St. Mary's Law Journal

Volume 27 | Number 2 Article 2

1-1-1996

The Habeas Corpus Revolution: A New Role for State Courts.

Charles F. Baird

Follow this and additional works at: https://commons.stmarytx.edu/thestmaryslawjournal

Part of the Environmental Law Commons, Health Law and Policy Commons, Immigration Law Commons, Jurisprudence Commons, Law and Society Commons, Legal Ethics and Professional Responsibility Commons, Military, War, and Peace Commons, Oil, Gas, and Mineral Law Commons, and the State and Local Government Law Commons

Recommended Citation

Charles F. Baird, *The Habeas Corpus Revolution: A New Role for State Courts.*, 27 St. Mary's L.J. (1996).
Available at: https://commons.stmarytx.edu/thestmaryslawjournal/vol27/iss2/2

This Article is brought to you for free and open access by the St. Mary's Law Journals at Digital Commons at St. Mary's University. It has been accepted for inclusion in St. Mary's Law Journal by an authorized editor of Digital Commons at St. Mary's University. For more information, please contact egoode@stmarytx.edu, sfowler@stmarytx.edu.

THE HABEAS CORPUS REVOLUTION: A NEW ROLE FOR STATE COURTS?

CHARLES F. BAIRD*

I. Introduction 298
II. History of the Federal Writ of Habeas Corpus and Its Expansion Through Federal Case Law............. 299
III. Restrictions on the Federal Writ 305
A. Substantive Limitations........................... 305
B. Prohibition on Applying New Constitutional Rules on Federal Habeas.......................... 311
C. State Procedural Default: Development of the Cause-and-Prejudice Standard.................... 318
D. Extension of the Cause-and-Prejudice Standard and Development of the "Harmless Error" Analysis 329
1. Extending the Cause-and-Prejudice Standard Beyond Procedural Default 329
2. Tailoring a Restrictive "Harmless-Error" Standard...................................... 333
E. Current Scope of the Federal Writ................ 335
IV. Implications for State Courts 337
A. Comity As a Consideration for the State Courts.. 337
B. Impact on State Collateral Review 340
V. Conclusion.. 349

* Judge, Texas Court of Criminal Appeals; B.B.A., University of Texas; J.D., South Texas College of Law; L.L.M., Judicial Process, University of Virginia. The author wishes to acknowledge and thank Dana Parker, who assisted in the preparation of this Article. The author also wishes to thank and acknowledge Professor Graham Lilly, his thesis advisor at the University of Virginia. This Article is adapted from a thesis submitted in partial fulfillment of the requirements for the degree of Master of Laws in the Judicial Process at the University of Virginia. Finally, this Article is not meant to be, nor should it be construed as, a probable decision on any particular case or matter that may come before the Texas Court of Criminal Appeals.

Published by Digital Commons at St. Mary's University, 1995

St. Mary's Law Journal, Vol. 27 [1995], No. 2, Art. 2

I. INTRODUCTION

The federal courts are the principal guardians of the rights guaranteed under the United States Constitution.[1] The primary means of enforcing these rights is the writ of habeas corpus, often referred to as the Great Writ. The Great Writ indisputably holds an honored position in our jurisprudence. Rooted deep in English common law, the writ claims a place in Article I of the United States Constitution.[2] "Today, as in prior centuries, the writ is a bulwark against convictions that violate 'fundamental fairness.'"[3] The root principle underlying the writ is now embodied in the modern federal habeas statute—"government in a civilized society must always be accountable for an individual's imprisonment."[4]

While commitment to this principle has remained constant, application of the remedy of federal habeas corpus to state convictions has been inconsistent. The writ's scope has been altered to conform with changing notions of what constitute fundamental and unacceptable defects in criminal proceedings.[5] Simultaneously, procedural limitations have been imposed to reflect the "unique character of our federal system."[6]

---

1. *See* Chapman v. California, 386 U.S. 18, 21 (1967) (citing 1 ANNALS OF CONG. 439 (Joseph Gales ed., 1789)) (referencing statement by James Madison that independent federal courts would be guardians of Bill of Rights).

2. *See* U.S. CONST. art. I, § 9, cl. 2 (prohibiting suspension of habeas corpus, except in certain situations). The provision reads: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." *Id.*

3. Engle v. Isaac, 456 U.S. 107, 126 (1982) (quoting Wainwright v. Sykes, 433 U.S. 72, 97 (1977)).

4. Murray v. Carrier, 477 U.S. 478, 516 (1986) (Brennan, J., dissenting) (citation omitted).

5. *Carrier*, 477 U.S. at 516 (Brennan, J., dissenting).

6. *See id.* at 517 (Brennan, J., dissenting) (describing how federal habeas relief is more difficult because of new procedural limits). The Supreme Court's efforts to strike an appropriate balance have occurred largely in the context of answering four interrelated questions:

> (1) What types of federal claims may a federal habeas court properly consider? (2) Where a federal claim is cognizable by a federal habeas court, to what extent must that court defer to a resolution of the claim in prior state proceedings? (3) To what extent must the petitioner who seeks federal habeas exhaust state remedies before resorting to the federal court? (4) In what instances will an adequate and independent state ground bar consideration of otherwise cognizable federal issues on federal habeas review?

Wainwright v. Sykes, 433 U.S. 72, 78–79 (1977).

https://commons.stmarytx.edu/thestmaryslawjournal/vol27/iss2/2

Baird: The Habeas Corpus Revolution: A New Role for State Courts.

The purpose of this Article is to portray in some detail recent changes in the United States Supreme Court's habeas corpus jurisprudence. These changes have been profound, but the totality of their impact has not been widely recognized. When considered in the aggregate, these limitations on the scope of the federal writ substantially reduce the role of the federal judiciary in overseeing the criminal justice systems of the states. However, seemingly little thought has been given to the question of whether this reduction in federal oversight should be accompanied by a greater measure of review on the part of state courts. After reviewing the history of the federal writ and the recent restrictions of the writ's scope, this Article addresses that question.

II. History of the Federal Writ of Habeas Corpus and Its Expansion Through Federal Case Law

The scope of the writ of habeas corpus has been defined more by judicial decision than by statute.[7] The first grant of federal court jurisdiction, the Judiciary Act of 1789,[8] conferred authority on the federal courts to issue the writ of habeas corpus.[9] This authority, however, extended only to prisoners held in custody by the United States.[10] The statute did not define the substantive reach of the writ; it merely recognized the power of the federal courts to issue writs of habeas corpus.[11] Consequently, the courts defined the

---

7. *See* Wainwright v. Sykes, 433 U.S. 72, 81 (1977) (noting Supreme Court's willingness to change scope of writ although statutes remain unchanged). *See generally* Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 463–99 (1963) (tracing development of habeas corpus jurisdiction through Supreme Court decisions and legislative matters).

8. Judiciary Act of 1789, ch. 20, 1 Stat. 73 (codified as amended in scattered sections of 28 U.S.C.).

9. *Id.* § 14, 1 Stat. at 81-82 (current version at 28 U.S.C. § 1651 (1988)). The Act states:

> That all the before-mentioned courts of the United States, shall have power to issue writs of *scire facias*, *habeas corpus*, . . . and all other writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law.

Id.

10. *See id.* (permitting federal habeas relief only if prisoner was held "in custody, under or by colour of the authority of the United States").

11. *See id.* (recognizing federal habeas power, but failing to establish substantive scope of habeas corpus); *see also* McCleskey v. Zant, 499 U.S. 467, 477 (1991) (explaining that English case law actually defined reach of writ of habeas corpus).

Published by Digital Commons at St. Mary's University, 1995

scope of the writ in accordance with the common law.[12] For example, where detention was authorized by a court, the only relevant inquiry at common law was whether the sentencing tribunal possessed jurisdiction over the matter; thus, the courts focused only on the jurisdictional issue rather than the writ's substantive scope.[13]

In the wake of the Civil War, the federal writ was extended to persons in state custody.[14] In 1867, Congress authorized federal courts to grant relief in "all cases where any person may be restrained of his or her liberty in violation of the constitution, or of any treaty or law of the United States."[15] Despite the facially broad scope of the statute, the federal courts adhered to the traditional view that federal habeas review was limited to consideration of the jurisdiction of the sentencing court.[16]

The scope of federal habeas review of federal convictions gradually expanded, as did the scope of federal review of state-court convictions.[17] Although the concept of "jurisdictional" defects was not abandoned, the scope of allowable claims was broadened to permit inmates to challenge convictions obtained in courts of competent jurisdiction. For example, the Supreme Court entertained habeas claims challenging the constitutionality of the statute under which

12. *See Ex parte* Bollman, 8 U.S. (4 Cranch) 75, 80-94 (1807) (analyzing basis for habeas corpus jurisprudence); Evans Wohlforth, Note, *Theories, a Meta-theory, and Habeas Corpus*, 46 RUTGERS L. REV. 1395, 1418 (1994) (claiming that Chief Justice Marshall defined federal writ "by allusion to the common law").

13. *Ex parte* Watkins, 28 U.S. (3 Pet.) 193, 202-03 (1830). In *Watkins*, Chief Justice Marshall reasoned that "[a]n imprisonment under a judgment cannot be unlawful, unless that judgment be an absolute nullity; and it is not a nullity if the Court has general jurisdiction of the subject, although it should be erroneous." *Id.*; *see also* Stone v. Powell, 428 U.S. 465, 475 (1976) (discussing history of writ and reluctance of courts to abandon limitations of review to jurisdictional considerations).

14. *See* Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385-86 (codified as amended at 28 U.S.C. § 2241 (1988)) (expanding writ of habeas corpus to include persons in state custody).

15. *Id.*, 14 Stat. at 385.

16. *See, e.g.*, Andrews v. Swartz, 156 U.S. 272, 276 (1895) (holding that writ will not lie unless lower court was so without jurisdiction as to make judgment void); Jugiro v. Brush, 140 U.S. 291, 296 (1891) (claiming that only complete want of jurisdiction results in allowance of writ of habeas corpus); Wood v. Brush, 140 U.S. 278, 287 (1891) (denying federal writ to state prisoner on account of race because exclusion of blacks from grand and petit juries did not affect jurisdiction of sentencing court).

17. *See* Marcus N. Bozeman, Note, 16 U. ARK. LITTLE ROCK L.J. 259, 265 (1994) (describing expansion of federal review of state convictions beyond mere jurisdictional problems).

Baird: The Habeas Corpus Revolution: A New Role for State Courts.

the conviction was obtained,[18] as well as claims asserting double jeopardy violations.[19] In conjunction with this substantive expansion, the Court imposed procedural restrictions by requiring the exhaustion of state remedies before federal review of state convictions could be obtained.[20]

In *Frank v. Mangum*,[21] the Supreme Court indicated its willingness to completely discard the limitation of federal habeas review to jurisdictional defects.[22] The Court affirmed the denial of federal habeas relief on Frank's constitutional claim that his trial was dominated by a mob, because the claim had been considered and rejected by a competent and unbiased state tribunal.[23] However, the Court added that if the state failed to provide an adequate corrective process for the full and fair litigation of federal claims, whether or not those claims were jurisdictional in nature, a federal court could inquire into the merits of those claims to determine whether the detention was lawful.[24] Significantly, the Court's discussion of this potentially broad scope of federal habeas review was based on its recognition that Congress had the power to broaden common-

---

18. *Ex parte* Siebold, 100 U.S. 371, 376-77 (1880).

19. *Ex parte* Lange, 85 U.S. (18 Wall.) 163, 175-76 (1873).

20. *See Ex parte* Royall, 117 U.S. 241, 251-52 (1886) (suggesting that federal courts normally should not entertain petitions from state court petitioners until state has acted); *see also Sykes*, 433 U.S. at 80 (noting that *Royall* has been applied in subsequent cases). The exhaustion requirement was codified in the federal habeas statute. 28 U.S.C. § 2254 (b)-(c) (1948), *amended by* 28 U.S.C. § 2254 (1988).

21. 237 U.S. 309 (1915).

22. *See Frank*, 237 U.S. at 335-36 (implying that problem with jurisdiction might be overcome by consideration of judicial proceeding as whole).

23. *Id.* at 329. In *Frank*, the Court explained:

> This is not a mere matter of comity, as seems to be supposed. The rule stands upon a much higher plane, for it arises out of the very nature and ground of the inquiry into the proceedings of the state tribunals, and touches closely upon the relations between the state and the Federal governments.

Id. In later passing upon a virtually identical claim of mob domination of a trial, however, the Court indicated that the state corrective process is inadequate to bar federal habeas review if the state court fails to correct constitutional error. *See* Moore v. Dempsey, 261 U.S. 86, 90-91 (1923) (asserting that Court can preserve petitioners' constitutional rights on habeas review even if state process was perfect or there was no way to prevent mob influence on trial).

24. *See Frank*, 237 U.S. at 330-32 (explaining that federal courts will look into jurisdictional facts when necessary to ensure that defendant was not deprived of liberty without due process).

Published by Digital Commons at St. Mary's University, 1995

St. Mary's Law Journal, Vol. 27 [1995], No. 2, Art. 2

law habeas procedures and that Congress had, in fact, done so in the 1867 act.[25]

In *Brown v. Allen*,[26] the Supreme Court further expanded the scope of the writ. Brown claimed that his grand jury was composed in a discriminatory manner and that his confession was not voluntary.[27] On direct appeal, the state's highest court affirmed Brown's conviction,[28] and the United States Supreme Court denied certiorari.[29] Despite the indisputable existence and apparent adequacy of state corrective processes, the Supreme Court reviewed the subsequent denial of a federal writ and held that Brown was entitled to full reconsideration of his constitutional claims on federal habeas review.[30] Thus, the Court decided that a state court's denial of federal constitutional claims would have no preclusive effect in subsequent federal habeas proceedings.[31]

Congress's 1948 enactment of the modern federal habeas statute[32] buttressed the *Brown* Court's inclination to abandon the view that an absence of state corrective processes was a prerequisite to

---

25. *See id.* (discussing "authority of the Congress to . . . liberalize the common law procedure on *habeas corpus* in order to safeguard the liberty of all persons within the jurisdiction of the United States"). Although *Frank* discussed the broad power of the federal courts to redress due process violations, it spoke in terms of habeas *procedures* and emphasized that "jurisdiction" encompasses more than a proper charging instrument. *Id.* at 331-33. Any resulting ambiguity was resolved in *Waley v. Johnson*, in which the Supreme Court made clear that federal habeas is available to vindicate the constitutional rights of criminal defendants, independent of the legal fiction of lack of jurisdiction in the sentencing court. 316 U.S. 101, 104-05 (1942).

26. 344 U.S. 443 (1953).

27. *Brown*, 344 U.S. at 466.

28. State v. Brown, 63 S.E.2d 99, 102 (N.C. 1951).

29. Brown v. North Carolina, 341 U.S. 943 (1951).

30. *Brown*, 344 U.S. at 466–76.

31. *Id.* at 462–65. With respect to questions of federal law, the *Brown* Court stated that "the state adjudication carries the weight that federal practice gives to the conclusion of a court of last resort of another jurisdiction on federal constitutional issues. It is not *res judicata*." *Id.* at 458.

32. Law of June 25, 1948, ch. 646, 62 Stat. 967 (current version at 28 U.S.C. § 2254 (1988)). When *Brown* was decided, § 2254 provided in pertinent part:

> An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

28 U.S.C. § 2254 (1988).

https://commons.stmarytx.edu/thestmaryslawjournal/vol27/iss2/2

Baird: The Habeas Corpus Revolution: A New Role for State Courts.

federal habeas corpus relief.[33] First, absence of adequate state corrective processes was not codified as a prerequisite to the grant of relief, but rather was provided as an excuse for a prisoner's failure to exhaust state remedies.[34] Second, although 28 U.S.C. § 2254 made no express provision for federal review of constitutional claims that had been adjudicated by state courts, such authority was found in the separate statutory requirement that a federal habeas court "summarily hear and determine the facts, and dispose of the matter as law and justice require."[35]

Even as *Brown* articulated an expanded scope of federal habeas review, the Court recognized two procedural effects of a state court's prior adjudication of federal claims. First, in a companion case contained within the *Brown* opinion, the Court affirmed the dismissal of a habeas petition because of the prisoner's state procedural default.[36] The state court had refused to consider the points raised on the petitioner's direct appeal because his statement of the case on appeal was untimely filed.[37] The Supreme Court held that because the state court judgment rested on a reasonable application of the state's legitimate procedural rule—a ground that would have barred direct Supreme Court review of his federal claims—the federal district court lacked the authority to grant habeas corpus relief.[38] Second, the Court noted that resolution of factual issues by the state courts might be dispositive of the legal merits of a petitioner's federal constitutional claims.[39]

---

33. *See Brown*, 344 U.S. at 485–87 (barring federal habeas relief for failure to use state's available remedy).

34. *See* 28 U.S.C. § 2254 (1988) (establishing that one condition under which federal court will consider habeas corpus is absence of state remedy); *see also Brown*, 344 U.S. at 447-50 (explaining effect of absence of state remedies on procedures for habeas corpus).

35. 28 U.S.C. § 2243 (1988); *see Brown*, 344 U.S. at 462-63 (noting that precursors of § 2243 applied only to federal habeas review of federal convictions).

36. *See Brown*, 344 U.S. at 482–87 (considering *Daniels v. Allen* case, and ultimately affirming dismissal of petition). A state court decision resting on an adequate foundation of state *substantive* law has long been held immune from review in the federal courts. *See* Murdock v. Memphis, 87 U.S. (20 Wall.) 590, 635 (1874) (deciding that Court should not reverse judgment that is correct based on record before Supreme Court). Federal habeas courts remain foreclosed from considering substantive state law questions. *Sykes*, 433 U.S. at 81.

