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A GREAT WRIT WHILE IT LASTED

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This is a brief essay on the emergence of an esoteric legal doctrine, or, more precisely, on the confluence of several legal doctrines. It is also a brief snapshot of how the Supreme Court hopes, or believes, that some of its esoteric doctrines of criminal procedure and jurisdiction can play a role in the amorphous social campaign to fight violent crime in America. The essential point is this: in a pair of decisions handed down this Term,[1] the Supreme Court substantially eviscerated federal habeas corpus jurisdiction as an instrument for constitutional law. And though we know no motives for Supreme Court cases other than those announced in the decisions, one can speculate that the Court was simply frustrated with the inadequacy of the execution rate of America's death row inmates.

I. AN EARLY HINT FROM JUSTICE REHNQUIST

A. FOILING FEDERAL HABEAS

The story might begin a decade ago. In the 1980 case of *Coleman v. Balkcom*,[2] surely one of the most remarkable sets of memorandum opinions ever written, then-Associate Justice Rehnquist signaled a new, more aggressive phase in his campaign against what he perceived to be two closely related phenomena in our post-Warren Court society: the rise of violent crime— indeed of homicidal chaos—and the abuse of federal habeas corpus jurisdiction by those who commit violent crime. In Justice Rehnquist's view, the Great Writ, so far from acting as an instrument to protect the innocent from prosecutorial oppression, had become the tool with which criminals obstructed society from punishing them with finality.

Coleman was, in legal terms, a relatively routine death penalty case that arrived at the Court from the Supreme Court of Georgia. Convicted of a brutal murder of six members of a family, Coleman lost on direct appeal in the Georgia courts and on his first certiorari

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[1] Butler v. McKellar, 110 S. Ct. 1212 (1990); Saffle v. Parks, 110 S. Ct. 1257 (1990).

[2] 451 U.S. 949 (1980) (denial of certiorari).

petition to the United States Supreme Court; he then lost again on state habeas in Georgia, so he was on his second round of certiorari, though he had not yet entered federal habeas corpus.[3] The claim itself was unremarkable. Coleman argued that he had been wrongly denied a change of venue claim based on prejudicial publicity. More precisely, he claimed that a combination of two Georgia statutes barred him from subpoenaing the witnesses he needed to prove that claim on collateral review in Georgia.[4]

Ironically, Justice Rehnquist urged the Court to *grant* certiorari, not because he thought Coleman had a plausible claim on the merits—quite the opposite—and not because he thought Coleman's claim presented an important question of law that needed to be resolved. Rather, Justice Rehnquist wanted the Court to take the case on the merits (and, presumably, do the same for an exemplary series of cases) and summarily affirm the state court decision, thereby virtually ending any hope Coleman might entertain for relief in the federal courts.[5] Otherwise, in Justice Rehnquist's view, if the Court followed its reasonable inclination to deny certiorari, Coleman would, like the typical death row inmate, begin clogging the docket of a federal district court with his claim under 28 U.S.C. § 2254.[6]

B. THE "GREAT WRIT" AND THE DEATH CASES

Justice Rehnquist's prediction that Coleman, along with other death row inmates, would clog the dockets of federal district courts was wholly realistic. For over three decades, state prisoners benefited from an expanded federal habeas corpus jurisdiction that made the federal trial courts effectively operate as "mini-Supreme Courts." These courts, armed with an expanding Warren Court criminal jurisprudence, aggressively scrutinized state criminal convictions. In 1953 in *Brown v. Allen*,[7] the Court virtually mandated its own lower courts to turn the Great Writ to this new mission. From the late 1950s until at least 1970, the Warren Court gave state prisoners more and more doctrinal weapons under the fourth, fifth, sixth, eighth, and fourteenth amendments, enabling the federal courts to find flaws in a wide variety of situations previously immune

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[3] *Id.* at 956-57 (Rehnquist, J., dissenting).

[4] The statutes simultaneously required Coleman to file his state habeas petition in the county where he was imprisoned— more than 150 miles from the site of his trial— and barred him from subpoenaing witnesses from more than 150 miles away. *Id.*

[5] *Id.* at 957.

[6] 28 U.S.C. § 2254 (1982) (requiring all federal courts to hear habeas corpus cases brought pursuant to the Constitution or the laws of the United States); *Coleman*, 451 U.S. at 957.

[7] 344 U.S. 443, 460-65 (1953).

to federal review because the cases were too mundane or too fact-specific to warrant the attention of the Supreme Court on direct review.

Moreover, a paradoxically simultaneous legal phenomenon ensured an increasing, and increasingly motivated and well-represented, flood of these litigants: the sequence of death penalty cases marked by *Furman v. Georgia*[8] and *Gregg v. Georgia*[9] made it possible by the late 1970s for hundreds of death row inmates to seek federal habeas relief. These litigants were both the most desperate and the best represented. Thanks to Warren Court doctrines—and, ironically, even post-*Gregg* Burger Court doctrines[10]—these litigants carried plenty of doctrinal weaponry with them when they entered the federal courts.

Hence Justice Rehnquist developed his novel strategy: to foil petitioners like Coleman from flooding the federal trial courts with federal habeas petitions, the Court should grab the cases on direct review, affirm them summarily on the merits, and thereby preclude further appeals through the federal courts. Otherwise, the specter was that "[i]f petitioner follows the path of many of his predecessors, he will now turn to a single-judge federal habeas court" and will begin the whole process anew.[11] Justice Rehnquist explained, "Given so many bites at the apple, the odds favor petitioner finding some court willing to vacate his death sentence because in its view his trial or sentence was not free from constitutional error."[12] Justice Rehnquist then stated that the confluence of these legal phenomena—expanded habeas review and expanded eighth amendment rights—had created a "stalemate in the administration of federal constitutional law."[13] Despite the supposed reinstitution of the death penalty in *Gregg*, the existence of the death penalty had become "virtually an illusion":[14] "Since 1976, hundreds of juries have sentenced hundreds of persons to death, presumably in the belief that the death penalty in those circumstances is warranted, yet

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8 408 U.S. 238 (1972) (death penalty, as then currently administered, is cruel and unusual punishment in violation of eighth amendment).

9 428 U.S. 153 (1976) (death penalty does not violate eighth and fourteenth amendments in all cases but its constitutionality may rest on new fair procedures).

10 *E.g.*, Bullington v. Missouri, 451 U.S. 430 (1981) (right to preclude double jeopardy where defendant has won a "life verdict"); Green v. Georgia, 442 U.S. 95 (1979) (per curiam) (compulsory process right to pro-defense evidence); Gardner v. Florida, 430 U.S. 349 (1977) (confrontation right to rebut state evidence).

11 Coleman v. Balkcom, 451 U.S. 949, 957 (1980) (Rehnquist, J., dissenting in denial of certiorari).

12 *Id.*

13 *Id.*

14 *Id.* at 958.

virtually nothing happens except endlessly drawn out legal proceedings . . . ."[15] Justice Rehnquist conceded that the courts want to avoid becoming a "Bloody Assizes" but argued that the result of this constitutional squeamishness was a judicial overreaction— "arcane niceties which parallel the equity court practices described in Charles Dickens's *Bleak House*."[16]

In perhaps the most telling part of what might otherwise have been an obscure essay on statutory jurisdictional rules, Justice Rehnquist argued that these issues had profound implications for the problem of violent crime in America.[17] He noted that the procedural protractions encouraged by the broad use of section 2254 frustrated the deterrent goals of the modern death penalty.[18] Moreover, harking back to the *Gregg* Court's earlier treatment of retributional goals as a basis for the death penalty, he argued that these litigation maneuvers encouraged a counter-force of vigilante violence in America as well.[19]

> San Francisco experienced vigilante justice during the Gold Rush in the middle part of the last century; the mining towns of Montana experienced it a short time later; and it is still with us as a result of the series of unsolved slayings of Negro children in Atlanta. . . . I believe we have in our judicial decisions focused so much on controlling the government that we have lost sight of the equally important objective of enabling the government to control the governed. . . . In Atlanta, we cannot protect our small children at play. In the Nation's Capital, law enforcement authorities cannot protect the lives of employees of this very Court who live four blocks from the building in which we sit and deliberate the constitutionality of capital punishment.[20]

C. THE NEW HISTORY OF THE OLD WRIT

Of course, by the time the *Coleman* case came to the Supreme Court, the Burger Court had managed to reverse much of the Warren Court jurisprudence that, in Justice Rehnquist's view, supplied

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[15] *Id.*

[16] *Id.*

[17] *Id.* at 961-62.

