corpus proceedings to assert Fourth Amendment illegal search and seizure claims if a state court has afforded a full and fair opportunity to pursue the claim.[45] The Court stated as follows:

> Resort to habeas corpus, especially for purposes other than to assure that no innocent person suffers an unconstitutional loss of liberty, results in serious intrusions on values important to our system of government. They include "(i) the most effective utilization of limited judicial resources, (ii) the necessity of finality in criminal trials, (iii) the minimization of friction between our federal and state systems of justice, and (iv) the maintenance of the constitutional balance upon which the doctrine of federalism is founded."[46]

In a case decided as this Article went to press, the Supreme Court declined to extend the *Stone* rule of preclusion to *Miranda*-type proceedings.[47] The Court had rejected applying the *Stone* approach in other contexts on three prior occasions. It declined to extend *Stone* to federal habeas claims alleging discrimination in the selection of a grand jury,[48] to habeas petitions alleging a constitutional insufficiency of evidence,[49] and to habeas claims alleging violations of the Sixth Amendment right to effective assistance of counsel.[50] This latter claim, interest-

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44. 412 U.S. 218, 266 (1973) (Powell, J., concurring).

45. 428 U.S. 465, 494 (1976).

46. *Id.* at 491 n.31 (quoting *Schneckloth*, 412 U.S. at 259 (Powell, J., concurring)).

47. Withrow v. Williams, No. 91-1030, 1993 WL 119753 (U.S. Apr. 21, 1993). Writing for the majority in the 5-4 decision, Justice Souter cited the lack of significant benefit for federal courts since "eliminating habeas review of Miranda issues would not prevent a state prisoner from simply converting his barred Miranda claim into a due process claim that his conviction rested on an involuntary confession." *Id.* at *8.

48. Rose v. Mitchell, 443 U.S. 545, 564 (1979).

49. Jackson v. Virginia, 443 U.S. 307, 323-24 (1979).

50. Kimmelman v. Morrison, 477 U.S. 365, 382-83 (1986). Justice Powell joined the majority in *Kimmelman*.

ingly, was based on counsel's failure to raise a Fourth Amendment violation in state court.[51] In each of these cases the Supreme Court recognized the prisoner's fundamental constitutional right to be protected, notwithstanding the existence of direct review by the state courts.[52]

As this brief history of habeas corpus reveals, federal habeas petitions would be drastically curtailed if the legislation introduced in 1982 had prevailed. A return to the pre-*Brown* law would eliminate the extensive analysis that lower federal courts must go through to determine cause and prejudice, exhaustion of all claims, a new rule, a successive petition, an abusive petition, and a miscarriage of justice under claim of actual innocence of the conviction or of the death sentence. Such reform would eliminate delay and piecemeal federal appeal and would return the finality of state court judgments to an exalted place supreme over the Constitution.[53] Expediency would no longer be a problem for federal courts. The work load of the federal courts would be greatly reduced.[54] Under "full and fair opportunity" rules, federal judges would have questionable jurisdiction to determine whether state authorities subjected prisoners to the extreme penalty of death despite violation of the prisoner's fundamental constitutional rights. Such legislation would give renewed emphasis to the words of Justice Stewart in *Francis v. Henderson*: "This Court has long recognized that in some circumstances considerations of comity and concerns for the orderly administration of criminal justice require a federal court to forgo the exercise of its habeas corpus power."[55]

This all sounds very logical and meritorious, but there are

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51. *Id.* at 378.

52. *Id.* at 371, 380-81 (permitting federal habeas review even though case had proceeded through state's appellate system); *Jackson*, 443 U.S. at 311 & n.4, 323-24 (same); *Rose*, 443 U.S. at 549, 564 (same).

53. Such legislation would return to the state judiciary a primary role in policing the federal courts. As Justice Kennedy recently stated in *Sawyer v. Smith*: "State courts are coequal parts of our national judicial system and give serious attention to their responsibilities for enforcing the commands of the Constitution." 497 U.S. 227, 241 (1990).

54. The Court is concerned that duplicative litigation in federal court "places a heavy burden on scarce judicial resources." Keeney v. Tamayo-Reyes, 112 S. Ct. 1715, 1718 (1992).

55. 425 U.S. 536, 539 (1976). By precluding federal review, it may be argued public confidence would be reinforced in attaining finality of judgment in the state court. As Justice Powell wrote in *Schneckloth v. Bustamonte*: "It is this paradox of a system, which so often seems to subordinate substance to form, that increasingly provokes criticism and lack of confidence." 412 U.S. 218, 275 (1973) (Powell, J., concurring). It could also be argued the rehabilita-

many fundamental deficiencies in these arguments. They place rules of procedural efficiency over principles of fundamental fairness in subjecting a person's life or liberty to a possibly unconstitutional adjudication. One is traded for the other. Speed and finality shun the possibility of human error and injustice.[56]

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tive interest of the criminal law will thereby be restored and no longer frustrated. *See* Sanders v. United States, 373 U.S. 1, 24-25 (1963).

According to Chief Justice Rehnquist and Justices Scalia and Thomas, *Brown*'s requirement of de novo review has already been brought into question by *Teague v. Lane*. *See* Wright v. West, 112 S. Ct. 2482, 2489-91 (1992) (plurality opinion). According to these three justices, federal habeas review is now limited to inquiring only whether a state court was reasonable in treating existing constitutional rules. *Id.* at 2490; *see also* Butler v. McKellar, 494 U.S. 407, 415 (1990) (defining a new rule for retroactive purposes as one "susceptible to debate among reasonable minds").

56. Commentators have long argued that state courts are just as effective at applying constitutional review as federal courts. *See, e.g.*, Michael E. Solimine & James L. Walker, *Constitutional Litigation in Federal and State Courts: An Empirical Analysis of Judicial Parity*, 10 HASTINGS CONST. L.Q. 213 (1982). However, there is nothing wrong with a system that stresses disciplined and even repetitive review of possible human errors in convicting or executing a person. Our sense of morality is offended if an innocent person is convicted or if the state uses unfair, biased tactics to deprive an individual of life or liberty without constitutional due process. A few recent habeas cases from the Eighth Circuit Court of Appeals serve as good examples.

In Henderson v. Sargent, 926 F.2d 706 (8th Cir. 1991), *cert. denied*, 112 S. Ct. 915 (1992), the defendant was convicted of capital murder and sentenced to death. The court of appeals affirmed the grant of writ of habeas corpus on the ground of ineffective assistance of trial counsel. Counsel had failed to investigate the crime and discover factual circumstances that incriminated the victim's husband and two other persons. The only evidence incriminating Henderson was a sheet of yellow paper belonging to him that was found on the floor of the victim's place of work. The defendant testified and gave an alibi that was corroborated by his wife. Although not discoverable by trial counsel, the victim's husband told a third person at the coroner's hearing that he disputed the coroner's opinion that the victim had been sitting when she was shot. The husband said, "[T]hat's not the way it was. She dove out of the chair to miss the bullet." *Id.* at 711 n.8.

In a second habeas case, Smith v. Lockhart, 923 F.2d 1314 (8th Cir. 1991), the petitioner received a 242-year sentence for threatening the payroll department of his company with a gun while distraught. The petitioner had had his billfold stolen from his truck. He was without funds and requested the payroll department to advance his check by one day so he would have money. It refused to do so. Smith returned with a loaded pistol and threatened the seven employees. He was convicted of extortion with an armed weapon and was given 242 years. A state justice dissented on direct appeal and stated he found the sentence "outrageous" and "unconscionable." *See id.* at 1316 n.1. On appeal from a denial of a writ of habeas corpus to the Eighth Circuit, we observed: "Although this sentence might be legalistically condoned, it should shock the inner conscience of reasonable minds that our laws allow such treatment." *Id.* The Eighth Circuit granted a writ of habeas corpus on the basis of ineffective assistance of counsel at a critical stage of the proceeding. *Id.* at

As Herbert Packer teaches us, quality control is missing from the assembly line production of criminal conviction.[57] Arguments of state court finality and comity lose sight of the historical concerns of our constitutional fathers. In 1821, Chief Justice Marshall observed the Constitution did not provide the states with preeminent authority for enforcing the Constitution.[58] He wrote:

> There is certainly nothing in the circumstances under which our constitution was formed; nothing in the history of the times, which would justify the opinion that the confidence reposed in the States was so implicit, as to leave in them and their tribunals the power of resisting or undefeating, in the form of law, the legitimate measures of the Union.[59]

Over a century later, Justice Rutledge stated:

> The writ should be available whenever there clearly has been a fundamental miscarriage of justice for which no other adequate remedy is presently available. Beside executing its great object, which is the preservation of personal liberty and assurance against its wrongful deprivation, considerations of economy of judicial time and procedures, important as they undoubtedly are, become comparatively insignificant.[60]

A majority of the Supreme Court later observed that the "prevention of undue restraints on liberty is more important than mechanical and unrealistic administration of the federal courts."[61]

1321-22. Smith's appointed counsel was a part-time municipal judge whom Smith was suing in a § 1983 case.

In another state prisoner case, *Jones v. Arkansas*, the Eighth Circuit reversed a trial court and granted a writ of habeas corpus because the defendant had been sentenced under a state statute that was not in force at the time of his crime. 929 F.2d 375, 381 (8th Cir. 1991). We stated:

> It would be difficult to think of one who is more "innocent" of a sentence than a defendant sentenced under a statute that *by its very terms* does not even apply to the defendant.
>
> Jones' case falls within the extremely narrow band of cases in which a federal habeas court can grant the writ based on a miscarriage of justice. As Justice Frankfurter wrote almost half a century ago, "[t]he history of liberty has largely been the history of observance of procedural safeguards."

Id. (quoting McNabb v. United States, 318 U.S. 332, 347 (1943)).

57. Herbert L. Packer, *Two Models of the Criminal Process*, 113 U. PA. L. REV. 1, 9-23 (1964).

58. Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 387-428 (1821).

59. *Id.* at 388. In *Kaufman v. United States*, the Court said "[t]he right . . . is not merely to a federal forum but to full and fair consideration of constitutional claims." 394 U.S. 217, 228 (1969).

60. Sunal v. Large, 332 U.S. 174, 189 (1947) (Rutledge, J., dissenting).

61. Wade v. Mayo, 334 U.S. 672, 681 (1948). The Supreme Court recognized the great weight to be accorded life and liberty when it stated in *Sanders v. United States* that "[c]onventional notions of finality of litigation have no

A basic deficiency in the rationale of returning to the pre-*Brown* era is the failure to realize that at that time the Supreme Court had not interpreted the Bill of Rights as applying to the states.[62] At that time, therefore, the Court simply focused on the Due Process Clause of the Fourteenth Amendment, which did little more than guarantee a full and fair hearing in the state court.[63] When the Court applied the Bill of Rights, particularly the Fourth, Fifth, and Sixth Amendments, to the states, the reasoning changed. Thus, as Justice O'Connor makes clear in her concurrence in *Wright v. West*, the pre-*Brown* limitations were "a rule of constitutional law, not a threshold requirement of habeas corpus."[64]

In 1991, after the Senate moved to narrow habeas corpus dramatically, Justice Brennan wrote to Congressman Jack Brooks, pointing out the shortcomings of legislation to remove de novo federal review in habeas corpus. Justice Brennan wrote:

> The Great Writ of habeas corpus is the principal means by which federal courts can protect the Bill of Rights in state criminal cases. The crime bill recently passed by the Senate, however, contains proposals that would effectively strip federal courts of their habeas corpus jurisdiction.
>
> According to that bill, when state courts "fully and fairly adjudicate" a federal constitutional claim, federal courts are barred from re-

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place where life or liberty is at stake and infringement of constitutional rights is alleged." 373 U.S. 1, 8 (1963). In *Mackey v. United States*, Justice Harlan summarized the underlying rationale of habeas corpus as providing "a quasi-appellate review function, forcing trial and appellate courts in both the federal and state system to toe the constitutional mark." 401 U.S. 667, 687 (1971) (opinion of Harlan, J.). Justice Harlan has echoed the sentiments of those who advocate a decisive conclusion to drawn out litigation. He acknowledged that the interests of concluding litigation may well outweigh the competing interest in readjudicating convictions, but he was also convinced that "[t]he consequences of injustice—loss of liberty and sometimes loss of life—are far too great to permit the automatic application of an entire body of technical rules whose primary relevance lies in the area of civil litigation." *Sanders*, 373 U.S. at 24 (Harlan, J., dissenting). Justice Harlan criticized the idea of an arbitrary cut-off point for habeas petitions, stating "[t]here is little societal interest in permitting the criminal process to rest at a point where it ought properly never to repose." *Mackey*, 401 U.S. at 693.

62. *See* Wright v. West, 112 S. Ct. 2482, 2493 (1992) (O'Connor, J., concurring).

63. *Id.*; *see also* Ponzi v. Fessenden, 258 U.S. 254, 260 (1922) (stating that the Constitution requires only that a defendant receive a full and fair trial in state court); Frank v. Mangum, 237 U.S. 309 (1915) (denying habeas corpus because the state prisoner had already received a full and fair hearing in the state court).

64. 112 S. Ct. at 2493.

