

Failed Enterprise: The Supreme Court's Habeas Reform

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Nearly two decades ago, the Supreme Court began an effort to reform habeas corpus. Despite academic criticism, congressional displeasure, and internal disagreement, the Court's effort to limit the availability of habeas relief is still ongoing. Much has been written about whether the Court is pursuing the correct goals in its reform effort. This Article accepts the Court's own goals—fairness, finality, federalism, and judicial economy—as a given. Rather than evaluating the Supreme Court's habeas reform by an independent normative standard, Professor Friedman examines whether the reform effort advances the very goals it is designed to further. The author suggests that habeas reforms have not resulted in greater finality. Instead, the reforms have generated unwarranted doctrinal complexity, directed judicial inquiry from the merits to procedural issues, produced uncertainty, and increased litigation—all to the detriment of finality. In addition, the interests of federalism and comity have been hindered, not helped. Reform efforts have increased the intrusiveness of federal review and created additional work for state courts. As far as the goal of judicial economy, federal courts must now consider a host of new procedural issues of little precedential or substantive value. Thus, the Court's habeas reform has not only increased the workload of state courts, but that of federal courts as well. Finally, all of the reforms have come at the cost of fairness—the very value the writ was designed to serve. In short, fairness is sacrificed without any of the Court's goals actually being advanced. Given

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this state of affairs, the author concludes that the reform effort has been a failure.

INTRODUCTION

Almost two decades ago the Supreme Court set out to reform habeas corpus. Flying banners of federalism and finality, the Court signaled its intention to impose strict limitations upon the availability of the writ. Early salvos such as *Stone v. Powell*¹ and *Wainwright v. Sykes*² contained the framework for the broad assault on habeas corpus that was to follow.

Some two decades later the effort continues. And continues. And continues. Almost every Term of the Supreme Court provides an onslaught of new decisions,³ adding further twists and turns to the law of habeas corpus. Shortly after the outset of the Court's reform venture, commentators found the doctrine Byzantine and unfathomable.⁴ Those days are now but a fond memory.⁵

Each Term's new decisions yield what is by academic terms a flood of new commentary, much of it uncomplimentary of the Court's efforts.⁶

1. 428 U.S. 465 (1976).

2. 433 U.S. 72 (1977).

3. The 1992 Term included six decisions involving important habeas issues. See *Gilmore v. Taylor*, 113 S. Ct. 2112 (1993); *Withrow v. Williams*, 113 S. Ct. 1745 (1993); *Brecht v. Abrahamson*, 113 S. Ct. 1710 (1993); *Graham v. Collins*, 113 S. Ct. 892 (1993); *Herrera v. Collins*, 113 S. Ct. 853 (1993); *Lockhart v. Fretwell*, 113 S. Ct. 838 (1993). Four important habeas cases were decided in the 1991 Term. See *Sawyer v. Whitley*, 112 S. Ct. 2514 (1992); *Wright v. West*, 112 S. Ct. 2482 (1992); *Keeney v. Tamayo-Reyes*, 112 S. Ct. 1715 (1992); *Stringer v. Black*, 112 S. Ct. 1130 (1992). There were also three such decisions during the 1990 Term. See *Ylst v. Nunnemaker*, 501 U.S. 797 (1991); *Coleman v. Thompson*, 501 U.S. 722 (1991); *McCleskey v. Zant*, 499 U.S. 467 (1991). Similarly, three cases concerning habeas issues were decided during the 1989 Term. See *Sawyer v. Smith*, 497 U.S. 227 (1990); *Saffie v. Parks*, 494 U.S. 484 (1990); *Butler v. McKellar*, 494 U.S. 407 (1990). The Court handed down five habeas decisions during the 1988 Term. See *Penry v. Lynaugh*, 492 U.S. 302 (1989); *Maleng v. Cook*, 490 U.S. 488 (1989); *Castille v. Peoples*, 489 U.S. 346 (1989); *Teague v. Lane*, 489 U.S. 288 (1989); *Harris v. Reed*, 489 U.S. 255 (1989).

4. See, e.g., Barry Friedman, *A Tale of Two Habeas*, 73 MINN. L. REV. 247, 253 (1988) [hereinafter Friedman, *Two Habeas*] ("[T]he rules governing access to habeas review have become hopelessly confusing and confused."); Larry W. Yackle, Book Review, 36 RUTGERS L. REV. 375, 394 (1983) (reviewing IRA P. ROBBINS, *THE LAW AND PROCESSES OF POST-CONVICTION REMEDIES* (1982)) ("[A]nyone who reads the advance sheets knows that the greater proportion of judicial time in habeas cases is spent wrestling with threshold procedural matters of extraordinary complexity."); see also Judith Resnik, *Tiers*, 57 S. CAL. L. REV. 837, 961 (1984) (questioning whether procedural obstacles to habeas corpus can "be justified as economical").

5. Judge Lay has painted a persuasive picture of a complex habeas corpus doctrine that does little to attain purported goals. Donald P. Lay, *The Writ of Habeas Corpus: A Complex Procedure for a Simple Process*, 77 MINN. L. REV. 1015 (1993).

6. My prior work in the area provides a fairly comprehensive bibliography of the habeas literature. See Friedman, *Two Habeas*, *supra* note 4, at 248 n.2; Barry Friedman, *Habeas and Hubris*, 45 VAND. L. REV. 797, 799 n.13 (1992); Barry Friedman, *Pas de Deux: The Supreme Court and the Habeas Courts*, 66 S. CAL. L. REV. 2467, 2467 n.1 (1993) [hereinafter Friedman, *Pas de Deux*]. Since that time there have been a number of good new entries into the field. See John H. Blume & Stephen P. Garvey, *Harmless Error in Federal Habeas Corpus after Brecht v. Abrahamson*, 35 WM. & MARY L. REV. 163 (1993); Markus D. Dubber, *Prudence and Substance: How the Supreme Court's New Habeas Retroactivity Doctrine Mirrors and Affects Substantive Constitutional Law*, 30 AM. CRIM. L. REV. 1

Most of the negative press, however, might well be attributed to a conflict between each scholar's own vision of the proper role of habeas corpus, and the Supreme Court's quite different vision. Once habeas reform began, numerous commentators offered their own vision of where it should end.⁷ This sort of critical commentary is commendable, for normative scholarship plays an important role. Nonetheless, there may be some unfairness to the Supreme Court in all the strident criticism: Perhaps the critics simply do not agree with what is nonetheless a coherent, workable normative vision of habeas corpus being offered by the Supreme Court.

Rather than measuring the habeas jurisprudence against an independent normative perspective, this Article assesses the Supreme Court's habeas reform effort by its own terms. Instead of criticizing the Court for failing to achieve a normative vision it may not at all share, this article assesses whether the Supreme Court has furthered its own agenda in a coherent fashion. In other words, have the concerns that motivated habeas reform been addressed?

This evaluation is an important one. After all, as suggested, the vast majority of commentary in recent years has been critical. Moreover, Congress repeatedly has expressed discontent by threatening to step into the fray.⁸ Even on the Supreme Court itself criticism is strident, decisions often coming by narrow majorities.⁹ If the Supreme Court is getting where it wishes to go, the Court's steadfast efforts in the face of persistent criticism might be understandable. If, on the other hand, the Court's reform effort is not succeeding even by the Court's own terms, perhaps it has come time to reconsider the entire venture.

(1992); Charles Fried, *Impudence*, 1992 SUP. CT. REV. 155; Lay, *supra* note 5; Evan T. Lee, *The Theories of Federal Habeas Corpus*, 72 WASH. U. L.Q. 151 (1994); David McCord, *Visions of Habeas*, 1994 B.Y.U. L. REV. 735; Linda Meyer, "Nothing We Say Matters": Teague and New Rules, 61 U. CHI. L. REV. 423 (1994); Jordan Steiker, *Innocence and Federal Habeas*, 41 UCLA L. REV. 303 (1993); Daniel P. Yeager, *Categorical and Individualized Rights-Ordering on Federal Habeas Corpus*, 51 WASH. & LEE L. REV. 669 (1994). Of particular note is an excellent article by Professors Hoffmann and Stuntz: Joseph L. Hoffmann & William J. Stuntz, *Habeas After the Revolution*, 1993 SUP. CT. REV. 65 (arguing that habeas should be seen as part of the criminal justice system, not as an aspect of federal jurisdiction designed to afford a federal forum for federal claims). Thus, Hoffmann and Stuntz argue that habeas doctrine should reflect goals of the criminal justice system: reliable judgments and deterrence of unconstitutional police conduct. *Id.* at 91-104.

7. For examples of habeas literature advancing a strongly normative view of how habeas should work, see Friedman, *Two Habeas*, *supra* note 4; Hoffman & Stuntz, *supra* note 6; Lay *supra* note 5; James S. Liebman, *Apocalypse Next Time?: The Anachronistic Attack on Habeas Corpus/Direct Review Parity*, 92 COLUM. L. REV. 1997 (1992); Larry W. Yackle, *The Habeas Hagioscope*, 66 S. CAL. L. REV. 2331 (1993).

8. For example, in 1993 Senator Biden introduced a comprehensive crime control bill which included a variety of habeas reforms. See S. 1607, 103d Cong., 1st Sess. §§ 301-311 (1993); see also Vivian Berger, *Justice Delayed or Justice Denied?—A Comment on Recent Proposals to Reform Death Penalty Habeas Corpus*, 90 COLUM. L. REV. 1665 (1990); Yackle, *supra* note 7, at 2416-23 (explaining various congressional bills which have attempted to reform the habeas statute).

9. See, e.g., *Brecht v. Abrahamson*, 113 S. Ct. 1710 (1993) (5-4 decision); *Graham v. Collins*, 113 S. Ct. 892 (1993) (5-4 decision); *Herrera v. Collins*, 113 S. Ct. 853 (1993) (6-3 decision); *McCleskey v. Zant*, 499 U.S. 467 (1991) (6-3 decision).

The premise here is that the Supreme Court's reform agenda is a failure. The methodology of this Article is straightforward. Instead of measuring the Supreme Court's habeas handiwork against an independent normative yardstick, the metric employed here is the Court's own. The question is whether the Court's reform efforts have succeeded by its own terms.

I

THE REFORM METRIC

Given that the goal here is to measure the habeas reform effort by the Supreme Court's own terms, those terms must be set. The task is not a difficult one. The primary factors relevant in deciding habeas cases are few and familiar, and there is not likely to be much disagreement about them. Disagreement is encountered in the relevant importance of the factors, both generally, and in individual cases. But here too it is possible to roughly rank the Court's recent priorities, in order to assess the extent to which the reform decisions achieve the goals the Court itself has established.¹⁰ First I identify the factors, then I rank them.

Leading the list, at least logically, is the notion of "fairness." I say logically, because fairness refers to the very purpose(s) of having a writ of habeas corpus. Different Justices and decisions identify the purposes of habeas corpus in varying terms,¹¹ and it is probably not possible to identify one purpose in the decisions that explains all habeas cases.¹² But, at bottom, habeas clearly has something to do with matters such as vindicating constitutional rights, deterring the violation of those rights in future cases, and perhaps ensuring that punishment is only afforded to those deserving of it.¹³ The critical point is that however the purpose is defined, it is a writ that works in favor of the incarcerated criminal defendant. Absent some concern about the fairness of the incarceration, there need be no debate about habeas corpus. All the other factors analyzed below cut against the

10. See Emanuel Margolis, *Habeas Corpus: The No-Longer Great Writ*, 98 DICK. L. REV. 557 (1994) (discussing factors that animate the Supreme Court's recent decisions; identifying finality, federalism, and scarcity of resources as rationales provided by the Court).

11. See, e.g., *Desist v. United States*, 394 U.S. 244, 262-63 (1969) (Harlan, J., dissenting) (describing the "deterrence function" of habeas by noting that "the threat of habeas serves as a necessary additional incentive for trial and appellate courts throughout the land to conduct their proceedings in a manner consistent with established constitutional standards"); *Fay v. Noia*, 372 U.S. 391, 402 (1963) ("Vindication of due process is precisely its historic office."), *overruled in part*, *Wainwright v. Sykes*, 433 U.S. 72 (1977); see also *Teague v. Lane*, 489 U.S. 288, 312-33 (1989) (adopting Justice Harlan's view that "one of the two principal functions of habeas corpus" is to "'assure that no man has been incarcerated under a procedure which creates an impermissibly large risk that the innocent will be convicted' ") (quoting *Desist*, 394 U.S. at 262).

12. See Friedman, *Two Habeas*, *supra* note 4, at 267-72 (discussing why popular theories of habeas corpus are problematic in explaining habeas cases).

13. See *infra* note 391.

award of the writ. Thus, it is logical to begin with fairness, for this alone is the reason for having the writ at all.

Balanced against fairness are a number of factors that mitigate against liberal application of the writ. One of these plays a fairly minor role, and is often ignored by the Court. But its recurrence is common enough that it requires mention. That is the concern about the conservation of federal judicial resources.¹⁴ Habeas by its nature requires the use of federal court time. The Court is wary of using those resources repeatedly in the cause of the same petitioner, and is concerned about the fact that habeas petitions pull the federal courts away from other pressing business.¹⁵

Far more significant to the Court in assessing the proper use of the writ are the twin concerns of federalism and finality.¹⁶ Federalism refers to the coordinate role of the states in both adjudicating guilt and innocence, and in addressing claims of constitutional violation.¹⁷ A part of federalism, often referred to under the same umbrella, is the notion of comity: that federal courts should respect the determinations of state courts regarding the adjudication of constitutional claims.¹⁸ Finality, on the other hand, is the principle that the criminal process must have some end. The Court's view is that the determination of guilt is not fully vindicated until the judgment is final in the sense that all review has come to an end.¹⁹ Finality plays an obviously important part in death penalty cases, for enforcement of the sentence is often delayed while habeas review proceeds.²⁰

It rather quickly becomes apparent that, identify discrete factors as one may, the factors themselves resist being cabined so neatly. Logical questions flow rather easily to mind, and the factors soon start to spill over their boundaries. When a conviction is overturned, is that an injury to finality or to federalism? When the habeas courts hear successive petitions, is that an injury to finality or a drain on judicial resources?

14. See *McCleskey v. Zant*, 499 U.S. 467, 491 (1991) ("Federal collateral litigation places a heavy burden on scarce federal judicial resources, and threatens the capacity of the system to resolve primary disputes."); *Schneekloth v. Bustamonte*, 412 U.S. 218, 260 (1973) (Powell, J., concurring).

15. See generally Margolis, *supra* note 10, at 593-99.

16. See Yale L. Rosenberg, *Kaddish for Federal Habeas Corpus*, 59 GEO. WASH. L. REV. 362, 363 (1991) (stating that the Supreme Court has "quietly eviscerated, if not interred, federal habeas corpus based on a glorification of its own twin deities, finality and federalism") (footnotes omitted).

17. See *Murray v. Carrier*, 477 U.S. 478, 487 (1986) (identifying as one cost of habeas "both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights") (quoting *Engle v. Isaac*, 456 U.S. 107, 129 (1982)); accord *McCleskey*, 499 U.S. at 491.

18. See *Stone v. Powell*, 428 U.S. 465, 493-94 & n.35 (1976) ("[W]e are unwilling to assume that there now exists a general lack of appropriate sensitivity to constitutional rights in the trial and appellate courts of the several States. State courts, like federal courts, have a constitutional obligation to safeguard personal liberties and uphold federal law.").

19. *McCleskey*, 499 U.S. at 491 ("Neither innocence nor just punishment can be vindicated until the final judgment is known."); *Teague v. Lane*, 489 U.S. 288, 309 (1989) ("Without finality, the criminal law is deprived of much of its deterrent effect.")

20. *Barefoot v. Estelle*, 463 U.S. 880, 887-88 (1983) (discussing how habeas delays executions).

While establishing clear boundaries is analytically messy, that difficulty poses no problem for present purposes. The reasons are twofold. First, the factors are the Court's own, and the Court has not sought to tidy up its analytic disarray. Taking the Court on its own terms, we may only struggle with the categories we are given. But second, it turns out to not matter, because seepage only occurs around irrelevant boundaries. Understanding this point requires that we look for a moment at the all-important question of how the Court ranks the factors.

It turns out—and will turn out again and again throughout this Article—that the Court's "reform" is primarily about subordinating a concern for fairness to the twin deities of federalism and finality. Where habeas once was about what one would think it would be about, exercising extraordinary judicial power to ensure the fairness of convictions, the entire exercise has become an almost unseemly rush to deny the importance of fairness when it stacks up against federalism and finality.

The move to subordinate fairness in the name of federalism and finality is evident in many of the strains of habeas process, but perhaps the best example involves the issue of procedural default. In *Fay v. Noia*²¹ the Supreme Court took up the question of what should occur when the claim raised in habeas had not been litigated in state court and thus was defaulted in those courts. In a ringing paean to the fairness aspects of habeas, the *Fay* Court resolved the problem by recognizing that although as a matter of comity a federal court might in certain instances refuse to hear a claim that was deliberately bypassed in state court, as a matter of power the habeas court could hear the claim.²² "For [the habeas writs'] function has been to provide a prompt and efficacious remedy for whatever society deems to be intolerable restraints. Its root principle is that in a civilized society, government must always be accountable to the judiciary for a man's imprisonment"²³

Within fifteen years the tone had changed notably. Citing concerns of finality and federalism, in *Wainwright v. Sykes*²⁴ the Court rejected the *Fay* rule, at least in the context of a contemporaneous objection rule at trial.²⁵ Years later, *Fay* was rejected altogether: "*Fay* was based on a conception of federal/state relations that undervalued the importance of state procedural rules We now recognize 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 them."²⁶

21. 372 U.S. 391 (1963).

22. *Id.* at 433-34.

23. *Id.* at 401-02.

24. 433 U.S. 72 (1977).

25. *Id.* at 87-89.

26. *Coleman v. Thompson*, 501 U.S. 722, 750 (1991).

It is clear that times have changed. Finality, federalism, and to a lesser extent the preservation of judicial resources, all have come to top fairness as the mainstay of habeas. It now has become familiar to catalogue the *costs* of habeas. While the fairness purpose of habeas gets mention, inevitably it is either in a reluctant concession at the end of the discussion of habeas' costs²⁷ or in a quick acknowledgment before moving on to discuss the costs.²⁸ It perhaps was subconscious, but nonetheless significant, that Justice O'Connor, in her separate opinion in *Withrow v. Williams*, referred to the "principles that inform our habeas jurisprudence" and then put them in this order: "finality, federalism, [and] fairness."²⁹ Finality and federalism were discussed at length, while fairness received barely a mention.³⁰

As I recognize above, logic may lead one to quibble whether these can really be the Court's priorities. After all, what is the point of even having the writ, if not to achieve fairness, however defined? But that question, while logical, ignores the agenda, which is the dismantling of habeas. And while the remainder of this Article goes on to show what a poor job the Court has done of pursuing its stated "principles," any doubt about the ordering of those priorities can be simply resolved: however bad a job the Court is doing with its own "reform," one could not seriously argue the recent decisions are aimed at enhancing fairness, however defined.

Which brings us back to the question of seepage among the factors. Seepage indeed there is. When the Court addresses the question of whether claims of innocence standing alone should be heard by a habeas court, one might reasonably ask if this is a concern for federalism, or for finality, or for judicial resources. But there is no need, at the same time, to worry that a refusal to hear such a claim seeps into fairness, for the factors are juxtaposed. Courts hear habeas cases, even though precious judicial resources are utilized, because fairness might require *granting* the writ. But granting the writ—at least in the Court's terms—interferes with federalism and finality. So, cases pose one set of questions or the other: preserve resources, obtain finality, and foster federalism, *or* grant the writ and ensure fairness. Across this line there is little seepage. And there is little doubt on which side of the line the reform efforts sit.

Taking the Supreme Court at its word, this Article evaluates whether the habeas decisions—particularly those of the 1992 Term—are getting the Court where it says it wants to go. This Part has established the standard against which the reform effort will be measured. Finality and federalism,

27. See *McCleskey v. Zant*, 499 U.S. 467, 491, 493 (1991) (acknowledging habeas' purpose after discussing costs of habeas review at length).

28. *Coleman*, 501 U.S. at 747-48 ("Recognizing that the writ of habeas corpus 'is a bulwark against convictions that violate fundamental fairness,' we also acknowledged that 'the Great Writ entails significant costs.'") (quoting *Engle v. Isaac*, 456 U.S. 107, 126 (1982)).

29. *Withrow v. Williams*, 113 S. Ct. 1745, 1756 (1993) (O'Connor, J., concurring in part and dissenting in part).

30. See *id.* at 1756-58.

preservation of judicial resources, and fairness—in that order—are the priorities the Court has set for itself. Part II discusses the 1992 Term's most significant habeas decisions, contrasting those decisions with the Court's stated reform goals. What the 1992 Term shows most clearly is that the Court has gotten itself into a pickle. It is inevitable in doctrinal reform that there is some uncertainty for awhile, until the new rules get sorted out. But twenty years of reform is a long time. Part III then measures the Court's reform jurisprudence as a whole against reform's goals, and finds the venture a failure. The progress of reform demonstrates that the reform effort increasingly is more jury-rigged than well-considered. Innovation is spawning innovation, but every innovation seems to spawn more work for courts and less clarity in the law. Perhaps most important, every step taken toward finality, every paeon paid to federalism, in practice promotes the opposite reaction. In light of reform's failure, even by its own terms, reconsideration seems both appropriate and unavoidable.

II

THE OCTOBER 1992 TERM

During the 1992 Term the Supreme Court handed down decisions in at least four areas that have played a significant role in the habeas reform effort. As is true of the several Terms before, the 1992 Term cases directed at reform have sown as much confusion as coherence, and have, to a substantial extent, run at odds with what it is the Court purports to want to accomplish. This Part reviews the decisions of the October 1992 Term.

A. *Brecht: Not Harmless, After All These Years*

*Brecht v. Abrahamson*³¹ tells a tragic story. This is true of the facts of the case, certainly. But it is equally true of the law.

Brecht was released from a Georgia prison where he was serving time for felony theft when his sister and her husband, a district attorney, paid restitution for Brecht's crimes and took Brecht into their care.³² Brecht's brother-in-law, Roger Hartman, was not particularly keen on the idea, unhappy with Brecht's criminal record, heavy drinking and homosexual tendencies.³³ While perhaps in part for the wrong reasons, Hartman's concerns proved, to his detriment, to be apt.

Brecht was forbidden from drinking while in the Hartman household.³⁴ Nonetheless, one day while the Hartmans were away, Brecht broke into the liquor cabinet and started drinking, then headed to the back yard for some target practice with the Hartman rifle. When Roger Hartman came home

31. 113 S. Ct. 1710 (1993). For an in-depth discussion of *Brecht*, see Blume & Garvey, *supra* note 6.

32. 113 S. Ct. at 1714.

33. *Id.*

34. *Id.*

and discovered this, Brecht shot Hartman in the back. After managing to alert the police, Hartman died from his wound, while Brecht made his getaway in his sister Molly Hartman's car.³⁵

During his flight Brecht had several encounters with the police, and at no time did he volunteer to them any information or explanation about the shooting.³⁶ At trial, however, after hearing the prosecution's case, Brecht had an explanation. He said the entire shooting was an accident, that the gun went off when he was running with it, and that Hartman then disappeared after the shooting, so Brecht drove off in Ms. Hartman's car to look for him, but that upon finding Hartman at a neighbor's, Brecht panicked and fled.³⁷

At trial the State made use of the fact that Brecht had been in contact with the police and yet had not offered his explanation of what happened until trial.³⁸ After his conviction Brecht repeatedly sought reversal on the ground that the prosecutor's arguments made impermissible use of his post-*Miranda* silence.³⁹ That is known as a *Doyle* violation.⁴⁰ *Doyle* stands for the proposition that after a suspect has been *Mirandized*, it violates due process to point out to the jury that the defendant was silent and did not, for example, tell to the police the story now being told to the jury.⁴¹

Because *Brecht* involved what seemed to be a clear *Doyle* error, one would have thought that the issue in Brecht's habeas case was whether the error was harmless beyond a reasonable doubt.⁴² In *Chapman v. California*,⁴³ the Supreme Court had set out the rule that convictions in which there was constitutional error must be set aside unless the prosecution could prove that the error that occurred was harmless beyond a reasonable doubt.⁴⁴ Brecht's case went through the usual number of courts before

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.* at 1714-15.