[18] *Id.*

[19] *Id.*

[20] *Id.* Justice Rehnquist went on to cite the salutary example of a nineteenth-century judge, Judge Isaac Parker of the old Western District of Arkansas, who had become legendary as a "hanging judge" of the Old West and who is reported as saying, " 'I never hanged a man. It is the law.' " *Id.* at 962 (quoting J. GREGORY & R. STRICTLAND, HELL ON THE BORDER 28 (1971)). The life of Judge Parker is apparently one of the Chief Justice's scholarly hobbies. In addition to the Gregory & Strictland biography, the Chief Justice has cited H. CROY, HE HANGED THEM HIGH 222 (1952), to establish that Judge Parker's treatment of Indian cases caused the Choctaw tribe to revere him. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 199 n.10 (1978).

the constitutional arguments for these death penalty litigants. The Court had begun reversing the expansive trend in the interpretation of the Bill of Rights.[21] Equally important, the Burger Court had begun reexamining the philosophical basis of the expansion of federal habeas corpus begun in *Brown*.[22] The Court had begun treating section 2254 not as the basis of a constitutional entitlement, but rather as a technical statutory device that was subject to pragmatic instrumental analysis. Its discussion of the writ shifted from the rhetoric of grandiloquent constitutional idealism to the less compelling rhetoric of crime control, bureaucratic monitoring, and pleading rules. The Court inferred that Congress did not want the writ to be used or abused beyond certain highly specific practical goals.[23]

In that regard, two crucial limitations on habeas corpus emerged in the 1970s. The first was what we might call the "substantive" approach. If one galling legacy of the Warren Court most exacerbated the problem of state prisoners drowning the federal courts with federal claims, it was the complex progeny of *Mapp v. Ohio*.[24] Fourth amendment claims became, in the Burger Court's view, the paradigm of the most suspect class of constitutional claims—those that had no legitimate bearing on the role of state trial courts in separating the guilty from the innocent.

After a halting effort in 1973,[25] three years later the Court handed down *Stone v. Powell*,[26] virtually announcing the end of all federal habeas corpus relief for fourth amendment claims.[27] Two crucial things need to be noted about *Stone*. First, though limited to fourth amendment claims, it left hints that search-and-seizure issues were merely emblematic of the larger relevant category of cases to be carved out of section 2254—those not bearing on factual guilt and innocence.[28] In short, *Stone* suggested that there might be a

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[21] *E.g.*, Kirby v. Illinois, 406 U.S. 682 (1972) (right to counsel at lineups only applies after start of formal proceedings); Harris v. New York, 401 U.S. 222 (1971) (*Miranda* right does not apply when prosecution seeks to introduce defendant's statements for impeachment).

[22] For a description of *Brown*, see *supra* text accompanying note 7.

[23] Stone v. Powell, 428 U.S. 465 (1976).

[24] 367 U.S. 643 (1961) (applying fourth amendment exclusionary rule to state courts).

[25] Schneckcloth v. Bustamonte, 412 U.S. 218, 250-75 (1973) (Powell, J., concurring).

[26] 428 U.S. at 465.

[27] *Stone* allows federal habeas petitions on fourth amendment issues only when the state courts wholly deny the defendant an "opportunity for full and fair litigation." *Id.* at 491-92 n.31.

[28] *Stone* left temptingly open the possibility that the Court would further exclude from habeas other types of claims that did not clearly bear on guilt or innocence—most notably *Miranda* claims. Of course, determining whether *Miranda* or coerced confession claims are procedural claims or claims that tend to establish innocence is not an easy

hierarchy of constitutional criminal procedure rights. Second, *Stone* was the case that introduced into modern habeas jurisprudence the new, less grandiloquent rhetoric of policy analysis in treating section 2254. Federal claims previously viewed by some as virtually deontological in their significance were reduced to instruments of deterrence of certain forms of state misconduct, instruments whose value might well be exceeded by their costs in actually destroying the deterrent effect of state criminal law.[29]

The second restriction had to do not with the invocation of the writ itself but with a particular perceived abuse of it. Numerous prisoners, having been poorly counseled at trial or having been unable to anticipate some of the constitutional innovations of the federal courts toward the end of the Warren era, would seek federal habeas relief on claims never pressed or not fully preserved at trial or on appeal in the state courts. Facing the problem of waiver when they tried to exercise their entitlements and seek habeas review under *Brown*, these prisoners were ultimately able to rely on the watershed Warren Court case of *Fay v. Noia*,[30] which relieved them of the penalty of waiver so long as there was no evidence that their failure to preserve their claim in state courts had been part of a cynical strategy of "sandbagging." Yet a decade and a half later, the Court perceived that the problem of sandbagging—deliberately "throwing the trial" in state courts in order to set up a federalism-subverting victory under section 2254—had become both so prevalent and so insidiously hard for the state to disprove that the burden of persuasion on this issue had to be shifted in the other direction.[31]

The result was *Wainwright v. Sykes*,[32] under which a state prisoner who had failed to preserve a constitutional claim in state court lost that claim altogether unless he could later meet the exquisitely obscure test of "cause and prejudice." The "cause" test essentially meant that the prisoner need show either such a level of lawyerly incompetence in failing to raise a clear claim that he was better off

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matter, and one that, contrary to indications in a Rehnquist footnote in Wainwright v. Sykes, 433 U.S. 72, 87 n.11 (1977), the Court has avoided so far. For examples of cases hearing claims on the merits even though the claims did not bear on factual innocence, see Estelle v. Smith, 451 U.S. 454 (1981), Rose v. Mitchell, 443 U.S. 545 (1979), and Crist v. Bretz, 437 U.S. 28 (1978).

29 *Stone*, 428 U.S. at 493 (no reason to assume that "any specific disincentive [for police to violate the fourth amendment] already created by the risk of exclusion . . . [in those proceedings] would be enhanced even if there were the further risk that a conviction might be overturned in collateral proceedings often occurring years after the incarceration of the defendant").

30 372 U.S. 391 (1963).

31 Wainwright v. Sykes, 433 U.S. 72 (1977).

32 433 U.S. at 72.

directly characterizing his claim as a sixth amendment ineffective assistance of counsel claim, or, paradoxically, that his new federal claim rested on such unforeseeable new constitutional innovations following his conviction that not even a wonderful defense lawyer could have anticipated them.[33] As for the "prejudice" part of the test, *Sykes* essentially linked itself back to *Stone*, reminding litigants that the new jurisprudence of harmless error would discourage claims that could not be shown to have demonstrably affected the result of the trial.[34] Later cases fleshing out this "cause-and-prejudice" test made clear that the Court had adopted a miserly view of the reasonable availability of section 2254.[35] Symbolic vindication of federal rights was not the purpose of federal habeas corpus.

D. DECIPHERING THE LAW OF DEATH

This was the situation in the law of federal habeas corpus at the time that Justice Rehnquist was expounding on the significance of the otherwise insignificant *Coleman* case. At the same time this clash was emerging between the lagged expansion of federal rights and the Burger court's jurisdictional restrictions under the statute, another massive change was occurring which, of course, can be laid on the lap of the Burger Court: the death penalty cases. In the wake of *Furman*, and even in the wake of *Gregg*, death row inmates around the country were encouraged to pursue a whole new jurisprudence's worth of federal constitutional claims that the Court had essentially created for the death penalty—both "substantive" and "procedural" eighth amendment claims. Many of those claims involved fine-tuning the new forms of statutory regulation which the *Gregg* Court essentially required. "Eighth amendment due process" became a new category of constitutional law, and the new legal phe-

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[33] Tague, *Federal Habeas Corpus and Ineffective Representation of Counsel: The Supreme Court Has Work To Do*, 31 STAN. L. REV. 1, 38-66 (1978); *see* Murray v. Carrier, 477 U.S. 478 (1986).

[34] Tague, *supra* note 33, at 27-34.