> viewing the claim. "Full and fair adjudication" is a legal term of art, both in habeas corpus and other contexts. Under the "full and fair adjudication" standard, the state courts need only hold a procedurally regular hearing; even cases in which the state court has overlooked serious constitutional violations would be immune from federal courts' review. This prospect is particularly troubling in state capital cases: an American Bar Association study reveals that in forty percent of such cases, habeas courts have, until now, granted relief. For these reasons, I must agree with the recent decision by the Judicial Conference of the United States to "oppose the inclusion of language relating to full and fair adjudication."
>
> The Senate crime bill is of course intended to reduce unnecessary delays in carrying out valid sentences. The bill, however, addresses these delays simply by making relief for constitutional violations impossible. It is unwise, I think, to purchase greater speed in criminal proceedings at the price of our constitutional liberties. Moreover, the Senate bill fails to address one important cause of delay in state criminal, particularly capital, proceedings—the inadequacy of trial counsel who in many cases fail to identify and raise constitutional issues in timely fashion. I note in this connection the recommendation of the American Bar Association and the Judicial Conference of the United States that a mandatory system of specific attorney competency standards be established in every state that imposes the death penalty.
>
> This is a complex issue, not easily understood. I hope you will take the time to study it carefully because it is vital to this country's constitutional protections and longstanding legal traditions.[65]

In approaching the question of legislative change, we should never lose sight of Justice Frankfurter's admonition in *Brown v. Allen*: "The complexities of our federalism and the workings of a scheme of government involving the interplay of two governments, one of which is subject to limitations enforceable by the other, are not to be escaped by simple, rigid rules which, by avoiding some abuses, generate others."[66]

B. EXHAUSTION OF STATE REMEDIES

By passing the Habeas Corpus Act in 1867, Congress implicitly recognized that state courts did not always view state convictions with the Federal Constitution in mind.[67] However, it was a fundamental premise of federalism that state courts be given every opportunity to manage their own criminal dockets

65. Letter from William Brennan, Associate Justice of the United States Supreme Court, to Congressman Jack Brooks, Chair of the House Judiciary Committee (Oct. 8, 1991) (on file with the *Minnesota Law Review*).

66. 344 U.S. 443, 498 (1953) (opinion of Frankfurter, J.).

67. *Ex parte* Royall, 117 U.S. 241, 248 (1886) (stating that "it was the purpose of Congress to invest the courts of the Union . . . to restore to liberty any person . . . who is held in custody, by whatever authority, in violation of the Constitution").

before federal review. This premise led the Supreme Court in 1886 to require that state prisoners exhaust state court procedures before they could receive benefits from federal habeas relief.[68]

The various states expanded their own procedures for collateral review after the Supreme Court, in *Fay v. Noia*,[69] eased federal habeas requirements for constitutional claims that petitioners had not pursued in state court.[70] The integrity of state finality was thus vindicated by the state courts' competence in handling their own criminal docket and "toe[ing] the constitutional mark."[71] Federal review was still justified because of the need to provide uniformity in federal constitutional law, thus adhering to Supremacy Clause doctrine.[72] As early observed by Chief Justice Marshall: if state courts were given final jurisdiction over federal causes, the result would be "a hydra in government from which nothing but contradiction and confusion can proceed."[73]

The great proliferation of cases collaterally challenging state court convictions has caused the states to look for ways to limit their collateral procedures.[74] Many states have now limited or eliminated state post-conviction review by enacting procedural bypass rules.[75] By refusing to provide post-conviction

68. *Id.* at 252-53; *cf.* 28 U.S.C. § 2254(b) (1988) (requiring exhaustion of state remedies); Castille v. Peoples, 489 U.S. 346, 349 (1989) (same); Rose v. Lundy, 455 U.S. 509, 515 (1982) (explaining policies underlying exhaustion doctrine).

69. 372 U.S. 391 (1963), *overruled by* Wainwright v. Sykes, 433 U.S. 72 (1977), *and* Coleman v. Thompson, 111 S. Ct. 2546 (1991), *and* Keeney v. Tamayo-Reyes, 112 S. Ct. 1715 (1992), *and* Sawyer v. Whitley, 112 S. Ct. 2514 (1992). *Fay* allowed prisoners to present claims to the federal habeas court that the prisoners had not raised in the state court as long as the prisoner had not deliberately bypassed the state procedures. *Id.* at 438.

70. The federal courts rarely have found these constitutional claims to be valid. *See infra* note 166 and accompanying text.

71. *See* Mackey v. United States, 401 U.S. 667, 687 (1971) (opinion of Harlan, J.). I recall Justice Brennan addressing a bar group in Missouri, in 1965, before I was a federal judge, encouraging each state to establish and expand their post-conviction procedures so as initially to examine the constitutional fairness of state convictions.

72. *See* Brown v. Allen, 344 U.S. 443, 510 (1953) (opinion of Frankfurter, J.).

73. Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 415-16 (1821) (citation omitted).

74. *See, e.g.*, Whitmore v. State, 771 S.W.2d 266, 267 (Ark. 1989) (stating that post-conviction remedies are "out of control").

75. *See, e.g.*, Engle v. Isaac, 456 U.S. 107, 125 n.28 (1982) (discussing Ohio rules); Dawan v. Lockhart, 980 F.2d 470, 475 (8th Cir. 1992) (stating that in abolishing certain post-conviction rules, the Arkansas Supreme Court has lim-

review, states left prisoners no opportunity to exhaust state remedies before federal habeas review.[76] These short-sighted reforms meant that the states failed to heed their own complaints that federal intrusion eliminated the state courts' opportunity to provide constitutional integrity to their own judgments. Thus, the states themselves abdicated responsibility, turning their backs on the deference and comity that the federal courts attempted to provide state decisional processes. With state exhaustion futile,[77] states placed a greater burden on the limited resources of the federal judiciary. Federal district court often became the initial forum for evidentiary hearing and decision making.[78] In addition, federal courts had to assume sole responsibility for post-conviction constitutional adjudication of state prisoner claims.[79]

In *Rose v. Lundy*,[80] the Supreme Court made a rudimentary change to the requirements of exhausting state remedies. This change has added to the burden that federal habeas courts shoulder. In order to obviate piecemeal review through the filing of repetitive petitions for different claims, the Supreme Court ruled in *Rose* that before any exhausted constitutional claims could be reviewed, the complaint must not contain any unexhausted claims.[81] If the petition contained unexhausted claims, the entire petition had to be denied and remanded to the state court for full exhaustion. Prior to *Rose*, the federal courts had not required total exhaustion before entertaining a

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ited state habeas relief to cases where "the commitment is invalid on its face or the committing court lacked jurisdiction" (quoting Mackey v. Lockhart, 819 S.W.2d 702, 704 (Ark. 1991))). Arkansas has since reinstated some post-conviction remedies. *See* ARK. R. CRIM. P. 37.1 publisher's notes. Missouri has also limited state post-conviction relief. For example, Missouri imposes sharp limitations on the number of days a prisoner has to file for post-conviction relief, MO. R. CRIM. P. 29.15(b) (30 days after the filing of a transcript if an appeal is taken), and consolidates the post-conviction proceedings with direct appeals, *id.* at 29.15(l). Missouri also provides for state habeas corpus proceedings, MO. R. CIV. P. 91, but the state courts have not determined how the post-conviction and habeas procedures interrelate. Schlup v. Armontrout, 941 F.2d 631, 637 (8th Cir. 1991), *cert. denied*, 112 S. Ct. 1273 (1992).

76. *See, e.g., Engle*, 456 U.S. at 125-26 n.28; *Dawan*, 980 F.2d at 475.

77. *See, e.g., Engle*, 456 U.S. at 125-26 n.28.

78. Under 28 U.S.C. § 2254(d) (1988), federal courts must give deference to state court findings of fact. Without evidentiary records from the state court, however, federal courts become the first court to hear factual claims and to have available the state court factual determinations.

79. *See, e.g., Engle*, 456 U.S. at 125 n.28.

80. 455 U.S. 509 (1982).

81. *Id.* at 520-22.

claim.[82]

Rather than reducing piecemeal review, *Rose v. Lundy* has created bifurcated review in both state and federal courts.[83] Under this process, federal district courts first review habeas petitions to ascertain whether the prisoner has exhausted all state claims. Often, this determination is not made until the case is reviewed on appeal. Whether or not the exhausted federal claims are meritorious, they cannot be adjudicated until the prisoner returns to state court to exhaust all unexhausted claims.[84] After so doing, the petitioner can return to federal court. This process results in the addition of interminable delays in adjudicating the claims and the waste of both state and federal resources. Moreover, it confuses and frustrates uneducated prisoners and prison writ writers.[85] Finally, there is no evidence that the rule achieved its goal of reducing piecemeal petitions. In fact, the experience is just the opposite.[86]

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82. *Id.* at 523 (Blackmun, J., concurring).

83. Justice Blackmun was concerned that *Rose* would promote delay of non-frivolous claims rather than speed the process. *Id.* at 522, 527-29 (Blackmun, J., concurring).

84. *Id.* at 522.

85. *Id.* at 522 (Blackmun, J., concurring) (stating that the decision "operates as a trap for the uneducated and indigent *pro se* prisoner-applicant").

86. The excessive delay caused by the exhaustion and procedural bypass rules is well illustrated by the history of *LaRette v. Delo*, now pending in the federal court in the Eastern District of Missouri. No. 86-0753 C(2) (E.D. Mo. filed Apr. 11, 1986). Acting pro se, Anthony J. LaRette, a death-row inmate at the Potosi Correctional Center, filed a petition for writ of habeas corpus in the United States District Court on April 11, 1986. Petition for Rehearing and Suggestion for Rehearing En Banc at 1, *In re* Delo, No. 92-3468 (8th Cir. Dec. 11, 1992).

A state court jury had convicted LaRette of capital murder and the Missouri Supreme Court, on March 29, 1983, upheld his conviction and sentence. State v. LaRette, 648 S.W.2d 96 (Mo.) (en banc), *cert. denied*, 464 U.S. 908 (1983). LaRette's attempts at state post-conviction relief were denied. *See* LaRette v. State, 757 S.W.2d 650 (Mo. Ct. App. 1988); LaRette v. State, 703 S.W.2d 37 (Mo. Ct. App. 1985).

The federal habeas court entered an order staying LaRette's execution on April 11, 1986. Petition at 1, *Delo* (No. 92-3468). The Missouri Attorney General argued that the habeas petition contained unexhausted claims and the district court appointed the Federal Public Defender's Office to represent LaRette. *Id.* LaRette filed amended petitions on July 17, 1986 and August 20, 1986. *Id.* In June 1988, pursuant to an amended response, the district court accepted the Attorney General's waiver of the exhaustion defense. *Id.* On February 3, 1989, LaRette filed his third amended petition. *Id.* The Attorney General responded April 10, 1989, raising the "defense of procedural bar despite the recent 'waiver of exhaustion.' " *Id.* LaRette then filed a "motion to hold the proceedings in abeyance" while he exhausted his claims in state court. The motion was granted November 14, 1990. *Id.*

The district court permitted LaRette to file his fourth amended petition

C. PROCEDURAL BYPASS

In *Wainwright v. Sykes*,[87] the Court rejected the deliberate bypass rule of *Fay v. Noia*, which had allowed prisoners to present issues on federal habeas that they did not present at their trial unless they had deliberately chosen to bypass state adjudication. Instead, the Court adopted a rule requiring prisoners to show "cause and prejudice" for defaulting on issues at their state trials.[88] Under this standard, a petitioner must show cause for the noncompliance and actual prejudice from the alleged constitutional violation.[89]

The Court proffered four reasons for adopting the cause

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on February 14, 1992. *Id.* One month later, the district court referred some issues to a magistrate judge and excluded other claims from consideration. *Id.* at 1-2. LaRette moved for reconsideration, and the district court ordered him to show cause why the excluded claims should be considered. *Id.* at 2. LaRette filed his pleadings on August 5, 1992, and five days later, the Attorney General filed his opposition. *Id.* Ten days later, on August 20, 1992, LaRette filed his reply. *Id.* The magistrate judge on August 28, 1992, directed LaRette to show he had exhausted the excluded claims. *Id.* On September 7, 1992, LaRette filed a request for clarification and subsequently filed a timely response to the magistrate's order. *Id.*

The Attorney General then filed a petition for writ of mandamus with the Eighth Circuit Court of Appeals even though he had not sought relief from the district court. *Id.* On December 11, 1992, a panel of the Eighth Circuit issued a writ of mandamus ordering the district court judge "to consider *all of the issues* presented in LaRette's case and to enter final judgment within 150 days of the date of th[e] order." *In re* Delo, No. 92-3468, slip op. at 1 (8th Cir. Dec. 11, 1992) (emphasis added). As of January 1993, the case was still pending in the district court.

The unbelievable history of delay in the above case can be directly traced to the decisions of *Rose v. Lundy*, discussed in this section, and *Wainwright v. Sykes*, discussed in the next section. This case history is not atypical of hundreds of other cases reported in the courts of appeals.

The merits of this case could have been adjudicated in 1986 without delay. Notwithstanding the nonexhausted claims, the case would have resulted in a final adjudication within a reasonable time.

87. 433 U.S. 72 (1977). *Wainwright* grew out of the Court's decisions in Davis v. United States, 411 U.S. 233 (1973), and Francis v. Henderson, 425 U.S. 536 (1976). The Court has debated whether the procedural bypass rules are founded on the concept of adequate state grounds, Coleman v. Thompson, 111 S. Ct. 2546, 2553-54 (1991), or whether they rest on principles of federalism, Harris v. Reed, 489 U.S. 255, 280 (1989) (Kennedy, J., dissenting). Justice Brennan challenged the legal underpinnings the majority advanced in *Sykes*, stating that "the entire edifice is a mere house of cards whose foundation has escaped any systematic inspection." 433 U.S. at 100 n.1 (Brennan, J., dissenting).

88. 433 U.S. at 88-91. The Court drove the final coffin spike into *Fay* by limiting the miscarriage of justice exception last Term in Sawyer v. Whitley, 112 S. Ct. 2514, 2618-23 (1992).

89. 433 U.S. at 84, 90-91.

and prejudice standard. First, it stated that a contemporaneous objection clarifies the record when recollections of witnesses are fresh.[90] Second, precluding federal review lends to finality in criminal litigation.[91] Third, stricter procedural bypass rules avoid "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 a federal habeas court if their initial gamble does not pay off."[92] Fourth, the Court opined that federal habeas review detracts from the state trial as a "decisive and portentous event."[93]

Wainwright and its progeny of *United States v. Frady*,[94] *Engle v. Isaac*,[95] and *Murray v. Carrier*,[96] turn on principles of comity and federalism. As Justice O'Connor said in *Engle*:

> [T]he Great Writ imposes special costs on our federal system. The States possess primary authority for defining and enforcing the criminal law. In criminal trials they also hold the initial responsibility for vindicating constitutional rights. Federal intrusions into state criminal trials frustrate both the States' sovereign power to punish offenders and their good faith attempts to honor constitutional rights.[97]

The Court has viewed the tension between habeas review and

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90. *Id.* at 88.

