

ARTICLES

Teague and Death: The Impact of Current Retroactivity Doctrine on Capital Defendants

By DAVID R. DOW*

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* Assistant Professor of Law, University of Houston Law Center. J.D. 1985, M.A. 1982, Yale University; B.A. 1981, Rice University. This work was supported by a grant from the University of Houston Law Foundation. I am grateful to the following people for their having improved this Article: Ronald J. Mann, Irene Merker Rosenberg, Yale Rosenberg, and Joe Sanders. I would also like to thank Deborah Wible, who helped prepare the manuscript; Katja Glockner, who aided in the unwieldy task of gathering and assembling the data presented in Part II; and Gwen Samora, who provided superb research assistance.

I'd make my Supreme Court down in Texas,
And there wouldn't be no killers gettin' off free.
If they were found guilty,
Then they would hang quickly,
Instead of writin' books and smiling on T.V.

Hank Williams, Jr.

If the South would have won
(We'd have had it made).

Introduction

Hank doesn't need to worry about moving the Court to Texas. The one in Washington, D.C., is doing just fine. In a series of cases decided in the 1989 Term, the Court dramatically affected—some would say altered—habeas corpus doctrine. The Court seriously narrowed the range of issues that may be raised in collateral proceedings. These decisions have paved the way for the acceleration of executions. Although the impact of these decisions is not limited to the capital context,¹ it is there that the consequences will be most dramatic. In addition, irrespective of the merits of these decisions in other areas of doctrine, their application to the claims of death row inmates is profoundly inappropriate. This Article will thus focus on the impact of *Teague v. Lane*² and its progeny³ on the imposition of the death penalty.

Starting with the recent decision in *Teague*, the Court has crafted a habeas corpus doctrine that seems oblivious to the premium it places on innovative lawyering. Yet place such a premium it does. The unsettling consequence is that death row inmates, who ordinarily do not receive the most creative lawyers that the system has to offer, will find themselves procedurally out of luck. This is a cruel irony, especially since the Court has been unanimous in affirming that the procedure followed in the capi-

1. Indeed, *Teague v. Lane*, 489 U.S. 288 (1989), which I discuss in greater detail below and which is central to my argument, was a non-capital case. See *infra* Part I; see also *Nadworny v. Fair*, 744 F. Supp. 1194, 1209-10 (D. Mass. 1990) (applying retroactivity rule announced in *Teague* to preclude a defendant convicted of second-degree murder and sentenced to life from taking advantage of the new rule extending the requirement of a lesser-included offense instruction to non-capital cases).

2. 489 U.S. 288 (1989). The literature pertaining to *Teague* in general is already substantial. See, e.g., Marc M. Arkin, *The Prisoner's Dilemma: Life in the Lower Courts After Teague v. Lane*, 69 N.C. L. REV. 371, 418-19 (1991) (concluding that effects of *Teague* are still uncertain); Ellen E. Boshkoff, Note, *Resolving Retroactivity After Teague v. Lane*, 65 IND. L.J. 651, 672-74 (1990) (proposing an "individual exception" to *Teague* for the purpose of allowing habeas petitioners to receive relief from arguably unfair convictions).

3. See *infra* notes 27-30 and accompanying text. *Teague's* progeny include *Butler v. McKellar*, 494 U.S. 407 (1990), and *Saffle v. Parks*, 494 U.S. 484 (1990), which I discuss in substantial detail; and *Penry v. Lynaugh*, 492 U.S. 302 (1989), which I discuss less fully.

tal context demands especial care and scrutiny.⁴ The arguments advanced in support of the distinctive quality of the capital context are trite—that the death sentence is final, irrevocable, and qualitatively unique⁵—but this does not render them any less compelling. By placing such a premium on innovative lawyering, the Court has betrayed its erstwhile insistence that death sentences receive the highest scrutiny. It has made the choice between death and life intolerably arbitrary, subject to a fortuity that turns less on the circumstances of the offense than on the relative skill of the defendant's lawyer.

How the Court could sanction such capriciousness in the capital context is an interesting question, the answer to which has to do, in my judgment, with what the Court is.⁶ Who we are has a great deal to do

4. See *Gregg v. Georgia*, 428 U.S. 153 (1976) (plurality opinion). In *Gregg*, the plurality upheld Georgia's death penalty statute only after satisfying itself that the sentencing procedures channeled the jury's discretion and contained additional safeguards against arbitrariness by requiring state appellate review of all death sentences. *Id.* at 188-207 (Stewart, J., joined by Powell and Stevens, JJ.). In their opinion concurring in the judgment, Justices White and Rehnquist and Chief Justice Burger likewise scrutinized these features of the Georgia sentencing procedures. *Id.* at 220-26.

See also *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (“[T]he penalty of death is qualitatively different’ from any other sentence.” (quoting *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976))). Although the Court was fragmented in its ultimate reversal of *Lockett's* death sentence, each opinion that addressed the validity of Ohio's death penalty statute closely examined the sentencing procedures. Chief Justice Burger's opinion, joined by Justices Powell and Stevens, held the Ohio statute infirm because its procedures did not allow the jury amply to consider mitigating circumstances. *Id.* at 608. Justice Blackmun, concurring separately, similarly focused on the fact that the statute did not permit the sentencing authority to consider the degree of the defendant's participation in the homicide. *Id.* at 658-61. Justice Marshall adhered to his categorical opposition to the death penalty, see, e.g., *infra* text accompanying note 250, but he also insisted that when a life is at stake the Court must demand “fine precision in the process.” 438 U.S. at 620. Likewise, Justice White, concurring in the judgment, expressed concern that the petitioner had been sentenced to death without a finding of intention to kill. *Id.* at 624. Finally, even Justice Rehnquist, who would not have reversed *Lockett's* sentence, voiced concern over the problem of allowing juries too much discretion. *Id.* at 631.

The finest discussion of the principles in the central death penalty cases is Ronald J. Mann, *The Death Penalty as Cruel and Unusual Punishment* (unpublished manuscript, on file with author). See also Margaret J. Radin, *Cruel Punishment and Respect for Persons: Super Due Process for Death*, 53 S. CAL. L. REV. 1143 (1980). But see William S. Geimer, *Death at Any Cost: A Critique of the Supreme Court's Recent Retreat from Its Death Penalty Standards*, 12 FLA. ST. U. L. REV. 737 (1985).

5. See, e.g., *Furman v. Georgia*, 408 U.S. 238, 306 (1972) (Stewart, J., concurring) (noting uniqueness of death penalty in its total irrevocability, its rejection of rehabilitation, and its absolute renunciation of all that is embodied in the notion of humaneness); see also Mann, *supra* note 4. But see Daniel R. Harris, Note, *Capital Sentencing After Walton v. Arizona: A Retreat from the “Death is Different” Doctrine*, 40 AM. U. L. REV. 1389 (1991).

6. Let me make clear that I do not mean this to be the slightest bit pejorative. The Court comprises the very paragon of the legal profession; it is emphatically not a cross section. Thus, to adumbrate a bit, it is not surprising that the members of the Court have not had dealings

with what we know. This is why, for example, Jews after the Holocaust are not—and cannot be—the same as we were before.⁷ It is why one who has endured great pain or loss comes to possess a different perspective. It is what we mean when we talk about growing from experience. It is why closeness to death changes one's view of life.⁸ It is why the more one learns about the criminal justice system, the more uncomfortable one becomes with the death penalty and the more one worries that our values are being sullied.⁹

In Harris County, Texas, in 1987, seven indigent defendants stood trial for capital murder. All seven were convicted and sentenced to death.¹⁰ The prosecutors batted a thousand. Their opponents were court-appointed lawyers, not public defenders, whose fees were set at a fraction of what they could make representing paying clients,¹¹ thus removing an incentive to pursue the cases assiduously even if the lawyers were talented enough to do so. In that same year in Dade County, Florida, where an excellent public defender system provides representation to indigent defendants, twenty-seven out of thirty men convicted of capital murder received life sentences.¹² The prosecutors batted just one out of

with the likes of the attorneys who are often called upon to represent indigent capital defendants. When I say, therefore, that the Court does not “know” what goes on in the bowels of the system, I mean not merely that the Justices have not themselves typically defended indigent capital defendants, or even that they have not periodically personally encountered and observed the performance of a remarkably inept attorney, but that they are not aware of the level of legal assistance that is routinely provided to indigent capital defendants in states without public defender systems.

7. See, e.g., RICHARD L. RUBINSTEIN, *AFTER AUSCHWITZ* (1966); ELIEZER BERKOVITS, *FAITH AFTER THE HOLOCAUST* (1973); ANDRE NEHER, *THE EXILE OF THE WORD* (1981).

8. This is why Schopenhauer regarded suicide as evidence of a concealed will for life (and why Pascal said that it is easier to die than to think about death without dying). See MARTI LEIMBACH, *DYING YOUNG* 229, 276 (1990) (nicely juxtaposing the Schopenhauer and Pascal insights).

9. For the concerns of a defense attorney, see, e.g., David Bruck, *Decisions of Death*, *NEW REPUBLIC*, Dec. 12, 1983, at 18. For similar views from prosecutors, see, e.g., Jason DeParle, *Special Report: A Matter of Life or Death*, *NEW ORLEANS TIMES-PICAYUNE* 2, 6 (1985) (reprinting articles published Apr. 7, 1985) (on file with author) (quoting Orleans Parish District Attorney Harry Connick, who characterized the death penalty as “random, chance, throw of dice”; and quoting Terry Alarcon, former Orleans Parish Assistant District Attorney, who noted that “[t]here’s virtually no chance of someone wealthy getting the death penalty”).

10. See *infra* Part II.C.

11. See *HOUSTON CHRON.*, Feb. 27, 1991, at 20A (describing effort by court-appointed lawyers in a capital case to recover \$10,000 for 250 hours of work outside the courtroom (\$40 per hour), where local guidelines limit such out-of-court expenses to \$500).

12. The system used in Dade County relies heavily, but not exclusively, on public defenders. See *infra* Part II.C. Of the capital defendants represented by public defenders in 1987, none received a sentence of death. The competence of the so-called special assigned attorneys

ten. The following year in Kentucky, nine defendants stood trial for capital murder. All were represented by public defenders, who are paid by the state and who utilize state resources to do background investigation that often does not get done in jurisdictions without public defender systems. Not a single one received the death penalty; all were sentenced to life.¹³ The prosecutors struck out.

This type of data, which is presented in greater detail from a number of jurisdictions below in Part II.C, suggests that the quality of lawyering matters inordinately at the punishment phase of a capital trial,¹⁴ and that the better lawyering occurs in jurisdictions with public defender systems. The Supreme Court of the United States, however, in its recent retroactivity decisions, seems not to have recognized this.¹⁵ It certainly did not acknowledge it.¹⁶ Hence, the Court's development of doctrine in the area of retroactive application of new rules seems to depend on an almost willful lack of knowledge.

While this emerging "new rule" jurisprudence presupposes highly skilled and innovative trial lawyers, the legal test currently utilized to examine the effectiveness of counsel calls for only minimal competence. Thus, although the constitutional demand of the Sixth Amendment imposes an extremely low threshold,¹⁷ under new rule jurisprudence a de-

(employed primarily in cases in which there is a conflict with the office of the public defender) varies widely, but these lawyers do have access to state resources for purposes of investigation and pretrial work.

13. See *infra* Part II.C.

14. I do not doubt that the difference also manifests itself at the guilt-innocence phase of a capital trial. Indeed, some of the evidence presented *infra* Part II.C attests to a difference at this earlier stage as well. Nevertheless, partly because the evidence for that conclusion is too incomplete, and partly because my primary focus is on sentencing, this Article addresses only the comparative performance of counsel at the punishment phase.

15. The Court's unwillingness to confront this feature of the system also has pernicious ramifications in the context of procedural default, a distinct problem not addressed in this Article. The relationship between procedural default and inadequate trial counsel, as well as between that area of doctrine and recent doctrinal developments, was addressed most recently by John C. Jeffries, Jr. & William J. Stuntz, *Ineffective Assistance and Procedural Default in Federal Habeas Corpus*, 57 U. CHI. L. REV. 679 (1990).

16. See, e.g., *Teague v. Lane*, 489 U.S. 288, 299-310 (1989) (focusing instead on considerations of finality in formulating retroactivity doctrine).

17. See, e.g., *Messer v. Kemp*, 474 U.S. 1088 (1986) (Marshall, J., joined by Brennan, J., dissenting from denial of certiorari). The attorney representing Messer at the sentencing phase of his capital trial neglected to inform the jury that the defendant had no prior criminal record, that he had been steadily employed, that he had received an honorable discharge from the military, that he had been a regular churchgoer, and that he had cooperated with the police. *Id.* at 1090. Even though the magistrate held that this neglect was sufficient to establish ineffectiveness—finding that this conduct had left the petitioner effectively without representation at the sentencing phase—the district court nonetheless denied Messer relief, finding no reasonable probability that "but for" this conduct Messer would have received a different sentence. *Id.*; see also *Moore v. Maggio*, 740 F.2d 308, 319 (5th Cir. 1984) (similarly refusing to find

fendant will be fairly treated only if his attorney is brilliant.¹⁸ The test for ineffectiveness set out in *Strickland v. Washington*¹⁹ ensures that very few convictions will be disturbed because of alleged ineffectiveness.²⁰ Under the *Strickland* standard, a convicted defendant challenging the efficacy of his or her counsel must meet the formidable barriers of establishing both that an error was made and that it probably altered the outcome of the trial.²¹ Coupled with this test for ineffectiveness, the Court's recent decisions in the area of retroactivity generate a doctrine that will permit states regularly to execute their citizens even when a constitutional violation has vitiated the process. This should give pause to even the firmest supporters of capital punishment.²² Nevertheless, rather than argue that the retroactivity doctrine is misguided—though I believe in certain critical regards it is—I offer proposals in Part III that would require no alteration of the doctrine; indeed, they are an attempt to respond to it.

In order for any death penalty statute to satisfy our constitutional values (and indeed the values that the Court itself has steadfastly invoked in the capital context), counsel who represent indigent capital defendants

ineffectiveness where death row habeas petitioner could not show that trial counsel's failure to object to trial court errors at sentencing phase was unreasonable and prejudicial).

It is now clear beyond cavil that under the current test for ineffectiveness only the most egregious instances of ineptitude lead to a finding of ineffectiveness. See Martin C. Calhoun, Note, *How to Thread the Needle: Toward a Checklist-Based Standard for Evaluating Ineffective Assistance of Counsel Claims*, 77 GEO. L.J. 413 (1988); Paul Marcotte, *Snoozing, Unprepared Lawyer Cited*, A.B.A. J., Feb. 1991, at 14-15. As an example of the degree of ineptitude necessary to trigger a finding of ineffectiveness, this essay in the *A.B.A. Journal* notes the performance of one James Venable, a former imperial wizard of the Ku Klux Klan, who slept a "good deal" during the capital trial of his black client. *Id.* at 14.

18. See the definition of brilliant embraced in David R. Dow, *When Words Mean What We Believe They Say: The Case of Article V*, 76 IOWA L. REV. 1 n.3 (1990); see also Daniel R. Farber, *The Case Against Brilliance*, 70 MINN. L. REV. 917 (1986) (arguing for thoughtfulness rather than brilliance as a more valuable characteristic in legal thinking).

19. 466 U.S. 668 (1984); see also *infra* note 20 and accompanying text.

20. See Marianne Lavelle & Marcia Coyle, *Fatal Defense—Effective Assistance: Just a Nominal Right?*, NAT'L L.J., June 11, 1990, at 42 (citing statistics which indicate that federal circuit courts of appeals have granted capital defendants post-conviction relief for ineffective assistance of counsel in only 24 of 97 cases). What is most interesting (and perhaps startling) about the cited statistics is the differences between circuits. For example, while in the Seventh Circuit all three capital defendants raising ineffectiveness challenges were granted relief under *Strickland*, in the Fifth Circuit, only one of 31 death row inmates persuaded the court that he had received ineffective assistance. See also Marcotte, *supra* note 17, at 14 (noting that only three cases in Georgia have found ineffectiveness under *Strickland*).

21. *Strickland*, 466 U.S. at 687; see *infra* Part II.A.

22. And it has. See, e.g., William F. Buckley, Jr., *Execute Ronald Monroe; Analysis of Evidence that Points to His Innocence*, NAT'L REV., Sept. 15, 1989, at 63 (advocating pardon for arguably innocent death row inmate while expressing the view that too few people receive the death penalty).

must be highly competent.²³ The state may not take a citizen's life without offering the citizen a meaningful opportunity to resist. This thesis is dictated entirely by the Eighth Amendment, not the Sixth. Specifically, my argument is that within the confines of Eighth Amendment jurisprudence alone, the Court has rightly been loathe to accept arbitrariness and fortuity in sentencing.²⁴ Yet by employing both the *Strickland* test for ineffectiveness and the *Teague* retroactivity standard in the capital context, the Supreme Court has created a grotesquely arbitrary system, much like the one Justice Douglas warned about in *Furman v. Georgia*—a scheme where “anyone making more than \$50,000 would be exempt from the death penalty.”²⁵

No member of the Court has argued that original intent is dispositive in the realm of capital punishment.²⁶ Where the Cruel and Unusual Punishments Clause is concerned, the Court has been neither persuaded by nor even interested in the question of whether a particular punishment was in fact viewed by the Framers as cruel and unusual. This indifference to originalism is not manifested with respect to the Court's analysis of other constitutional provisions. Thus, whatever the merits of the *Strickland* test for safeguarding the Sixth Amendment right to effective counsel, the Eighth Amendment value is entirely distinct. Counsel charged with defending an accused against the state's effort to take his or her life must be more than minimally competent.

In view of the Court's own recognition of the special nature of the death penalty, the general prohibition against retroactive application of new rules is profoundly inappropriate in the context of capital punishment. Capital defendants should be allowed the benefit of new rules. *Simply put, retroactivity jurisprudence ought not to apply in the realm of the death penalty.* As a normative proposition, this thesis can stand alone. And in view of the scandalous quality of trial representation available to indigent capital defendants in jurisdictions without public defender systems, the Court's refusal to permit death row inmates to avail themselves of constitutionally mandated new rules is utterly indefensible.

23. This claim is rooted in and informed by the principle of comparative justice. For a discussion of the principle, see JOEL FEINBERG, *SOCIAL PHILOSOPHY* 98-119 (1973) (explaining that this principle, with its roots in Aristotle, requires that like cases be treated alike and unlike cases be treated differently). Further, in view of current retroactivity law, trial counsel must be super-competent, since collateral relief is increasingly unavailable.

24. See, e.g., *Gregg v. Georgia*, 428 U.S. 153, 188 (1976) (plurality opinion) (emphasizing that although the death penalty is not per se unconstitutional, it may not be imposed under arbitrary and capricious procedures).

25. *Furman v. Georgia*, 408 U.S. 238, 256 (1972) (Douglas, J., concurring).

26. See generally Anthony F. Granucci, “*Nor Cruel and Unusual Punishments Inflicted*”: *The Original Meaning*, 57 CAL. L. REV. 839 (1969); Mann, *supra* note 4.

Part I of this Article reviews the Court's recent pronouncements in the area of retroactivity of so-called new rules.²⁷ The cases include *Teague v. Lane*,²⁸ *Butler v. McKellar*,²⁹ and *Saffle v. Parks*.³⁰ *Penry v. Lynaugh*³¹ is important primarily because it specifies unmistakably that the retroactivity doctrine established by *Teague*, *Butler*, and *Parks* applies equally to cases involving petitioners on death row.³² Part II criticizes the ramifications of these recent decisions. More particularly, Part II summarizes the *Strickland* standard for ineffective assistance of counsel, then examines typical death penalty representation in several states. Frequently, the level of representation provided to indigent capital defendants falls well below the quality that *Teague* and its progeny assume is typical (and that they would therefore seem to demand), even though the representation does ostensibly satisfy the *Strickland* standard. In addition, Part II presents data, collected here for the first time, that strongly indicate the superiority of public defenders over court-appointed private counsel in saving capital defendants from the gallows.