39. *Id.* at 1715-16.

40. See *Doyle v. Ohio*, 426 U.S. 610 (1976).

41. *Id.* at 619. Although *Doyle* makes some sense, subsequent cases limiting it do not. The *Doyle* rule "rests on 'the fundamental unfairness of implicitly assuring a suspect that his silence will not be used against him and then using his silence to impeach an explanation subsequently offered at trial.'" *Brecht*, 113 S. Ct. at 1716 (quoting *Wainwright v. Greenfield*, 474 U.S. 284, 291 (1986) (quoting *South Dakota v. Neville*, 459 U.S. 553, 565 (1983))). In *Jenkins v. Anderson*, 447 U.S. 231 (1980), the Court refused to extend *Doyle* to pre-*Miranda* silence. *Id.* at 239-40. But the right to remain silent exists prior to the giving of *Miranda* warnings. Moreover, some—perhaps many—suspects know of their right to remain silent even before they are given *Miranda* warnings. Thus, it is unclear why defendants can be penalized for pre-*Miranda* silence, but not post-*Miranda* silence.

42. See *Brecht*, 113 S. Ct. at 1717 ("[W]e think *Doyle* error fits squarely into the category of constitutional violations which we have characterized as 'trial error.' . . . Since our landmark decision in *Chapman v. California*, 386 U.S. 18 (1967), we have applied the harmless-beyond-a-reasonable-doubt standard in reviewing claims of constitutional error of the trial type.") (parallel citations omitted).

43. 386 U.S. 18 (1967).

44. *Id.* at 22, 24. Of course, "there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error . . ." *Id.* at 23. Examples include the rights to counsel

getting to the Supreme Court on habeas review, and with the exception of the trial court none doubted that there was constitutional error in Brecht's trial.⁴⁵ It was on the very question of whether the *Doyle* error was harmless under *Chapman* that many of the courts had disagreed in Brecht's case.⁴⁶

The Supreme Court, however, granted review in Brecht's case for quite a different reason. It turns out that *Brecht* presented the question whether *Chapman* applied *at all* to collateral review of *Doyle* errors: "[i]n this case we must decide whether the *Chapman* harmless-error standard applies in determining whether the prosecution's use for impeachment purposes of petitioner's post-*Miranda* silence . . . entitles petitioner to habeas corpus relief."⁴⁷ The word "must" in the sentence above, while perhaps accurate nonetheless, is at least a little odd. As the Court itself observed, *Chapman* was decided in 1967, one quarter of a century earlier. *Chapman* had previously been applied to *Doyle* errors, on habeas and otherwise.⁴⁸ But despite the historical soundness of *Chapman*, the Seventh Circuit had held in *Brecht* that *Chapman* was not the appropriate standard, so the Supreme Court was confronted with the question.⁴⁹

Indeed, the Court characterized the issue even more broadly. The issue was not only whether *Chapman* harmless error review applied to *Doyle* errors, but whether *Chapman* applied to *any* errors of the "trial type" on habeas review.⁵⁰ That this was the issue was more than a little odd. As the Court itself observed, in a number of cases spanning over two decades,

and an impartial judge. *Id.* at 23 n.8. For most constitutional trial errors, however, *Chapman*'s harmless error analysis is applied.

45. *State v. Brecht*, 421 N.W.2d 96, 104 (Wis. 1988); *Brecht v. Abrahamson*, 759 F. Supp. 500, 507 (W.D. Wis. 1991); *Brecht v. Abrahamson*, 944 F.2d 1363, 1368 (7th Cir. 1991).

46. *Brecht*, 113 S. Ct. at 1715-16.

47. *Id.* at 1713-14.

48. For examples of habeas decisions analyzing *Doyle* errors under *Chapman*'s "harmless beyond a reasonable doubt" standard, see *Vanda v. Lane*, 962 F.2d 583, 585 (7th Cir.), *cert. denied*, 113 S. Ct. 254 (1992); *Leecan v. Lopes*, 893 F.2d 1434, 1442 (2d Cir.), *cert. denied*, 496 U.S. 929 (1990); *Tuggle v. Seabold*, 806 F.2d 87, 93-94 (6th Cir. 1986). For cases applying *Chapman* harmless-error analysis to *Doyle* violations on direct review, see, e.g., *United States v. Laury*, 985 F.2d 1293, 1304 (5th Cir. 1993); *United States v. Foster*, 985 F.2d 466, 468-69 (9th Cir. 1993), *as amended*, 17 F.3d 1256 (1994); *United States v. Newman*, 943 F.2d 1155, 1157-58 (9th Cir. 1991). Over time there had been some agitation to address squarely the question of whether *Chapman* applied to *Doyle* errors. For example, the Seventh Circuit's *Brecht* opinion, written by Judge Easterbrook, held that the proper standard for collateral review of *Doyle* violations was the "substantial and injurious effect" standard of *Kotteakos v. United States*, 328 U.S. 750 (1946), rather than the harmless-beyond-a-reasonable-doubt test of *Chapman*. *Brecht*, 944 F.2d at 1375. The main reasons for adopting this new standard for habeas cases were considerations of finality and federalism, and the fact that *Doyle* is a "prophylactic rule" which "neither promotes accuracy nor can be located in the Constitution itself." *Id.* at 1372, 1373-75; see also *United States ex rel. Miller v. Greer*, 789 F.2d 438, 448-53 (7th Cir. 1986) (Easterbrook, J., dissenting) (urging application of the *Kotteakos* standard to *Doyle* violations on collateral review), *rev'd*, 483 U.S. 756 (1987). But see *Arizona v. Fulminante*, 499 U.S. 279, 288-89 (1991) (White, J., dissenting) (arguing that even the *Chapman* harmless-error standard is inappropriate for *Doyle* violations, because the right to be protected against the admission of a coerced confession is "so basic to a fair trial" that its violation "can never be treated as harmless error") (quoting *Chapman*, 386 U.S. at 23).

49. *Brecht*, 113 S. Ct. at 1716.

50. *Id.* at 1722.

the Court had applied *Chapman* harmless error review to errors of the trial type being reviewed on habeas corpus.⁵¹ Although the Court did not say so, the only compelling need to resolve this issue seems to have come from the Justices who sought to further their habeas reform agenda.

The Court's holding came at the outset, short and direct. Does *Chapman* apply?: "We hold that it does not."⁵² Instead, the Court told us, the standard "better tailored to the nature and purpose of collateral review"⁵³ is a standard the Court spelled out in 1946, in an entirely different context, in a case called *Kotteakos v. United States*.⁵⁴ That standard is whether the error "'had substantial and injurious effect or influence in determining the jury's verdict.'"⁵⁵ By requiring such a showing, *Brecht* makes it more difficult to grant a writ of habeas corpus, even where there has been constitutional error.

It is difficult to understand precisely how or why the standard adopted by the *Brecht* Court is the correct one. Traditional tools of statutory analysis could not take the Court where it was going. The Court stated that the habeas statute is "silent on this point,"⁵⁶ and that "[w]e have filled the gaps of the habeas corpus statute with respect to other matters, . . . and find it necessary to do so here."⁵⁷ But it is unclear that the statute *is* silent on this point. After all, the statute does say that petitions are to be entertained on the ground that the petitioner is "in custody in violation of the Constitution,"⁵⁸ and, as Justice White argued in dissent, *Chapman* must be grounded in the Constitution.⁵⁹ Thus, if there is constitutional error, and *Chapman* is not satisfied, it would seem that the petitioner is "in custody in violation of the Constitution."⁶⁰

Even assuming the statute was silent on the point, and that there was a gap, it is still unclear why the Court's solution is the correct one. How does

51. *Id.* at 1718 (citing *Yates v. Evatt*, 500 U.S. 391 (1991) (reviewing claim that burden-shifting jury instructions violated Fourteenth Amendment under rule established in *Sandstrom v. Montana*, 442 U.S. 510 (1979)); *Rose v. Clark*, 478 U.S. 570 (1986) (reviewing similar *Sandstrom* claim); *Milton v. Wainwright*, 407 U.S. 371 (1972) (reviewing a claim that use of petitioner's involuntary confession violated his Fifth and Sixth Amendment rights, under rule established in *Massiah v. United States*, 377 U.S. 201 (1964)); *Anderson v. Nelson*, 390 U.S. 523 (1968) (per curiam) (reviewing claim that rule of *Griffin v. California*, 380 U.S. 609 (1965), had been violated when prosecutor commented about petitioner's failure to testify during trial).

52. *Brecht*, 113 S. Ct. at 1714.

53. *Id.* at 1714.

54. 328 U.S. 750 (1946).

55. *Brecht*, 113 S. Ct. at 1714 (quoting *Kotteakos*, 328 U.S. at 776).

56. *Brecht*, 113 S. Ct. at 1718.

57. *Id.* at 1719 (citations omitted).

58. 28 U.S.C. § 2254(a) (West 1994).

59. *Brecht*, 113 S. Ct. at 1726 (White, J., dissenting).

60. *See id.* For whatever it's worth, the Court acknowledged that Congress had declined to pass proposed legislation that would have done exactly what the Court did in *Brecht*. *Id.* at 1719 (referring to S. 3833, 92d Cong., 2d Sess. (1972)).

Kotteakos have anything to do with the matter?⁶¹ The Court admitted, and Justice Stevens emphasized in his concurrence, that *Kotteakos* was a judicial interpretation of a federal statute having only to do with *nonconstitutional* errors being reviewed in *federal* criminal trials.⁶² Moreover, when the legislation at issue in *Kotteakos* was passed, its proponents strained to make clear that the statute did not apply to "non-technical" error.⁶³ Thus, *Kotteakos* was no more obviously the correct tool to gauge constitutional error on habeas than a screwdriver is the proper tool to hammer in a nail.

At bottom the Court's basis for adopting the *Kotteakos* standard was its reform agenda: under the new standard fewer convictions would be reversed,⁶⁴ which protects the finality of judgments and federalism interests in general.⁶⁵ The Court reached this conclusion by applying a (somewhat lop-sided) cost-benefit analysis, finding that *Chapman* review imposed too many costs in overturning convictions,⁶⁶ and that it overturned the convictions of those who had not been "grievously wronged."⁶⁷ Yet, the Court produced—as Justice O'Connor pointed out in dissent—not one whit of evidence or analysis that *Chapman* was an "onerous standard."⁶⁸ Moreover, the Court's analysis says nothing about the benefits of vindicating constitutional rights.⁶⁹

Brecht's adoption of the new standard will likely prove a failure in terms of the reform agenda. It was wrong as a matter of simple justice,⁷⁰ a point that probably would not detain the Court long. But in time *Brecht* will prove to be a nightmare of judicial administration, and more harmful

61. Of course, the Seventh Circuit had applied *Kotteakos*, but that alone is insufficient to justify the Court's adoption of the standard.

62. *Id.* at 1718 n.7; *id.* at 1723-24 (Stevens, J., concurring).

63. H.R. REP. NO. 913, 65th Cong., 3d Sess. 1 (1919) (quoted in *Brecht*, 113 S. Ct. at 1723, n.1 (Stevens, J., concurring)).

64. *Brecht*, 113 S. Ct. at 1721-22.

65. *Id.* at 1720.

66. *Id.* at 1721 ("[W]e think the costs of applying the *Chapman* standard on federal habeas outweigh the additional deterrent effect, if any, which would be derived from its application on collateral review.").

67. *Id.*

68. *Id.* at 1729 (O'Connor, J., dissenting).

69. The *Brecht* majority simply found no reason to deter constitutional violations through reversal, absent evidence that state court judges are "ignoring their oath." *Id.* at 1721. But see *Teague v. Lane*, 489 U.S. 288, 306 (1989) (basing the "new rule" standard on the need to deter lower courts from violating constitutional standards in criminal proceedings).

70. See *Brecht*, 113 S. Ct. at 1730 (O'Connor, J., dissenting) ("By tolerating a greater probability that an error with the potential to undermine verdict accuracy was harmful, the Court increases the likelihood that a conviction will be preserved despite an error that actually affected the reliability of the trial.").

than helpful to federalism interests.⁷¹ Whether it will enhance the finality of judgments is purely a matter of speculation.⁷²

As to fairness, the Court seemed to be of the opinion that the *Chapman* standard was causing convictions to be overturned in cases in which there had been no injustice done, or at least not one warranting habeas relief.⁷³ But it is difficult to quibble with Justice O'Connor's dissenting argument that replacing *Chapman* with *Kotteakos* runs the risk of upholding convictions in which the very reliability of the trial was at issue.⁷⁴ Upholding a conviction despite errors such as admission of an involuntary confession will be more likely under the Court's formulation than before. That, in fact, must be the majority's assumption, otherwise *Brecht* could not possibly further finality and federalism interests.

The problems that *Brecht* will yield as to finality, federalism, and judicial administration cannot be fully realized without studying the concurring opinion of Justice Stevens. Justice Stevens provided an essential fifth vote to support the majority's novel edifice. While signing on to the majority opinion, Justice Stevens also wrote separately to clarify his view of the standard that the Court was adopting. It is uncertain from reading his opinion, however, that Justice Stevens was building from the same foundation as the majority or ending up in the same place. More importantly, because Justice Stevens provided the crucial fifth vote, it is unclear what the law even is. Indeed, given that Justice Stevens' interpretation differs from that of the five-person "majority" opinion he joined, it is difficult even to coin the appropriate descriptive words. In my discussion of the case, I will simply refer to the majority's (aside from Justice Stevens') understanding of *Kotteakos* as the "majority opinion."

71. As Justice O'Connor pointed out in her dissent:

[E]ven on its own terms the Court's decision buys the federal courts a lot of trouble. From here on out, prisoners undoubtedly will litigate—and judges will be forced to decide—whether each error somehow might be wedged into the narrow potential exception the Court mentions in a footnote today

Nor does the majority demonstrate that the *Kotteakos* standard will ease the burden of conducting harmless-error review in those cases to which it does apply. Indeed . . . *Kotteakos* is unlikely to lighten the load of the federal judiciary at all. The courts still must review the entire record in search of conceivable ways the error may have influenced the jury [and] they still must conduct their entire review *de novo*

Id. at 1731; see also *infra* text accompanying notes 83-87.

72. Habeas review, in general, cuts against the finality of state judgments. Yet, as Justice O'Connor noted in her dissent, the majority does not explain how the harmless-error standard is any different in this regard from "any other question presented on habeas; such costs [i.e., a decrease in the finality of judgments] are inevitable *whenever* relief is awarded." *Brecht*, 113 S. Ct. at 1732 (O'Connor, J., dissenting); see also *infra* text accompanying notes 94-95.

73. See *Brecht*, 113 S. Ct. at 1721 ("[G]ranting habeas relief merely because there is a 'reasonable possibility' that trial error contributed to the verdict, see *Chapman*, 386 U.S. at 24, is at odds with the historic meaning of habeas corpus—to afford relief to those whom society has 'grievously wronged.'" (citation omitted)).

74. *Id.* at 1730 (O'Connor, J., dissenting) ("When such an error is detected, the harmless-error standard is crucial to our faith in the accuracy of the outcome").

Justice Stevens cast into doubt the majority opinion's entire premise that *Kotteakos* review will be more deferential to state decisions than *Chapman* analysis. The *Kotteakos* review Justice Stevens described is extremely rigorous.⁷⁵ He applauded the Court's adoption of the *Kotteakos* standard because that standard:

accords with the statutory rule for reviewing other trial errors that affect substantial rights; places the burden on prosecutors to explain why those errors were harmless; requires a habeas court to review the entire record *de novo* in determining whether the error influenced the jury's deliberations; and leaves considerable latitude for the exercise of judgment by federal courts⁷⁶

Justice Stevens quoted Justice Rutledge, the author of *Kotteakos*, at length in underscoring two points. First, the reviewer applying *Kotteakos* must determine not whether the jurors were correct in their decision, but whether the error might have had an impact as measured against the "total setting."⁷⁷ Second, the reviewer must judge the impact of the error not in her own mind, but as it might have affected the "minds of other[s]."⁷⁸ Finally, Justice Stevens concluded that the difference between *Kotteakos* and *Chapman* "is less significant than it might seem," and that "[i]n the end, the way we phrase the governing standard is far less important than the quality of the judgment with which it is applied."⁷⁹

None of this must have been what the other "majority" Justices were thinking. For one thing, the majority opinion flat out contradicts Justice Stevens as to who has the burden of proof under the new standard, thus leaving this matter in total confusion.⁸⁰ But more important, why go to all

75. *Id.* at 1723 (Stevens, J., concurring).

76. *Id.*

77. *Id.* at 1724 (quoting *Kotteakos*, 328 U.S. at 764).

78. *Id.* (quoting *Kotteakos*, 328 U.S. at 764).

79. *Id.* at 1725.

80. Compare *id.*, at 1722 (holding, under the new standard, that habeas petitioners may obtain review based on trial error only if they can "establish that it resulted in 'actual prejudice' ") with *id.* at 1723 (Stevens, J., concurring) ("*Kotteakos* plainly stated that unless an error is merely 'technical,' the burden of sustaining a verdict by demonstrating that the error was harmless rests on the prosecution."); see also Blume & Garvey, *supra* note 6, at 166.

This confusion generated by *Brecht* was resolved by the recent decision in *O'Neal v. McAninch*, 115 S. Ct. 992 (1995), in which the Supreme Court held that the answer to the question "who has the burden of proof under *Brecht*?" turned out to be "No one." Rather, the *O'Neal* Court reframed the entire inquiry as one for the habeas court's alone, holding simply that "[w]hen a federal judge in a habeas proceeding is in grave doubt about whether a trial error of federal law had 'substantial and injurious effect or influence in determining the jury's verdict,' that error is not harmless. And, the petitioner must win." *Id.* at 994.

In addition to cleaning up this untidy point, the *O'Neal* decision comes with its own irony and intrigue. The irony is that while the Court is correct to remove burden of proof questions from an inquiry that is essentially the trial court's own, in another case the same Term, *Schlup v. Delo*, 115 S. Ct. 851 (1995), the Court nonetheless continued, in the Chief Justice's words, "a classic mixing of apples and oranges." *Id.* at 873 (Rehnquist, C.J., dissenting). The issue in *Schlup* was the standard by which a petitioner shows actual innocence to excuse another procedural misstep. For prisoners alleging

the bother of establishing a new standard if, as asserted by Justice Stevens, it will not make much of a "difference" or be all that "significant?"⁸¹

In any event, *Brecht's* adoption of the *Kotteakos* standard almost inevitably will frustrate the broad goals of the reform effort. In order to understand the problem with the *Kotteakos* standard it is useful to think about the relative ease and intrusiveness that applying *Chapman* and *Kotteakos* entails. The *Chapman* standard is a hard one for the state to meet. *Chapman* mirrors the "proof beyond a reasonable doubt" standard, and it is not intended to permit a great number of convictions to be upheld in the face of constitutional error. The prosecutor must, on the record before the court, establish that any error that occurred was harmless beyond a reasonable doubt, i.e., that it could not have had any impact on the jury's verdict.⁸² Given the difficulty of meeting that standard, prosecutors likely did not even try to defend a fair number of convictions based upon the notion that the constitutional error that occurred was harmless.⁸³ And, if the prosecutor did argue the error was harmless, the court's time spent performing *Chapman* analysis was somewhat limited: the court needed only to review the trial record enough to determine that the violation *could* have had *some* impact.⁸⁴

innocence of the offense, the Court held petitioners must make a showing that "it is more likely that not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt." *Id.* at 867. As the Chief Justice observed, this test confuses a "quintessential charge to a finder of fact," with a "quintessential conclusion of law . . ." *Id.* at 873 (Rehnquist, C.J., dissenting). So while in *O'Neal* the Court was cleaning up its standards of review, in *Schlup* the Court was making a further mess. *See infra* note 146 (discussing the impact of *Schlup*).

The intrigue rests in the reversal in tone that *O'Neal* suggests as compared with the other reform cases. The five member majority not only adopted a pro-petitioner rule, but justified it in part on the "stakes involved in the habeas proceeding," 115 S. Ct. at 996, and discounted the interests of finality and federalism. *Id.* The change in tone could be the result of the addition of the Court's two newest Justices: Justice Breyer (the author of the opinion) and Justice Ginsburg. If so, the doctrine may continue to turn toward fairness and away from federalism and finality. I am a bit skeptical of any dramatic shift, but one can rest assured that doctrinal coherence on this twisting road is not likely.

81. *See Brecht*, 113 S. Ct. at 1725 (Stevens, J., concurring).

82. *Chapman*, 386 U.S. at 24. There are, however, instances where courts have found a constitutional error "harmless" under the *Chapman* standard. *See, e.g.,* *Vanda v. Lane*, 962 F.2d 583, 585 (7th Cir.) (holding that prosecutor's *Doyle* violation was harmless beyond a reasonable doubt), *cert. denied*, 113 S. Ct. 254 (1992); *Leecan v. Lopes*, 893 F.2d 1434, 1442 (2d Cir.) (finding that *Doyle* violation on cross-examination was harmless under the *Chapman* standard), *cert. denied*, 496 U.S. 929 (1990); *Porretto v. Stalder*, 834 F.2d 461, 466 (5th Cir. 1987) (holding that trial court's error in admitting defendant's involuntary testimony was harmless beyond a reasonable doubt).

83. For example, in the following cases courts granted a defendant's habeas petition without even discussing whether the constitutional violation was harmless beyond a reasonable doubt: *United States ex rel. Free v. Peters*, 806 F. Supp. 705, 731-32 (N.D. Ill. 1992) (holding that the Eighth Amendment was violated because jury was not able to consider all of defendant's mitigating evidence), *rev'd in part*, 12 F.3d 700 (7th Cir. 1993), *cert. denied*, 115 S. Ct. 433 (1994); *Butler v. Sumner*, 783 F. Supp. 519, 520 (D. Nev. 1991) (finding ineffective assistance of counsel in violation of Sixth Amendment); *Martinez-Macias v. Collins*, 810 F. Supp. 782, 785 (W.D. Tex. 1991) (same), *aff'd*, 979 F.2d 1067 (5th Cir. 1992).

84. *See Chapman*, 386 U.S. at 23-24 (explaining that a constitutional error "which possibly influenced the jury adversely to the litigant cannot . . . be conceived of as harmless.") (emphasis added).

Brecht, in contrast, requires that the impact of the violation be assessed in a much greater number of cases, and to a much greater extent. *Brecht* is an open invitation to the state to raise the question of harmfulness in all habeas proceedings in which a constitutional error is found.⁸⁵ All *Brecht*'s talk of federalism and finality would be meaningless if the majority did not intend this question to be litigated (and resolved in favor of the state) in a fair number of the cases in which a violation had been found. However, by giving the state greater incentive to defend constitutionally questionable convictions, finality is not clearly advanced, and judicial resources are taxed.

Moreover, the analysis required by *Brecht* arguably will prove more time-consuming than the *Chapman* analysis, and might require far more second-guessing of state courts.⁸⁶ Applying *Kotteakos*, either literally or as Justice Stevens explained it, will require a court assessing a claim of harmlessness to familiarize itself with every aspect of the state court record.⁸⁷ The *Kotteakos* standard is a heavily nuanced one, requiring an extremely sensitive analysis of the impact of admitted or excluded evidence on the minds of twelve unknown people.⁸⁸ In essence, federal courts are going to be forced to displace the judgment of the state jury or factfinder when applying this analysis.