91. *Id.* at 88-89.

92. *Id.* at 89. With all due respect, the sandbagging argument is superficial. As Justice Brennan observed, "no rational lawyer would risk the 'sandbagging' feared by the Court." *Id.* at 103 (Brennan, J., dissenting). Under the *Fay* procedural bypass standard, an attorney who elects to sandbag must:

> First, hold back the presentation of his constitutional claim to the trial court, thereby increasing the likelihood of a conviction since the prosecution would be able to present evidence that, while arguably constitutionally deficient, may be highly prejudicial to the defense. Second, he would thereby have forfeited all state review and remedies with respect to these claims (subject to whatever "plain error" rule is available). Third, to carry out his scheme, he would now be compelled to deceive the federal habeas court and to convince the judge that he did not "deliberately bypass" the state procedures. If he loses on this gamble, all federal review would be barred, and his "sandbagging" would have resulted in nothing but the forfeiture of all judicial review of his client's claims. The Court, without substantiation, apparently believes that a meaningful number of lawyers are induced into [this option] by *Fay*. I do not. That belief simply offends common sense.

Id. at 103-04 n.5.

93. *Id.* at 90.

94. 456 U.S. 152 (1982) (defining prejudice).

95. 456 U.S. 107 (1982) (discussing standards for cause).

96. 477 U.S. 478 (1986) (discussing standards for cause).

97. 456 U.S. at 128 (citing Schneckloth v. Bustamonte, 412 U.S. 218, 263-65 (1973) (Powell, J., concurring)).

finality in terms of a cost-benefit analysis,[98] recently emphasizing the need to respect state procedural rules.[99] The majority in *Coleman v. Thompson* urged that the decision in *Fay* "undervalued the importance of state procedural rules."[100] Thus, the Court has returned state interests to a dominant position, as was the case before *Brown*.[101]

The cause and prejudice rule has created serious problems. As Justice Brennan observed in his dissent in *Wainwright*, procedural default arises mostly because counsel inadvertently failed to follow procedural rules.[102] Any realistic system of federal habeas corpus jurisdiction must be premised on the reality that the ordinary procedural default is born of the inadvertence, negligence, inexperience, or incompetence of trial counsel.[103] If the world were perfect—if appointed trial counsel were all trained, proficient criminal trial counsel—the rule of

98. For example, the Court in *Coleman v. Thompson* stated that a "different allocation of costs is appropriate in those circumstances where the State has no responsibility to ensure that the petitioner was represented by competent counsel. As between the State and the petitioner, it is the petitioner who must bear the burden of failure to follow state procedural rules." 111 S. Ct. 2546, 2567 (1991); *see also* Sawyer v. Whitley, 112 S. Ct. 2514, 2518 (1992) (stating that denial of habeas corpus was based on the costs of federal habeas review); McCleskey v. Zant, 111 S. Ct. 1454 (1991) (discussing the costs of federal habeas review, including the loss of finality of judgment); Teague v. Lane, 489 U.S. 288, 310 (1988) (opinion of O'Connor, J.) (suggesting that costs to the states outweigh the benefits of retroactive application of new constitutional rules in habeas corpus). The dissent in *Coleman* attacks the balance struck by the majority, stating:

> In a sleight of logic that would be ironic if not for its tragic consequences, the majority concludes that a state prisoner pursuing state collateral relief must bear the risk of his attorney's grave errors—even if the result of those errors is that the prisoner will be executed without having presented his federal claim to a federal court—because this attribution of risk represents the appropriate "allocation of costs."

111 S. Ct. at 2576 (Blackmun, J., joined by Marshall and Stevens, JJ., dissenting).

99. *Coleman*, 111 S. Ct. at 2551 (noting "the important interest in finality served by state procedural rules, and the significant harm to the States that results from the failure of federal courts to respect" federal-state relations); *see also McCleskey*, 111 S. Ct. at 1468 ("Since *Fay* we have taken care in our habeas corpus decisions to reconfirm the importance of finality.").

100. *Coleman*, 111 S. Ct. at 2565.

101. The Court has provided two exceptions to this pre-*Brown* rationalization: when the prisoner can demonstrate cause for default and actual prejudice from the violation of federal constitutional law, Wainwright v. Sykes, 433 U.S. 72, 84, 90-91 (1977), and when the prisoner can demonstrate a fundamental miscarriage of justice, Sawyer v. Whitley, 112 S. Ct. at 2518-19.

102. 433 U.S. at 113-16 (Brennan, J., dissenting).

103. *See id.*

cause and prejudice would not be as unjust as it now is. Even in death row cases, however, appointed counsel are all too frequently ill-trained for the assignment.[104] It seems incongruous that the state or federal court that appoints and pays counsel for the indigent may deny the petitioner review of a valid federal constitutional claim based upon the procedural oversight of that same appointed counsel.[105]

Three landmark cases illustrate the problem. In *Engle v. Isaac*,[106] counsel for three defendants failed to object at separate trials to jury instructions that placed the burden of proof on the defense.[107] This burden impaired the fact-finding function of the trials themselves. The lawyers did not object primarily because Ohio law, at the time of trial, placed the burden on the defense, and counsel believed any objection would be futile.[108] The Supreme Court majority reasoned that because of other decisions percolating through the courts, counsel did not lack "the tools" to make an objection.[109] In his dissent, Justice Brennan responded that the holding makes it easier to take "a camel . . . through the eye of a needle than for a state prisoner to show 'cause.' "[110]

The second case, *Murray v. Carrier*,[111] involved a defense counsel's failure to raise in state appeal the trial judge's denial of a discovery request for exculpatory evidence under *Brady v.*

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104. *See* Chief Judge A. Leon Higginbotham, Jr., Statement to the Judicial Conference of the United States 8-9 (Mar. 13, 1990) (transcript on file with the *Minnesota Law Review*). Judge Higginbotham cites several shocking cases of inappropriate representation from appointed counsel, including one case in which the lawyer described his own client as a "nigger" in front of the jury. *Id.* at 9. For further discussion of this problem, see *infra* notes 236-39 and accompanying text.

105. *Cf. Wainwright*, 433 U.S. at 114 (Brennan, J., dissenting) (noting that of the parties, the state sets forth admission and certification policies for attorneys).

106. 456 U.S. 107 (1982).

107. *Id.* at 110-14.

108. *Id.* at 130.

109. *Id.* at 132-33.

110. *Id.* at 144. Justice Brennan observed that Isaac's claims had not been exhausted and then added:

> Barely a month ago this Court emphatically reaffirmed the exhaustion doctrine, and indeed extended it, announcing a requirement of "total exhaustion" for habeas petitions. Rose v. Lundy, 455 U.S. 509 (March 3, 1982). But today the Court finds the nostrum of "cause and prejudice" more attractive, and so *Rose v. Lundy* is not applied. *Sic transit gloria Lundy!* In scarcely a month, the bloom is off the *Rose*.

Id. at 141 (footnotes omitted).

111. 477 U.S. 478 (1986).

Maryland.[112] The *Carrier* Court held that misjudgment or oversight of counsel on appeal did not overcome the fear of "sandbagging."[113] It concluded that "[f]ailure to raise a claim on appeal reduces the finality of appellate proceedings, deprives the appellate court of an opportunity to review trial error, and 'undercut[s] the State's ability to enforce its procedural rules.' "[114]

Finally, in *Coleman v. Thompson*,[115] a capital case that received nationwide publicity,[116] the Court barred federal review because post-conviction counsel was three days late filing an appeal of an ineffective trial counsel claim in a state post-conviction petition.[117] The Supreme Court held that even the incompetence of post-conviction counsel could not constitute cause. It relied in part on two civil cases to hold that "[a]ttorney ignorance or inadvertence is not 'cause' because the attorney is the petitioner's agent when acting, or failing to act, in furtherance of the litigation, and the petitioner must 'bear the risk of attorney error.' "[118] Because there is no constitutional right to an attorney in a post-conviction proceeding, a petitioner cannot claim constitutional ineffective assistance of counsel in such proceedings.[119] The Court rejected the argument that a prisoner should be able to satisfy the "cause" requirement by showing the ineffectiveness of counsel, even absent a constitutional right to counsel at that stage of the proceedings.[120] Thus, the Court made clear "that counsel's ineffec-

112. 373 U.S. 83, 87 (1963).

113. 477 U.S. at 491-92.

114. *Id.* at 491 (quoting Engle v. Isaac, 456 U.S. 107, 129 (1982)).

115. 111 S. Ct. 2546 (1991).

116. *See, e.g.*, Robert L. Jackson & David G. Savage, *Final Appeals Rejected, Killer is Executed*, L.A. TIMES, May 21, 1992, at A16.

117. 111 S. Ct. at 2552-53, 2567-68.

118. *Id.* at 2566-67 (quoting Murray v. Carrier, 477 U.S. 478, 488 (1986)). The two civil cases the Court cites are Link v. Wabash R.R., 370 U.S. 626, 634 (1962), and Irwin v. Veterans Admin., 111 S. Ct. 453, 456 (1990) (stating that "in 'our system of representative litigation . . . each party is deemed bound by the acts of his lawyer-agent' "). The Court added that "it is not the gravity of the attorney's error that matters, but that it constitutes a violation of petitioner's right to counsel, so that the error must be seen as an external factor, *i.e.* 'imputed to the State.' " 111 S. Ct. at 2567 (quoting Evitts v. Lucey, 469 U.S. 387, 396 (1985)).

119. *See* 111 S. Ct. at 2552-53.

120. The Court stated that "the existence of cause for a procedural default must ordinarily turn on whether the prisoner can show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule." For example, "a showing that the factual or legal basis for a claim was not reasonably available to counsel, . . . or that 'some inter-

tiveness will constitute cause only if it is an independent constitutional violation."[121]

It is difficult to understand why cause must be so rigidly defined. Post-conviction counsel's error is not the petitioner's fault. Cause and prejudice is strictly a court-made rule to give sufficient credence to comity and to defer to a state's need to enforce its procedural rules.[122] *Coleman* bars federal habeas review if the petitioner's post-conviction lawyer failed to file a timely appeal to the state post-conviction court. If counsel failed to adhere to state appellate procedures on direct review, however, his or her conduct would fall within the purview of the Sixth Amendment right to effective assistance of counsel.[123] This is true even though the lawyer was the agent for his client.[124] Although the Sixth Amendment does not apply to post-conviction proceedings, the error is the same in both types of proceedings. Under either circumstance, the conduct of counsel would fall below the standard of reasonable professional performance and there exists no logical reason why such omission should not be considered cause to obviate the procedural default.[125]

The Court has often written that there are "costs" to habeas proceedings that require procedural rules precluding federal habeas in favor of state finality,[126] but the Court's approach has several hidden costs itself. The cause and prejudice

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ference by officials' . . . made compliance impracticable, would constitute cause under this standard." 111 S. Ct. at 2566 (citations omitted) (quoting *Carrier*, 477 U.S. at 488).

121. *Id.* at 2567. The Court said any argument to the contrary contradicts its holding in *Murray v. Carrier*. 111 S. Ct. at 2566.

122. *See, e.g.*, Sawyer v. Whitley, 112 S. Ct. 2514, 2518 (1992) (noting that the cause and prejudice standard is "premised on our concerns for the finality of state judgments of conviction and the 'significant costs of federal habeas review' "); Coleman v. Thompson, 111 S. Ct. at 2571 (Blackmun, J., dissenting) (criticizing "the majority's unjustifiable elevation of abstract federalism over fundamental precepts of liberty and fairness"); *Carrier*, 477 U.S. at 501 (Stevens, J., concurring) (stating that the "formula . . . is not dispositive when the fundamental fairness of a prisoner's conviction is at issue"); Engle v. Isaac, 456 U.S. 107, 148 (1982) (Brennan, J., dissenting) (criticizing the Court's "hostility" to habeas corpus claims "through its application of the cause and prejudice standard").

123. *See, e.g.*, Evitts v. Lucey, 469 U.S. 387 (1985); Hannon v. Maschner, 845 F.2d 1553 (10th Cir. 1988).

124. *See Coleman*, 111 S. Ct. at 2566-67.

125. *See, e.g.*, Simmons v. Lockhart, 915 F.2d 372, 376 (8th Cir. 1990) (opinion of Arnold, J.) (stating that "ineffective assistance of post-conviction counsel can be 'cause' for purposes of lifting a procedural bar").

126. *See supra* note 98 and accompanying text.

test does not accomplish its intended goals. First, it is very time consuming.[127] The federal district courts must undertake lengthy and excessive analyses to determine first, whether there was a procedural bypass; second, whether there was cause; third, whether there was prejudice; and fourth, whether either the conviction or the death penalty represents a miscarriage of justice. Second, this exacting analysis creates inevitable delay at each level of the federal system—magistrate, district court, appellate court, and Supreme Court.[128] Undoubtedly, the Court feels these factors do not override the demands of federalism. However, I find this balance especially difficult

127. There are numerous cases in every circuit illustrating the excessive examination that cause and prejudice rules require even though examination of the merits of the constitutional claim could be resolved under settled principles within a much shorter time. *See, e.g.*, Stokes v. Armontrout, 901 F.2d 1460, 1463 (8th Cir. 1990) (en banc) (Lay, C.J., dissenting) (noting the "procedural catch-22" that prevented Stokes's claims from being heard on their merits).