[35] In Engle v. Isaac, 456 U.S. 107 (1982), and United States v. Frady, 456 U.S. 152 (1982), the Court held that the already high costs of liberal allowance of habeas relief were exacerbated when the petitioner tried to raise a claim he had waived in the state courts and applied the *Sykes* cause-and-prejudice test even though the underlying claim bore on factual innocence. In most cases now, if the "cause" for procedural default is attributable to an error by counsel, the petitioner will be far better off pleading a violation of his sixth amendment right to effective representation. *See Murray*, 477 U.S. at 478. If the cause has to do with the unanticipated novelty of the federal claim, the later case of Reed v. Ross, 468 U.S. 1 (1984), left open some opportunity for raising a claim "so novel that its legal basis [was] not reasonably available"—except that such a novel claim might now be barred under the 1990 retroactivity cases. *See infra* text accompanying notes 111-37.

nomenon of the "penalty trial" became the medium for creating a secondary panoply of Warren-Court-derived defendants' rights.[36]

Moreover, one other new death penalty doctrine—thanks to its wonderfully paradoxical plasticity—became another great source of constitutional doctrine-making. Though *Furman* and *Gregg* had called for stringent new regulation of the death jury's discretion, in *Lockett v. Ohio*[37] the Court engaged in a controversial mid-course correction. It held that to ensure the tradition of flexible, individualized sentencing (the happier side of the lawless and capricious sentencing that it was the purpose of *Furman* and *Gregg* to prevent) the states had to continue granting sentencers considerable room to maneuver in deciding the ad hoc moral propriety of a death sentence—so long as that discretion lay on the side of the defendant. Denounced as inconsistent with the very premises of *Furman* and *Gregg*,[38] *Lockett* provided defendants with a whole new source of demands that the death penalty jury be properly encouraged, mandated, instructed, or liberated to invoke an amorphous range of moral norms in determining the propriety of death in a particular case.[39]

The result was a huge—if temporary—expansion in opportunities for death row inmates to attack the legality of their death sentences in such (relatively) friendly courts as those of the Fifth and Eleventh Circuits. And, of course, the death row inmates became the most significant users of the statutory habeas remedy. They were the most likely to receive skilled, post-conviction representation, and they had, needless to say, the greatest incentives to pursue their claims as long as possible. Most starkly, they were the ones who most clearly perceived that mere protraction of their litigation, even without great hope of ultimate success, was beneficial.

E. RESTORING THE RESTORATION OF THE DEATH PENALTY

It was frustration over these converging forces that sparked Justice Rehnquist's *Coleman* opinion. Of course, at that time, it might have appeared that no one would ever get executed in the United States. Thus, Justice Stevens, in rebutting Justice Rehnquist, was moved to point out that the delays and protracted federal habeas proceedings that bothered his colleague might be the short term result of the early litigation that accompanied any new criminal

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36 See Weisberg, *Deregulating Death*, 1983 SUP. CT. REV. 305, 338-43.

37 438 U.S. 586 (1978) (eighth amendment right to admission of all mitigating evidence proffered by defense, even if outside statutory categories).

38 *Id.* at 629 (Rehnquist, J., dissenting).

39 Weisberg, *supra* note 36, at 322-28.

scheme—the phase in which reviewing courts "got the bugs out" of the system.[40] Justice Stevens foresaw that once these bugs had gotten worked out, executions would proceed apace. Of course, not even Justice Stevens wanted to concede the premise of the Rehnquist argument—namely, that it was the very goal of the federal courts to help the state carry out their executions. Justice Stevens nevertheless took a defensive stance in arguing that the federal courts were not unduly obstructing the plan for truly restoring capital punishment in America.[41]

Ten years later, whether Justice Stevens's prediction has been borne out is a matter of point-of-view. Over a hundred executions have occurred, at a steady but very slow rate.[42] Whether enough executions have occurred to vindicate the perceived public interest in deterrence and retribution depends on what the observer believes to be the optimal proportion of executions to sentences. Some southern states have executed a handful of prisoners a year. The majority of death penalty states have executed no one.[43] Though the federal judiciary now consists of a majority of appointees of recent Republican administrations,[44] something inherent in the procedural and substantive complexity of federal law has kept the execution rate far lower than the public would seem to prefer. And perhaps the chief medium for this institutional resistance to hurrying executions has been the repetitive and prolonged use of federal habeas corpus.

The courts have played an ambiguous role in this continuing "stalemate." Though some act as barriers to execution, others have been trying to lower the barriers. Reversals in eighth amendment doctrine in both the state and federal courts have limited the range of claims death row inmates can make.[45] The pro-defendant "deregulation" wrought by *Lockett* was followed by a symmetrical deregulation in favor of the states. Moreover, the Supreme Court eventually rejected the broadest possible readings of *Lockett*, the ones that would have barred the states from telling juries that the

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40 Coleman v. Balkcom, 451 U.S. 949, 950-51 (1980) (Stevens, J., concurring in denial of certiorari).

41 *Id.* at 950-53.

42 NAACP Legal Defense and Educational Fund, Inc., Death Row, U.S.A. 5 (July 1989).

43 *Id.* at 6.

44 *Over Half of Federal Judges Now Reagan Appointees*, 134 Chicago Daily L. Bull., Oct. 24, 1988, at 1.

45 There is no better state example than the entire set of over 70 death penalty affirmances out of 100 cases in the Supreme Court of California after the 1986 electoral demise of the Rose Bird court, which had affirmed 3 out of 60 death sentences. For a discussion of federal cases, see Weisberg, *supra* note 36, at 343-58.

law virtually dictated death sentences in particular cases, regardless of the jury's normative impulses. Most significantly, in the case of *McCleskey v. Kemp*,[46] the Court eliminated the last truly major structural attack on the death penalty.

While judicial efforts to discourage multiple or protracted capital appeals continued,[47] the cause of constraining habeas petitions in death cases turned to another logical arena—Congress. After all, section 2254 is a statute, not a constitutional principle, and in its oversight of federal courts, Congress might well be moved to free them of the task of reviewing endless federal claims of prisoners who might well have received their fair share of due process in the states. Himself a harsh realist about the state of capital punishment in America,[48] recently retired Justice Powell was appointed by new Chief Justice Rehnquist to head a committee that would recommend to the courts and Congress a new structural solution to the problem. The Committee's product, an elaborate scheme for trading off a virtual bar to multiple petitions for assurances of true due process in the states, has met a surprise fate—discussed below as an epilog to this doctrinal narrative.[49]

Nevertheless, the federal habeas petitions written by death row inmates have not stopped, nor could they be expected to, in part for the simple reason that death row inmates have no incentive to stop filing them. They have all to gain and nothing to lose. Moreover, the uncertain boundaries of the surviving Warren Court decisions as well as the Burger Court death penalty decisions have enabled prisoners to identify in their own cases arguably important new points of constitutional law.

At the same time, our increasingly conservative society has des-

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[46] 481 U.S. 279 (1987) (rejecting claim that death penalty was administered in a racially discriminatory manner in violation of the eighth and fourteenth amendments).

[47] The Court soon took other (halting) steps to constrict some of the worst perceived abuses of habeas, especially the use of multiple petitions alleging new legal claims. In Kuhlmann v. Wilson, 477 U.S. 436 (1986) (plurality opinion), a plurality would have barred a second petition—based on a claim previously litigated in the state courts but on which new federal law had intervened—when the claim, involving confessions and the right to counsel, did not bear on factual innocence. And in Barefoot v. Estelle, 463 U.S. 880, 888-96 (1983), the Court held that the federal circuit courts need not feel bound to issue stays of execution pending full consideration of the claim on the merits, but rather can decide the merits summarily upon the application for a stay.

[48] In the opinion for the Court in *McCleskey*, 481 U.S. at 309, Justice Powell was candid enough to acknowledge that a major reason for denying the claim of unconstitutional discrimination based on the race of the victim was that the claim logically implicated analogous discrimination throughout the criminal justice system.

[49] For the report of the Ad Hoc Committee on Federal Habeas Corpus in Capital Cases, see 45 Crim. L. Rep. (BNA) 3239 (1989). *See infra* text accompanying notes 143-51.

perately sought explanations and scapegoats for the perennial perception that violent crime is out of control. In this light, the new Rehnquist Court has continued its assault on habeas, and a strange sequence of new cases in 1989 and 1990 has taken the most forward step in that regard.