Of course, none of this even begins to touch upon the broader difficulty, which is that the analysis demanded by *Kotteakos* is practically impossible. Under *Kotteakos*, a court must determine whether the error had a "substantial and injurious effect or influence" on the verdict.⁸⁹ As Justice Stevens emphasized, this analysis is not the Court's own, but an attempt by the Court to get into the minds of the jurors who were actually present.⁹⁰ But that borders on the preposterous. The jurors are unknown, and their deliberations were secret. The standard either means something very different than it says, or the standard is a silly one.

To top all of this off, in *Brecht* the Court swung open the door to the argument that some yet-again different standard, as yet unstated, will apply in some category of cases as yet unidentified. After stating that *Kotteakos* would govern errors of the trial type, the Court dropped a pregnant footnote:

85. Thus, *Brecht* will strain judicial resources. See *infra* text accompanying notes 374-379.

86. *Chapman*, 386 U.S. at 23-24; see also *Lowery v. Collins*, 996 F.2d 770, 773 (5th Cir. 1993) (following *Brecht* Court and concluding that "de novo review of the entire trial record[]" constituted a "painstaking re-review").

87. *Brecht*, 113 S. Ct. at 1723 (Stevens, J., concurring) (stating that the *Kotteakos* standard requires a habeas court to review the entire record *de novo* in determining whether the error influenced the jury's deliberations).

88. See *id.* at 1724 (Stevens, J., concurring) ("*Kotteakos* . . . requires a reviewing court to decide that 'the error did not influence the jury' . . . and that 'the judgment was not substantially swayed by the error.'") (quoting *Kotteakos*, 328 U.S. at 764-65).

89. *Kotteakos*, 328 U.S. at 776.

90. See *Brecht*, 113 S. Ct. at 1724 (Stevens, J., concurring).

Our holding does not foreclose the possibility that in an unusual case, a deliberate and especially egregious error of the trial type, or one that is combined with a pattern of prosecutorial misconduct, might so infect the integrity of the proceeding as to warrant the grant of habeas relief, even if it did not substantially influence the jury's verdict.⁹¹

What this means is uncertain. Although this is the sort of escape that courts typically leave themselves when fashioning new rules of which they are somewhat uncertain, it ensures further litigation, and more work for the federal courts.⁹²

Indeed, the Supreme Court's stated interest in finality in *Brecht* runs smack into the uncertainty in the law cases like *Brecht* introduce.⁹³ The *Brecht* Court makes much of the fact that there were some six tiers of review in that case, evoking images of Justice Jackson's dictum that "[w]e are not final because we are infallible, but we are infallible only because we are final."⁹⁴ *Brecht*, however, is yet another change in a constantly changing body of law, with uncertain nuances and application, such as the difficulty of determining what is an error of the "trial type," and whether the *Kotteakos* standard even applies to all such errors. Every new rule surrounded by interpretive difficulties fosters more litigation, undermining the goal of finality. This is compounded by the different interpretations of the *Kotteakos* standard in *Brecht*. It is at least open to question whether a fixed but less deferential standard of review might not do more to achieve finality than a more deferential standard constantly in flux.

As rhetorically sensitive as *Brecht* is to federalism and comity concerns, the reality is likely to be that *Brecht* does little for those interests, and may actually harm them more than help them. First, one properly may question the number of petitioners at the margin whose claims *Brecht* will affect. The number of habeas petitions actually granted by the federal courts is small anyway,⁹⁵ and evidence suggests that the number has not dropped appreciably under the reform effort.⁹⁶ In any number of these, the

91. *Brecht*, 113 S. Ct. at 1722 n.9.

92. See *id.* at 1731 (O'Connor, J., dissenting) (noting that "since the Court only mentions the possibility of an exception, all concerned must also address whether the exception exists at all"). In fact, some courts have already begun to address the exception created in footnote nine. See *Kontakis v. Beyer*, 19 F.3d 110, 116 n.8 (3d Cir.) (acknowledging the *Brecht* exception, though declining to address it because it was not argued by the habeas petitioner), *cert. denied*, 115 S. Ct. 215 (1994); *Smith v. Dixon*, 14 F.3d 956, 975 n.12 (4th Cir.) (highlighting the exception created by footnote nine of *Brecht*), *cert. denied*, 115 S. Ct. 129 (1994).

93. For a detailed discussion of the confusion that has followed in the wake of *Brecht*, see Blume & Garvey, *supra* note 6.

94. *Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring).

95. See Daniel J. Meltzer, *Habeas Corpus Jurisdiction: The Limits of Models*, 66 S. CALIF. L. REV. 2507, 2524 (1993) (suggesting, based on various studies, that only 3.2% of all habeas petitions filed are ultimately successful).

96. See Christopher F. Smith, *Habeas Corpus Reform: The View from the Federal District Court* 17 (unpublished manuscript on file with author) ("Thus it appears that although the Supreme Court has

constitutional violations may have affected the verdict sufficiently to warrant reversal even under the *Brecht* standard. Moreover, a judge who finds a constitutional violation in the original trial is not going to uphold the conviction lightly. Thus, it is far from certain that *Brecht* will change the result in many cases in which a constitutional violation is found.

Second, in some cases *Brecht* may well have the perverse effect of leading judges to find more constitutional violations, thus undermining not only the purpose of *Brecht* itself, but also the purpose of much of the habeas "reform." *Brecht* on its face appears to lower the cost of finding a violation, because the conviction seems less likely to be overturned.⁹⁷ Thus, judges may be more likely to find violations. Judges who do so likely will extend existing constitutional rights somewhat, which rights then will apply in future state proceedings.⁹⁸

But federalism suffers as much or more for how something is done as it does from the final result. Even if fewer convictions are overturned, if judges are finding more constitutional error this hardly is likely to enhance comity between the two court systems. Nor, for that matter, is it likely to enhance the public perception of the state courts. But the injury is just as deep, if not more so, when convictions are overturned under *Brecht*. Prior to *Brecht*, overturning a conviction rested on so non-deferential a standard that a federal judge did not have to level much criticism to reach the decision.⁹⁹ Now, however, state court decisions will be overturned after federal judges pick apart those proceedings and then conclude that the impact was substantial—so substantial that any judge should have caught it.¹⁰⁰

In his dissenting opinion, Justice White may have best put his finger on a final problem here. If state courts are as sensitive to federal rights as are federal courts, then there was no need to move from *Chapman* to

created new precedent grounds for dismissing cases, these reforms have had no discernible impact on aggregate outcomes.").

97. After *Brecht*, finding a constitutional violation overturns a conviction on habeas *only* where a petitioner can show that the violation had "a substantial and injurious effect" on the jury's verdict. See *Brecht* at 1722 (quoting *Kotteakos*, 328 U.S. at 776). The court also labeled this test an "actual prejudice" standard. *Id.*

98. This is the very evil the *Teague* retroactivity doctrine is meant to prevent. See *infra* notes 231-233 and accompanying text (explaining *Teague* as designed to prevent federal courts from defining new constitutional rights on habeas review). After *Brecht*, there remains some question whether a federal court could avoid reaching the issue of constitutional error by finding that even if error existed, it would not require reversal under the *Brecht* standard.

99. All that *Chapman* required was a finding that the error was not "harmless beyond a reasonable doubt." See *Chapman*, 386 U.S. at 24. There was thus no need to affirmatively attack the state court's result.

100. See *Brecht*, 113 S. Ct. at 1723 (Stevens, J. concurring) (explaining that the *Kotteakos* standard "places the burden on prosecutors to explain why . . . errors were harmless; requires a habeas court to review the entire record *de novo* in determining whether the error influenced the jury's deliberations; and leaves considerable latitude for the exercise of judgment by federal courts").

Brecht. The results should be the same in most cases.¹⁰¹ But if state courts are less sensitive to constitutional rights, the change in standard is going to have an effect. Because *Brecht* demands greater harm before a conviction may be overturned, federal courts may defer when deference is inappropriate.¹⁰²

B. *The Havoc of Herrera*

*Herrera v. Collins*¹⁰³ may epitomize all that has gone wrong with the Supreme Court's "reform" efforts.¹⁰⁴ Having touted "actual innocence" as the ultimate safeguard of fundamental fairness for seven years,¹⁰⁵ the Court in *Herrera* was confronted with a petitioner facing execution who advanced nothing but a claim of "actual innocence" and argued the writ should issue.¹⁰⁶ Thus, in *Herrera*, the Supreme Court's reform chickens came home to roost.

Leonel Torres Herrera was convicted of capital murder for the killing of a police officer, Carrisalez.¹⁰⁷ He also pled guilty to the killing of another officer, Rucker. Rucker's body had been found at about 11:00 p.m. one evening; shortly thereafter Carrisalez and his partner stopped a speeder, and after a brief exchange Carrisalez was shot dead. Although the evidence in the Carrisalez case was not absolutely airtight, it appeared quite strong. The murder victim, prior to his death, and another officer identified Herrera. The car involved in the murder was registered to Herrera's girlfriend, with whom he lived—he had a set of car keys in his pocket when he was arrested. One officer identified the car as the car containing the murderer.

As for the evidence of the Rucker murder, Herrera's Social Security card was found lying next to Rucker's patrol car. Spatters of blood on Herrera's clothing and on the car involved in the shooting of Carrisalez were shown to be Rucker's, as were the hair strands found in the car. Finally, a note written by Herrera was found on him when he was arrested; the note "strongly implied that he had killed Rucker."¹⁰⁸

101. *Id.* at 1728 (White, J., dissenting) ("Either state courts are faithful to federal law, in which case there is no cost in applying the *Chapman* as opposed to the *Kotteakos* standard on collateral review; or they are not, and it is precisely the role of habeas corpus to rectify that situation.").

102. *Id.* ("Ultimately, the central question is whether States may detain someone whose conviction was tarnished by a constitutional violation that is not harmless beyond a reasonable doubt. *Chapman* dictates that they may not; the majority suggests that, so long as direct review has not corrected this error in time, they may.").

103. 113 S. Ct. 853 (1993).

104. For an in depth discussion of *Herrera*, see Vivian Berger, *Herrera v. Collins: The Gateway of Innocence for Death-Sentenced Prisoners Leads Nowhere*, 35 WM. & MARY L. REV. 943 (1994).

105. See, e.g., *McCleskey v. Zant*, 499 U.S. 467, 494 (1991); *Tcague v. Lane*, 489 U.S. 288, 311-13 (1989); *Murray v. Carrier*, 477 U.S. 478, 496 (1986).

106. *Herrera*, 113 S. Ct. at 858.

107. The facts related here are taken from *id.* at 857.

108. *Id.*

Herrera's attempts to have his death sentence set aside at first followed the usual course, but then they took a turn that proved difficult for the Supreme Court. After Herrera was convicted and sentenced to death he sought review through the usual chain of state appeals, state collateral review, and federal habeas.¹⁰⁹ All petitions were denied by all courts.¹¹⁰ But then Herrera returned to state habeas court arguing that he was "actually innocent" of the murders, and that the officers were murdered by his since deceased brother Raul.¹¹¹ The petition was accompanied by affidavits of an attorney who had represented Raul and of one of Raul's former cellmates, relating that Raul had confessed the murders to them.¹¹²

The Texas courts bounced this hot potato to the federal courts. The petition for relief was denied by the state habeas court,¹¹³ whose judgment was affirmed on appeal.¹¹⁴ The United States Supreme Court denied certiorari for what was now the third time in the case.¹¹⁵ So, Herrera filed a second federal habeas petition, again alleging innocence.¹¹⁶ In addition to the two affidavits filed in state court, he included two more: one from Raul's son, aged nine at the time of the murders, and one from a schoolmate of Raul, both of whom also said Raul had confessed the murders.¹¹⁷

When stripped down to what mattered to the Supreme Court, all that Herrera's petition contained was an allegation of "actual innocence," with no additional constitutional claim.¹¹⁸ Herrera's petition originally had alleged other claims, but they were dismissed as an abuse of the writ.¹¹⁹ There was a *Brady* claim alleging that the police were aware of some of the affidavit evidence and had withheld it, but the Court of Appeals dismissed

109. *Id.* at 858.

110. *Id.*

111. *Id.*

112. *Id.*

113. *Ex parte* Herrera, No. 81-CR-672-C (Tex. 197th Jud. Dist., Jan. 14, 1991).

114. *Ex parte* Herrera, 819 S.W.2d 528 (Tex. Crim. App. 1991).

115. *Herrera v. Texas*, 112 S. Ct. 1074 (1992).

116. *Herrera v. Collins*, 113 S. Ct. 853, 858 (1993).

117. *Id.* at 858-59.

118. *See id.* at 862-63 (characterizing Herrera's claim as a "free-standing claim of actual innocence" without an "independent" claim of a constitutional violation). Had Herrera stated an independent constitutional violation, such as trial error, he might have qualified for yet another exception to the Court's habeas limitations. *See id.*; *see also* *Sawyer v. Whitley*, 112 S. Ct. 2514 (1992) (holding that constitutional claims on habeas may not be dismissed for abuse of writ when petitioner demonstrates actual innocence).

119. *See* *Herrera v. Collins*, 954 F.2d 1029, 1034 (5th Cir. 1992), *aff'd*, 113 S. Ct. 583 (1993). It is a little difficult to understand why this is so, given the claim of actual innocence. *See McCleskey v. Zant*, 499 U.S. 467, 495 (1991) (holding that a "'colorable showing of factual innocence'" could excuse abuse of the writ) (quoting *Kuhlmann v. Wilson*, 477 U.S. 436, 454 (1986) (plurality opinion)).

this claim as "disingenuous."¹²⁰ Thus, all that remained and all that reached the Supreme Court was the claim of actual innocence.¹²¹

Although the evidence implicating Herrera was quite strong, it is possible to explain much of it away. For one thing, Herrera was sentenced to death for Carrisalez' murder, not Rucker's.¹²² The identifications involved in that murder could have been wrong: certainly the officer back in the patrol car would have had a difficult time identifying Herrera.¹²³ The Supreme Court opinion is silent as to whether the Herrera brothers looked alike, but there is suggestion elsewhere that they did.¹²⁴ If the murderer was Raul, the car could well have been the same. If those things were true, maybe Raul, and not Leonel, did commit the Carrisalez murder.¹²⁵

One would think that the last piece of business this Supreme Court would want the habeas courts to get into is re-adjudicating actual guilt or innocence of state prisoners.¹²⁶ It certainly was evident that the Supreme Court desperately wanted to avoid this result in *Herrera*. It even came very close to foreclosing such a result, stating "[c]laims of actual innocence based on newly discovered evidence have never been held to state a ground for federal habeas relief absent an independent constitutional [claim]."¹²⁷ In fact the Court might have gone further, and dropped the words "based on newly discovered evidence," for the vast bulk of habeas law makes apparent that the business of habeas is adjudicating claims of constitutional viola-

120. *Herrera*, 113 S. Ct. at 859 (citing *Herrera*, 954 F.2d at 1032). *Brady v. Maryland*, 373 U.S. 83 (1963), held that it is a violation of Fourteenth Amendment due process for the prosecution to withhold "evidence favorable" to a criminal defendant who requests to review such evidence. *Id.* at 87. *Herrera* had argued that the police had knowingly withheld from him evidence that Raul's son had attested in his affidavit to seeing Raul commit the murders. *Herrera*, 113 S. Ct. at 858-59.

121. *Herrera*, 113 S. Ct. at 859.

122. *Id.* at 857.

123. *Id.* (explaining that the officer who witnessed the Carrisalez murder was sitting in the patrol car when Carrisalez walked up beside assailant's car and talked to assailant, and when Carrisalez was shot). There is no indication the officer saw the assailant exit the car or was otherwise able to get a better look at him.

124. Though I have not been able to obtain the source, I am told this assertion is made in Petitioner's Brief, *Herrera v. Collins* (No. M-92-30) (S.D. Tex. Feb. 17, 1992).

125. Raul could possibly have been responsible even for the Rucker murder, given the evidence in that case. Raul could have been wearing his brother Leonel's jeans, and the Social Security card could have fallen out of them.

126. The Court has emphasized the importance of the criminal trial as "a decisive and portentous event" at which "[s]ociety's resources have been concentrated . . . in order to decide . . . the question of guilt or innocence . . ." *Wainwright v. Sykes*, 433 U.S. 72, 90 (1977); see also *Brecht v. Abrahamson*, 113 S. Ct. 1710, 1720-21 ("[W]e have recognized that '[l]iberal allowance of the writ . . . degrades the prominence of the trial itself,' and at the same time encourages habeas petitioners to relitigate their claims on collateral review.") (citation omitted) (quoting *Engle v. Isaac*, 456 U.S. 107, 127 (1982)); *Herrera*, 113 S. Ct. at 869 ("in state criminal proceedings the trial is the paramount event for determining the guilt or innocence of the defendant"). For the dissenting view that habeas should lie for bare claims of innocence if the state has not provided a full and fair opportunity to litigate the ultimate question of guilt, see *Steiker*, *supra* note 6, at 385-88; *Hoffmann & Stuntz*, *supra* note 6, at 97 (arguing habeas should lie even for a "naked" claim of innocence, such as that in *Herrera*).

127. *Herrera*, 113 S. Ct. at 860.

tions, not guilt or innocence.¹²⁸ And indeed, in *Herrera* the Court rehearsed all of the good reasons why habeas courts should not adjudicate guilt or innocence. The Court stressed again in *Herrera* that there is no particular reason to assume that a habeas court's determination of guilt or innocence will be better than a state court's.¹²⁹ The Court reemphasized its oft-made point that the state trial is the paramount event.¹³⁰ The Court again explained that years after a crime is committed the chance of accurately adjudicating innocence gets worse, not better.¹³¹

Moreover, the Court in *Herrera* repeatedly expressed confusion as to exactly what would be the remedy if the habeas court did find the petitioner was innocent.¹³² The Court almost appeared to ridicule *Herrera*'s various suggestions in this regard, beginning the review of possibilities by stating "[p]etitioner is understandably imprecise in describing the sort of federal relief to which a suitable showing of actual innocence would entitle him."¹³³ The Court leveled similar criticism at the dissenters, stating "[t]he dissent fails to articulate the relief that would be available if petitioner were to meet[s] [sic] its 'probable innocence' standard."¹³⁴

Finally, the Court's opinion seemed to look for every out available, even some that seemed to have little to do with the issues before it. For example, the Court discussed at length the power of clemency held by the Texas governor.¹³⁵ But it is hard to see what this had to do with *Herrera*'s claim. Indisputably, the governor does have this power, and may exercise it upon the recommendation of the Texas Board of Pardons and Paroles to commute a death sentence.¹³⁶ But the opportunity to seek clemency is no substitute for proper judicial procedure—assuming *Herrera*'s claim was proper.¹³⁷

128. See, e.g., *Moore v. Dempsey*, 261 U.S. 86, 87-88 (1923) (Holmes, J.) ("[W]hat we have to deal with [on habeas review] is not the petitioners' innocence or guilt but solely the question whether their constitutional rights have been preserved."); *Wainwright*, 433 U.S. at 90 ("Society's resources have been concentrated [in state criminal trials] in order to decide, within the limits of human fallibility, the question of guilt or innocence of one of its citizens.").

129. See *Herrera*, 113 S. Ct. at 862.

130. *Id.* at 861 ("The guilt or innocence determination in state criminal trials is a 'decisive and portentous event.'") (quoting *Wainwright*, 433 U.S. at 90).

131. *Id.* at 862.

132. See, e.g., *id.* (questioning whether relief would be "commutation of petitioner's death sentence, new trial, or unconditional release from imprisonment").

133. *Id.* at 861.

134. *Id.* at 862.

135. *Id.* at 866-69.

136. See TEX. CONST., ART. IV, § 11; TEX. CRIM. PROC. CODE ANN. § 48.01 (Vernon 1979), cited in *Herrera*, 113 S. Ct. at 868 & n.14.

137. See *Herrera*, 113 S. Ct. at 881 (Blackmun, J., dissenting) ("Whatever procedures a State might adopt to hear actual innocence claims, one thing is certain: The possibility of executive clemency is *not* sufficient to satisfy the requirements of the Eighth and Fourteenth Amendments The vindication of rights guaranteed by the Constitution has never been made to turn on the unreviewable discretion of an executive official").

Although the Court recognized all of the problems inherent in adjudicating guilt or innocence on habeas review, and sincerely seemed to want to limit the scope of habeas, the Court faced two large difficulties. First, Herrera's lawyers were very clever. After they saw their petition whittled down to nothing but the innocence claim, they put their best foot forward. True, they may have been imprecise in the relief to which they were entitled, but as for the issue presented, there was no imprecision there: "Petitioner asserts that the Eighth and Fourteenth Amendments to the United States Constitution prohibit the execution of a person who is innocent of the crime for which he was convicted."¹³⁸

The second big problem was that the Court was in a box created by its prior precedents, which had time and again invited habeas petitioners to prove "actual innocence" in order to get their habeas claims heard.¹³⁹ True, in all these prior instances, proof of "actual innocence" was a threshold to having a claim heard, for example when it had been defaulted. But absent these prior decisions, the answer to the issue petitioner brought to the Court might have been all of the reasons proffered earlier why habeas courts should not determine guilt or innocence. In an earlier day the Court might simply have said "Yes, the Constitution does prohibit executing innocent people, but innocence is properly a matter of what is adjudicated in a state trial proceeding free of constitutional error. All habeas courts determine is constitutional error."¹⁴⁰

The Court had no such out because it had made the determination of actual innocence by the habeas court not just a part of the habeas adjudication, but the last bastion of fundamental fairness. Take *Murray v. Carrier*,¹⁴¹ for example. In that case the Supreme Court held that attorney error not rising to the level of ineffective assistance of counsel does not

138. *Id.* at 859.

139. See, e.g., *McCleskey v. Zant*, 499 U.S. 467, 494 (1991) (holding that procedural default will be excused upon a showing of cause and prejudice or, in "extraordinary instances" where a petitioner cannot show cause or prejudice, if circumstances indicate that a "constitutional violation probably has caused the conviction of one innocent of the crime"); *Smith v. Murray*, 477 U.S. 527, 537 (1986) (holding that "where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default") (quoting *Murray v. Carrier*, 477 U.S. 478, 496 (1986)).

140. See, e.g., *Moore v. Dempsey*, 261 U.S. 86, 87-88 (1923) (Holmes, J.) ("[W]hat we have to deal with [on habeas review] is not the petitioner's innocence or guilt but solely the question whether their constitutional rights have been preserved."), quoted in *Herrera*, 113 S. Ct. at 860. But see *Jackson v. Virginia*, 443 U.S. 307, 324 (1979) (holding that a petitioner is entitled to federal habeas review of a state criminal conviction on the claim that "upon the record evidence adduced at the trial no rational trier of fact could have found proof of guilt beyond a reasonable doubt"). *Jackson* specifically rejected the notion that a habeas court could only review the sufficiency of the evidence upon a "no evidence" standard, explaining that both appellate courts, on direct review of a state court proceeding; and habeas courts, when requested on collateral review, have a responsibility to review the evidence to ensure that the petitioner's conviction is supported by "proof beyond reasonable doubt." *Id.* at 318, 323-24.

141. 477 U.S. 478 (1986).

constitute cause sufficient to excuse a procedural default.¹⁴² As *Carrier*'s companion case, *Smith v. Murray*,¹⁴³ demonstrated, what this holding meant in concrete terms is that you could still be executed even though if your attorney had not messed up you might have had your conviction reversed.¹⁴⁴ Well, the Court was understandably squeamish about that holding, so in *Carrier* it grandly announced a new safeguard: even in the absence of a showing of cause, a procedural default will be excused if the prisoner can make a showing of actual innocence.¹⁴⁵ Never mind all the immense problems with making such a showing,¹⁴⁶ most of which the Court rehearsed in *Herrera*: the Court was so overcome with its new idea—or rather its borrowing of an old idea from Judge Friendly¹⁴⁷—that it retreated to the idea every opportunity it got. Demonstrate actual innocence and a prisoner could be excused an abuse of the writ, a successive petition, presumably all of the procedural defects that a habeas petition could contain.¹⁴⁸ A showing of actual innocence became the panacea for every ill that might be spoken of the many procedural hurdles erected by the Court's habeas reform efforts.