37. *Brown*, 344 U.S. at 483.

38. *Id.* at 484-86.

39. *See id.* at 458, 463–65 (noting that it is not necessary for judge to hold hearing on merits if he is satisfied that defendant's constitutional rights have been protected).

Ten years after *Brown*, both of these limitations were revisited in *Fay v. Noia*,[40] which appeared to remove the "final barrier to broad, collateral re-examination of state criminal convictions."[41] In *Fay*, the Supreme Court held that state procedural grounds did not affect the *power* of the federal courts to grant habeas corpus relief.[42] The Court retained only a vestige of *Brown*'s procedural-default doctrine, namely, a "limited discretion" in the federal district courts to "deny relief to an applicant who has deliberately bypassed the orderly procedure of the state courts and, in doing so, has forfeited his state court remedies."[43] Given the historical increase in the substantive claims cognizable on collateral review,[44] *Fay* authorized, if not mandated, far-reaching federal review of state convictions.

The Supreme Court provided further explanation of the breadth of the federal writ in *Townsend v. Sain*,[45] in which the Court specifically addressed the circumstances that require a federal court to hold an evidentiary hearing on a writ of habeas corpus.[46] For example, the Court concluded that an evidentiary hearing is needed when the merits of the dispute were not resolved in the state court, when the state determination is not supported by the record, when the state procedure did not afford a fair hearing, or when there is newly discovered evidence.[47] The Court also clarified the circumstances in which federal habeas courts may defer to state-court factual findings relevant to the merits of federal constitutional

40. 372 U.S. 391 (1963).

41. *See Stone*, 428 U.S. at 477 (describing effect of *Fay* on habeas corpus petitions).

42. *Fay*, 372 U.S. at 398–99. The rationale for this holding was based on differences between appellate review and habeas review. *See id.* at 428-34 (pointing out that habeas review is much more restricted than direct review because Court can examine more issues on direct review). On direct Supreme Court review of a state-court judgment, an adequate state ground that independently supports that judgment effectively moots the federal question. *See id.* at 429-30 (noting that adequate-state-ground rule resulted from Court's refusal to pass upon moot questions). In contrast, federal habeas courts do not review state court judgments *per se*; instead, they review the legality of the detention itself. *See id.* at 430-31 (stating that court may not revise state-court judgment).

43. *Id.* at 438.

44. *See id.* at 413–14 (listing large number of cases in which Supreme Court has permitted habeas review).

45. 372 U.S. 293 (1963).

46. *See Townsend*, 372 U.S. at 312–13 (listing situations in which hearing is needed).

47. *Id.*

Baird: The Habeas Corpus Revolution: A New Role for State Courts.

claims.[48] Finally, the Court reasoned that in light of the federal courts' broad power to grant the writ, a similarly expansive view of the federal district courts' power to conduct evidentiary hearings was appropriate.[49] However, the Court held that whether a federal hearing is mandatory, as opposed to discretionary, essentially depends on two factors: (1) whether material facts were explicitly or implicitly determined in a prior state proceeding; and (2) whether the state proceeding was "full and fair."[50]

Although the Court embraced an expansive view of federal habeas relief for more than a decade, the most recent federal habeas jurisprudence may be characterized as an evolution of substantive and procedural restrictions on availability of the writ to state prisoners.[51] Unfortunately, these restrictions have been so extreme as to almost completely deny state prisoners access to the writ of habeas corpus, a consequence which has had a significant effect on state court systems.

III. Restrictions on the Federal Writ

A. *Substantive Limitations*

Stone v. Powell,[52] decided in 1977, was the first limitation on the scope of substantive claims reviewable in federal court on a writ of habeas corpus.[53] In the earlier case of *Kaufman v. United States*,[54] the Supreme Court decided that Fourth Amendment claims could

48. *See id.* (determining that federal court may defer to state court if "state-court trier of fact has after a full hearing reliably found the relevant facts").

49. *See id.* at 312 (explaining that "[t]he language of Congress, the history of the writ, the decisions of this Court, all make clear that the power of inquiry on federal habeas corpus is plenary").

50. *Townsend*, 372 U.S. at 312-18.

51. One key principle of *Fay* remains unquestioned: federal habeas courts possess plenary power to grant the writ. *See Fay*, 372 U.S. at 423–24 (commenting that individual liberties should not be restricted without opportunity for federal review). Judicially crafted restrictions, therefore, are not jurisdictional, but are limits on the exercise of equitable discretion. *See, e.g.*, *McCleskey*, 499 U.S. at 484–88 (discussing limitation on federal review due to petitioner's abuse of writ); Collins v. Youngblood, 497 U.S. 37, 40–41 (1990) (restricting federal habeas review on basis of retroactivity principles); Reed v. Ross, 468 U.S. 1, 9 (1984) (emphasizing procedural-default restrictions of federal habeas review).

52. 428 U.S. 465 (1977).

53. *See* Marcus N. Bozeman, Note, 16 U. Ark. Little Rock L.J. 259, 266–67 (1994) (dubbing *Stone* as first modern restriction on broad federal habeas powers).

54. 394 U.S. 217 (1969).

St. Mary's Law Journal, Vol. 27 [1995], No. 2, Art. 2

be considered on habeas review of a federal prisoner's conviction,[55] noting in dictum that such challenges would also be available to state prisoners.[56] *Stone* essentially overruled *Kaufman*'s anticipated application to state convictions.[57] The Court held in *Stone* that when the state court has provided an opportunity for full and fair litigation of a Fourth Amendment claim, neither the Constitution nor federal habeas statutes require further federal habeas review of a claim that evidence obtained in an unconstitutional search or seizure was introduced at the petitioner's trial.[58]

The *Stone* Court reached this conclusion after "weighing the utility of the exclusionary rule against the costs of extending it to collateral review."[59] As to the utility prong, the Court reasoned that the Fourth Amendment, and particularly the judicially created exclusionary rule used to enforce it, are different from other constitutional rights.[60] The Court noted that the primary purpose of the Fourth Amendment does not relate to the conduct of criminal trials; rather, the amendment is "intended to protect the 'sanctity of a man's home and the privacies of life.'"[61] The Court also concluded

55. *Kaufman*, 394 U.S. at 223–24. *Kaufman* rejected the rationale of a majority of the federal courts of appeal that Fourth Amendment violations are different from denials of Fifth and Sixth Amendment rights, in that the former do not "impugn the integrity of the fact-finding process or challenge evidence as inherently unreliable." *Id.* at 224. Rather, noted the Court, "the exclusion of illegally seized evidence is simply a prophylactic device intended generally to deter Fourth Amendment violations by law enforcement officers." *Id.*

56. *See id.* at 225 (citing number of cases showing that federal habeas review should apply to state prisoners claiming admission of unconstitutionally obtained evidence).

57. *See Stone*, 428 U.S. at 480–81 (concluding that state prisoner is not entitled to federal habeas relief for unconstitutionally admitted evidence if prisoner had full and fair state trial).

58. *Id.* at 482.

59. *Id.* at 489.

60. *Id.* at 490 (citing Kaufman v. United States, 394 U.S. 217, 237 (1969)). Evidence obtained in violation of the Fourth Amendment could be introduced in criminal proceedings until Weeks v. United States, which held such evidence inadmissible in federal criminal prosecutions. 232 U.S. 298, 383, 393 (1914). When Fourth Amendment protections against unreasonable search and seizure were made enforceable against the states, the exclusionary rule was expressly excluded from the ambit of this protection. Wolf v. Colorado, 338 U.S. 25, 27-28 (1949). It was only a dozen years later that the exclusionary rule was extended to state prosecutions. *See* Mapp v. Ohio, 367 U.S. 643, 655, 660 (1961) (recognizing right to privacy included in Fourth Amendment as enforceable against states).

61. *Stone*, 428 U.S. at 482 (quoting Boyd v. United States, 116 U.S. 616, 630 (1886)).

Baird: The Habeas Corpus Revolution: A New Role for State Courts.

that the exclusionary rule is not a personal constitutional right,[62] but a judicially created device designed to deter future Fourth Amendment violations by peace officers.[63] The *Stone* Court then determined that the utility of enforcing the exclusionary rule on federal habeas review rested on a "dubious" assumption that police would be deterred by the possibility that a Fourth Amendment violation would be found on federal habeas review, when none was detected at trial or on direct appeal.[64] Consequently, the Court asserted that nothing would be gained by allowing habeas review of a Fourth Amendment claim once the petitioner had been afforded a full and fair opportunity to present the claim in the state courts.[65]

With regard to the cost prong of the analysis, the Court concluded that enforcement of the exclusionary rule at trial diverts attention from the central question of guilt or innocence and, indeed, may distort the truth-seeking function of the trial by eliminating reliable evidence.[66] The majority determined that these costs persist on collateral review,[67] and recognized that there is minimal deterrent value in enforcing the exclusionary rule in a proceeding so distant from trial.[68] Accordingly, the Court removed Fourth Amendment claims from those cognizable on federal habeas review of state convictions.[69]

Dissenting Justices Brennan and Marshall vigorously disputed the majority's distinction between Fourth Amendment claims and

62. *Id.* at 486; *see also* Charles E. Trant, *OSHA and the Exclusionary Rule: Should the Employer Go Free Because the Compliance Officer Has Blundered*, 1981 DUKE L.J. 667, 676–77 (asserting that theory of exclusionary rule as personal constitutional right was overshadowed by theory that rule's purpose was to deter police misconduct).

63. *Stone*, 428 U.S. at 492–94.

64. *Id.* at 493.

65. *Id.* at 494–95.

66. *Id.* at 490. The Court explained that "while courts . . . must ever be concerned with preserving the integrity of the judicial process, this concern has limited force as a justification for the exclusion of highly probative evidence." *Id.* at 485.

67. *Stone*, 428 U.S. at 491. The majority noted that the costs associated with federal habeas review are heightened when review is used for purposes "other than to assure that no *innocent* person suffers an unconstitutional loss of liberty." *Id.* at 491 n.31 (emphasis added). It added that a petitioner raising a Fourth Amendment claim typically seeks relitigation of "an issue that has no bearing on the basic justice of his incarceration." *Id.* at 491.

68. *See id.* at 494–95 (asserting that exclusionary rule's effect on enforcement of Fourth Amendment is significantly diminished on federal habeas review).

69. *Id.* at 494.

Published by Digital Commons at St. Mary's University, 1995

other constitutional claims, and the implication that constitutional safeguards designed to secure the truth—to punish the guilty and free the innocent—are somehow worthier than prohibitions designed primarily to influence official behavior.[70] The dissenters also emphasized the "illogic" in the majority's willingness to apply the exclusionary rule at trial and on direct appeal, but not on habeas review.[71] Justice Brennan argued that "it is simply inconceivable that constitutional deprivation suddenly vanishes after the appellate process has been exhausted."[72] Additionally, Justice Brennan forecasted that the majority opinion laid the groundwork for "a drastic withdrawal of federal habeas jurisdiction, if not for all grounds of alleged unconstitutional detention, then at least for claims . . . [the] Court later decides are not 'guilt related.'"[73]

Despite Justice Brennan's prediction, *Stone* has not been extended beyond the Fourth Amendment.[74] For example, in *Kim-*

70. *Id.* at 524 (Brennan, J., dissenting). Justice Brennan explained: "[E]very guarantee enshrined in our Constitution, our basic charter and the guarantor of our most precious liberties, is by it endowed with an independent vitality and value, and this Court is not free to curtail those constitutional guarantees even to punish the most obviously guilty." *Id.*

71. *See Stone*, 428 U.S. at 512–13 (wondering how petitioner's rights could "suddenly evaporate" upon exhaustion of direct appeals); *id.* at 536–37 (White, J., dissenting) (disagreeing with contention that habeas should be less available to those alleging Fourth Amendment violations than to those alleging other violations).

72. *Id.* at 511. The majority's willingness to review Fourth Amendment claims in cases in which the State failed to provide an opportunity for full and fair litigation actually strengthened the dissent's position. *See id.* at 513–14 (attacking majority's proposition that ban on Fourth Amendment claims is supported by constitutional arguments). If violation of the exclusionary rule were not really constitutional in character, or if any constitutional error somehow dissipated upon conclusion of the direct appeal, then arguably there would be no reason for federal habeas review of such claims under any circumstances. However, there was another way to characterize the majority's position: the Fourth Amendment deprivation does not vanish, but there is a procedural limit to the number of times consideration of it will be judicially entertained. *See* J. Thomas Sullivan, *"Reforming" Federal Habeas Corpus: The Cost to Federalism, the Burden for Defense Counsel, and the Loss of Innocence*, 61 UMKC L. REV. 291, 302–04 (1992) (asserting that *Stone* only precludes Fourth Amendment claims when accused has had "full and fair" hearing). *But see* Emanuel Margolis, *Habeas Corpus: The No-Longer Great Writ*, 98 DICK. L. REV. 557, 568–69 (1994) (reasoning that *Stone* does result in disappearance of Fourth Amendment violations).

73. *Stone*, 428 U.S. at 517-18 (Brennan, J., dissenting).

74. *See* Withrow v. Williams, 113 S. Ct. 1745, 1748 (1993) (refusing to extend *Stone* to conviction based on statements acquired in violation of Miranda v. Arizona, 384 U.S. 436 (1966)); Kimmelman v. Morrison, 477 U.S. 365, 375-77 (1986) (failing to extend *Stone* to Sixth Amendment); Jackson v. Virginia, 443 U.S. 307, 321-24 (1979) (denying petitioner's request to extend *Stone* to insufficient-evidence claim under Due Process Clause); *see also*

melman v. Morrison,[75] the Supreme Court held that *Stone* did not foreclose federal habeas review of a Sixth Amendment claim that counsel rendered ineffective assistance by failing to raise a Fourth Amendment claim.[76] As in *Stone*, the *Kimmelman* Court examined the purposes of the constitutional right sought to be vindicated.[77] In contrast to the judicially created exclusionary rule, however, the Court considered the right to counsel a personal and fundamental constitutional right designed to assure the fairness, and thus the very legitimacy, of the adversary process itself.[78] Moreover, the Court reasoned that the benefits of allowing collateral review of such claims are anything but marginal: "Because collateral review will frequently be the only means through which an accused can effectuate the right to counsel, restricting the litigation of some Sixth Amendment claims to trial and direct review would seriously interfere with an accused's right to effective representation."[79]

More recently, in *Withrow v. Williams*,[80] the Court refused to extend the rationale of *Stone* to the *Miranda v. Arizona*[81] requirement that a suspect be informed of his Fifth Amendment rights prior to custodial interrogation.[82] Although the *Miranda* rule, like the Fourth Amendment exclusionary rule at issue in *Stone*, is judicially crafted and "prophylactic" in nature, that similarity was not sufficient to justify similar treatment of the issues on habeas review.[83] Instead, the Court again appeared to distinguish the Fourth Amendment right from other constitutional rights.[84] For example,

---

Note, *Fourth Amendment Dispute Types and the Scope of* Stone v. Powell, 68 VA. L. REV. 589, 589 (1982) (noting that *Stone* "has not been extended, and the case has remained a special exception for fourth amendment claims to the otherwise broad scope of federal habeas corpus jurisdiction").

75. 477 U.S. 365 (1986).

76. *See Kimmelman*, 477 U.S. at 382–83 (rejecting petitioner's argument that *Stone* restriction should be extended to Sixth Amendment).

77. *Id.* at 374–75.

78. *Id.* at 374, 377.

79. *Id.* at 378.

80. 113 S. Ct. 1745 (1993).

81. 384 U.S. 436 (1966).

82. *Withrow*, 113 S. Ct. at 1747.

83. *See id.* at 1752–53 (claiming that mere categorization of *Miranda* as "prophylactic" does not put *Miranda* and Fourth Amendment "on all fours").

84. *See id.* at 1753 (describing Fourth Amendment as deterrent, while focusing on *Miranda*'s effect on reliability and fairness of trial).

St. Mary's Law Journal, Vol. 27 [1995], No. 2, Art. 2

the Court found that even though *Miranda* may afford greater protections than those required by the Constitution, it nonetheless safeguards a "fundamental trial right."[85] The Court reasoned that the Fifth Amendment privilege against self-incrimination reflects the belief that an accusatorial criminal justice system that does not depend on confessions is more reliable than an inquisitorial system.[86] Furthermore, the Court asserted that the *Miranda* rule is distinguishable from the Fourth Amendment exclusionary rule because *Miranda* guards against admission of unreliable statements, whereas the exclusionary rule often results in the exclusion of reliable and probative evidence.[87]

The cost-benefit analysis developed in *Stone* also weighed in favor of federal habeas review of *Miranda* violations. Critical to the *Withrow* Court's analysis was the fact that removal of *Miranda* claims from the scope of federal habeas review would not prevent a prisoner from raising a due process challenge to the voluntariness of his confession.[88] Because the available due process challenge entails review of the totality of the circumstances, including whether the prisoner was advised of his *Miranda* rights, the Court concluded that elimination of *Miranda* claims would not measurably reduce litigation.[89] Therefore, the Court found that exclusion of *Miranda* claims from federal habeas review would not promote federalism or ease the burdens on federal courts.[90]

Kimmelman and *Withrow* indicate that constitutional protections designed to enhance the reliability of the criminal trial process will remain cognizable in federal habeas proceedings.[91] In addition, constitutional claims implicating the integrity of the judicial pro-

85. *Id.*

86. *Withrow*, 113 S. Ct. at 1753.

87. *See id.* (distinguishing Fourth Amendment's deterrent effect from *Miranda*'s purpose to secure fundamental trial rights and reliability of evidence).

88. *Id.* at 1754.