In view of this data and particular stories of lawyers' ineptitude in capital proceedings, Part III proposes certain reforms. It specifically urges the creation of a federal public defender's office for the purpose of representing indigent capital defendants in states that do not have adequate public defender offices. Also, in order for the sentencing schemes to satisfy the Constitution, Part III suggests that counsel be permitted either to waive the right to have a jury impose sentence or, alternatively, to place before the jury evidence of heinous crimes committed by other defendants in that jurisdiction which were not punished with the death sentence.

Much attention has been paid in recent months to reforming the rules of habeas corpus.³³ The attention has been provoked in large part

27. See *infra* notes 64, 73 and accompanying text.

28. 489 U.S. 288 (1989).

29. 494 U.S. 407 (1990).

30. 494 U.S. 484 (1990).

31. 492 U.S. 302 (1989).

32. *Id.* at 313-14. When *Teague* was announced, this was by no means clear. See, e.g., REPORT OF A.B.A. TASK FORCE ON DEATH PENALTY HABEAS CORPUS (1990) [hereinafter A.B.A. REPORT], reprinted in Ira P. Robbins, *Toward a More Just and Effective System of Review in State Death Penalty Cases*, 40 AM. U. L. REV. 1, 204-05 app. A (1990) (minority report of ABA Task Force co-chairman Malcolm M. Lucas). Arguably, the precise contours of *Teague* remain a bit hazy. See, e.g., *Sawyer v. Butler*, 881 F.2d 1273, 1280 (5th Cir. 1989) (en banc); see also *id.* at 1305 (King, J., dissenting).

33. This attention has come from the Supreme Court, commentators, and Congress. See, e.g., *McCleskey v. Zant*, 111 S. Ct. 1454 (1991); A.B.A. REPORT, *supra* note 32 (reviewing and commenting upon report and suggestions of the American Bar Association (ABA)); Vivian Berger, *Justice Delayed or Justice Denied?—A Comment on Recent Proposals to Reform Death*

by what is perceived to be an abuse of the legal system by lawyers representing inmates on death row.³⁴ Nevertheless, the proposals offered to date remain largely unresponsive to the problems delineated in this Article—namely, the problems concerning the relationship between retroactivity doctrine and inadequate trial counsel in capital cases.³⁵ The proposals offered here are designed to address both these features of the current system. They are designed, in other words, not with the quixotic aim of eliminating the death penalty altogether but with the hope of safeguarding the process by which we sentence citizens to death.

I. *Teague*, Its Progeny, and Retroactivity

Frank Teague, a black man, was convicted by an all-white jury of attempted murder, armed robbery, and battery.³⁶ The prosecutor used all ten of his peremptory challenges to remove blacks from the jury

Penalty Habeas Corpus, 90 COLUM. L. REV. 1665 (1990) (reviewing and commenting upon ABA Report as well as recommendations of the Powell Commission); Lewis F. Powell, Jr., *Capital Punishment*, 102 HARV. L. REV. 1035 (1989).

34. See, e.g., Judge Jones' opinion in *Bell v. Lynaugh*, 858 F.2d 978, 985-86 (5th Cir. 1988) (Jones, J., specially concurring) (comparing behavior of petitioner's habeas counsel to the behavior of petitioner himself, who raped and murdered his victim). Justice Scalia has also recently expressed this concern over habeas counsel's so-called delay tactics. See *Madden v. Texas*, 111 S. Ct. 902, 904-05 (1991) (Scalia, Circuit Justice).

35. With the exception of the recommendations of the ABA, the proposals that address the problem of delay and protracted litigation in the death penalty context pay scarce attention, if any, to the fundamental problem of inadequate trial counsel. The ABA, however, most certainly does recognize the centrality of this problem. Indeed, the ABA

is persuaded that the principal failings of the capital punishment review process today are the inadequacy and inadequate compensation of counsel at trial and the unavailability of counsel in state post-conviction proceedings. . . .

. . . [I]f competent trial counsel were appointed initially and given the resources to represent their clients properly, and if competent counsel represented petitioners from the earliest stages of state post-conviction review, then the entire capital litigation process would be shortened, perhaps greatly so.

Competent and adequately compensated counsel from trial through collateral review is thus the *sine qua non* of a just, effective, and efficient death penalty system.

A.B.A. REPORT, *supra* note 32, at 16-17 (citations omitted).

The central failure of the ABA proposals in this regard is the unresponsiveness to the method of selecting counsel to represent indigent capital defendants. I suggest below that the problem of inadequate trial counsel is endemic in jurisdictions that lack public defender systems. Stressing the importance of effective counsel is terribly important, and the content of the ABA recommendations in this regard cannot be overestimated. What we also need, however, is a proposal for attaining such counsel.

One final difference in focus between the proposals offered in this Article and the ABA suggestions is that the ABA paid little attention to the issue of retroactivity, primarily because the impact of *Teague v. Lane* was not yet known at the time the ABA proposals were redacted. Yet the spirit of the ABA Report can fairly be said to be squarely in line with the argument in this Article. See *id.* at 50-52.

36. 489 U.S. at 292-93.

panel.³⁷ Arguably, the prosecutor removed the potential black jurors because they were black.³⁸

Under what is known as the *Batson* doctrine,³⁹ a prosecutor's use of peremptory challenges to remove blacks because they are black may constitute a denial of the defendant's constitutional guarantee of equal protection. In *Batson v. Kentucky*,⁴⁰ the Court delineated the evidentiary showing that a defendant must make in order to prevail on this claim. A defendant establishes a prima facie case under *Batson* by showing that (1) "he is a member of a cognizable racial group," (2) the prosecution used its "peremptory challenges to remove from the venire members of the defendant's race," and (3) those "facts and other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the jury on account of their race."⁴¹ Once the prima facie case is established, "the burden shifts to the State to come forward with a neutral explanation for challenging black jurors."⁴²

Under *Batson*, Frank Teague had a strong claim that he had been denied equal protection. The problem is that Teague was convicted before *Batson* was rendered. Under *Swain v. Alabama*,⁴³ which *Batson* overruled in part, Teague's trial passed constitutional muster. Moreover, by the time *Batson* was decided, Teague's conviction had already become final.⁴⁴ Teague argued in the collateral attack on his conviction that *Batson* established that his due process rights had been abridged. But the Court ruled that because Teague's conviction was already final at the time of *Batson*, Teague could not avail himself of the *Batson* principle.⁴⁵ To be clear: The Court did not pass on the merits of Teague's claim, nor did it hold that the evidence was or was not sufficient to establish a prima facie case under *Batson*. The Court simply held that it would not permit Teague to raise the claim.

Imagine a different, hypothetical petitioner—one whose crime was identical to Teague's, whose evidence at both the guilt-innocence and trial phases was identical to Teague's, and who, like Teague, had been convicted and sentenced to prison. This hypothetical defendant would

37. *Id.* at 293.

38. *See id.*

39. *Batson v. Kentucky*, 476 U.S. 79, 86 (1986).

40. 476 U.S. 79 (1986).

41. *Id.* at 96.

42. *Id.* at 97.

43. 380 U.S. 202 (1965).

44. *See Teague*, 489 U.S. at 295. "Final" means that the judgment of conviction has been rendered, the availability of appeal exhausted, and the time for petition of certiorari has elapsed. *See Allen v. Hardy*, 478 U.S. 255, 258 n.1 (1986).

45. 489 U.S. at 295-96.

be able to raise the *Batson* issue in a collateral attack on his conviction either if his lawyer had preserved the issue and then persuaded the Supreme Court to grant certiorari to consider it⁴⁶ or if his conviction had not become final until after *Batson*. If he had been wealthy and able to afford a highly skilled lawyer, or had he been appointed a more competent lawyer, or if he had been fortunate enough to commit the crime in a jurisdiction with public defenders, his lawyer might well have preserved the issue, and sought and obtained review in the Supreme Court. Then he, unlike Teague, would have been able to invoke the *Batson* principle.⁴⁷ Furthermore, and perhaps even more remarkably, if the state appellate court in the case of our hypothetical defendant had merely acted more slowly, so that the United States Supreme Court had handed down *Batson* before the state appellate court affirmed his conviction, he would have been able to take advantage of the *Batson* rule.⁴⁸

The importance of having a clever trial attorney is impossible to gainsay. The element of pure chance plays a major, sometimes dispositive, role in determining whether each criminal defendant will enjoy certain constitutional rights. This result is not an unintended ramification of *Teague*. On the contrary, this is *Teague v. Lane*'s very core: Certain doctrines cannot be raised by habeas petitioners in collateral attacks on their convictions if those doctrines were not articulated by the Supreme Court until after the petitioner's conviction became final.⁴⁹ Yet aside from producing arbitrary results, as our hypothetical illustrates, *Teague* also raises an important question: Which doctrines fall into this group and therefore cannot be raised if they were not deemed claims until after the petitioner's conviction became final?

A. Retroactivity from *Linkletter* Through *Teague*

For several decades the Court has wrestled with the issue of retroactivity. The first explicit consideration of the issue seems to have been in *Linkletter v. Walker*,⁵⁰ which addressed the question of whether *Mapp v.*

46. Whether an issue is sufficiently preserved is a matter of state law. A nonpreserved issue can be raised by way of a collateral habeas attack on the conviction only in limited circumstances where the issue pertains to fundamental fairness.

47. It is perhaps important to point out that this hypothetical defendant is not genuinely hypothetical, for at the same time that *Teague* was being tried, other defendants' lawyers were raising this issue. See, e.g., *McCray v. New York*, 461 U.S. 961, 961-63 (1983); *id.* at 966-67 (Marshall, J., with Brennan, J., dissenting).

48. Cf. *Stone v. Powell*, 428 U.S. 465, 436-37 (1976) (White, J., dissenting) (making an analogous argument in the Fourth Amendment context).

49. *Teague*, 489 U.S. at 295-96.

50. 381 U.S. 618, 628 n.13 (1965). Prior to *Linkletter*, although the Court as a whole had not addressed this issue, individual Justices had expressed opinions concerning whether partic-

*Ohio*⁵¹ should be applied to cases that had become final before *Mapp* was decided. *Mapp* overruled *Wolf v. Colorado*⁵² and held that evidence seized in violation of the Fourth Amendment must be excluded from state criminal proceedings.⁵³ The *Linkletter* Court reasoned that the Constitution does not require that Supreme Court decisions be applied retroactively, and it thus denied relief on the *Mapp* issue.⁵⁴

Linkletter established a three-part balancing test for retroactive application.⁵⁵ First, would the new rule's purpose be advanced by retroactive application? Second, to what extent does the new rule rely on precedent existing at the time the new rule was articulated? Third, what effect would retroactive application have on the efficient administration of justice? The Court used this test irrespective of whether the case was before the Court on direct appeal or collateral review,⁵⁶ and it produced a series of somewhat ad hoc rulings.⁵⁷

ular newly recognized (or created) rules of criminal procedure ought to be given retroactive effect. *See, e.g., Jackson v. Denno*, 378 U.S. 368, 439-40 (1964) (Harlan, J., joined by Clark and Stewart, JJ., dissenting) (criticizing majority for refusing even to consider whether a newly announced rule of criminal procedure ought to be applied retroactively); *LaVallee v. Durocher*, 377 U.S. 998, 998 (1964) (Harlan, J., dissenting from denial of certiorari) (urging that certiorari be granted to determine retroactive application of *Gideon v. Wainwright*, 372 U.S. 335 (1963)); *Norvell v. Illinois*, 373 U.S. 420, 424-26 (1963) (Goldberg, J., joined by Stewart, J., dissenting) (arguing that majority ignored the important issue of determining the retroactive application of *Griffin v. Illinois*, 351 U.S. 12 (1956)).

51. 367 U.S. 643 (1961).

52. 338 U.S. 25 (1949).

53. *Mapp*, 367 U.S. at 655.

54. *Linkletter*, 381 U.S. at 639-40.

55. *Id.* at 636-37.

56. *See Stovall v. Denno*, 388 U.S. 293, 300 (1967) (concluding that no justifiable distinction exists between final convictions and convictions at various stages of trial and direct review); *cf. United States v. Johnson*, 457 U.S. 537, 548-63 (1982) (utilizing retroactivity analysis to determine whether *Payton v. New York*, 445 U.S. 573 (1980), which prohibited warrantless, non-consensual entry into suspect's home to make a felony arrest, should apply to arrests made before announcement of the new rule).

57. *See, e.g., Brown v. Louisiana*, 447 U.S. 323, 330-31 (1980) (giving retroactive effect to a decision invalidating conviction of a non-petty criminal offense by a non-unanimous six-person jury); *Daniel v. Louisiana*, 420 U.S. 31, 33 (1975) (denying retroactive effect to a decision holding unconstitutional the exclusion of women from jury); *Adams v. Illinois*, 405 U.S. 278, 284-85 (1972) (plurality opinion) (denying retroactive effect to a decision guaranteeing assistance of counsel at preliminary hearing). The period between *Linkletter* and *Teague* is thoroughly covered by Ginger G. Mayer, Note, *Retroactive Application of Constitutional Rules Regarding Criminal Procedure*, 56 U. CIN. L. REV. 1097, 1099-1111 (1988). *See also* James B. Haddad, *The Finality Distinction in Supreme Court Retroactivity Analysis: An Inadequate Surrogate for Modification of the Scope of Federal Habeas Corpus*, 79 NW. U. L. REV. 1062, 1078-79 (1985) (criticizing the inconsistency in the *Linkletter* line of cases and noting that Court's true concern appears to be the prevention of collateral attacks on state convictions on grounds unrelated to guilt or innocence). The cluster of cases decided at or around the time of *Teague* is amply discussed in Boshkoff, *supra* note 2.

Indeed, Justice Harlan was displeased with the test almost from the outset,⁵⁸ and he therefore proposed an alternative in *Mackey v. United States*⁵⁹ that focused on two factors rather than three and that eschewed the *Linkletter* balancing approach in favor of a yes-or-no analysis. Harlan believed that new rules should be applied retroactively to all cases on direct appeal and also to cases on collateral review when (1) the new rule placed "certain kinds of primary, personal individual conduct beyond the power of the criminal law-making authority to proscribe,"⁶⁰ or (2) the new rule required the observance of procedures that are implicit in the concept of ordered liberty.⁶¹ An example of the first prong of the Harlan test would be something like the abortion decision *Roe v. Wade*.⁶² Suppose that a certain doctor had been convicted of having performed an abortion during the sixth week of pregnancy (the first trimester). Suppose in addition that he had been sentenced to prison, his conviction had become final, and he was in fact serving his term. Although his case became final years before *Roe*, the Court in *Roe* placed the conduct of the physician beyond the power of the state to proscribe.⁶³ Therefore, under the first prong of Harlan's proposed test, the doctor would be permitted to use *Roe v. Wade* in a collateral attack on his conviction.⁶⁴

The second prong of Harlan's test is more difficult to fathom, and I will discuss it further shortly.⁶⁵ The point of immediate pertinence is that the *Teague* Court purported to embrace the Harlan test.⁶⁶

At the time that Frank Teague's case was before the Court on collateral review, it was not clear what approach to retroactivity the Court would use in such circumstances. The Court's approach was more lucid in cases on direct appeal. Shortly before *Teague* came up, the Court had jettisoned the *Linkletter* approach and applied Justice Harlan's analysis in a case on direct appeal concerning the *Batson* issue.⁶⁷ Then in *Teague*,

58. Initially Justice Harlan had supported *Linkletter*, but four years later, following the emergence of an "extraordinary collection of rules" as a consequence of *Linkletter*, he capitulated and proposed his alternative. *Desist v. United States*, 394 U.S. 244, 256-69 (1969) (Harlan, J., dissenting).

59. 401 U.S. 667, 675-702 (1971) (Harlan, J., dissenting).

60. *Id.* at 692.

61. *Id.* at 693.

62. 410 U.S. 113 (1973).

63. *Id.* at 164-66.

64. For more on this primary conduct exception, see Justice Harlan's opinion in *Hanna v. Plumer*, 380 U.S. 460, 474-78 (1965).

65. See *infra* notes 77-86 and accompanying text.

66. 489 U.S. at 303-16.

67. See *Griffith v. Kentucky*, 479 U.S. 314, 322-23 (1987) (applying *Batson* retroactively). Following Harlan's view that there is a distinction of constitutional magnitude between cases on direct appeal and those on collateral review, see, e.g., *Desist v. United States*, 394 U.S. 244,

the Court went a step further and applied the Harlan test to collateral attacks. The Court held that Frank Teague could not benefit from *Batson*.⁶⁸ *Teague* therefore rests inextricably upon the Court's conclusion that the *Batson* rule is not implicit in the concept of ordered liberty. This dispositive premise is neither necessarily nor self-evidently true. The question therefore arises: How and why did the Court determine that the *Batson* principle is not implicit in the concept of ordered liberty?

To discuss this question meaningfully a bit of background is needed. In *Allen v. Hardy*,⁶⁹ decided after *Batson*, the Court held that since *Batson* had overruled a portion of *Swain v. Alabama*,⁷⁰ it constituted a *substantial break* with precedent and would therefore not be applied retroactively to convictions that became final before *Batson* was announced.⁷¹ The *Allen* Court used the *Linkletter* balancing test rather than the Harlan analysis,⁷² and the two critical concepts on which *Allen* rests are "substantial break" and "final."⁷³ The definition of the latter is straightforward.⁷⁴ Under the *Linkletter* approach a petitioner whose conviction is final cannot take advantage of new doctrines if they amount to a substantial break with precedent. *Allen* leaves us with the problem of defining substantial break⁷⁵—a concept that is not amenable to rigor-

258 (1969) (Harlan, J., dissenting), the Court in *Teague* held that although retroactive application is generally required in cases on direct review, see *Griffith*, 479 U.S. at 328, retroactive application is the exception in cases on collateral review. *Teague*, 489 U.S. at 310. Of course, the issue of retroactivity arises only in the context of so-called new rules. If the rule is not new—if it was in place already before the conviction became final—then no retroactivity problems arise (though there may well be issues of procedural default). See *Yates v. Aiken*, 484 U.S. 211, 217-18 (1988).

68. 489 U.S. at 296.

69. 478 U.S. 255 (1986) (per curiam).

70. 380 U.S. 202 (1965).

71. 478 U.S. at 258-59.

72. See *supra* notes 55-61 and accompanying text.

73. 478 U.S. at 258-60.

74. According to the Court, "final" is defined as a case "where the judgment of conviction was rendered, the availability of appeal exhausted, and the time for petition for certiorari had elapsed." 478 U.S. at 258 n.1.

75. *Teague's* lawyer, and many others in his position, did not raise the *Swain* issue at trial or on direct appeal. This is important because the *Teague* Court reaffirmed the holding in *Wainwright v. Sykes*, 433 U.S. 72 (1977), that, as a matter of federal habeas law, unless the petitioner can show cause for not raising the issue as well as prejudice resulting therefrom, it cannot be raised in collateral attacks upon the conviction. *Teague*, 489 U.S. at 298 (O'Connor, J., joined by Rehnquist, C.J., and White, Scalia, and Kennedy, JJ.). This area of doctrine is known as procedural default. For an excellent analysis of the cases, and their relation to the Court's test for ineffective assistance of counsel, see Jeffries & Stuntz, *supra* note 15, at 681-90.