In the face of all this reliance on innocence the Supreme Court would have had little credibility if it had taken the difficult course and held that the

142. *Id.* at 492 (holding attorney's failure to raise specific claim on appeal insufficient to "constitute cause for a procedural default").

143. 477 U.S. 527 (1986).

144. *Id.* at 539-40 (Stevens, J., dissenting) (explaining that the majority did not deny that petitioner's constitutional rights were violated, but rather held his claim procedurally barred because his attorney did not raise his Fifth Amendment objection at the proper time).

145. See *Murray*, 477 U.S. at 496; *Smith*, 477 U.S. at 537.

146. The nature of the problem with proving actual innocence was underscored when the Supreme Court decided *Schlup v. Delo*, 163 U.S.L.W. 4089 (U.S. Jan. 24, 1995), as this Article was going to print. In *Schlup* the Court addressed what was required to prove "actual innocence" to avoid a procedural bar. The question had been answered in *Sawyer v. Whitley*, 112 S. Ct. 2514 (1992), in the context of a petitioner who challenged the propriety not of the guilt determination, but of the decision to sentence him to death. The *Sawyer* Court had held that to excuse a procedural bar in the death sentence context, the petitioner had to prove by clear and convincing evidence that but for a constitutional error no reasonable juror would have sentenced him to death. See *Schlup*, 63 U.S.L.W. at 4090. The *Schlup* Court essentially held that in the context of a procedural bar to a claim challenging the guilt determination, the burden on the petitioner ought to be lower than that in either the *Sawyer* or *Herrera* context. The appropriate burden, the *Schlup* Court held, is for the petitioner to show that "it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt." *Id.* at 4097.

It may well be that under careful scrutiny the hierarchies of proof of innocence found in *Schlup*, *Sawyer* and *Herrera* make sense. But it equally is true that telling the difference between the standards in actual cases would prove quite a task for mere mortals. Thus, the Court continues to confuse and complicate the habeas doctrine.

147. See Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142, 142 (1970) (arguing that habeas relief should be granted *only* when the prisoner supplements his constitutional plea with a colorable claim of innocence).

148. See *Herrera v. Collins*, 113 S. Ct. 853, 862 (1993).

claim of actual innocence, standing alone, was not cognizable on habeas.¹⁴⁹ If the Court had never set out on this venture, the argument would have been available. After all, numerous critics of the jurisprudence of actual innocence have pointed out that, in our system, the only meaningful way to speak of guilt or innocence is in terms of what the trier of fact held.¹⁵⁰ The Court in *Herrera* took a weak stab at making this argument, insisting that in those prior cases "actual innocence" was just a "gateway," not a basis for relief.¹⁵¹ But the Court had insisted time and again that habeas courts could determine guilt or innocence:¹⁵² now they were being asked to do so, in an issue framed in the most difficult of ways.

What did the Court do? It actually held, by a vote of 9-0, that innocent people cannot be executed, and that if state channels to review a claim of actual innocence are not open then the federal habeas courts will hear the claim.¹⁵³ Many of the Justices tried hard to conceal this holding, even hinting that the opposite was being held.¹⁵⁴ And commentators initially were taken in.¹⁵⁵ But on careful analysis the Supreme Court seems to have opened the habeas doors to claims of actual innocence.¹⁵⁶

149. At first blush, some Justices, indeed the majority opinion, seem to have adopted this difficult holding. See *infra* note 154. However, as shown *infra* text accompanying notes 156-171, that is not the case upon close examination.

150. For a chronicle of current scholarship on this issue, see Nancy J. King, *Postconviction Review of Jury Discrimination: Measuring the Effects of Juror Race on Jury Decisions*, 92 MICH. L. REV. 63, 127 n.249 (1993).

151. *Herrera*, 113 S. Ct. at 862 ("[A] claim of 'actual innocence' is not itself a constitutional claim, but instead a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits.").

152. See, e.g., *McCleskey v. Zant*, 499 U.S. 467, 494 (1991); *Smith v. Murray*, 477 U.S. 527, 537 (1986); *Murray v. Carrier*, 477 U.S. 478, 496 (1986).

153. See *infra* text accompanying notes 162-165; see also Berger, *supra* note 104, at 997-1006 (analyzing the Court's vote in *Herrera*); Hoffmann & Stuntz, *supra* note 6, at 97 & n.93 (stating that the Court did not "rule out" the possibility of entertaining a claim of innocence, but suggesting in a footnote that the Court might do so in a later case). Any doubt on this point seems resolved by the recent decision in *Schlup v. Delo*, 63 U.S.L.W. 4089 (U.S. Jan. 24, 1995), in which the Court contrasts the "actual innocence" standard to avoid a procedural misstep with the "substantive innocence" claims recognized in *Herrera*. *Id.* at 4093-94.

154. See, e.g., *Herrera*, 113 S. Ct. at 860 (Rehnquist, C.J.) ("Claims of actual innocence based on newly discovered evidence have never been held to state a ground for federal habeas relief absent an independent constitutional violation occurring in the underlying state criminal proceeding"); *id.* at 871 (O'Connor, J., concurring) (stating that resolving the issue of whether a petitioner who had otherwise received a "constitutionally adequate trial," but who claimed he was actually innocent, should be granted habeas relief "is neither necessary nor advisable in this case"); *id.* at 874-75 (Scalia, J., concurring) ("There is no basis in text, tradition, or even in contemporary practice (if that were enough), for finding in the Constitution a right to demand judicial consideration of newly discovered evidence of innocence brought forward after conviction.").

155. Initial reports from the press, for example, presented the decision as holding that the federal courts would not entertain claims of actual innocence, absent some other constitutional claim. See, e.g. Joan Biskupic, *New Claims of Innocence from Death Road Curbed*, WASH. POST, Jan. 26, 1993, at A1; see also Steiker, *supra* note 6, at 307 n.25 (discussing popular reaction to *Herrera*).

156. See *infra* note 308.

The dissenters plainly decided that habeas courts could hear the claims of innocence, as did Justice White concurring in the judgment.¹⁵⁷ Justice Blackmun, joined by Justices Stevens and Souter would have held that if the state does not hear the claim, the habeas courts should determine if the petitioner is "probably actually innocent."¹⁵⁸ The dissenters would have remanded for this determination.¹⁵⁹ Justice White concurred in the judgment but stated forthrightly "that a persuasive showing of 'actual innocence' made after trial, even though made after the expiration of the time provided by law for the presentation of newly discovered evidence, would render unconstitutional the execution of petitioner in this case."¹⁶⁰ His standard was higher than that of the dissenters, however: he required a showing that " 'no rational trier of fact could [find] proof of guilt beyond a reasonable doubt.' "¹⁶¹ Thus, there were four clear votes to entertain claims of innocence.

The standard of the majority opinion (five votes) is completely unclear, but the decision is not. After hemming and hawing its way around every avoidance possible, the Court came down to it:

We may assume, for the sake of argument in deciding this case, that in a capital case a truly persuasive demonstration of "actual innocence" made after trial would render the execution of a defendant unconstitutional, and warrant federal habeas relief if there were no state avenue open to process such a claim.¹⁶²

But the majority went further than assuming "for the sake of argument." The Court went ahead and spoke to the applicable standard, stating the "threshold . . . would necessarily be extraordinarily high."¹⁶³ Finally, the Court proceeded at length to review the evidence in the case, measuring it against this high threshold.¹⁶⁴ It would be hard in a future case to explain why in *Herrera*—a poor showing of actual innocence¹⁶⁵—the Court afforded the petitioner this review, but refused it in what might be a better case.

The Court's direction was unsettling enough that in two concurrences, four Justices explained their votes, all the while adding further confusion. Justice O'Connor, joined by Justice Kennedy, wrote to say *Herrera* presented a difficult issue that the Court did not need to resolve.¹⁶⁶ But she

157. *Herrera*, 113 S. Ct. at 875 (White, J., concurring); *id.* at 876, 880-83 (Blackmun, J., dissenting).

158. *Id.* at 878, 882 (Blackmun, J., dissenting).

159. *Id.* at 883-84.

160. *Id.* at 875.

161. *Id.* (quoting *Jackson v. Virginia*, 433 U.S. 307, 324 (1979)) (alteration in original).

162. *Herrera*, 113 S. Ct. at 869.

163. *Id.*

164. *Id.* at 869-70.

165. *Id.* at 869 (stating that petitioner's evidence, which consisted only of affidavits, "falls far short" of the showing of innocence that would be required to sustain a constitutional claim).

166. *Id.* at 871 (O'Connor, J., concurring).

stated at the outset that she "cannot disagree with the fundamental legal principle that executing the innocent is inconsistent with the Constitution,"¹⁶⁷ and stressed at the end that "[n]owhere does the Court state that the Constitution permits the execution of an actually innocent person."¹⁶⁸ In between she devoted many pages to analysis of the evidence in this case and why Herrera could not make a strong enough showing.¹⁶⁹

Finally, even Justice Scalia, joined by Justice Thomas, bowed to the inertial forces. Justice Scalia began by asserting that it is unquestionable but that there is "no basis in text, tradition, or even in contemporary practice (if that were enough), for finding in the Constitution a right to demand judicial consideration of newly discovered evidence of innocence brought forward after conviction."¹⁷⁰ He continued, however, "I nonetheless join the entirety of the Court's opinion" ¹⁷¹ Including, evidently, the Court's holding to the contrary of the view he had just stated.¹⁷²

Herrera is one of those cases that hardly needs an explicit critique, for it seems almost to speak for itself about the problems it will cause. Human nature being what it is, the federal courts will see lots of these cases. As Justice Scalia went on to explain, the Supreme Court has undoubtedly hurt the cause of conserving judicial resources, imposing on the lower courts "the burden of regularly analyzing newly-discovered-evidence-of-innocence claims in capital cases (in which event such federal claims, it can confidently be predicted, will become routine and even repetitive)."¹⁷³ Such perception requires little additional comment.

Having gone this far, one might wonder why the rule in *Herrera* ought to be limited to capital cases.¹⁷⁴ It is possible to do so: after all, the Court has put in place rules that require greater accuracy in capital cases.¹⁷⁵ But *Herrera* was not about guaranteeing accuracy; that was the whole problem. *Herrera* was about punishing the innocent. Though it is a matter of important degree, it seems difficult, having gone this route, to countenance the

167. *Id.* at 870.

168. *Id.* at 874.

169. *Id.* at 871-73.

170. *Id.* at 874-75 (Scalia, J., concurring).

171. *Id.* at 875.

172. *Id.*

173. *Id.*

174. *See id.* at 869 (holding that "in a capital case a truly persuasive demonstration of 'actual innocence' made after trial would render the execution of a defendant unconstitutional . . .") (emphasis added).

175. *See, e.g., id.* at 863 (stating that "the Eighth Amendment requires increased reliability of the process by which capital punishment may be imposed") (citing *McKoy v. North Carolina*, 494 U.S. 433 (1990); *Eddings v. Oklahoma*, 455 U.S. 104 (1982) (holding that a sentencer in a capital case may not refuse to consider mitigating evidence); *Lockett v. Ohio*, 438 U.S. 586 (1978) (holding that the Eighth and Fourteenth Amendments require individualized consideration of mitigating factors in capital cases)); *see also* David R. Dow, *Teague and Death: The Impact of Current Retroactivity Doctrine on Capital Defendants*, 19 HASTINGS CONST. L.Q. 23, 25 (1991) (stating that the Court has required "especial care and scrutiny" of capital cases).

incarceration for ten, twenty, thirty, or forty years of a person who can demonstrate "actual innocence."

So with a new drain on judicial resources, down the drain goes finality. The Supreme Court, which has stressed repeatedly that the trial is the "main" or "paramount" event,¹⁷⁶ has now permitted subsequent adjudication of the trial issues. Death-sentenced prisoners now can attempt to prove actual innocence in a habeas proceeding, perhaps on the eve of execution. If prediction holds true, prisoners incarcerated for a term of years will be doing the same. And should the showing be high enough, at the least convictions will be overturned.

And so too go concerns of federalism. Superficially the most serious-seeming injury is the very fact that federal courts will adjudicate claims of guilt and innocence. This displaces the state courts from their very *raison d'être*. But there is another injury to federalism here, an injury of the very sort one would think the Rehnquist Court would most disdain. That is the implicit aspect of *Herrera*, the "if they don't do it we will do it for them" conclusion that the federal courts may only hear innocence claims if state process is unavailable.¹⁷⁷ This appears to wipe away state limitations on the time for presenting newly discovered evidence, at least if state courts want to avoid the risk of federal courts throwing egg all over their faces. This is the very sort of coerced state proceeding that undoubtedly led *Henry v. Mississippi* to fall into desuetude.¹⁷⁸

C. From Stone to Withrow: Stalled Reform

While *Herrera* appears to have expanded the scope of the writ of habeas corpus, *Withrow v. Williams* declined to narrow it. In *Withrow*, the Court refused to extend the reasoning of *Stone v. Powell* to *Miranda* claims.¹⁷⁹ But in so doing the Court neglected to put an end to the *Stone*

176. See *Herrera*, 113 S. Ct. at 869; see also *infra* note 302.

177. *Id.* at 869 (discussing whether a claim of "actual innocence" made after trial would justify federal habeas review "if there were no state avenue open to process such a claim.") (emphasis added).

178. 379 U.S. 443 (1965). The *Henry* Court held that a defendant's procedural default in state court would not bar Supreme Court review of his constitutional claims "unless the State's insistence on compliance with its procedural rule serves a legitimate state interest." *Id.* at 447. Justice Harlan dissented in *Henry* on the ground that the "real reason" behind the decision was to "dilut[e] the adequate state-ground doctrine" and induce the states "to voluntarily obliterate all state procedures, however conducive they may be to the orderly conduct of litigation, which might thwart state-court consideration of federal claims." *Id.* at 463-64 (Harlan, J., dissenting). Justice Harlan had made similar criticisms in an earlier dissent from *Fay v. Noia*, 372 U.S. 391 (1963), where he stated that if states "wish to detain those whom they convict, they must revamp their entire systems of criminal procedures." *Id.* at 470 (Harlan, J., dissenting). See also Paul M. Bator, et. al., *HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 620-21 (3d ed. 1988) (questioning the soundness of the *Henry* rule). In practice, however, it appears that *Henry* has not had the radical impact that Justice Harlan feared, precisely because this aspect of *Henry* has not been followed. See Daniel J. Meltzer, *State Court Forfeitures of Federal Rights*, 99 HARV. L. REV. 1130, 1145, 1153 (1986) (stating that a number of subsequent decisions have failed to cite *Henry* despite its apparent pertinence, and questioning its actual importance).

179. *Withrow v. Williams*, 113 S. Ct. 1745 (1993).

issue once and for all. Justice Scalia wrote a dissent in *Withrow* that, while only representing the views of two Justices, was strenuously urged and could be, if adopted, quite a blow to the stated goals of habeas reform.

Stone v. Powell involved the question of whether Fourth Amendment claims were cognizable on habeas.¹⁸⁰ The *Stone* Court, in determining that Fourth Amendment claims would not be cognizable on habeas if there had been a full and fair opportunity to litigate in state court,¹⁸¹ rang all the bells of why reform ostensibly was necessary. Justice Powell, writing for the Court, went through a catalog of the problems posed by habeas review, focusing on the burden on judicial resources, the lack of finality of judgments, the friction between coordinate court systems, and general problems of federalism.¹⁸² Moreover, Justice Powell condemned the view of some that federal review was necessary because of a "basic mistrust" of state courts to protect federal rights.¹⁸³ And for good measure Justice Powell advanced the view that habeas corpus generally was awarded to provide a safeguard against incarcerating the innocent.¹⁸⁴

Unfortunately for the coherent development of doctrine, Justice Powell said all of this in footnotes, while at the same time denying that he was making a statement about habeas at all.¹⁸⁵ The body of the *Stone* decision reads like a Fourth Amendment case, all full of balancing the deterrent value of excluding evidence against the cost to society of doing so.¹⁸⁶ The entire discussion regarding habeas corpus comes in footnotes 31 and 35 of the decision.¹⁸⁷ But then in footnote 37 the Court accuses the dissent of engaging in "hyperbole" because it dared to suggest that *Stone* was "laying the groundwork for a 'drastic withdrawal of federal habeas corpus jurisdiction, if not for all grounds . . . then at least [for many]. . . .'"¹⁸⁸ Given what was to come, one might easily think Justice Powell was protesting too much.

180. 428 U.S. 465, 469 (1976).

181. *Id.* at 481-82. The "full and fair" formulation was originated three decades earlier by Professor Bator. See Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 455-56 (1963) (arguing that "if a full opportunity to test the integrity of the processes of the committing court was furnished on appeal, collateral inquiry might . . . constitute mere repetition.").

182. *Stone*, 428 U.S. at 491 n.31 (Powell, J., concurring).

183. *Id.* at 493 n.35.

184. The novel view that habeas relates primarily to innocence was apparently borrowed from Judge Friendly. See Friendly, *supra* note 147, at 142. Under Judge Friendly's view, reflected in some of the Court's habeas doctrine, habeas should not be granted absent a showing of innocence even in a case in which habeas was otherwise appropriate to correct constitutional error in state court proceedings. See *id.*; see also Friedman, *Two Habeas*, *supra* note 4, at 278-79 & nn. 144-45 (explaining relationship between Supreme Court's innocence jurisprudence and Judge Friendly's theory).

185. *Stone*, 428 U.S. at 494 n.37.

186. *Id.* at 489 (applying a cost-benefit analysis to "weigh[] the utility of the exclusionary rule against the costs of extending it to collateral review of Fourth Amendment claims").

187. *Id.* at 491, 493.

188. *Id.* at 494 n.37 (quoting Brennan, J., dissenting) (alterations and ellipses in original).

Over the next decade *Stone*'s habeas reform philosophy remained alive even while the Court repeatedly rebuffed attempts to extend the specific holding of *Stone* to other substantive claims.¹⁸⁹ What was noteworthy about those cases for present purposes is that rather than disavowing the reasoning of *Stone*'s footnotes, they perpetuated it. Thus, for example, in *Rose v. Mitchell* the question was whether a claim of discrimination in selecting the grand jury foreperson was cognizable on habeas.¹⁹⁰ Rather than taking the position that *Stone* was simply a Fourth Amendment case, and that all other constitutional claims were cognizable on habeas, the Court distinguished this particular claim as one not appropriate under the *Stone* "full and fair" rule for exclusion from habeas.¹⁹¹ *Rose* was distinguished from *Stone* because the nature of the error alleged in *Rose* affected the judicial process, suggesting that process was not full and fair.¹⁹² Thus, although no claim was excluded, the doctrine of habeas corpus suggested they could be, opening up the door for making the full and fair argument in countless cases, and leaving the law uncertain.

In the 1992 Term, in *Withrow v. Williams*,¹⁹³ the Court took up the question of whether *Miranda* claims were cognizable on habeas, with *Miranda* claims perhaps having the second-best chance of exclusion after *Stone*'s Fourth Amendment exclusion.¹⁹⁴ In *Withrow* the respondent was convicted on two counts of first-degree murder and a related charge.¹⁹⁵ The conviction was based in part on a confession obtained in the course of an interrogation in which the officers blatantly and knowingly violated the defendant's *Miranda* rights.¹⁹⁶ The state courts nonetheless admitted the

189. See *Jackson v. Virginia*, 443 U.S. 307, 320-24 (1979) (declining to use *Stone* reasoning to bar habeas review of claim that state failed to prove elements of crime beyond a reasonable doubt); *Rose v. Mitchell*, 443 U.S. 545, 559-64 (1979) (declining to apply *Stone* to bar habeas review of an equal protection claim of racial discrimination in the selection of grand jury foreman).

190. 443 U.S. at 551.

191. *Id.* at 560-61.

192. *Id.* at 563.

193. 113 S. Ct. 1745, 1748 (1993).

194. This, obviously, is because of the hostility of many members of the Court to *Miranda* itself. For cases relegating *Miranda* to the status of a subconstitutional rule, see, e.g., *Duckworth v. Eagan*, 492 U.S. 195, 202-03 (1989) (holding that *Miranda* warnings need not "be given in the exact form described in that decision," because such warnings are "'not themselves rights protected by the Constitution but [are] instead measures to ensure that the right against compulsory self-incrimination [is] protected.'" (quoting *Michigan v. Tucker*, 417 U.S. 433, 444 (1974)) (alterations in original); *Oregon v. Elstad*, 470 U.S. 298, 304-05 (1985) (holding that a merely "procedural" *Miranda* violation does not require suppression of a subsequent voluntary and informed confession); *New York v. Quarles*, 467 U.S. 649, 654-56 (1984) (holding that there is a "public safety" exception to the prophylactic *Miranda* rule).

The Court had been faced with the question of whether *Miranda* violations were reviewable on habeas twice before, but had ducked it. See *Eagan*, 492 U.S. at 201 n.3 (noting that petitioner had not raised the issue of *Stone*'s applicability to *Miranda* claims); *Wainwright v. Sykes*, 433 U.S. 72, 87 n.11 (1977) (explaining that *Stone*'s effect on a "bare allegation of a *Miranda* violation" was not addressed because petitioner did not raise the issue, and because the case could be resolved on other grounds).

195. 113 S. Ct. at 1749.

196. *Id.* at 1748-49.

evidence,¹⁹⁷ and the conviction was upheld on appeal.¹⁹⁸ Withrow then sought a writ of habeas corpus,¹⁹⁹ which was granted by the district court, a decision affirmed by a unanimous panel of the court of appeals.²⁰⁰ Thus, when the case came to the Supreme Court, the question of whether *Stone* would be extended to *Miranda* claims was clearly presented.

Although the *Withrow* Court, in a 5-4 decision, refused to extend *Stone* to *Miranda* claims,²⁰¹ the Court continued to buy into the reasoning of *Stone*, thus doing little to clean up the doctrine or put an end to state attorneys raising the "full and fair" argument with regard to other claims. Rather than overrule *Stone*, or limit it to the Fourth Amendment context, the Court continued the usual course of distinguishing the particular right at stake—the right to receive *Miranda* warnings—from the right at stake in *Stone*.²⁰² Admittedly, there are parts of the *Withrow* decision that seem to suggest no other claim will fall under *Stone*'s rule in the future.²⁰³ For example, the Court distinguished *Miranda* claims from *Stone* claims on the ground that the right to Fourth Amendment exclusion is not a "personal constitutional right" of the defendant.²⁰⁴ If a Fourth Amendment exclusionary ruling is not a personal right, but a *Miranda* exclusionary ruling is, it is difficult to imagine what other claims beside Fourth Amendment claims would meet this standard. But if *Stone* is *sui generis*, why did the Court not explicitly limit it?

There are other aspects of the *Withrow* decision that perpetuate all of the problems the reform efforts have caused. The *Withrow* Court told us that *Miranda* claims, unlike Fourth Amendment claims, are cognizable because they are not "necessarily divorced from the correct ascertainment of guilt."²⁰⁵ Thus, the rationale that habeas exists primarily to free innocent prisoners lives on, echoing the problems caused by *Herrera*.²⁰⁶ Moreover, the *Withrow* Court continued to give the impression that the very existence of habeas threatens federalism interests, arguing only that eliminating *Miranda* claims will not resolve the tensions between state and federal courts because those claims will inevitably be brought to habeas courts framed as Fifth Amendment involuntariness claims.²⁰⁷

197. *Id.* at 1749.

198. *People v. Williams*, 429 N.W.2d 649 (Mich. Ct. App. 1988).