89. *Id.*

90. *See Withrow*, 113 S. Ct. at 1754–55 (asserting that tension between federal and state system would persist even with removal of *Miranda* situations from federal habeas review because petitioners could simply raise question as to straight voluntariness of confession).

91. *See* Carole J. Yanofsky, Note, Withrow v. Williams: *The Supreme Court's Surprising Refusal to* Stone Miranda, 44 AM. U. L. REV. 323, 338 (1994) (commenting on "extra-constitutional importance" afforded to claims of habeas petitioners under *Withrow* and *Kimmelman*).

cess, such as those alleging racial discrimination in the selection of a grand jury foreman, are subject to full federal review even though they are unrelated to the question of guilt or innocence.[92] Consequently, *Stone*'s justifications for removing Fourth Amendment claims from the scope of federal habeas review have little application to other constitutional rights, and *Stone* is therefore unlikely to be extended in the future.[93]

Nevertheless, in recent years the Court has restricted federal habeas review on grounds unrelated to the nature of the constitutional claim asserted.[94] Rather than imposing these restrictions by a straight-forward extension of *Stone*, the Court has utilized much more circuitous means, as the next three sections of this Article discuss. The Court could have selectively extended *Stone* to other areas and adjusted the *Stone* test so as not to preclude federal review unless there had actually been a full and fair adjudication of constitutional claims in the state court.[95] Even in retrospect it is not clear why the Court declined to restrict habeas corpus review through *Stone*, for the means ultimately selected by the Court are much more technical and cumbersome. Perhaps the explanation lies in the Court's desire to restrict the ability of federal judges to oversee state-court adjudications, regardless of the nature of the constitutional claim at stake.[96]

B. *Prohibition on Applying New Constitutional Rules on Federal Habeas*

On a much broader scale, a general prohibition against the application of new rules of constitutional law to cases on federal collateral review has emerged as a barrier to federal habeas relief. The

92. Rose v. Mitchell, 443 U.S. 545, 562–63 (1979).

93. *See* Daniel B. Yeager, *Categorical and Individualized Rights-Ordering on Federal Habeas Corpus*, 51 WASH. & LEE L. REV. 669, 685 (1994) (predicting that *Stone*'s limitation on federal habeas review will not expand past Fourth Amendment exclusionary rule).

94. *See* Gary Peller, *In Defense of Federal Habeas Corpus Relitigation*, 16 HARV. C.R.-C.L. L. REV. 579, 592–602 (1982) (tracking constitutional restrictions placed on habeas corpus review).

95. *See id.* at 602 (explaining that Court allows review only on guilt-related claims when there has been full and fair litigation in state court).

96. *See* Nicole A. Gordon & Douglas Gross, *Justiciability of Federal Claims in State Court*, 59 NOTRE DAME L. REV. 1145, 1150 (1984) (pointing out that ability of federal court to supervise state institutions is limited by principles of comity).

seminal case in this area is *Teague v. Lane*.[97] In *Teague*, the petitioner filed a federal writ seeking to extend the "fair cross section" requirement of the Sixth Amendment from the petit jury venire to the petit jury itself.[98] Because the petitioner sought a result contrary to existing precedent, he sought a "new rule,"[99] and the Court concluded that such a rule was unavailable on federal collateral review.[100] In reaching this conclusion, a plurality of the Supreme Court examined, and substantially modified, the law governing retroactive application of new rules of constitutional law.[101]

Prior to *Teague*, the purpose of a new rule largely determined whether it would be given retroactive effect.[102] Rules designed to promote accuracy and reliability in criminal proceedings generally were applied retroactively, while rules designed primarily to deter police misconduct were not.[103] Under *Teague*, however, new rules

---

97. 489 U.S. 288 (1989).

98. *Teague*, 489 U.S. at 293. In *Taylor v. Louisiana*, the Supreme Court expressly stated that its application of the "fair cross section" principle to petit jury *venires* imposed no comparable requirement with respect to the composition of the petit jury itself. 419 U.S. 522, 538 (1975); *see also* Akins v. Texas, 325 U.S. 398, 403 (1945) (holding that Constitution does not require proportionate representation of races on jury).

99. *Teague*, 489 U.S. at 299. Broadly defined, a "new rule" is one that "breaks new ground or imposes a new obligation" on the government. *Id.* at 301. Stated in a more functional manner, a case announces a new rule if existing precedent at the moment a defendant's conviction became final does not dictate the result he now seeks on federal habeas. *Id.* This alternative definition has assumed great significance in subsequent retroactivity decisions. *See* Caspari v. Bohlen, 114 S. Ct. 948, 953 (1994) (utilizing alternative definition of new rule to deny habeas relief to petitioner who sought retroactive application of new rule). *But see* Sawyer v. Smith, 497 U.S. 227, 246 (1990) (Marshall, J., dissenting) (asserting that alternative definition of new rule and subsequent interpretations unduly restrict habeas review to which prisoners are entitled).

100. *See Teague*, 489 U.S. at 305 (holding that new rules of criminal procedure should not be retroactively applied in federal habeas corpus review).

101. *See id.* at 311-16 (establishing exceptions to general rule prohibiting retroactivity of new rules).

102. *See* Hankerson v. North Carolina, 432 U.S. 233, 243 (1977) (holding that new rule is applied retroactively if purpose of rule is to avoid impairment of criminal trial's search for truth); Linkletter v. Walker, 381 U.S. 618, 629 (1965) (suggesting that courts look *inter alia* at purpose of new rule, its effect, and its prior history in determining whether rule should be applied retroactively).

103. *Compare* United States v. Johnson, 457 U.S. 537, 548–50 & n.11 (1982) (noting that application of full retroactivity is "necessary adjunct" to ruling that trial court had no authority to convict or punish criminal defendant) *with Linkletter*, 381 U.S. at 636–37 (explaining that retroactive application of new constitutional rules to prior police misconduct would not serve primary purpose of deterring future misconduct). In cases dealing with police misconduct, retroactivity turned on examination of the purpose of the new rule, the degree of reliance on prior law, and the impact of retroactive application on the adminis-

Baird: The Habeas Corpus Revolution: A New Role for State Courts.

are always applied retroactively prior to completion of direct appeals but are generally not applied to cases on federal collateral review.[104]

The *Teague* plurality adopted the approach to retroactivity that Justice Harlan took in *Mackey v. United States*,[105] with minor modifications.[106] Under this approach, the relevant inquiry is usually not into the purpose of the new rule; instead, the decisive factor is the purpose for which the writ is made available.[107] In the interests of finality and comity, and out of concern for the costs associated with overturning final state convictions,[108] the *Teague* plurality determined that habeas corpus review should generally be limited to those constitutional claims that were prevailing at the time a petitioner's conviction became final.[109]

There are two exceptions, however, to this general rule of non-retroactive application. First, a new rule that places "certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe" is retroactively appli-

---

tration of justice. *Linkletter*, 381 U.S. at 636–40. Under this approach, some new rules were applied to all nonfinal convictions, others were retroactively applied only in the particular cases announcing the new rules, and still others were not retroactively applied even in the cases announcing them. *See Johnson*, 457 U.S. at 544–45 (noting various standards Court has allowed for retroactivity).

104. *See Teague*, 489 U.S. at 303–05 (noting Justice Harlan's belief that rules should be applied retroactively to cases on direct review, but not to criminal cases on collateral review).

105. 401 U.S. 667 (1971).

106. *See Teague*, 489 U.S. at 310 (referring to Justice Harlan's views on retroactivity of new rules); *see also Mackey*, 401 U.S. 682–94 (Harlan, J., concurring in part and dissenting in part) (explaining view that courts should not apply new rules retroactively absent two narrow exceptions).

107. *Teague*, 489 U.S. at 306.

108. Application of constitutional rules not in existence when a conviction becomes final erodes the principle of finality, which is essential to the deterrent function of the criminal law. *Id.* at 309. Such an application also requires an ongoing expenditure of state resources to continue the incarceration of defendants whose trials comported with then-existing constitutional standards. *Id.* at 310. Finally, application of new rules frustrates the good-faith efforts of state judges to conduct criminal proceedings in compliance with constitutional requirements. *Id.*

109. *See id.* at 308–10 (analyzing criticisms of retroactivity and adopting Justice Harlan's view that new rules should not be applied to cases on collateral review). The purpose of federal habeas is to correct mistakes that were made at the time the petitioner's conviction became final, in light of the then-existing constitutional rules. *See* Saffle v. Parks, 494 U.S. 484, 488 (1990) (describing federal writ of habeas corpus as method of guaranteeing that state proceedings were conducted with Constitution, as then interpreted, being foremost in court's mind).

Published by Digital Commons at St. Mary's University, 1995

cable to cases subject to collateral review.[110] Marrying someone of another race,[111] enjoying marital privacy,[112] freely expressing oneself,[113] and receiving information and ideas[114] have been identified as the types of primary, private conduct that qualify under this exception.[115] The second exception is for "watershed rules of criminal procedure," such as the right to counsel at the time of trial.[116] With respect to this latter exception, the *Teague* Court stressed that the new rule must both improve the accuracy of the fact-finding process and implicate the fundamental fairness of the trial.[117]

Despite these exceptions, Justice Brennan was correct in warning that *Teague* would "contract substantially the Great Writ's sweep."[118] This effect is primarily due to *Teague*'s definition of new rules. The commonly entertained definition of new rules as those breaking new ground or imposing unanticipated obligations is *not*

110. *Teague*, 489 U.S. at 311 (Harlan, J., concurring in part and dissenting in part) (internal quotation marks omitted) (quoting Mackey v. United States, 401 U.S. 667, 692 (1971)).

111. *See* Loving v. Virginia, 388 U.S. 1, 12 (1967) (establishing right to interracial marriage).

112. *See* Griswold v. Connecticut, 381 U.S. 479, 486 (1965) (holding that right to privacy in marriage is fundamental right).

113. *See* Street v. New York, 394 U.S. 576, 593 (1969) (deciding that Constitution ensures freedom of expression).

114. *See* Stanley v. Georgia, 394 U.S. 557, 564 (1969) (finding that "Constitution protects the right to receive information and ideas").

115. *See Mackey*, 401 U.S. at 692 (Harlan, J., concurring in part and dissenting in part) (discussing types of conduct that are "beyond the power of the criminal law-making authority to proscribe").

116. *See Teague*, 489 U.S. at 311 (determining that new rules "implicit in concept of ordered liberty" should be applied retroactively (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937))); *see also* Hardy v. Wiggington, 922 F.2d 294, 301 (6th Cir. 1990) (claiming that right to counsel is excellent example of watershed rule).

117. *Teague*, 489 U.S. at 312. Neither exception was applicable to Teague's claim that the fair-cross-section requirement applied to the petit jury that convicted him. First, because the requirement of a "balanced" petit jury was not dictated by precedent at the time Teague was convicted, Teague sought a new rule. *Id.* at 299. Second, because the absence of a representative cross-section on the petit jury venire does not infringe upon the fundamental fairness or reduce the likelihood of an accurate verdict, a rule extending the requirement to the petit jury did not fall within the second *Teague* exception. *Id.* at 315. Thus, the Court did not allow Teague to claim the rule, regardless of its current validity. *Id.* at 316. The Court explained: "[H]abeas corpus cannot be used as a vehicle to create new constitutional rules of criminal procedure unless those rules would be applied retroactively to *all* defendants on collateral review through one of the two exceptions we have articulated." *Id.*

118. *See id.* at 334 (Brennan, J., dissenting) (predicting that *Teague* plurality opinion would significantly limit availability of federal habeas relief).

Baird: The Habeas Corpus Revolution: A New Role for State Courts.

the definition endorsed by *Teague* and its progeny.[119] Rather, *Teague* suggested a functional definition of a new rule, namely, that which was "not *dictated* by precedent existing at the time the defendant's conviction became final."[120]

The Supreme Court's subsequent application of the *Teague* definition in *Butler v. McKellar*[121] has sharply limited the range of constitutional rules available to federal habeas petitioners.[122] Butler, who was sentenced to death in state court, sought federal habeas relief on the basis that police illegally interrogated him as to the charged offense after he had previously invoked his Fifth Amendment right to counsel and retained an attorney on an unrelated crime.[123] Because there was continuous custody, Butler claimed that *Edwards v. Arizona*[124] prohibited police-initiated interrogation about any offense.[125] This assertion was accepted by the Supreme Court in *Arizona v. Roberson*[126] on the same day the federal court of appeals affirmed the denial of Butler's federal habeas petition.[127] On certiorari review, Butler argued that *Roberson* was

119. *See* Butler v. McKellar, 494 U.S. 407, 412 (1990) (asserting that common definition obviously applies when new decision expressly overrules earlier precedent, but contending that because most cases are not this clear, *Teague* definition should be used).

120. *Teague*, 489 U.S. at 301.

121. 494 U.S. 407 (1990).

122. *See Saffle*, 494 U.S. at 497 (Brennan, J., dissenting) (opining that *Butler* and *Saffle* significantly limit federal habeas review because of their "virtually all-encompassing definition of 'new rule'"); David McCord, *Visions of Habeas*, 1994 B.Y.U. L. REV. 735, 809 n.222 (describing how *Butler* made *Teague*'s new-rule definition even more restrictive). McCord went even further to show how much *Butler* restricted federal habeas review: "Even some people who could hardly be classified as liberals with respect to habeas believe that the Court has defined 'new rule' too restrictively." David McCord, *Visions of Habeas*, 1994 B.Y.U. L. REV. 735, 809 n.222.

123. *Butler*, 494 U.S. at 409–10. After he was arrested for assault, Butler invoked his Fifth Amendment right to counsel and retained an attorney to represent him at a bond hearing. *Id.* at 409. He was unable to make bond and was interrogated the next day about an unrelated murder. *Id.* Butler did not request his attorney's presence and eventually confessed to the murder. *Id.* at 409–10. The confession was introduced at his state trial. *Id.* at 410.

124. 451 U.S. 477 (1981).

125. *Butler*, 494 U.S. at 410-11. In *Edwards*, the defendant requested counsel after his arrest. *Edwards*, 451 U.S. at 479. The following day, officers elicited a confession after reinforming Edwards of his *Miranda* rights, despite Edwards's prior request for counsel and the detention officer's statement that Edwards "had to" speak with the officers. *Id.* The Supreme Court held that this type of police conduct violated the Fifth Amendment when there was continuous custody. *Id.* at 485–87.

126. 486 U.S. 675 (1988).

127. *Butler*, 494 U.S. at 411–12.

Published by Digital Commons at St. Mary's University, 1995

available to support his claim for habeas relief because, instead of announcing a new rule, it merely applied the rule of *Edwards* to slightly different facts.[128]

The Supreme Court did not deny that *Roberson* was controlled by *Edwards*, but nevertheless held that *Roberson* announced a new rule.[129] Central to this holding was the premise that retroactivity principles "validate[ ] reasonable, good-faith interpretations of existing precedents made by state courts even though they are shown to be contrary to later decisions."[130] Thus, the fact that a case is within the "logical compass" of, or "controlled by," existing precedent is not determinative of whether the case announces a new rule.[131] A case may be found to announce a new rule if the outcome is subject "to debate among reasonable minds."[132] In short, if at the time the petitioner's conviction became final the application of the constitutional rule he now seeks was a matter of reasonable debate, that rule "was not dictated by precedent" and, hence, is new.[133]

---

128. *Id.* at 414.

129. *See id.* at 415 (reasoning that just because new decision is controlled by previous decision, it is not conclusive as to whether decision announces new rule under *Teague*).

130. *Id.* at 414. This premise is consistent with the Court's view that changing the rules after a conviction becomes final frustrates good-faith efforts by state judges to comply with the Constitution. *Id.* However, the Court's citation to United States v. Leon, 468 U.S. 897, 918–19 (1984), which adopted a good-faith exception to the Fourth Amendment exclusionary rule, suggests that retroactivity principles have become a type of "good-faith" exception to the grant of habeas relief for a state prisoner. *See Butler*, 494 U.S. at 414 (asserting that retroactivity principle "validates reasonable good-faith interpretations of existing precedents made by state courts").

131. *Butler*, 494 U.S. at 415.

132. *Id.* Even if a petitioner relies on existing decisions that control or govern his claim, he may seek a new rule by urging a court to conclude that the Constitution compels an alternate interpretation. *Saffle*, 494 U.S. at 488.

133. *See Butler*, 494 U.S. at 412 (restating principle of *Teague* that case announces new rule "if the result was not dictated by precedent existing at the time the defendant's conviction became final"). Justice Brennan dissented and characterized this definition of a new rule as depriving state prisoners of almost any meaningful federal review of their constitutional claims. *Butler*, 494 U.S. at 417 (Brennan, J., dissenting). According to Justice Brennan, the writ is available only in those cases in which "the state court's rejection of the constitutional challenge was *so* clearly invalid under then-prevailing legal standards that the decision could not be defended by any reasonable jurist." *Id.* at 418. In addition, the dissenting Justices characterized the majority's decision that *Roberson* announced a new rule as "mystifying, given [the Court's] explanation in *Roberson* that the result was clearly dictated by *Edwards*." *Id.* at 421. The dissenters pointedly observed that even first-year law students learn that "adjudication according to prevailing law" entails much more than mere application of holdings to identical fact patterns. *Id.* at 423. Criticizing the Court's

Baird: The Habeas Corpus Revolution: A New Role for State Courts.