128. A good case in point is Rust v. Hopkins, 984 F.2d 1486 (8th Cir. 1993), in which the Eighth Circuit recently upheld a writ of habeas corpus because of constitutional violations in the death sentence phase of Rust's trial. In affirming the trial judge, the court expressed its concern over the more than 17 years the case had been pending in the courts without final resolution. *Id.* at 1489 n.5. Rust first petitioned for federal habeas relief in 1981, *see* Rust v. Parratt, No. CV 81-L-332, slip op. at 1 (D. Neb. Nov. 10, 1982), but the case was not resolved until the Eighth Circuit's January 20, 1993 opinion. As is shown in the following chronology, procedural issues accounted for most of the delay:

Rust was convicted of murder and sentenced to death in the Nebraska state courts in 1975. 984 F.2d at 1489 n.5. His conviction and sentence were upheld on direct appeal, State v. Rust, 250 N.W.2d 867 (Neb.), *cert. denied*, 434 U.S. 912 (1977), and on petition for post-conviction relief in the state courts, State v. Rust, 303 N.W.2d 490 (Neb.), *cert. denied*, 454 U.S. 882 (1981). Rust then sought a writ of habeas corpus from the federal courts, but at Rust's suggestion the trial judge dismissed the action for lack of exhaustion. Rust v. Parratt, slip op. at 1. Rust returned to state court, where he again lost. State v. Rust, 388 N.W.2d 483 (Neb. 1986) (per curiam), *cert. denied*, 481 U.S. 1042 (1987). The state courts also denied Rust's petition for state habeas corpus in 1988. Rust v. Gunter, 421 N.W.2d 458 (Neb. 1988). Thus, as the Eighth Circuit noted, "twelve years and eight months elapsed between the trial and the state court's final denial of relief." 984 F.2d at 1489 n.5.

Rust returned to the federal courts with his second petition for habeas corpus relief in 1988. *Id.* The district court granted Rust relief, requiring Nebraska either to resentence Rust or to impose no more than a life term of imprisonment, but the Eighth Circuit remanded the case because the district court had not disposed of all issues. Rust v. Clarke, 960 F.2d 72, 73-74 (8th Cir. 1992) (per curiam). The appeals court directed the trial judge to resolve those issues within 90 days. *Id.* at 73. More than 11 years after Rust filed his first habeas petition, both the district and circuit court, after an exhaustive analysis that included claims of procedural default, denied the grant of the writ on the merits of the conviction. However, the Eighth Circuit did affirm the trial court's grant of the writ as to the penalty phase of the case. 984 F.2d at 1495.

to reconcile in light of the more important trade-off—denying prisoners a review of convictions or death sentences that states may have imposed in violation of federal constitutional fairness.[129]

It is not the author's purpose to debate the "cause and prejudice" and "deliberate bypass" rules. Whether a lower court judge agrees or disagrees with a legal standard is irrelevant. The author's purpose is to demonstrate the efficacy of the rule of cause and prejudice in terms of whether it carries out the purposes it is designed to serve. Such an analysis must start with an examination of the fundamental purpose behind habeas corpus legislation and the scope of the writ itself.

The cause and prejudice standard conflicts with the very purpose of federal habeas corpus. As a court-made rule, the cause and prejudice requirement is designed to artificially provide great deference to state trial and appellate proceedings, thus lending greater integrity to the finality of state court judgments. Of course, the pre-*Brown* rule precluding de novo federal review accomplished this goal also. Indeed, the two procedures differ only minimally in promoting comity and deference to state tribunals. But the Court in *Brown v. Allen* rejected blind adherence to comity and deference for good reason. The rationale of *Brown* rests on the idea that the very nature of the writ of habeas corpus is to attack faulty state court finality.[130] Any rule that protects an unconstitutional state court judgment is hardly worth promoting. Federal habeas corpus was not designed to give deference and comity to state finality rules, but to serve as a vehicle for attacking state convictions that rest upon unconstitutional process.[131]

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129. *See, e.g.*, Sawyer v. Whitley, 112 S. Ct. 2514, 2530 (1992) (Stevens, J., concurring) ("The writ [of habeas corpus] is a bulwark against convictions that violate 'fundamental fairness'.").

130. *See* Brown v. Allen, 344 U.S. 443, 498-501 (1953) (opinion of Frankfurter, J.) (discussing Congress's grant of habeas corpus jurisdiction to the federal judiciary).

131. Justice Blackmun's dissent in *Coleman* sums up this notion:

> While state courts may choose to draw their orders as they wish, the right of a state prisoner, particularly one sentenced to death, to have his federal claim heard by a federal habeas court is simply too fundamental to yield to the State's incidental interest in issuing ambiguous summary orders.

Coleman v. Thompson, 111 S. Ct. 2546, 2574 (1992) (Blackmun, J., dissenting). Justice Blackmun concludes:

> To permit a procedural default caused by attorney error egregious enough to constitute ineffective assistance of counsel to preclude federal habeas review of a state prisoner's federal claims in no way

The principles of federalism can be maintained without the lower federal courts' excessive preoccupation with procedural rules and the inevitable delay that all the procedural obstacles cause.[132] Justice Stevens's dissent in *Rose v. Lundy* contains the seeds of a workable system of merit review for federal habeas cases.[133] It would eliminate the artificial rules that now preoccupy the federal judiciary and provide simplicity and efficiency to federal habeas process. I think it is a fair conclusion that his view will, someday, prevail.

In his *Rose v. Lundy* dissent, Justice Stevens pointed out three classifications of constitutional claims that federal courts could routinely handle and easily adjudicate without excessive examination: first, those claims that factually do not amount to a violation of a constitutional right, even though labeled as such;[134] second, those cases involving a violation of a constitutional right that constituted harmless error on direct review;[135] and third, those cases that might constitute error on direct review but that do not contain the kind of fundamental unfairness that supports a collateral attack.[136]

A fourth class is comprised of cases that may require issuance of a writ. These are cases in which the violation may affect the validity of the underlying judgment or the integrity of the state process by which the judgment was obtained. Only in such rare instances should federal habeas relief be granted.[137]

The federal courts' current preoccupation with procedural

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serves the State's interest in preserving the integrity of its rules and proceedings. The interest in finality, standing alone, cannot provide a sufficient reason for a federal habeas court to compromise its protection of constitutional rights.

Id. at 2577.

132. *See* Max Rosenn, *The Great Writ—A Reflection of Societal Change*, 44 OHIO ST. L.J. 337, 363-65 (1983).

133. *See* 455 U.S. 509, 543-44 (1982) (Stevens, J., dissenting).

134. *Id.* at 543.

135. *Id.* Justice Stevens cited Chapman v. California, 386 U.S. 18, 22 (1967) (harmless error), as an example.

136. 455 U.S. at 543. As an example of this type of case, Justice Stevens cited Stone v. Powell, 428 U.S. 465 (1976) (Fourth Amendment claim).

137. 455 U.S. at 544. As Justice Stevens observed:

> This category cannot be defined precisely; concepts of "fundamental fairness" are not frozen in time. But the kind of error that falls in this category is best illustrated by recalling the classic grounds for the issuance of a writ of habeas corpus—that the proceeding was dominated by mob violence; that the prosecutor knowingly made use of perjured testimony; or that the conviction was based on a confession extorted from the defendant by brutal methods. Errors of this kind justify collateral relief no matter how long a judgment may have been

review no more exalts the integrity of the state finality rule than does the denial of relief in the vast majority of cases reviewed on the merits.[138] The fundamental difference between the two approaches is that under stringent procedural rules a prisoner may be denied justice because of the oversight or inadvertence of appointed counsel.[139] Although procedural rules may appear to promote principles of federalism, this goal should be balanced against the rights of litigants as well as the excessive delay and inefficient use of federal judicial resources that they cause. When these same principles of federalism can be protected through an expedited review of the merits, the federal judiciary's obsession with artificial procedural obstacles to exalt state comity is too costly.

D. THE "NEW RULE" DOCTRINE OF *TEAGUE V. LANE*

No commentary on habeas corpus is complete without discussion of the Supreme Court's 1989 decision in *Teague v. Lane*.[140] The Court, in a plurality opinion written by Justice O'Connor, adopted Justice Harlan's view[141] that new rules may be applied retroactively to cases on direct review but not to cases on collateral attack.[142] Justice Harlan created two exceptions to this principle. He said a new rule should be applied retroactively if it places "certain kinds of primary, private indi-

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final and even though they may not have been preserved properly in the original trial.

. . . .

. . . The doctrine of non-retroactivity, the emerging "cause and prejudice" doctrine, and today's "total exhaustion" rule are examples of judicial lawmaking that might well have been avoided by confining the availability of habeas corpus relief to cases that truly involve fundamental unfairness.

Id. at 544, 547 (footnotes omitted).

138. As noted below, only a very small percentage of habeas cases are found to be meritorious. This was true even before the Supreme Court began erecting procedural hurdles to substantive consideration of petitions for habeas corpus. *See infra* note 166 and accompanying text.

139. *See, e.g.*, Coleman v. Thompson, 111 S. Ct. 2546, 2567-68 (1991) (denying habeas review because counsel filed late appeal).

140. 489 U.S. 288 (1989).

141. *See* Mackey v. United States, 401 U.S. 667, 682-84 (1971) (opinion of Harlan, J.).

142. 489 U.S. at 305-10. The traditional test of retroactivity was set forth in Stovall v. Denno, 388 U.S. 293 (1967), which required consideration of (1) the purpose of the new rule, (2) the extent of reliance on the old rule, and (3) the effect on the administration of justice. *Id.* at 297. In a series of cases starting with United States v. Johnson, 457 U.S. 537 (1982), and Shea v. Louisiana, 470 U.S. 51 (1985), the *Stovall* rule was modified by extending the doctrine of retroactivity in criminal cases to all cases then pending on direct review.

vidual conduct beyond the power of the criminal law-making authority to proscribe"[143] or if retroactivity requires observance of "those procedures that . . . are 'implicit in the concept of ordered liberty.' "[144] The *Teague* plurality seemed to limit the second exception to those cases that are substantially related to guilt or innocence.[145]

The interest of state finality again spurred the change in habeas procedures.[146] In defining a "new rule" as one in which "the result was not *dictated* by precedent existing at the time the defendant's conviction became final,"[147] the *Teague* Court created a controversial debate. As Justice Brennan said in dissent, "[f]ew decisions on appeal or collateral review are *'dictated'* by what came before. Most such cases involve a question of law that is at least debatable."[148] Because of this, *Teague* greatly restricts habeas corpus.[149]

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143. *Mackey*, 401 U.S. at 692.

144. *Id.* at 693 (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937)).

145. *See* 489 U.S. at 311-13. In *Teague*, the Court faced the question of whether the fair cross section requirement of the Sixth Amendment applies to the selection of petit juries. *Id.* at 341 (Brennan, J., dissenting). The plurality indicated that, if adopted, this new rule would not fall within the exceptions outlined above. *Id.* at 301, 316.

146. Justice O'Connor reasoned:

> Application of constitutional rules not in existence at the time a conviction became final seriously undermines the principle of finality which is essential to the operation of our criminal justice system. Without finality, the criminal law is deprived of much of its deterrent effect. The fact that life and liberty are at stake in criminal prosecutions "shows only that 'conventional notions of finality' should not have *as much* place in criminal as in civil litigation, not that they should have *none*."
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> . . . .
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> The "costs imposed upon the State[s] by retroactive application of new rules of constitutional law on habeas corpus . . . generally far outweigh the benefits of this application." In many ways the application of new rules to cases on collateral review may be more intrusive than the enjoining of criminal prosecutions, for it *continually* forces the States to marshall resources in order to keep in prison defendants whose trials and appeals conformed to then-existing constitutional standards. Furthermore, as we recognized in *Engle v. Isaac*, "[s]tate courts are understandably frustrated when they faithfully apply existing constitutional law only to have a federal court discover, during a [habeas] proceeding, new constitutional commands."

Id. at 309-10 (citations omitted).

147. *Id.* at 301. The Court also defined a new rule as one that "breaks new ground or imposes a new obligation on the States or the Federal Government." *Id.*

148. *Id.* at 333 (Brennan, J., dissenting).

149. Justice Brennan shared this concern, stating that "[t]he plurality's approach . . . can thus be expected to contract substantially the Great Writ's sweep." *Id.* at 334. Justice Brennan wrote:

There are many criticisms of *Teague*.[150] For one, the new principles of retroactivity have spawned a debate over whether a contention is a "new rule," once again requiring excessive examination and inefficiency in federal habeas procedures.[151] In addition, *Teague* undermines the historical development of the writ of habeas corpus, which, by its very nature, assumes disruption of conventional notions of finality.[152] Perhaps Justice Brennan best summed up the pernicious effect of *Teague* in the final sentence of his dissent, when he stated that "the plurality would deprive us of the manifold advantages of deciding important constitutional questions when they come to us first or most cleanly on collateral review."[153]

When Congress debated proposed habeas corpus reforms in 1990, it invited several of the chief judges of the courts of appeals to address the proposed amendments.[154] Chief Judge James L. Oakes of the Second Circuit and Chief Judge Gilbert S. Merritt of the Sixth Circuit appeared with the author before a House hearing chaired by then-Congressman Kastenmeier of

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> Certainly it is desirable, in the interest of fairness, to accord the same treatment to all habeas petitioners with the same claims. Given a choice between deciding an issue on direct or collateral review that might result in a new rule of law that would not warrant retroactive application to persons on collateral review other than the petitioner who brought the claim, we should ordinarily grant certiorari and decide the question on direct review.

Id. at 338.

150. *See, e.g.*, David R. Dow, Teague *and Death: The Impact of Current Retroactivity Doctrine on Capital Defendants*, 19 HASTINGS CONST. L.Q. 23 (1991); Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731 (1991); Barry Friedman, *Habeas and Hubris*, 45 VAND. L. REV. 797 (1992).

151. Determining what is a new rule is perplexing under the facts of each case. The division of the Court in Penry v. Lynaugh, 492 U.S. 302 (1989), demonstrates the ambiguity of the new rule. In applying *Teague* standards to a collateral attack on capital sentencing procedures, Justice O'Connor, writing for the majority, held that the claim did not involve a new rule. *Id.* at 318-19. Justice Scalia took the opposite tack, arguing a new rule includes "not only a new rule that replaces an old one, but a new rule that replaces palpable uncertainty as to what the rule might be." *Id.* at 352.

152. Justice Brennan observed in *Fay v. Noia* that in federal habeas corpus, "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 federal judicial review." 372 U.S. 391, 424 (1963).