II. *TEAGUE*: A NEW RULE ON NEW RULES

A. RETROACTIVITY RETURNS

The trigger for the new restrictions lies in a 1989 case, *Teague v. Lane*.[50] Teague, an Illinois prisoner, raised the issue of habeas in yet another guise, one that exists somewhat independently of habeas as well—the question of retroactivity.[51] Traditional restrictions on retroactivity have always been plagued by jurisprudential problems. Courts, especially federal courts imposing their constitutional views on state courts, face a perennial problem when they find in a particular case the occasion for announcing a concededly expansive view of their precedents. They are reluctant to penalize the adverse party—in this context, a state government—for failing to anticipate a dramatic change in the law, but, traditionally anxious about crossing the line between law-discovering and law-making, courts are inclined, at the very least, to apply a new rule of law in the case in which it is articulated.[52] The problem especially plagues the United States Supreme Court because of that Court's paradoxical identity. On the one hand, it must act like any other appellate court—eschewing advisory opinions, worrying over issues of mootness and ripeness, ensuring that a decision does not exceed its particular factual context. On the other hand, the combination of the discretionary certiorari process and the supremacy clause gives the Supreme Court an essentially advisory task.

The problem of retroactivity, though not limited to cases on collateral review, arises with special difficulty in that context for the obvious reason that, at any time, the number of people who might benefit from a new expansive definition of a federal right and who are currently in prison after exhausting their direct appeals exceeds those who are either still facing trial or on direct review. Given the complex permutations of retroactivity, before *Teague* the Supreme Court had never fully clarified any distinction between direct review

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50 109 S. Ct. 1060 (1989). Justice O'Connor's lead opinion in *Teague* represented a majority for some parts, but only a four-justice plurality for the key retroactivity decision.

51 *Id.* at 1065.

52 *See* Linkletter v. Walker, 381 U.S. 618 (1965).

and collateral review for purposes of retroactivity. In *Teague* the Court found the opportunity to do so.

B. SCRAMBLING FOR APPLICABLE LAW

The substantive background case to *Teague* was the 1986 case *Batson v. Kentucky*.[53] *Batson* ruled that the equal protection clause right to a jury composed of the cross section of the community prohibited the prosecution from using its peremptory challenges to strike blacks from the jury venire.[54] *Batson* thereby overruled *Swain v. Alabama*,[55] which had held that to prove a violation of the jury cross section requirement, the defendant had to prove that the prosecutor had demonstrably removed blacks from juries time after time, case after case, to the extent that he had perverted the whole scheme of criminal justice.[56]

Teague arguably had a good claim under *Batson*, but he could not benefit from *Batson* because, shortly after *Batson* was handed down, the Court had held in *Allen v. Hardy*[57] that *Batson* could not be applied retroactively to cases already—like Teague's—on collateral review. Relying on the old retroactivity standards of *Linkletter v. Walker*,[58] the case that had rejected the retroactivity of *Mapp*, the Court held that *Batson* constituted an "explicit and substantial break with prior precedent [sic]" because it overruled part of *Swain*.[59] Under the *Linkletter* standard, the Court looked to various factors such as the degree of change from the old rule and the practical effect retroactivity would have on the adverse party.[60] Of course, the *Linkletter* standard did not necessarily rely on the distinction between direct and collateral review, but in *Allen*, the Court took the not uncommon approach of holding *Batson* applicable only to cases still on direct review and rejecting its application to cases already on federal habeas.[61]

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53 476 U.S. 79 (1986).

54 *Id.* at 94-95.

55 380 U.S. 202 (1965).

56 Of course, *Batson* did not hold that a defendant is guaranteed that his particular petit jury represent a fair cross section. *See* Taylor v. Louisiana, 419 U.S. 522, 538 (1975) ("[I]n holding that petit juries must be drawn from a source fairly representative of the community we impose no requirement that petit juries actually chosen must mirror the community and reflect the various distinctive groups in the population.").

57 478 U.S. 255, 258 (1986) (per curiam).

58 381 U.S. 618 (1965).

59 *Allen*, 478 U.S. at 258.

60 *Linkletter*, 381 U.S. at 636-40.

61 Teague had a minor argument that another decision, McCray v. New York, 461 U.S. 961 (1983), which preceded the finality of his conviction, had itself sufficiently overruled *Swain* to free him of the constraints of *Swain*. Teague v. Lane, 109 S. Ct. 1060,

Teague tried to circumvent the problem of non-retroactivity by arguing that *Swain* itself supported his claim for reversal,[62] but, whatever the merits of that claim, he had apparently fatally waived it under *Sykes* and, in any event, still had an opportunity to try that claim again in the state courts.[63] Thus, in his tortuous effort to find some basis for federal relief, Teague took a rather extreme strategy. Having been denied relief under the oldest precedent, *Swain*, and also having been denied relief under the newer "precedent," *Batson*, Teague tried to make himself the medium of the newest possible doctrine of all. Shifting gears from the equal protection clause to the sixth amendment jury right, Teague, in the Court's view, now argued that the right to a jury of his peers applied to the petit jury and governed his case independently of his fourteenth amendment equal protection right.[64]

To the (uncertain) extent that this new claim was that a defendant was entitled to a petit jury that was itself constitutionally cross sectional, the Court could easily have dealt with the merits, and, most likely, it would have flatly rejected the claim. And nothing in what the Court did ultimately say would give any hope to a future claimant making that argument. But the Court did not (exactly) address the merits at all. Rather, it readdressed retroactivity by focusing squarely on the issue of how the distinction between direct and collateral review affected retroactivity.[65]

C. A NEW RULE ON NEW RULES

The Court has usually taken the approach of applying a "new rule" of criminal procedure to the case at hand, and then later, in a separate case, confronting the retroactivity issue.[66] By the Court's own concession,[67] the result has been confusion. Some new rules

1067 (1989). *McCray* was actually a cluster of opinions concurring in and dissenting from the denial of certiorari, and it merely invited a reexamination of *Swain*. The *Teague* Court rejected this argument on the ground that the denial of certiorari can have no substantive effect. *Id.*

[62] Teague's argument was that once the prosecutor proffers explanations for his peremptory challenges, *Swain* would permit an examination of those stated reasons just as it would permit scrutiny of a systemic bias in juror challenges. *Id.*

[63] *Id.* at 1068.

[64] *Id.* at 1069.

[65] *Id.* at 1071-75. The retroactivity issue was raised by an amicus in *Teague*, but not by the parties. *Id.* at 1069.

[66] *E.g.*, Linkletter v. Walker, 381 U.S. 618 (1965). *But see, e.g.*, Morrissey v. Brewer, 408 U.S. 471 (1972) (addressing retroactivity in the same case announcing the new rule).

[67] *Teague*, 109 S. Ct. at 1070-71.

have applied only to cases on direct review,[68] others only to defendants in the case at bar,[69] and others only to trials which have not even begun at the time the rule is announced.[70]

The *Teague* decision squarely reversed the Court's normal approach: when a prisoner proffers an arguably new rule of criminal procedure, the Court will first hypothesize its granting of the claim and immediately consider the consequences for retroactivity of granting it.[71] Retroactivity is now a threshold, not a secondary question, and, with tails now wagging dogs, that threshold question will determine whether the Court reaches the merits at all. The fear of expansive retroactive effect will now govern whether any judicial law-making occurs at all.

Teague unraveled itself as follows. First, the Court relied on an apparently inarguable general principle of retroactivity: even if the case proposing a new rule of constitutional criminal procedure is on collateral review, the Court would feel bound to apply the new rule to the case at hand.[72] But another principle intervened—an assumed principle of horizontal equity: if the prisoner raising the claim on federal habeas is entitled to the benefit of its granting, then so too would be all those similarly situated prisoners, those also capable of or in the act of raising it on collateral review.[73] Then a third principle, essentially derived from the now partly irrelevant *Linkletter* doctrine, was invoked. If the practical consequences and harm to the states of applying a new rule to all those prisoners who are equitably entitled to its benefit would be too great, then the only logical solution is not to grant the claim at all—at least in a habeas case.[74]

Of course, assumed in all this discussion has been the definition of a "new rule." *Teague* suggests a definition: a ruling that "breaks new ground or imposes new obligations" on the states or on the federal government.[75] Put differently, it is a new rule if it is not "dictated by precedent" existing at the time the petitioner's conviction became final.[76] The Court seems unembarrassed at invoking a distinction that law students soon learn to deconstruct—the concep-

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68 *E.g.*, Tehan v. United States *ex rel.* Shott, 382 U.S. 406 (1966).

69 *E.g.*, Stovall v. Denno, 388 U.S. 293 (1967).