Another difficulty is the peculiarity of having the defendant pay for the Court's tardiness in discovering the true meaning of the Constitution. Unless the petitioner falls within one of two exceedingly narrow exceptions, that petitioner will lose if the Court's decision is deemed a substantial break with precedent. But all these cases are *constitutional* cases. The Court is

ous definition because it includes the modal adjective “substantial.”

Justice Harlan’s yes-or-no test, although arguably an improvement over the *Linkletter* approach, does not circumvent this definitional difficulty; in fact, it exacerbates it. Under the Harlan test, as we will see, the same definitional problem arises at an earlier stage of the inquiry: during the determination of whether the newly articulated constitutional principle is a “new” rule. Thus, when in *Teague* a plurality of the Court, comprising Justices O’Connor, Scalia, Kennedy, and Chief Justice Rehnquist, adopted Justice Harlan’s test for determining whether a new rule would apply retroactively to cases on collateral review, the plurality also adopted a test that would subsume rather than avoid the intractable question of defining substantial break.

The *Teague* plurality proceeded to pose a second inscrutable question as well. The *Teague* Court defined a “new rule” as a rule that “breaks new ground or imposes a new obligation on the States or the Federal government.”⁷⁶ A case does so, the Court continued, whenever “the result was not dictated by precedent existing at the time the defendant’s conviction became final.”⁷⁷ Notice that the *Linkletter* problem of defining substantial break has simply reappeared with the very definition of new rule. The rule is new if it “breaks new ground,” if it was not “dictated by precedent.” These locutions appear to be indistinguishable from the concept of “substantial break.” The definitional problem inherent in the Harlan test has not been circumvented; it has just been moved.

In any event, once a court finds a new rule, it can utilize the two Harlan exceptions to the general bar against retroactive application and apply the new rule retroactively to cases on collateral review only if the new rule (1) precludes the state from outlawing certain conduct or (2) requires the state to observe procedures that are implicit in the concept of ordered liberty. Here we confront the second definitional conundrum: the amorphous notion of “implicit in the concept of ordered liberty.” The question whether a new rule is in fact implicit in the concept of ordered liberty is a question that eludes definition just as steadfastly as does the issue of “substantial break.”⁷⁸

saying what the Constitution requires. Hence, when the Court decrees a new rule but declares it not applicable retroactively, it is penalizing the defendant for its own interpretive error.

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

77. *Id.* (emphasis omitted).

78. This very point, of course, was made by Justice Black in the incorporation debate. See *Adamson v. California*, 332 U.S. 46, 69-90 (1947) (Black, J., dissenting). The “implicit in the concept of ordered liberty” language itself also has its origins in the incorporation debate. See *Palko v. Connecticut*, 302 U.S. 319, 325 (1937) (opinion of Cardozo, J.).

To summarize, a new rule is one that breaks new ground, meaning that it was not dictated at the time the petitioner's conviction became final.⁷⁹ It is defined, in other words, in terms parallel to the *Linkletter* question of "substantial break." A case that constitutes a substantial break with precedent would satisfy the *Teague* definition of new rule, and vice versa. A new rule is simply one that represents a substantial break. This leaves the issue of which new rules will be applied retroactively. The *Teague* plurality, purporting to follow Justice Harlan's test, held that of all the new rules in the constitutional universe, the ones that will be applied retroactively are those that are implicit in the concept of ordered liberty.⁸⁰

B. The Problem with *Teague* Generally

For reasons of common sense, *Teague's* juxtaposition of the critical concepts "substantial break" and "implicit in the concept of ordered liberty" is perplexing. A rule is "new" if it represents a substantial break with precedent. Some substantial breaks are dictated because they represent principles that are implicit in the concept of ordered liberty. But if the new procedures are genuinely implicit in the concept of ordered liberty, how does it make any sense—any *semantic* sense—to call them "new"? The term "implicit" suggests that the rule or procedure is already there (albeit hidden). Something is implicit when it is necessarily present, when it is essential.⁸¹ Thus, although a newly articulated rule might clearly constitute a substantial break with precedent, insofar as the rule is implicit in the concept of ordered liberty, then, unless the idea of liberty has changed since the petitioner's conviction became final, the rule was already constitutionally mandated at the time that the petitioner's case became final.

The *Teague* plurality was apparently aware that, far from eliding the definitional difficulties inherent in the *Linkletter* test, it had merely recast them. Further, the Court seems to have recognized that by shifting to the Harlan approach, it actually augmented the conceptual problems, for

79. See *supra* note 74. In addition, as I discuss below, in the aftermath of *Butler*, even when there is only a very minor deviation from a previous case—some might say even when there is no deviation at all—the definition of new rule will be satisfied.

Here it is appropriate to discuss the meaning of "deviation." *Butler* is not a deviation if what we mean by deviation is "contradiction," for *Butler* does nothing that is at odds with prior case law. *Butler* seems to indicate, however, that the Court also defines "deviation" as "extension," which, as I argue in the text, is enormously problematic.

80. 489 U.S. at 311.

81. See WEBSTER'S NEW TWENTIETH CENTURY UNABRIDGED DICTIONARY 914 (2d ed. 1979). "Implicit" is also defined as "virtually or potentially contained in." 7 OXFORD ENGLISH DICTIONARY 724 (2d ed. 1989).

the Court was then forced to grapple as well with the “implicit in the concept of ordered liberty” issue. To circumscribe this latter difficulty, the *Teague* plurality, while nominally utilizing the Harlan test, held that a new rule will have retroactive effect only if the denial to the petitioner of the now-mandated procedure (the new rule) is deemed seriously to affect the reliability of the conviction.⁸² In other words, the *Teague* plurality, faced with this definitional morass, defined “implicit in the concept of ordered liberty” as tantamount to the reliability of the conviction.⁸³

This is obviously a bizarre equation. It is therefore not surprising that the central disagreement in *Teague* concerned the scope of the second prong of the Harlan exception. Whereas the *Teague* plurality suggested that Harlan’s exceptions (or the second one at any rate) embrace only those errors bearing on the determination of innocence or guilt,⁸⁴ Justice Stevens, in an opinion joined by Justice Blackmun, declined to so limit the reach of the Harlan exceptions.⁸⁵ In Stevens’s view, “implicit in the concept of ordered liberty” has to do with “fundamental fairness,” and fundamental unfairness is not necessarily limited to the ultimate question of guilt or innocence.⁸⁶

If we accept the distinction between substance and procedure, then Justice Stevens’s argument has ineluctable force. For despite the difficulty in deciding what is implicit in the concept of ordered liberty and what we mean by fundamental fairness, these terms must mean more than the ultimate question of innocence or guilt, or else there is no reason to preserve the substance-procedure distinction. The question of innocence or guilt is precisely what we mean by *substantive* fairness; therefore, if procedural fairness as a separate category means anything, it must mean something besides innocence or guilt. Stevens’s argument is simply unassailable here.

Moreover, even if we embrace the demise of the substance-procedure distinction—even if we are willing to say that the only values we care about are substantive and that therefore nothing is constitutionally meaningful besides the issue of innocence versus guilt—the result in

82. 489 U.S. at 313.

83. In *Teague*, the plurality does not acknowledge that it has equated these two terms. Instead, it seems to treat the second exception as having two requirements—implicitness and a wrongful conviction. *Id.* at 311-15.

84. *Id.* at 313.

85. *Id.* at 318-26 (Stevens, J., with Blackmun, J., concurring in part and concurring in the judgment).

86. *Id.* at 320-21.

Teague still does not follow. It is on this latter point that I would like to focus.

“Guilt” is a term of art. It does not mean that the defendant “did it,” for that statement would raise difficult, perhaps unanswerable, epistemological questions in many, though not all, cases. As Wittgenstein argued:

‘Knowledge’ and ‘certainty’ belong to different categories. They are not two ‘mental states’ like, say ‘surmising’ and ‘being sure.’ (Here I assume that it is meaningful for me to say “I know what (e.g.) the word ‘doubt’ means” and that this sentence indicates that the word “doubt” has a logical role.) What interests us now is not being sure but knowledge. That is, we are interested in the fact that about certain empirical propositions no doubt can exist if making judgments is to be possible at all. Or again: I am inclined to believe that not everything that has the form of an empirical proposition *is* one.⁸⁷

The Supreme Court, in other words, has committed what the philosopher Gilbert Ryle calls a category mistake;⁸⁸ it has confused “guilty” with an empirical proposition. What we really mean by “guilt” is that a jury of the defendant’s peers believed beyond a reasonable doubt that the defendant did it.⁸⁹ We never really know why the jury believed this, only that it did (or that it did not).⁹⁰ This is quite important. The jury is a deliberative body.⁹¹ Some members of it will ascribe importance to cer-

87. LUDGWIG WITTGENSTEIN, ON CERTAINTY 39e, proposition 308 (G.E.M. Anscombe & G.H. von Wright eds., 1969). *See also id.* at 2e, prop. 5 (“Whether a proposition can turn out false after all depends on what I make count as determinants for that proposition.”); *id.* at 3e, prop. 8 (“The difference between the concept of ‘knowing’ and the concept of ‘being certain’ isn’t of any great importance at all, except where ‘I know’ is meant to mean: I *can’t* be wrong. In a law-court, for example, ‘I am certain’ could replace ‘I know’ in every piece of testimony.”); *id.* at 12e, prop. 83 (“The *truth* of certain empirical propositions belongs to our frame of reference.”); *id.* at 72e, prop. 550 (“If someone believes something, we needn’t always be able to answer the question ‘why he believes it’; but if he knows something, then the question ‘how does he know?’ must be capable of being answered.”).

88. GILBERT RYLE, THE CONCEPT OF MIND 16 (1949).

89. For a short discussion of the difficulty of quantifying how much proof satisfies the “beyond a reasonable doubt” standard, see RICHARD G. SINGER & MARTIN R. GARDNER, CRIMES AND PUNISHMENT: CASES, MATERIALS AND READINGS IN CRIMINAL LAW 9 (1989).

90. Even this conclusion is problematic and not quite accurate. All we really know is what the jury did, which is to say we know the verdict is rendered. Concluding anything beyond this puts us on treacherous ground.

91. This is especially meaningful in the death penalty context, where the decision of how to punish a defendant found to be guilty is also subject to numerous influences. *See* William S. Geimer & Jonathon Amsterdam, *Why Jurors Vote for Life or Death: Operative Factors in Ten Florida Death Penalty Cases*, 15 AM. J. CRIM. L. 1, 53 (1988); Phoebe C. Ellsworth, *Are Twelve Heads Better Than One?*, LAW & CONTEMP. PROBS., Autumn 1989, at 205, 223-24 (concluding that deliberative process works well at sorting out the facts but not well at apply-

tain factors; others will rely on entirely different variables. Some will vote to convict, and properly so, even though they hold a scintilla of doubt on the question of whether the defendant did it. This legal idea of guilt is simply not the same as the question of whether the defendant "did it," for the legal category acknowledges that in many cases it is, as a matter of epistemology, impossible to answer with certainty the question of whether he "did it." Given this epistemological limitation, the legal system insists instead on reasonable certainty. *Consequently, anything that interferes with the system's analysis of the issue of reasonable certainty does indeed bear, in a direct and inexorable manner, on the question of innocence versus guilt.* This is true whether the interference is procedural or substantive.

The *Teague* plurality mistakenly believed that a single factor, or even a limited set of particular factors, can be identified as the one or several that determine the jury's conclusion on guilt or innocence.⁹² This is not ordinarily possible. The construction given to the second Harlan exception by the *Teague* plurality therefore reflects, if nothing else, a deeply flawed epistemology.⁹³

C. The Special Problem with *Teague* in the Capital Context

In the capital context, where the jury not only finds guilt but also sentences to death, this mistake is especially troubling. In *Penry v. Lynaugh*,⁹⁴ the Court specifically applied the *Teague* plurality's version

ing the law to the facts). See also Lawrence T. White, *Juror Decision Making in the Capital Penalty Trial*, 11 LAW & HUMAN BEHAV. 113 (1987) (finding that penalty decision of mock jurors was mediated by their perception of defendant's volition, future dangerousness, and relative competence of the opposing attorneys). Notably, White found a significant tendency among mock jurors to vote for the proposition advanced by the most able attorney. *Id.* at 127. Given the data presented below in Part II.C, this is an extraordinarily important finding.

92. An example of the seriousness of this error is the execution of Warren McCleskey. Two jurors who voted to sentence McCleskey to death announced that they would not have done so had they known that one of McCleskey's accusers was a police informant who, in exchange for his testimony, had been offered a reduced sentence. See Peter Applebome, *Man Whose Appeals Shook the Courts Faces Execution*, N.Y. TIMES (National), Sept. 24, 1991, at A18. McCleskey was responsible for two major Supreme Court decisions, the first of which is analyzed in Randall L. Kennedy, *McCleskey v. Kemp: Race, Capital Punishment and the Supreme Court*, 101 HARV. L. REV. 1388 (1988).

This same error, incidentally, is manifest in the Court's recent decision in the area of the Fifth Amendment, holding that a coerced confession does not necessarily require the setting aside of a guilty verdict if there is enough other evidence to support the conviction. *Arizona v. Fulminante*, 111 S. Ct. 1246 (1991).

93. In addition, many rules of criminal procedure, the exclusionary rule being the quintessential example, positively undermine the truth-seeking enterprise. "Truth" with a capital "T" is but one of several competing values.

94. 492 U.S. 302, 314 (1989).

of the Harlan test to death penalty cases. This boded darkly for habeas petitioners, and their worst fears were confirmed in subsequent cases, including two that involved claims raised by death row inmates. In *Saffle v. Parks*⁹⁵ and *Butler v. McKellar*,⁹⁶ the Supreme Court applied *Teague*'s new rule analysis to deny habeas relief to petitioners who had been sentenced to death.

In the *Butler* case, Horace Butler had been convicted and sentenced in South Carolina.⁹⁷ Butler had originally been arrested on suspicion of assault and battery in a case unrelated to the murder he was subsequently convicted of committing.⁹⁸ In the context of the assault and battery investigation, Butler asked for a lawyer.⁹⁹ Once he did, the police ceased interrogating him on that case. While still in custody, however, Butler became a suspect in the murder investigation. The police commenced questioning him on that offense, and Butler confessed to the murder.¹⁰⁰ The issue presented in the collateral attack on his final murder conviction was whether Butler's request for counsel in the context of the investigation for which he was originally arrested, the assault and battery charge, forbade police from continuing to question him even in the context of a different criminal investigation.

At the time Butler's case went to trial, there was Supreme Court authority that would support a motion to suppress Butler's confession to the murder.¹⁰¹ The motion to suppress is filed as a matter of course in cases like Butler's, and in fact a motion to suppress was filed in Butler's case. The trial court refused to grant it. Existing case law was not manifestly at odds with this decision, but neither was the trial court's decision compelled by existing law. Eventually the Supreme Court refined the law of confessions in a manner conducive to Butler's claim.¹⁰² Under this refinement a decision to grant Butler's motion to suppress would

95. 110 S. Ct. 1257, 1259 (1990) (5-4 decision).

96. 110 S. Ct. 1212, 1214 (1990) (5-4 decision).

97. *Id.* at 1215. Virtually every Supreme Court opinion involving the death penalty recites in gory detail the details of the crime for which the petitioner was convicted. *See, e.g., Penry*, 492 U.S. at 307 (describing how the victim was brutally raped, beaten, and stabbed with scissors). The reasons for doing this are not clear, since the grisly facts rarely bear on the legal issues presented. The fact that the Court does this—the fact that it is able to do this—is pertinent to a proposal I make below. *See infra* Part III.B, recommendation number 4.

98. *Butler*, 110 S. Ct. at 1214.

99. *Id.*

100. *Id.*

101. *See Edwards v. Arizona*, 451 U.S. 477 (1981).

102. Here the meaning of "deviation" is pivotal. *See supra* note 79. What several commentators view as especially troubling about *Butler* is that there is simply no break with precedent at all; there is just a new decision. I am especially grateful to Ronald Mann and Yale Rosenberg for discussing with me at great length the *Butler* decision.

have been compelled. Had Butler's case arisen several years after it did, the outcome of the trial arguably would have been different. If Butler's case had arisen later but his lawyer had failed to file the motion to suppress, or if the lawyer had filed the motion only to have it denied by the trial court, Butler would have had a stronger argument for relief than he had. Given the temporal dimension of the actual case, however, Butler's lawyer would have had to have been prescient, in the true sense of the word, to raise the suppression issue and articulate it in a way that would cause the Supreme Court to grant certiorari.¹⁰³

Subsequent to Butler's final conviction, a different lawyer in a different case had been sufficiently prescient. In *Arizona v. Roberson*,¹⁰⁴ the Court held that once a suspect requests counsel, police can no longer question the suspect even in the context of a separate investigation. This holding would have provided the authority Butler's counsel needed to suppress his confession, for Butler's confession had been obtained under circumstances largely indistinguishable from those in *Roberson*. Indeed, had *Roberson* been decided prior to *Butler*, it is difficult to imagine that Butler's lawyer would not have been deemed ineffective for failing to file a motion to suppress.

In order to ascertain whether Butler should receive the benefit of *Roberson*, the first step is to determine whether *Roberson* constitutes a new rule, that is, whether it represents a substantial break with precedent.¹⁰⁵ If *Roberson* does constitute a new rule, then Butler may raise it in a collateral attack on his conviction only if it falls within one of Justice Harlan's two exceptions to the general bar against retroactive application of new rules.¹⁰⁶

Following this analysis, the *Butler* Court first observed that *Roberson* had announced a new rule.¹⁰⁷ The Court explained that the doctrine established by *Roberson* was not "dictated by precedent" existing when Butler's conviction became final.¹⁰⁸ In Butler's case, aside from broader doctrinal issues, his assertion that the *Roberson* rule was not a new rule should certainly have prevailed in view of the fact that the Court itself

103. In fact, it could plausibly be said that a lawyer practicing in this area would not have needed to be a genius at all to anticipate *Arizona v. Roberson*, discussed below.

104. 486 U.S. 675, 677-78 (1988).

105. *Butler*, 110 S. Ct. at 1218. In *Butler*, the way the Court phrased the issue was whether *Roberson* was "dictated by precedent." This followed the plurality opinion in *Teague*, in which Justice O'Connor used this phrasing. *Teague*, 489 U.S. at 301.

106. See *supra* notes 58-61 and accompanying text.

107. 110 S. Ct. at 1218.

108. Although this observation seems correct, its relevance is not clear. Whatever the difficulty of defining "substantial break," it surely cannot mean what the Court implies by using the "dictated by precedent" analysis.

said in announcing *Roberson* that the rule it there articulated was not new.¹⁰⁹ Nevertheless, Butler's assertion did not prevail, apparently because the Court's own pronouncement is sometimes not determinative on the new rule issue.¹¹⁰ This is simply extraordinary.

Remarkably, the *Butler* Court seems to have concluded that the definition of a new rule—the formative definitional problem posed by the retroactivity issue—is satisfied whenever reasonable judges might differ on the ultimate legal issue. Because the trial court could have granted Butler's motion to suppress, and because it could also have denied the motion (which it did), any rule would be "new." The Court equated a new rule with one not dictated by precedent, and it announced that the rule is not dictated by precedent if reasonable legal minds might differ.¹¹¹ This means, as Justice Brennan's dissent recognized, that the new rule hurdle will always be surmounted.¹¹² On how many issues of constitutional procedure are reasonable legal minds even close to unanimous? Every rule will satisfy this test, so every rule will be regarded as new. The "new-ness" prong of the analysis thus turns out not truly to be a prong at all, but merely a chimerical hurdle.

