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# NOTE

## FEDERAL HABEAS CORPUS: THE NEW STANDARD OF RETROACTIVITY

### INTRODUCTION

The United States Supreme Court has severely curtailed the availability of federal habeas corpus relief for state capital defendants by limiting their ability to benefit from intervening changes in constitutional law. Although the Constitution neither prohibits nor requires the retroactive application of new constitutional principles,<sup>1</sup> the Court has recognized a "nonretroactivity" defense to claims for relief that are based on new rules of law.<sup>2</sup> The Court's recent retroactivity decisions reveal that the defense has become a major obstacle to federal habeas corpus relief for state petitioners, and for state capital petitioners the obstacle could cost them their lives.

The defense of "nonretroactivity" has been recognized for more than twenty-five years.<sup>3</sup> This defense has been reinforced of late by a new broad standard of retroactivity. State capital petitioners will not be able to benefit from "new"<sup>4</sup> rules of law unless the rule falls into one of two very narrow exceptions.<sup>5</sup> The new doctrine was first established in *Teague v. Lane*<sup>6</sup> and *Penry*

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<sup>1</sup> Linkletter v. Walker, 381 U.S. 618, 629 (1965) ("[T]he Constitution neither prohibits nor requires retrospective effect.").

<sup>2</sup> See JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE 85-90 (Supp. 1989).

<sup>3</sup> See notes 33-38 and accompanying text *infra* for a discussion of the progeny of Linkletter v. Walker, 381 U.S. 618 (1965), the first decision to recognize the defense of "nonretroactivity."

<sup>4</sup> See notes 73, 96-99, 107-17 & 123-27 and accompanying text *infra* for the Court's recent definitions as to what constitutes a "new" rule.

<sup>5</sup> See notes 74-78, 100-01, 118-20 & 128-31 and accompanying text *infra* for the Court's definition and application of the exceptions.

<sup>6</sup> 489 U.S. 288 (1989).

*v. Lynaugh*<sup>7</sup> and has been broadly defined so that its impact on state capital petitioners has been especially harsh. Capital petitioners are denied the benefit of newly announced constitutional rules—rules that could save their lives. This impact is apparent in the cases of *Butler v. McKellar*,<sup>8</sup> *Saffle v. Parks*,<sup>9</sup> and *Sawyer v. Smith*,<sup>10</sup> in each the Court applied and further modified the new retroactivity doctrine.

This Note examines how the new standard of retroactivity has affected the ability of a state capital petitioner to benefit from the federal writ of habeas corpus. Part I of this Note explores the writ's history and competing interpretations of its purpose. Part II discusses the old standard of retroactivity and the development and application of the new standard. Part III analyzes the impact of the new standard on capital petitioners and addresses some of the problems with the Court's retroactivity analysis. Part IV offers a recommendation for legislative action to counteract the effects of the Court's recent decisions in this area. This Note concludes that some form of legislative action is absolutely essential in order for state capital petitioners to obtain federal habeas corpus relief whenever new rules of constitutional law render their convictions or sentences illegal.

## I. THE FEDERAL WRIT OF HABEAS CORPUS FOR STATE PRISONERS

### A. *History of the Writ*

The writ of habeas corpus—the “Great Writ”—has its origins in English common law and has been considered to be “the most celebrated writ in the English law.”<sup>11</sup> Its importance is based on its value as a remedy in all cases of illegal restraint or confinement.<sup>12</sup> In the United States, the Framers embraced the

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<sup>7</sup> 492 U.S. 302 (1989).

<sup>8</sup> 110 S. Ct. 1212 (1990).

<sup>9</sup> 110 S. Ct. 1257 (1990).

<sup>10</sup> 110 S. Ct. 2822 (1990).

<sup>11</sup> 3 WILLIAM BLACKSTONE, COMMENTARIES \*129. See *Fay v. Noia*, 372 U.S. 391, 399-400 (1963) (discussing origins of the writ).