153. Teague v. Lane, 489 U.S. 288, 345 (1989) (Brennan, J., dissenting).

154. *See Habeas Corpus Legislation: Hearings on H.R. 4737, H.R. 1090, H.R. 1953, and H.R. 3584 Before the Subcomm. on Courts, Intellectual Property, and the Admin. of Justice of the House Comm. on the Judiciary*, 101st Cong., 2d Sess. 120 (1990) [hereinafter *House Habeas Hearings*].

Wisconsin.[155] All three of us were vocal in our criticism of *Teague*. Chief Judge Merritt expressed our concerns best of all by reminding the panel that when Congress passed the Judiciary Act of 1789, "the theory was [then,]. . . as I think it is today, that the Bill of Rights establishes the rights. Habeas establishes the remedy. When you weaken the remedy, it leaves the rights unenforced."[156] Chief Judge Merritt stated that *Teague* represents "the greatest threat in recent years to the remedy which enforces the right."[157] He said *Teague*

> has the effect essentially of freezing the Bill of Rights in habeas cases in its present form, and not allowing the Supreme Court or the Federal courts to review any suggested modification . . . either to constrict or to expand it . . . Not only is it a radically new rule because it changes the law of retroactivity; it prevents the common law process [of incremental adjustment in the law]. . . . [T]he worst thing about this case, of all the bad things about it, . . . is that it undermines the common law method of adjudication of cases.[158]

E. A FINAL WORD ON COST-BENEFIT ANALYSIS

Justice Powell's cost-benefit analysis in his concurring opinion in *Schneckloth v. Bustamonte*[159] laid the groundwork for the Court's retrenchment in federal habeas corpus.[160] As discussed earlier, Justice Powell articulated concerns for federalism that continue to form the foundation for restricting habeas.[161] With all due respect, the experience of the last twenty years has demonstrated principles of federalism do not merit blanket rules causing federal courts to ignore substantive complaints of arbitrary and illegal conduct in criminal prosecutions.

First, habeas corpus petitions from state prisoners make up only five percent of the civil caseload in federal district court.[162]

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155. *Id.*

156. *Id.* at 159 (statement of Judge Merritt).

157. *Id.*

158. *Id.* at 160.

159. 412 U.S. 218, 259-66 (1973).

160. *See, e.g.*, Wainwright v. Sykes, 433 U.S. 72, 79-80 (1977); Stone v. Powell, 428 U.S. 465, 494-95 (1976). These concerns in large part emanated from Justice Harlan's dissenting views in *Fay v. Noia*. They were originally promulgated by the late Professor Paul Bator in *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441 (1963). Professor Bator later served as Deputy Solicitor General during the Reagan Administration.

161. *Schneckloth*, 412 U.S. at 259.

162. State prisoners filed 10,325 habeas corpus petitions in federal court, which amounted to five percent of all civil actions filed in federal court during

Their impact is minimal compared to that of diversity of citizenship cases,[163] which require federal courts to decide questions of state law, and to that of federal civil rights litigation under section 1983.[164]

Second, the persistent emphasis on finality seems paradoxical in light of the Court's use of cost-benefit analyses for habeas corpus.[165] If large numbers of state convictions were being overturned by lower federal courts, then the concern of state finality could be of greater significance. However, this has not occurred.[166] Further, while state finality was crucial to the

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the year ending June 30, 1991 (total of 207,742). 1991 DIRECTOR OF THE ADMIN. OFFICE OF THE UNITED STATES COURTS ANN. REP. 190-91.

163. Diversity of citizenship cases totalled 50,944, 24.5% of the total number of civil cases filed during the year ending June 30, 1991. *Id.* at 190.

164. Prisoners filed a total of 26,045 § 1983 claims, comprising 12.5% of the total number of civil cases filed during the year ending June 30, 1991. *Id.* at 190-91.

165. Although the interest in finality is important to the judicial process, on balance it pales when compared to the importance of fair and accurate adjudication in a case involving a lengthy imprisonment or death. *See* Coleman v. McCormick, 874 F.2d 1280, 1296-97 (9th Cir. 1989) (Reinhardt, J., concurring).

166. The percentage of successful state habeas corpus petitions is very low. A study for the Department of Justice found that only 3.2% of habeas petitions resulted in any form of relief. *See* OFFICE OF LEGAL POLICY, REPORT TO THE ATTORNEY GENERAL ON FEDERAL HABEAS CORPUS REVIEW OF STATE JUDGMENTS 34-35 (1988) (citing Paul H. Robinson, *An Empirical Study of Federal Habeas Corpus Review of State Court Judgments* 4(c), 51 (Federal Research Justice Program 1979)). Similarly, a study of habeas petitions filed in the United States District Court for the Southern District of New York found a success rate of three percent from 1973 to 1975, and four percent from 1979 to 1981. Richard Faust et al., *The Great Writ in Action: Empirical Light on the Federal Habeas Corpus Debate*, 18 N.Y.U. REV. L. & SOC. CHANGE 637, 668, 677-81 (1991). Interestingly, the success rate increased slightly between the two periods studied (1973-1975 and 1979-1981) even though the Supreme Court erected various procedural barriers to the writ in that time. *Id.* at 681. Other researchers have estimated the success rate of non-capital habeas petitions to be as low as 0.25%. *See* Murray v. Giarratano, 492 U.S. 1, 23-24 (1989) (Stevens, J., dissenting) (citing Michael Mello, *Facing Death Alone: The Post-Conviction Attorney Crisis on Death Row*, 37 AM. U. L. REV. 513, 520-21 (1988)). Other figures suggest a seven percent success rate in non-capital habeas petitions. *Id.*

In stark contrast to these low figures is the high success rate in *capital* habeas corpus petitions, where the percentage of successful petitions ranges from 50% to 70%. *See* Linda Greenhouse, *Rehnquist Urges Curb on Appeals of Death Penalty*, N.Y. TIMES, May 16, 1990, at A1 ("In recent years, more than half of all state court death sentences have been overturned by Federal courts during habeas corpus proceedings."); *see also Giarratano*, 492 U.S. at 24 (Stevens, J., dissenting) (noting a 60% to 70% success rate in capital cases); Barefoot v. Estelle, 463 U.S. 880, 915 (1983) (Marshall, J., dissenting) (indicating that 70% of capital defendants seeking habeas corpus in federal courts of appeals obtained relief); Mello, *supra*, at 521 (success rate ranging from 60% to

question of whether federal courts should offer a forum for state prisoners to collaterally attack their convictions, Congress answered that question in 1867 when it directed the federal courts to provide a habeas forum.[167]

Federal habeas corpus, by its very nature, challenges the finality of unconstitutional state court convictions.[168] It inevitably provides "duplication of judicial effort," "delay in setting the criminal proceeding at rest," "inconvenience," and "postponed litigation of fact."[169] Notwithstanding these obvious concerns, Congress nevertheless created the remedy. Placing artificial procedural rules on prisoner claims does not eliminate these concerns. The court-made rules serve only to accentuate the delay and to increase the inefficient use of the limited resources of the federal courts.

Finality is equally served by federal review of the merits. This is borne out by the federal statistics showing that federal courts reject the great majority of state prisoner claims.[170] The fact that federal courts seldom grant writs, however, does not defeat the need for federal review. The sanctity of life and lib-

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75% as of 1982, 70% as of 1983, and 60% as of 1986). The high rate of success of capital habeas appeals suggests that state courts are overlooking fundamental constitutional protections in reviewing convictions under their state's laws. *See Coleman*, 874 F.2d at 1295 (Reinhardt, J., concurring). Judge Reinhardt postulated that federal courts stand in a better position to adjudicate constitutional rights because of "greater receptivity . . . to Supreme Court dictates, insulation from majoritarian pressures, and even superior technical competence." *Id.* at 1295 n.8 (citing Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977)).

167. *See* Judiciary Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385, 385 (current version at 28 U.S.C. § 2241(c)(3) (1988)).

168. The decisions of Fay v. Noia, 372 U.S. 391 (1963); Brown v. Allen, 344 U.S. 443 (1953); Waley v. Johnston, 316 U.S. 101 (1942) (per curiam); and Moore v. Dempsey, 261 U.S. 86 (1923), have been the basis for constitutionalizing state criminal procedure. Decisions such as Furman v. Georgia, 408 U.S. 238 (1972) (per curiam); Stovall v. Denno, 338 U.S. 293 (1967); United States v. Wade, 388 U.S. 218 (1967); Miranda v. Arizona, 384 U.S. 436 (1966); Griffin v. California, 380 U.S. 609 (1965), have provided the impetus for the state courts to "toe the constitutional mark." *See* Mackey v. United States, 401 U.S. 667, 687 (1971) (opinion of Harlan, J.) (citing Kaufman v. United States, 394 U.S. 217, 226 (1969)). Through such decisions the Court has not emphasized the deterrence of finality because it observed a need to protect against the wrongful deprivation of a person's life or liberty. *See, e.g.*, *Furman*, 408 U.S. at 253 (Douglas, J., concurring); *Wade*, 388 U.S. at 238; *Miranda*, 384 U.S. at 482.

169. Schneckloth v. Bustamonte, 412 U.S. 218, 261 (1973) (Powell, J., concurring) (quoting Anthony Amsterdam, *Search, Seizure, and Section 2255: A Comment*, 112 U. PA. L. REV. 378, 383-84 (1964)).

170. *See supra* note 166.

erty is worthy of a backup system to check human fallibility.[171] The rule of finality as expressed by Justice Powell is based on the presumption that "if a job can be well done once, it should not be done twice."[172] But, what if the job is not done well the first time?[173] All judges are mere humans; no judge is so infallible that he or she should resent hindsight review when another's life or liberty is at stake.[174]

In *Schneckloth v. Bustamonte*, Justice Powell also sought a "minimization of friction between our federal and state systems of justice."[175] This factor has long been a concern of federalism.[176] Federal concerns cannot be ignored, however, when Congress sets forth a mandate in which federal adjudication overlaps state interests.[177] I respectfully suggest that the potential for a federal court to "embarrass" a state court by declaring that it had erred in its view of a federal constitutional right is a shallow reason for denying enforcement of federal rights.[178] It is human nature to want to be right. A trial judge

171. One recent study, relied on by Justice Blackmun, found that 23 innocent people had been executed in the United States during the twentieth century. *See* Herrera v. Collins, 113 S. Ct. 853, 876 n.1 (1993) (Blackmun, J., dissenting).

172. *See* Bator, *supra* note 160, at 451.

173. *See, e.g.*, Rust v. Hopkins, 984 F.2d 1486 (8th Cir. 1993). In *Rust*, the death penalty sentencing panel failed to use the reasonable doubt standard in sentencing defendant to death. *See id.* at 1493.

174. Concerns of finality should not be paramount when "errors . . . are so fundamental that they infect the validity of the underlying judgment itself, or the integrity of the process by which that judgment was obtained." Rose v. Lundy, 455 U.S. 509, 543-44 (1982) (Stevens, J., dissenting).

175. 412 U.S. 218, 259 (1973) (Powell, J., concurring).

176. In *Younger v. Harris*, Justice Black urged that interests of federalism are necessarily involved in protecting federal rights but courts should vindicate federal rights "in ways that will not unduly interfere with the legitimate activities of the States." 401 U.S. 37, 44 (1971). Further, Justice Powell also noted a separate need to maintain a constitutional balance between the interests of the state and federal systems. *See Schneckloth*, 412 U.S. at 263 (Powell, J., concurring).

177. Diversity jurisdiction under 28 U.S.C. § 1332 is a prime example of the exercise of federal adjudication involving state interests. *See* Byrd v. Blue Ridge Rural Elec. Coop., Inc., 356 U.S. 525, 536-37 (1958). Similarly, under 42 U.S.C. § 1983, federalism is served by allowing a plaintiff the choice of a state or federal forum. *See* Patsy v. Board of Regents, 457 U.S. 496, 506-07 (1982); Martinez v. California, 444 U.S. 277, 283 n.7 (1980). In federal habeas corpus cases, the Supreme Court recognized in *Ex parte Royall* that principles of federalism required exhaustion of state remedies. 117 U.S. 241, 250-52 (1886). Thus, a state court must be given every opportunity to provide a full and fair review of any constitutional claim before the claim may be raised in a federal court.

178. *See Schneckloth*, 412 U.S. at 263-64 (Powell, J., concurring) (quoting

understandably may be disappointed if reversed by another court. However, all judges understand the judicial system and the process of judicial review. Correcting an unconstitutional legal process that results in the loss of an individual's life or liberty is more important than the personal feelings or sensitivities of individual judges.

Balancing the interests of federalism in habeas corpus requires federal deference to the interests of the state, but principles of federalism must yield to the Supremacy Clause.[179] Statements of finality should not be judicially exalted to overrule the congressional mandate that provides state prisoners a federal forum.[180] Congress desired an extra check on criminal convictions because of the fallibility of criminal processes. Federal judges have the experience and capacity to adjudicate federal constitutional claims without excessive examination of procedural barriers. Federal judges can readily recognize frivolous claims. Our present system breeds delay and inefficiency. Most important, it serves to subordinate federal constitutional rights to compliance with procedural rules.[181] It is time to simplify federal habeas procedures.

It is indeed a sick society that executes its youth, ill, mentally retarded, and paraplegic prisoners without considering their constitutional claims, simply because their lawyers failed to file timely appeals or made other procedural errors.[182]

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speech by Massachusetts Supreme Court Justice Paul C. Reardon on the "humiliation of review from the full bench of the highest State appellate court to a single United States District Court judge"); *see also* Snead v. Stringer, 454 U.S. 988, 993-94 (1981) (Rehnquist, C.J., dissenting) (denying certiorari) ("It is scarcely surprising that fewer and fewer capable lawyers can be found to serve on state benches when they may find their considered decisions overturned by the ruling of a single federal district judge on grounds as tenuous as these.").

179. U.S. CONST. art. VI, § 2.

180. *See Royall*, 117 U.S. at 253.

181. In his dissent in *Coleman v. Thompson*, Justice Blackmun eloquently explained this problem:

> [D]isplaying obvious exasperation with the breadth of substantive 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. . . . I believe that the Court is creating a Byzantine morass of arbitrary, unnecessary, and unjustifiable impediments to the vindication of federal rights . . . .