The remaining question, therefore, is whether to apply the new rule retroactively.¹¹³ The first prong of the Harlan exception¹¹⁴ was of no avail to Butler, for the Court in *Roberson* did not place certain primary conduct beyond the power of the State to prohibit.¹¹⁵ The issue in *Butler v. McKellar*, therefore, concerned the second Harlan exception. The question was whether the rule announced in *Roberson* was "implicit in the concept of ordered liberty." This very question underlaid the disagreement in *Teague*, and it continued to be divisive in *Butler*. In a sense, any jurist claiming to be a strict constructionist must perform answer

109. See *Roberson*, 486 U.S. at 677 (Court couches its decision as a refusal to craft an exception to the rule announced in *Edwards v. Arizona*, 451 U.S. 477 (1981)). As Professor Wright has observed, *Butler* represents "a very drastic extension of the principle of *Teague*." Letter from Charles A. Wright, Professor, University of Texas, to Ronald J. Mann, Solicitor General's Office of the United States (Mar. 26, 1990) (on file with author).

110. See *Butler*, 110 S. Ct. at 1217-18. In rejecting Butler's claim that *Roberson* did not establish a new rule, the Court noted that *Teague* and *Penry* adequately defined the test for a new rule (namely, the rule is new if it was "not dictated by precedent existing at the time the defendant's conviction became final"). *Id.* at 1216 (quoting *Penry*, 492 U.S. at 314, and *Teague*, 489 U.S. at 301) (emphasis omitted).

111. 110 S. Ct. at 1217-18.

112. *Id.* at 1219 (Brennan, J., dissenting).

113. The issue of retroactivity is defined after *Teague* in the epistemologically incoherent terms of guilt versus innocence.

114. This exception is illustrated above in the discussion of *Roe v. Wade*. See *supra* notes 62-64 and accompanying text.

115. See *supra* note 60 and accompanying text.

this question affirmatively,¹¹⁶ but that would mean that every new rule would be applied retroactively. Consequently, the Court in *Butler*, immediately after posing the question in the manner that Harlan had posed it, answered a different question, the question that in *Teague* it had equated with Harlan's inquiry. The Court held that *Roberson* would not be extended retroactively to Butler's conviction because the fact that Butler himself did not enjoy the benefit of *Roberson* did not "seriously diminish the likelihood of obtaining an accurate determination."¹¹⁷

As it had done in *Teague*, the Court in *Butler* defined the elusive notion of "implicit in the concept of ordered liberty" as coterminous with the issue of innocence versus guilt. The Court offered neither authority nor reason to support this equation. In addition, Justice Harlan himself never seems to have embraced this contorted exegesis of his test. Nevertheless, this spin first given to the Harlan test by the *Teague* plurality was again embraced by the *Butler* majority.¹¹⁸

Butler epitomizes the epistemological error that animates the *Teague* approach. It is simply not possible to say what the jury in Butler's case would have done had his confession been suppressed.¹¹⁹ In

116. The reason, as indicated above, is that if it is not implicit in the concept of ordered liberty, then where does it come from? See *Teague*, 489 U.S. at 312 (expressing concern that application of the "implicit in ordered liberty test" alone would do little more than import incorporation debate into the retroactivity decisions).

117. *Butler*, 110 S. Ct. at 1218 (Brennan, J., dissenting).

118. In view of the *Butler* majority's focus on innocence versus guilt, it is somewhat peculiar that the Court's actual decision in *Butler* concentrated not on the guilt-innocence issue but instead on the nature of the new rule announced in *Roberson*. The Court's treatment of the guilt-innocence question altogether neglected to examine why the jury might have found as it did.

Justice Brennan's dissent in *Butler*, joined by Justice Marshall and in part by Justices Blackmun and Stevens, charged that the Court in *Teague* had "dramatically restructur[ed] retroactivity doctrine." *Id.* (Brennan, J., dissenting). Noting that the distinction between new rules and rules prevailing at the time of conviction is "far from sharp," Brennan lamented that as a consequence of the *Butler* Court's explication of *Teague* a prisoner could secure habeas relief only by showing that 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 1219 (emphasis in original).

119. There might be some debate as to whether the question posed in the text is the appropriate question. Perhaps the focus ought to be on the reliability of the confession, since this seems more closely connected to the issue of actual guilt (i.e., whether the defendant actually did it). If this latter question is the appropriate one, it surely merits emphasis that confessions are notoriously unreliable. See *Escobedo v. Illinois*, 378 U.S. 478, 488-89 (1964) (observing that "a system of criminal law-enforcement which comes to depend upon the confession will, in the long run, be less reliable and more subject to abuses than a system which depends on extrinsic evidence independently secured through skillful investigation"); *Haynes v. Washington*, 373 U.S. 503, 519 (1963) (recognizing that confessions have often been extorted in order to save the police the trouble of obtaining other evidence); George E. Dix, *Texas Confession Law and Oral Self-Incriminating Statements*, 41 BAYLOR L. REV. 1 (1989) (noting that origin

addition, *Butler* demonstrates the premium that the *Teague* doctrine places upon defense counsel's creativity.¹²⁰ But it would have been surprising if *Butler's* own lawyer had possessed such creativity. *Butler* was arrested and tried in South Carolina. Rather than rely upon court-appointed lawyers¹²¹—who, by virtue of niggardly compensation, often perform poorly even if they are competent¹²²—*Butler* hired his own lawyer, the only attorney he knew.¹²³ Capital defendants are usually poor,¹²⁴ and *Butler* was no exception, which is why he was able to pay only \$300 for his lawyer.¹²⁵ He got what he paid for. His lawyer's performance has been generously characterized as "worse than bad."¹²⁶ For reasons common to other jurisdictions that lack public defender systems for assigning counsel to indigent capital defendants, lawyers assigned to represent indigent defendants in South Carolina, or hired by them individually, are rarely stellar and often dismal. *Butler's* lawyer was marginally competent at best, and if the allegations in the habeas petition are even half true, he was not quite that.¹²⁷ *Butler* lost the benefit of *Roberson*, in large part, because his lawyer did not have the prescience to see that the

of confession law was to prevent inaccurate convictions based on unreliable confessions); Robin Simpson, *Confessions—Their Reliability*, 56 MEDICO-LEGAL J. 125 (1988). See generally Irene M. Rosenberg & Yale L. Rosenberg, *In the Beginning: The Talmudic Rule Against Self-Incrimination*, 63 N.Y.U. L. REV. 955 (1988) (arguing for a per se rule against use of confessions).

120. Because neither Horace *Butler's* trial counsel nor his appellate counsel envisaged the new rule, and did not therefore raise and have certiorari granted with respect to the claim that the Supreme Court would adopt in *Roberson*, Horace *Butler* was not permitted to avail himself of it. For want of a more creative lawyer—for want of the lawyer whom *Roberson* was lucky enough to secure—*Butler* could have died at the hands of the state. (Furthermore, it merits emphasis that anticipating *Roberson* did not exactly require great genius. See *supra* note 103 and accompanying text.)

Remarkably, *Butler* got relief from the South Carolina Supreme Court on a successor petition. *Butler v. State*, 397 S.E.2d 87, 88 (S.C. 1990) (granting relief because of judge's warning in open court that jury would likely hold *Butler's* failure to testify against him).

121. See *infra* Part II.C. Although the data from South Carolina consist entirely of estimates, they are suggestive nonetheless.

122. See *infra* Parts II.B, II.C.

123. Petition for Habeas Corpus at 36, *Butler v. State*, 397 S.E.2d 87 (S.C. 1990) [hereinafter Petition for Habeas Corpus].

124. See Julius Debro et al., *Death Row Inmates: A Comparison of Georgia and Florida Profiles*, CRIM. JUST. REV., Spring 1987, at 41, 45 (describing similar profiles of Georgia and Florida death row inmates, most of whom were young, undereducated, underemployed, economically deprived, working class, recidivist offenders).

125. Interview with John Blume, habeas counsel for *Butler* (Feb. 22, 1991). The lawyer who represented *Butler* at trial, W. McAlister Hill, had not previously tried a murder case. Petition for Habeas Corpus, *supra* note 123, at 7.

126. Interview with John Blume, habeas counsel for *Butler* (Feb. 22, 1991).

127. This is not to say or imply that counsel is not highly competent in the areas more familiar to and traversed by him. He is simply not a criminal lawyer.

Supreme Court would eventually articulate the rule it did articulate in *Roberson*.¹²⁸

Saffle v. Parks,¹²⁹ decided the same day as *Butler*, also applied *Teague* to a capital case. A jury sentenced Robyn Leroy Parks to death after it was instructed at the penalty phase of the trial to avoid any influence of sympathy.¹³⁰ This instruction arguably violated Parks' Eighth Amendment protection. Parks argued that *Lockett v. Ohio*¹³¹ and *Eddings v. Oklahoma*,¹³² both of which were decided before his conviction became final, dictated that jurors be permitted to consider their sympathy for the defendant as a mitigating factor in assessing punishment. Parks also relied on *California v. Brown*,¹³³ which was decided after his conviction became final. The Court rejected Parks's argument by focusing on *Lockett* and *Eddings*, concluding that they did not dictate the rule sought by Parks.¹³⁴ The Court then intimated that *California v. Brown* would not help Parks either,¹³⁵ but it did not thoroughly pursue this argument, holding instead that because "*Brown* itself was decided nearly four years after Parks' conviction became final," Parks could not benefit from *Brown* without first establishing "that the decision in *Brown* did not create a new rule."¹³⁶ In the Court's view, it did create a new rule, and Parks could thus not resort to it without first establishing that it fell within one of the two Harlan exceptions to the general rule barring retroactive application of new rules.

Proceeding to that issue, the Court initially observed that the putative new rule failed to satisfy the first exception, pertaining to the

128. See Petition for Habeas Corpus, *supra* note 123, at 22-36 (describing Butler's lawyer's failure to have any mental health evaluation conducted or to present any mitigating evidence concerning Butler's background). If, for example, any mental health investigation had been carried out, the jury might have learned that Butler is mentally retarded, *id.* at 24, has organic brain damage, *id.* at 27, and is schizophrenic, *id.* at 28. Butler was raised in dire poverty, and during his childhood, rats invaded his home and "gnawed on the children in their sleep." *Id.* at 31.

129. 110 S. Ct. 1257 (1990) (5-4 decision).

130. *Id.* at 1259.

131. 438 U.S. 586, 605 (1978) (plurality opinion) (requiring that jury be permitted to consider mitigating circumstances in capital cases).

132. 455 U.S. 104, 113-15 (1982) (prohibiting trial judge, when sentencing in capital cases, from disregarding mitigating evidence proffered by defendant).

133. 479 U.S. 538, 539 (1987) (5-4 decision) (upholding instruction informing jurors that they must not be swayed by mere sentiment, sympathy, or prejudice during penalty phase of capital trial).

134. 110 S. Ct. at 1261.

135. See *id.* at 1263 (observing that in *California v. Brown*, the Court had held that anti-sympathy instruction did not violate Eighth Amendment).

136. *Id.* at 1263.

criminalization of protected conduct.¹³⁷ Next the Court considered whether the new rule was implicit in the concept of ordered liberty—the gist of the second exception¹³⁸—and it held that that exception also was not satisfied.¹³⁹ Again the Court avoided the question of what “implicit in the concept of ordered liberty” actually means, and it attended instead, as it had in *Butler*, to the relationship between the new rule and the question of innocence versus guilt. Conceding that the “contours of this [second Harlan] exception may be difficult to discern,”¹⁴⁰ the Court decided that the new rule established by *Brown* was not a watershed rule of criminal procedure that undercut the accuracy of Parks’ trial.¹⁴¹ The soundness of the jury’s determination, the Court reasoned, is “more likely to be threatened than promoted by a rule allowing the sentence to turn not on whether the defendant, in the eyes of the community, is morally deserving of the death sentence, but on whether the defendant can strike an emotional chord in a juror.”¹⁴²

This statement utterly ignores the relationship between emotion and the concept of desert.¹⁴³ There is no necessary contradiction between the ability of a defendant to strike an emotional chord in the jury, on the one hand, and the question of whether the defendant is “morally deserving” of death, on the other. Indeed, of the numerous justifications for punishment,¹⁴⁴ only deterrence is purely rational.¹⁴⁵ Every other justification is

137. See *supra* note 60 and accompanying text.

138. See *supra* notes 81-86 and accompanying text.

139. 110 S. Ct. at 1263-64.

140. *Id.* at 1264.

141. Again, remarkably, the Court altogether neglected to examine the reasons why the jury might have acted as it did.

142. 110 S. Ct. at 1264.

143. See generally RICHARD LEMPert & JOSEPH SANDERS, AN INVITATION TO LAW AND SOCIAL SCIENCE: DESERT, DISPUTES AND DISTRIBUTION 42-59 (1986) (arguing that determination of just desert depends on depth at which adjudication occurs). Because an anti-sympathy instruction might tend to dissuade jurors from perceiving the uniqueness of the defendant’s crime and from making serious inquiries about the defendant’s upbringing and personal history, such an instruction would seem to permit, if not encourage, shallow adjudication. See *id.* at 45-51; see also IMMANUEL KANT, METAPHYSICAL ELEMENTS OF JUSTICE 102 (John Ladd trans., Bobbs-Merrill 1965) (1797) (concluding that legal justice requires that all murderers be executed, “so that everyone will duly receive what his actions are worth”); DAVID D. RAPHAEL, MORAL JUDGMENT 75 (1957) (embracing Mosaic principle that degree of punishment called for depends on degree of injury visited on others).

144. See, e.g., JOHANNES ANDENAES, PUNISHMENT AND DETERRENCE (1974); PHILOSOPHICAL PERSPECTIVES ON PUNISHMENT (Gertrude Ezorsky ed., 1972); THEORIES OF PUNISHMENT (Stanley E. Grupp ed., 1971); Gerald Gardiner, *The Purposes of Criminal Punishment*, 21 MOD. L. REV. 117 (1958).

145. In *Gregg v. Georgia*, 428 U.S. 153, 183-84 (1976), however, the Court made it clear that retribution is an appropriate interest for the state to serve through its death penalty statute.

connected, either directly or more tenuously, to some (for lack of a better word) emotional factor.¹⁴⁶ This is largely what punishment is.¹⁴⁷ To say that these factors have no part in the assessment of punishment ignores what juries do.¹⁴⁸

Furthermore, the Court's conclusion and analysis in *Parks* again rest upon the problematic supposition that we have the ability to isolate a particular factor as irrelevant to the jury's assessment of guilt and its determination of the appropriate sentence.¹⁴⁹ Finally, Robyn Parks pays the price for having received a lawyer less creative and less prescient than Albert Brown's.¹⁵⁰

The *Teague* line of cases, in sum, has desiccated the very essence of the great writ.¹⁵¹ These cases demonstrate two fundamental errors that are especially insidious in the capital context, where any slip can prove fatal. First, they mistakenly assume that it is possible to locate individual factors that caused the jury to act in a certain way. The translation of the second Harlan exception into a question of guilt or innocence derives entirely from this mistake.¹⁵² Second, the *Teague* line of cases not only creates a situation in which the defendant's enjoyment of certain constitutional rights turns on whether the defendant had a creative lawyer; it also seems oblivious to the very premium that is now placed on innovative lawyering at the trial level.

146. See Ernest van den Haag, *The Ultimate Punishment: A Defense*, 99 HARV. L. REV. 1662, 1665 & n.13 (1986) (noting conflicting and inconclusive data on question of deterrence).

147. Professor West has a slightly different, but no less caustic, critique. In her view, *Saffle v. Parks* moves beyond *Butler* by holding that even when the petitioner's argument does not rely at all on cases decided after his conviction became final, the argument itself is not available if it would constitute a new rule. See Robin West, *Foreword: Taking Freedom Seriously*, 104 HARV. L. REV. 43, 56, 58 (1990) (discussing *Saffle v. Parks*).

148. This point is further evidenced by the recent decision to allow the jury at the sentencing phase of a capital trial to consider testimony from the victim's family. See *Payne v. Tennessee*, 111 S. Ct. 2597 (1991).

149. See *supra* notes 90-93 and accompanying text.

150. Albert Brown is the petitioner in *California v. Brown*, 479 U.S. 538 (1987).

151. See, e.g., Yale L. Rosenberg, *Kaddish for Federal Habeas Corpus*, 59 GEO. WASH. L. REV. 362 (1991) (concluding that *Teague* line of cases has eviscerated the great writ even though Supreme Court has not forthrightly acknowledged its demise).

152. One can accept the gist of the Harlan test, I think, without treating it as the Court has. Decisions pertaining to criminal procedure can be seen as falling on a spectrum—from watershed to trivial. In this regard, *Gideon v. Wainwright*, 372 U.S. 335 (1963), is surely fundamental (or watershed), whereas *Roberson* is trivial. *Batson* would fall somewhere in between.

The normative question of whether one should receive or lose the benefit of any rule, be it fundamental or trivial, merely by virtue of the fortuity of the lawyer's skill, is a separate matter. It does not bear on the premise of the Harlan test, which premise is simply that these rules can indeed be categorized and placed on a spectrum of relative importance.

I am again extremely grateful to Ronald Mann for long discussions concerning the Harlan test.

Under the current habeas corpus doctrine, habeas counsel is constrained not merely by the law existing at the time the petitioner's conviction became final, but also by the quality of lawyering that the petitioner had received up until the time the conviction became final. The absence of prescience among trial counsel is nearly impossible to overcome on collateral appeals. This is the central doctrinal blindness of the *Teague* line of cases.¹⁵³ The radical significance of this myopia cannot be comprehended without lingering over the quality of counsel in the typical capital case, something that neither the Court nor the hopeful reformers of the habeas system seem to have done.

II. What We Mean When We Talk About Incompetence

At least two Justices of the Supreme Court (four prior to the departure of Justices Brennan and Marshall),¹⁵⁴ and numerous commentators,¹⁵⁵ view the *Teague* line of cases as having eviscerated the great writ. Of course, it may be within Congress' purview to overrule¹⁵⁶ *Teague* and its progeny, though with a general population cowering in fear due to a

153. I am not suggesting that better trial attorneys are less trapped by *Teague* and current retroactivity doctrine; good lawyers are every bit as affected as are poor lawyers. Instead, my argument is that precisely because current retroactivity doctrine is so unreceptive to a habeas petitioner's claims, it is all the more important that trial counsel be highly effective, i.e., substantially more effective than is called for under *Strickland*. Put differently, a criminal defendant whose trial counsel was good is simply far less dependent on collateral review than is a defendant whose lawyer was bad, which means that the real impact of *Teague* and its progeny is on defendants who had the poorest lawyers.

154. Two sitting Justices can be said with certainty to feel this way. The views of Justices Souter and Thomas on this question remain unknown. See, e.g., *Saffle v. Parks*, 110 S. Ct. 1257, 1264-65 (1990) (Brennan, J., joined by Marshall, Blackmun, and Stevens, J.J., dissenting) (arguing, *inter alia*, that definition of "new rule" is fundamentally incompatible with the purpose of habeas corpus).