199. *Withrow*, 113 S. Ct. at 1749; see also *Williams v. Withrow*, No. 90-CV-70256-DT, 1990 U.S. Dist. LEXIS 19731 (D. Mich. Oct. 29, 1990) (original habeas proceeding).

200. *Williams v. Withrow*, 944 F.2d 284 (6th Cir. 1991).

201. *Withrow*, 113 S. Ct. at 1748.

202. *Id.* at 1753.

203. Professor Yeager is blunt about it: "*Withrow* illustrates that *Stone*'s limit on review will not extend beyond the Fourth Amendment exclusionary rule." Yeager, *supra* note 6, at 685.

204. *Withrow*, 113 S. Ct. at 1753 (quoting *Stone v. Powell*, 428 U.S. 465, 486 (1976)).

205. *Id.*

206. See *supra* text accompanying notes 141-52.

207. *Withrow*, 113 S. Ct. at 1754. The majority's decision only hints at the administrative problems that would accompany converting all *Miranda* claims to voluntariness claims. Because they are heavily dependent on the facts of each case, voluntariness claims are time-consuming to resolve, no

If *Withrow* seems bland proof for the thesis that reform has failed by its own terms, however, it is because all of the real action in *Withrow* is in Justice Scalia's dissent.²⁰⁸ It was Justice Scalia, joined by Justice Thomas, who pressed the case for more innovative reform, exemplifying all of the difficulty presented by the Court's inability to agree on a doctrinal formulation for habeas and apply it in a coherent fashion. Justice Scalia took the position that *Miranda* claims should be barred from habeas corpus,²⁰⁹ but his reasoning had little to do with the reasoning of *Stone*, or with a comparison of *Miranda* claims with Fourth Amendment claims. Rather, Justice Scalia took the position that the "full and fair" reasoning of *Stone* should be extended to *all* claims on habeas corpus, except claims that bear heavily enough on judicial integrity to undermine the possibility of a full and fair opportunity.²¹⁰ Thus, absent a finding by a federal court in a given case that the state had not provided a full and fair opportunity for review, few federal claims would be heard by a federal habeas court.

It is difficult to make sense of Justice Scalia's opinion. He begins with the somewhat remarkable argument that because the statutory scope of habeas corpus is so broad, the Supreme Court, as a matter of equity, should narrow the scope severely.²¹¹ This is particularly odd coming from him. While Justice Scalia is correct that the habeas statute grants jurisdiction over the claims of all prisoners "in custody in violation of the Constitution,"²¹² which is what makes the entire *Stone* line so problematic, the statutory language seems to make *all* constitutional claims cognizable on habeas. As is well known, Justice Scalia is given to belaboring the point

doubt increasing the work of habeas courts in the long run. This is true despite Justice O'Connor's argument in dissent that the *Miranda* rule is not as "bright line" as the majority makes it seem. See *id.* at 1763-64 (O'Connor, J., dissenting). What Justice O'Connor seems to miss, as did the majority in *Brecht*, is that "search the record" or "totality of the evidence" standards inevitably consume greater judicial resources, given the need to review an entire trial record and place the evidence in context. Moreover, totality-of-evidence review is less deferential to state courts, as it inevitably involves picking over their work.

208. There were two dissenting opinions in *Withrow*. Justice O'Connor, joined by Justice Rehnquist, stayed within the analytical framework laid out by the majority, but worked out the problem in a different way. Justice O'Connor argued that *Miranda* claims were not distinguishable from Fourth Amendment claims, *id.* at 1759 (O'Connor, J., dissenting), and that on balance the value of hearing the claims on habeas was outweighed by the need to accord deference to state courts. *Id.* at 1760.

209. *Id.* at 1766 (Scalia, J., concurring in part and dissenting in part).

210. *Id.* at 1768.

211. *Id.* at 1766 (stating that "[h]abeas jurisdiction is tempered by the restraints that accompany the exercise of equitable discretion").

212. *Id.* The habeas statute provides as follows:

The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

28 U.S.C. § 2254(a) (West 1994).

that the plain words of the statute should be followed by courts.²¹³ Apparently not in this instance, however.

Where exactly this new-found equitable discretion comes from is a little hard to say from reading Justice Scalia's opinion. He points to other language in the habeas statute, stating that the court "may" grant the writ and should dispose of the matter as "law and justice require."²¹⁴ He cites and quotes Blackstone and the common law tradition.²¹⁵ But because none of this quite gets him there, he is forced, penultimately, to employ backward, inside-out reasoning: "[T]o say that prior opportunity for full and fair litigation no longer *automatically* precludes from consideration even nonjurisdictional issues is not to say that such prior opportunity is no longer a relevant equitable factor."²¹⁶ This is what is offered as support for Justice Scalia's conclusion that claims that a petitioner had a "full and fair" opportunity to litigate *were* automatically barred on habeas. So much for the pedigree of the theory: essentially there is none.²¹⁷

However, the real problem with Justice Scalia's opinion is that he is attempting to lead the Court down yet another tangent that will spell more work for courts, interfere more with interests of federalism and comity, and do less justice. As Justice Scalia acknowledged, the "full and fair" formulation will not eliminate habeas corpus review entirely,²¹⁸ sparing the states all affront and the federal courts any work. To the contrary, Justice Scalia explained (as he must) all of the post-*Stone* cases that reject the *Stone* argument by referring to the Court's continued unfortunate reasoning that there was not a full and fair opportunity in those cases.²¹⁹ Thus, in *Rose v. Mitchell*, for example, claims of grand jury discrimination remained cognizable because they go to judicial integrity and undermine the notion that there could be a full and fair opportunity to litigate.²²⁰ Under Justice Scalia's approach, each claim will require analysis under the full and fair opportunity standard.

Rather than aiding federalism, however, adoption of the full and fair standard would open a hornet's nest of problems. Every habeas petitioner will conceive an argument why there was not a full and fair opportunity in

213. For an analysis of Justice Scalia's statutory interpretation, see Nicholas S. Zeppos, *Justice Scalia's Textualism: The "New" New Legal Process*, 12 CARDOZO L. REV. 1597 (1991).

214. 113 S. Ct. at 1766 (quoting 28 U.S.C. §§ 2241(a), 2243 (1994)) (emphasis added by Scalia, J.).

215. *Id.* at 1766.

216. *Id.* at 1768.

217. Indeed, the primary pedigree for Justice Scalia's entire theory is Bator's law review article, which the opinion curiously does not cite. See Bator, *supra* note 181 (urging habeas corpus review only if there is no "full and fair" opportunity to litigate in state court). Powerful critiques of the historical accuracy of Bator's model are offered in Gary Peller, *In Defense of Federal Habeas Corpus Relitigation*, 16 HARV. C.R.-C.L. L. REV. 579 (1982) and Liebman, *supra* note 7.

218. *Withrow*, 113 S. Ct. at 1767 (Scalia, J., concurring in part and dissenting in part).

219. *Id.* at 1768.

220. 443 U.S. 545 (1979).

state court. The lawyer was not good enough. The lawyer was underpaid by the state. The public defender's office is underfunded. The judge was a racist, as demonstrated by her off-the-bench life. It is hard to see how federalism interests are advanced by answering these questions.

Both in being asked and in being answered, these questions inevitably will create much more tension between state and federal courts than the existing regime.²²¹ The existing regime is about law, and properly so. Did the state court get a question of law wrong? There is no sin in being wrong; appeals courts make this judgment daily, and part of the job of being a judge is having some other judge decide you were wrong. But full and fair questions are an entirely different matter. They strike at the fairness and integrity of state prosecutors, judges, police officials, and the state system as a whole.

Justice Scalia's position in *Withrow* is emblematic of the harm the Court does itself as it rousts around for some new theory to curtail a basis for an exercise of federal jurisdiction of which the Court does not approve. But as often as not, the solution is the primary cause of new problems. The only thing that can be said for *Withrow* is that, for now, Justice Scalia has no majority.²²² That is not true, however, of the other approaches of the Court.

D. *The Teague Morass: From Penry to Graham*

It seems that rivers of ink have been spilled and mountains of paper consumed over the Supreme Court's "reform" effort in *Teague v. Lane*,²²³ most of the commentary critical.²²⁴ Much criticism has been leveled at the disingenuousness of *Teague*'s rationale, commentators noting that *Teague* was a major attempt at habeas reform clad as something different.²²⁵ To believe the *Teague* Court, *Teague* was designed to clean up an untidy corner of retroactivity law, and to avoid the unfair "happenstance" of similarly situated petitioners being treated differently, all by applying a formula advanced by Justice Harlan long ago.²²⁶ A number of commentators have argued persuasively, however, that *Teague* was an attempt to curtail habeas

221. This argument has been advanced by both Judith Resnik and Erwin Chemerinsky. See Erwin Chemerinsky, *Thinking About Habeas Corpus*, 37 CASE W. RES. L. REV. 748, 777-78 (1987); Resnik, *supra* note 4, at 886 n.157.

222. Only Justice Thomas joined Justice Scalia's opinion. *Withrow*, 113 S. Ct. at 1765 (Scalia, J., concurring in part and dissenting in part).

223. 489 U.S. 288 (1988).

224. An early and prescient critique was provided by Joseph Hoffmann, *The Supreme Court's New Vision of Federal Habeas Corpus for State Prisoners*, 1989 SUP. CT. REV. 165; see also Marc M. Arkin, *The Prisoner's Dilemma: Life in the Lower Federal Courts After Teague v. Lane*, 69 N.C. L. REV. 371 (1991); Dow, *supra* note 175; Friedman, *Habeas and Hubris*, *supra* note 6; James S. Liebman, *More Than "Slightly Retro": The Rehnquist Court's Rout of Habeas Corpus Jurisdiction in Teague v. Lane*, 18 N.Y.U. REV. L. & SOC. CHANGE 537 (1990-91).

225. See sources cited *infra* notes 228-29.

226. See *Teague*, 489 U.S. at 300, 304, 310.

that, in a sense, had little to do with retroactivity,²²⁷ that the *Teague* solution bore little resemblance to what Justice Harlan suggested,²²⁸ and that any happenstance cleared up by *Teague* rapidly was replaced by the new and tremendous unfairness generated by *Teague*.²²⁹

Commentary also has taken a shot at the impact of *Teague*. While *Teague* purported to be just about the procedural rules governing relief in habeas corpus,²³⁰ in effect what *Teague* did was remove lower federal courts from the business of advancing criminal constitutional norms.²³¹ This served to emphasize the result-oriented nature of *Teague*, aimed not only at habeas corpus, but at the entire corpus of constitutional rights accorded criminal defendants.

But there is something different that needs to be said about *Teague*, criticism that has not been leveled at length perhaps because in its simple observation it slipped beneath the realm of theoretical academic commentary. That criticism is that *Teague* is a disaster of judicial administration and doctrinal development. The 1992 Term made clear what had long been building, that *Teague* has spawned far more confusion than it has eliminated, and that it has set courts and lawyers off spending hours and pages of arguments and briefs on an incoherent, unproductive, and ultimately unworkable task.

"The doctrine of *Teague v. Lane*, that a state prisoner seeking federal habeas relief may not receive retroactive benefit of a 'new rule' of law, has proven hard to apply."²³² So spoke Justice Souter in *Graham v. Collins*²³³ with some understatement, as he dissented in a 5-4 opinion that demonstrated just what a mess *Teague* has become. *Graham* involved a defendant sentenced to death in Texas for murder. Graham killed Bobby Grant Lambert when Lambert resisted Graham's attempt to rob him. The killing of Lambert set off a week of violent crimes committed by Graham before he was apprehended.²³⁴

227. See, e.g., Friedman, *Habeas and Hubris*, *supra* note 6, at 819-20 (arguing that *Teague* confines to the Supreme Court alone the power to consider original constitutional arguments); Meyer, *supra* note 6, at 424-26.

228. See, e.g., Dow, *supra* note 175, at 38-39; Friedman, *Habeas and Hubris*, *supra* note 6, at 811-14; Kit Kinports, *Habeas Corpus, Qualified Immunity, and Crystal Balls: Predicting the Course of Constitutional Law*, 33 ARIZ. L. REV. 115, 190 (1991).

229. See, e.g., Arkin, *supra* note 224, at 419 (stating that "it is a troubling rule indeed which permits one person to be executed and another to stay alive simply because of the date on which a petition for certiorari to the United States Supreme Court is denied.")

230. *Teague*, 489 U.S. at 310.

231. Friedman, *Habeas and Hubris*, *supra* note 6, at 823; see also Ann Althouse, *Saying What Rights Are—In and Out of Context*, 1991 WIS. L. REV. 929, 930 (describing *Teague* as "silencing the voices of the lower federal courts" in a way that "dramatically redesigned the context in which constitutional law will develop"); Hoffmann, *supra* note 224, at 190-92 (discussing how *Teague* limits ability of lower federal courts to define criminal constitutional law).

232. *Graham v. Collins*, 113 S. Ct. 892, 918 (1993) (Souter, J., dissenting) (citation omitted).

233. 113 S. Ct. 892 (1993).

234. *Id.* at 895.

In Texas at the death stage of a capital trial the jury is asked to answer three "special issues." The first asks whether the killing was deliberate, and the third asks whether the killing was unreasonable in response to any provocation.²³⁵ It is the second question that bears all the attention. The second question asks whether "there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society."²³⁶ Appropriately, this second question often is billed the "future dangerousness" inquiry.²³⁷

Understanding the problem presented by *Graham* requires an understanding of the inherent tension in the Supreme Court's capital sentencing jurisprudence, particularly as that tension plays out in Texas' sentencing scheme. In a line of cases that stretches back to *Furman v. Georgia*,²³⁸ the Court expressed its concern with the discretion capital juries have to decide who shall live and who shall die, particularly to the extent race may bear upon the capital sentencing decision.²³⁹ This concern led to the rule that capital sentencing statutes must narrow sentencer discretion.²⁴⁰ Texas sought to do so by making the death penalty applicable only when the three special issues are answered affirmatively.²⁴¹ But just as the Court expressed concern about narrowing sentencer discretion, it also voiced concern about limiting the ability of the jury to consider whatever evidence the capital defendant might offer in mitigation. Thus, in another line of cases beginning with *Lockett v. Ohio*,²⁴² the Court held that defendants have a right to introduce whatever evidence they care to on the mitigation issue.²⁴³

235. TEX. CRIM. PROC. CODE ANN. § 37.071(b) (Vernon 1981) (quoted in *Graham*, 113 S. Ct. at 896).

236. *Id.*

237. See, e.g., *Graham*, 113 S. Ct. at 897.

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

239. *Id.* at 255 (Douglas, J., concurring); see also *Boyde v. California*, 494 U.S. 370 (1990); *Franklin v. Lynaugh*, 487 U.S. 164 (1988) (plurality opinion); *Jurek v. Texas*, 428 U.S. 262 (1976); *Proffitt v. Florida*, 428 U.S. 242 (1976); *Gregg v. Georgia*, 428 U.S. 153 (1976).

240. *Furman v. Georgia*, 408 U.S. 238, 310 (1972) (Stewart, J., concurring), cited in *Graham v. Collins*, 113 S. Ct. 892, 898 (1993). Justice Thomas explained that *Furman* was "decided in an atmosphere suffused with concern about race bias in the administration of the death penalty" and that the *Furman* Court's adoption of rules narrowing sentencer discretion was based on the concern that without such rules to guide them, "an uninformed jury could be tempted to resort to irrational considerations, such as class or race animus." *Graham*, 113 S. Ct. at 904, 907 (Thomas, J., concurring); see also *Penry v. Lynaugh*, 492 U.S. 302, 353 (1989) (Scalia, J., concurring in part and dissenting in part) (explaining that *Furman* "invalidated Georgia's capital punishment scheme on the ground that, since there were no standards as to when it would be applied for a particular crime, it created too great a risk that the death penalty would be irrationally imposed").

241. See TEX. CRIM. PROC. CODE ANN. § 37.071(b) (Vernon 1981) (quoted in *Graham*, 113 S. Ct. at 896); see also *id.* at §§ 37.071(e), (g).

242. 438 U.S. 586 (1978) (plurality opinion).

243. *Id.* at 605; see also *Hitchcock v. Dugger*, 481 U.S. 393 (1987); *Skipper v. South Carolina*, 476 U.S. 1 (1986); *Eddings v. Oklahoma*, 455 U.S. 104 (1982); *Roberts v. Louisiana*, 431 U.S. 633 (1977); *Woodson v. North Carolina*, 428 U.S. 280 (1976). For a general discussion of the conflict between the *Furman* and *Lockett* principles, see Scott E. Sundby, *The Lockett Paradox: Reconciling Guided Discretion and Unguided Mitigation in Capital Sentencing*, 38 UCLA L. Rev. 1147 (1991).

As Justices Scalia and Thomas, among others, have observed, there is some tension between limiting jury discretion on the one hand, and, on the other, permitting the defendant to introduce any mitigating evidence he desires.²⁴⁴

Such doctrinal tension is the essence of Supreme Court decisionmaking. Lines of doctrine regularly develop in tension with one another, reflecting the real-life tensions that the law reflects as it tries to resolve societal disputes. And as these competing values grow into conflict with one another, courts—and particularly the Supreme Court—are called upon to reconcile the competing values if possible, and to choose the value that will prevail if reconciliation is impossible. This sort of tension has been evident in many of the *Teague* cases that have reached the Court.²⁴⁵

Texas' peculiar sentencing statute brought home the tension between the *Furman* and *Lockett* lines of precedent. Texas' statute comes closer than any other state to being a mandatory sentencing statute. While this surely fulfills the goals of *Furman*, it may be incompatible with *Lockett*. In a series of cases, the Supreme Court struck down mandatory death sentencing statutes on the ground that despite being consistent with the goal of limiting jury discretion, they fail to fully effectuate mitigating evidence.²⁴⁶ Because the first and third questions of the Texas statute almost certainly will be answered "yes" in any case in which a prosecutor decides to seek the death penalty,²⁴⁷ doctrinal conflict is centered in the second question.

244. *Johnson v. Texas*, 113 S. Ct. 2658, 2672 (1993) (Scalia, J., concurring) ("In my view the *Lockett-Edwards* principle that the sentencer must be allowed to consider 'all relevant mitigating evidence' is quite incompatible with the *Furman* principle that the sentencer's discretion must be channeled."); *Graham*, 113 S. Ct. at 904 (Thomas, J., concurring) (explaining his view that Texas' capital sentencing statute had properly resolved the tension between the contrasting requirements of *Furman* and *Lockett*); see also *id.* at 898 (majority opinion).

245. *Teague* itself illustrates the tension between finality and fairness: it was clear that *Teague* had been done an injustice when African-Americans were excluded from his jury, yet the Court chose finality over fairness. See *Teague v. Lane*, 389 U.S. 288, 309-10 (1989). *Butler v. McKellar*, 494 U.S. 407 (1990), represented a tension between the state's right to interrogate suspects and the suspect's right to remain silent unless represented by counsel. Relying on the *Teague* non-retroactivity principle, the Court was able to avoid resolving this difficult question on the merits. See *id.* at 415.

There are two general types of *Teague* cases: those in which the doctrinal tension is evident because the petitioner is seeking an extension of prior precedent (arguing that the new rule falls into one of *Teague*'s two exceptions), and those in which the petitioner is arguing that a prior precedent was not new, so he should have the benefit of it. Thus, the tension that underlies a *Teague* case has often been resolved in a prior case, and the petitioner is attempting to bring that prior resolution to bear. See *infra* text accompanying notes 266-76 (discussing the problems presented by "second-tier" *Teague* cases). In some situations, it is difficult to determine which type of *Teague* case is presented. See, e.g., *Graham*, 113 S. Ct. at 901-02 (indicating that *Graham* sought to extend the reach of *Penry v. Lynaugh*, 492 U.S. 302 (1989), but holding that *Penry* constituted a "new rule" in *Graham*'s case and was therefore barred by *Teague*).

246. See, e.g., *Roberts v. Louisiana*, 428 U.S. 325, 333-34 (1976) (plurality) (holding that Louisiana's mandatory death penalty statute violated the Eighth and Fourteenth Amendments because it did not allow for consideration of particularized mitigating factors); see also *Washington v. Louisiana*, 428 U.S. 906 (1976) (holding Louisiana's mandatory death penalty statute unconstitutional based on *Roberts*).

247. The first "special issue" asks "whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the

Thus, the issue presented in cases like *Graham* is whether the inquiry into future dangerousness is broad enough to accommodate any mitigating evidence that the defendant might wish to present.²⁴⁸

The Court has not been consistent on this issue. In *Jurek v. Texas*²⁴⁹ the Court upheld the Texas statute on its face, relying on state court decisions that appeared to give great leeway in offering evidence in mitigation.²⁵⁰ In *Franklin v. Lynaugh*²⁵¹ the Court followed *Jurek* in holding that the Texas statute provided enough leeway to permit the jury to consider evidence of a clean prison disciplinary record as mitigating evidence,²⁵² although there were murmurings of discontent with the decision of the Court.²⁵³ Then, in *Penry v. Lynaugh*,²⁵⁴ a *Teague* case, the Court held that Texas could not constitutionally permit the jury to consider evidence of mental retardation and abuse at childhood because the evidence would lead the jury to find future dangerousness, even though the evidence was offered in mitigation.²⁵⁵ In other words, defendants would want to introduce evidence as a reason not to give them the death sentence, but under Texas law the jury's consideration of the evidence was channelled solely to the question of whether the defendant could prove a future danger. The Texas scheme gave the jury no way to consider the evidence in mitigation.

In *Graham* the question presented on the merits was whether the second question permitted the jury to consider evidence of Graham's "youth" at the time the offense was committed, his unfortunate background, and his "positive character traits."²⁵⁶ Graham argued that just as in *Penry*, the first two pieces of evidence offered in mitigation might lead to a finding of potential future dangerousness by the jury.²⁵⁷ The State of Texas, somewhat ironically given the Court's resolution, did not disagree with Graham, but rather argued that if Graham was challenging the statute on its *face*, he would be requesting the benefit of a "new rule" (one that would overrule *Jurek*) on habeas and should therefore be denied relief under *Teague*.²⁵⁸ The State's argument prevailed.²⁵⁹

deceased or another would result," and the third asks "whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased." TEX. CRIM. PROC. CODE ANN. § 37.071(b) (Vernon 1981) (quoted in *Graham*, 113 S. Ct. at 896).

248. See *Graham*, 113 S. Ct. at 895.

249. 428 U.S. 262 (1976).

250. *Id.* at 272-74, 276.

251. 487 U.S. 164 (1988) (plurality opinion).

252. *Id.* at 178.

253. See *id.* at 183 (O'Connor, J., concurring) (expressing "doubts" about constitutionality of potential future applications of the Texas statute).

254. 492 U.S. 302 (1989).

255. *Id.* at 322-24, 326.

256. *Graham v. Collins*, 113 S. Ct. 892, 895 (1993).

257. See *id.* at 897.

258. See *id.* at 902-03.

259. *Id.* (holding that "[t]he ruling Graham seeks . . . would be a 'new rule' under *Teague*," and that since neither of the two exceptions applied habeas to Graham's case, relief must be denied).

Graham exemplifies all of the reasons why the *Teague* rule was bankrupt from the start. First, the rule in *Teague* is too unclear to be applied coherently. Second, application of *Teague* requires untold laboring over an issue with little doctrinal or precedential value. Third, *Teague* cases often actually resolve issues on the merits, but in a way that veils the issue from proper argument or briefing. Fourth, *Teague* leads to gross unfairness between similarly situated prisoners. Finally, *Teague* cannot do much to advance the values of federalism when it is too incoherent to give notice as to what constitutes a new rule.