The limited exceptions to *Teague*'s retroactivity rule have not measurably slowed the narrowing of the scope of federal habeas law. The first exception was actually expanded to include more than constitutionally protected conduct. In *Penry v. Lynaugh*,[134] the Court announced that new rules which prohibit a certain punishment for a class of defendants because of their status or offense may be retroactively applicable on collateral review.[135] This expansion, however, appears to have little practical application in capital cases and virtually none in noncapital ones.[136]

Application of the second exception dealing with bedrock procedural rules has merely borne out the *Teague* plurality's observation that it is "unlikely that many such components of basic due process have yet to emerge."[137] In *Sawyer v. Smith*,[138] the Court reaffirmed that bedrock rules must be essential to the fundamental fairness of a criminal proceeding and enhance the accuracy of that proceeding.[139] In holding that the rule of *Caldwell v. Mississippi*[140] did not fall within the second *Teague* exception, the Court did not just examine the purpose and intended effect of that rule.[141] Instead, the Court focused on whether the measure of protection *Caldwell* ad-

---

retroactivity rule, Justice Brennan declared: "With this requirement, the Court has finally succeeded in its thinly veiled crusade to eviscerate Congress' habeas corpus regime." *Id.*

134. 492 U.S. 302 (1989).

135. *See Penry*, 492 U.S. at 330 (reasoning that adoption of new rule placing certain class of individuals beyond state's power to punish may fall under first exception to general rule of nonretroactivity allowing such rule to be applicable on collateral review).

136. *See* Johnson v. Texas, 113 S. Ct. 2658, 2668 (1993) (refusing to apply *Penry* to claim that jury instructions prevented adequate consideration of defendant's youth in capital case); Graham v. Collins, 113 S. Ct. 892, 901 (1993) (emphasizing that *Penry* is limited in application and would not be read "as effecting a sea change in this Court's view of the constitutionality of the former Texas death penalty statute").

137. *Teague*, 489 U.S. at 313.

138. 497 U.S. 227 (1990).

139. *Sawyer*, 497 U.S. at 242.

140. 472 U.S. 320 (1985). *Caldwell* held that the Eighth Amendment prohibits imposition of the death penalty when the sentencer is misled to believe that some other entity is responsible for deciding whether a death sentence is appropriate. *Caldwell*, 472 U.S. at 328-29.

141. *See Sawyer*, 497 U.S. at 244 (discussing whether *Caldwell* was necessary to ensure fairness of trial, rather than focusing on *Caldwell*'s purpose). In *Caldwell*, the Court found that misleading the jury about its sentencing responsibility violated the Eighth Amendment because it biased the jury in favor of the death penalty and created a risk that the defendant would be executed without any entity deciding that death was an appropriate sentence in his particular case. *Caldwell*, 472 U.S. at 331-33.

Published by Digital Commons at St. Mary's University, 1995

St. Mary's Law Journal, Vol. 27 [1995], No. 2, Art. 2

ded to existing due process guarantees was essential to fundamental fairness.[142]

C. *State Procedural Default: Development of the Cause-and-Prejudice Standard*

Notwithstanding the restrictions imposed by the Supreme Court's retroactivity approach, the availability of federal habeas review has been further limited by the state procedural-default doctrine. The effect that this doctrine would have on the scope of the federal writ first became apparent in *Francis v. Henderson*,[143] when the Supreme Court applied a cause-and-prejudice standard. In *Francis*, the petitioner forfeited state-court review of his challenge to the composition of the grand jury that indicted him because he did not timely object before trial.[144] Critical to the question of whether this default also precluded federal habeas review was *Davis v. United States*,[145] an earlier case in which a federal prisoner defaulted an identical claim by failing to comply with a comparable federal rule.[146] The legitimate and substantial interests furthered by the federal rule led the *Davis* Court to enforce it on collateral review.[147] The Supreme Court concluded in *Francis* that when the petitioner demonstrates neither actual prejudice nor cause for failing to comply with the state rule, "considerations of comity and federalism" require federal courts to "give no less effect to the same clear interests when asked to overturn state criminal convictions."[148]

---

142. *See Sawyer*, 497 U.S. at 244 (deciding that *Caldwell* was not totally necessary for fundamental fairness of trial, which removed it from second *Teague* exception).

143. 425 U.S. 536, *vacated sub nom.* Newman v. Henderson, 425 U.S. 967 (1976).

144. *Francis*, 425 U.S. at 542.

145. 411 U.S. 233 (1973).

146. *See Davis*, 411 U.S. at 242–45 (finding that failure to file Rule 12(b)(2) claim as to discrimination in grand jury selection waived such claim on federal collateral review); *see also* FED. R. CRIM. P. 12(b)(2) (stating that defenses or objections based on defects in indictment or information must be raised before trial). In *Davis*, the Supreme Court expressly chose to apply the federal procedural rule instead of the *Fay v. Noia* waiver standard. *Davis*, 411 U.S. at 238–42 & n.6 (citing Fay v. Noia, 372 U.S. 391 (1963)).

147. *Davis*, 411 U.S. at 241.

148. *Francis*, 425 U.S. at 541. *Francis* also relied on federal law to create an exception to the otherwise preclusive effect of the state procedural bar. *Id.* at 542. The federal rule involved in *Davis* authorized review notwithstanding a failure to object if the defendant showed cause for noncompliance and actual prejudice resulting from the alleged error. *Davis*, 411 U.S. at 245. Although the state's procedural rule had no comparable exception,

In *Wainwright v. Sykes*,[149] the Court extended *Francis* to a different state procedural rule and a different constitutional claim. Sykes claimed that admission of certain statements made by him while intoxicated violated the rule of *Miranda*[150] because he did not understand his rights.[151] The state courts did not review the merits of this claim because Sykes did not make a contemporaneous objection at trial.[152] Sykes then filed a writ in federal district court, which ordered the state court to hold a *Jackson v. Denno*[153] hearing.[154] The United States Court of Appeals for the Fifth Circuit affirmed the district court's order, holding that Sykes's noncompliance with the contemporaneous-objection rule would only bar review if he "deliberately bypassed" his opportunity to object for strategic purposes.[155]

In a "significant departure from the 'deliberate-bypass' standard announced in *Fay*,"[156] the Supreme Court reversed the Fifth Circuit's decision and held that, absent a showing of cause and prejudice, a petitioner who forfeits state-court review by failing to comply with the state's contemporaneous-objection rule also forfeits federal habeas review.[157] To reach this result, the Court characterized *Fay*'s stringent waiver rule as overly broad.[158] This freed the Court to adopt the cause-and-prejudice standard of *Francis* without expressly overruling *Fay*'s deliberate-bypass standard.[159]

---

this cause-and-prejudice standard was applied to Francis's default. *Francis*, 425 U.S. at 542. However, Francis was unable to meet this standard. *Id.*

149. 433 U.S. 72 (1977).

150. *See* Miranda v. Arizona, 384 U.S. 436, 475 (1966) (holding that suspect in custody must knowingly waive rights to counsel and silence prior to interrogation).

151. *Sykes*, 433 U.S. at 75.

152. *Id.*

153. 378 U.S. 368 (1964). *Jackson* mandates a preliminary hearing on the voluntariness of a confession by a body other than that deciding the defendant's guilt or innocence. *Jackson*, 378 U.S. at 391–96.

154. *Sykes*, 433 U.S. at 75–76.

155. Wainwright v. Sykes, 528 F.2d 522, 527 (5th Cir. 1976), *aff'd*, 433 U.S. 72 (1977).

156. *Sykes*, 433 U.S. at 94 (Stevens, J., concurring).

157. *See id.* at 90 (stressing that state trial court is proper forum for constitutional objections and asserting that "[a]ny procedural rule which encourages the result that those proceedings be as free of error as possible is thoroughly desirable, and the contemporaneous-objection rule surely falls within this classification").

158. *Id.* at 88-89 & n.12.

159. *See* Mary Ann Snow, Comment, Lundy, Isaac *and* Frady: *A Trilogy of Habeas Corpus Restraint*, 32 CATH. U. L. REV. 169, 171 (1982) (asserting that *Sykes* adopted cause-and-prejudice standard); *see also* Dion A. Sullivan, *Habeas Corpus: Ending Endless Ap-*

The dominant factors supporting the Court's preference for *Francis* over *Fay* were considerations of federalism, comity, and finality of judgments.[160] While these interests were furthered by federal collateral enforcement of a contemporaneous-objection requirement, they were undermined by acceptance of a broad reading of *Fay*'s stringent waiver principle.[161] Thus, the notion that a state procedural default precludes federal habeas review became the rule, rather than the exception.

Sykes also expanded the scope of the procedural default doctrine in another way. In contrast to *Francis*, the legitimacy of the state's procedural rule in *Sykes* was not linked to the existence of a federal counterpart.[162] Rather, the Court examined the interests furthered by a contemporaneous-objection requirement and found them sufficient to justify enforcement of the state procedural bar on federal habeas review.[163] This analysis opened the door for a wide range of state procedural defaults to stand as barriers to federal habeas review.[164]

---

peals and the Paradox of the Independent and Adequate State Ground Doctrine, 11 WHITTIER L. REV. 783, 789–90 (1990) (discussing cause-and-prejudice standard of *Sykes* and fact that *Sykes* did not expressly overrule *Fay*); *cf.* J. Thomas Sullivan, *A Practical Guide to Recent Developments in Federal Habeas Corpus for Practicing Attorneys*, 25 ARIZ. ST. L.J. 317, 322 (1993) (stating that *Fay's* deliberate-bypass standard was expressly overruled in Coleman v. Thompson, 501 U.S. 722, 748–50 (1991)).

160. *See Sykes*, 433 U.S. at 90 (concluding that adoption of *Francis* will make "state trial on the merits the 'main event,' so to speak, rather than a 'tryout on the road' for what will later be the determinative federal habeas hearing"); Stephanie Dest, Comment, *Federal Habeas Corpus and State Procedural Default: An Abstention-Based Interest Analysis*, 56 U. CHI. L. REV. 263, 271 (1989) (explaining that procedural default tests of *Francis* and *Fay* concern comity and federalism).

161. *See Sykes*, 433 U.S. at 88–90 (opining that broad reading of *Fay* could result in defense lawyers "sandbagging" objections to assert on federal collateral review in event of guilty verdict). Significantly, the *Sykes* Court reasoned that the cause-and-prejudice exception was broad enough to allow federal habeas courts to redress miscarriages of justice, although the Court left the content of the miscarriage-of-justice exception for future decisions. *See id.* at 90-91 (finding that, while exact meaning of cause-and-prejudice and miscarriage-of-justice standards was not clearly defined at time, facts of *Sykes* would not have allowed petitioner to claim such exemption).

162. *See id.* at 84-90 (failing to mention whether federal counterpart to state contemporaneous-objection rule existed).

163. *See id.* at 88-89 (listing possible "sandbagging" of objections by lawyers and more lenient state court enforcement as reasons to enforce contemporaneous-objection rule on federal collateral review).

164. For example, federal habeas review may be forfeited not only by defaults occurring at trial, but also by those occurring on appeal, Murray v. Carrier, 477 U.S. 478, 489–90 (1986); and on state collateral review, Coleman v. Thompson, 501 U.S. 722, 745 (1991). A

One such barrier emerged in *Engle v. Isaac*,[165] when the Court refused writ relief for a state prisoner who failed to object to a later-invalidated state burden of proof requirement.[166] In *Engle*, the defendant was tried for assault and pleaded self-defense.[167] At the time of his trial, Ohio law required defendants to bear the burden of proving self-defense by a preponderance of the evidence,[168] and Isaac did not object to an instruction imposing this burden.[169] Ten months after Isaac's conviction, the Ohio Supreme Court changed the law.[170] On appeal, Isaac relied upon the change in the law, but the state court affirmed his conviction because Isaac failed to object at trial.[171] Isaac then filed a federal writ claiming that the jury instruction violated the Due Process Clause.[172] Although the federal district court denied relief, the Sixth Circuit granted relief after finding that Isaac satisfied the cause-and-prejudice standard.[173]

The State appealed and, on certiorari review, Isaac advanced two basic arguments to avoid the preclusive effect of the state procedural default. First, he advocated that *Sykes* should be limited to those constitutional claims that do not affect the truth-finding function of the trial.[174] Second, Isaac urged two circumstances as cause:

---

procedural rule that does not serve legitimate state interests, however, is inadequate to bar federal review. *See* James v. Kentucky, 466 U.S. 341, 348–49 (1984) (holding that state procedural bar resulting from state law distinction between jury instructions and jury admonishments did not preclude direct Supreme Court review).

165. 456 U.S. 107 (1982).

166. *See Engle*, 456 U.S. at 135 (denying habeas relief for failure to follow state procedures and failure to show cause for such default).

167. Isaac v. Engle, 646 F.2d 1129, 1135 (6th Cir. 1980), *rev'd on other grounds*, Engle v. Isaac, 456 U.S. 107 (1982).

168. *Engle*, 456 U.S. at 110.

169. *Id.* at 112.

170. *Id.* at 115. In *State v. Robinson*, the Ohio Supreme Court held that OHIO REV. CODE ANN. § 2901.05 placed only the burden of production of an affirmative defense on the defendant, not the burden of proof. 351 N.E.2d 88, 93 (Ohio 1976). The Ohio court concluded that once the defendant produces some evidence in support of an affirmative defense, the state must disprove the defense beyond a reasonable doubt. *Id.*

171. *Engle*, 456 U.S. at 115.

172. *Id.* at 117–18.

173. *Engle*, 646 F.2d at 1133. The Sixth Circuit reasoned: "The futility of objecting to this established practice supplied adequate cause for Isaac's waiver. Prejudice, the second prerequisite for excusing a procedural default, was 'clear' since the burden of proof is a critical element of fact-finding, and since Isaac had made a substantial issue of self-defense." *Id.* at 1134.

174. *Engle*, 456 U.S. at 129.

St. Mary's Law Journal, Vol. 27 [1995], No. 2, Art. 2

(1) the futility of an objection in light of well-established state law; and (2) the novelty of the constitutional claim, in that he could not have known that the Due Process Clause addresses the burden of proving affirmative defenses.[175]

The Court rejected Isaac's first argument based on a lengthy review of the societal costs associated with federal habeas review that led to adoption of the cause-and-prejudice standard in *Sykes*.[176] These costs include the degradation of trials, the strain placed on the federal system, and the lack of finality of state court judgments.[177] The Court noted that such costs "do not depend upon the type of claim raised by the prisoner."[178]

With regard to Isaac's second argument, the Supreme Court first categorically rejected the notion of futility as cause, stating: "If a defendant perceives a constitutional claim and believes it may find favor in the federal courts, he may not bypass the state courts simply because he thinks they will be unsympathetic to the claim."[179] Next, without actually deciding if the novelty of a constitutional claim constitutes cause for a failure to object, the Court determined that Isaac's claim was not novel at the time of trial.[180] The Court reached this conclusion after assessing the law in existence at the time of Isaac's trial to determine whether it provided "the tools to construct [the] constitutional claim."[181] The Court noted that *In re Winship*,[182] which was decided nearly five years before the state

175. *Id.* at 130.

176. *See id.* at 126–29 (reviewing costs associated with habeas corpus writ).

177. *Id.*

178. *Engle*, 456 U.S. at 129. This statement appears to contradict the rationale of *Stone v. Powell*, in which the Court stated that granting the writ for purposes "other than to assure that no innocent person suffers an unconstitutional loss of liberty" represents a burden on allocation of judicial resources and an intrusion on interests of comity, federalism, and finality. 428 U.S. 465, 491 n.31 (1977). Constitutional rights designed to further the truth-finding function of a criminal trial serve as protections against conviction of the innocent. *See* Hankerson v. North Carolina, 432 U.S. 233, 242 (1977) (describing reasonable doubt standard as limiting possibility of convicting innocent person because of its focus on truth-finding aspect of trial).

179. *Engle*, 456 U.S. at 130.

180. *See id.* at 131 (refusing to address whether novel constitutional claim can ever meet cause requirement for failure to object, because claims involved were far from novel).

181. *Id.* at 132–33.

182. 397 U.S. 358 (1970). *Winship* generally held that the Due Process Clause requires the State to prove every essential element of an offense beyond a reasonable doubt. *Winship*, 397 U.S. at 364. Five years after *Winship*, the Supreme Court applied this general due process principle in the related context of rules allocating the burden of proof in crimi-

Baird: The Habeas Corpus Revolution: A New Role for State Courts.

trial, provided the basis for raising a due process challenge to rules shifting the burden of proof from the state to the defense.[183] Consequently, Isaac did not demonstrate cause for his default and was thus barred from asserting the claim on federal habeas.[184]

The Court addressed the question left open by *Engle* in *Reed v. Ross*,[185] in which it expressly held that the novelty of a constitutional claim can constitute cause for a procedural default.[186] At a trial for murder, the judge had instructed the jurors that Ross had the burden of proving his asserted defenses, absence of malice and self-defense.[187] Although Ross appealed, he did not challenge the constitutionality of the jury instructions, which were sanctioned by over a century of North Carolina law.[188] On federal habeas review, the district court held that review was barred because Ross had not

---

nal proceedings. *See* Mullaney v. Wilbur, 421 U.S. 684, 704 (1975) (deciding that when malice is essential element of offense of murder, state denies defendant due process by shifting to him burden of proving that he acted in heat of sudden passion).

183. *Engle*, 456 U.S. at 131–33. The conclusion that the general rule of *Winship*, rather than the specific rule of *Mullaney*, marked the point at which Isaac's burden-shifting challenge became available was based in part on the Court's reasoning that, in the five-year interval between the decisions, many defendants relied on *Winship* to raise the claim accepted in *Mullaney*. *Id.* at 131-33 & n.40. The *Engle* Court noted that during the same five-year interval, numerous courts accepted the argument that due process requires the state to disprove certain affirmative defenses. *Id.* at 132–33. According to the Court, even those cases rejecting such claims showed that other defendants were aware of the issue. *Id.* at 133 n.41.