155. See, e.g., Rosenberg, *supra* note 151, at 378; West, *supra* note 147, at 58; Joseph L. Hoffman, *Retroactivity and the Great Writ: How Congress Should Respond to Teague v. Lane*, 1990 B.Y.U. L. REV. 183; John J. Curtin, Jr., *The Great Writ: Habeas in the '90s*, A.B.A. J., Mar. 8, 1991, at 8. In fact, my colleague Yale Rosenberg has over the years detailed the steady demise of the great writ. See, e.g., Yale L. Rosenberg, *Constricting Federal Habeas Corpus: From Great Writ to Exceptional Remedy*, 12 HASTINGS CONST. L.Q. 597 (1985) [hereinafter Rosenberg, *Constricting Federal Habeas Corpus*]; Yale L. Rosenberg, *Jettisoning Fay v. Noia: Procedural Defaults By Reasonably Incompetent Counsel*, 62 MINN. L. REV. 341 (1978) [hereinafter Rosenberg, *Jettisoning Fay v. Noia*]. See generally Robert M. Cover & T. Alexander Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 YALE L.J. 1035 (1977); Charles A. Wright, *Habeas Corpus: Its History and Its Future*, 81 MICH. L. REV. 802 (1983); Larry W. Yackle, *Explaining Habeas Corpus*, 60 N.Y.U. L. REV. 991 (1985).

156. For rules pertaining to federal habeas corpus procedure, see 28 U.S.C. §§ 2241-2256 (1991).

soaring crime rate,¹⁵⁷ it is unlikely that Congress will be so bold.¹⁵⁸ In addition, given the obscurity of the data presented below, there is little reason for Congress to act. The evil is not both blatant and egregious, the combination that is ordinarily required before reform is undertaken. Nevertheless, irrespective of the consequences of the new rule doctrine in other areas of criminal law, its ramifications in the capital context are truly pernicious. The lawyers who represent indigent capital defendants are not *worse* than the lawyers who represent indigent rapists or armed robbers or car thieves; the point is that they are just as bad. The stakes, however, are much greater.

A. *Strickland*—Why Bad Isn't Bad Enough

We have seen that under *Teague* and its progeny a rule is categorized as new if it was not dictated by precedent at the time the petitioner's conviction became final. Hence, a petitioner whose conviction is already final at the time the new rule is articulated can benefit from it only if it satisfies one of the two Harlan exceptions. In light of the spin given by the current Court to the Harlan exceptions, this means that the petitioner can benefit from the new rule only if there is a serious likelihood that it would have led to a different verdict—a serious likelihood, that is, that the defendant is innocent.¹⁵⁹

Aside from the philosophical nonsense of this doctrine,¹⁶⁰ it means as a practical matter that the petitioner's trial counsel must somehow have preserved an argument that had not yet been recognized at the time of trial, and the lawyer must then persuade the Supreme Court to grant

157. See Allen E. Liska & William Baccaglini, *Feeling Safe by Comparison: Crime in the Newspapers*, 37 SOC. PROBS. 360 (1990) (reviewing various surveys showing that a high percentage of the U.S. population fears crime and that this percentage is increasing).

158. In fact, with the Senate's passage of the Habeas Corpus Reform Act of 1991, S. 1241, 102d Cong., 1st Sess. (1991), Congress is poised to "insulate virtually all state convictions from federal habeas review." Letter from Sara-Ann Determan, Steering Committee Chair, ABA Postconviction Death Penalty Representation Project, to Volunteer Lawyers Representing Death Row Inmates 1 (Aug. 5, 1991) (on file with author).

The version of the crime bill passed by the House is nearly as draconian, but it does modify the holding of *Teague*. Although the House proposal requires that habeas petitions be filed within one year following the date that the conviction becomes final (an arguably unconstitutional requirement), it defines "new rule" as a "clear break from precedent." H.R. 3371, 102d Cong., 1st Sess. (1991). At the time of Congress' winter adjournment, no compromise had yet been reached.

159. The language in the text might be a bit of a fudge, since "different verdict" and "innocent" are not necessarily the same thing. But it does seem to me that, taken as a whole, *Teague*, *Butler*, and *Parks* equate these terms.

160. See *supra* Part I.B.

certiorari on this issue under the facts of the case.¹⁶¹ Given the virtual impossibility of securing retroactive application of new rules in collateral appeals, the only hope for capital defendants is that they receive a sentence less than death or that their trial lawyers preserve an issue, even though that issue is not yet delineated. For economic and structural reasons, however, attorneys representing capital defendants at the trial and direct appeal stage are rarely so ingenious.

Far more troubling is that lawyers who represent capital defendants are often shy not only of brilliance but also of competence.¹⁶² They are not sufficiently incompetent, however, to satisfy the Supreme Court's test for violation of criminal defendants' Sixth Amendment guarantees to effective counsel. The data presented below in Part II.C are highly suggestive in this regard, and the discrete episodes recounted in Part II.B are nearly incredible. Taken as a whole, this information indicates that the problem of inadequate legal representation at the trial stage is endemic in jurisdictions that rely on court-appointed lawyers to represent indigent capital defendants. "Inadequate," however, does not mean "ineffective." In fact, in every case illustration offered below, the legal test for incompetence was not satisfied.¹⁶³ The ineptitude was not enough to violate the Sixth Amendment.¹⁶⁴

Under *Strickland v. Washington*,¹⁶⁵ an attorney's failure to raise a claim constitutes ineffectiveness only if (1) the error fell below a certain standard (far below brilliance), and (2) the error is likely to have affected the outcome.¹⁶⁶ According to the *Strickland* Court, the petitioner is re-

161. See, e.g., Jeffries & Stuntz, *supra* note 15, at 682-83 n.15; see also Ruthann Robson & Michael Mello, *Ariadne's Provisions: A "Clue of Thread" to the Intricacies of Procedural Default, Adequate and Independent State Grounds, and Florida's Death Penalty*, 76 CAL. L. REV. 89 (1988); David J. Meltzer, *State Court Forfeitures of Federal Rights*, 99 HARV. L. REV. 1130 (1986); Bruce S. Ledewitz, *Procedural Default in Death Penalty Cases: Fundamental Miscarriage of Justice and Actual Innocence*, 24 CRIM. L. BULL. 379 (1988). On procedural default itself, see *Wainwright v. Sykes*, 433 U.S. 72 (1977); *Murray v. Carrier*, 477 U.S. 478 (1986).

162. See Lavelle & Coyle, *supra* note 20, at 30, 42. This gap between the level of counsel guaranteed by *Strickland* and the level seemingly demanded by the law pertaining to procedural default has been examined, in an argument that parallels the one I make here, by my colleague Yale Rosenberg. See Rosenberg, *Constricting Federal Habeas Corpus*, *supra* note 155, at 614-23.

163. In several of the instances, the issue is still in litigation.

164. My basic argument, as discussed earlier, is that there is an Eighth Amendment violation—because the punishment is "unusual"—when there is a departure from the principle of comparative justice. Inept lawyers, while not sinking to the level of ineffectiveness under *Strickland*'s Sixth Amendment standard, nonetheless abridge this Eighth Amendment value.

165. 466 U.S. 668 (1984).

166. The second prong mirrors the epistemological error of the *Teague* Court's delineation of the second Harlan exception, since this is a literally unknowable counterfactual. Actually, this fallacy can be said to be present in the very idea of harmless error. This is a large topic

quired to show that “but for” the lawyer’s error(s), there is a “reasonable probability that . . . the result . . . would have been different.”¹⁶⁷ Either prong, standing alone, would be onerous; together, they are virtually insurmountable.¹⁶⁸ Ironically, *Strickland* itself was a capital case. The Court, in rejecting the allegation of ineffectiveness, reasoned that the trial counsel’s strategy at the punishment phase of the trial “probably” did not result in prejudice.¹⁶⁹

The standard set by the first prong of the *Strickland* test is extremely hard for the petitioner challenging his lawyer’s competence to satisfy, in part because the Court indulges in a “strong presumption” that the lawyer was competent.¹⁷⁰ This presumption stems either from disingenuousness or from a lack of knowledge.¹⁷¹ Supreme Court Justices hear tales, but they are probably not personally familiar with the ineptitude that abounds in capital trials. Presumably they read about it in transcripts, but they are perhaps justifiably skeptical given the ubiquity of ineffectiveness challenges. Virtually every death row habeas petitioner argues that his lawyer was constitutionally ineffective.¹⁷² Not all of these lawyers are inept, but the truth is that a great many are shockingly dismal, which makes the *Strickland* presumption preposterous. This is especially so, I will argue, in jurisdictions lacking public defender systems.

that is not immediately germane, but I should mention that I do not believe that accepting my argument necessarily entails a rejection of the idea of harmless error, though it might suggest that only de minimis issues can be treated under the harmless error approach.

167. 466 U.S. at 694.

168. See, e.g., *People v. Gaines*, 473 N.E.2d 868 (Ill. 1984) (in which Illinois Supreme Court, following *Strickland*, held that defense attorney’s failure to present mitigating evidence at sentencing phase of capital trial did not necessarily prejudice defendant); Gary Goodpaster, *The Adversary System, Advocacy, and Effective Assistance of Counsel in Criminal Cases*, 14 N.Y.U. REV. L. & SOC. CHANGE 59, 73 (1986) (arguing that strong presumption of competence afforded under *Strickland* test makes ineffectiveness claims difficult to establish as a matter of law); see also Stephen B. Bright, *Death by Lottery—Procedural Bar of Constitutional Claims in Capital Cases Due to Inadequate Representation of Indigent Defendants*, 92 W. VA. L. REV. 679, 683 (1990) (concluding that counsel’s failure to preserve a constitutional violation due to negligence, ignorance, or incompetence will still not rise to *Strickland*’s ineffectiveness standard).

169. 466 U.S. at 698-99.

170. *Id.* at 690-91.

171. See *supra* note 6.

172. Former Chief Justice Burger angered the bar when he announced publicly that some half of the lawyers who represent criminal defendants are unsatisfactory. See Rosenberg, *Jettisoning Fay v. Noia*, *supra* note 155, at 436-37 n.389 (1978) (citing Warren Burger, *The Special Skills of Advocacy*, 42 FORDHAM L. REV. 227, 234 (1973)). Burger was speaking of what he had heard, not what he had seen. One must hope that the jurists who indulge in the presumption of competence when evaluating *Strickland* claims are unaware of this widespread incompetence.

Furthermore, although the petitioner will be challenging particular acts and omissions committed by the lawyer, the *Strickland* test perversely looks at the lawyer's conduct as a whole.¹⁷³ Even the worst lawyer, however, does some things, indeed many things, competently. By evaluating the lawyer's entire performance, particular errors, even if egregious, can be effectively overlooked—buried in the context of the overall performance. In a recent article concerning procedural default in capital cases, Professors Jeffries and Stuntz aptly characterize the *Strickland* standard as one that “approximates gross negligence.”¹⁷⁴ In the United States, therefore, under the Constitution, a person can be executed if his lawyer performed at a level a scintilla above gross negligence.¹⁷⁵ Many lawyers representing indigent capital defendants are performing, at best, at precisely that level.

B. What Bad Is—Stories of the System

Examples abound of appalling behavior by lawyers representing capital defendants.¹⁷⁶ The lawyers, however, deserve only part of the blame; the system itself is vitiated. Specifying the reasons for this systemic ailment requires hazardous conjecture, but among the plausible factors are that judges are often elected in states with death penalty laws¹⁷⁷ and that states are loathe to spend tax dollars to defend accused killers.¹⁷⁸ For example, Louisiana executed a man represented at trial by

173. See *Strickland*, 466 U.S. at 688 (holding that in cases presenting an ineffectiveness challenge, “the performance inquiry must be whether counsel’s assistance was reasonable *considering all the circumstances*”) (emphasis added).

174. Jeffries & Stuntz, *supra* note 15, at 682.

175. Curiously, despite their observation that “criminal defendants are often bound by the mistakes of their lawyers” as a result of current doctrine, *id.* at 683, a consequence that Professors Jeffries and Stuntz characterize as “hard to justify,” *id.*, the authors nonetheless tailor their reforms to protect the “arguably innocent.” *Id.* at 691. Their proposal is thus subject to the same philosophical critique of *Teague*, see *supra* Part I.B, as are several other proposals discussed below in Part III.

176. See, e.g., Lavelle & Coyle, *supra* note 20 (quoting closing argument of defense counsel who told jury that he had searched his mind for a possible defense in face of all the evidence pointing toward guilt); Marianne Lavelle, *A Different Approach*, NAT’L L.J., June 11, 1990, at 34 (describing how defense lawyer in Texas referred to his client as a “wetback” during voir dire).

177. This is true in Texas, for example, the state with the largest death row population, and also in California, with the nation’s second largest death row population. See *infra* note 238. The significance of having judges elected is that they then become more directly subject to majoritarian pressures, and studies show that the American population strongly favors capital punishment. See *infra* note 218.

178. Both these factors seem to have combined in a recent high-profile capital murder case in Texas, in which Carl Wayne Buntion was tried for capital murder for killing a policeman. Buntion’s lead lawyer, J. Philip Scardino, received \$17,500 for defending Buntion. (Scardino’s co-counsel, John Kiernan, received \$11,337.) Scardino had requested more than twice the sum

a court-appointed lawyer who could receive a maximum of \$1000. At fifty dollars an hour—less than large firms bill for the work of their paralegals—Louisiana provided this capital defendant with twenty hours of legal assistance.¹⁷⁹

Louisiana is not unique in this regard.¹⁸⁰ In Alabama, attorneys appointed to represent capital defendants receive forty dollars an hour for time in the courtroom and twenty dollars an hour for out-of-court trial preparation. Because the ceiling for out-of-court time is \$1000, Alabama is in effect giving lawyers for capital defendants only fifty hours to get a case ready for trial. Georgia too pays twenty dollars an hour for out-of-court time (with a \$500 ceiling), but only thirty dollars an hour in court. In Mississippi the hourly rate varies, but it averages just under twelve dollars an hour (with a \$1000 ceiling). Besides paying niggardly wages, the states that make up the so-called southern “Death Belt” tend to appoint lawyers who are highly inexperienced.¹⁸¹ More than half of the lawyers appointed to represent capital defendants in six southern states (Texas, Louisiana, Mississippi, Alabama, Georgia, and Florida) had not previously handled a capital case. Only five percent had handled more than ten trials. Lawyers in these states who represent capital defendants are disciplined by their respective state bar administrations at rates forty-six times higher than other lawyers in these states.

Of course, many lawyers who represent capital defendants are quite competent. As a result of systemic factors, however, even they will face enormous obstacles in assembling an adequate defense because of low compensation rates and the inadequate sums allowed for investigation and retention of experts. Still, as virtually any lawyer who has handled a

he received (an additional \$19,850). It is noteworthy that the trial judge charged with approving Scardino's request was involved in a close reelection contest in November 1990; his opponent in that race was Scardino. Scardino has pointed out that the trial itself, including jury selection, took three months, and there was substantial investigation and pretrial work before that. See Rad Salle, *2 Buntion Lawyers Threaten to Sue Over Legal Fees, Costs*, HOUSTON CHRON., Feb. 27, 1991, at 20A.

179. The statistics on fees and lawyer experience outlined in this section have been widely discussed of late. See Mark Curriden, *Indigent Defense in the South: Begging for Justice*, A.B.A. J., Jan. 1991, at 64; Lavelle & Coyle, *supra* note 20, at 30-31; see also Michael G. Millman, *Financing the Right to Counsel in Capital Cases*, 19 LOY. L.A. L. REV. 383 (1985).

In response to Curriden's article in the *A.B.A. Journal* critical of the inadequate fees paid by southern states to court-appointed lawyers in capital cases, a West Virginia resident responded that effective July 1990, the hourly rate for such counsel had been increased in West Virginia to \$65 per hour. Conceding that this figure was still below the market rate, this letter writer characterized this new fee scale as a “great improvement.” Letter from Michele W. Good, A.B.A. J., Mar. 1991, at 10.

180. The statistics cited in this paragraph are, unless otherwise noted, drawn from Curriden, *supra* note 179.

181. Lavelle & Coyle, *supra* note 20, at 32.

habeas petition for a capital inmate on a pro bono basis will attest, the presence of a number of talented lawyers should not obscure the fact that many of the lawyers who represent capital defendants are among the worst lawyers in the United States.

A resident of death row in Texas, for example, was represented by a lawyer who repeatedly fell asleep during jury selection and then again at trial.¹⁸² Often the examples of a lawyer's misconduct are difficult to verify, because the lawyer and the inmate are involved in a swearing match.¹⁸³ At times, however, and in this particular instance, there are means to ascertain the truth. This particular death row inmate's story has been confirmed by the somnambulist lawyer's co-counsel who, though out of law school less than a year, had been appointed to sit as second chair in this capital trial. Although the state trial court held that this conduct did not satisfy the *Strickland* standard for ineffectiveness, it is difficult to imagine that either of these lawyers—the tyro or the sleeper—could have had the prescience that current new rule jurisprudence demands.¹⁸⁴

Equally unseemly is the behavior of many of the judges. For example, a Texas man was recently executed after electing to forego his appeals.¹⁸⁵ The date he was executed is easy to remember because it fell on a state holiday, San Jacinto Day. That was no coincidence: A certain Texas judge delights in setting execution dates on holidays. He ordered that the so-called Candyman, Ronald Clark O'Bryan, who was convicted of murdering his son by lacing his Halloween candy with cyanide (to

182. *Ex parte Johnson*, No. 286 440-B (Tex. Dist. Ct. Feb. 1979).

183. Lawyers who handle prisoners' habeas petitions know of the inmates' tendency to prevaricate. Virtually all of them, for example, maintain their innocence. One is therefore loathe to credit the story of a condemned man. Of course, the lawyers charged with incompetence also have a significant incentive to lie—it is their competence that is being called into question. Hence, it is not necessarily a simple matter to dismiss the inmates' allegations.

184. Professor Arkin's fine article on *Teague* does not address trial counsel incompetence directly, but a recognition of it lies beneath the surface of his discussion, in which he concludes that current retroactivity doctrine creates a "prisoner's dilemma" in which a habeas petitioner can avoid procedural default only by establishing that he is relying on a novel rule of law, after which the rule's novelty is used to deny relief under *Teague*. Mark M. Arkin, *The Prisoner's Dilemma: Life in the Lower Federal Courts After Teague v. Lane*, 69 N.C. L. REV. 371, 419 (1991).

185. The inmate was Michael Derrick. Some defendants who are convicted choose to give up. That is their right, and those who purport to represent death row inmates ought to respect it. The reason for this is that the Eighth Amendment is, in my view (and my parlance), an individual right, not a societal right. See David R. Dow, *Standing and Rights*, 36 EMORY L.J. 1195, 1197 (1987) (defining societal rights as those which, when abridged, cause no distinctive injury but instead an injury that is necessarily widespread and similar).

collect on a life insurance policy), be executed on Halloween.¹⁸⁶ Inflicting death, irrespective of the debate over whether the state should even do it at all, is a solemn act. The families of the victims know this, and so do the guards and wardens; too often the judges and state prosecutors¹⁸⁷ do not.

Unbecoming conduct on the part of judges is not terribly uncommon in Texas. At a recent hearing in Harris County, for example, a different judge was setting an execution date for a man whose conviction had been affirmed by the Texas Court of Criminal Appeals.¹⁸⁸ In between the affirmance and the setting of the execution date, the inmate's lawyer quit without telling anybody, but his desertion was discovered by a lawyer at the Texas Resource Center, an organization that seeks to locate pro bono counsel to represent death row inmates.¹⁸⁹ A lawyer from the Resource Center appeared in court for the proceeding during which the execution date was to be set, though the sole purpose of the Resource Center's appearance was to inform the Court that the inmate was without counsel and that efforts were underway to locate an attorney to handle the habeas appeals on a pro bono basis.¹⁹⁰ When the Resource Center lawyer asked that the setting of an execution date be postponed until a lawyer could be found, the judge actually laughed out loud.

186. *O'Bryan Executed in Texas*, FACTS ON FILE WORLD NEWS DIGEST, Apr. 6, 1984, at 249 G2, available in LEXIS, Nexis Library, Facts File.

187. Reputable rumor has it, for example, that prosecutors in Harris County celebrate executions on the nights they take place by drinking champagne in their offices.