With regard to *Teague*'s incoherence, Justice Souter's statement that *Teague* "has proven hard to apply"²⁶⁰ was an understatement. From the beginning, the Court has not been able to agree on how to define a "new rule." As a result, every time the Court considers the issue, new definitions crop up. Then, at the outset of each *Teague* opinion the Court rattles off the definitions,²⁶¹ as though they have some real, consistent, intelligible content. While perhaps not the best example of this, *Graham* was no exception:

A holding constitutes a "new rule" within the meaning of *Teague* if it "breaks new ground," "imposes a new obligation on the States or the Federal Government," or was not "*dictated* by precedent existing at the time the defendant's conviction became final." While there can be no dispute that a decision announces a new rule if it expressly overrules a prior decision, "it is more difficult . . . to determine whether we announce a new rule when a decision extends the reasoning of our prior cases." Because the leading purpose of federal habeas review is to "ensur[e] that state courts conduct criminal proceedings in accordance with the Constitution as interpreted at the time of th[ose] proceedings," we have held that "[t]he 'new rule' principle . . . validates reasonable, good-faith interpretations of existing precedents made by state courts." This principle adheres even if those good-faith interpretations "are shown to be contrary to later decisions."²⁶²

Because there are few cases that "expressly overrule a prior decision," one is necessarily left in the swamp of figuring out what all these other words mean.²⁶³ But some of them, such as "breaks new ground," are so vague as to provide virtually no meaningful guidance. And others seem to be at war with one another. It appears obvious, for example, that there is a

260. *Id.* at 918 (Souter, J., dissenting).

261. *Teague v. Lane*, 489 U.S. 288, 301 (1989).

262. *Graham*, 113 S. Ct. at 897-98. (citations omitted) (alterations and ellipses in original) (quoting *Teague*, 489 U.S. at 301; *Saffie v. Parks*, 494 U.S. 484, 488 (1990); and *Butler v. McKellar*, 494 U.S. 407, 414 (1990), respectively).

263. See Arkin, *supra* note 224, at 399 ("It may be argued that these definitions [of what constitutes a new rule] are unusually oblique In addition, it could be suggested that they do not appear to be mutually consistent.") (footnotes omitted).

difference between a decision that "imposes a new obligation on the States" and a rule that "validates reasonable, good-faith interpretations of existing precedents by state courts." The first formulation says that states must follow existing rules, but need not follow new ones. The second says that state "interpretation" of an existing rule, even if incorrect, is valid if made in good faith. The latter formulation necessarily gives states more leeway than the former. The resulting confusion has led commentators to attempt to map out when a rule is new under *Teague*,²⁶⁴ and has engendered a spate of 5-4 decisions from a Court that cannot seem to agree on when a rule is new.²⁶⁵

Worse yet, *Teague* maladies have a multiplier effect, as *Graham* demonstrates. In the sort of case envisioned by *Teague*, a prisoner would put forward a rule that governed his case, and courts would have to decide at the threshold if the rule followed or departed from existing precedent.²⁶⁶ That question is difficult enough. But the *Teague* Court seems not to have anticipated that *Teague* decisions would create second-tier questions of their own. Thus, in *Graham* the petitioner did not just argue that the rule he wanted followed from prior precedent such as *Lockett*. He also argued that his case fell within *Penry*, which itself had resolved the *Teague* issue by holding that *Penry* was *not* requesting a new rule.²⁶⁷

The result in *Graham* demonstrates how embarrassing these multiplier cases can be. The *Graham* majority held that the claim was barred on habeas because Graham was requesting a new rule.²⁶⁸ But this result is incoherent: the four-member dissent pointed out that *Penry* had advanced the very same claim, and the Court had held *Penry* was not requesting a new rule.²⁶⁹ The rule *Penry* requested was *not* a new rule, as even the majority was forced to concede, because it followed from *Lockett* and *Eddings*, the very cases that supported Graham's argument.²⁷⁰ Thus, if *Penry* did not request a new rule, and Graham's case followed squarely upon *Penry*, it is difficult to understand how Graham had requested a new rule.

This sort of confusion leads one to ask whether *Teague* forces the entire judicial system into an incoherent inquiry that has no precedential or doctrinal value. *Teague* requires lawyers and judges to churn out countless pages arguing over something that has nothing to do with the merits, seems to have no precedential value from case to case, and is, as best as all the

264. See, e.g., Meyer, *supra* note 6, at 455-57; Dubber, *supra* note 6, at 16-18.

265. See e.g., *Graham v. Collins*, 113 S. Ct. 892 (1993); *Sawyer v. Smith*, 497 U.S. 227 (1990); *Saffle*, 494 U.S. at 484; *Butler*, 494 U.S. at 407.

266. See *Teague*, 489 U.S. at 300-01.

267. See *Graham*, 113 S.Ct. at 901 (citing *Penry v. Lynaugh*, 492 U.S. 302, 318-19 (1989)).

268. *Id.* at 903.

269. *Id.* at 920 (Souter, J., dissenting).

270. *Id.* at 901 (citing *Saffle v. Parks*, 494 U.S. 484, 491 (1990)).

evidence shows, nearly impenetrable anyway.²⁷¹ *Teague*, in this way, is noticeably different from the Court's other procedural thresholds in habeas cases. There are the occasional disputes about whether a claim is exhausted,²⁷² whether it has been defaulted,²⁷³ and whether it is barred by *res judicata*.²⁷⁴ Such disputes are inevitable. But none of these other threshold inquiries generates the confusion engendered by *Teague*. The other issues are, in many cases, subject to relatively easy and clear resolution.²⁷⁵ The *Teague* issue has proven just the opposite.²⁷⁶

But there is a less benign view of *Teague* that is perhaps more accurate, which is that the battles about whether something is a new rule really mask decisions on the merits.²⁷⁷ These "new rule" decisions supposedly having nothing to do with the merits are being treated as though they do. This is evident in *Graham*. Five justices voted to hold that *Graham* was requesting a new rule, one of whom, Justice Thomas, wrote separately to maintain that *Penry* had been wrongly decided.²⁷⁸ Then, just five months later, in *Johnson v. Texas*,²⁷⁹ the Court reached the merits question ostensibly avoided in *Graham*. Not surprisingly, the petitioner's argument failed, by the same five-to-four vote that decided *Graham*.²⁸⁰ When the *Johnson* Court faced the question on the merits, one of the grounds for ruling against *Johnson* was *stare decisis*.²⁸¹ The case that had this precedential effect? *Graham*.²⁸² This plainly indicates that the Court cannot keep the *Teague* inquiry separate from the merits.

271. *Teague* has been criticized because it is "difficult to apply and will lead to inconsistent results." *Id.* at 667; see also Arkin, *supra* note 224, at 379 (discussing difficulties lower courts will face in applying *Teague* due to its imprecision).

272. See, e.g., *Rose v. Lundy*, 455 U.S. 509, 522 (1982) (holding that district courts "must dismiss habeas petitions containing both unexhausted and exhausted claims.").

273. See, e.g., *Murray v. Carrier*, 477 U.S. 478 (1986) (denying petitioner's request for habeas review for failure to establish cause for procedural default of his discovery claim).

274. See, e.g., *McCleskey v. Zant*, 499 U.S. 467, 486-87 (1991) (interpreting 28 U.S.C. § 2244(b) to bar successive habeas petitions as *res judicata*, unless petitioner alleges a new ground for relief and demonstrates he did not deliberately withhold a claim or "otherwise abus[e] the writ.") (alteration in original) (quoting *Smith v. Yeager*, 393 U.S. 122, 125 (1968)).

275. But see generally Yackle, *supra* note 7.

276. See *supra* notes 263-270 and accompanying text.

277. See Ellen E. Boshkoff, *Resolving Retroactivity After Teague v. Lane*, 65 IND. L.J. 651, 667 (1990) (discussing how judges can manipulate the rule in *Teague* to avoid harsh results).

278. See *Graham v. Collins*, 113 S. Ct. 892, 903 (1993) (Thomas, J., concurring).

279. 113 S. Ct. 2658 (1993).

280. Chief Justice Rehnquist and Justices Kennedy, White, Scalia, and Thomas agreed that the jury instruction on "future dangerousness" required by the Texas capital sentencing statute allowed adequate consideration of the petitioner's mitigating evidence (his youth). *Id.* at 2669. Justices O'Connor, Blackmun, Stevens, and Souter dissented. See *id.* at 2672-80.

281. See *id.* at 2671.

282. See *id.* at 2669 (citing *Graham* as support for its holding that the second special issue in Texas' capital sentencing statute—future dangerousness—allowed the jury to give constitutionally sufficient consideration to Johnson's mitigating evidence, i.e., his youth); see also Meyer, *supra* note 6, at 459 (arguing that *Johnson* exemplifies how "*Teague's* distorted view of precedent has infected substantive constitutional law.").

Ironically, *Teague* exacerbates the very sort of injustice it was supposed to correct. This is evidenced by the results in *Graham*. The *Teague* rule was supposedly necessary because the Court's prior retroactivity doctrine led similarly situated prisoners to be treated differently.²⁸³ That is, if in Case A the Supreme Court held for the petitioner but denied retroactive effect, prisoner A got the benefit of the new rule, but prisoners in other pending cases did not.²⁸⁴ But this same unfairness, which *Teague* is supposed to prevent, occurred in *Graham*. *Graham*—whose case seemed indistinguishable from *Penry*'s—remained sentenced to death, while *Penry* was spared. What accounts for this difference? It appears that the differential treatment resulted primarily from the replacement of Justice Powell with Justice Thomas, who does not agree with *Penry*.²⁸⁵

The unfairness of post-*Teague* adjudication is even more apparent in another case decided during the 1992 Term, *Gilmore v. Taylor*.²⁸⁶ The Court in *Taylor* denied the petitioner relief on the ground that the rule announced in *Falconer v. Lane*,²⁸⁷ which might otherwise have overturned the petitioner's conviction, was a new rule which could not be a basis for collateral relief under the *Teague* doctrine.²⁸⁸ In *Taylor*, the petitioner sought release from confinement by arguing that his jury instructions violated due process.²⁸⁹ *Falconer* was a previous case precisely on point with *Taylor*'s, in which the petitioner had prevailed with this argument in the Seventh Circuit and the Supreme Court did not review the decision.²⁹⁰ *Falconer* gets the writ granted, *Taylor* does not. Why? Because certiorari was granted in one case but not the other. Worse yet, the Supreme Court denied *Taylor*'s habeas petition on the grounds that the Seventh Circuit had decided the *Teague* issue incorrectly in *Falconer*.²⁹¹ Any scheme so inco-

283. See *Teague v. Lane*, 489 U.S. 288, 303 (1989). The retroactivity standard employed prior to *Teague*—the *Linkletter* standard—had received criticism from commentators because it “ha[d] not led to consistent results,” and “led to the disparate treatment of defendants on direct review.” *Id.* at 302-03.

284. *Id.* at 302-03.

285. In his concurring opinion in *Graham v. Collins*, Justice Thomas flatly stated, “I believe *Penry* was wrongly decided.” *Graham*, 113 S. Ct. 892, 903 (1993). Justice Thomas’ objection was that *Penry* interpreted the *Lockett-Eddings* line of cases too broadly, prohibiting states from “channell[ing] or focus[ing] the jury’s discretion” according to “any rational standards.” *Id.* at 911. In allowing juries to consider a broad range of mitigating evidence, Justice Thomas believes that *Penry* “negate[s] the central tenet of *Furman*”: that sentencers not be given “unguided discretion in imposing the death penalty.” *Id.* at 904, 911.

286. 113 S. Ct. 2112 (1993).

287. 905 F.2d 1129 (7th Cir. 1990).

288. *Taylor*, 113 S. Ct. at 2116.

289. *Id.*

290. See *id.* *Falconer* had prevailed not only on the merits, but on the *Teague* inquiry as well: the Seventh Circuit found that *Falconer*'s claim fell within the principles established by *Cupp v. Naughten*, 414 U.S. 141 (1973) (holding that erroneous jury instruction did not so infect the entire trial that reversal was required). *Falconer*, 905 F.2d 1129, 1135 (7th Cir. 1990).

291. *Taylor*, 113 S. Ct. at 2119. By the time *Taylor v. Gilmore* reached the Seventh Circuit, that court had decided it had been wrong about exactly which prior precedent mandated the decision in *Falconer*, but concluded that it had been correctly decided nonetheless. So *Taylor* prevailed. See *id.* at

herent as to require Supreme Court resolution is unavoidably bound to produce haphazard results.

So *Teague* does not aid the cause of fairness; it undermines the credibility of courts; and it imposes an enormous extra workload on litigants and courts.²⁹² Perhaps, nonetheless, it serves some good. After all, surely the twin values of federalism and finality are advanced by all this malarkey.²⁹³

Whether finality and federalism *are* advanced by *Teague* is, however, a matter of dispute. Graham's case is perhaps instructive here as well. It has been evident for some time that the agenda being advanced by at least some Justices is to remove impediments to execution—finality for sure—and thereby address the supposed friction between the state and federal systems.²⁹⁴ There is serious doubt whether the Court is achieving this goal, however. The Department of Justice's statistics suggest that as habeas reform proceeds, the time between sentencing and execution is actually growing, and at a fairly dramatic rate. The average time between sentencing and execution for prisoners executed between 1977 and 1983 was 51 months, for prisoners executed in 1984 it was 74 months, and for prisoners executed in 1993 it was 113 months.²⁹⁵

But assuming reform is speeding up executions,²⁹⁶ habeas reform can still backfire when it all becomes unseemly, as perhaps occurred in Graham's case. At this writing Graham is still alive. Graham's case has been spread over countless newspapers, to the point where the Texas courts

2116. The Seventh Circuit stated that *Cupp* was "too general to have compelled *Falconer* within the meaning of *Teague*," *Taylor v. Gilmore*, 954 F.2d 441, 452 (7th Cir. 1992), but held that *Boyde v. California*, 494 U.S. 370 (1990) and *Connecticut v. Johnson*, 460 U.S. 73 (1983) (plurality opinion), were "specific enough to have dictated" its decision in *Falconer*. *Taylor*, 945 F.2d at 452-53. Unfortunately for Taylor, the Supreme Court took his case—surely an event of happenstance in any case—and held that the Seventh Circuit had decided the *Teague* issue incorrectly in *Falconer*. *Taylor*, 113 S. Ct. at 2119.

292. The Seventh Circuit's decision in *Taylor v. Gilmore*, 954 F.2d 441 (7th Cir. 1992), is a telling example. Of the fourteen pages in the Seventh Circuit opinion, fully nine were consumed in deciding the *Teague* "new rule" question. See *id.* at 445-53.

293. See *Teague*, 489 U.S. at 309-10 (explaining that "new rules" should not be retroactively applied on collateral review because of the need for finality in criminal proceedings and because of the need to preserve the authority of state courts in a federal system).

294. See Friedman, *Habeas and Hubris*, *supra* note 6, at 822 (arguing that "[t]he Rehnquist Court has not been shy to express its concern that federal habeas" is "slowing the process toward imposing the death sentence, which is the state's ultimate goal"); see also *Herrera v. Collins*, 113 S. Ct. 853, 884 (1993) (Blackmun, J., dissenting) (referring to the "Court's obvious eagerness to do away with any restriction on the states' power to execute whomever and however they please.").

295. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, *Capital Punishment 1993* 11. Note that *Teague* was decided in 1989. It is difficult to interpret this data with any certainty, because the statistics do not explain how or why prisoners are chosen for execution at a particular time. The data could simply suggest that states have chosen to execute prisoners who have arrived more recently on death row earlier than prisoners who have been on death row a longer time. But the statistics do show that across the aggregate group of people being executed, the time between sentence and execution is growing.

296. There are more executions now than there were ten years ago. See *infra* note 330.

have been embarrassed into doing something about the case.²⁹⁷ One might argue that this is what federalism is all about: state courts cleaning up their own act. On the other hand, one might also argue that there are better, more seemly, ways to deal with these cases—forthrightly and on the merits.

The simple fact of the matter is that Texas' capital sentencing scheme appears at war with much of the Court's precedent.²⁹⁸ Maybe the Texas scheme should be overturned, and maybe the Court's precedent should be overturned. *Teague* ostensibly aids finality and federalism by avoiding merits inquiries in many cases. But the conflicts between state practices and Supreme Court precedents are inevitable, and ultimately must be resolved. One might argue plausibly that the causes of finality and federalism are not advanced by a "threshold" doctrine, a procedural rule that is so hard to follow that the states cannot have any clear sense of their obligations.²⁹⁹ Perhaps the better solution would just be to address the merits directly.

III

ASSESSING THE COURT'S REFORM EFFORTS

The 1992 Term came to an end with the Supreme Court having once again significantly modified the rules governing habeas corpus jurisdiction. Quite evidently, the ostensible goal is to promote the reform agenda. Reform has been under way for almost twenty years, and the last seven years have seen habeas doctrine in almost constant flux. The question that presents itself is whether this reform effort, taken as a whole, is succeeding. Many commentators, with their own views as to result, suggest that the answer is no. The following analysis asks whether, taking as a given goals stated by the Supreme Court, the reform effort has met its mark.

A. Finality

Probably at the top of the Supreme Court's own list of priorities is finality.³⁰⁰ The importance of finality is evident in part from the tremendous amount of lip service paid this consideration by the Court.³⁰¹ It is, in

297. For a complete chronicle of Graham's later hearings in state and federal court, see *infra* note 356. The many newspaper articles on Graham's death-penalty challenge include *Take No Chances, Gary Graham's 'New Evidence' Should Be Heard*, HOUSTON POST, Aug. 18, 1993, at A20 (editorializing that Graham should be given a hearing on his new evidence of innocence, even though the chance he was innocent was "slight"); *Reining in Our Savage Instincts*, HOUSTON POST, Aug. 17, 1993, at A17; Mary Lenz, *Indefinite Death Stay for Graham Ruling Calls for Decision on New Evidence*, HOUSTON POST, Aug. 17, 1993, at A1.

298. See *supra* notes 246-255 and accompanying text.

299. See *supra* notes 259-278 and accompanying text.

300. See Resnik, *supra* note 4, at 939 ("[T]he principle that there must be some end to litigation, a principle relegated to the back seat in 1963, is now up front.") (internal quotation marks, footnote, and alteration omitted).

301. See, e.g., *Brecht v. Abrahamson*, 113 S. Ct. 1710, 1720 (1993) (emphasizing the "State's interest in the finality of convictions that have survived direct review within the state court system");

the Court's view, a linchpin to the other policies that habeas reform is designed to further. The Court believes finality is good for its own sake, for—as the Court often says—matters must eventually come to an end.³⁰² But finality is also important because the Court sees the continuation of criminal proceedings as increasing tensions between the state and federal systems.³⁰³ Moreover, the longer matters drag on, the more precious judicial resources are frittered away.³⁰⁴ In this manner, other habeas values are subsumed into finality.

But the Supreme Court's adoption of finality as the primary goal of reform is equally evident from what the Court does. The Court has been trying to corral habeas claims, cutting them off at every juncture. This effort was obvious as long ago as *Stone v. Powell*,³⁰⁵ which flat out eliminated habeas review for Fourth Amendment claims, and which set off the unsuccessful attempt to further curtail review of substantive claims. Another obvious area in which the Court has attempted to achieve finality is the long campaign—from *Wainwright v. Sykes*³⁰⁶ to *Murray v. Carrier*³⁰⁷ and beyond—to limit petitions based upon attorney error. If more evidence is needed, the tightening of the standard of review in *Brecht* provides it. These cases point to a Court determined to limit habeas proceedings. Try as it might, however, the Court's efforts have at best had a limited impact, and at worst have backfired completely.

The crowning failure of the Supreme Court's attempt to impose finality on habeas petitioners was its decision in *Herrera*.³⁰⁸ *Herrera* is

Herrera v. Collins, 113 S. Ct. 853, 874 (1993) (O'Connor, J., concurring) ("At some point in time, the State's interest in finality must outweigh the prisoner's interest in yet another round of litigation."); *Teague v. Lane*, 489 U.S. 288, 309 (1988) (stating that finality is "essential to the operation of our criminal justice system").

302. See *Wainwright v. Sykes*, 433 U.S. 72, 90 (1977) (emphasizing the need for rules which make "the state trial on the merits the 'main event' . . . rather than a 'tryout on the road' for what will later be the determinative federal habeas hearing").

303. *Brecht*, 113 S. Ct. at 1720 ("Federal intrusions into state criminal trials frustrate both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights.") (quoting *Engle v. Isaac*, 456 U.S. 107, 128 (1982)).

304. *Id.* at 1721 ("Retrying defendants whose convictions are set aside also imposes significant 'social costs,' including the expenditure of additional time and resources for all the parties involved . . .").

305. 428 U.S. 465 (1976).

306. 433 U.S. 72 (1977).

307. 477 U.S. 478 (1986).

308. Since January 25, 1993, the day *Herrera* was decided, over two dozen habeas petitioners have brought "actual innocence" claims in the federal courts. See, e.g., *Spencer v. Murray*, 18 F.3d 229, 236 (4th Cir. 1994) (rejecting habeas petitioner's claim of actual innocence, on the ground that *Herrera* held that such a claim was not itself an independent constitutional claim, "but instead a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim heard on the merits") (quoting *Herrera v. Collins*, 113 S. Ct. 853, 862 (1993)); *Schlup v. Delo*, 11 F.3d 738, 743 (8th Cir. 1993) (analyzing habeas petitioner's "actual innocence" claim as sufficient, by itself, to state an independent constitutional claim, on the ground that *Herrera* established "that in a capital case a truly persuasive demonstration of 'actual innocence' made after trial would render the execution of a defendant unconstitutional, and warrant federal habeas relief if there were no state avenue open to

emblematic of the Court's inability to come to grips with human nature, both that of habeas petitioners and of the judges who entertain habeas petitions. Leaving the door open for habeas claims based solely on actual innocence cannot be understood to advance finality.

The current Supreme Court—for all its zeal to reform habeas by limiting it as much as possible—cannot help itself from creating exceptions. If “reform” has shown anything, it is that every rule seems to spawn at least two, if not more, exceptions. The *Teague* rule has two exceptions.³⁰⁹ The cause and prejudice/successive petition/abuse of the writ rule has three,³¹⁰ and exhaustion has one.³¹¹ These exceptions are the inevitable result of a Court embarked upon a reform effort in which it is none too secure. The Court should, and does, worry that in curtailing habeas it is closing a door to what might be a valid claim (however “valid” is defined in each Justice’s mind).³¹² So, for every door it shuts, the Court creates several escapes. In

process such a claim’”) (quoting *Herrera*, 113 S. Ct. at 869), *cert. granted*, 114 S. Ct. 1368 (1994); *Bennett v. Borg*, 15 F.3d 1083 (9th Cir. 1993) (unpublished memorandum opinion at 1993 U.S. App. LEXIS 33401) (holding that even if *Herrera* allows a habeas petitioner to make a free-standing claim of actual innocence based on newly discovered evidence, the petitioner should not be granted relief because the new evidence was not sufficiently convincing), *cert. denied*, 114 S. Ct. 2106 (1994).

The issue of “actual innocence” has even reached the Supreme Court again since *Herrera*. In *Blair v. Delo*, 999 F.2d 1219 (8th Cir. 1993), the Court of Appeals temporarily stayed the execution of Walter Blair to determine whether his claim of actual innocence, based on newly discovered evidence, “survive[d] *Herrera*,” or whether it was “frivolous and entirely without merit.” *Id.* at 1220 (internal quotation marks omitted). The Supreme Court voided the stay. 113 S. Ct. 2922 (1993). In support of its decision, the majority noted that both the facts and claims raised by Blair were virtually identical to those of *Herrera*. *Id.* at 2923. In dissent, Justice Blackmun, joined by Justice Stevens, emphasized that *Herrera* had left room for habeas relief to be granted in the case of a truly persuasive showing of actual innocence, and thus that Blair’s newly discovered evidence of actual innocence should not be “dismissed summarily.” *Id.* at 2924.

309. A “new rule” will still be applied retroactively on collateral review if it places “certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe,” or if it is a “watershed rule[] of criminal procedure,” one which “requires the observance of those procedures that . . . are implicit in the concept of ordered liberty.” *Teague*, 489 U.S. at 311 (internal quotation and citations omitted).