184. *Id.* at 135. Isaac raised a third argument in which he requested that the cause-and-prejudice standard be replaced by a "plain error" inquiry. *Id.* at 134. This argument was rejected based on an opinion, handed down the same day as *Engle*, in which the Court held the *Sykes* cause-and-prejudice standard applicable to procedural defaults by federal prisoners. *Id.* (citing United States v. Frady, 456 U.S. 152 (1982)). *Frady* explained the prejudice prong of *Sykes*: The petitioner must show "not merely that the errors at his trial created a *possibility* of prejudice, but that they worked to his *actual* and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." United States v. Frady, 456 U.S. 152, 170 (1982). Because federal prisoners were not entitled to review of defaulted claims for plain error, increased comity and finality concerns justified application of the cause-and-prejudice standard to state prisoners. *Engle*, 456 U.S. at 134-35.

185. 468 U.S. 1 (1984).

186. *Ross*, 468 U.S. at 13.

187. *Id.*

188. *Id.* at 3, 5–6. Six years after Ross's trial, the Court held that similar instructions requiring the defendant to disprove malice were unconstitutional. *See Mullaney*, 421 U.S. at 701 (deciding that instructions which shift burden of proof to defendant increase chance of erroneous conviction and violate Constitution). *Mullaney* was accorded full retroactive effect in a case involving the same North Carolina law pursuant to which Ross's jury was instructed. *See Hankerson*, 432 U.S. at 240–42 (1977) (explaining how state court erred in failing to apply *Mullaney* rule retroactively).

Published by Digital Commons at St. Mary's University, 1995

St. Mary's Law Journal, Vol. 27 [1995], No. 2, Art. 2

raised the issue on appeal as required by North Carolina law,[189] and the Fourth Circuit dismissed the appeal.[190] The Supreme Court subsequently vacated and remanded for reconsideration in light of *Engle*,[191] and the Fourth Circuit held that Ross met the cause standard because of the novelty of his claim.[192]

On certiorari review for the second time, the Supreme Court referred, as in *Sykes* and *Engle*, to the costs associated with habeas review of defaulted claims: "Counsel's failure to raise a claim for which there was no reasonable basis in existing law does not seriously implicate any of the concerns that might otherwise require deference to a State's procedural bar."[193] The Court explained that it was reasonable under the circumstances to assume both that a competent attorney would not even perceive the possibility of asserting the claim and that a court would not appreciate such a claim.[194] Consequently, the Court in *Ross* held that a petitioner establishes cause for a state procedural default "where a constitutional claim is so novel that its legal basis is not reasonably available to counsel."[195] Applying this standard, the Court determined

189. *Ross*, 468 U.S. at 8.

190. Ross v. Reed, 660 F.2d 492 (4th Cir. 1981).

191. Ross v. Reed, 456 U.S. 921, 921 (1982).

192. Ross v. Reed, 704 F.2d 705, 707 (4th Cir. 1983). The State conceded that Ross was actually prejudiced by the error. *Id.*

193. *Ross*, 468 U.S. at 15.

194. *Id.* The *Ross* Court stated: "Despite the fact that a constitutional concept may ultimately enjoy general acceptance . . . when the concept is in its embryonic stage, it will, by hypothesis, be rejected by most courts. Consequently, a rule requiring a defendant to raise a truly novel issue is not likely to serve any functional purpose." *Id.*; *cf.* David Rudenstine, *Judicially Ordered Social Reform: Neofederalism and Neonationalism and the Debate over Political Structure*, 59 S. CAL. L. REV. 449, 485 (1986) (noting that Supreme Court often rejects novel constitutional arguments of prisoners and mental patients).

195. *Ross*, 468 U.S. at 16. The long-standing practice of requiring defendants to shoulder the burden of disproving certain elements of the crime was arguably sanctioned by *Leland v. Oregon. See* 343 U.S. 790, 798-800 (1952) (permitting state to require defendant to prove insanity beyond reasonable doubt even though defense might indicate absence of mens rea). Only two cases, one by a federal court of appeals and the other by a superior court of another state, provided even indirect support for Ross's claim at the time of trial. *Ross*, 468 U.S. at 18-19; *see* Stump v. Bennett, 398 F.2d 111, 113 (8th Cir. 1968) (finding that rule which shifts burden of proof to defendant violates 14th Amendment); State v. Niles, 248 A.2d 242, 243-44 (Conn. Super. Ct. 1968) (emphasizing that defendant has no burden to prove his innocence). *Engle* was distinguished because *Winship*, which *Engle* found to be the legal basis for challenges to burden-shifting instructions, was announced the year *after* Ross's trial. *Ross*, 468 U.S. at 19. Ross prevailed because the novelty of his claim excused trial counsel's failure to object to the jury instruction. *Id.* at 20. However, it is interesting to note that had *Teague* been in effect when Ross sought federal habeas relief,

that Ross demonstrated cause because the legal basis for an objection to burden-shifting instructions was not reasonably available at his 1969 trial.[196]

The Court considered a related issue in *Murray v. Carrier*,[197] which involved the question of whether defense counsel's inadvertent failure to raise a constitutional claim amounted to cause for a resulting procedural default.[198] During Murray's prosecution for rape, his attorney filed a motion to examine the victim's statements, which was denied.[199] Murray was convicted and he appealed, but his attorney left out the point of error relating to the victim's statements.[200] Thereafter, Murray's claim that denial of the victim's statements violated due process was rejected in a state habeas action because he failed to raise it on direct appeal.[201]

On federal habeas review, the Supreme Court declared: "[T]he mere fact that counsel failed to recognize the factual or legal basis for a claim, or failed to raise the claim despite recognizing it, does not constitute cause for a procedural default."[202] The *Carrier* Court reasoned that when counsel's actions are not constitutionally

---

Ross would not have been entitled to relief unless the new rule announced in *Winship* met one of the *Teague* exceptions. *See* Teague v. Lane, 489 U.S. 288, 310 (1989) (finding that new rules should not be retroactively applied unless they meet one of two narrow exceptions). Under the *Teague* standard, Ross would have argued that *Winship* was a watershed case that improved the accuracy of the fact-finding process and implicated the fundamental fairness of the trial. Ross might well have succeeded in fitting his claim within the exception. As the Court stated in *Ivan v. New York*, "the major purpose of the constitutional standard of proof beyond a reasonable doubt announced in *Winship* was to overcome an aspect of a criminal trial that substantially impairs the truth-finding function." 407 U.S. 203, 205 (1972). Nevertheless, it seems that in light of the new-rule bar of *Teague*, novelty will no longer be a viable means of excusing cause.

196. *See Ross*, 468 U.S. at 20 (finding that Ross established cause because his claim was novel enough in 1969 that his attorney had excuse for failing to raise burden-shifting argument).

197. 477 U.S. 478 (1986).

198. *Carrier*, 477 U.S. at 481–82. Soon after Fay v. Noia, 372 U.S. 391 (1963), the Supreme Court recognized that absent exceptional circumstances, a defendant is bound by his attorney's decisions in matters of trial strategy, regardless of whether he was consulted about them. Henry v. Mississippi, 379 U.S. 443, 451 (1965). At the very least, *Sykes* implied that counsel's default of a claim for tactical reasons would foreclose federal habeas review. *Carrier*, 477 U.S. at 485.

199. *Carrier*, 477 U.S. at 482.

200. *Id.*

201. *Id.* at 482–83.

202. *Id.* at 486-87.

St. Mary's Law Journal, Vol. 27 [1995], No. 2, Art. 2

ineffective,[203] it is equitable to place the risk of attorney error on the defendant.[204] The Court noted, however, that if the procedural default amounts to ineffective assistance, the Sixth Amendment requires that the state bear responsibility for the default.[205] This holding rejected any implication left by *Ross* that defendants were bound by defense counsel's procedural defaults only if the defaults stemmed from counsel's tactical decisions or from a deliberate-bypass of state procedures.[206] After *Carrier*, if the defendant's counsel is "constitutionally" competent, most, if not all, of his mistakes will be "imputed" to his client.

Carrier's treatment of the cause-and-prejudice standard did, however, open a new possibility. The Court acknowledged that escape from its stringent cause-and-prejudice standard may be so difficult as to deny a sufficient opportunity for federal habeas courts to redress fundamental miscarriages of justice.[207] Accordingly, for the first time, the Court defined the "miscarriage of justice" standard and created a new exception to the procedural default doctrine, stating: "[I]n an extraordinary case, where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in

---

203. For a detailed discussion of ineffective-assistance claims, see Strickland v. Washington, 466 U.S. 668 (1984).

204. *Carrier*, 477 U.S. at 488. The Court stated that "the existence of cause for a procedural default must ordinarily turn on whether the prisoner can show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule." *Id.* These factors include the unavailability of the factual or legal basis for a claim and interference by state officials. *Id.*

205. *Id.* In addition to excusing a procedural bar, ineffective assistance of counsel may provide an independent basis for federal habeas relief. *See* Kimmelman v. Morrison, 477 U.S. 365, 378, 383 (1986) (extending federal habeas relief to Sixth Amendment ineffective-assistance-of-counsel claims regardless of nature of attorney's underlying error); *cf.* *Carrier*, 477 U.S. at 496 (holding that use of cause-and-prejudice test to evaluate ineffective assistance claims will not prevent federal habeas courts from ensuring fundamental fairness).

206. *See Ross*, 468 U.S. at 13-14 (deciding that defense counsel may not tactically forego procedural opportunity and pursue alternate means in federal court). This Sixth Amendment rationale has been carried to its extreme. If federal claims are defaulted in a state proceeding to which the Sixth Amendment does not apply, even egregious attorney error will not constitute cause for the default. *See Coleman*, 501 U.S. at 725 (finding ineffective-assistance-of-counsel claim without merit because that constitutional guarantee does not apply to state post-conviction proceedings).

207. *See Carrier*, 477 U.S. at 495–96 (accepting that situation may exist where cause-and-prejudice requirements would bar claim of one who has suffered fundamental miscarriage of justice).

Baird: The Habeas Corpus Revolution: A New Role for State Courts.

the absence of a showing of cause for the procedural default."[208] Almost immediately thereafter, in *Smith v. Murray*,[209] the Court extended the notion of "actual innocence" to include a prisoner's innocence of a sentence.[210]

The "fundamental miscarriage of justice" exception articulated in *Carrier* and *Smith* was realized in *Schlup v. Delo*.[211] Rather than claiming actual innocence as a basis for relief,[212] Schlup based his claims on a denial of a constitutional right; he alleged ineffective assistance of counsel and asserted that the prosecution withheld evidence.[213] The sole purpose of Schlup's innocence claim was to render the "narrow class of cases . . . implicating a fundamental miscarriage of justice applicable to him."[214] Schlup's innocence claim was not a genuine constitutional claim, but merely a "gateway through which a habeas petitioner must pass to have his otherwise-barred constitutional claim considered on the merits."[215] Upon passing through the "gateway," application of the *Carrier* standard would require Schlup to show that the alleged constitutional deprivation had "probably resulted in the conviction of one who is actually innocent."[216] Designed to prevent "manifest injustice," this standard limits review to "extraordinary" claims and allows the habeas court to consider the probable force of relevant evidence that was either excluded or unavailable at trial.[217] The *Schlup* Court ultimately found that the lower courts should have applied the *Carrier* "probably resulted" standard in determining

208. *Id.*

209. 477 U.S. 527 (1986).

210. *Smith*, 477 U.S. at 537–38. The Supreme Court has held that a showing of "actual innocence" requires a petitioner to prove that "no reasonable juror would have found the petitioner eligible for the death penalty under the applicable state law." Sawyer v. Whitley, 505 U.S. 333, 336 (1992). The *Smith* Court extended this accepted definition to error in the sentencing phase of the trial. *Smith*, 477 U.S. at 537–38.

211. 115 S. Ct. 851 (1995).

212. The Court had previously denied a "claim of actual innocence based on newly discovered evidence" in the absence of a separate constitutional violation. Herrera v. Collins, 113 S. Ct. 853, 860 (1993).

213. *Schlup*, 115 S. Ct. at 860.

214. *Id.*

215. *Id.*

216. *Id.* at 867.

217. *Schlup*, 115 S. Ct. at 867.

Published by Digital Commons at St. Mary's University, 1995

St. Mary's Law Journal, Vol. 27 [1995], No. 2, Art. 2

whether to grant Schlup an evidentiary hearing on his claims, and vacated and remanded the case accordingly.[218]

The Court again extended the cause-and-prejudice standard in *Coleman v. Thompson*,[219] which represents the culmination of the Court's rejection of *Fay v. Noia*. On state collateral review, Coleman raised numerous constitutional challenges to his conviction and death sentence, which the state circuit court rejected.[220] He forfeited review of all these claims in the Virginia Supreme Court, however, because his attorneys did not timely file a notice of appeal.[221] Previously, *Fay*'s deliberate-bypass standard apparently controlled when a defendant forfeited, for reasons other than tactical advantage, review of *all* of his constitutional claims by the state's highest court.[222]

Presented with facts squarely falling within *Fay*'s holding, the Court overruled *Fay*.[223] After reviewing the development of the procedural-default doctrine following *Fay*, the Court concluded: "*Fay* was based on a concept 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."[224] Accordingly, the Court explicitly held that *all* procedural defaults, including Coleman's default of an entire appeal, would bar federal habeas review unless the petitioner showed cause and prejudice or otherwise established that federal review was necessary to correct a fundamental miscarriage of justice.[225]

---

218. *Id.* at 869. The Court had previously applied a stricter standard in *Sawyer v. Whitley*. *See* 505 U.S. 333, 336 (1992) (articulating "clear and convincing evidence" standard required for finding that court imposed death penalty in violation of petitioner's constitutional rights).

219. 501 U.S. 722 (1991).

220. *Coleman*, 501 U.S. at 727.

221. *Id.*

222. *See Carrier*, 477 U.S. at 492 (limiting holding to default of *particular* claims); *Sykes*, 433 U.S. at 88 n.12 (noting that Court was not considering application of *Fay* under specific circumstances presented therein).

223. *See Coleman*, 501 U.S. at 750 (superseding *Fay*'s deliberate-bypass standard in light of cases like *Francis, Sykes, Engle,* and *Carrier*, which placed greater emphasis on finality and comity).

224. *Id.*

225. *Id.*

D. *Extension of the Cause-and-Prejudice Standard and Development of the "Harmless Error" Analysis*

The Court's emphasis on the costs associated with federal habeas review and on considerations of comity and finality has resulted in additional procedural limitations on the availability of the writ. First, the cause-and-prejudice standard and the related miscarriage-of-justice exception, as developed in the context of state procedural bars, have been translated to other aspects of federal habeas procedure. Second, most constitutional claims are subject to a harmless error analysis that is less stringent than the standard applicable on direct appeal.

1. Extending the Cause-and-Prejudice Standard Beyond Procedural Default

In *McCleskey v. Zant*,[226] the Court incorporated the cause-and-prejudice standard into the federal doctrine of "abuse of the writ," which limits a petitioner's ability to obtain review of subsequent petitions.[227] Accordingly, the current version of the federal habeas

---

226. 499 U.S. 467 (1991).

227. *See McCleskey*, 499 U.S. at 477–89 (discussing statutory and judicial development of "abuse of the writ" doctrine). McCleskey confessed to participating in a robbery in which a police officer was shot and killed. *Id.* at 470. At his trial for robbery and murder, he renounced the confession. *Id.* In rebuttal, the prosecution called an inmate who had occupied a jail cell next to McCleskey's. *Id.* The inmate testified that McCleskey admitted to and bragged about shooting the police officer. *Id.* McCleskey was convicted of murder and sentenced to death. *Id.* at 471. On direct appeal, McCleskey unsuccessfully claimed that the prosecutor's failure to disclose the substance of the inmate's testimony violated due process. *Id.*; *see also* Brady v. Maryland, 383 U.S. 83, 86 (1963) (holding that failure to disclose codefendant's murder confession until after trial violated defendant's due process rights). On state post-conviction review, McCleskey renewed his challenge and claimed that he was denied due process because the prosecution failed to disclose a deal it made with the inmate. *McCleskey*, 499 U.S. at 472. McCleskey also asserted that the admissions were deliberately elicited in violation of his Sixth Amendment right to counsel. *Id.* After the state courts denied relief, McCleskey filed his first federal habeas petition and included the two due process challenges to the inmate's testimony, but omitted the Sixth Amendment claim. *Id.* at 472–73. Ultimately, relief was denied on the presented claims. *Id.* at 473. In his second federal petition, McCleskey asserted the Sixth Amendment challenge to the inmate's testimony. *Id.* at 474. He relied on a signed statement the inmate made approximately two weeks before McCleskey's trial. *Id.* This statement was first provided to McCleskey over nine years later—one month before he filed his second federal petition. *Id.* In the statement, the inmate not only related McCleskey's jailhouse admissions, but also stated that he gained McCleskey's confidence by pretending to be the uncle of one of McCleskey's accomplices. *Id.* Based on the inmate's statement and the testimony of the jailor in whose office the statement was taken, the federal district court found the police

statute provides a limited form of res judicata: a federal court need not entertain a second or subsequent petition unless it raises a new factual or legal ground and the court is satisfied the petitioner did not deliberately withhold the ground or otherwise abuse the writ.[228] The statute, however, does not address at least two issues. First, it does not define "abuse of the writ," although it provides that such conduct justifies refusal to consider a second or successive petition.[229] Additionally, the statute does not specify the limits, if any, on a federal court's discretion to entertain a petition notwithstanding abuse of the writ.[230] Prior to *McCleskey*, these issues were resolved by reference to whether the "ends of justice" warranted consideration of a second or subsequent petition.[231]

Applying this "ends of justice" analysis, the Court reached varying conclusions. In *Sanders v. United States*,[232] the Court mentioned deliberate withholding or abandonment of claims from the first federal petition as examples of abuse of the writ.[233] In *Kuhlmann v. Wilson*,[234] on the other hand, the plurality suggested

---

violated the Sixth Amendment by using the inmate to gather incriminating evidence in the absence of counsel. *Id.* at 475. The district court rejected the State's claim that McCleskey's failure to include the claim in the first federal petition constituted an abuse of the writ because McCleskey had no knowledge of the statement or the identity of the jailor and his failure to raise the claim was not inexcusable neglect. *Id.* at 475–76. The court of appeals reversed. *Id.* at 476.