70 The most glaring example has been in post-*Miranda* cases. *See Teague*, 109 S. Ct. at 1071.

71 *Id.* at 1078.

72 *Id.* at 1069.

73 *Id.* at 1069-70.

74 *Id.* at 1071-72.

75 *Id.* at 1070.

76 *Id.*

tually impossible distinction between a ruling that follows ineluctably from precedent and one which concededly expands precedent—all this in a judicial world where courts rarely acknowledge that they do any more than draw ineluctable conclusions from precedent. Under its definition, the Court claimed to have little trouble deciding that Teague's sixth amendment claim indeed would constitute a new rule.[77]

The plurality's new approach of categorically distinguishing direct from collateral review purports to solve the confusion attributed to *Linkletter*.[78] And the implicit author of this new approach is Justice Harlan, who, the Court now says, foreshadowed it in opinions never quite adopted by the Court. Himself highly dissatisfied with *Linkletter*, Justice Harlan essentially advocated the categorical distinction between direct and collateral review,[79] and the Court recently invoked, if not fully accepted, the Harlan view in *Griffith v. Kentucky*.[80] The Court in *Griffith* adopted at least one part of the Harlan idea—rejecting *Linkletter* where it might have refused retroactivity even to other cases on direct review.[81]

The relevant gist of the Harlan position was that the Court's focus should not be the abstract issue of retroactivity but rather the instrumental issue of the purpose of collateral review.[82] For Justice Harlan, federal habeas jurisdiction, however expansive *Brown* intended it to be, should revert to its most fundamental purposes: to free state prisoners who had essentially been lawlessly imprisoned, that is, who had suffered from state court decisions that had so flagrantly violated settled federal law as to constitute virtual plain error.[83] The goal of section 2254 was not to help federal law evolve—that is what the Supreme Court does on direct review—but to deter state officials and courts from shamelessly violating the Constitution.[84] And where the Supreme Court did indeed expand the constitutional rights of defendants, the counterbalancing principle of

77 Under recent retroactivity cases like Yates v. Aiken, 484 U.S. 24 (1988), Teague was unquestionably, in the Court's view, calling for a new rule himself, though Teague haplessly insisted that his claim was a mere application of Duren v. Missouri, 439 U.S. 357 (1979). *Teague*, 109 S. Ct. at 1070 n.1.

78 *Id.* at 1071-72.

79 Mackey v. United States, 401 U.S. 667, 675 (1971) (Harlan, J., concurring); Desist v. United States, 394 U.S. 244, 256 (1969) (Harlan, J., dissenting).

80 479 U.S. 314 (1987) (holding *Batson* applies retroactively to all cases on direct review not yet final when *Batson* was decided).

81 *Griffith* held that the "integrity of judicial review" and principles of equity required that all cases on direct review be treated alike. *Id.* at 323.

82 *Mackey*, 401 U.S. at 675.

83 *Id.* at 684.

84 *Id.* at 685-86.

repose barred application of the new holding to inmates who had exhausted their direct appeals.[85]

Justice Harlan, however, insisted on two exceptions to the principle of non-retroactivity of new rules to collateral cases. First, a habeas petitioner might enjoy a new rule if that rule operated to place "certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe."[86] Second, the new rule might apply if it involved those procedures so fundamental that, to quote the elusively concise formula of Justice Cardozo in *Palko v. Connecticut*,[87] they " 'are implicit in the concept of ordered liberty.' "[88] The Harlan paradox then was that a rule could only be invoked on federal habeas to upset the repose of state convictions if it was so absolutely fundamental—substantively or procedurally—as to undermine the very premise of state prosecution in the first place.

Of course, this summary of Justice Harlan's view also glides over the issue of defining the "new rule" concept. But the *Teague* Court simply assumed that Teague was invoking a new rule, since the part of the *Linkletter* doctrine that pointed to the direct overruling of precedent still obtained.[89] Thus, the *Teague* Court had only to consider whether either of the two Harlan exceptions applied. Since the first exception was unquestionably irrelevant,[90] the Court's only problem was in parsing the exquisitely paradoxical and vague language of *Palko* to determine the fundamental-ness of Teague's claim in the pantheon of purported rules of criminal procedure. In one case, Harlan had taken a somewhat indirect but clarifying approach to this second exception: the proposed rule would have to be a virtual watershed.[91] Put more bluntly, if the claimed right did not seem as essential as that of Clarence Gideon, then it was not fundamental enough.[92] If so, the oddity of the *Gideon* litmus test is that it requires the claimant to exaggerate his claim—to stretch it to something so hyperbolic that it would meet the watershed test—though such a rhetorical maneuver would thereby also probably ensure its demise on the merits. But another Harlan opinion offered a more modest, and arguably more precise, notion of a second exception—one far more consistent with the themes of Burger-Rehnquist Court

[85] *Id.* at 682-83.
[86] *Id.* at 692.
[87] 302 U.S. 319 (1937).
[88] *Mackey*, 401 U.S. at 693 (quoting *Palko*, 302 U.S. at 325).
[89] *See* Solem v. Stumes, 465 U.S. 638, 646-47 (1984).
[90] Teague v. Lane, 109 S. Ct. 1060, 1075 (1989).
[91] *Mackey*, 401 U.S. at 693-94.
[92] *See* Gideon v. Wainwright, 372 U.S. 335 (1963).

criminal procedure, from *Stone* to *Sykes*: the new rule claimant would, at the very least, have to demonstrate that the new rule would be designed to distinguish the factually innocent from the factually guilty.[93] The *Teague* plurality chose a combination of the two approaches,[94] and therefore adopted about as stringent a test as imaginable.

Either way, Teague himself was a loser. If there are any watershed cases left, there are few of them, and Teague's somewhat amorphously identified claim, tied up in hyper-subtle issues of presumptions and evidence rules, was not one of them.[95] A ruling in Teague's favor on the merits might represent a helpful advance on fair trial rights, but it would lack the grandeur of the classic criminal procedure cases that established that you cannot drag the defendant behind the jailhouse and beat a confession out of him, or refuse to allow him to see a lawyer.[96]

Of the other opinions in *Teague*, one bears special notice. Justice Stevens partly agreed and partly disagreed with the notion of deciding the retroactivity issue first.[97] He applauded the idea that, reversing *Linkletter* to some degree, the Court would now treat the retroactivity issue in the same case that would deal with the claim on the merits.[98] But for Justice Stevens, the Court had gotten things backwards: it should first rule on the merits, and then decide retroactivity, and if this raised the risk of an apparently advisory decision on the merits, it did so no more than the now-undisputed notion that the Court could decide an issue on the merits before determining whether any established error was prejudicial.[99] Perhaps more significantly, Justice Stevens competed with the Court for the proper legacy of the somewhat elusive Harlan approach—preferring a reversion to the old *Palko* test mentioned in one of the Harlan opinions.[100] But his reason was not a preference for vague rhetori-

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93 Desist v. United States, 394 U.S. 244, 262 (1969) (Harlan, J., dissenting).

94 *Teague*, 109 S. Ct. at 1076-77.

95 *See* Daniel v. Louisiana, 420 U.S. 31, 32 (1975) (fair cross-section requirement does "not rest on premise that every criminal trial or any particular trial [is] necessarily unfair because it [is] not conducted in accordance with what we determined to be the requirements of the Sixth Amendment").

96 *E.g.*, Brown v. Mississippi, 297 U.S. 278 (1936); Powell v. Alabama, 287 U.S. 45 (1932). Nevertheless, Justice Stevens's concurrence notes that a claim of racial discrimination in a death penalty case evokes the fundamental concerns about the criminal justice system that might merit extraordinary review. *Teague*, 109 S. Ct. at 1081 (Stevens, J., concurring in part and concurring in the judgment).

97 *Id.* at 1079.