188. In Texas, if a defendant is sentenced to death, he gets an automatic appeal to the Texas Court of Criminal Appeals, the highest criminal court in Texas. No execution date is set until after the Court of Criminal Appeals affirms the conviction. TEX. CODE CRIM. PROC. ANN. art. 37.071(h) (West Supp. 1991).

189. The Texas Resource Center (TRC), based in Austin, recruits volunteer lawyers to represent death row inmates in their post-conviction legal struggle. With over 300 inmates on death row in Texas, this is a difficult job, particularly given the time commitment that effective post-conviction relief entails. The lawyers with the ideological disposition to do the work tend to be solo practitioners or practitioners in the less-than-optimal fee categories. The younger lawyers at the big law firms that have a moral interest in doing the work lack the leverage at their firms to take on a capital case without firm approval. Finding lawyers is critical, however, as there are more than 20 death row inmates at any given moment in Texas alone who are without legal representation. In addition, many of those who do have lawyers have lawyers who had never handled a criminal case prior to taking on the inmate's case. Thus, the primary function of the TRC is to help all the lawyers who are trying their best but who really do not know what they are doing. Similar resource centers exist in Florida and California, the two states besides Texas with substantial death row populations, and in many other states with smaller death rows (e.g., Georgia, Alabama, Oklahoma).

190. The episode recounted in this and the following paragraphs, as well as several additional episodes I report below, are, in my judgment, factually accurate. Every story told in this essay was confirmed by at least two eyewitnesses. For obvious reasons, it would be imprudent for me to reveal in most instances the source's identity.

While denying this request was by no means outrageous (after all, the setting of an execution date would impel the Resource Center to locate habeas counsel more expeditiously), the lawyer's request hardly seems funny.¹⁹¹

After a brief discussion, the judge chose a date for the execution. At that point, the Resource Center lawyer requested that the proceedings be placed on the record. The judge then stated, into the record, "we have all agreed" to set the execution date on such-and-such a date. The Resource Center lawyer interrupted and said, "Excuse me, but we haven't all agreed. I have not agreed, and this man is without counsel, so the petitioner has not agreed." The judge instructed the Resource Center lawyer to be quiet, telling him that he would get his turn. When his turn came, the Resource Center lawyer finally raised an on-the-record objection to the proceeding and the scheduling of an execution date in only forty-five days when the inmate did not even have counsel. The district attorney interrupted and chided the lawyer for complaining. The district attorney said that everyone in the court knew fully well that the inmate would get a stay, if not from the Texas Court of Criminal Appeals then from a federal court. For the district attorney and the trial judge, the entire procedure was the first move in a game that would end at the Supreme Court about forty-four days and twenty-three hours from the moment they all stood there. The Resource Center lawyer and the inmate could not be too sanguine, however, for shortly before this proceed-

191. After the judge laughed, the Resource Center lawyer retreated and asked for 120 days. Again the judge chuckled and said that there was no way he was going to give the man 120 days. Then he said to the lawyer, "and you know that." The judge added that 30 days ought to do it, but 30 days would not work because there was another inmate scheduled to die that day. So the judge asked the district attorney to take out his calendar and asked him how is such-and-such a date, 40 days from the present date, as if they were discussing a dinner date.

This points to a major problem. Many of the criminal court judges are former assistant district attorneys. Not only do they socialize with the district attorneys who regularly appear before them, but they have relationships of trust with them. Judges not only routinely do what the district attorneys ask, but they actually ask the district attorneys what they should do. That trial judges are former district attorneys cannot be helped, and maybe it is not even bad, but we should be aware of this feature of the system when we establish procedural rules.

Fraternities in Texas used to hold parties on the evenings of executions. Those celebrants were just sophomoric collegians, not criminal court judges. Moreover, the prison officials involved in the executions were as unforgiving as anyone of this flippancy. Reasonable people disagree on the moral issue posed by executions. Wherever one stands, however, there can be no question that the taking of a human life is a solemn affair. Those who carry out the executions realize this (as was evidenced by the attitude and demeanor of the warden of the Mississippi prison system, who was interviewed at length in the BBC documentary entitled *Fourteen Days in May*, concerning the execution of Edward Earl Johnson); those who impose the sentence and oversee the process ought to as well.

ing, an inmate whom everyone thought would get a stay was executed.¹⁹² That is what *Teague*, *Butler*, and *Saffle* have done.

Among many of the judges involved in the death penalty process there is an air of nonchalance that is at once understandable and inexcusable. The horror of the crimes often makes the focus on procedure seem a grotesque indulgence.¹⁹³ In addition, for all but the Justices of the Supreme Court, judges can always entertain the idea that there is some other judge further up the line who can prevent any miscarriage of justice, some other judge who is double checking. This attitude is unjustified¹⁹⁴ and ironic, for the further a case proceeds, the more likely that the appellate judge will conclude that plenty of other judges have already scrutinized the issue.¹⁹⁵ Even in the federal system, where the judges are more isolated from political pressures¹⁹⁶ and tend to be more resolute if not actually better jurists, their frustration and impatience manifests itself as disregard for a petitioner's constitutional rights.¹⁹⁷ A federal court of appeals judge, for example, once wrote an opinion denying habeas relief on the day before the scheduled execution. The judge wrote: "After a careful review of the record, we conclude" The other members of the panel, assuming that this judge had in fact reviewed the record and trusting his judgment, signed the opinion denying relief. In fact, the author of the opinion had not reviewed any part of the

192. *McCoy v. State*, 713 S.W.2d 940 (Tex. Crim. App. 1986) (en banc), cert. denied, 480 U.S. 940 (1987).

193. Interestingly, Justice Harlan, whose ostensible test is now used to determine the issue of retroactivity, held the view that the Fourteenth Amendment is entirely about procedure. See *Poe v. Ullman*, 367 U.S. 497, 540-41 (1961) (Harlan, J., dissenting). This view is not unlike Professor Ely's view of the fundamental concern of the Fourteenth Amendment. JOHN H. ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980). On the substance-procedure issue generally, see Thomas C. Grey, *Procedural Fairness and Substantive Rights*, in *DUE PROCESS, NOMOS XVIII*, at 182 (J. Roland Pennock & John W. Chapman eds., 1977); JOHN RAWLS, *A THEORY OF JUSTICE* 83-90 (1971).

194. This optimism is unjustified because trial judges are elected, are often former prosecutors, and are not inclined to give the indigent, nonvoting defendant much in the way of breaks. In the 1990 elections in Texas, where appellate judges are also elected, a number of appellate judges were opposed as being too sensitive to the constitutional rights of accused criminals.

195. See, e.g., Judge Jones' opinion denying relief in *Bell v. Lynaugh*, 858 F.2d 978, 984 (5th Cir. 1988) (Jones, J., concurring) (suggesting that because of the lengthy procedural history (Bell had been twice tried and sentenced to death) the slight mental retardation could not have been perceived as mitigating).

196. Cf. Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977).

197. Of course, by the time the case gets to this stage, the petitioner has only half a quiver of constitutional arrows left to fire. See Arkin, *supra* note 184, at 407-08 (comparing the dilemma presented by the *Wainwright v. Sykes* procedural default rule and the *Teague* retroactivity rule to a "whipsaw").

record, for it had never entered that judge's chambers.¹⁹⁸ We can only guess how often this occurs, but that it does occur is scandalous.¹⁹⁹

When we talk about the system being corrupt, therefore, we are talking not only about the lawyers, or elected state-court hanging judges, or members of the federal bench. We are talking about the entire system, top to bottom.

The single most significant step that can be implemented to cleanse the system is to ensure competent lawyers at the trial level. Of course, judges must remain vigilant and must keep in mind that the judges who reviewed the record before them may not have done so thoroughly. Nevertheless, the ultimate problem remains the lawyers. Stories of ineptitude abound, and they would be hysterically funny were someone not on death row because of them. One lawyer failed to object when the prosecutor said, during closing argument, "The woman's vagina was cut off and it was never found; the defendant probably ate it."²⁰⁰ Another lawyer failed to object when the prosecutor implored the jury to give the defendant the death penalty. "Don't just send him to prison for life," the prosecutor begged. "The defendant is homosexual, and we all know what goes on inside of prisons, so sending him there would be like sending him to a party."²⁰¹ These vignettes are but trivial additions to the legion of incredible episodes that take place daily in capital prosecutions. They are known to many, but not to enough. In her recent review of various proposals for habeas reform, Professor Berger captures the flavor in a single trenchant sentence:

Hence, among the knowledgeable, horror stories abound of defense counsel who refer to the accused as a "nigger" in front of the jury, who indicate that they are representing the client with reluctance, who absent themselves from court while a prosecution witness takes the stand, who adduce no evidence in favor of the client at the penalty phase, or who file no brief on appeal.²⁰²

Most of the defendants in capital murder cases did in fact "do it." But this is constitutionally of no moment. Regardless of whether it is categorically "cruel" to execute criminals, it is manifestly "unusual" when the only defendants realistically subjected to this sanction are those with inept trial attorneys. The Eighth Amendment problem is that the ques-

198. For reasons that I trust are obvious, I cannot name either the judge or the sources of this information.

199. See also *Bird v. Collins*, 934 F.2d 629, 630 (5th Cir.), cert. denied, 111 S. Ct. 2820 (1991).

200. *Cook v. State*, 741 S.W.2d 928 (Tex. Crim. App. 1987), vacated, 488 U.S. 807 (1988).

201. *Burdine v. State*, 719 S.W.2d 309 (Tex. Crim. App. 1986) (en banc), cert. denied, 480 U.S. 940 (1987).

202. Berger, *supra* note 33, at 1670 (citations omitted).

tion of who gets sentenced to death has less to do with whether the defendant did it than with the quality of the defendant's lawyer.

C. How Bad It Is—The Numbers

It is difficult, if not impossible, to quantify the number of death sentences that have been handed down due to inadequate representation.²⁰³ Nevertheless, the data I have collected suggest a significant correlation between the quality of trial counsel and the imposition of the death penalty (instead of a lesser sentence, such as life imprisonment).

In collecting this data I began with the hypothesis that the quality of trial counsel in jurisdictions that have public defender offices would be superior to the quality of indigent trial counsel elsewhere. The bases for this hypothesis were as follows:

(1) Public defenders are ideologically committed to their jobs, and thus generally work more aggressively than their state-appointed counterparts.²⁰⁴

(2) Public defender jobs are difficult to get. Because the positions are so competitive, those who hire can insist on individuals of the highest caliber. Few of these individuals plan to make a career out of this work, and the burn-out rate is substantial. Nevertheless, the level of production during their tenures is high.

(3) Public defenders have access to state resources for pretrial investigations. This bestows an enormous advantage over court-appointed lawyers, even those with stellar qualifications, whose inadequate remuneration

203. This is so because of the sheer number of variables involved. Different attitudes toward the death penalty may be associated with geography; crimes vary in their luridness; individual characteristics of both the killer and the victim may affect the jury; relative skills of the defense attorneys and the prosecutors may have an impact on the jury's decision. The data I have collected controls for none of these variables. Although several scholars have attempted to control many of these variables to determine which play the largest role in determining whether the defendant will be sentenced to death, *see, e.g.*, DAVID C. BALDUS, EQUAL JUSTICE AND THE DEATH PENALTY 140-88 (1990) (presenting statistical data suggesting that race of victim plays a role in death sentencing); M. Dwayne Smith, *Patterns of Discrimination in Assessments of the Death Penalty: The Case of Louisiana*, 15 J. CRIM. JUST. 279 (1987), these studies are compelled to assign numerical values to the perceived seriousness of the offense. This obviously calls for a judgment on the part of the statisticians, but there is no way to know whether this evaluation coincides with that of the jury that actually sentenced the defendant.

Thus, there are many pitfalls to which we must be alert. In spite of these various difficulties, I do think we can hazard tentative conclusions on the basis of the data.

204. *See, e.g.*, the profile of Steve Bright in A.B.A. J., Sept. 1991, at 8. Although not a public defender, Bright has spent his legal career representing capital defendants and death row inmates. He runs the Southern Center for Human Rights on an annual budget of less than \$500,000, and earns a salary of around \$20,000. *Id.*

neration makes such investigation prohibitive.²⁰⁵

(4) In jurisdictions with public defenders, even those defendants who rely on private counsel will benefit insofar as the public defenders office can act as a resource for private lawyers.

The difference in quality of counsel might affect various stages of the process. For instance, prosecutors might be more reluctant to charge defendants with capital murder when the prosecutors believe they will face a tough, drawn-out trial. Therefore, there may be fewer capital murder indictments in jurisdictions with public defenders.²⁰⁶ This possibility, of course, is difficult to measure, though it does not appear to be reflected by the data. In addition, an assortment of variables could qualify our firm conclusions from the data. For example, it is difficult to compare the seriousness of various offenses within a single jurisdiction, and even more difficult to compare seriousness across jurisdictions.²⁰⁷ Cognizant of these hazards, my focus has been on four criteria:

(1) The number of capital murder indictments.

(2) The number of cases that proceed to trial under a capital murder indictment (the first criteria, minus the number of plea bargains, reductions in charges, and dismissals).

(3) The number of guilty verdicts for capital murder (the second criteria, minus the number of acquittals, plea agreements reached during trial, and convictions for lesser offenses).

(4) The number of death sentences (the third criteria, minus the number of lesser sentences).

The data fairly and powerfully suggest that, measured either in terms of ability to avoid a guilty verdict or in terms of ability to secure a sentence lesser than death, public defenders are significantly more successful than their private counterparts.²⁰⁸

205. In addition, public defenders, as specialists, may have a knowledge of the total universe of capital cases that attorneys who only periodically represent capital defendants lack. This difference would aid the public defender in negotiating pleas and hazarding educated guesses on the question of what a jury would be likely to do.

206. In fact, the data suggest that this is not necessarily the case.

207. An example of an effort to control for this variable can be found in the work of BALDUS, *supra* note 203 (studying imposition of the death penalty in Georgia).

208. I do not address the success of public defenders at the appellate level. However, it appears from the data that their success at the appellate level approximates their success at the trial level. For example, the appellate public defender's office in New Jersey has won 26 out of its 27 appeals in the New Jersey Supreme Court. See Joseph F. Sullivan, *New Jersey Defenders Battle Death Law*, N.Y. TIMES, Feb. 26, 1991, at A13.

In addition to the issues alluded to *supra* note 203, another limitation on the utility of the data is that not all jurisdictions were able to supply information on identical statistical categories. My focus, however, has been limited to states with significant death row populations. With the exception of California, these tend to be southern states, so one might suppose that

Alabama*—Court Appointed

	<u>Composite of 1988-1990</u>
Number of indictments	71
Number guilty of capital murder	36
Number of guilty verdicts resulting in death sentences	11**
Percentage of guilty verdicts resulting in death sentences (where sentence is known)	32%

* Information compiled from news clippings, and therefore incomplete.

** With respect to two of the convictions, sentence is unknown.

Alabama*—Public Defender

	<u>Composite of 1988-1990</u>
Number of indictments	3
Number guilty of capital murder	2
Number of guilty verdicts resulting in death sentences	0
Percentage of guilty verdicts resulting in death sentences (where sentence is known)	0%

* Information compiled from news clippings, and therefore incomplete.

attitudinal differences presumably associated with geographical region do not play an especially skewing role here.

I compiled these data with the generous assistance of the following people:

Alabama: Eva Ansley and Will Fitzpatrick, Alabama Capital Representation Resource Center.

California: Steve Carroll, Public Defender's Office of San Diego; Judy Farncomb, Central Public Defender's Office.

Florida: Ted Parker, Office of Computer Services and Information Systems, Dade County; Gordon Morgan and Darryl Hanzelon, Office of the Circuit and County Courts, Felony Division, Jacksonville; Edith Georgi, Public Defender's Office of Miami.

Georgia: Eric Kocher, Southern Prisoners' Defense Committee; Patsy Morris, Georgia Resource Center.

Kentucky: Lisa Davis, Kentucky Capital Litigation Resource Center.

Mississippi: Sheila O'Flaherty and Jim Craig, Capital Defense Resource Center.

Nevada: Bruce Anderson, District Attorney's Office, Clark County.

North Carolina: Patrick Tamer, Administrative Office of the Courts; Kin Hinnis, Appellate Defender's Office.

South Carolina: John Blume, South Carolina Resource Center.

Texas: Norman Kinne, District Attorney's Office, Dallas; Bert Graham, District Attorney's Office, Harris County; Tim Palmquist, Bexar County Clerk's Office, San Antonio.

Virginia: Bart Stapert and Marie Deans, Virginia Coalition on Jails and Prisons.

Alabama*—Retained

	<u>Composite of 1988-1990</u>
Number of indictments	2
Number guilty of capital murder	2
Number of guilty verdicts resulting in death sentences	1**
Percentage of guilty verdicts resulting in death sentences (where sentence is known)	50%

* Information compiled from news clippings, and therefore incomplete.

** There is no information on the sentence of the other; the death penalty in the known case was assessed despite the jury's recommendation of life without parole.

Alabama*—Type of Representation Unknown

	<u>Composite of 1988-1990</u>
Number of indictments	66
Number guilty of capital murder	21
Number of guilty verdicts resulting in death sentences	9**
Percentage of guilty verdicts resulting in death sentences (where sentence is known)	45%

* Information compiled from news clippings, and therefore incomplete.

** With respect to one of the convictions, sentence is unknown.

California—Public Defender*

	<u>1988</u>	<u>1989</u>
Number of cases filed with special circumstances (i.e., number of capital murder indictments)	209	205
Number that proceed to guilt/innocence determination	119	91
Number that proceed to penalty phase	104	54**
Number that receive life without possibility for parole	70	28
Number that receive death sentences	34	33
Percentage of guilty verdicts resulting in death sentences	33%	61%
Percentage of cases which proceed to trial that result in death sentences	29%	36%

* Approximately 90% of indigent capital defendants in California are represented by public defenders.

** In some years, 1989 for example, a significant number of cases are disposed of after a guilty verdict. These cases result in life without parole. This reflects another stage at which public defenders are successful in avoiding the death penalty.

NOTE: These numbers operate as estimates in the following regard: Although the number of indictments is kept on an annual basis, the cases are not tracked individually, and some of them will be disposed of in subsequent calendar years. Hence, the dispositions in 1989 will include some cases that were filed in 1988, and so on. This does not appear to affect the data, given that the number of capital murder indictments has remained largely unchanged over the past five years.

Georgia

	<u>1985</u>	<u>1986</u>	<u>1987</u>	<u>1988</u>	<u>1989</u>	<u>1990</u>
Cases where death penalty was sought					47	
Indigent					37	
Retained					10	
Number of death sentences	11	15	16	10	9	16

Jacksonville, Florida—Court Appointed Counsel

	<u>1988</u>	<u>1989</u>	<u>1990</u>
Number of capital murder indictments	7	19	8
Number pleading guilty	1	2	3
Number of not guilty verdicts	0	0	0
Number of guilty verdicts	0	0	1
Number of death sentences	0	0	0
Number of life or lesser sentences	1	2	3
Nolle prosequi	1	0	4
Percentage of guilty verdicts resulting in death sentences	0%	0%	0%

Jacksonville, Florida—Private Appointed Counsel

	<u>1988</u>	<u>1989</u>	<u>1990</u>
Number of capital murder indictments	7	19	8
Number pleading guilty	1	0	0
Number of not guilty verdicts	0	0	1
Number of guilty verdicts	1	2	0
Number of death sentences	0	0	0
Number of life or lesser sentences	2	1	0
Nolle prosequi	0	2	0
Percentage of guilty verdicts resulting in death sentences	0%	0%	0%

Jacksonville, Florida—Public Defenders

	<u>1988</u>	<u>1989</u>	<u>1990</u>
Number of capital murder indictments	7	19	8
Number pleading guilty	4	12	2
Number of not guilty verdicts	0	2	0
Number of guilty verdicts	0	1	1
Number of death sentences	0	1	0
Number of life or lesser sentences	4	12	2
Nolle prosequi	0	1	2
Percentage of guilty verdicts resulting in death sentences	0%	0%	0%

Dade County, Florida (Miami)—Private Attorneys*

	<u>1985</u>	<u>1986</u>	<u>1987</u>	<u>1988</u>	<u>1989</u>	<u>1990</u>
Number of capital murder indictments	101	91	77	115	109	147
Number that proceed to trial	2	9	20	18	13	22
Number of guilty verdicts	8	10	12	5	4	1
Number of death sentences	0	1	1	0	0	0
Number of life sentences	7	7	11	4	2	1
Percentage of guilty verdicts resulting in death sentences	0%	10%	8½%	0%	0%	0%

* Retained primarily by drug offenders.