310. One exception is where interference by state officials made compliance impracticable. *See Amadeo v. Zant*, 486 U.S. 214, 222 (1988). A second is for ineffective assistance of counsel. *See Murray v. Carrier*, 477 U.S. 478, 488 (1986). The third is “novelty”—the claim that petitioner’s counsel did not raise a constitutional issue because it was “reasonably unknown to him.” *See Reed v. Ross*, 468 U.S. 1, 14-15 (1984). There is also a fourth exception if you count “actual innocence.” *See Murray*, 477 U.S. at 495-96.

311. The only exception to the exhaustion requirement is futility, which exists if “there is no opportunity to obtain redress in state court or if the corrective process is so clearly deficient as to render futile any effort to obtain relief.” *Duckworth v. Serrano*, 454 U.S. 1, 3 (1981) (*per curiam*); *see also* 28 U.S.C. § 2254(h) (1994).

312. For example, in *Murray v. Carrier*, the Court stated:

“[I]n appropriate cases” the principles of comity and finality that inform the concepts of cause and prejudice “must yield to the imperative of correcting a fundamentally unjust incarceration.” We remain confident that, for the most part, “victims of a fundamental miscarriage of justice will meet the cause-and-prejudice standard.” But we do not pretend that this will always be true.

Herrera, the Court's penchant for creating exceptions came back to haunt it.³¹³

Moreover, given the human nature of habeas petitioners, *Herrera* is one exception the Court may come to regret. For every door that the Court opens a crack, there are countless petitioners, ready to waltz on through.³¹⁴ As Justice Scalia observed, the lower federal courts will be overcome with *Herrera* claims.³¹⁵ The aftermath of *Herrera* supports this claim.³¹⁶ Unless *Herrera* can be limited to the death penalty context—and it is unclear why it can or should be³¹⁷—finality will hardly be the byproduct of the Court's efforts. And even limited to the death penalty, *Herrera* still stands as a significant obstacle to finality in the one area that, more than any other, gave rise to calls for reform.

But the crack in the walls of finality cannot be attributed solely to *Herrera*; finality is threatened under any regime in which the law is changing constantly. And yet, perhaps no word better describes the reform effort than "flux." This is the irony of *Teague*. The insight of *Teague* that makes the most sense—never mind the Court's decision—is that in a system in which constitutional law is changing constantly, the habeas petitioners will flock to the courts with petitions following every significant change in the law.³¹⁸ So the Court tried to impose finality by saying that petitioners simply could not take advantage of the new rules (unless Exceptions One and Two apply, of course).

But as the *Teague* cases of the 1992 Term demonstrated, the Supreme Court's reform decisions tend to substitute unending litigation on the merits with unending litigation on procedural issues. *Graham* clearly demonstrates that the distinctions required by *Teague* are too fine to be coherent.³¹⁹ The arguments under *Teague* are the stuff of which Talmudic scholarship is made. Can one seriously doubt that lower courts are now spending countless hours resolving *Teague* new rule questions, and *Teague* exception questions, not to mention the already existing inquiries regarding

477 U.S. 478, (1986) (alteration in original) (citations omitted) (quoting *Engle v. Isaac*, 456 U.S. 107, 135 (1982)). Based on its concern about the effects of the cause-and-prejudice standard, the Court went on to establish an actual innocence exception to it. *Id.*

313. See *supra* notes 139-152 and accompanying text.

314. See Marcia Coyle, *Innocence vs. Executions*, NAT'L L. J., Dec. 27, 1993, at 1 (discussing efforts of death row inmates to prove innocence using scientific evidence).

315. *Herrera v. Collins*, 113 S. Ct. 853, 875 (1993) (Scalia, J., concurring).

316. See *supra* note 309.

317. In *Herrera* itself, the Court emphasized its refusal "to hold that the fact that a death sentence has been imposed requires a different standard of review on federal habeas corpus." 113 S. Ct. at 863 (quoting *Murray v. Giarratano*, 492 U.S. 1, 9 (1989) (plurality opinion)).

318. *Teague v. Lane*, 489 U.S. 288, 309 (1989) ("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.").

319. For example, the Court in *Graham v. Collins*, 113 S. Ct. 892, 895 (1993), split 5-4 on the issue whether the petitioner was seeking relief under a "new rule." See generally *supra* notes 262-267 and accompanying text.

exhaustion and procedural default?³²⁰ Litigation is not ended by generating new things to litigate about.

The 1992 Term epitomized the Court's habit of making procedural decisions that will lead to more litigation. On the mild side, the *Withrow*³²¹ decision failed to put an end to the notion that there might be some habeas claims that are barred by the magical "full and fair" test,³²² no doubt leading prosecutors to continue to argue for application of that test. But *Withrow* is nothing compared to the mess that *Brecht* will spawn. Dread to think of the time to be spent searching state court records to ascertain whether constitutional error had a "substantial impact" on a jury's deliberations.³²³ Nor does the 1992 Term stand alone. The entire history of reform shows that each new twist creates still others. *Wainwright v. Sykes* begat the "cause and prejudice" standard, which, when litigated to what might have been a conclusion, begat *Murray v. Carrier* and the "actual innocence" standard, which, of course, begat *Herrera*.

What the Court does not seem to understand is that for the majority of prisoners who choose to litigate habeas petitions, non-finality in procedural issues is just the same as non-finality with regard to merits issues. Few prisoners are getting out of jail anyway.³²⁴ But if they are inclined to litigate, they are going to keep trying, hoping to land on "Chance" and get the "Get Out Of Jail Free" card. Although the Court might have barred the door to litigation of many merits claims, the procedural tangle it has created will spawn habeas litigations reminiscent of that described in Charles Dickens' *Bleak House*.

Indeed, the only prisoners for whom reform seems to have spelled more finality are those on death row. When the prisoner serving a term of years gets bounced out of court on a successive petition, that petitioner will spend the next months or years trying to find new evidence or a new argument. But not so the death row inmate: the death row inmate's processing time is speeded up under special rules put in place by the Court, the "death

320. See *infra* text accompanying notes 374-380.

321. 113 S. Ct. 1745 (1993).

322. Indeed, since *Withrow* was decided, at least one habeas case has included a claim by the prosecution that the "full and fair" test of *Stone v. Powell*, 428 U.S. 465 (1976), should be applied outside the Fourth Amendment context. See *United States ex. rel. Josephson v. Gilmore* (No. 93-C-6084) (N.D. Ill. Feb. 10, 1994) (unpublished memorandum opinion at 1994 U.S. Dist. LEXIS 1793) (explaining prosecution's claim that *Stone* barred habeas review of a *Miranda* violation if the petitioner was provided a "full and fair" hearing of that claim in state court).

323. Indeed, lower federal courts are already re-trying the facts on habeas in the wake of *Brecht*. For example, the court in *Lowery v. Collins*, 996 F.2d 770 (5th Cir. 1993) explained that, "[a]s applied by the Court in *Brecht*, *Kotteakos* commands that, in determining whether a constitutional error is harmless, a de novo review of the entire trial record must be performed by the reviewing court." *Id.* at 773. The Court went on to discuss the results of its "painstaking re-review" of the evidence presented at Lowery's trial. *Id.*

324. See *infra* note 343.

is different" rules of *Barefoot v. Estelle*.³²⁵ Under the death is different rules, most evidently imposed in the Court's final order in *Vasquez v. Harris*,³²⁶ the theory at least is that more death row inmates are going to die sooner.

There are several things that need to be said about the greater finality accorded death sentences. First, this might have been what the entire enterprise was all about.³²⁷ If so, there is a certain modicum of success that the Court can claim. But second, it is fair to ask exactly what was achieved and at what cost. I do not have in mind a defendant-biased analysis that the Court might eschew, but instead the kind of hard-nosed cost and benefit analysis that the Court seems to favor.

One might question the extent to which the new doctrine really resulted in earlier executions, and whether doctrinal change did not slow some cases down. It is true there have been more than 176 executions since 1985, but it is unclear how many of these inmates were not going to die pretty soon anyway.³²⁸ Meanwhile, death cases were tied up for years litigating new procedural issues such as the new rule question,³²⁹ so long in fact that one suspects even if relief had been granted on the merits and new

325. 463 U.S. 880 (1983). In *Barefoot*, the Court indicated that where a petitioner who was sentenced to death sought habeas corpus review, a court of appeals "may adopt expedited procedures in resolving the merits of habeas appeals," including a policy whereby a court decides both the merits of a habeas appeal and a motion for a stay of execution in a single opinion. *Id.* at 894.

326. 112 S. Ct. 1713 (1992) (vacating stay of execution granted by the Ninth Circuit Court of Appeals one day earlier, and forbidding entry of any further stays). Harris was executed soon thereafter, without any further input by the lower federal courts. See Stephen Reinhardt, *The Supreme Court, the Death Penalty, and the Harris Case*, 102 YALE L.J. 205, 213 (1992); Fried, *supra* note 6, at 158-66.

327. As Justice White explained in *Barefoot*:

It is a matter of public record that an increasing number of death-sentenced petitioners are entering the appellate stages of the federal habeas process. The fair and efficient consideration of these appeals requires proper procedures for the handling of applications for stays of executions and demands procedures that allow a decision on the merits of an appeal accompanying the denial of a stay.

463 U.S. at 892. Justice O'Connor suggested a similar rationale for the Court's decision in *Teague*: "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." *Teague v. Lane*, 489 U.S. 288, 309 (1989). Several Justices have publicly noted their frustration with the lack of finality in habeas proceedings. See Friedman, *Habeas and Hubris*, *supra* note 6, at 822 n.140 (highlighting several speeches by Supreme Court Justices on this issue).

328. BUREAU OF JUSTICE STATISTICS, *supra* note 295, at 11. The statistics cited go through 1993, the last year for which complete information was available. Note that since 1976, the year the Supreme Court ruled the death penalty was constitutional, a total of 226 persons had been executed as of 1993. *Id.* Only 50 of these executions took place in the years 1976-1985. *Id.* Thus, the 176 persons executed during the period 1986-1993 represents a figure more than triple the number executed during the years 1976-1985.

329. Graham, for example, initially petitioned for federal habeas relief in 1988, and the Supreme Court's final decision as to whether the relief he sought would require the creation of a "new rule" under *Teague* was not announced until 1993. *Graham v. Collins*, 113 S. Ct. 892, 896-97 (1993).

sentencings held, the inmates still might have been executed faster.³³⁰ Studying what evidence there is, it is far from certain that the Court's reform efforts did not contribute to delay.³³¹

Moreover, although it is possible that the Court had a hand in speeding things up, on some notable occasions the speed came more from doctrinal *departure* in death cases than from consistent application of doctrine. *Barefoot*, and the special rules that case created to handle death cases, is but one example.³³² *Vasquez v. Harris* is another.³³³ It is hard to list these cases as accomplishments of habeas reform, rather than as aberrations from it.

In addition, it is likely that speeding up death cases came at the cost of slowing many non-death habeas cases. As indicated above, *Teague* coupled with *Barefoot* may bring an execution about faster, though the evidence so far suggests that this is uncertain.³³⁴ But, in non-death cases, *Teague* standing alone may drag out a habeas petition interminably, even when the merits claim could have been adjudicated more quickly. Thus, all the hurry in the death cases might have actually injured finality in all the others, which in fact, are the vast majority of cases.³³⁵

Despite the high priority the Court has accorded the value of finality, there still is not much good to be said about the Court's efforts to achieve it. Procedural litigation may simply have replaced substantive litigation. The flux of doctrine has undoubtedly clogged habeas dockets, slowing down litigation. It is also questionable, outside of death cases, whether there is more finality. Furthermore, it is questionable whether there is greater finality in death cases, and if so, whether it is the result of generally applicable doctrine. And one can only speculate about what *Herrera* will do for finality in the long run.

330. The "average elapsed time from sentence to execution" has increased from 51 months, for persons executed during the years 1977-83, to 116 months, for persons executed in 1991. BUREAU OF JUSTICE STATISTICS, *supra* note 295, at 13 (1991).

331. *Id.*

332. See *Barefoot v. Estelle*, 463 U.S. 880, 892-96 (1983).

333. 112 S. Ct. 1713 (1992); see *supra* note 326.

334. See *supra* notes 327-328 and accompanying text.

335. The most recent nationwide empirical study of habeas corpus cases appears to have been done in 1984, and it did not distinguish between the number of petitions which dealt with the death penalty and those which dealt with other punishments. See BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, FEDERAL REVIEW OF STATE PRISONER PETITIONS: HABEAS CORPUS (1984). A search of the WESTLAW database, however, gives a rough idea of the relatively large volume of non-death habeas petitions. This search showed that from 1980 through Jan. 1994, 12,763 habeas corpus decisions had been handed down by the U.S. Courts of Appeals which *did not* mention the phrase "death sentence," while those same courts, during the same period, decided only 1,361 habeas corpus cases which *did* use the phrase "death sentence."

B. Federalism and Comity

Number two on the Court's list of goals for habeas reform is concern about federalism and comity between the state and federal courts.³³⁶ In part this one-two ranking is a result of the symbiotic relationship that seems to exist in the Court's mind between finality and federalism. The Court appears to believe that states are going to be happier if these cases are just over sooner.³³⁷ But the cases also reflect the Court's evident belief that habeas review hurts the feelings of state courts and the states, and the Court's desire to eliminate friction and tension in the federal system.³³⁸

Unfortunately, the Court is a bit vague when it comes to explaining the exact content of the federalism and comity concerns that arise during the exercise of federal habeas jurisdiction. At its inception habeas was a real bother to the states because it was the primary vehicle for imposing federal constitutional commands on the states.³³⁹ This was precisely the focus of early reform cases such as *Stone v. Powell*.³⁴⁰ But supremacy of federal law, after all, is the cost of a federal system. Even *Teague* says so.³⁴¹ Habeas is not to blame for this imposition; the Supremacy Clause and the entire constitutional idea are.³⁴² Likewise, no one enjoys having their work reviewed, even lower court judges by appellate judges in the same system. But short of getting rid of habeas altogether, which even the current Court does not seem likely to do, review is inevitable.

336. Federalism has been defined by the Court as a "system in which there is sensitivity to the legitimate interests of both State and National Governments . . . in which the National Government . . . always endeavors to [protect federal rights and interests] in ways that will not unduly interfere with the legitimate activities of the States." *Younger v. Harris*, 401 U.S. 37, 44 (1971). Comity, in turn, is defined as "a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a . . . belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways." *Id.*

337. See, e.g., *Brecht v. Abrahamson*, 113 S. Ct. 1710, 1720 (1993) (emphasizing "the State's interest in the finality of convictions that have survived direct review within the state court system").

338. In *Brecht*, for example, Chief Justice Rehnquist reviewed the Court's rationale for applying different standards to cases on direct and collateral review. Highlighting the Court's emphasis on the need for "comity and federalism," Rehnquist quoted an important passage from *Engle*:

"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."

Brecht, 113 S. Ct. at 1720 (quoting *Engle v. Isaac*, 456 U.S. 107, 128 (1982)).

339. See *Stone v. Powell*, 428 U.S. 465, 475-78 (1976) (explaining the historical expansion of the writ to provide relief for state prisoners who raised a wide variety of federal constitutional claims); see also *Bator*, *supra* note 181, at 463; *Friendly*, *supra* note 147, at 154-55.

340. *Stone v. Powell*, 428 U.S. 465 (1976).

341. *Teague v. Lane*, 489 U.S. 288, 306 (1989) (acknowledging that the "threat of habeas serves as a necessary additional incentive for trial and appellate courts throughout the land to conduct their proceedings in a manner consistent with established constitutional standards' ") (quoting *Desist v. United States*, 394 U.S. 244, 262-63 (1969) (Harlan, J., dissenting)).

342. See *Hoffmann & Stuntz*, *supra* note 6, at 25 (arguing that with regard to federalism concerns, habeas represents a small intrusion compared with the nationalization of criminal procedure).

State interests could be offended by granting the writ to petitioners, but here too there are difficulties in making the federalism argument. There are precious few people getting writs granted in their favor anyway³⁴³—few enough that it is difficult to see what all the hullabaloo is about if this is the federalism concern.³⁴⁴ At any rate, any injury to state interests from overturning convictions is not that different from what must occur when convictions are overturned on direct appeal. But there is no serious argument to get rid of Supreme Court review altogether in criminal cases.³⁴⁵

The existence of the death penalty, by the same token, no doubt has a great deal to do with what are considered federalism concerns. While overall the number of petitions granted in habeas cases is small, it is much larger in death cases.³⁴⁶ Even so, it is hard to know what to make of this fact. Some argue there is more error in death cases.³⁴⁷ That may be true, but one might also suspect we tolerate less error in death cases, given the finality of the sentence.³⁴⁸ In either event, the high reversal rates obviously reflect some widespread concern with process in death cases, a concern evidently shared by a now quite conservative lower federal court bench.

Even acknowledging some small gain in federalism if we let the states execute people faster—or at least gains in federalism in the states that want to do so (for citizens of the other states may look on in horror)—there are still some serious arguments that the Supreme Court's entire habeas jurisprudence is hurting federalism more than it is helping it. But these arguments require some more sophisticated analysis than worrying about hurt feelings and inexplicable tensions, or about simply counting writs granted.

343. See BUREAU OF JUSTICE STATISTICS, *supra* note 335, at 5 (finding, in a nationwide empirical study, that only 3.2% of all habeas petitions are ultimately granted). See also Meltzer, *supra* note 95, at 2524 n.103 (discussing related studies and explaining that, since not every petition represents a separate petitioner challenging his or her conviction (i.e., some are second petitions by the same person, etc.), the 3.2% rate for granting habeas petitions translates into approximately 7.3% of all petitioners being granted relief).

344. See Chemcrinsky, *supra* note 221, at 777 (arguing habeas could decrease friction between state and federal courts because so few writs are granted).

345. See Friedman, *Pas de Deux*, *supra* note 6, at 2480-82 (explaining there is no serious disagreement about the need for Supreme Court review).

346. See Meltzer, *supra* note 95 at 2525 & n.109 (stating that in capital cases, "the percentage in which relief is granted is estimated to be 40-60 percent") (citing Berger, *supra* note 8, at 1665-66; Liebman, *supra* note 224, at 541; Ira P. Robbins, *Toward a More Just and Effective System of Review in State Death Penalty Cases*, 40 AM. U. L. REV. 1, 109 & n.359 (1990)).

347. See, e.g., Meltzer, *supra* note 95, at 2526 (mentioning his "concerns about the narrowness of the writ when death is at issue").

348. See Friedman, *Pas de Deux*, *supra* note 6, at 2504 n.180 (suggesting the greater rate of reversal in death-penalty habeas cases "reflects . . . a lower threshold for reversal implicitly applied by courts in death cases, given the gravity of the sentence"). The lower tolerance for error in death cases is a straightforward application of standard due-process balancing, which affords more process when the stakes are higher. See *Herrera v. Collins*, 113 S. Ct. 853, 863 (1993) (explaining the Court's previous holdings to the effect "that the Eighth Amendment requires increased reliability of the process by which capital punishment may be imposed").

These arguments rest on the attempt to understand what federalism is all about.

First, federalism and comity ought to have something to do with what I would call "shared respect," the idea that the national and state governments ought to accord one another the respect they would in turn like to receive. For example, a respectful federalism might try to explain in some coherent way the exercise of habeas jurisdiction by the federal courts. Commentators have offered normative explanations that reflect jurisdictional realities or the nature of our federal system, but that do not cast unnecessary stones at the integrity of the state courts.³⁴⁹ That has not been the way of the Court's "reform." *Teague* exemplifies this inability to demonstrate shared respect even with regard to the explanation for why habeas review exists. *Teague* comes from the pen of Justice O'Connor, which is ironic given her strong federalist tendencies.³⁵⁰ *Teague* undoubtedly was crafted to assist comity, but it creates a rationale for habeas that is not at all complimentary to the states. *Teague* is premised completely on state infidelity to constitutional guarantees and the need to deter state courts from violating the law. *Teague* says an ocean:

"[T]he threat of habeas serves as a necessary additional incentive for trial and appellate courts throughout the land to conduct their proceedings in a manner consistent with established constitutional standards. In order to perform this deterrence function, . . . the habeas court need only apply the constitutional standards that prevailed at the time the original proceedings took place."³⁵¹

This rationale clearly subordinates states in the federal system: it may be accurate, but it hardly seems the language of a court respectful of coordinate sovereigns.

Federalism and comity also require that the federal courts avoid undue intrusion into state processes, but the habeas decisions seem to be leading in just the opposite direction. In *Brecht*, for example, because the Court

349. E.g., Friedman, *Two Habeas*, *supra* note 4, at 273-77 (arguing that after *Brown v. Allen*, 344 U.S. 443 (1953), habeas became a surrogate appeal because the Supreme Court could no longer perform its direct-review function); Hoffman & Stuntz, *supra* note 6 (arguing that habeas review should reflect goals of the criminal justice system).

350. For example, Justice O'Connor's concurring opinion in *Withrow* contained a lengthy essay on the importance of federalism in traditional habeas corpus jurisprudence. *Withrow v. Williams*, 113 S. Ct. 1745, 1757-58 (1993) (O'Connor, J., concurring in part and dissenting in part); see also *New York v. United States*, 112 S. Ct. 2408, 2414, 2418-19 (1992) (opinion of O'Connor, J.) (holding that certain provisions of the federal Low Level Radioactive Waste Policy Act exceeded Congress' powers under the Commerce and Spending Clauses, and thus violated the Tenth Amendment); *FERC v. Mississippi*, 456 U.S. 742, 777-79 (1982) (O'Connor, J., concurring in part and dissenting in part) ("State legislative and administrative bodies are not field offices of the national bureaucracy. . . . Instead, each State is a sovereign . . . governing its citizens and providing for their general welfare. While the Constitution and federal statutes define the boundaries of that domain, they do not harness state power for national purposes.").

351. *Teague v. Lane*, 489 U.S. 288, 306 (1989) (quoting *Desist v. United States*, 394 U.S. 244, 262-63 (1969)).

revised the standard for granting relief in cases in which a constitutional violation is found, federal courts must now tear apart state records to determine whether or not the constitutional violation had a "substantial impact" on the jury verdict.³⁵² Moreover, *Brecht*, by supposedly raising the standard for actually granting the writ, might lead the federal courts to find constitutional violations more readily.³⁵³ While this might be satisfying to a Court that was trying to promote the development of constitutional rights, it hardly is the mark of a Court that seems concerned about federalism interests.