98 *Id.*

99 *Id.*

100 *Id.*

cal abstractions like "ordered liberty." Rather, it was the very practical concern, almost completely ignored by the Court, that the concept of factual innocence was almost wholly inapposite to any claim governing the penalty phase of capital trial.[101] He would have therefore tolerated an "exception" based on a more intuitive sense of fundamental constitutional importance, and would have been inclined to find virtually any claim involving racial discrimination to meet that test.[102]

D. THE FIRST "OLD RULE" UNDER THE NEW "NEW RULE" RULE

Meanwhile, in the same Term *Teague* was decided, the Court had an opportunity to clarify the lingering question in *Teague*—the definition of a "new rule." The defense bar was probably deceptively heartened by the result. In *Penry v. Lynaugh*,[103] the Court faced one of the most viscerally vexing questions the death penalty had forced on it—whether the eighth amendment forbade the execution of a mentally retarded defendant. A tortured majority in this Texas case ended up ruling that the defendant's death sentence was unconstitutional, but it avoided any categorical decision on the death sentence eligibility of a retarded man.[104] Rather, returning to the twisted judicial history of the Texas death penalty statute, a majority ruled that the heart of the Texas scheme, its infamous Question No. 2, however well it generally met the demands of *Gregg* and *Lockett*, did not by its terms permit the jury to give the constitutionally requisite consideration to the defendant's retardation.[105] The Court thereby broached procedurally what it would not confront substantively, but the relevant point here is that to even reach that

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[101] *Id.* at 1081; *see* Weisberg, *supra* note 36, at 346.

[102] Justice Stevens, of course, recognized that Allen v. Hardy, 478 U.S. 255 (1986) (per curiam), was an obstacle to Teague's *Batson* claim as well as to his sixth amendment claim, but he took the view that the other basis for Teague's claim—that in *Swain* itself—merited a remand to the Illinois courts. *Teague*, 109 S. Ct. at 1083 (Stevens, J., concurring in part and concurring in the judgment).

[103] 109 S. Ct. 2934 (1989).

[104] Various combinations of justices joined in various parts of Justice O'Connor's *Penry* opinion. A majority agreed that the eighth amendment did not categorically forbid the execution of a retarded person, while Justice O'Connor stood alone in her view that the execution of Penry could not be supported on the evidence of his mental capacity presented by this particular record. *Id.* at 2940.

[105] The heart of the Texas scheme was the question asking the penalty jury "whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society." TEX. CRIM. PROC. CODE ANN. 37.071(b)(2) (Vernon 1981 & Supp. 1990). The Court had earlier approved this Texas statute on the understanding that somehow this question would permit the jury to hear all proffered mitigating evidence, Jurek v. Texas, 428 U.S. 262 (1976), as was later explicitly required by Lockett v. Ohio, 438 U.S. 586 (1978).

issue, it had to run Penry's claim past the new *Teague* test.[106] Ironically, had the claim been treated as the categorical one, it might have been viewed as readily falling into the first Harlan exception, so that its new rule status would have been no bar to relief.

In any event, the Court then had to decide whether, having ambivalently approved the Texas scheme in *Gregg*'s partner case—*Jurek v. Texas*[107]—and having tolerated it under *Lockett*, it would be creating a new rule by granting Penry's claim. Holding in the negative,[108] the majority incurred the wrath of Justice Scalia, who was moved by the Court's decision on this threshold jurisdictional question to note, "It is rare that a principle of law as significant as that in *Teague* is adopted and gutted in the same Term."[109] Justice Scalia alone confronted the conceptual finesse the Court had attempted in distinguishing "dictated" from "merely informed" new decisions:

> In a system based on precedent and stare decisis, it is the tradition to find each decision "inherent" in earlier cases (however well concealed its presence might have been), and rarely to replace a previously announced rule with a new one. If *Teague* does not apply to a claimed "inherency" as vague and debatable as that in the present case, then it applies only to habeas requests for plain overruling.[110]

Penry itself proved to be a deceptive step along the way to resolving the definitional question in *Teague*. The result in *Penry* may have obscured the potential for that lingering issue in *Teague* to become the source of the most dramatic cutback in federal habeas jurisdiction in decades. *Teague* set the stage for the new cases—*Butler* and *Parks*. Indeed, it set the stage so comprehensively that after reading the new cases one might wonder why the recent shock over their results did not occur at the time of *Teague*. The answer may be that because the substantive claim in *Teague* seemed like a new rule under any definition and because *Penry* held that the merits issue there did not involve a new rule, the elusive issue in *Teague*—the actual definition of "new rule"—did not receive the focus it deserved. It certainly did receive focus in the new cases.

III. The 1990 Cases

A. *Butler v. McKellar*

Butler, a South Carolina death row inmate, went into federal habeas on a fifth amendment claim on which he had lost on direct

106 *Penry*, 109 S. Ct. at 2944.
107 428 U.S. 262 (1976).
108 *Penry*, 109 S. Ct. at 2945.
109 *Id.* at 2965 (Scalia, J., dissenting).
110 *Id.* (Scalia, J., dissenting).

appeal.[111] Butler's claim was a variant (how much a variant is the problem) of the rule of *Edwards v. Arizona*,[112] one of the most important post-*Miranda* cases. *Edwards* simply held that after a Mirandized suspect has invoked his right to counsel, the police cannot make any further attempt to interrogate him, even if they re-Mirandize him; any further conversation must be at the initiation of the suspect.[113] The variation between Butler's claim and the *Edwards* rule is simple: Butler had first been arrested on, and had invoked his right to counsel in, an assault and battery charge, so the question was whether that invocation barred the police from later questioning him on a separate murder charge. However much of an expansion that claim would require from *Edwards*, the Supreme Court itself had decided in the defendant's favor on the identical claim in the direct review case of *Arizona v. Roberson*,[114] handed down after Butler's direct appeals had been exhausted. The question then was whether *Roberson* had extended *Edwards* into a new rule (or less probably, whether, if a new rule, it would fall into one of the two exceptions *Teague* had derived from Justice Harlan's opinions).

Butler thus forced the Court to confront the jurisprudential morass involved in distinguishing cases dictated by precedent from those merely "informed" by it. The Court referred back to the Harlan notion of the purpose of federal habeas jurisdiction, and concluded that even if, under *Roberson*, the South Carolina courts had erred, they had nevertheless acted in good faith; they had not acted lawlessly.[115] Indeed, as if to underscore its effort at thematic coherence in its overall criminal jurisprudence, the Rehnquist Court explicitly linked its decision here to the rather different issue raised in *United States v. Leon*.[116] There it had held that even where a policeman violates the fourth amendment, the violation will be excused—and the exclusionary rule will not apply—if the policeman acted in good faith on a warrant obtained from a magistrate.[117] A suspect is guaranteed protection from lawless, bad faith behavior, but a suspect is not necessarily protected from mere violations of the fourth amendment. The heart of *Leon* was the assumption that the exclusionary rule is not a deontological right, but an instrument designed to monitor police behavior, and thus is subject to cost-

[111] Butler v. McKellar, 110 S. Ct. 1212, 1215 (1990).
[112] 451 U.S. 477 (1981).
[113] *Id.* at 484-85.
[114] 486 U.S. 675 (1988).
[115] *Butler*, 110 S. Ct. at 1217-18.
[116] *Id.* at 1217 (citing United States v. Leon, 468 U.S. 897 (1984)); *see Butler*, 110 S. Ct. at 1223 n.6 (Brennan, J., dissenting).
[117] *Leon*, 468 U.S. at 926.

benefit analysis.[118] In *Butler* the Court asserted, however weak the analogy, that the same is true of section 2254 in its role in monitoring the state courts.[119]

Butler's lawyers cannot be blamed for their rather simple argument that the very language of the Court in *Roberson* would seem to belie the view that *Roberson* announced a new rule.[120] The rather typical rhetoric of the *Roberson* majority had stressed that the decision there was dictated by *Edwards*, and indeed the lawyers for Arizona implicitly conceded much of that point by casting their argument more as a request for an exception from *Edwards* than as a warning against an expansion of it.[121] One also must admire the candor of the majority in *Butler*, which said, in effect, "Don't be so literal. We always say that sort of thing."[122] After all, *Roberson* had acknowledged that the lower courts had split on the separate-crime *Miranda* issue.[123] That was enough to establish that the ruling in the defendant's favor was a new rule.[124] And the *Roberson* rule hardly qualified under either of the Harlan exceptions.[125] Indeed, the irony of Butler's claim is that, in terms of the second exception, it was quite the opposite of the model of a claim bearing on factual innocence. Rather, and one wonders if this motivated the Court, it was essentially the kind of fifth amendment claim which the Court had once hinted it would treat like fourth amendment claims—that is, as essentially unworthy of being raised at all under *Stone*.[126]

B. *SAFFLE V. PARKS*

If Butler raised one paradigmatic federal claim that had vexed the issue of federal habeas—the *Miranda* claim that had just barely escaped the fate of fourth amendment claims in *Stone*—Parks, an Oklahoma death row prisoner, raised the other paradigm in the companion habeas retroactivity case—a highly nuanced claim under *Lockett*.[127] The Oklahoma jury that sentenced him to death was in-

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118 *Id.* at 907-25.