Dade County, Florida (Miami)—Public Defenders

	<u>1985</u>	<u>1986</u>	<u>1987</u>	<u>1988</u>	<u>1989</u>	<u>1990</u>
Number of capital murder indictments	101	91	77	115	109	147
Number that proceed to trial	9	15	10	20	16	33
Number of guilty verdicts	6	11	8	8	5	2
Number of death sentences	0	1	0	1	1	0
Number of life sentences	5	10	6	7	2	2
Percentage of guilty verdicts resulting in death sentences	0%	9%	0%	12½%	20%	0%

Dade County, Florida (Miami)—Special Assigned Attorneys*

	<u>1985</u>	<u>1986</u>	<u>1987</u>	<u>1988</u>	<u>1989</u>	<u>1990</u>
Number of capital murder indictments	101	91	77	115	109	147
Number that proceed to trial	20	26	14	34	43	54
Number of guilty verdicts	13	24	13	25	14	2
Number of death sentences	1	6	2	2	0	0
Number of life sentences	12	16	10	20	13	1
Percentage of guilty verdicts resulting in death sentences	8%	25%	16%	8%	0%	0%

* Used in cases of conflict with public defenders. Like public defenders, special assigned attorneys have access to public funds.

Kentucky—Public Defenders*

	1985	1986	1987	1988	1989**	1990**
Number of capital murder indictments	58	40	34	27	17	8
Number of capital murder cases that proceed to trial	34	26	25	17	11	2
Number of pleas	29	30	20	24	11	6
Number of guilty verdicts	28	19	23	18	6	1
Number of death sentences	2	4	5	0	0	1
Number of life sentences	21	28	8	9	15	2
Number of life sentences without parole before 25 years	0	0	0	0	0	0
Percentage of guilty verdicts resulting in death sentences	7%	20%	22%	0	?	?

* Public defenders represent 100% of indigent capital defendants.

** Data from 1989 and 1990 are incomplete due to continuances and pending appeals.

Kentucky—Retained Counsel

	1985	1986	1987	1988	1989*	1990*
Number of capital murder indictments	8	13	11	1	3	3
Number of capital murder cases that proceed to trial	5	6	11	2	0	1
Number of pleas	7	7	2	2	0	0
Number of guilty verdicts	1	6	5	1	0	3
Number of death sentences	1	1	0	0	0	1
Number of life sentences	1	6	2	0	1	0
Number of life sentences without parole before 25 years	1	0	0	0	0	0
Percentage of guilty verdicts resulting in death sentences	100%	17%	0	0	?	?

* Data from 1989 and 1990 are incomplete due to continuances and pending appeals.

Mississippi*—(Estimates)

30-50 cases per year where State initially seeks death penalty

25% proceed to trial

80% represented by court-appointed lawyers

(three counties have a full time public defender)

55-90% result in death sentences

* In 1991, twelve cases actually proceeded to trial under a capital murder indictment. Three defendants pleaded during trial. Of the nine jury verdicts, seven found the defendant guilty of capital murder (and two found the defendant guilty of simple murder). Of the seven capital murder verdicts, the jury sentenced five of the defendants to death and two to life.

Las Vegas, Nevada*

	<u>Composite of 1988-1990</u>
Number of defendants charged with murder or murder with a deadly weapon	204
Number dismissed prior to trial or at trial	52
Number found guilty of capital murder	42
Number found guilty of lesser charge	2
Number found not guilty	10
Number of guilty verdicts resulting in death sentences	10
Number of guilty verdicts resulting in life without possible parole	9
Number of guilty verdicts resulting in life with possible parole	10
Percentage of guilty verdicts resulting in death sentences**	25%

* Figures quoted as being 90% accurate. Approximately 60% of indigent capital defendants are represented by public defenders.

** In addition, 2 of the 98 defendants who pleaded guilty received a sentence of death.

North Carolina—Private Appointed Counsel

	<u>1986</u>	<u>1987</u>	<u>1988</u>	<u>1989</u>	<u>1990</u>
Number of capital murder indictments	465	545	529	589	677
Total number disposed	221	292	305	306	334
Number of dismissals	18	19	27	24	30
Guilty pleas to charged offense/to lesser offense	55/80	62/114	59/126	66/129	29/175
Number of cases that went to trial	64	82	80	78	87
Number of convictions (percentage)*	48 (75%)	62 (76%)	63 (79%)	53 (68%)	65 (75%)
Number of acquittals (percentage)*	13 (20%)	13 (16%)	11 (14%)	17 (22%)	18 (21%)
Number of death sentences	—	—	11	7	9
Percentage of guilty verdicts resulting in death sentences	—	—	17%	13%	14%

* Percentages do not equal 100; remainder pleaded during trial.

North Carolina—Private Retained Counsel

	1986	1987	1988	1989	1990
Number of capital murder indictments	465	545	529	589	677
Total number disposed	166	151	148	142	150
Number of dismissals	18	21	21	23	19
Guilty pleas to charged offense/to lesser offense	48/31	38/40	34/50	24/37	11/63
Number of cases that went to trial	57	47	39	47	45
Number of convictions (percentage)*	40 (70%)	32 (68%)	26 (67%)	33 (70%)	36 (80%)
Number of acquittals (percentage)*	16 (28%)	15 (32%)	10 (26%)	13 (28%)	7 (16%)
Number of death sentences	—	—	2	1**	1
Percentage of guilty verdicts resulting in death sentences	—	—	8%	3%	3%

* Percentages do not equal 100; remainder pleaded during trial.

** One additional death sentence was imposed on a defendant who represented himself.

North Carolina—Public Defenders

	1986	1987	1988	1989	1990
Number of capital murder indictments	465	545	529	589	677
Total number disposed	58	69	80	68	105
Number of dismissals	5	7	12	6	4
Guilty pleas to charged offense/to lesser offense	25/9	27/16	14/36	12/30	16/51
Number of cases that went to trial	18	17	15	19	29
Number of convictions (percentage)*	11 (61%)	14 (82%)	11 (73%)	13 (68%)	23 (79%)
Number of acquittals (percentage)*	6 (33%)	3 (18%)	3 (20%)	5 (26%)	6 (21%)
Number of death sentences	—	—	3	0	4
Percentage of guilty verdicts resulting in death sentences	—	—	27%	0%	17%

* Percentages do not equal 100; remainder pleaded during trial.

South Carolina*—(Estimates)

	<u>Composite of 1985-1990</u>
Number of capital murder indictments	25-30 cases per year where state files notice of intent to seek death penalty
Number that proceed to trial	10 go to trial/20 plead out
Number of guilty verdicts	9 found guilty
Number of death sentences	Death penalty imposed in 4-5 (roughly)
Percentage of guilty verdicts resulting in death sentence	50%

* Public defenders represent 80% of indigent capital defendants.

Dallas, Texas—Private Appointed Counsel*

	<u>1985</u>	<u>1986</u>	<u>1987</u>	<u>1988</u>	<u>1989</u>	<u>1990</u>
Number of capital murder indictments	n/a	n/a	n/a	n/a	n/a	n/a
Number of cases that went to trial	0	1	7	5	5	5
Number of convictions	0	1	7	5	5	5
Number of death penalty sentences	0	1	7	5	5	5
Percentage of guilty verdicts resulting in death sentences	—	100%	100%	100%	100%	100%

* No capital murder defendants represented by public defenders.

Harris County, Texas (Houston)—Private Appointed Counsel*

	<u>1985</u>	<u>1986</u>	<u>1987</u>	<u>1988</u>	<u>1989</u>	<u>1990</u>
Number of capital murder indictments	32	41	27	27	26	n/a
Number of capital murder trials	9	18	7	12	13	n/a
Number of guilty verdicts	9	18	7	12	13	n/a
Number of death penalty sentences	7	13	7	9	9	n/a
Number of life sentences	2	5	0	3	4	n/a
Percentage of guilty verdicts resulting in death sentences	77%	72%	100%	75%	70%	n/a

* All of the defendants were represented by court-appointed attorneys except for one case in 1988, resulting in a life sentence.

San Antonio, Texas—Private Court Appointed Counsel

	<u>1985</u>	<u>1986</u>	<u>1987</u>	<u>1988</u>	<u>1989</u>	<u>1990</u>
Number of capital murder indictments	10	8	8	10	11	9
Number of cases that went to trial	4	3	4	3	7	1
Number of guilty pleas to capital murder	1	4	4	5	1	0
Number of guilty verdicts (excluding pleas)	4	3	4	3	7	1
Number of guilty verdicts resulting in death sentences	2	1	2	1	6	1
Percentage of guilty verdicts resulting in death sentences	50%	33%	50%	33%	86%	100%

Virginia

	<u>Composite for April 1988-September 1990</u>
Number of capital murder indictments	75 [vs. 29 for June 1986-July 1987]
Number convicted of capital murder	20 [24*]
Number of guilty verdicts resulting in death sentences	4 [4*]
Number of guilty verdicts resulting in life sentences	16
Percentage of guilty verdicts resulting in death sentences	20%

* Number in brackets include trials for Timothy Spencer, who was convicted and sentenced to death four separate times.

NOTE: The Virginia Coalition on Trial and Prisons established a Pre-Trial Tracking and Assistance Project to aid in the representation of capital defendants. Of the 75 indictments during this period, the Project assisted in 68 cases. Of those resulting in death, the Project assisted in only one (excluding Timothy Spencer).

The data suggest that in jurisdictions which use public defenders, the prosecutors' rate of success in obtaining the death penalty for those charged with capital murder ranges from zero (Kentucky and Florida) to around fifty percent (Alabama). On the other hand, the prosecutors' rate of success in jurisdictions that rely entirely on private court-appointed lawyers to represent indigent capital defendants ranges from around fifty percent (South Carolina) to one hundred percent (Texas).

It is possible that there are explanations for these distributions that have nothing to do with the quality of counsel. For example, it may be the case that more of the defendants in Harris County "did it" as compared to defendants in Kentucky. Absent some indication of qualitative differences in police work, however, that hypothesis lacks plausibility. The more reasonable explanation suggested by the above numbers is the competence of trial counsel and the resources available to them.

III. Reforms—Who Should Do It and What They Should Do

Federal reform of the death penalty system involves two distinct components. Death penalty laws themselves are often infirm,²⁰⁹ and repairing them is up to the states. The federal role here, the responsibility of the judiciary, is to specify what characteristics these statutes must possess in order to pass constitutional muster, and then to determine whether given statutes do in fact possess these characteristics. Federal involvement occurs through the writ of habeas corpus used to challenge death sentences. As a body of federal law, the habeas corpus rules are obviously drafted and amended by the federal government. Thus, if part of the problem with current death penalty litigation stems from the rules of habeas corpus, federal action may well be called for.

Even if it is true that the rules of habeas corpus are partly responsible for the gridlock in the death penalty system—a supposition that underlies current reform efforts—we must be wary of two traps: the tendency to blame the rules of federal habeas corpus for problems that in fact inhere in a state's own death penalty statute, and the possibility that a state might repair a discrete feature of its death penalty statute without simultaneously improving the level of representation ordinarily provided to indigent capital defendants. Congress ought not to permit states to take advantage of amendments to the rules of habeas corpus that are designed to shorten the time between imposition of sentence and execution unless Congress is first persuaded that the states have provided a level of counsel appropriate to the capital context. Irrespective of the

209. See, e.g., *Penry v. Lynaugh*, 492 U.S. 302 (1989).

Supreme Court's interpretation of the threshold demanded by the Sixth Amendment, Congress can surely insist that the pace of executions be accelerated only in those jurisdictions that have redressed the denial of comparative justice that stems from inadequate trial counsel.

A. The Price of Having Values

Locating state legislators who are urging reform of their own states' death penalty laws is a difficult assignment. State officials appear to rely on federal solutions. Unless the rules of habeas corpus are blameworthy, however, the delay cannot fairly be attributed to the federal government. In addition, even the proposed repairs to the habeas system focus to a significant degree on the question of guilt versus innocence.²¹⁰

Nothing gives greater pause, to either proponents or critics of the death penalty, than the terrible prospect of executing an innocent person. So the focus on saving innocent persons is predictable. The most popular "ideal" system of collateral review is one that would save the innocent from the gallows without also freeing the guilty on the basis of so-called technicalities. Proposals that seek to attain this ideal have a great intuitive appeal, for they seem to satisfy the philosophical notion of desert and, at the same time, the sentiment expressed by Judge Cardozo that it is unthinkable that the criminal go free merely because the constable has blundered.²¹¹ These proposals permit us to indulge our consciences and rest assured that we are not executing the innocent, and also to sidestep the clamoring masses who huddle in fear from crime and seem ready to trade the Constitution for more potent law enforcement.²¹² Current suggestions for habeas reform offer the impossible. They pretend that it is

210. In this regard, these proposals are misguided in a way that is analogous to the Court's analysis in *Teague* and its progeny. For example, as Jeffries and Stuntz put it, "Our focus is on factual innocence. By that phrase, we mean to include anyone who did not commit the crime with which he or she is charged." Jeffries & Stuntz, *supra* note 15, at 691. They quite clearly seem to focus on whether the petitioner actually "did it." In this regard, they are following the late Judge Friendly's suggestion that habeas relief be available only to those petitioners who "can make a colorable showing of factual innocence." *Id.* at 692; see Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142 (1970). Like Judge Friendly, Jeffries and Stuntz approximate the spin given to the Harlan test by the *Teague* plurality. My reference in the text also includes the recent proposals in Congress. These are discussed and evaluated in Berger, *supra* note 33, at 1704-13. The ABA proposals do not seem to me to suffer from this obsessive focus. See A.B.A. REPORT, *supra* note 32. For a philosophical attack on the actual innocence focus, see Irene M. Rosenberg & Yale L. Rosenberg, *Guilt: Judge Friendly Meets the MaHaRaL of Prague*, — MICH. L. REV. — (forthcoming 1992).

211. *People v. Defore*, 150 N.E. 585, 587 (N.Y. 1926).

212. See Rosenberg, *supra* note 151, at 376 (observing that the *Teague* line of cases "effectively capsulizes the popular sentiment that the accused in a criminal case is entitled to freedom only if he is innocent and has had the hell beat out of him").

costless to have values; they intimate that we can be utilitarians and at the same time adhere to the Constitution in every instance.

This is simply not so. It is always harder to have values and adhere to them than not to have values, or to overlook them when the pressures to do so are great. More importantly, suggestions that focus narrowly on protecting the "arguably innocent"²¹³ embody the same epistemological error committed by the *Teague* plurality and now prominent in retroactivity analysis. This emphasis confounds the notion of guilt, a purely legal notion, with the question of whether the defendant actually did it.²¹⁴ Whether a particular defendant is found guilty by a jury obviously has a great deal to do with whether that defendant did it; these issues are emphatically not unrelated. But it also has a great deal to do with whether a defendant who concededly did it has a good lawyer or a not-so-good one.²¹⁵ As we have seen, their lawyers are often not so good, especially when the defendants are indigent and on trial in a jurisdiction that lacks a public defender system. This is, in part, why someone like Cullen Davis, who, on at least one presentation of the facts, seems to have "done it," can be found not guilty,²¹⁶ while others like Clarence Brandley and Randall Dale Adams, who have since been deemed innocent, were determined by the jury to have done it and came within days

213. See Boshkoff, *supra* note 2; Jeffries & Stuntz, *supra* note 15, at 691; Friendly, *supra* note 210, at 142.

214. See *supra* notes 89-93 and accompanying text.

215. Muneer Mohammed Deeb was sentenced to death after being found guilty of hiring David Wayne Spence to kill Gayle Kelley, who had spurned Deeb's romantic overtures. (Spence had kidnapped, assaulted, and killed three people, but not Kelley, in what was supposedly a case of mistaken identity.) Deeb's conviction was overturned in July 1991, some seven and one-half months after Deeb was sent to death row, and Deeb has decided that if he is retried he will not again rely on a court-appointed lawyer. "This time I'm going to get the best lawyers money can buy," he is quoted as saying. Kathy Fair, *Conviction Overturned, Inmate Now Seeks a Job*, HOUSTON CHRON., July 6, 1991, at 26A.

At this point, one might observe that if my argument is that the difference between life and death is the difference between a more and less competent lawyer, then a possible solution would be to increase executions rather than decrease them, i.e., attempt to insure that more of the defendants who did it, but happen to have good lawyers, also get sentenced to death. I confess that in theory this solution would redress the primary philosophical objection I emphasize. Cf. KANT, *supra* note 143. As a practical matter, however, it is utterly unrealistic. The data in Part II.C strongly suggest that competent lawyers at the trial stage consistently defeat the prosecutors' pleas for death. The reasons for this are beyond the scope of this Article. However, I would surmise that the phenomenon results at least in part from the decisions that prosecutors make concerning the allocation of scarce resources. Whatever the explanation, the preliminary data seem striking.

216. Davis was defended by the famous Richard "Racehorse" Haynes, and the trials are discussed in GARY CARTWRIGHT, *BLOOD WILL TELL* (1979).

of being executed.²¹⁷

The exclusive focus on innocence versus guilt also overlooks the fact that the sentencing phase of a capital trial is at least as critical as the guilt-innocence stage. Once the jury considers punishment, the defendant's putative guilt has already been established and the question is simply the appropriate level of punishment. Thus, even if guilt versus innocence were the appropriate focus at the first stage of the trial, it would still be a red herring at the punishment stage. Further, testimony and evidence presented at the guilt-innocence stage do not suddenly cease to influence jurors when they are considering punishment. This means that even mistakes made at the outset of the trial, or well before the trial begins, might well have an impact at the culmination of the trial.

B. The Death Penalty and the States

Americans favor the death penalty.²¹⁸ Thirty-five states have a death penalty statute, and thirty-three states have at least one resident on death row.²¹⁹ Only one state that permits capital punishment statutorily excludes the mentally retarded from those subject to this highest penalty.²²⁰ Executing criminals as young as sixteen years old is legal in our

217. *Ex parte Brandley*, 781 S.W.2d 886, 891-94 (Tex. Crim. App. 1989) (en banc) (reversing Brandley's conviction on grounds that the state conducted a flawed investigation and, in violation of defendant's due process rights, suppressed evidence favorable to the accused).

218. See Hans Zeisel & Alec M. Gallup, 5 J. QUANTITATIVE CRIMINOLOGY 285 (1989) (analyzing Gallup Poll data from 1936 to 1986); *Washington Wire*, WALL ST. J., Jan. 19, 1990, at A1 (71% of those surveyed favored death penalty for murder); see also Neil Vidmar & Phoebe C. Ellsworth, *Research on Attitudes Toward Capital Punishment*, in DEATH PENALTY IN AMERICA 68, 84 (Hugo A. Bedau ed., 3d ed. 1982) (hypothesizing, after a review of various attitudinal studies, that some people may favor the idea of the death penalty without realizing or accepting its implications); DAVID LESTER, THE DEATH PENALTY—ISSUES AND ANSWERS 17-25 (1987) (noting that death penalty attitudinal studies consistently reveal that capital punishment is more strongly supported by older people, the less educated, those earning more, whites, those with authoritarian attitudes, and conservatives).