111 S. Ct. 2546, 2569 (1991).

182. A congressional committee has observed that procedural barriers may cause inequities, noting that "of two identically situated defendants, each having the same meritorious constitutional claim, one was awarded a new trial and sentence hearing, and the other was executed because his lawyer failed to

II. THE POWELL COMMITTEE REPORT

While the Supreme Court was erecting the procedural hurdles in federal habeas corpus, Chief Justice William H. Rehnquist formed an Ad Hoc Committee On Federal Habeas Corpus in Capital Cases.[183] In June 1988, he asked the Committee "to inquire into 'the necessity and desirability of legislation directed toward avoiding delay and the lack of finality' in capital cases."[184] The Chief Justice appointed members of the Committee from the Fifth and Eleventh Circuits because the greatest number of prisoners subject to capital sentences are from those circuits.[185] Retired Associate Justice Lewis F. Powell chaired the Committee, and Professor Albert M. Pierson of the University of Georgia Law School, who had experience representing defendants in capital cases, served as the reporter.[186]

The Committee observed that current habeas corpus procedures dispense justice ineffectively.[187] In particular, the Committee noted three problems with the current system. The first was delay and repetition. Because of the multi-layered state and federal appeal and collateral review processes, piecemeal litigation caused years of delay between sentencing and final judicial resolution.[188] The Committee asserted that the lack of finality undermined public confidence in the criminal justice system. It found, for example, that the average length of proceedings in five of the states within the Fifth and Eleventh Circuits was eight years and two months.[189] Further, eighty

raise the claim." H.R. REP. NO. 681, 101st Cong., 2d Sess., pt. 1, 134 n.24 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6472, 6539.

183. POWELL COMM. REP., *supra* note 3, at 1.

184. *Id.*

185. *Id.* at 1-2. The members of the Committee were Chief Judge Charles Clark of the Fifth Circuit, Chief Judge Paul Roney of the Eleventh Circuit, District Judge William Terrell Hodges of Florida, and District Judge Barefoot Sanders of Texas. *Id.* at 1.

186. *Id.* at 2.

187. *Id.*

188. *Id.* at 1. The Committee did not mention the delays that stringent, new procedural by pass rules cause.

189. *Id.* at 3. The longest case the Committee studied covered a period of 14 years and six months. *Id.* Public concern over the delay in executing death row prisoners cannot be attributed solely to federal habeas corpus proceedings. Critics frequently point to serial killer Ted Bundy's decade on death row as an example of the undue delays that habeas corpus causes in executing state prisoners. *See, e.g., Graham Urges Time Limit on Death Appeals*, L.A. TIMES, Jan. 26, 1989, § 1, at 18 (quoting Sen. Bob Graham's condemnation of Bundy's case as a "typical abuse" of habeas corpus). Most of the delay in Bundy's execution, however, occurred while on direct appeal. Convicted separately in 1979 and 1980 of murders in Florida, Bundy v. Wainwright, 651 F. Supp. 38, 39 (S.D. Fla.

percent of the time spent collaterally litigating death penalty cases occurred outside of the state collateral proceedings.[190] The Committee concluded that the present system of collateral review frustrated the law of the thirty-seven states that then had the death penalty.[191] Moreover, the lack of finality in these cases undermined the public's confidence in the criminal justice system.[192]

1986), *rev'd*, 808 F.2d 1410 (11th Cir. 1987); Bundy v. Dugger, 675 F. Supp. 622, 628 (M.D. Fla. 1986), *aff'd*, 850 F.2d 1402 (11th Cir. 1988), *cert. denied*, 488 U.S. 1034 (1989), Bundy's direct appeals were completed in 1986, Bundy v. State, 471 So. 2d 9 (Fla. 1985), *cert. denied*, 479 U.S. 894 (1986); Bundy v. State, 455 So. 2d 330 (Fla. 1984), *cert. denied*, 479 U.S. 1109 (1986). Bundy's state post-conviction petition was also denied in 1986, Bundy v. State, 497 So. 2d 1209 (Fla. 1986). Federal habeas corpus proceedings began that same year. *See* Bundy v. Dugger, 850 F.2d at 1402; Bundy v. Wainwright, 651 F. Supp. at 39. Bundy was executed two and one-half years later, on January 24, 1989. *Graham Urges Time Limit on Death Appeals*, *supra*, at 18. Thus, three-fourths of the much criticized 10-year period occurred before Bundy initiated federal habeas corpus proceedings.

190. POWELL COMM. REP., *supra* note 3, at 3. The Committee studied cases from Alabama, Florida, Georgia, Mississippi and Texas. *Id.* Many states provide limited post-conviction review. For example, the State of Ohio provides that Ohio prisoners may litigate in a post-conviction proceeding only those claims that could not have been litigated before judgment or on direct appeal. *See* Engle v. Isaac, 456 U.S. 107, 125-26 n.28 (1982) (citing OHIO REV. CODE ANN. § 2953.21(A) (1975)). Four of the states studied by the Powell Commission have similar limitations. In Alabama, Alabama Rule of Criminal Procedure 32.2 directs that all claims are precluded if they were not raised at trial or on appeal. Alabama also has a two-year statute of limitations on any post-conviction claim. ALA. R. CRIM. P. 32.2(c). Mississippi has a three-year statute of limitation, MISS. CODE ANN. § 99-39-5, and applies strict rules of procedural bypass, *id.* § 99-39-21. Florida has a two-year statute of limitation. FLA. R. CRIM. P. 3.850. Texas applies a strict rule of procedural default. *See Ex parte* Crispen, 777 S.W.2d 103, 105 (Tex. Crim. App. 1989) (en banc) (contemporaneous objection rule followed except for novel constitutional claims). However, in Georgia, the General Assembly broadened the scope of post-conviction review in 1967 by rejecting a strict procedural default rule in favor of a liberalized rule of "intentional relinquishment or abandonment." *See* GA. CODE ANN. 9-14-42. Effective September 1, 1989, the State set up a new procedure in death penalty cases. Called the "unified appeal" procedure, it makes certain that defendants have every opportunity to raise all constitutional concerns in a timely and correct manner. GA. R. UNIFIED A. I-IV. It is readily understandable that abbreviated state post-conviction proceedings will be quicker than plenary federal review under 28 U.S.C. § 2254. Furthermore, appointed counsel in federal habeas corpus proceedings will often be new counsel who must familiarize him or herself with the file and must make an exhaustive analysis of the entire state proceeding. Generally the state post-conviction counsel will be the same as the trial and appellate counsel. Under such circumstances, the state proceeding will generally take less time.

191. POWELL COMM. REP., *supra* note 3, at 3.

192. *Id.* at 1. In its findings, the Committee pointed out that prisoners were shunted between the state and federal systems, but did not mention the

Second, the Committee noted a serious problem in satisfying the need for qualified counsel to represent inmates in collateral review.[193] Capital habeas litigation is difficult and complicated, and prisoners often fail promptly and properly to exhaust their state remedies.[194] If counsel enters the case when execution is imminent, the prisoner may have already waived serious constitutional claims.[195] The Committee therefore recognized that death-row prisoners need competent counsel in both state and federal collateral review.[196]

Finally, the Committee stressed the fact that habeas corpus petitions are often filed at the last minute, when there is an impending execution.[197] Courts must expend valuable judicial resources as the prisoner seeks a stay of execution.[198] To address this problem, the Committee recommended that the merits of capital cases be reviewed carefully and not under time pressure.[199] Once this thorough review has been done, last minute litigation should not be permitted.[200]

To resolve these problems, the Committee proposed a new statutory scheme for capital cases.[201] Under the current system, capital litigants have an incentive to delay the judicial proceedings, whereas prisoners sentenced to a term of years tend to assert their claims as soon as possible in order to gain release. Thus, the Committee's proposal was to subject capital cases "to one complete and fair course of collateral review in the state and federal system, free from the time pressure of impending execution, and with the assistance of competent counsel for the defendant."[202]

To accomplish this goal, the Committee drafted proposed legislation. At their option, states could bring capital litigation

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circuitous total exhaustion rule of *Rose v. Lundy*. Recognizing that res judicata was inapplicable to federal habeas proceedings, the Committee noted the fact that capital litigants return to federal court with repetitive petitions for relief. *Id.* at 2-3. It also observed that under the present system, at least three petitions for certiorari to the United States Supreme Court are permitted: after direct review, after state trial proceedings, and after the federal habeas proceedings. *Id.* at 3.

193. *Id.* at 4.
194. *Id.*
195. *Id.*
196. *Id.*
197. *Id.* at 5.
198. *Id.*
199. *Id.*
200. *Id.*
201. *Id.*
202. *Id.* at 6.

by prisoners within the statute by providing competent counsel on state collateral review.[203] States that did so would benefit because the proposal contained a six-month statute of limitation period for federal habeas petitions.[204] The Committee noted that although the six-month period seemed short, it is longer than the time provided for appeals in the state and federal systems, or the period for seeking certiorari review in the Supreme Court.[205] Second, the Committee's proposal provided an automatic stay of execution to last until federal habeas corpus proceedings are completed, or until the prisoner fails to file a petition within the limitation period.[206] Finally, although the proposed statute generally includes only claims exhausted in state court, it permits immediate presentation of new claims in federal court in extraordinary circumstances, a practice different than current law.[207] If no relief is granted in the counseled state and federal collateral processes, later federal habeas petitions cannot be the basis of a stay of execution, absent extraordinary circumstances and a colorable showing of factual innocence.[208]

The Committee's proposal was released on August 23, 1989 and was placed on the Judicial Conference agenda for debate on September 20.[209] Although the Committee had earlier invited written comments from various parties and organizations before formulating its proposals, groups such as the American Bar Association, the National Association of Criminal Defense Lawyers, and the federal judiciary had no opportunity to review and comment on the Committee's specific proposal.[210] Several members of the Judicial Conference were alarmed that an important vote on this proposal was to take place without sufficient opportunity for review, substantive input, and critique. Because of these concerns, the Judicial Conference voted

203. *Id.*

204. *Id.* The filing period began to run on the appointment of counsel for the prisoner, or refusal of the offer of counsel. The six-month period was tolled during the pendency of all state court proceedings. *Id.*

205. *Id.*

206. *Id.* at 7.

207. *Id.* Even though exhaustion is waived, the petitioner still faces the burden of showing cause and prejudice for failure to raise their claims in the state court.

208. *Id.*

209. *Id.* at 1.

210. *Habeas Corpus Reform: Hearing on S. 88, S. 1757, and S. 176 Before the Senate Comm. on the Judiciary*, 101st Cong., 1st Sess. 29 (1989) [hereinafter *Senate Habeas Hearings*] (statement of Hon. Donald P. Lay), *reprinted in* 19 CAP. U. L. REV. 659, 661 (1990).

seventeen to seven to defer approval of the Powell Committee Report and recommendation until March 1990.[211] The day after the Judicial Conference action, the Chief Justice asked Justice Powell to make a public statement concerning his report.[212]

The Senate, however, had already set forth a schedule for consideration of the proposed statute.[213] Because of this legislation, Chief Justice Rehnquist determined it was his duty to forward the Powell Committee Report to the Judiciary Committees of the House and Senate immediately, notwithstanding the absence of the Conference recommendation.[214] Chief Justice Rehnquist transmitted this report on September 22. Although several members of the Judicial Conference believed that this action had undermined the Conference's vote to defer,[215] I felt the Chief Justice's interpretation of the legislation was understandable. However, the shortcoming of his action was that the transmittal did not include a policy statement from the Judicial Conference and none could be obtained until March of 1990.[216]

The Report triggered immediate hearings before the Senate Judiciary Committee.[217] Appearing on behalf of the Powell Committee Report was retired Associate Justice Powell, Chief Judge Clark, and Chief Judge Roney.[218] Chief Judge Holloway of the Tenth Circuit, Chief Judge Oakes of the Second Circuit, and I, as Chief Judge of the Eighth Circuit, were also summoned to comment.[219]

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211. *See* 1989 DIRECTOR OF THE ADMIN. OFFICE OF THE UNITED STATES COURTS ANN. REP. 84; Linda Greenhouse, *Judges Challenge Rehnquist Role on Death Penalty*, N.Y. TIMES, Oct. 6, 1989, at A1.

212. In his statement, Justice Powell reiterated his support for the Committee's proposal. Justice Lewis F. Powell, Statement to the Public (Sept. 21, 1989).

213. *See* Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7323, 102 Stat. 4181, 4467. The Act set forth a timetable for Senate action once Chief Justice Rehnquist forwarded the Powell Committee Report to the House and Senate. *Id.* It did not mention approval from the Judicial Conference, but urged expedited filing of the report. *Id.* at 4467-68. The House had not agreed to a specific expedited schedule. H.R. REP. NO. 681, *supra* note 182, at 113 n.8.

214. Greenhouse, *supra* note 211.

215. *See id.*

216. When I appeared before the Committee in November of 1989, Chairman Biden said he "would have felt much more comfortable" had the report been submitted after Judicial Conference action. *See Senate Habeas Hearings*, *supra* note 210, at 119.

217. *See id.* at 1.

218. *See id.* at 5, 234, 252.

219. *See id.* at 77, 118, 207. Chief Judge Oakes was unable to attend but sent a written statement. *Id.* at 77. Testifying in his place was Judge Steven

The two main legislative proposals submitted at that time were Senate Bill 1760, which in effect codified the Powell Committee proposal,[220] and Senate Bill 1757, known as the Biden bill.[221] Chief Judge Oakes, Chief Judge Holloway, Judge Reinhart, and I testified against Senate Bill 1760 and the Powell Committee Report, and instead advocated adopting the Biden bill.