<sup>12</sup> *Fay*, 372 U.S. at 400. There are different forms of the writ of habeas corpus. This Note is concerned with *habeas corpus ad subjiciendum*, the function of which is the “inquiry into illegal detention with a view to an order releasing the petitioner.” *Id.* at 399 n.5. The other forms have functions that are not relevant to this Note; for a discussion of them, see BLACKSTONE, *supra* note 11, at \*\*129-32.

common law notions of habeas corpus in the Constitution<sup>13</sup> as well as in the Judiciary Act of 1789.<sup>14</sup> The Judiciary Act of 1789, however, was not designed for state petitioners—it authorized federal courts to issue writs of habeas corpus to prisoners in federal custody. The specific availability of federal habeas corpus for state petitioners was not addressed until 1867.

The Habeas Corpus Act of 1867 empowered the federal courts to issue writs of habeas corpus “in all cases where any person may be restrained of his or her liberty in violation of the constitution, or of any treaty or law of the United States.”<sup>15</sup> Although the words of the statute appear to be unambiguous, the legislative history reveals little as to the legislative intent behind its enactment.<sup>16</sup> Thus, there have been various interpretations as to the proper scope of the writ.

From 1867 until the 1930s, federal habeas relief for state petitioners was generally limited to cases in which the state statute defining the offense or the punishment was unconstitutional or the conviction or sentence was void for lack of jurisdiction.<sup>17</sup> Although it was established that federal habeas corpus relief could be granted when a state petitioner had been denied a federally protected constitutional right, from the 1930s until the 1950s various procedural obstacles to relief made the consideration of

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<sup>13</sup> See U.S. CONST. art. I, § 9, cl. 2 (“The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.”).

<sup>14</sup> Ch. 20, 1 Stat. 73 (1789) (codified at 28 U.S.C. §§ 1-1631 (1982)). Section 14 of the Judiciary Act provides, in part:

[E]ither of the justices of the supreme court, as well as judges of the district courts, shall have the power to grant writs of habeas corpus for the purpose of an inquiry into the cause of commitment.

Ch. 20, § 14, 1 Stat. 73, 82.

<sup>15</sup> Ch. 28, 14 Stat. 385, 385 (1867) (current version codified at 28 U.S.C. §§ 2241-2255 (1982)). Section 2254(a) provides:

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

28 U.S.C. § 2254(a) (1982). See generally WILLIAM F. DUKER, A CONSTITUTIONAL HISTORY OF HABEAS CORPUS, 189-94 (1980).

<sup>16</sup> See DUKER, *supra* note 15, for an overview of the congressional history of The Habeas Corpus Act of 1867.

<sup>17</sup> See generally DONALD E. WILKES, JR., FEDERAL AND STATE POSTCONVICTION REMEDIES AND RELIEF 23-24 (1983) (discussing Supreme Court decisions regarding the scope of the writ).

habeas petitions on the merits rare.<sup>18</sup> A more expansive implementation of the writ was not practiced until the 1960s.<sup>19</sup>

The Warren Court enlarged the number of federal rights available for state defendants, removed various procedural obstacles to habeas relief, and expanded the scope of review of the federal courts.<sup>20</sup> This expansion of the writ lasted until the early 1970s, when the Burger Court began to restrict the availability of federal habeas corpus relief. The Burger Court narrowed the scope of federally protected rights and generally expanded the number and reach of various obstacles to relief.<sup>21</sup> The Rehnquist Court has continued this trend of establishing procedural barriers to the federal habeas corpus remedy, as is apparent in the Court's recent retroactivity decisions.<sup>22</sup> These differing interpre-

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<sup>18</sup> See *id.* Cf. *Brown v. Allen*, 344 U.S. 443 (1953) (state petitioners who were one day late in appealing their state conviction were barred from federal habeas review of their cases because they failed to demonstrate that the delay resulted from "lack of counsel, incapacity, or some interference by officials").

<sup>19</sup> See generally WILKES, *supra* note 17, at 23-24.

<sup>20</sup> *Id.* Cf. *Fay v. Noia*, 372 U.S. 391 (1963) (state prisoner's failure to appeal from a conviction was not an intelligent and understanding waiver of his right to appeal so as to justify the withholding of federal habeas corpus relief); *Townsend v. Sain*, 372 U.S. 293 (1963) (evidentiary hearing required in federal habeas corpus proceeding challenging the validity of a state conviction). *Fay* effectively overruled *Brown*. See note 22 *infra*.