119 *Butler*, 110 S. Ct. at 1217.

120 *Id.*

121 Arizona v. Roberson, 486 U.S. 675, 677 (1988).

122 Somewhat more euphemistically than the imaginary language in the text, Chief Justice Rehnquist said, "Courts frequently view their decisions as being 'controlled' or 'governed' by prior opinions even when aware of reasonable contrary conclusions reached by other courts." *Butler*, 110 S. Ct. at 1217.

123 *Id.*

124 *Id.* at 1218.

125 *Id.*

126 *See supra* note 28 and accompanying text.

127 Saffle v. Parks, 110 S. Ct. 1257 (1990). For a discussion of *Lockett*, see *supra* text accompanying notes 37-39.

structed that it must "avoid any influence of sympathy, sentiment, passion, prejudice, or other arbitrary factor when imposing sentence."[128] The Court had probably thought it had dispensed with this sort of *Lockett* subtlety after *California v. Brown*,[129] but it had underestimated just how subtle *Lockett* claims can get, and how persistent the defense bar is in resisting any formalism in the sentencing process that relieves the jurors of their responsibility for a visceral choice over sentence.[130]

Parks's jury was allowed to hear any mitigating evidence proffered by the defense, and it was not explicitly instructed to give less than full respect to any mitigating evidence it found evocative.[131] Parks argued, however, that the jury might construe this version of the anti-sympathy instruction as requiring it to suppress any inclinations toward mercy which might depend on mitigating evidence that did not bear on culpability for the crime.[132] If that were true, the instruction might violate *Lockett*. Or, more relevantly, whatever the merits of the claim, it would track *Lockett* so closely that a ruling in Parks's favor would not constitute a new rule under *Teague*.[133] The Court, however, characterized Parks's claim somewhat differently—sufficiently differently that it could treat it as a call for a new rule. It treated it as precisely the kind of claim it rejected the same day in another case, *Boyde v. California*,[134] and had been discouraging in other guises elsewhere: the claim that no matter how systematically and equitably the state sentencing procedure arranges for the comparative balancing of aggravating and mitigating factors, the jury

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[128] *Parks*, 110 S. Ct. at 1259.

[129] 479 U.S. 538 (1987). *Brown* rejected an eighth amendment claim to a jury instruction that had told death penalty jurors to avoid "mere sentiment, sympathy, passion, prejudice, or public feeling" in their decision. *Id.* at 542. Presumably, *Brown* did not settle Parks's claim in the state's favor because in *Brown* the Court held the instruction could not reasonably be construed as limiting consideration of all mitigating evidence, while Parks argued that his instruction could be so construed. *Parks*, 110 S. Ct. at 1263.

[130] For years after *Lockett*, defendants argued that penalty jurors were entitled to, and indeed were required to, receive explicit reminders that no matter the formula for weighing aggravating and mitigating circumstances, they could not choose death over life unless they made a normative moral decision that death was appropriate. *See* Ledewitz, *The Requirement of Death: Mandatory Language in the Pennsylvania Death Penalty Statute*, 21 DUQ. L. REV. 103 (1982). These arguments represented a considerable stretch beyond earlier Supreme Court case law rejecting any "automatic death penalty." This line of argument was essentially rejected by the Court this term in Blystone v. Pennsylvania, 110 S. Ct. 1078 (1990), and Boyde v. California, 110 S. Ct. 1190 (1990).

[131] *Parks*, 110 S. Ct. at 1259.

[132] *Parks*, 110 S. Ct. at 1263.

[133] In his dissent, Justice Brennan argued that the narrower version of Parks's claim was the accurate one, so Parks was not calling for any new rule at all. *Id.* at 1265 (Brennan, J., dissenting).

[134] 110 S. Ct. 1190, 1196 (1990).

must be told that no matter the outcome of that balancing procedure, it can or must still make the independent, subjective decision whether the defendant deserves to die.

That the Court continues to get vexed by these post-*Lockett* claims simply indicates that it is sowing what it had reaped in *Lockett* itself, in that case's awkward relation to *Furman* and *Gregg*. But while the Court was fending off one substantive version of this claim in *Boyde*, it was taking a different approach at discouraging it here: right or wrong, Parks's view of the statute constituted a new rule, and federal habeas petitioners like Parks cannot call for new rules. *Lockett* was about *admission* of mitigating evidence. Parks's claim was, contrary to his own characterization of it, about *processing* of mitigating evidence, and that was a bright enough line upon which the Court could rely.[135] Put differently, a lower court would not be acting in illogic or bad faith to hold that *Lockett* does not dictate this result. In language that reaches exquisite nuance in finessing the issue of whether a federal court would ever admit to making, as opposed to discovering, law, the Court explained that at best *Lockett* might be said to "inform, or even control, or govern" it.[136] And as for the two Harlan exceptions, Parks was left with precisely the argument that the Court could not accept because accepting it would undermine the very point of these habeas cases: the argument that any claim that could reasonably affect the outcome of the penalty trial was at least the moral equivalent of a claim of factual innocence and was, quite obviously, so crucial to the case as to demand a hearing.[137]

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135 The brightness of that line is blurred, ironically, by the one major prodefendant case handed down this term, indeed on the same day as *Parks*, *Butler*, and *Boyde*. In McKoy v. North Carolina, 110 S. Ct. 1227 (1990), the Court reversed a death sentence and invalidated a key part of a state statute because the state unconstitutionally required a unanimous finding of any mitigating circumstance before that circumstance could enter into the final weighing decision. *McKoy* is arguably about processing, not admission, and one can find language in the *McKoy* opinion that traces the holding ineluctably back to *Lockett*. However one reads the hyper-subtlety of these *Lockett* cases, the Court in *Parks* was showing remarkable confidence in claiming to distinguish new post-*Lockett* rules from mere applications.

136 *Parks*, 110 S. Ct. at 1261. The Court had a bit more difficulty explaining why Parks was asking for a new rule where Penry had not been. But the Court insisted that Penry's case was indeed about admitting, not processing evidence. *Id.* at 1261-62.

137 *Id.* at 1263-64.

The point was only confirmed by another decision handed down near the end of the last Term. In Sawyer v. Smith, 58 U.S.L.W. 4905 (U.S. June 21, 1990) (No. 89-5809), the Court held that its decision in Caldwell v. Mississippi, 472 U.S. 320 (1985), was a "new rule" under *Teague*. In *Caldwell*, the Court found an eighth amendment violation where the prosecutor had told the sentencing jury that any death verdict it handed down would be reviewed by higher courts. The Court held that such "reassurance" undermined the reliability of death sentencing by diminishing the sentencer's sense of respon-

IV. Epilog: The Future of Capital Habeas

The new cases may well enable the lower federal courts to avoid facing vexing marginal questions in constitutional criminal procedure. Whether they actually will reduce the district courts' habeas dockets is less clear. Presumably, the defense bar will soon become expert in a new rhetoric of pleading, treating death row federal claims as being "dictated by" earlier cases, denouncing the state courts for faithless disloyalty to settled precedent, and congratulating themselves on the very modesty of their claims.[138] This rhetoric will, of course, cause defendants some consistency problems because it would seem to contradict the sort of rhetoric they will need to convince the Supreme Court that their claims are of such central legal importance as to be worthy of certiorari, either on direct review before the section 2254 plea or later, after the federal habeas claim is rejected by both the district and circuit courts. Otherwise, in trying to circumvent the sinkhole of the "new rule" rule, petitioners may scurry to find previously undiscovered factual evidence bearing on innocence or mercy, so that they can avoid having their legal claims called "legal" in the first place.