The Senate deferred further action on the Powell Committee Report until the Judicial Conference had an opportunity to pass upon the proposal. The American Bar Association and other groups therefore had an opportunity to comment. In September 1989, the Powell Committee Report was submitted to the Judicial Conference.[222] A group of chief judges—Patricia Wald of the D.C. Circuit, James Oakes of the Second Circuit, Leon Higginbotham of the Third Circuit, Sam Irwin of the Fourth Circuit, Alfred Goodwin of the Ninth Circuit, William Holloway of the Tenth Circuit, and I, and District Judge Frank Kaufman—who was a member at-large of the Conference—endorsed a resolution to modify the Powell Committee Report.[223]

Reinhart of the Ninth Circuit Court of Appeals. *Id.* at 212. For the text of my remarks before the committee, see *Senate Habeas Hearings*, *supra* note 210, at 18 (statement of Hon. Donald P. Lay). The lecture from which this article is adapted drew heavily from these remarks.

220. S. 1760, 101st Cong., 1st Sess. (1989) (statement of Sen. Thurmond); *see also House Habeas Hearings*, *supra* note 154, at 44 (statement of Hon. Lewis F. Powell).

221. S. 1757, 101st Cong., 1st Sess. (1989) (statement of Sen. Biden).

222. *See* 1990 DIRECTOR OF THE ADMIN. OFFICE OF THE UNITED STATES COURTS ANN. REP. 7-8.

223. *See House Habeas Hearings*, *supra* note 154, at 158. Our resolution was as follows:

> The Judicial Conference of the United States endorses the essential objectives of the Powell Committee Ad Hoc Report on federal habeas corpus review of capital cases:
>
> (1) to eliminate piecemeal appeals;
>
> (2) to provide an automatic stay in capital cases in order to obviate successive petitions for stay; and
>
> (3) to provide competent counsel on state post-conviction cases.
>
> The Judicial Conference endorses the recommendations of the Powell Committee Report with the following modifications:
>
> A. Because many of the delays in habeas corpus procedures are related to the fact that the defendant was not represented by competent counsel at the trial level (as well as in the state post-conviction proceedings), specific mandatory standards similar to those set forth in the Anti-Drug Abuse Act of 1988 should be required with respect to the appointment and compensation of counsel for capital defendants at all stages of the state and federal capital punishment litigation.
>
> Upon the filing of a petition for a writ of habeas corpus in the

We first suggested extending the limitation period the

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federal court the court should first determine whether the specific guidelines for competent counsel were followed in the state proceedings. If the court determines that competent counsel was appointed in the state proceedings, the same counsel should be appointed in the federal court, wherever possible. If the court determines that competent counsel was not appointed in the state proceedings, the federal district court should appoint new counsel under the governing guidelines. In the latter case, the federal court should not require dismissal of non-exhausted state claims, or apply any procedural default rules or the rule governing the presumption of correctness of state court findings of fact, regarding those proceedings at which competent counsel was not present.

COMMENTARY

The present proposal of the Powell Committee provides states with the option to set standards of competency for the appointment of counsel in state post-conviction cases. This proposal has serious drawbacks. Providing states the option to set and comply with the standards will lead to the creation of different and inconsistent standards among the states, and will result in two sets of procedures in federal post-conviction cases: one for petitioners from states that have opted to adopt standards and another for petitioners from states that have not. The result would be confusion and a proliferation of litigation. Hence, we endorse the ABA Task Force recommendation of one mandatory national standard governing competent counsel.

B. The Conference endorses the following recommendation of the ABA Task Force, except for the language substituted at the conclusion of this paragraph for the phase "result in a miscarriage of justice."

> Federal courts should not rely on state procedural bar rules to preclude consideration of the merits of a claim if the prisoner shows that the failure to raise the claim in a state court was due to the ignorance of the prisoner, or the neglect or ignorance of counsel, or if the failure to consider such a claim would undermine the court's confidence in the jury's determination of guilt on the offense or offenses for which the death penalty was imposed, or in the appropriateness of the sentence of death.

C. The Conference supports the essential features of the ABA Task Force recommendation concerning second or successive petitions for habeas relief. The Conference, however, favors a change in that recommendation so that it be clear that the Conference supports a federal court entertaining a second or successive petition on the grounds stated in the ABA Task Force recommendation, but, in addition, stating that any statutory revision would include a proviso that such a successive or second petition be entertained where the facts, if proven, would also undermine the court's confidence in "the appropriateness of the sentence of death." In order to make this clear within the context of the ABA Task Force recommendation, the Conference supports the following modified recommendation:

> A federal court should entertain a second or successive petition for habeas corpus relief if: the request for relief is based on a claim not previously presented by the prisoner in the state and federal courts and the failure to raise the claim is

Powell Committee proposed.[224] We felt that six months was too short for new counsel to absorb all of the state court proceedings, including any post-conviction review, and to develop sufficient understanding of the complexities of death penalty litigation law.[225] As we pointed out, the number of Supreme Court opinions on cause and prejudice, exhaustion, retroactivity, abusive petitions, and successive petitions was multiplying. We thought that at least one year from the conclusion of state collateral proceedings is required to make an intelligent study of all of this information and to allege exhausted constitutional claims.

Another problem with the Powell proposal was that the time for filing a federal habeas petition began to run as soon as appointment of counsel was made in the state court.[226] In practice, state courts often appoint new counsel to file state post-conviction petitions, and they postpone the filing deadline while the new attorney studies the briefs and records of both the trial and the direct appeal. Thus, since the limitation period would not be tolled until the post-conviction petition was actually filed in the state court, the time limit for filing in the federal

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> the result of state action in violation of the Constitution or laws of the United States, the result of Supreme Court recognition of a new federal right that is retroactively applicable, or based on a factual predicate that could not have been discovered through the exercise of reasonable diligence; or the facts underlying the claim would be sufficient, if proven, to undermine the court's confidence in the jury's determination of guilt on the offense or offenses for which the death penalty was imposed, or in the appropriateness of the sentence of death.
>
> D. The federal statute of limitations, which should be one year, should commence upon the conclusion of all direct state appeals and state post-conviction proceedings, and after the date of judgment on petitions for certiorari timely filed after the final state court decision on post-conviction relief.
>
> E. The Judicial Conference adopts the following recommendation of the ABA Task Force:
>
> > The standard for determining whether changes in federal constitutional law should apply retroactively should be whether failure to apply the new law would undermine the court's confidence in the jury's determination of guilt on the offense or offenses for which the death penalty was imposed, or in the appropriateness of the sentence of death.

Id. at 155-58.

224. *Id.* at 158.

225. For a critical analysis of the six-month limitation, see Michael Mello & Donna Duffy, *Suspending Justice: The Unconstitutionality of the Proposed Six-Month Time Limit on the Filing of Habeas Corpus Petitions by State Death Row Inmates*, 18 N.Y.U. REV. L. & SOC. CHANGE 451 (1990).

226. *See* POWELL COMM. REP., *supra* note 3, at 6.

district court could actually be far shorter than the prescribed six months.

Justice Powell was concerned that the one-year limitation we suggested was too long.[227] Before the Senate Committee, he compared the limitations period to those of appeals in other areas of the law.[228] This comparison, however, is unfair. Habeas corpus petitions are unique because all possible constitutional claims must be exhausted for fear of bypassing any claim.[229] Few lawyers are competent to handle habeas petitions in capital cases without a great deal of time and study.[230] In comparison, the attorney for a petitioner in certiorari usually served as trial and appellate counsel and has focused on the specific areas for review. Such counsel has lived with the case for years and understands what issues are involved. A new federal habeas counsel does not enjoy this same empirical background. The Powell Committee's rejoinder that the same counsel serves in both the state collateral and federal habeas petitions[231] is an unrealistic appraisal. Federal habeas counsel is most often *not* the same counsel who appeared in the state post-conviction proceeding.[232] Rather, federal habeas counsel is most often appointed by the federal district court and needs additional time to examine the entire state court trial transcript as well as the state post-conviction proceeding.[233]

The Judicial Conference vote on modifying the six-month period of limitations was a tie—thirteen to thirteen. In a most unusual move, the Chief Justice exercised his right to vote, adding his voice in support of the original Powell Committee proposal.[234] Therefore, the opposition Committee's modification proposal was defeated.[235]

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227. *See* AD HOC COMM. ON FEDERAL HABEAS CORPUS IN CAPITAL CASES, 101ST CONG., 1ST SESS., SUPPLEMENTAL COMMENT ON THE POWELL COMMITTEE REPORT 4 (1990) [hereinafter POWELL SUPP. COMMENT].

228. *Senate Habeas Hearings*, *supra* note 210, at 34.

229. *See, e.g.*, Kuhlman v. Wilson, 477 U.S. 436 (1986).

230. ABA TASK FORCE REPORT, *supra* note 14, at 63-75.

231. POWELL SUPP. COMMENT, *supra* note 227, at 5.

232. The state public defender's office often represents the indigent defendant in state collateral proceedings; but in many states, because of a heavy caseload, state public offenders are not allowed to participate in federal habeas proceedings. These cases simply take too much time.

233. New federal habeas counsel must spend an average of 25% of a year's billable hours to process a capital case in federal habeas corpus. ABA TASK FORCE REPORT, *supra* note 14, at 72 n.96.

234. *See* Linda Greenhouse, *Vote is a Rebuff for Chief Justice*, N.Y. TIMES, Mar. 15, 1990, at A16.

235. *Id.* Our opposition did not go unheeded in the Senate or the House.

Chief Judge A. Leon Higginbotham, Jr. of the Third Circuit then proposed the opposition Committee's second modification.[236] It required states to provide indigent defendants with experienced criminal attorneys at both the trial and direct appeal as well as the post-conviction proceeding.[237] Judge Higginbotham stressed that "[i]t is at the trial and direct appeal stage—not in state collateral proceedings—where ineffectual counsel do the most damage to their clients' rights and to the

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In both Senator Biden's bill and Congressman Brooks's bill, a one-year limitation period was proposed. Congressman Brooks's bill read:

SEC. 1101. SHORT TITLE.

This Act may be cited as the "Habeas Corpus Reform Act of 1991".

SEC. 1102. STATUTE OF LIMITATIONS.

Section 2254 of title 28, United States Code, is amended by adding at the end the following:

"(g)(1) In the case of an applicant under sentence of death, any application for habeas corpus relief under this section must be filed in the appropriate district court not later than one year after—

(A) the date of 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 Supreme Court;

(B) the date of issuance of the mandate of the highest court of the State on direct appeal or unitary review of the conviction and sentence, if a petition for a writ of certiorari is not filed, within the time limits established by law, in the Supreme Court; or

(C) the date of issuance of the mandate of the 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 capital sentence undisturbed.

(2) The time requirements established by this section shall be tolled—

(A) during any period in which the State has failed to provide counsel as required in section 2257 of this chapter;

(B) during the period from the date the applicant files an application for State post-conviction relief until final disposition of the application by the State appellate courts, if all filing deadlines are met; and

(C) during an additional period not to exceed 90 days, if counsel moves for an extension in the district court that would have jurisdiction of a habeas corpus application and makes a showing of good cause."

H.R. 3371, 102d Cong., 1st Sess. (1991).

236. *See* Higginbotham, *supra* note 104.

237. *Id.* at 4. Judge Higginbotham adopted standards set out in the Anti-Drug Abuse Act of 1988, which requires appointment of counsel in habeas death penalty cases. *Id.* The Act recommends appointed counsel be admitted to practice for at least five years and have at least three years experience trying felony prosecutions. 21 U.S.C. § 848(q)(5), (6) (1988). In addition, the Act provides that appointed counsel be given sufficient resources to hire investigators and experts as needed. *Id.* § 848(q)(9).

integrity of the judicial process."[238] He cited numerous examples, including the case of a criminal defense attorney in a capital case who stated in closing argument that "if he were the victim's friend, he also 'would want [the defendant] dead.' "[239]

The Judicial Conference approved this proposal and amended the Powell Committee Report to incorporate national mandatory standards for both trial and post-conviction proceedings.[240] Our attempt to modify the Powell Committee proposal was largely motivated by the emphasis placed upon the compe-

238. Higginbotham, *supra* note 104, at 6. The South Carolina Supreme Court recently stressed the extraordinary demands required of trial counsel in capital cases. *See* Bailey v. State, 424 S.E.2d 503 (S.C. 1992). In *Bailey*, the court determined that the state's indigent defense fee statutes could not constitutionally be applied in capital cases because "they clearly do not provide compensation adequate to ensure effective assistance" in death penalty litigation. *Id.* at 508. South Carolina law called for appointment of two attorneys in capital cases; their fees and costs were not to exceed $5,000 per trial. *Id.* at 505. Private attorneys were to be paid $15 per hour for in-court time and $10 per hour for out-of-court time up to the $5,000 cap. *Id.* The law provided up to $2,500 for experts and investigation. *Id.* The two lawyers in *Bailey* expended roughly 370 hours and $1,750 obtaining a dismissal of charges against their client before trial. *Id.* An investigator spent 265 hours and about $1,600 investigating the case. *Id.* Observing the many demands on attorneys at both the guilt and sentencing phases of death penalty litigation, the court said:

> It is an understatement that the very livelihood of many attorneys appointed to death penalty trials is threatened by this burden, a result fundamentally unfair to those so impacted. The record before us demonstrates that capital trials today, as never before, present a myriad of complexities heretofore unknown. For example, until very recent years, most capital trials were, from beginning to end, completed within four days. Today, selection of the jury alone often consumes a week or more.

Id.

239. Higginbotham, *supra* note 104, at 11. Judge Higginbotham said state and federal reporters "burgeon with cases in which ill-prepared, inexperienced, or grossly negligent lawyers—lawyers whose capabilities might have been stretched by uncontested divorces or misdemeanor plea bargains—have been entrusted with the representation of criminal defendants facing the law's ultimate sanction." *Id.* at 8-9. He also cited several additional examples reported by an American Bar Association Task Force on Death Penalty Habeas Corpus. *Id.* at 9. These include an attorney who referred to his own client as a "nigger" before the jury, an attorney who stipulated to all the elements of first degree murder and to two aggravating circumstances supporting the death penalty, an attorney who was parking his car outside the courthouse while a critical prosecution witness testified inside, and an attorney who stated he could identify only two criminal cases by name—*Miranda v. Arizona* and *Dred Scott v. Sanford*. *Id.* As Judge Higginbotham pointed out, the latter attorney "should have quit while he was ahead; *Dred Scott* was not a criminal case." *Id.*

240. *See House Habeas Hearings*, *supra* note 154, at 91 (statement of Judge Roney). This provision was now incorporated in Congressman Brooks's Bill, which read:

tency of *trial* counsel because of the severe consequences of

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SEC. 1104. LAW APPLICABLE.