Indeed, a Court truly concerned about federalism would refrain from enacting doctrine that has the impact of wiping out state procedural rules with a sweep of the hand, as the Court did in its *Herrera* decision. *Herrera* strongly suggests that if state procedures will not permit the hearing of newly discovered evidence, then the federal courts will do it for them.³⁵⁴ Thus, while the Court purports to approve state rules that place time limits on the period in which newly discovered evidence will be considered, at the same time the Court sweeps those limits aside. The proof of this assertion is evident in the proceedings in *Graham*. Graham's claim to habeas was turned away by the Supreme Court on the ground he was requesting a new rule.³⁵⁵ Subsequently, however, Graham took his claim, including a claim to newly discovered evidence, to the Texas state courts. Prior to *Herrera* those courts would not have heard Graham's claim, as the evidence was well outside the 30-day limitation for offering such evidence. But, wisely, in light of *Herrera*, those courts decided to hear Graham's claim, avoiding another trip by Graham to federal court.³⁵⁶

352. See *Brecht v. Abrahamson*, 113 S. Ct. 1710, 1714 (1993); see also *supra* note 326 and accompanying text.

353. See *supra* notes 98-99 and accompanying text.

354. See *Herrera v. Collins*, 113 S. Ct. 853, 869 (1993).

355. See *Graham v. Collins*, 113 S. Ct. 892, 895 (1993).

356. In fact, Texas state courts heard Graham's case several more times. Graham filed a second petition with the state for habeas corpus relief on April 20, 1993, which was denied by both the trial court and the Texas Court of Criminal Appeals. *Ex Parte Graham*, 853 S.W.2d 564 (Tex. Crim. App. 1993). Governor Ann Richards granted Graham a temporary stay of execution on August 28. See Deborah Q. Hensel, *Anti-Graham Rally at Governor's Mansion*, HOUSTON POST, Sept. 27, 1993, at A14. Later, the Texas Court of Criminal Appeals stayed Graham's execution a second time to await the Supreme Court's decision in *Johnson v. Texas*, 113 S. Ct. 2658 (1993). *Ex Parte Graham*, 853 S.W.2d 565 (Tex. Crim. App. 1993). Graham's execution date was subsequently reset, but then a state court in Travis County, Texas, granted a temporary injunction and ordered that Graham be given a "due course of law hearing on his post-conviction claim of innocence." See *State ex rel. Holmes v. Third Court of App.*, 860 S.W. 2d 873, 874 (Tex. Crim. App. 1993). In the meantime, Graham filed another petition for habeas corpus in the federal courts. The U.S. District Court for the Southern District of Texas denied his petition on August 13, 1993. *Graham v. Collins*, 829 F. Supp. 204 (S.D. Tex. 1993). One day before Graham's rescheduled execution date, however, on August 16, 1993, the Texas Court of Criminal Appeals again upheld a stay of execution — and this time the stay was indefinite. *State ex rel. Holmes*, 860 S.W.2d at 873. The Texas Court of Criminal Appeals did not issue a written order, but a concurring opinion by Judge Clinton cited *Herrera* for the proposition that the United States Supreme Court had declared executive clemency "the 'fail-safe' in our criminal justice system . . . the historic remedy for preventing miscarriages of justice where judicial process has been exhausted." *Id.* at 873 (Clinton, J.,

In addition, a concern for federalism would not impose unnecessary work upon coordinate state courts, but this is what several habeas reform cases do. In a sense, cases like *Herrera* only complete the work begun by *Rose v. Lundy*,³⁵⁷ which forced state courts to go through the exercise of hearing state prisoners' claims despite the fact that federal courts would have little regard for their decisions on federal review. In *Rose*, the Court adopted a total exhaustion rule—a federal court could not hear the claims of a state prisoner until those claims had been presented to the state courts.³⁵⁸ The rule encourages exhaustion of *all* claims in state court prior to bringing an initial habeas petition, because successive habeas petitions may be dismissed as an abuse of the writ, barring any claims not included in the first petition.³⁵⁹ The impact of *Rose* was that prisoners are encouraged to tender to state courts even the most trivial of claims to ensure they are preserved, despite the fact that one central claim may be a winner, and despite the fact that the state court determination on the merits is not going to be binding on the federal courts anyway.³⁶⁰

Likewise, a concern for federalism would not displace state efforts entirely. In this sense, it is difficult to think of a decision more disrespectful of federalism than *Herrera*. *Herrera* displaces the states from their traditional role of being the adjudicators of guilt or innocence. Until *Herrera*, the Supreme Court never recognized a constitutional claim that essentially rested on a determination that the state court resolution of the guilt-innocence question was incorrect,³⁶¹ though the entire “innocence” juris-

concurring) (quoting *Herrera v. Collins*, 113 S. Ct. 853, 866, 868 (1993)) (emphasis omitted). Thus, according to Judge Clinton, it was improper for the Court of Criminal Appeals to interfere with the orders of the Court of Appeals for the Third District of Texas, because “[d]ue course of law certainly requires that such a condemned person desperately seeking executive clemency not be executed on the simple expediency that the State officials responsible for fairly considering his plea [for clemency] have refused to hear it.” *Id.* at 875 (Clinton, J., concurring). Moreover, since all available *criminal* process had been exhausted by Graham, issuing a *civil* order to obtain a hearing prior to executive clemency did not “invade” the “exclusive post-conviction jurisdiction” of the Criminal Court of Appeals. *Id.* plus additional notes.

357. 455 U.S. 509 (1982).

358. *Id.* at 522 (“[W]e hold that a district court must dismiss habeas petitions containing both unexhausted and exhausted claims.”).

359. Justice O'Connor explained that a prisoner who wanted “speedy federal relief on his claims” could:

always amend the petition to delete any unexhausted claims, rather than returning to state court to exhaust all of his claims. By invoking this procedure, however, the prisoner would risk forfeiting consideration of his unexhausted claims in federal court. Under 28 U.S.C. § 2254 Rule 9(b), a district court may dismiss subsequent petitions if it finds that “the failure of the petitioner to assert those [new] grounds in a prior petition constituted an abuse of the writ.”

Rose, 455 U.S. at 520-21 (plurality opinion) (alteration in original).

360. See Friedman, *Two Habeas*, *supra* note 4, at 311.

361. *Herrera v. Collins*, 113 S. Ct. 853, 860 (1993) (“Claims of actual innocence based on newly discovered evidence have never been held to state a ground for federal habeas relief absent an independent constitutional violation occurring in the underlying state criminal proceeding.”). But see *Jackson v. Virginia*, 443 U.S. 307, 324 (1979) (holding that a habeas petitioner could seek relief on the

prudence of *Murray v. Carrier*,³⁶² *Kuhlmann v. Wilson*,³⁶³ and the like certainly were the start of a difficult trip.

Finally, federalism and comity ought to compel the federal courts to treat state processes gingerly, yet some of the most radical reform thinking would accomplish just the opposite. There is a very real danger to state processes from the persistent interest in Professor Bator's "full and fair opportunity" formulation, most recently championed by Justice Scalia in his dissent in *Withrow*.³⁶⁴ It is difficult to think of an approach more inherently damaging to the notion of comity than to invite the federal courts into the state proceedings, to ensure the state judges provided a "full and fair hearing." One would hope that state courts did so, and if not, one perhaps could be polite about it and instruct in some subtle way. But the formulation adopted in *Stone v. Powell*³⁶⁵ forces federal courts to denigrate state processes, as *Rose v. Mitchell*³⁶⁶ aptly demonstrates. Justice Scalia's opinion in *Withrow* also makes this plain. In *Withrow* Justice Scalia explained away all the cases in which the rule of *Stone v. Powell* was not applied by stating that in those cases the full and fair opportunity standard was not met.³⁶⁷ But if, in Justice Scalia's view, three out of five cases flunked the standard, one can only imagine what a sustained endeavor of identifying "no full and fair opportunity" cases would produce. If "full and fair opportunity" were to become the test, any serious advocate of federalism and comity might shudder to think of what habeas litigation would become. Inevitably, clever counsel and persistent prisoners would dredge up the most embarrassing arguments as to why no full and fair opportunity existed in state court to litigate federal claims. As suggested earlier, petitioners would attack state funding for indigent defense, the quality of state judging, make claims about racial bias of state actors, and the like.³⁶⁸ Even if the federal courts resolutely turned back the claims, the evidence and the coverage in the media would be a huge embarrassment to the state courts.

It is hard to argue the Supreme Court has done for federalism what reform promised. The most generous thing that can be said about the Court's decisions in *Stone*, *Rose*, or *Brecht*, or perhaps *Herrera*, is that the Court failed to account for the legal version of Newton's third law of physics: for every decision that purports to help federalism, there will be an equal and opposite, although perhaps unintended, reaction that does more

ground that "upon the record evidence adduced at the trial no rational trier of fact could have found proof of guilt beyond a reasonable doubt").

362. 477 U.S. 478 (1986).

363. 477 U.S. 436 (1986).

364. See *supra* notes 208-222 and accompanying text.

365. 428 U.S. 465 (1976).

366. 443 U.S. 545, 560-61 (1979) (acknowledging that claim of discrimination in selection of grand jury foreperson implicates fairness of state's judicial process).

367. See *supra* notes 218-222 and accompanying text.

368. See *supra* note 224 and accompanying text.

harm than good to federal interests. But less generously, and perhaps more accurately, in its zeal to curtail habeas the Court has done a number of inconsistent and ill-considered things that have had a seriously harmful impact on federalism. The Court's decisions displace state procedural rules, put in place doctrines that encourage habeas courts to find state courts to be violators of constitutional rights, and toy constantly with doctrinal innovation. The "full and fair" standard, if adopted, would place an uncomfortable and unwelcome spotlight on state courts, and ultimately displace state adjudication as to guilt or innocence. And, as the rationale for its primary reform efforts, the Court asserts the need to deter state courts from violating rights.

C. *Judicial Resources*

The third item on the Court's reform agenda is concern for conserving judicial resources.³⁶⁹ To a certain extent, the Court sees this as a concomitant to finality: if cases were final, there would be no more judicial resources expended.³⁷⁰ But the interest nonetheless stands on its own two feet.

It is less clear whether the Court is concerned about conserving state or federal resources, though any sensible analysis of the problem must recognize federal resources as the primary target. After all, state resources only are strained when a retrial or resentencing is ordered in state court. Yet, this is extremely rare. Surely, the use of these state resources pales in comparison to the utilization of federal resources in hearing habeas petitions. Even if conserving state resources were an issue, however, the federalism discussion demonstrated that decisions such as *Rose v. Lundy* make state courts do extra and unnecessary work.³⁷¹

It is difficult to argue that the Supreme Court has done anything to conserve federal judicial resources when every decision made by the Court seems to impose a greater strain on those resources. Before reform began, the focus of the federal courts primarily was on the familiar and often easy task of determining the merits of constitutional claims. True, there were some successive petitions, but the seriousness of the number and complexity was probably overstated.³⁷² Now, before the federal courts can even get close to the merits they must wade through a morass of new, complicated,

369. See, e.g., *McCleskey v. Zant*, 499 U.S. 467, 491 (1991) ("[f]ederal collateral litigation places a heavy burden on scarce federal judicial resources").

370. See, e.g., *Brecht v. Abrahamson*, 113 S. Ct. 1710, 1721 (1993) (explaining that where a state's "final and presumptively correct" conviction is open to collateral review, "social costs" such as the "expenditure of additional time and resources" are imposed).

371. See *supra* text accompanying notes 357-360.

372. See 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, 687-88 (1990-91) (explaining results of a study of habeas corpus cases in the United States District Court for the Southern District of New York, which showed that successive petitions were filed in the federal court by only 15% of prisoners).

and ever-changing procedural rules. *Teague* is a new twist virtually unknown before reform. The same is true with regard to the rules for excusing a procedural default and for requiring total exhaustion. It is not just that new procedural rules require new work; it is that the work required is particularly difficult and time consuming.³⁷³

One result of the new rules is the requirement that federal courts vigorously search state trial and appellate records. *Brecht* requires this, as does the total exhaustion rule. The federal courts must search to see that claims were actually raised, and more laboriously, to weigh the impact of error on state proceedings.³⁷⁴ It is time consuming work searching trial records.

Second, reform has put the federal courts in the business of attempting to determine guilt and innocence. This certainly is the result of *Herrera*,³⁷⁵ but it also is true of the actual innocence standards of *Murray v. Carrier*³⁷⁶ and *McCleskey v. Zant*.³⁷⁷ Those cases are devoid of suggestion as to how the lower federal courts are to accomplish this. Are federal courts to try the issue of innocence? Or is this simply an extension of the "search-the-record" model? In either event, substantial judicial resources will be consumed.

Moreover, the *Teague* doctrine has turned the federal courts into painstaking legal historians. No longer is it enough to determine if the state courts violated constitutional norms. Now, in order to determine if relief is warranted, federal courts must trace the genesis and development of those norms.³⁷⁸ This task is extremely complicated, uncertain, and time consuming, as is evident from several reported court decisions.³⁷⁹

While it is evident that the time and energy of federal courts are being consumed in these sideline procedural inquiries, the damage actually goes much deeper. It is too easy to forget that it is the attorneys for both sides that carry at least some of the weight in these inquiries. Their limited resources are further strained, placing yet greater strains on an already stressed criminal justice system. But it is not just the attorneys who are affected. It is also the habeas clerks in district court clerks' offices, the

373. For example, in *Graham v. Collins*, 113 S. Ct. 892 (1993), Justice White's analysis of whether Graham's claim would require the Court to announce a "new rule" under *Teague* spanned over eight pages of the Supreme Court Reporter.

374. See *supra* note 323 and accompanying text.

375. See *supra* notes 153-156 and accompanying text.

376. 477 U.S. 478, 496 (1986).

377. 499 U.S. 467, 494-95 (1991).

378. See *supra* notes 262-270 and accompanying text.

379. See, e.g., *Graham v. Collins*, 113 S. Ct. 892 (1993); *Gilmore v. Taylor*, 113 S. Ct. 2112 (1993). Recent examples of federal appellate decisions that have spent considerable time and effort deciding the new rule question include: *Farrel v. Davis*, 3 F.3d 370 (11th Cir. 1993); *Echlin v. LeCureux*, 995 F.2d 1344 (6th Cir.), *cert. denied*, 114 S. Ct. 552 (1993); *Nethery v. Collins*, 993 F.2d 1154, 1160-62 (5th Cir. 1993), *cert. denied*, 114 S. Ct. 1416 (1994); *Bohlen v. Caspari*, 979 F.2d 109 (8th Cir. 1992), *rev'd*, 114 S. Ct. 948 (1994).

police and other state officials called as witnesses, and all the other actors in the system.

Here too, reform has failed. The Chief Justice stumps the country talking about the burdens on federal jurisdiction, and the Court does seem concerned about expending judicial resources.³⁸⁰ But the burdens on the federal system imposed by reform are so substantial that it is difficult to take the Court's expression of concern about judicial resources seriously. Of course, sometimes additional burdens are necessary to get a job done. But it is hard to see how habeas reform falls into that category.

D. Fairness

It might be embarrassing to talk about "fairness" as a goal of habeas corpus if the Supreme Court were not so persistent about putting it on the list. Justice O'Connor included it in her alliterative list of the values balanced in habeas decisions.³⁸¹ But she is not alone. At times when the Court seeks to explain or defend a twist in habeas doctrine, it resorts to pointing out that the overriding goal is fundamental fairness.³⁸²

However, the Court's repeated references to fairness only serve to emphasize that the Court lacks any normative vision of the purpose of habeas corpus review. Fairness is a nice-sounding goal, but it lacks content unless there is some broader end that one is trying to achieve in fair fashion. Yet the Court has offered conflicting ideas of what the end of habeas corpus is, making it difficult to know what would constitute fair treatment.

In *Teague*, the Court said the goal of habeas corpus is to deter state courts from violating constitutional rights.³⁸³ In a sense, this rationale comes the closest to what one might suppose is the point of habeas from reading the habeas statute, which is that the writ exists to remedy constitutional rights violations.³⁸⁴ Deterring such violations is one way to remedy them, i.e., by seeing that they never happen.³⁸⁵ The difficulty is that even assuming a good-faith attempt at deterring such violations, they are still going to occur. Yet the thrust of the Court's *Teague* decisions is to imple-

380. See, e.g., William H. Rehnquist, *Seen in a Glass Darkly: The Future of the Federal Courts*, Kastenmeier Lecture, University of Wisconsin Law School (Sept. 15, 1992), in 1993 Wis. L. REV. 1, 3 (1993) ("Simply put, time and again the nation has looked to the federal courts to handle a larger and larger proportion of society's problems.").

381. *Withrow v. Williams*, 113 S. Ct. 1745, 1756-57 (1993) (O'Connor, J., concurring in part and dissenting in part) (discussing importance of fairness, finality, equity and federalism in habeas proceedings).

382. See, e.g., *McCleskey v. Zant*, 499 U.S. 467, 494-95 (1991) (explaining its fundamental fairness exception to the cause and prejudice standard for abuse of the writ); *Graham*, 113 S. Ct. at 903 (acknowledging an exception to *Teague*'s "new rule" standard for rules that "implicat[e] the fundamental fairness . . . of the criminal proceeding") (quoting *Saffle v. Parks*, 494 U.S. 484, 494 (1990)).

383. *Teague v. Lane*, 489 U.S. 288, 306 (1989).

384. See *supra* note 212.

385. See Barry Friedman, *When Rights Encounter Reality: Enforcing Federal Remedies*, 65 S. CAL. L. REV. 735, 741 (1992).

ment a doctrinal structure that simply labels the violation of constitutional rights a "good faith interpretation[] of existing precedent[],"³⁸⁶ i.e., makes the violations go away. That might be "fair" to the state courts, but that hardly is what one would think a concern for "fairness" means.

At other times the keystone for fairness seems to be innocence.³⁸⁷ The Court repeatedly indicates that the only worthy petitioners are innocent ones. There is some superficial appeal to this, so much so that it might seem "fair" to treat innocent petitioners better than guilty ones. The problem, as the *Herrera* Court set out at length, is that the state court proceeding is supposedly where society determines guilt.³⁸⁸ In a sense then, everyone in a habeas court is "guilty." Yet, rewarding some and denying others based on a showing to a court not charged with finding guilt or innocence, and procedurally ill-equipped to do so, will be unfair in application, no matter how rosy it is in rhetoric.³⁸⁹ Perhaps that is why, until *Herrera*, innocence never had been treated as a substantive basis for habeas.

Alternatively, the Court focuses at times on whether there was a full and fair opportunity to litigate in state court.³⁹⁰ If this formulation were to find broader application, fairness would mean affording a hearing to those that had not had one in state court. But in a sense all petitioners had a hearing in state court. Thus, the Court needs some broader vision of why some hearings were adequate and others were not. But because application of the "full and fair" test has been confined to the Fourth Amendment context, the Supreme Court has not really been challenged to define what "full and fair" means.

Pursuing an inquiry into fairness thus is quite futile when there is no benchmark by which to measure it. Before the reform efforts began, fairness seemed to focus on the question whether those whose rights were violated in state court obtained relief.³⁹¹ Now, however, this is anything but

386. *Graham*, 113 S. Ct. at 898 (quoting *Butler v. McKellar*, 494 U.S. 407, 414 (1990)).

387. See, e.g., *Murray v. Carrier*, 477 U.S. 478, 495-96 (1986) (explaining the need for an exception to the cause-and-prejudice standard for procedural default on the ground that it is fundamentally unfair to convict an innocent person); *McCleskey v. Zant*, 499 U.S. 467, 494-95 (1991) (following *Murray*).

388. *Herrera v. Collins*, 113 S. Ct. 853, 860 (1993) (explaining that once a state court finds guilt beyond a reasonable doubt, the petitioner comes before a habeas court not as one who is innocent, but "as one who has been convicted by due process of law").

389. See *id.* at 862 (noting that a habeas court is unlikely to make a more "exact" determination of innocence or guilt, because it often makes its decision years after the original trial, when evidence is stale and witnesses may no longer be available).

390. See, e.g., *Stone v. Powell*, 428 U.S. 465, 481-82 (1976).

391.

Habeas corpus . . . is today, as it has always been, a fundamental safeguard against unlawful custody . . . the basic question before the court to which the writ is addressed has always been the same: . . . is the detention complained of "in violation of the Constitution or laws or treaties of the United States"?

Fay v. Noia, 372 U.S. 391, 449 (1963) (Harlan, J., dissenting) (quoting 28 U.S.C. § 2254(a)).

the focus of the Court. And no coherent definition of fairness has taken its place.

It is also possible to point to results of the Supreme Court's reform efforts that seem patently unfair under some commonly applied standards. For example, in *Teague* the Court stressed the need to treat similarly situated petitioners similarly.³⁹² Yet, reform has done its utmost to treat many prisoners differently based on nothing more than the happenstance of whether their petition for certiorari was granted on direct or collateral review.³⁹³ But this, by any measure, is akin to lightening striking: winning the lottery hardly seems a fair way to decide who will be free and who will not, who will live and who will die.

Similarly, it is more than a little difficult to see the merit in granting liberty to those who are tried in state courts that respect constitutional rights, and denying it to petitioners tried in state courts that do not. But this has been the impact of the Court's admittedly poorly designed efforts to foster federalism by deferring to state courts. Thus, *Teague* essentially labels state court failures to adhere to constitutional norms acceptable if the norms were not clearly established at the time, which all too often simply means there was not a Supreme Court decision on point.³⁹⁴ But some courts are going to anticipate changing norms and adhere to them. Defendants tried in these courts succeed, where others fail. It is hard to see the fairness there.

But the unfairness wrought by *Brecht* is much worse. After *Brecht*, the less sensitive a state court is to federal rights, the less likely federal relief will be granted. Assume Prisoner A and Prisoner B are subject to the very same constitutional violation. The state courts of State A recognize the violation, and the error is found to not be harmless. Prisoner A goes free, or is retried. State Court B is hostile to constitutional rights, and either fails to recognize the violation, or holds it harmless. On habeas review in Prisoner B's case, *Brecht* mandates applying a standard less favorable than harmless error. Given the very same violation that frees Prisoner A, Prisoner B may receive no relief under *Brecht*. Thus, prisoners from states more hostile to federal rights are treated less favorably. It is difficult to see the fairness in that.

Indeed, what Justice O'Connor seemed to have missed when she set out her trio of interests that concern the Court³⁹⁵ in fashioning habeas jurisdiction is that fairness, federalism and finality often are at war with one

392. *Teague v. Lane*, 489 U.S. 288, 300 (1989).

393. See *supra* notes 284-86 and accompanying text.

394. See *Teague*, 489 U.S. at 301 (holding that a case would establish a "new rule"—and should thus not be heard on collateral review—when it "breaks new ground or imposes a new obligation on the States or the Federal Government . . . [or] if the result was not *dictated* by precedent existing at the time the defendant's conviction became final").

395. See *Withrow v. Williams*, 113 S. Ct. 1745, 1756-57 (1993) (O'Connor, J., concurring in part and dissenting in part).

another.³⁹⁶ The previous discussion has demonstrated that as to finality and federalism the Court has not done as well as it hoped. But it certainly was trying to accommodate those interests, and in doing so it inevitably undermined any attempt at achieving fairness.

CONCLUSION

In the late 1970s the Supreme Court set out to reform habeas corpus. Judging from word and deed, the Court believed existing habeas practice failed to accord sufficient respect to state process, failed to achieve finality, and consumed too many judicial resources. The Court sought to strike a better balance. Reform has almost become a fetish, with the desire for change outpacing the sense of exactly where the endeavor is headed. Almost twenty years later the reform effort is still underway. Has the Supreme Court's reform effort succeeded? Hardly so by any standards. Criticism from all quarters has been abundant. Congress repeatedly has considered habeas legislation, itself a sign the Court is not doing well. And most reform decisions come by thin majorities.

But what is important for present purposes is that even by the standards the Court is setting for itself, reform seems to be a failure. There is no evidence that state courts think more highly of the federal courts for all the reform decisions. A few more writs may have been denied, which may or may not be what the Court wished. From a doctrinal standpoint, however, the course of habeas law is as damaging to state interests and to finality as the rhetoric—or some of it—is respectful.

One might reasonably wonder if this was the better course. Play a mind game for a moment. Assume that the Supreme Court slowed the flow of new rights-expanding decisions (as was inevitable) but habeas courts were left free to resolve claims on the merits, without the procedural tangle reform has mandated. Compare that to the state of affairs now. There is an awfully good argument that matters would be much better. Cases would be resolved on the merits. They would be filed, dealt with, and resolved. It is unlikely many more writs would be granted. Eventually time would run out on death row inmates.

Whether or not this alternative state of affairs would be preferable, it is time for the Supreme Court to ask itself whether the reform venture has been a success. The Court is so wrapped up in the effort that it may be difficult to obtain the clarity of judgment necessary. But habeas has become a perennial battleground, with the war showing no sign of ending. Perhaps it is time to admit defeat.

396. Cf. Chemerinsky, *supra* note 221, at 789 (discussing balancing of finality and the need to reach correct results); Kinports, *supra* note 228, at 130-33 (explaining that value of remedying constitutional rights is balanced against other values such as treating the trial as the "main event").