<sup>21</sup> See generally WILKES, *supra* note 17, at 23-24. Cf. *Engle v. Issac*, 456 U.S. 107 (1982) (state prisoners who failed to make timely objection under state rule to the correctness of jury instructions could not litigate their claim in a federal habeas corpus proceeding without a showing of cause for and actual prejudice from the failure to object); *Wainwright v. Sykes*, 433 U.S. 72 (1977) (state prisoner who failed to make timely objection under state rule to the admission of inculpatory statements could not litigate that claim in a federal habeas corpus proceeding without showing cause for and actual prejudice from the noncompliance); *Francis v. Henderson*, 425 U.S. 536 (1976) (state prisoner who failed to make timely challenge under state rule to the composition of the grand jury that indicted him could not litigate that claim in a federal habeas corpus proceeding without showing of cause for and actual prejudice from the failure to challenge). Taken together these cases effectively overruled *Fay*. See note 22 *infra*.

<sup>22</sup> See notes 139-58 and accompanying text *infra* for a discussion of the impact of the new standard of retroactivity. See also Timothy J. Foley, *The New Arbitrariness: Procedural Default of Federal Habeas Corpus Claims in Capital Cases*, 23 LOY. L.A. L. REV. 151, 193, 195 (1989) (discussing the Rehnquist Court's continuation of the Burger Court's legacy of constructing barriers to the assertion of claims presented in federal habeas actions); Larry W. Yackle, *Explaining Habeas Corpus*, 60 N.Y.U. L. REV. 991, 993-96 (1985) (explaining the existence of federal habeas corpus review in spite of the lack of enthusiasm of the Court for the writ in general).

In its 1991 term the Rehnquist Court erected yet another procedural barrier to the federal habeas corpus remedy. In *Coleman v. Thompson*, 111 S. Ct. 2546 (1991), the Court denied a state capital petitioner federal habeas corpus review of his case because the petitioner's lawyer had filed the state habeas corpus petition three days late. 111 S.

tations of the scope and availability of the writ spring from different conceptions of the purpose of the writ.

### B. *The Purpose of the Writ: Competing Interpretations*

The determination of the purpose of the federal writ of habeas corpus directly affects the availability of the writ for state petitioners. If the primary purpose of the writ is to ensure that the individual is free from restraints contrary to fundamental law, then the scope of the writ will be interpreted broadly.<sup>23</sup> On the other hand, if the primary purpose is to ensure that the state courts abide by federal constitutional standards, the scope of the writ will be interpreted more narrowly.<sup>24</sup> These competing values of individual liberty and federalism have shaped the habeas corpus debate.

The habeas debate can be framed as a cost-benefit analysis: the costs to state sovereignty and state resources versus the benefit of protecting individual rights by providing the individual with a federal forum.<sup>25</sup> The debate has intensified because federal habeas corpus is the only means by which federal judges can hear constitutional challenges to state convictions and

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Ct. at 2552-53. The Court determined that this constituted "procedural default" and that federal habeas corpus review of the petitioner's claim was barred because the petitioner was unable to demonstrate cause for and actual prejudice from the late filing. See *id.* at 2565. The Court has thus resuscitated *Brown v. Allen*, 344 U.S. 443 (1953), and has officially departed from the theory espoused in *Fay v. Noia*, 372 U.S. 391 (1963). See 111 S. Ct. at 2561-66. See also notes 18 & 20 *supra*.

Although the 6-3 opinion in *Coleman* was written by Justice O'Connor, with Justices Blackmun, Marshall and Stevens dissenting, it is interesting to note that subsequently Justice O'Connor, along with Justice Stevens, joined a statement by Justice Blackmun written in response to a refusal by the Court to hear an appeal strikingly similar to that in *Coleman*. The statement urged the federal courts to consider carefully substantial federal claims and afford a meaningful federal habeas review where necessary. See *O'Dell v. Thompson*, 112 S. Ct. 618 (1991) See also Linda Greenhouse, *In Shift, O'Connor Urges Appeal in Murder Case*, N.Y. TIMES, Dec. 3, 1991, at B10.

<sup>23</sup> The Warren Court's expansion of the writ was based on its view that "Habeas lies to enforce the right of personal liberty; when that right is denied and a person confined, the federal court has the power to release him." *Fay*, 372 U.S. at 430-31.