(a) IN GENERAL.—Chapter 153 of title 28, United States Code, is amended by adding at the end the following: "§ 2256. Law applicable.".

In an action filed under this chapter, the court shall not apply a new rule. For purposes of this section, the term "new rule" means a clear break from precedent, announced by the Supreme Court of the United States, that could not reasonably have been anticipated at the time the claimant's sentence became final in State court.

(b) CLERICAL AMENDMENT.—The table of sections at the beginning of chapter 153 of title 28, United States Code, is amended by adding at the end the following: "2256. Law applicable.".

SEC. 1105. COUNSEL IN CAPITAL CASES; STATE COURT.

(a) IN GENERAL.—Chapter 153 of title 28, United States Code, is amended by adding at the end the following: "§ 2257. Counsel in capital cases; State court

(a) A state in which capital punishment may be imposed shall provide legal services to—

(1) indigents charged with offenses for which capital punishment is sought;

(2) indigents who have been sentenced to death and who seek appellate, collateral, or unitary review in State court; and

(3) indigents who have been sentenced to death and who seek certiorari review of State court judgments in the United States Supreme Court.

(b) The state shall establish an appointing authority, which shall be

(1) a statewide defender organization;

(2) a resource center; or

(3) a committee appointed by the highest State court, comprised of members of the bar with substantial experience in, or commitment to, criminal justice.

(c) the appointing authority shall—

(1) publish a roster of attorneys qualified to be appointed in capital cases, procedures by which attorneys are appointed, and standards governing qualifications and performance of counsel, which shall include—

(A) knowledge and understanding of pertinent legal authorities regarding issues in capital cases;

(B) skills in the conduct of negotiations and litigation in capital cases, the investigation of capital cases and the psychiatric history and current condition of capital clients, and the preparation and writing of legal papers in capital cases;

(C) in the case of counsel appointed for the trial or sentencing stages, 5 years of experience in the representation of criminal clients in felony cases and experience in at least one case in which the death penalty was sought; and

(D) in the case of counsel appointed for the appellate, postconviction, or unitary review stages, 5 years of experience in the representation of criminal clients in felony cases at the appellate, postconviction, unitary review, or certiorari stages and experience in at least one case in which the client has been sentenced to death;

(2) monitor the performance of attorneys appointed and delete from the roster any attorney who fails to meet qualification and performance standards; and

(3) appoint a defense team, which shall include at least 2 at-

failure to make contemporaneous objections or timely claims in the initial state proceedings.

We achieved mixed results with our other modifications. Our proposal to obviate the procedural bypass rules in capital cases was unfortunately defeated by another closely divided vote.[241] The Committee's proposal to modify the rule in *Teague v. Lane* was defeated by a tie vote with the Chief Justice voting

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torneys, to represent a client at the relevant stage of proceedings, promptly upon receiving notice of the need for the appointment from the relevant State court.

(d) an attorney who is not listed on the roster shall be appointed only on the request of the client concerned and in circumstances in which the attorney requested is able to provide the client with quality legal representation.

(e) No counsel appointed pursuant to this section to represent a prisoner in State postconviction proceedings shall have previously represented the prisoner at trial or on direct appeal in the case for which the appointment is made, unless the prisoner and counsel expressly request continued representation.

(f) The ineffectiveness or incompetence of counsel appointed pursuant to this section during State or Federal postconviction proceedings shall not be a ground for relief in a proceeding arising under section 2254 of this title. This limitation shall not preclude the appointment of different counsel at any phase of State or Federal postconviction proceedings.

(g) Upon receipt of notice from the appointing authority that an individual entitled to the appointment of counsel under this section has declined to accept such an appointment, the court requesting the appointment shall conduct, or cause to be conducted, a hearing, at which the individual and counsel proposed to be appointed under this section shall be present, to determine the individual's competency to decline the appointment, and whether the individual has knowingly and intelligently declined it.

(h) Attorneys appointed from the private bar shall be compensated on an hourly basis and at a reasonable rate in light of the attorney's qualifications and experience and the local market for legal representation in cases reflecting the complexity and responsibility of capital cases and shall be reimbursed for expenses reasonably incurred in representing the client, including the costs of law clerks, paralegals, investigators, experts, or other support services.

(i) Support services for staff attorneys of a defender organization or resource center shall be equal to the services listed in subsection (h).

(j) If a State fails to provide counsel in a proceeding specified in subsection (a), or counsel appointed for such a proceeding fails substantially to meet the qualification standards specified in subsections (c)(1) or (d), or the performance standards established by the appointing authority, the court, in an action under this chapter, shall neither presume findings of fact made in such proceeding to be correct nor decline to consider a claim on the ground that it was not raised in such proceeding at the time or in the manner prescribed by state law."

H.R. 3371, *supra* note 235.

241. *See* Greenhouse, *supra* note 234, at A16.

to make the tie.[242] The Judicial Conference did approve our proposal to expand review of successive petitions to allow consideration of the appropriateness of the death sentence.[243]

In May 1990, the House Judicial Committee held hearings on the proposed legislation.[244] The Kastenmeier bill tracked the Biden bill.[245] During debates on the bill, Judge Paul Roney and Justice Powell defended the original Powell Committee Report, particularly disagreeing with our modification on con-

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242. *Id.*

243. *See House Habeas Hearings*, *supra* note 154, at 92 (statement of Judge Roney). Chief Judge William J. Holloway, Jr. summarized our concerns in his testimony before the Senate Judiciary Committee. *See Senate Habeas Hearings*, *supra* note 210, at 172. He stated:

> The Ad Hoc Committee's Report overlooks appalling cases where constitutional claims could only be presented *after* the conclusion of a first post-conviction proceeding, with the discovery of concealed evidence withheld from the defendant and his counsel and not earlier discoverable—evidence which seriously undermined the constitutional validity of the death sentences involved. If such withheld evidence undermines the validity of aggravating circumstances considered in the penalty phase, or makes available a showing of mitigating circumstances not able to be considered at that time, clearly a challenge to a death sentence itself *should* be heard in a federal habeas case and the federal court should not be deprived of jurisdiction to consider such compelling claims.

Id. at 174-75.

244. *See House Habeas Hearings*, *supra* note 154, at 1; H.R. REP. NO. 681, *supra* note 182, at 113-15.

245. *See* H.R. 4737, 101st Cong., 2d Sess. (1990); *see also* H.R. REP. NO. 681, *supra* note 182, at 114. This measure read in Congressman Brooks's bill as follows:

> SEC. 1106. SUCCESSIVE FEDERAL PETITIONS.
>
> Section 2244(b) of title 28, United States Code, is amended—
>
> (1) by inserting (1) after (b);
>
> (2) by inserting ", in the case of an applicant not under sentence of death," after "When"; and
>
> (3) by adding at the end the following:
>
> (2) In the case of an applicant under sentence of death, a claim presented in a second or successive application, that was not presented in a prior application under this chapter, shall be dismissed unless—
>
> (A) the applicant shows that—
>
> (i) the basis of the claim could not have been discovered by the exercise of reasonable diligence before the applicant filed the prior application; or
>
> (ii) the failure to raise the claim in the prior application was due to action by State officials in violation of the Constitution of the United States; and
>
> (B) the facts underlying the claim would be sufficient, if proven, to undermine the court's confidence in the applicant's guilt of the offense or offenses for which the capital sentence was imposed, or in the validity of that sentence under Federal law.

H.R. 3371, *supra* note 235.

sideration of the appropriateness of the death sentence in a second or successive petition.[246] Judge Roney indicated to the Committee that he did not understand the term, "*'appropriateness' of the sentence of death*," and therefore urged that it should not be considered in a successive petition.[247]

Chief Judge Oakes and I pointed out to the Committee more than thirty-five Supreme Court opinions that discuss the appropriateness of the death sentence in terms of constitutional procedures.[248] For example, in *Woodson v. North Carolina*,[249] Justices Stewart, Powell, and Stevens, in a combined opinion, stated as follows:

> [T]he penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.[250]

Thus, this language was not new.[251]

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246. *See House Habeas Hearings*, *supra* note 154, at 92-93 (statement of Judge Roney).

247. *Id.* at 92.

248. *See Senate Habeas Hearings*, *supra* note 210, at 126-51.

249. 428 U.S. 280 (1976).

250. *Id.* at 305.

251. Judge Roney later provided the Committee with a supplemental statement in which he stated that while the appropriateness of the death penalty was indeed frequently discussed in Supreme Court cases, it had not been used as a standard of review. *House Habeas Hearings*, *supra* note 154, at 95. Judge Roney's law clerk found in a computer search at least 121 Supreme Court cases discussing the appropriateness of the death penalty. *Id.* at 97.

The standard of review, however, is not the issue in controversy. The discussion at the Judicial Conference did not concern adopting a "standard of review" but it concerned whether the appropriateness of the death sentence could even be reviewed in addition to the merits of the conviction in a successive petition. The Powell Commission Report limited a successive petition to the question of actual innocence. POWELL COMM. REP., *supra* note 3, at 7. However, actual innocence is rarely reviewed in capital cases during habeas corpus proceedings. The overwhelming majority of the cases reviewed by the Supreme Court concern the appropriateness of the death sentence itself. *See, e.g.*, Sawyer v. Whitley, 112 S. Ct. 2514 (1992). The issues generally concern whether the statute or procedures relating to the death penalty are constitutionally fair. The Powell Commission Report would eliminate consideration of this issue in a successive petition. Thus, as Judge Holloway made clear, even if new evidence was discovered, a person who had previously filed a petition for habeas review could not challenge the illegality of the death sentence itself in a successive petition upon the basis of newly discovered evidence. *See Senate Habeas Hearings*, *supra* note 210, at 173-74 (statement of Judge Holloway). The Brooks bill addressed this problem by permitting a successive petition if "the claim would be sufficient, if proven, to undermine the court's confidence in the applicant's guilt of the offense or offenses for which the capital sentence

As of January 1, 1993, the Congress has not yet passed habeas legislation.[252] The fact that reasonable people may differ about legislative reform on habeas corpus in capital cases seems to forestall any definitive legislation. Those of us who opposed the Powell Committee Report did so primarily because we felt it did not live up to its billing of fundamental fairness. We deemed it an attempt to rush many capital cases on a fast track to execution without needed quality controls on fundamental fairness. As this Article explains, much of our concern lay in the existing case law surrounding habeas corpus. Viewed with the requirements of procedural bypass, exhaustion, new rules, successive petitions, and abusive petitions, most of the measures of the Powell Committee seemed extremely unfair.

CONCLUSION

It is difficult for many of us to believe that in today's society an individual may be executed by reason of technical error by his or her lawyer in order to exalt the goal of state finality above the requirements of fundamental fairness. When individuals such as Roger Coleman can be executed simply because his lawyer filed his notice of appeal three days late,[253] or because, as in *Carrier*,[254] a lawyer failed to raise a constitutional claim on the appeal, reasonable doubt exists about the fairness of our procedures. To many within and without the judiciary, this seems unconscionable.

The Eighth Circuit wrote in *Mercer v. Armontrout*:

> Human life is our most precious possession. Our natural instincts guide us from birth to sustain life by protecting ourselves and protecting others. All notions of morality focus on the right to live and all of man's laws seek to preserve this most important right. When presented with challenges to a capital sentence, it would be easy to respond rhetorically by asking, "what about the victim whom the defendant has been found guilty of unmercifully killing." But this approach fails to reflect on the ideal that a government founded by a moral and civilized society should not act as unmercifully as the defendant is accused of acting. If the original murder cannot be justified under man's laws, it is equally unlawful and inhumane to commit the

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was imposed, *or in the validity of that sentence under Federal law.*" *See* H.R. 3371, *supra* note 235, § 1106 (emphasis added).

252. *See* Statement on Signing the Crime Control Act of 1990, 1990 PUB. PAPERS 1715-16 (Nov. 29, 1990). President Bush stated in signing the Crime Control Act of 1990 that habeas "reforms were stripped from the crime bill by the conference committee" even though both houses of Congress had passed a version. *Id.*

253. *See* Coleman v. Thompson, 111 S. Ct. 2546 (1991).

254. *See* Murray v. Carrier, 477 U.S. 478 (1986).

> same atrocity in the name of the state. What separates the unlawful killing by man and the lawful killing by the state are the legal barriers that exist to preserve the individual's constitutional rights and protect against the unlawful execution of a death sentence. If the law is not given strict adherence, then we as a society are just as guilty of a heinous crime as the condemned felon. It should thus be readily apparent that the legal process in a civilized society must not rush to judgment and thereafter rush to execute a person found guilty of taking the life of another.[255]

As we approach the twenty-first century, there is a compelling need to reexamine our procedures to make certain that inefficient procedural rules do not subsume principles governing fundamental fairness. This is particularly true as states continue to use capital punishment in enforcing their criminal laws. Indeed, one Supreme Court justice has expressed doubt about the continued constitutionality of the death penalty in light of the new procedural impediments to review.[256] As long as society does not view capital punishment as barbaric or inhumane, a reevaluation of fundamental fairness is needed more than ever before.

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255. 864 F.2d 1429, 1431-33 (8th Cir. 1988).

256. Sawyer v. Whitley, 112 S. Ct. 2514, 2525 (1992) (Blackmun, J., concurring in the judgment). Justice Blackmun explained:

> I also write separately to express my ever-growing skepticism that, with each new decision from this Court constricting the ability of the federal courts to remedy constitutional errors, the death penalty really can be imposed fairly and in accordance with the Eighth Amendment.
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> . . . .
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> . . . 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 sentenced to death, the more the Court undermines the very legitimacy of capital punishment itself.

Id. at 2525, 2530 (citations omitted).