228. 28 U.S.C. § 2244 (1994).

229. *See id.* § 2244(b) (mentioning abuse of writ as bar to successive petition, but failing to explain what constitutes such abuse).

230. *McCleskey*, 499 U.S. at 486–87.

231. *See* Kuhlmann v. Wilson, 477 U.S. 436, 454 (1986) (concluding that "ends of justice" mandate that federal courts hear habeas petitions only when prisoners add showing of factual innocence to constitutional claims); Sanders v. United States, 373 U.S. 1, 15 (1963) (requiring that all habeas applications be evaluated on merits if it would serve "ends of justice"). At common law, as now, denial of habeas relief was not res judicata. *McCleskey*, 499 U.S. at 479. However, to avoid endless and repetitive writ applications, the courts have long recognized that the previous denial of a federal writ can be given great, and even controlling, weight. *See* Salinger v. Loisel, 265 U.S. 224, 231 (1924) (asserting that court may give prior refusal to discharge on similar habeas petition great weight and collecting numerous cases that illustrate this point). Congress addressed the problem of successive writ applications in the modern habeas statute, conferring discretion upon the federal courts to refuse to consider such applications. *See* 28 U.S.C. § 2244 (1994) (allowing federal court to refuse to hear successive habeas petition if such petition fails to raise new facts or legal ground and court believes petitioner did not deliberately withhold such facts or otherwise abuse writ).

232. 373 U.S. 1 (1963).

233. *Sanders*, 373 U.S. at 18.

234. 477 U.S. 436 (1986).

Baird: The Habeas Corpus Revolution: A New Role for State Courts.

that the "ends of justice" warranted consideration of a successive petition only if the petitioner supplemented his claims with a "colorable showing of factual innocence."[235] The *McCleskey* Court, however, adopted the cause-and-prejudice and miscarriage-of-justice standards to provide "meaningful content" for the "ends of justice" inquiry.[236] *McCleskey* also made clear that abuse of the writ includes any omission of claims through inexcusable neglect.[237]

The Court's adoption of the cause-and-prejudice and miscarriage-of-justice standards in *McCleskey* was motivated by the similarity, in both purpose and design, between the doctrines of abuse of the writ and procedural default.[238] The Court found that both doctrines "imply a background norm of procedural regularity binding on the petitioner."[239] In addition, the Court recognized that the concerns implicated by abuse of the writ are virtually identical

---

235. *Kuhlmann*, 477 U.S. at 454–55 n.17. *Kuhlmann* adopted the factual innocence analysis proposed by Judge Friendly, whose discussion of the costs associated with federal habeas review has been accepted by the Court and used to justify limitations on availability of the writ. *See* Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142, 148 (1970) (recognizing that overwhelming number of habeas corpus cases produce no resulting remedy and have draining effect on community resources).

236. *McCleskey*, 499 U.S. at 495. Application of the cause-and-prejudice standard to McCleskey's claim reflects how onerous the standard can be in application. *Id.* at 500. The Court emphasized that cause "'requires a showing of some external impediment *preventing* counsel from constructing or raising a claim.'" *Id.* at 497 (quoting Murray v. Carrier, 477 U.S. 478, 492 (1985)). Facts within McCleskey's knowledge at the time he filed his first federal petition provided the factual basis for raising a Sixth Amendment challenge to the inmate's testimony, as McCleskey had done in an earlier state habeas application. *Id.* at 500. Accordingly, McCleskey failed to establish cause. *See id.* at 498 (finding that 21-page statement, which was not available to McCleskey when first petition was filed, did not show cause because McCleskey's knowledge of facts at that time was sufficient to have presented claim in initial petition). The miscarriage-of-justice exception was unavailing to McCleskey because the Sixth Amendment violation, if any, resulted only in the admission of truthful inculpatory evidence and did not affect the reliability of the guilty verdict. *Id.* at 503.

237. *Id.* at 489. This is consistent with the Court's abandonment of the deliberate-bypass standard in the context of procedural defaults. *See* Coleman v. Thompson, 501 U.S. 722, 749-50 (1991) (choosing to explicitly overrule *Fay* by adopting cause-and-prejudice standard); Wainwright v. Sykes, 433 U.S. 72, 89–91 (1977) (applying *Francis*'s cause-and-prejudice standard rather than *Fay*'s deliberate-bypass standard because *Fay* standard encourages attorneys to save objections for collateral review).

238. *See McCleskey*, 499 U.S. at 490 (deciding that court should use same standards to allow procedural defaults in state court as court uses in abuse-of-writ situations).

239. *Id.*

St. Mary's Law Journal, Vol. 27 [1995], No. 2, Art. 2

to those implicated by state procedural defaults,[240] except that the disruptions are "[f]ar more severe . . . when a claim is presented for the first time in a second or subsequent federal habeas petition."[241] Thus, the *McCleskey* Court concluded that the same standard appropriately limits a federal court's discretion to excuse both types of procedural irregularities.[242] The Court added that, as a practical matter, lower federal courts are familiar with the cause-and-prejudice standard, and it is well-defined in the case law.[243]

The same costs and concerns led the Supreme Court to also apply the cause-and-prejudice and miscarriage-of-justice standards to the question of whether a federal evidentiary hearing must be conducted when facts are inadequately developed in a state-court proceeding.[244] In *Keeney v. Tamayo-Reyes*,[245] Tamayo-Reyes pleaded nolo contendere to a charge of manslaughter.[246] In his federal habeas petition, Tamayo-Reyes claimed that his plea was not knowing and intelligent because, among other things, a translator did not accurately translate the *mens rea* element of the offense.[247] Although Tamayo-Reyes had been afforded a state evidentiary hearing on this issue, he contended that a federal evidentiary hearing was necessary because the material facts had not been adequately developed at the state-court hearing.[248]

In such situations, *Townsend v. Sain*[249] previously held that a federal evidentiary hearing was required unless the petitioner deliberately bypassed state procedures.[250] *Tamayo-Reyes*, however, expressly overruled *Sain* to the extent that *Sain* adopted the delib-

---

240. *See id.* at 490–91 (explaining that focus on petitioners' acts, costs, and finality is common in both abuse-of-writ and procedural-default contexts).

241. *Id.* at 492.

242. *See McCleskey*, 499 U.S. at 496 (adopting cause-and-prejudice standard, which prevents abuse of writ system and assures its continued efficacy).

243. *Id.*

244. *See* Keeney v. Tamayo-Reyes, 504 U.S. 1, 7 (1992) (asserting that issues of comity, judicial economy, and finality dictated application of cause-and-prejudice standard to situation in which state convict did not develop material facts in trial court).

245. 504 U.S. 1 (1992).

246. *Tamayo-Reyes*, 504 U.S. at 5.

247. *Id.* at 7–8.

248. *Id.* at 2–3.

249. 372 U.S. 293 (1963).

250. *See Sain*, 372 U.S. at 317 (finding that if evidence necessary for constitutional claim was not heard at state hearing, for any reason other than inexcusable neglect of petitioner, federal hearing is needed).

Baird: The Habeas Corpus Revolution: A New Role for State Courts.

erate-bypass standard of *Fay v. Noia*.[251] The *Tamayo-Reyes* Court relied upon those cases that eroded the deliberate-bypass standard in the context of state procedural bars, deeming it "irrational to distinguish between failing to properly assert a federal claim in state court and failing in state court to properly develop such a claim."[252] Concerns of finality, comity, and judicial economy were critical to the Court's adoption of the cause-and-prejudice standard in *Tamayo-Reyes*, as in other recent cases restricting the writ.[253]

Although *Tamayo-Reyes* does not actually limit the claims subject to federal habeas review, it does limit the breadth of that review.[254] The merits of many constitutional issues turn on resolution of disputed facts, and the facts available to the federal habeas court are of obvious importance. As Justice O'Connor observed in dissent, the majority opinion in *Tamayo-Reyes* denies a petitioner the ability to prove his claim even when the reliability of state-court fact-finding is undermined because the court was not presented with critical evidence.[255]

2. Tailoring a Restrictive "Harmless Error" Standard

In addition to the procedural-default doctrine and rules on retroactivity, the Supreme Court has begun to tailor "harmless error" standards to restrict federal habeas review. In *Brecht v. Abrahamson*,[256] the Court adopted a relaxed harmless error standard for cases on federal habeas review, which may be the first step in the Court's adoption of a form of "prejudice" requirement.[257] In *Chapman v. California*,[258] the Court previously articulated a harmless error standard that has been widely applied to constitutional "trial error."[259] *Chapman* provided that "before a federal constitu-

251. *Tamayo-Reyes*, 504 U.S. at 5.

252. *Id.* at 8.

253. *See id.* (stressing that finality, comity, and judicial economy motivate application of cause-and-prejudice standard).

254. *See id.* at 11–12 (adopting narrow "fundamental miscarriage of justice" exception to cause-and-prejudice standard in habeas corpus proceedings).

255. *Tamayo-Reyes*, 504 at 1724 (O'Connor, J., dissenting).

256. 113 S. Ct. 1710 (1993).

257. *See Brecht*, 113 S. Ct. at 1722 (applying standard requiring that error must have had substantial and injurious effect to be considered harmful).

258. 386 U.S. 18 (1967).

259. *See Chapman*, 386 U.S. at 24 (requiring that error be harmless beyond reasonable doubt for it to be "harmless error"); *see also* Arizona v. Fulminante, 499 U.S. 279,

Published by Digital Commons at St. Mary's University, 1995

tional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt."[260] Under *Chapman*, the state bears the burden of proving harmless error.[261]

While *Chapman* remains applicable on direct review,[262] *Brecht* held that a less onerous standard should apply on federal habeas review, namely, "whether the error 'had substantial and injurious effect or influence in determining the jury's verdict.'"[263] The Court stressed the differences between direct and collateral review,[264] and also emphasized concerns of finality, comity, and federalism.[265] These factors justified a less onerous harmless error standard on habeas review than that applicable on direct review, which would overturn a conviction with only a "reasonable possibility" that the error contributed to the verdict.[266]

Brecht's wide sweep applies to a variety of constitutional violations that may be characterized as "trial error."[267] Under the new standard, "[h]abeas petitioners may obtain plenary review of their constitutional claims, but they are not entitled to habeas relief based on trial error unless they can establish that it resulted in 'actual prejudice.'"[268] The scope of *Brecht* was nevertheless limited by the concurring opinion of Justice Stevens, whose vote was necessary to support the opinion of the Court. Justice Stevens noted

284–85 (1991) (affirming Arizona Supreme Court decision precluding harmless error analysis for coerced confession).

260. *Chapman*, 386 U.S. at 24.

261. *See id.* (noting that burden of proving harmless error is on beneficiary of error).

262. *See Brecht*, 113 S. Ct. at 1721–22 (maintaining that *Chapman* standard should apply on direct review); *Chapman*, 386 U.S. at 24 (adopting harmless error test as standard for appellate court review).

263. *Brecht*, 113 S. Ct. at 1722 (quoting Kotteakos v. United States, 328 U.S. 750, 776 (1946)).

264. *Id.* at 1720–22.

265. *See id.* at 1719-21 (outlining Court's previous reasoning for limiting writ of habeas corpus).

266. *See id.* at 1721-22 (explaining that standard used on collateral review allows review of constitutional claims, but denies habeas relief unless error caused actual prejudice to defendant).

267. *See Fulminante*, 499 U.S. at 306–07 (listing numerous cases that involved trial error). *Fulminante* defined trial error as "error which occurred during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt." *Id.* at 307-08.

268. *Brecht*, 113 S. Ct. at 1722.

Baird: The Habeas Corpus Revolution: A New Role for State Courts.

that the burden of proving harm under *Kotteakos v. United States*[269] rests on the prosecution rather than the petitioner,[270] unless the error was technical; in his view, a constitutional violation would never be technical.[271] Justice Stevens also stressed that proper application of either the *Kotteakos* or *Chapman* harmless error standard entails a careful review of the impact of the error based on a review of the entire record.[272]

This limitation of the scope of *Brecht* is apparent in the recent case of *O'Neal v. McAninch*.[273] In *O'Neal*, the Supreme Court reiterated the *Brecht* majority's conclusion that a federal judge in a habeas proceeding must find a trial error harmful if the judge is in grave doubt about whether the error of federal law had "substantial and injurious effect or influence in determining the jury's verdict."[274] However, the *O'Neal* Court essentially adopted Justice Stevens's view in *Brecht* that the State should bear the burden of showing harmless error.[275] The Court conceded that denying the writ would "help protect the State's interest in the finality of its judgments and would promote federal-state comity."[276] Nonetheless, those considerations were minor when compared with the number of individuals who would be wrongly imprisoned or executed if the writ were denied.[277]

E. *Current Scope of the Federal Writ*

With *Stone v. Powell*, the Court began an unrelenting march toward narrowing the scope of the federal writ. While once the

---

269. 328 U.S. 750 (1946).

270. *See Brecht*, 113 S. Ct. at 1723 (Stevens, J., concurring) (following *Kotteakos* by placing burden on prosecution to show harmless error in cases in which errors involve substantial rights).

271. *Id.* at 1723–24.

272. *Id.* at 1724.

273. 115 S. Ct. 992 (1995).

274. *O'Neal*, 115 S. Ct. at 994 (quoting Brecht v. Abrahamson, 113 S. Ct. 1710, 1712 (1993)).

275. *See id.* at 997(explaining why prosecution should have burden of proving harmless error on collateral review); *see also* J. Thomas Sullivan, *The "Burden" of Proof in Federal Habeas Litigation*, 26 U. MEM. L. REV. 205, 252 (1995) (describing how *O'Neal* "modified the impact of *Brecht* by expressly disavowing any intent to impose a 'burden of proof' upon the federal habeas petitioner").

276. *O'Neal*, 115 S. Ct. at 997.

277. *See id.* at 998 (expressing belief that number of wrongly imprisoned people if writ were denied would far surpass number of wrongly acquitted people if writ were granted).

Great Writ could be sought by any state inmate who had not deliberately bypassed the state system, today state inmates must hurdle seemingly insurmountable barriers to seek federal habeas relief. Although *Stone* has been effectively limited to Fourth Amendment claims, the procedural hurdles imposed by the "new rule" definition of *Teague v. Lane* have limited the application of new rules in the habeas context to the state courts.[278] Moreover, even if an inmate is able to establish that the relief sought does not require a new rule, relief is probably foreclosed by rules of procedural default or the fact that the error did not cause grave doubt as to the degree of harm the inmate received from the violation.

In sum, the Court has narrowed the availability of federal habeas corpus by three primary means: retroactive application, procedural default, and harmless error. If one avenue is open, the others are likely to be closed.[279] Of particular importance is the fact that, under *Teague,* the determination of whether a rule is new is a preliminary question for the federal habeas corpus judge.[280] The judge, in essence, assumes for purposes of argument that the petitioner relies upon a valid construction of the constitutional rule at stake. But if that construction establishes a new rule as to the petitioner, it is generally unavailable to him.[281] Since the federal judge usually addresses the new rule only in a hypothetical context, its

278. *See* Teague v. Lane, 489 U.S. 288, 303–05 (1989) (explaining and adopting Justice Harlan's view that new rules should apply retroactively on direct appeal, but generally not on collateral review).

279. *See* Skelton v. Whitley, 950 F.2d 1037, 1042 (5th Cir.) (conveying near impossibility of escaping cause-and-prejudice requirements), *cert. denied*, 506 U.S. 833 (1992). In *Skelton*, Judge Jones explained:

> [I]f a constitutional rule is 'new' under *Teague*, it may not be retroactively applied. Of course, it is but a pyrrhic victory that a petitioner might then have escaped procedural bar or writ abuse because the rule was 'new' and he had 'cause' for his earlier default. Conversely, if a rule is 'not new' under *Teague*, ordinarily it was 'not new' from the standpoint of furnishing 'cause' for avoiding a procedural bar or writ abuse, and the petitioner could not overcome these two stumbling blocks to habeas relief.

Id. But see Teague, 489 U.S. at 307 (providing narrow exceptions to general rule of nonretroactivity of new rules).

280. *See Teague*, 489 U.S. at 316 (describing difficulty involved in making decision on whether rule is new).

281. *See Skelton*, 950 F.2d at 1042 (commenting that rule is not applied retroactively if considered new under *Teague)*.

actual validity is never established.[282] The effect of *Teague*, in conjunction with the procedural default rule of *Sykes*, is largely to remove lower court federal judges from the process of interpreting the Constitution and applying it to state prisoners.

IV. Implications for State Courts

The recent limitations on the scope of the federal writ may result in numerous implications for state courts.[283] For example, these limitations will likely affect the relations between state and federal courts. Additionally, the administration of state postconviction procedures will inevitably take on heightened significance.