<sup>24</sup> The Burger Court's restriction of habeas corpus was based on the fact that it was "not as concerned as the Warren Court was with the possibility that governmental power may be abused, or individual rights violated . . . . The Burger Court [was] preoccupied with assuring . . . that amicable federal-state relations [were] not disturbed . . . ." WILKES, *supra* note 17, at 24.

<sup>25</sup> See notes 132-38 and accompanying text *infra* for a discussion of the Court's balancing, or lack thereof, of these competing concerns in its new retroactivity analysis.

sentences;<sup>26</sup> without this federal forum state prisoners are limited to appealing their convictions directly within their own state court systems.<sup>27</sup> The divergent opinions on the habeas debate result from the differing views as to the proper balance between the needs of the state and those of the individual.

Critics of a broad interpretation of habeas corpus claim that the "finality" of state judgments is undermined by both the delay involved and the fact that federal review threatens to overturn a conviction which has been affirmed by the state's highest court.<sup>28</sup> According to this view, federal-state comity is of extreme importance; although it is important to deter state courts from unconstitutional decision making through the threat of federal habeas review, federal intrusion must be limited. These

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<sup>26</sup> Not only is this the only way for judges in the federal district courts and courts of appeals to hear such challenges, but in addition, the Supreme Court's original jurisdiction with regard to granting habeas corpus review is rather limited:

[T]he jurisdiction conferred on [the Supreme Court] to issue writs of habeas corpus in aid of its appellate jurisdiction . . . is discretionary and [the] Court does not, save in exceptional circumstances, exercise it in cases where an adequate remedy may be had in a lower federal court, or, if the relief sought is from the judgment of a state court, where the petitioner has not exhausted his remedies in the state courts.

*Ex parte Abernathy*, 320 U.S. 219 (1943) (per curiam) (citations omitted). Generally, all state remedies must be exhausted before federal habeas corpus relief can be granted. Section 2254 contains the following exhaustion requirement:

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

28 U.S.C. § 2254(b) (1988). According to § 2254, "An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State, to raise, by any available procedure, the question presented." 28 U.S.C. § 2254(c). The exhaustion requirement relates to the time the application for § 2254 relief is filed: the convicted person must have satisfied the exhaustion requirement by the time of filing. See *WILKES*, *supra* note 17, at 147. See also note 38 *infra* for a discussion of state and federal remedies.

<sup>27</sup> Of course a state petitioner may ultimately appeal to the United States Supreme Court, but this does not ensure that the Court will hear the challenge. See 28 U.S.C. § 1257 (defines the limited circumstances in which the Court will grant a review on writ of certiorari). And, as this Note will demonstrate, the ability to appeal to the Supreme Court is meaningless for the state prisoner who bases her challenge on a new rule of constitutional law that did not exist at the time her conviction became final. See notes 68-131 and accompanying text *infra*.

<sup>28</sup> See generally Yackle, *supra* note 22, at 1010-19 (discussing the criticisms of federal habeas corpus for state petitioners).

critics argue that the deterrence function can be accomplished by requiring that states comply with only those constitutional standards which are unambiguous at the time the defendant's conviction became final.<sup>29</sup> Thus, the state's reliance on prevailing law will be protected, while at the same time, state courts will be given an incentive to fulfill the primary purpose of habeas corpus: to ensure that state courts observe constitutional standards.

Habeas defenders assert that the protection of individual rights requires federal review, and therefore federal courts must have the final say on federal issues.<sup>30</sup> According to this view, states must abide by constitutional standards, even if those standards are unclear at the time of conviction. Thus, decisions must be overturned if the Supreme Court's ultimate decision on the issue differs from that of the state.<sup>31</sup> The defenders believe that this view of the deterrence function adequately fulfills the primary purpose of habeas corpus: to protect the state defendant from unconstitutional convictions.<sup>32</sup>

The habeas debate is an ongoing one; because the scope of federal habeas corpus relief is shaped by the differing views on the purpose of the writ, the debate will inevitably continue. The debate is particularly intense in the retroactivity context. Because the retroactive application of a new rule of constitutional law to a state petitioner's case on federal habeas corpus review may be the key to a reversal of the state conviction, habeas critics and defenders naturally hold strong views on when new rules of law should be retroactively applied.