Nevertheless, the district courts will not be hearing the sorts of claims to which they have become all too used. Especially in circuits covering states that have had few or no executions, the legal picture will change. Federal courts that might have felt compelled or inclined to hear fairly basic structural attacks on the statutes will be telling petitioners that their claims belong—or belonged—in the state courts or directly in the Supreme Court. To the extent that federal habeas in these states has become a kind of class-action lawsuit leading to injunctive relief against the state death penalty sys-

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sibility for its act. Petitioner Sawyer, a Lousiana inmate sought to invoke *Caldwell* in his federal habeas claim, but the Court held that *Caldwell*, though it had found "general support" in earlier eighth amendment cases, nevertheless had not been a "predictable development" that state courts should have been expected to foresee. Though the general principle of reliability in sentencing had been established at least as far back as *Lockett*, to hold that *Caldwell* was therefore not a new rule would make the test meaninglessly general. *Id.* at 4907. Moreover, as for the *Teague* exceptions, the Court flatly rejected as proving far too much, the argument that *Caldwell* qualified for an exception because it was designed to improve the accuracy of the trial decision. The Court stressed that the new rule must also meet the "watershed" test of being fundamentally necesssary to the trial. *Id.* at 4909.

[138] The two new "meta-rules" of federal habeas might be called Catch 22 and Catch 22A. Catch 22 is that a new rule is not cognizable on habeas unless it is so new as to be one of the last remaining unrecognized watersheds. Catch 22A is that a petitioner may suffer a procedural default under Wainwright v. Sykes, 433 U.S. 72 (1977), unless his "cause" for default is that he did not anticipate a new intervening constitutional ruling, in which case that ruling may be a "new rule" to which he is not entitled under the new cases.

tem,[139] the action will change venues, or collapse in failure, or both.

On the other hand, if the Court believes that the new cases will get the federal courts out of the general business of creating new rules of constitutional criminal procedure, it may merely have shifted the pressure back to itself—on direct review. Certainly, the issues abound, and though the political dynamics of the death penalty are unclear, the defense bar will now redirect its calls for constitutional innovation to the state courts. As Justice Stevens himself argued,[140] the Court has failed to address the complex relationship between the general theme of factual innocence as the criterion of cognizable claims, and the somewhat inapposite category of claims of "sentencing innocence"—that is, claims that may have affected the jurors' decision as to the propriety of the death sentence where the claims do not bear directly on the defendant's culpability for the crime. This version of "harmless error" has always been one of the conceptual knots in death penalty law.

The problem is not limited to the death penalty. The notion that there is a hierarchy of constitutional claims, with the most fundamental being those bearing on factual innocence, has always been intellectually suspect, since it would carve out of some types of federal jurisdiction claims sufficiently important that the Burger-Rehnquist Courts have felt them worthy of certiorari, even where the results have been against the defendants. Some of these rules have dealt with crucial elements of trial practice and advocacy that do not bear directly on factual innocence, but rather on the sixth amendment right to counsel which, because of the symbolic centrality of the lawyer-client relationship, seems to deserve a high place in any morally coherent hierarchy.[141] A related category consists of those claims that deal on the very borderline between the category of claims the Court has almost excluded from federal habeas altogether, yet at the same time invoke these same vital concerns about the lawyer-client relationship.[142]

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139 *E.g.*, Adamson v. Ricketts, 865 F.2d 1011 (9th Cir. 1988) (substantially invalidating Arizona statute).

140 For a discussion of Justice Stevens's opinion in *Teague*, see *supra* text accompanying notes 97-102.

141 *E.g.*, Nix v. Whiteside, 475 U.S. 157 (1986) (no violation of right to counsel when defense lawyer refuses to participate in client perjury); Morris v. Slappy, 461 U.S. 1 (1983) (no sixth amendment violation where court denied continuance to enable original public defender to rejoin defense team).

142 Moran v. Burbine, 475 U.S. 412 (1986) (no sixth amendment violation where police do not inform suspect that attorney retained by third party was trying to reach him); Estelle v. Smith, 451 U.S. 454 (1981) (fifth amendment bars state psychiatrist from testifying about penalty phase when defendant did not receive *Miranda* rights at interview);

But the possibility remains that the Court has achieved its less explicit goal: to simply block the opportunities for death row inmates to win late and successful stays of execution by filing plausible, legally novel, successive habeas petitions. The irony is that the new cases have come down simultaneously with a parallel legal development aimed at curbing the same perceived abuse.

Shortly after he was elevated, Chief Justice Rehnquist created the "Powell Committee" to devise some fair means of combating the wasteful protraction of multiple habeas petitions in death cases, and, last year, the Committee offered up a proposal to the courts and Congress.[143] The Committee's report proposed a complex compromise: it would solve the problem of multiple federal habeas petitions by essentially limiting each death row inmate to one bite at the federal apple, subject to one crucial qualification and one crucial exception. The qualification concerned legal representation. Though death row inmates are guaranteed state-paid lawyers at trial and on direct appeal, in the often overlooked phase of state collateral proceedings, they are often left to the charity of the local defense bar or private anti-death penalty organizations. The Powell proposal would tell the states that if they want to benefit from the new restriction of death row federal claims to one habeas petition, they must, in exchange, set up a system for paid and competent representation in state habeas corpus proceedings.[144] Consistently with his own opinion in *Stone*, Justice Powell tried to tell the states that if they can fulfill some minimal level of "full and fair procedure," they can save themselves a lot of trouble in federal court.[145]

Conversely, the Powell proposal would require the defendant to file his federal habeas petition within six months of a certain fixed deadline, and would limit the defendant to one federal petition, subject to a key exception.[146] In extraordinary circumstances—the defendant discovers a new claim not yet presented in any court because it is based on a new constitutional principle declared retroactive to claimants on collateral review or because it is based on newly discovered and not previously available evidence, *and* it bears on factual innocence—the federal court might just barely consider granting him a second hearing.[147]

Ross v. Moffitt, 417 U.S. 600 (1974) (no *Gideon* right to counsel on discretionary appeals).

[143] Ad Hoc Committee on Federal Habeas Corpus in Capital Cases, Report on Habeas Corpus in Capital Cases, 45 Crim. L. Rep. (BNA) 3239 (1989).

[144] *Id.* at 3241-42.

[145] *Id.*

[146] *Id.* at 3244-45.

[147] *Id.* at 3245.

The current fate of the Powell proposal tells us something about judicial sensitivity to the Rehnquist effort to restrict the habeas process. It may also tell us something about the complexity of the political dynamics of crime and law in America. The public wants executions, and it elects legislators and indirectly chooses judges who are increasingly likely to satisfy it. Yet something in the institutional culture of the courts and of the congressional judiciary committees resists what is perceived to be a wholesale revision of the inherent screening and filtering mechanics of the system. A few months after the report was formally issued, Chief Justice Rehnquist was rebuffed not only by the legislators for whom the report was intended, but also by the Judicial Conference of the United States itself, whose panel of circuit chief judges amended or tried to amend the proposal to gut some of its key recommendations.[148] The Conference insisted on putting some substance behind what it otherwise considered the empty promise of "competent" representation demanded of the state systems; it would require the states to provide competent lawyers at every state court phase—from the very first trial onward.[149] Moreover, the amended proposal would essentially adopt Justice Stevens' view that a challenge to the propriety of the death sentence was indeed the moral and legal equivalent of a claim of factual innocence.[150] One of the proposed amendments, which failed on a tie vote only by virtue of the Chief Justice's own vote, would, ironically, have overturned *Butler* and *Parks*.[151]

The new stalemate means that we may now have the worst of all worlds: death row inmates can still pursue multiple habeas petitions, but the petitions will likely leave state proceedings untouched. The Great Writ will continue to manifest itself in reams of pleading paper, but it will probably cease to be the instrument of constitutional idealism, nor will the rationalization of some of its liberal apologists—its role in "dialectical federalism"[152]—have any further force. The constriction on federal habeas may give the country the rate of executions it wants—or thinks it wants. If that happens, the

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[148] *Judges Reject Bar To Appeals Filed From Death Row*, N.Y. Times, Mar. 15, 1990, at A1, A13.

[149] *Id.*

[150] *Id.*

[151] *Id.* The resistance to the Chief Justice's proposal may derive from a generational and political conflict. The Chief Judges of the circuit courts are senior jurists, and a disproportionate number of them—as compared to the federal bench generally—are pre-Reagan or Democratic appointees.

[152] Cover & Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 YALE L.J. 1035 (1977) (arguing that section 2254 ensured a "conversation" between the state and federal courts on constitutional values).

result may be some social perception that the courts are implementing—or at least are no longer obstructing—the populist desire for combating violent crime in America. In any event, the federal courts, to the extent that they truly feel swamped by a death docket that they perceive to be tangential to their true judicial mission, may find some relief. If, as is possible, none of these results follow, we will have learned some lessons about the illusion of social engineering through doctrinal manipulation.