A. *Comity As a Consideration for the State Courts*

The Supreme Court's change in attitude has placed a great deal of trust and responsibility in state courts. Consequently, the actions and opinions of state judges have assumed greater importance during subsequent federal habeas proceedings.[284] It is, therefore, imperative that state courts conscientiously apply federal law, not only because the Constitution requires it, but because comity entails state-court respect for the federal judiciary.[285]

Under the Supremacy Clause of Article VI of the United States Constitution, state judges are bound by federal law as the supreme

---

282. In some circumstances the new rule might have been established after the petitioner's conviction became final. Therefore, the question of the validity of the new rule will not always be hypothetical.

283. *See* Christopher E. Smith, *Federal Habeas Corpus Reform: The State's Perspective*, 18 Just. Sys. J. 1, 1–9 (1995) (discussing effect of federal habeas limitations on state court system).

284. *See* Chris Hutton, *The "New" Federal Habeas: Implications for State Standards of Review*, 40 S.D. L. Rev. 442, 477 (1995) (acknowledging that state's role in habeas proceedings is unique because federal review is virtually gone).

285. *See* Gilmore v. Taylor, 113 S. Ct. 2112, 2116 (1993) (explaining how "'new rule' principle . . . validates reasonable, good-faith interpretations of existing precedents made by state courts, and thus effectuates the states' interest in the finality of criminal convictions and fosters comity between federal and state courts") (citation omitted) (quoting Butler v. McKellar, 494 U.S. 412, 414 (1990)); *see also* Note, *The Federal Interest Approach to State Waiver of the Exhaustion Requirement in Federal Habeas Corpus*, 97 Harv. L. Rev. 511, 523 (1983) (explaining that "interest in encouraging state court cooperation in the process of vindicating federal constitutional rights is a distinctly federal one"); *cf.* Judith Resnik, *Tiers*, 57 S. Cal. L. Rev. 837, 903 (1984) (citing comity as possible explanation for recent limitations on federal habeas review).

law in the United States.[286] Because federal judges are severely limited in their ability to apply federal law to state prisoners, a special responsibility is cast upon state judges.[287] The procedural and substantive rules that the Supreme Court has fashioned to limit the application of federal constitutional rules by lower court federal judges on habeas are *not intended* to prohibit state relief. Thus, these rules operate, in combination, to make state judges the first and last line of defense in most criminal cases.[288]

In carrying out this special responsibility in criminal cases, state judges should take care in applying federal precedent. For example, the broad definition of "new rule" in *Butler v. McKellar* should not be treated as an invitation for state courts to read federal precedent in an overly narrow manner or adopt a practice of limiting Supreme Court cases to their particular facts. The *Butler* dissent provides wise counsel to state judges passing upon federal constitutional claims:

> As every first-year law student learns, adjudication according to prevailing law means far more than obeying precedent by perfunctorily applying holdings in previous cases to virtually *identical* fact patterns. Rather, such adjudication requires a judge to evaluate both the content of previously enunciated legal rules and the breadth of their application. A judge must thereby discern whether the principles applied to specific fact patterns in prior cases fairly extend to govern

286. U.S. CONST. art. VI. Article VI reads, in pertinent part:

> This Constitution and the Laws of the United States which shall be made in Pursuance thereof; and all the Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Id.

287. *See* Richard J. Bonnie, *Preserving Justice in Capital Cases While Streamlining the Process of Collateral Review*, 23 U. TOL. L. REV. 99, 101 (1991) (describing how recent Supreme Court cases severely limit power of federal courts to apply federal law to state prisoners).

288. It is true, of course, that the Supreme Court can directly review state court convictions. *See* Jackson v. Virginia, 443 U.S. 307, 318 (1979) (describing review Supreme Court conducts for direct appeal of state conviction involving use of involuntary confession). As a practical matter, however, the Court cannot hear more than a comparative handful of these cases in any given term because too many litigants are competing for the Court's attention. *See* William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331, 362 (1991) (estimating that Supreme Court only handles between three and seven habeas cases per term involving state and federal prisoners).

> *analogous* factual patterns. In Justice Harlan's view, adjudication according to prevailing law demands that a court exhibit "conceptual faithfulness" to the principles underlying prior precedents, not just "decisional obedience" to precise holdings based upon their unique factual patterns.[289]

Responsible adjudication, such as that described by Justice Brennan in *Butler*, is a credit to any judiciary. At the very least, responsible adjudication makes it extremely unlikely that federal habeas relief will be granted on the basis that the state courts did not reasonably and in good faith apply controlling law.[290]

Likewise, care should be taken in the selection and application of state procedural rules. To begin with, federal respect for state procedural bars is not without limits. A procedural rule that does not serve legitimate state interests will not bar federal review of constitutional claims.[291] Thus, state legislators and state judges with rule-making authority should thoughtfully consider and weigh the particular interests at stake when formulating rules of procedural default.[292] In addition, continued federal respect for state procedural bars requires that forfeiture rules and corollary exceptions be applied in a principled fashion and not merely to avoid review of meritorious constitutional claims.[293] Comity and the Constitution demand no less. Therefore, the application of a state procedural rule is not an absolute assurance that federal review of the merits is foreclosed.[294]

---

289. Butler v. McKellar, 494 U.S. 407, 423 (1990) (Brennan, J., dissenting) (citing Desist v. United States, 394 U.S. 244, 266 n.5 (1969) (Harlan, J., dissenting)).

290. *See* Joseph L. Hoffmann, *Starting from Scratch: Rethinking Federal Habeas Review of Death Penalty Cases*, 20 FLA. ST. U. L. REV. 133, 135 (1992) (describing how "reasonable, 'good faith' interpretation" of law by state court will protect conviction from habeas review).

291. *See* James v. Kentucky, 466 U.S. 341, 348–49 (1984) (asserting that state's practice of distinguishing between admonitions and instructions is not type of state practice that prevents application of federal constitutional rights).

292. *See* Chris Hutton, *The "New" Federal Habeas: Implications for State Standards of Review*, 40 S.D. L. REV. 442, 477 (1995) (suggesting that states reconsider procedural limitations for habeas review in light of recent federal limitations so that prisoners are not denied full and careful review of their claims).

293. *See* Fay v. Noia, 372 U.S. 391, 432–33 (1963) (explaining that federal courts usually defer to state procedural requirements provided they are not offensive to prisoner's federal rights).

294. *See id.* at 432 (stating that federal courts sometimes will not defer to state procedural rules if the rules "[make] burdensome the vindication of federal rights"). *But see* Robert J. Glennon, *The Jurisdictional Legacy of the Civil Rights Movement*, 61 TENN. L.

St. Mary's Law Journal, Vol. 27 [1995], No. 2, Art. 2

More importantly, state judges need to discern under what circumstances they should make an independent judgment about whether a procedural default by a petitioner's lawyer should preclude review on the merits. State judges are free to do what federal judges generally are not, namely, to reach the merits of a petitioner's claim even though he has technically defaulted.[295] It is perfectly permissible, perhaps even desirable, for state courts to formulate their own habeas corpus principles governing procedural default.

B. *Impact on State Collateral Review*

In addition to heightening comity considerations for the state courts, decreased availability of the federal writ has caused state appellate review to assume a more prominent role in the postconviction review process.[296] Because of the strict federal rules of procedural default, direct appeals to state high courts, particularly state postconviction proceedings, have become much more significant. In the wake of cases like *McCleskey v. Zant*,[297] the availability of state collateral review may need to be reassessed and modified.[298] The critical issue is whether the states should follow the lead of the federal courts or instead provide a greater measure of review to state inmates.

The answer to this question hinges on the law and public policy of each particular state. Certainly, many of the systemic and financial costs associated with federal habeas review are pertinent

---

REV. 869, 909 (1994) (commenting that failure of prisoner to comply with state procedure will protect state court from federal review regardless of capriciousness of procedure).

295. *Compare* Sawyer v. Whitley, 505 U.S. 333, 335 (1992) (requiring federal habeas petitioner to prove "actual innocence" before considering merits of claim) *with Ex parte* Drake, 883 S.W.2d 213, 214–15 (Tex. Crim. App. 1994) (permitting habeas review of claim despite petitioner's failure to object to misjoinder of offenses at trial).

296. *See* Chris Hutton, *The "New" Federal Habeas: Implications for State Standards of Review*, 40 S.D. L. REV. 442, 477 (1995) (highlighting importance of state courts due to recent limitations on federal habeas jurisprudence).

297. 499 U.S. 467 (1991).

298. For an interesting comment on the effect of cases like *McCleskey*, see Christopher E. Smith, *Federal Habeas Corpus Reform: The State's Perspective*, 18 JUST. SYS. 1, 6 (1995). Smith conducted a survey of attorneys concerning recent limitations on federal habeas review. *Id.* at 6. Most of the state's attorneys felt that the federal limitations did not result in a lighter burden on the state court system. *Id.* For example, many attorneys stated that *McCleskey* made the state's work harder rather than easier due to the difficulty in determining whether a petitioner had, in fact, filed a previous habeas writ. *Id.*

Baird: The Habeas Corpus Revolution: A New Role for State Courts.

here.[299] Finality of convictions, for example, is an important state interest.[300] As Justice Harlan noted in his dissent in *Sanders v. United States*:

> Both the individual criminal defendant and society have an interest in insuring that there will at some point be the certainty that comes with an end to litigation, and that attention will ultimately be focused not on whether a conviction was free from error but rather on whether the prisoner can be restored to a useful place in the community.[301]

Finality of convictions thus furthers the core concerns of rehabilitation and deterrence.

Similarly, the states have an interest in emphasizing the prominence of the trial itself.[302] "A criminal trial concentrates society's resources at one 'time and place in order to decide, within the limits of human fallibility, the question of guilt or innocence.'"[303] Because the resources expended at trial are state resources, judicial economy is of obvious importance to the states.[304] Of even greater concern to the states is the accuracy of the guilt-innocence determination, because the ultimate goal of the criminal justice system is to free the innocent and punish the guilty through procedures that comport with societal values.[305] While the most accurate result is generally more likely to be obtained at the first trial because witnesses become unavailable and memories fade with the passage of

---

299. *See* Engle v. Isaac, 456 U.S. 107, 126 (1982) (recognizing significant costs associated with habeas corpus); *cf.* J. Alexander Tanford, *A Political-Choice Approach to Limiting Prejudicial Evidence*, 64 IND. L.J. 831, 854 (1989) (positing that efficiency is key factor in litigation system).

300. *See* Coleman v. Thompson, 501 U.S. 722, 750 (1991) (noting state's interest in finality); Kelli Hinson, *Post-Conviction Determination of Innocence for Death Row Inmates*, 48 SMU L. REV. 231, 254 (1994) (weighing state's interest in finality against cost of further collateral review).

301. Sanders v. United States, 373 U.S. 1, 24-25 (1963) (Harlan, J., dissenting).

302. *See Engle*, 456 U.S. at 127 (asserting that "liberal allowance of the writ . . . degrades the prominence of the trial itself").

303. *Id.* (quoting Wainwright v. Sykes, 433 U.S. 72, 90 (1977)).

304. *See* Eric D. Scher, Sawyer v. Whitley: *Stretching the Boundaries of a Constitutional Death Penalty*, 59 BROOK. L. REV. 237, 265 n.128 (1993) (stressing that judicial economy is significant goal of criminal justice system).

305. *See* Michael T. Fisher, *Harmless Error, Prosecutorial Misconduct, and Due Process: There's More to Due Process Than the Bottom Line*, 88 COLUM. L. REV. 1298, 1299 (1988) (stating that primary objective of criminal justice system is to enforce law through conviction and punishment of guilty).

Published by Digital Commons at St. Mary's University, 1995

St. Mary's Law Journal, Vol. 27 [1995], No. 2, Art. 2

time,[306] the problem for state courts is one of identifying cases in which the normal expectancy is not fulfilled.

Although an emphasis on the initial trial might militate in favor of the states restricting the scope of collateral review, specific state concerns weigh on the other side of the balance. For example, a state constitution or statute may independently reflect a policy decision to afford broad postconviction review.[307] Under such circumstances, the state's highest court might adopt a standard for review of successive writ applications that is more lenient than the cause-and-prejudice standard.[308]

---

306. *Cf.* United States v. Mohawk, 20 F.3d 1480, 1488 (9th Cir. 1994) (finding that problems of faded memories and deaths are not present in appeals due to record of first trial); John S. Gillig, *Kentucky Post-Conviction Remedies and the Judicial Development of Kentucky Rule of Criminal Procedure 11.42*, 83 KY. L.J. 265, 383 (1995) (noting that mandatory filing period for postconviction relief in Kentucky should result in fewer frivolous claims because prisoners will be unable to rely on lost memories, lost transcripts, or deaths of judges or witnesses).

307. *See* TEX. CODE CRIM. PROC. ANN. art. 11.01-.64 (Vernon 1977 & Supp. 1996) (describing habeas corpus scheme in Texas). Article 11.07 is an example of how a state procedure can differ from federal procedure, as Texas has not adopted the cause-and-prejudice standard for successive petitions:

> (a) If a subsequent application for writ of habeas corpus is filed after final disposition of an initial application challenging the same conviction, a court may not consider the merits of or grant relief based on the subsequent application unless the application contains sufficient specific facts establishing that:
>
> (1) the current claims and issues have not been and could not have been presented previously in an original application or in a previously considered application filed under this article because the factual or legal basis for the claim was unavailable on the date the applicant filed the previous application; or
>
> (2) by a preponderance of the evidence, but for a violation of the United States Constitution no rational juror could have found the applicant guilty beyond a reasonable doubt.
>
> (b) For purposes of Subsection (a)(1), a legal basis of a claim is unavailable on or before a date described by Subsection (a)(1) if the legal basis was not recognized by and could not have been reasonably formulated from a final decision of the United States Supreme Court, a court of appeals of the United States, or a court of appellate jurisdiction of this state on or before that date.
>
> (c) For purposes of Subsection (a)(1), a factual basis of a claim is unavailable on or before a date described by Subsection (a)(1) if the factual basis was not ascertainable through the exercise of reasonable diligence on or before that date.

Id. art. 11.07, § 4.

Moreover, if states use their state constitutions as opposed to the federal constitution for a basis of relief, there is an independent and adequate state ground for relief, which prevents Supreme Court review. *See Coleman*, 501 U.S. at 729 (noting that Court does not have power to review state law decision sufficient to support judgment).

308. *See* Kathleen Patchel, *The New Habeas*, 42 HASTINGS L.J. 939, 1021 (1991) (commenting that states have "considerable freedom to structure their criminal process as they

Moreover, what constitutes "cause" for a procedural default may be different in state courts than on federal habeas review. For example, the Texas formulation of "novelty" as an excuse for procedural defaults is broader than the federal definition.[309] Specifically, in *Penry v. Lynaugh*[310] the Supreme Court held that Penry was not seeking a new rule;[311] otherwise, *Teague v. Lane* would have barred his habeas claim. However, when the Texas Court of Criminal Appeals considered similar claims in light of *Penry*, Judge Campbell concluded that those claims were so novel as to amount to a previously unrecognized right.[312] In other words, while the Supreme Court found Penry's claim settled by established precedent, the Texas Court of Criminal Appeals read *Penry* as announcing a new

---

see fit"). While liberal review of second or subsequent state writs will not lead to additional federal habeas review under *McCleskey*, it may provide an additional opportunity for direct review by the Supreme Court. The federal statute conferring certiorari jurisdiction provides:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where . . . any title, right, privilege, or immunity is specially set up or claimed under the Constitution . . . [of] the United States.

28 U.S.C. § 1257(a) (1994). Such review would not be of the petitioner's detention per se, as on federal habeas review, but of the correctness of the state judgment denying state habeas relief.

309. *See* Mathews v. State, 768 S.W.2d 731, 733 (Tex. Crim. App. 1989) (discussing difference between federal and state "novelty" tests). The court in *Mathews* explained:

> At this juncture, it is appropriate to reiterate that the federal procedural default doctrine also involves a "novelty" test, providing that "where a constitutional claim is so novel that its legal basis is not reasonably available to counsel, a defendant has cause for his failure to raise the claim in accordance with applicable state procedures." This test determines federal cognizability where there has been a procedural default at the state level, and as pointed out in *Chambers*, supra, the federal procedural default doctrine *per se* applies only in federal habeas corpus proceedings. This Court also conducts a "novelty" analysis; however, when we do so, it is to decide whether there need be a contemporaneous objection in the first instance. Finding a constitutional claim sufficiently "novel," we hold there is no procedural default.

Id. (citation omitted).

310. 492 U.S. 302 (1989).

311. *Penry*, 492 U.S. at 315. In *Penry*, the Court held that the absence of jury instructions telling the jury that they could consider mitigating evidence was not a new rule because it did not "'impos[e] a new obligation' on the state of Texas." *Id.* at 315 (quoting Teague v. Lane, 489 U.S. 288, 301 (1989)).

312. Black v. State, 816 S.W.2d 350, 374 (Tex. Crim. App. 1991) (Campbell, J., concurring). In *Black*, Judge Campbell explained that several past decisions rejected claims that special jury instructions may be necessary to allow the jury to consider certain mitigating evidence. *Id.* at 372. Thus, *Penry*'s holding that absence of such instructions violated the constitution was "novel" because it was "a right not previously recognized." *Id.* at 374.