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<sup>29</sup> Cf. *Sawyer v. Smith*, 110 S. Ct. 2822, 2830 (1990) ("Federal habeas corpus serves to ensure that state convictions comport with the *federal* law that was established at the time the petitioner's conviction became final."); *Desist v. United States*, 394 U.S. 244, 262-63 (1969) (Harlan, J., dissenting) ("[T]he threat of habeas serves as a necessary additional incentive for [state] courts . . . [to abide by] constitutional standards; this 'deterrent function' is served by applying standards which prevailed at the time of the original proceedings.").

<sup>30</sup> See generally Yackle, *supra* note 22 (discussing the defenses to the criticisms of federal habeas corpus for state petitioners).

<sup>31</sup> See LIEBMAN, *supra* note 2, at 104-05 ("[T]he only meaningful way to give [states] an incentive to treat ambiguous questions of federal constitutional law responsibly . . . is to require state-level decisions to be remade whenever they deviate from the decision the Supreme Court ultimately renders on the question.).

<sup>32</sup> See *id.* at 105.



## II. HABEAS CORPUS AND THE STANDARD OF RETROACTIVITY

### A. *The Old Standard: Linkletter and its Progeny*

To understand the new standard of retroactivity announced by the Rehnquist Court in the 1989 and 1990 terms, it is necessary to understand the evolution of the old standard. The Court recognized the defense of "nonretroactivity" in 1965, in *Linkletter v. Walker*.<sup>33</sup> In *Linkletter* the issue was whether the Fourth Amendment exclusionary rule of *Mapp v. Ohio*<sup>34</sup> should apply to state convictions that had become final before *Mapp* was decided.<sup>35</sup> The Court applied a three-factor balancing approach in determining whether to retroactively apply the exclusionary rule. The three factors were: (1) the purpose to be served by the new standard; (2) the extent of reliance by law enforcement authorities on the old standard; and (3) the effect on the administration of justice of a retroactive application of the new standard.<sup>36</sup> The *Linkletter* Court balanced the factors and decided that the *Mapp* rule did not require retroactive application.<sup>37</sup> The Court would thereafter apply the *Linkletter* approach on a case-by-case basis. Shortly after *Linkletter*, the Court held that this analysis applied both to convictions that were final and to convictions pending on direct review.<sup>38</sup>

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<sup>33</sup> 381 U.S. 618 (1965).

<sup>34</sup> 367 U.S. 643 (1961) (state courts were required to exclude evidence seized in violation of the search and seizure provisions of the Fourth Amendment).

<sup>35</sup> The Court explained that "final" meant that the judgment of conviction had been rendered, the availability of appeal had been exhausted, and the time for petition of certiorari had elapsed. *Linkletter*, 381 U.S. at 622 n.5.

<sup>36</sup> *Stovall v. Denno*, 388 U.S. 293, 297 (1967); *Linkletter*, 381 U.S. at 636. Whereas *Linkletter* first applied a three-factor balancing approach, *Stovall* consolidated the analysis into a "three-prong test" but did not alter its substantive terms.

<sup>37</sup> *Linkletter*, 381 U.S. at 637-38. The Court decided that the purpose of the *Mapp* rule would not be advanced by making the rule retroactive, that the states had relied upon the old standard, and that to make the rule retroactive would "tax the administration of justice to the utmost." *Id.* The Court therefore held that "[a]fter full consideration of all the factors we are not able to say that the *Mapp* rule requires retrospective application." *Id.* at 640.