However, for a collection of popular opposition to capital punishment, see IAN GRAY & MOIRA STANLEY, A PUNISHMENT IN SEARCH OF A CRIME: AMERICANS SPEAK OUT AGAINST THE DEATH PENALTY (1989). See also *The Execution of Ronnie Dinkins (Cont'd)*, WASH. POST, Aug. 6, 1989, at B6 (letter from Dorothea B. Morefield to Editor, *Washington Post*) (mother whose son was killed by death row inmate argues that death penalty is not the answer).

219. NAACP LEGAL DEFENSE AND EDUC. FUND, INC., DEATH ROW, U.S.A., Aug. 23, 1991, at 1. One defendant has been sentenced to death under the federal death penalty statute. See A.B.A. J., Aug. 1991, at 24.

220. GA. CODE ANN. § 27-1503 (Harrison Supp. 1990); see *Penry v. Lynaugh*, 492 U.S. 302 (1989) (plurality opinion) (finding insufficient evidence of national consensus against executing the mentally retarded and thus concluding that the Eighth Amendment does not categorically prohibit punishment of such individuals).

society.²²¹ In view of this popular feeling, it is unrealistic to expect the political processes of the states, by definition sensitive to local popular sentiment, to be especially concerned with safeguarding the integrity of the capital punishment process.

What activities to criminalize and how severely to punish them are prototypical examples of issues left to the discretion of the states. It is precisely within this sphere of sovereignty that thirty-five states have enacted capital punishment laws.²²² The problems of delay associated with imposition of the death penalty are related entirely to *state* death penalty laws. Consequently, problems in this area would seem quintessentially suited to resolution by the states. Absent some indication that the states are impotent or that Congress has interfered with their power to punish, there is no constitutionally sound basis for Congress or the federal courts to intrude into this area of state sovereignty.²²³ If death penalty laws are being frustrated, the frustration should be felt precisely in the states that are being precluded from implementing their laws. Principles of federalism mandate that the states be permitted, if not required, to repair their own systems and insure where possible that their laws not be frustrated by legitimate constitutional concerns.²²⁴ The death penalty problem is, in short, initially a state problem.

Chief Justice Rehnquist's involvement in the political movement to reform habeas corpus procedures is thus anomalous. Similarly, the extensive congressional interest in this area, insofar as it precedes efforts by the states to bring their own systems into compliance with constitutional dictates, is difficult to justify. Chief Justice Rehnquist appointed retired Justice Lewis Powell to chair a commission organized to investigate the pervasive problem of delay in death penalty appeals and to recommend measures to streamline appeals and speed up executions. The Powell Commission's report makes no mention of the responsibility of the states to repair their own systems and is silent about the quality of counsel

221. See *Stanford v. Kentucky*, 492 U.S. 361 (1989) (5-4 decision).

222. Although there is a federal death penalty law, only one person has been sentenced to die under it.

223. Admittedly, it has become fashionable to say that the laws of the states with death penalty statutes are being frustrated. Yet such assertions tend to emanate to a great degree from federal, not state, officials. Their standing to voice such concerns must be regarded as suspect.

224. See Mark Ballard, *ABA Panel Calls for State-Paid Death Row Counsel*, TEX. LAW., Dec. 4, 1989, at 4 (proposing that Congress enact legislation allowing states that provide paid attorneys for death row inmates to take advantage of streamlined method of post-conviction appeals in capital cases). In support of this proposal, the late Fifth Circuit Judge Alvin Rubin argued that "[i]f the state chooses the death penalty, you have to afford the accused his constitutional rights. . . . And that costs money." *Id.* at 5.

provided during the typical capital trial.²²⁵ These silences are stunning. Furthermore, both the House and Senate, which have recently considered amendments to the habeas corpus rules and will do so again in the current Congress, have refused to link acceleration of the habeas appeals system with the requirement that states provide competent counsel at the trial stage.²²⁶

The lust for executions that certain federal judges display is especially ironic since these same judges are ordinarily proponents of a theory of federalism that values independence of the states and protects them against incursions by the federal government.²²⁷ Chief Justice Rehnquist, for example, observed that the essence of the death penalty question is "the pros and cons of federalism,"²²⁸ but he has nonetheless been at the forefront in urging Congress, a federal body, to remedy problems that are largely remediable at the state level and that are in fact within the legitimate province of state control. Similarly, Judge Edith Jones' proposals for reform in the Fifth Circuit,²²⁹ which in substance are not dissimilar from those offered below, have the odd cast of a federal judge's recommending to a state how it ought to repair its own system.

All this federal participation, from Chief Justice Rehnquist to Judge Jones to Congress, is quite peculiar, because the decision to impose a death sentence is a state decision, and states that have elected to impose the death penalty are in a position to accelerate executions without any intervention by Congress or federal judges. Texas, for example, requires that an execution date be set thirty days in advance of the scheduled execution,²³⁰ but does not require that the trial judge set the date at any particular time. If Texas wanted to speed up its own system, it could provide that execution dates be set, for example, eighteen months in ad-

225. This point is discussed in Berger, *supra* note 33, at 1674-84.

226. The proposals were amendments to the Omnibus Crime Bill. Because the conference committee could not resolve the differences between the two houses speedily, the habeas reforms were dropped from the crime bill. This is an important issue, however, and it has reappeared in the current Congress. I have previously criticized the version of habeas reform that was contemplated by the Senate in the last Congress. See David R. Dow, *Rush to Judgment*, TEX. OBSERVER, June 15, 1990, at 8. For a response to this criticism, see the letter from Orrin G. Hatch, U.S. Senator, to David R. Dow, *reprinted in* TEX. OBSERVER, Sept. 28, 1990, at 2.

227. See, e.g., Justice Scalia's opinion in *Madden v. Texas*, 111 S. Ct. 902 (Scalia, Circuit Justice 1991) (denying applicants' motions to extend time for filing habeas petitions).

228. William Rehnquist, Remarks at the American Law Institute Annual Meeting (May 15, 1990).

229. Edith H. Jones, *Death Penalty Procedures: A Proposal for Reform*, 53 TEX. BAR J. 850, 852-53 (1990) (proposing that the Texas Attorney General's Office, the TRC, the Texas Court of Criminal Appeals, and the federal district and circuit courts all cooperate to remove procedural obstacles to enforcement of Texas' death penalty).

230. TEX. CODE CRIM. PROC. ANN. art. 43.14 (West 1990).

vance. The state could further require that a trial court judge set an execution date within six weeks of the decision by the Texas Court of Criminal Appeals to affirm the conviction. State law could then insist that an inmate's habeas petition be filed within six months of the scheduled execution date. This would provide ample time for judges to examine thoughtfully the issues raised in the petition, without the time pressures of eleventh-hour appeals. It is simply a matter of amending state law. No "assistance" from the federal government is necessary.

Whether judges would in fact scrutinize the petitions even if given adequate time is a different matter, but the penchant some judges have for neglecting to read transcripts²³¹ would be somewhat less consequential if states were to provide, by public defenders or some other system, highly competent trial counsel for capital defendants. Delay exists in the current system partly because the most creative and diligent lawyers do not enter the scene until an execution date has been set. Furthermore, until an execution date is set, the lawyer has no incentive to work on the habeas petition. The lawyer will prefer to work for paying clients, which the death row inmate usually is not, and under the present system, will postpone serious work on the habeas petition until the execution date is imminent. Certainly the lawyers are at fault, but so is the system that encourages this conduct; and the system is one that the state can easily remedy.²³²

Despite the eagerness of many players in the federal government to suggest reforms, the proposals they have offered ignore the fundamental problem from which all other evils stem: inadequate representation at the trial level.²³³ Judge Jones does advert to the problem when she explains that the cases are expensive to litigate while the clients are indigent.²³⁴ But the concrete proposals from Congress and the Powell Commission doggedly refuse to address this central problem. Current

231. See *supra* text accompanying note 198.

232. See A.B.A. REPORT, *supra* note 32, at 134-56.

233. This is not true of the ABA Report. Robbins, *supra* note 32, at 14-27. In a recent article, Professor Berger examined the two major proposals. Berger, *supra* note 33. She aptly characterizes the Powell Committee Report as a band-aid, *id.* at 1674, and the ABA Report as surgery, *id.* at 1684. While the ABA Report does recognize the importance of adequate trial counsel and acknowledges that reform at this level of the system must be the linchpin of any habeas reform, it suffers from lack of unanimity among task force members. See Robbins, *supra* note 32, at 14. Nevertheless, this should not obscure the insight of the ABA, and in view of it, it is all the more remarkable that neither the Powell Commission nor the congressional proposals were sufficiently sensitive to this point. The ABA Report specifies certain threshold qualifications that counsel in death cases would have to possess, but it leaves the appointment to state authorities, roughly the same actors that do the appointing at present. This is unwise, and the proposal I offer in the text departs from the ABA suggestion.

234. See Jones, *supra* note 229, at 851.

doctrine makes it virtually impossible for habeas petitioners to receive the retroactive benefit of new rules, and a capital defendant's lawyer is not deemed ineffective merely because the lawyer lacked the skill or ingenuity to preserve or articulate the new rule. Consequently, under existing law we stand to execute citizens whose trials, at either the guilt-innocence or sentencing phase, were potentially constitutionally infirm.²³⁵ Doctrine seems unlikely to change soon. This is so even though, as suggested above, doctrine is incoherent as a philosophical matter, and even though it is within Congress' power to overrule *Teague*. Hence, given current doctrine, the only way to give capital cases the heightened level of care that the Court has insisted they receive²³⁶ is to provide much better lawyers at the trial stage.

The key to reforming the present system within current doctrine is to redouble efforts to locate competent counsel to represent capital defendants at their trials. The following proposals are offered with this goal in mind:

1. Establish federal public defenders offices for the purpose of providing trial counsel to capital defendants.²³⁷ These offices would be modelled in part on existing federal public defender offices and in part on the Resource Centers that currently exist in several death penalty states. (These Resource Centers have acquired expertise in death penalty litigation, for they are charged primarily with the responsibility of locating counsel to represent death row inmates in their habeas proceedings and with assisting such counsel.) Offices would be established in every state that has a death penalty statute and that opts into this system. Opting in would be prerequisite to obtaining the benefits of any reforms of the habeas rules.

(A) Salaries for these employees would be set by Congress, with one-half the salary being paid by the federal government and one-half to be paid by the state.

(B) In addition, a budget providing for support and investigation would also be created, with the funding coming from Congress and from states with death penalty statutes. The contribution by each state would be adjusted to reflect the demand placed by that state on the system. This demand would be measured primarily by the number of death row prosecutions per year and the number of death row inmates. The

235. I say "potentially" because the merits of the constitutional issue evade review.

236. *See supra* note 4.

237. Congress might enact such a program using its enforcement powers under Section 5 of the Fourteenth Amendment. Congress could presumably condition receipt of federal monies on a state's compliance with this program. *Cf. South Dakota v. Dole*, 483 U.S. 203 (1987).

percent contribution by each state would thus bear a rough similarity to the size of that state's death row population.²³⁸

(C) Lawyers from these offices would not pursue a defendant's direct appeal.²³⁹ The states, however, in order to opt into this system, would be required to demonstrate that indigent capital defendants were also being provided with highly competent appellate counsel.

(D) Even in the infrequent cases where defendants prefer to retain private counsel rather than receive a federal defender, a federal defender would nonetheless be assigned to work with the defendant's private counsel. For the rare cases in which a public defender is not needed, a statutory waiver provision would be established.²⁴⁰

2. States that choose not to opt into this system can obtain a waiver from Congress by demonstrating the existence of a local public defender office that provides reasonably comparable representation. The burden would be on the state to establish equivalence, though it is assumed that systems like those in California, Kentucky, and Miami would satisfy the standard.

3. States either opting into the system or obtaining the waiver would be permitted to avail themselves of the "one bite at the [habeas] apple" proposals, in whatever form they ultimately take.

4. All states with death penalty statutes would be required to permit the capital defendant to waive the right to have a jury impose sentence, even after choosing to have the jury determine innocence versus

238. Under such a system, states like California, Florida, and Texas would contribute more because the size of their death row populations is much larger than most. See NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC., DEATH ROW, U.S.A., Aug. 23, 1991, at 9, 13, 29 (indicating that Texas has the largest death row population (343), with California (305) and Florida (297) close behind).

239. The reason for this is that the process must be amenable to a claim on direct appeal that trial counsel was ineffective. Although the obvious purpose of placing such a premium on trial counsel is to preclude ineffective trial lawyers from representing indigent capital defendants in the first place, the ineffectiveness argument must still be available to the appellate lawyers. Cf. A.B.A. REPORT, *supra* note 32, at 15 (recommending appointment of new appellate counsel because of unlikelihood that trial counsel would raise ineffectiveness challenge).

240. A problem here is that many indigent defendants believe that the private lawyers they can afford to hire will be better than public defenders. This is usually not the case, as the lawyers capital defendants can afford to hire are usually not especially qualified. (The data on Kentucky, for example, bear this out.) Nevertheless, these defendants obviously have the right to choose their own counsel. Yet to insure adequate representation, lawyers from the public defender's office should assist the privately retained counsel. The idea is to ensure that a Horace Butler, for example, receives a federal public defender even if he does not want one. At the same time, the waiver is necessary since we will not need a public defender to shadow someone like Racehorse Haynes.

guilt.²⁴¹ Judges, unlike juries, are aware of the range of crimes that can be prosecuted as capital murder, and a particular defense attorney may believe that the client's crime is not especially lurid. In addition, defense counsel may know the views of a particular judge toward the death penalty.

Even when the defendant elects to have the jury determine the sentence, states must permit defense counsel to place before the jury at the sentencing phase evidence of other crimes that have gone unpunished by the death penalty in that jurisdiction.²⁴² State statutes would have to allow this evidence in order for those states to take advantage of expedited habeas procedures. The jury is a one-shot body, and jurors tend to believe that the facts they are hearing are the most grisly that ever occurred.²⁴³ Hence, heinous murderers succeed in evading the ultimate punishment, whereas more routine murderers are fortuitously condemned.²⁴⁴ In cases where the public defenders so choose, they would be permitted to inform the jury of other cases.²⁴⁵ The narrative would be

241. There might be some doubt about the constitutionality of this proposal, but I am persuaded that the right to a jury trial is an individual right that belongs to the criminal defendant; it is his to waive or invoke. See Dow, *supra* note 185; Akhil R. Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1196 (1991). *But see* Singer v. United States, 380 U.S. 24, 34-36 (1965) (holding that effectiveness of defendant's waiver of right to a jury trial can be conditioned upon consent of prosecuting attorney and trial judge); Patton v. United States, 281 U.S. 276, 312 (1930) (stating in dicta that court and government must consent to defendant's waiver). These cases strike me as patently incorrect. *Cf.* Linda E. Carter, *Maintaining Systemic Integrity in Capital Cases: The Use of Court-Appointed Counsel to Present Mitigating Evidence When the Defendant Advocates Death*, 55 TENN. L. REV. 95 (1987) (arguing against allowing defendant to waive). See generally Duncan v. Louisiana, 391 U.S. 145, 158 (1968) (noting that right to a jury trial is fundamental and that defendant may waive it in many jurisdictions).

242. See FEINBERG, *supra* note 23; KANT, *supra* note 143. *But cf.* van den Haag, *supra* note 146 (arguing that maldistribution of any punishment, including the death penalty, is irrelevant to the penalty's justice or morality).

243. See generally HARRY KALVEN, JR. & HANS ZEISAL, *THE AMERICAN JURY* (1966).

244. See Jack Greenberg, *Against the American System of Capital Punishment*, 99 HARV. L. REV. 1670, 1676 (1986) (citing the example of Charles Manson in arguing that death penalty is often not used on the most heinous criminals).

245. This proposal is in line with the general argument that the sentencing jury should have more information rather than less. The rationale that underlies this particular proposal is not dissimilar from the rationale that permits the defendant to make a plea for mercy without being subject to cross-examination, a device known as a Zola plea. See J. Thomas Sullivan, *Use of the Zola Plea in New Jersey Capital Prosecutions*, 21 SETON HALL L. REV. 3, 56 (1990) (arguing for Zola plea, essentially a plea for mercy, as a means to personalize the capital defendant). Whether particular trial counsel choose to avail themselves of this technique might be an issue not reviewable in subsequent ineffectiveness challenges. On the areas where the standards for capital trial counsel are more definitive, however, see Gary Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U. L. REV. 299 (1983) (discussing obligations of trial counsel); A.B.A. GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF COUNSEL IN DEATH PENALTY CASES (Feb. 1989).

agreed to in advance by the prosecution and defense. The ability of the Supreme Court to distill the ostensibly essential facts in death penalty cases shows that such encapsulations are feasible. The narratives would take the form of the introductory paragraphs that routinely grace Supreme Court opinions in death penalty cases.²⁴⁶

Conclusion

On July 19, 1990, Justices Brennan and Marshall dissented from the denial of the writ of certiorari in the capital case of *Boggs v. Muncy*.²⁴⁷ They filed their usual opinion:

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, we would grant the application for stay of execution in order to give the applicant time to file a petition for a writ of certiorari, and would grant the petition and vacate the death sentence in this case.²⁴⁸

On the following day, Justice Brennan resigned from the Court. Exactly one week later, on July 27, 1990, the Supreme Court denied the stay application and petition for a writ of certiorari in the capital case of *Bertolotti v. Dugger*.²⁴⁹ This time the dissent was different:

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, I would grant the application for stay of execution in order to give the applicant time to file a petition for a writ of certiorari, and would grant the petition and vacate the death sentence in this case.²⁵⁰

The grammar in the boilerplate had changed; it had become singular rather than plural. "My" replaced "our"; "I" replaced "we." For nearly a year, Justice Marshall stood alone. Then, on June 27, 1991, he too retired. The boilerplate has now disappeared entirely. Among the members of the current Court, not a single Justice believes that capital punishment categorically and unequivocally violates the Eighth Amendment's prohibition against cruel and unusual punishment. The Brennan-Marshall view is a minority view as a matter of politics as well as a matter of law, but it is an important view, one that deserves an advocate. Our nation is the only western democracy that sanctions the power of the state to execute its own citizens. And on our highest Court, not a single voice rises up in protest.

246. See, e.g., *Butler v. McKellar*, 494 U.S. 407 (1990); *Saffle v. Parks*, 494 U.S. 484 (1990).

247. 111 S. Ct. 2 (1990).

248. *Id.* (Brennan, J., with Marshall, J., dissenting) (citation omitted).

249. 111 S. Ct. 2 (1990).

250. *Id.* (Marshall, J., dissenting) (citation omitted).

At the same time that we accept this ultimate punishment, however, both our legal and political values counsel caution and extraordinary care. Our values, constitutional and cultural, decry haste and fatuousness. Though we may approve of the imposition of death, we recognize that inflicting this awesome sanction is a serious matter, and the entire process of imposing it must be marked by compunction and solemnity. We betray these essential values when we diminish the gravity of death, when we permit flippant judges to order the execution of indigent defendants who are represented by counsel that is, at best, minimally competent. We mock our Constitution when we rush to judge. What marks our greatness, what distinguishes our culture, what separates "us" from "them" is our values. But currently, in the realm of capital punishment, our values are losing.