St. Mary's Law Journal, Vol. 27 [1995], No. 2, Art. 2

rule so novel that similar claims were not subject to the traditional rules of procedural default and, thus, concluded that the rule could be raised for the first time in a postconviction proceeding.[313]

A number of other Texas cases illustrate how various state courts can respond to the continued reduction of the availability of the federal writ of habeas corpus. For instance, the Texas Court of Criminal Appeals recognizes the futility of an objection in the face of well-established state law.[314] This cognizance of claims that were at one time contrary to established law stands in stark contrast to the federal approach of *Engle v. Isaac*.[315] However, the court of criminal appeals reasoned that requiring defendants to make an objection in the face of established law would increase the burdens on the state judiciary.[316] Along these lines, courts have also recognized the inequity in faulting defendants for failing to assert a claim when the constitutional right has not been recognized by the state courts, but instead has been repeatedly rejected.[317]

Another justification for broader state review of final state convictions is the supervisory authority that the states' highest courts possess over the entire state judicial system.[318] Federal habeas courts, in contrast, exercise no such supervisory authority. Regardless of whether a particular error is harmless under the federal standard announced in *Brecht v. Abrahamson* and *O'Neal v. McAninch*, responsibility for the integrity of the state judicial process may in certain cases warrant reversal of a conviction on state collateral review.[319] For example, the Texas Court of Criminal Appeals has fashioned a procedure for reviewing postconviction

313. *Id.* at 368–71.

314. *See id.* at 362 (holding that failure to object did not waive claim on habeas review because, at time, objection based on law would have been futile).

315. 456 U.S. 107 (1982).

316. *Black*, 816 S.W.2d at 369 (Campbell, J., concurring).

317. *Id.* (quoting Reed v. Ross, 468 U.S. 1, 15 (1984)).

318. *See, e.g.*, IOWA CONST. art. 5, § 4 (granting state supreme court "supervisory and administrative control over all inferior judicial tribunals throughout the state"); LA. CONST. art. 5, § 5(A) (providing that supreme court has general supervisory powers over all other courts in state); TENN. CODE ANN. § 16-3-501 (1994) (establishing that state supreme court has supervisory authority "over all the inferior courts of the state").

319. *See* Henry M. Hart, Jr., *The Supreme Court, 1958 Term—Foreword: The Time Chart of the Justices*, 73 HARV. L. REV. 84, 118 (1959) (asserting that scrutiny of state court decisions on federal habeas review could "encourage the development of reasonable state procedures" and limit need for extensive federal review).

claims of actual innocence that are brought by death-row inmates.[320] Although a majority of the Supreme Court recognized that execution of an innocent individual would violate the Due Process Clause,[321] the Court did not dictate to the states what procedures were required for review of such claims. Texas's highest criminal court, thus, used its judicial oversight to create a state corrective process that did not previously exist.

The appropriate exercise of supervisory authority is a critical issue in the context of state habeas proceedings. Because there is no constitutional right to counsel in state habeas proceedings, an attorney's erroneous failure to fully develop the facts during those proceedings cannot, for purposes of federal collateral review, constitute cause for a procedural default.[322] In such cases, the petitioner forfeits federal habeas review or a federal hearing unless he can show that constitutional error resulted in the conviction of one who is actually innocent of the crime.[323]

Prudential considerations, however, may warrant a different approach in state court. Even though attorney error in state habeas proceedings does not implicate the federal constitution, such error can affect the integrity of the state habeas process to the extent that it must be redressed by a state appellate court in the exercise of supervisory authority. Alternatively, state public policy may warrant treating attorney error that rises to a certain level as cause for procedural irregularities in state postconviction proceedings.[324]

---

320. *See* State *ex rel.* Holmes v. Third Court of Appeals, 885 S.W.2d 389, 398–99 (Tex. Crim. App. 1994) (requiring habeas petitioner to prove "that the newly discovered evidence, if true, creates a doubt as to the efficacy of the verdict sufficient to undermine confidence in the verdict and that it is probable that the verdict would be different" to show factual innocence). The court in *Holmes* placed the burden of proof on the petitioner to "show that based on the newly discovered evidence and the entire record before the jury that convicted him, no rational trier of fact could find proof of guilt beyond a reasonable doubt." *Id.*

321. *See* Herrera v. Collins, 113 S. Ct. 853, 870, 875, 876, 882 (1993) (concurring opinions of Justices O'Connor, Kennedy, and White, and dissenting opinion of Justices Blackmun, Stevens, and Souter) (agreeing on basic proposition that showing of "actual innocence" after trial would make individual's execution unconstitutional).

322. Murray v. Carrier, 477 U.S. 478, 486–87 (1986); *see Coleman*, 501 U.S. at 752–58 (holding that attorney inadvertence in state habeas proceeding does not provide cause for procedural default that will permit federal habeas review).

323. *McCleskey*, 499 U.S. at 502.

324. *Cf.* Barry Friedman, *A Tale of Two Habeas*, 73 MINN. L. REV. 247, 328 (1988) (suggesting that standard for ineffective-assistance-of-counsel claim should be whether representation was constitutionally defective and resulted in "actual error").

For instance, attorney error that would constitute ineffective assistance of counsel at trial or on direct appeal might be an appropriate measure of cause on collateral review, even though such error does not implicate the Constitution. Thus, state habeas review might afford greater protection than that provided by the federal courts.

Additionally, just as the federal doctrine of procedural default increases the probability that state courts will be courts of last resort in the sense of last in time, the broad prohibition against announcing new rules of constitutional law on federal habeas review makes it more likely that state courts will be courts of last resort in the context of applying new constitutional protections. As a practical matter, the Supreme Court lacks the resources to grant certiorari review in the majority of cases on direct appeal, and certiorari petitions are not even filed in many such cases.[325] Consequently, *Teague v. Lane*'s nonretroactivity rule may result in a slowing of the development of constitutional principles in the federal judicial system,[326] which may in turn result in unfairness in some individual cases. Again, the burden falls on state courts.

Teague, of course, does not apply to the state courts. Consequently, state courts are not bound by its narrow "new rule" holding.[327] In a particular state, therefore, public policy may warrant a broader substantive review than that available on federal habeas.[328] Given the importance of the guilt-innocence determination under state law, the state's highest court may be justified in retroactively applying new constitutional rules designed to promote accurate fact-finding, even though they might not fall within

325. *See* Stephen R. McAllister, *Practice Before the Supreme Court of the United States*, 64 J. KAN. B. ASS'N 25, 32 (1995) (explaining that one function of certiorari process is to discover flawed cases to save Court's limited resources).

326. *See* Emanuel Margolis, *Habeas Corpus: The No-Longer Great Writ*, 98 DICK. L. REV. 557, 586 (1994) (emphasizing that *Teague* and interest in finality have "chilling effect on habeas practitioners"); Linda Meyer, *"Nothing We Say Matters"*: Teague *and New Rules*, 61 U. CHI. L. REV. 423, 492 (1994) (postulating that allowing *Teague* principles to continue would confuse "common law adjudication" and result in great deal of uncertainty in habeas system).

327. *See* 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, 32 (1992) (describing how Supreme Court has given state courts degree of discretion in applying retroactivity doctrine).

328. *See id.* (explaining that state court application of retroactivity may differ from federal review). Dubber, however, feels that state court interpretations of *Teague* are likely to be narrower, rather than broader, than federal court interpretations. *Id.* at 31.

Baird: The Habeas Corpus Revolution: A New Role for State Courts.

either exception to *Teague*'s retroactivity bar. For example, after the Texas Court of Criminal Appeals held that *Penry* provided a right not previously recognized, and was thus a new rule, *Penry* claims were given retroactive effect.[329] Likewise, special rules might be appropriate for state collateral review in death-penalty cases. The important interests at stake and the rapid evolution of constitutional principles applicable in death-penalty cases might serve to justify differential treatment.[330]

While this type of broadened state review of federal constitutional claims should not increase the level of federal habeas oversight, it remains to be seen whether federal courts will apply *Teague* to cases in which the petitioners seek review of the denial of state habeas relief. Such cases, although on collateral review, may provide the federal courts with an additional vehicle for developing constitutional principles. The state courts will have decided that concerns of finality were outweighed to a certain extent, and comity considerations would not support restricted federal habeas review.[331] The issue then becomes whether the state courts, by making available to state habeas petitioners selected constitutional rules that would ordinarily not be available in federal habeas proceedings, expose themselves to a merits review of their interpretation and application of the constitutional rules. The answer should

329. *See Ex parte* Williams, 833 S.W.2d 150, 150 (Tex. Crim. App. 1992) (granting relief because *Penry* required that jury be allowed to consider mitigating evidence at trial); *Ex parte* McGee, 817 S.W.2d 77, 81 (Tex. Crim. App. 1991) (setting aside conviction in light of *Penry* because trial court prevented jury from considering "mitigating evidence of mental retardation and an abusive childhood").

330. *See* Thompson v. Oklahoma, 487 U.S. 815, 856 (1988) (O'Connor, J., concurring) (stressing that death penalty is treated differently under Eighth Amendment and asserting that great care and deliberation is needed in such cases); Gregg v. Georgia, 428 U.S. 153, 188 (1976) (acknowledging that Furman v. Georgia, 408 U.S. 238 (1974), recognized that "penalty of death is different in kind from any other punishment imposed under our system of criminal justice").

331. *Cf.* Rose v. Lundy, 455 U.S. 509, 550 (1982) (Stevens, J., dissenting) (commenting that judiciary's concerns for procedural requirements in habeas cases are often outweighed by petitioner's liberty interest); Jordan D. Becker, Note, *Removing Temptation: Per Se Reversal for Judicial Indication of Belief in the Defendant's Guilt*, 53 FORDHAM L. REV. 1333, 1348 (1984) (asserting that there may be situations when "vindication of the constitutional right should prevail over considerations of judicial administration"); Ronald J. Tabak & J. Mark Lane, *Judicial Activism and Legislative "Reform" of Federal Habeas Corpus: A Critical Analysis of Recent Developments and Current Proposals*, 55 ALB. L. REV. 1, 19 (1991) (observing that in pre-Rehnquist Court, issues such as finality were often outweighed by concerns for constitutional rights).

be in the affirmative. If the state courts are willing to provide expanded review, their interpretation of the relevant federal constitutional standards should be subject to review in the federal courts.[332] Otherwise, the state courts might decide to either grant or deny habeas relief based on faulty interpretations of controlling authority.

State courts also retain flexibility to adopt new rules of state procedure. In *Geesa v. State*,[333] for example, the Texas Court of Criminal Appeals went beyond federal constitutional requirements and mandated that jury instructions in all criminal cases include a definitional instruction on reasonable doubt.[334] If the *Teague* retroactivity formulation had been strictly applied, *Geesa* would have required reversal of every pending criminal case in the state.[335] Therefore, to improve state law while minimizing the impact on completed criminal trials, the court of criminal appeals chose to give *Geesa* limited prospective application—it would apply in Geesa's own case and in all cases to be tried in the future.[336] The options available to state courts thus provide special opportunities for the development of state law and may result in an increased emphasis on state procedural and constitutional protections.

A final way in which state courts can provide a greater measure of review to state inmates is by applying a lower harmless error standard. While federal habeas petitioners, like those in the states, bear the burden of establishing the harm resulting from the constitutional violation, the Supreme Court has made this burden diffi-

332. *See* Saffle v. Parks, 494 U.S. 484, 488 (1990) (stating that prime reason for federal habeas review is "ensuring that state courts conduct criminal proceedings in accordance with the Constitution as interpreted at the time of the proceedings"); Deborah A. Waldbillig, Note, *Padlock Orders and Nuisance Laws: The First Amendment in* Arcara v. Coloud Books, 51 ALB. L. REV. 1007, 1038 (1987) (explaining that state court's reading of federal constitution may be reviewed by Supreme Court).

333. 820 S.W.2d 154 (Tex. Crim. App. 1991).

334. *Geesa*, 820 S.W.2d at 161–62.

335. *See id.* at 163–64 (explaining that full retroactivity approach may be made to "apply the new rule to the parties in the case in which the rule is pronounced and in all future cases, but not those pending on direct review or not yet final at the time of the decision, and not to those seeking collateral review of convictions which were final before the new rule was announced").

336. *See id.* at 164–65 (using "limited prospectivity" approach and applying rule announced only to instant case and applicable cases in future).

cult to meet.[337] Following *Brecht*, the petitioner must now show that the error had a substantial and injurious effect or influence on the verdict.[338] State courts, while maintaining the petitioner's burden,[339] may wish to consider constitutional violations under the lower harmless error standard in *Chapman v. California* for at least two reasons. First, *Chapman* is a familiar standard that the state courts are accustomed to applying when evaluating the harm arising from a constitutional violation.[340] Indeed, some states have codified the *Chapman* standard for the evaluation of every error that is subject to harmless error analysis.[341] Second, because the violation was one of constitutional magnitude, the state courts may find the lower standard more appropriate.[342] To paraphrase Justice Brennan, albeit in a slightly different context, it is inconceivable that the harm sustained from a constitutional violation is lessened simply because the appellate process has been exhausted.[343]

V. CONCLUSION

A comparison of the Supreme Court's decisions in the 1950s and 1960s expanding availability of the writ with its more recent deci-

---

337. *See* Carole J. Yanofsky, Note, Withrow v. Williams: *The Supreme Court's Surprising Refusal to* Stone Miranda, 44 AM. U. L. REV. 323, 339 (1994) (commenting that *Brecht* makes habeas petitioner's burden of proof much more difficult than in past).

338. Brecht v. Abrahamson, 113 S. Ct. 1710, 1722 (1993). *But see O'Neal*, 115 S. Ct. at 999 (Thomas, J., dissenting) (claiming that under majority's decision, government must prove harmlessness of alleged error).

339. *See Ex parte* Dutchover, 779 S.W.2d 76, 78 (Tex. Crim. App. 1989) (holding that such burden is appropriate in collateral attack when applicant must show illegality of restraint).

340. *See Brecht*, 113 S. Ct. at 1721 (explaining that "[s]tate courts are fully qualified to identify constitutional error and evaluate its prejudicial effect on the trial process under *Chapman*").

341. *See* TEX. R. APP. P. 81(b)(2) (adopting *Chapman* harmless error standard). The rule reads in pertinent part:

> If the appellate record in a criminal case reveals error in the proceedings below, the appellate court shall reverse the judgment under review, unless the appellate court determines beyond a reasonable doubt that the error made no contribution to the conviction or to the punishment.

Id. The Supreme Court has recognized that certain constitutional violations are not subject to a harm analysis. Arizona v. Fulminante, 499 U.S. 279, 287–88 (1991).

342. The Texas Court of Criminal Appeals continues to apply the harmless error standard when reviewing habeas claims of constitutional violations. *See Ex parte* Barber, 879 S.W.2d 889, 891–92 (Tex. Crim. App. 1994) (finding that applicant failed to show he was harmed by constitutionally inadmissible testimony concerning his future dangerousness).

343. Stone v. Powell, 428 U.S. 465, 511 (1976) (Brennan, J., dissenting).

sions restricting the writ reveals a change in attitude toward state courts. While earlier cases acknowledged some of the costs associated with federal habeas review, the Court gave those factors little weight. In more recent opinions, the Court has focused on the impact of federal habeas review on the administration of justice by the states. Primary concerns have been comity, federalism, finality of convictions, judicial economy, and channeling resolution of constitutional claims into the most appropriate forum.

The Court's emphasis on comity and finality reflects a changed attitude toward state judges. Rather than treating state judges as reluctant participants in protecting constitutional rights, the Court seems to be enlisting them as partners and allies in the process. At present, the Court has accepted the view that "federal intrusions may seriously undermine the morale of our state judges."[344] There is "nothing more subversive of a judge's sense of responsibility, of the inner subjective conscientiousness which is so essential a part of the difficult and subtle art of judging well, than an indiscriminate acceptance of the notion that all the shots will always be called by someone else."[345] Hopefully, this new approach will result in fewer meritorious federal constitutional claims reaching federal court, not because of increased procedural hurdles for state prisoners, but because state-court judges will already have redressed the error. If state courts accept their heightened responsibility, both the courts and the parties will benefit.

This partnership approach recognizes the important roles played by both the state and federal courts. Because the bulk of criminal prosecutions occur in state courts, the states have primary responsibility for defining and implementing the criminal laws in our federal system. For this reason, the states "also hold the initial responsibility for vindicating constitutional rights," both on direct and postconviction review.[346] The federal courts, however, possess ultimate authority to enforce federal constitutional commands by either direct or collateral review of state criminal proceedings. Judicial economy in both systems is best served when state trials are conducted in compliance with the Constitution and, failing this,

---

344. Engle v. Isaac, 456 U.S. 107, 128 n.33 (1982).

345. Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 451 (1963).

346. *Engle*, 456 U.S. at 128.

Baird: The Habeas Corpus Revolution: A New Role for State Courts.

when errors are redressed at the earliest opportunity—typically in state court. This prompt adjudication of constitutional issues also promotes accurate resolution of those issues and helps ensure the accuracy of the guilt-innocence determination itself.

It remains to be seen whether the current focus on the costs associated with federal habeas review and corresponding restrictions on the writ will endure, or whether they will instead someday be viewed as an experiment. The federal habeas remedy has historically been shaped more by judicial decision than by statute, and the case law reflects the Supreme Court's willingness to modify the law in response to changes in social norms and prevailing philosophies. The Court has rejected the argument that limiting federal habeas review will cause state judges to enforce federal constitutional rights less vigorously, and state-court decisions may ultimately provide empirical data that will prove or disprove this hypothesis. Because recent restrictions on availability of the writ are due to judicial discretion rather than an absence of judicial authority, the Supreme Court remains free to remedy any perceived abuses or inequities in the current habeas regime. Congress, too, certainly has the ability to amend the habeas statutes to broaden the scope of federal review. Thus, the present era of limited federal oversight of state criminal processes may not endure.

In the meantime, it is important for states to seize their new responsibilities. State courts should abandon the old working hypothesis that generally denied state relief because multiple opportunities for federal relief lay ahead. An ideal criminal justice system should detect and correct serious errors early in the process, thus saving both the defendant and society the burden of repetitious litigation.

Published by Digital Commons at St. Mary's University, 1995