<sup>38</sup> *Johnson v. New Jersey*, 384 U.S. 719, 732 (1966). A conviction is pending on direct review when "trial remedies" or "appellate remedies" have not yet been exhausted. See WILKES, *supra* note 17, at 3-4. These remedies can include state remedies, federal remedies, or both. *Id.* A conviction is final when the ordinary methods of direct review have been exhausted, or the allowable time to exercise these methods has passed. See note 35 *supra* for the *Linkletter* Court's definition of "final." A final conviction can be challenged by resorting to a "postconviction remedy," also called a "collateral remedy." See WILKES, *supra* note 17, at 3-4. A case is on collateral review when it is before a court

Although the Court would employ the *Linkletter* approach for twenty-two years,<sup>39</sup> a conflict existed within the Court on the applicability of the approach to cases on direct and collateral review.<sup>40</sup> Justice Harlan's dissent in *Desist v. United States*<sup>41</sup> and concurrence in *Mackey v. United States*<sup>42</sup> were evidence of his frustration with the *Linkletter* approach and its failure to treat differently the retroactive application of rules for cases on direct and collateral review. Justice Harlan argued that in deciding whether to apply a rule retroactively, the determining factor should be the procedural stance of the case and not the purpose of the new rule in question.<sup>43</sup> According to Justice Harlan, "'Retroactivity' must be rethought."<sup>44</sup> Justice Harlan's arguments for change in the area of retroactivity were to be adopted, although gradually, by the majority of the Court in the years to follow.

Justice Harlan advocated treating differently cases on direct and collateral review. According to Justice Harlan, courts should resolve all cases on direct review in accordance with existing governing constitutional principles.<sup>45</sup> And, as a general rule,

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in order to consider a previous, and otherwise final, judgment. Postconviction remedies can be state or federal. This Note is concerned with the collateral remedy of federal habeas corpus. See also note 26 *supra* for a discussion of the federal habeas corpus requirement of exhaustion—which generally includes the exhaustion of state direct and postconviction remedies before the federal writ can be granted.

<sup>39</sup> See notes 60-62 and accompanying text *infra*.

<sup>40</sup> See note 38 *supra* for a definition of direct and collateral review.

<sup>41</sup> 394 U.S. 244, 256-69 (1969). The majority, employing the *Linkletter* approach, refused to give retroactive application to a "new" rule regarding the reach of the Fourth Amendment to a case on direct review. Justices Douglas and Fortas also dissented, each writing separately. In his dissent, Justice Harlan introduced his theory concerning the retroactive treatment of new constitutional rules to cases on direct and collateral review. See notes 45-58 and accompanying text *infra*.

<sup>42</sup> 401 U.S. 667, 675-702 (1971). The majority, employing the *Linkletter* approach, held that a "new" rule regarding the Fifth Amendment did not apply retroactively to a case on collateral review. Justices Brennan and Marshall concurred in the judgment, and Justices Douglas and Black dissented. Justice Harlan concurred in the judgment only, and wrote a separate opinion to further explain and modify the theory that he first introduced in his *Desist* dissent, concerning the retroactive application of new constitutional rules to cases on direct and collateral review. See notes 45-58 and accompanying text *infra*.

<sup>43</sup> See *Mackey*, 401 U.S. at 682 (Harlan, J., concurring) ("[T]he relevant frame of reference, in other words, is not the purpose of the new rule whose benefit the petitioner seeks, but instead the purposes for which the writ of habeas corpus is made available.").

<sup>44</sup> *Desist*, 394 U.S. at 258 (Harlan, J., dissenting).

<sup>45</sup> See *Mackey*, 401 U.S. at 679 (Harlan, J., concurring); *Desist*, 394 U.S. at 259

courts should resolve all cases on collateral review in accordance with the law prevailing at the time the conviction became final.<sup>46</sup> According to Justice Harlan, there should be two exceptions to this general rule. First, new rules that place certain kinds of primary conduct beyond the power of the criminal law-making power to proscribe should be applied retroactively.<sup>47</sup> Second, the retroactive application of a new rule should occur where there are "claims of nonobservance of those procedures that . . . are 'implicit in the concept of ordered liberty.'"<sup>48</sup>

Justice Harlan originally defined the second exception more narrowly in *Desist*, in terms of a "truth-determining test," which provided that "all 'new' constitutional rules which significantly improve the pre-existing fact-finding procedures are to be retroactively applied on habeas."<sup>49</sup> However, in *Mackey*, Justice Harlan abandoned the view that a rule must go to the accuracy of the conviction to be retroactively applied.<sup>50</sup> Justice Harlan explained that this modification resulted from his realization that the exception must reflect the purpose of habeas, which is "to inquire into every constitutional defect in any criminal trial, where the petitioner remains 'in custody' because of the judgment . . . ."<sup>51</sup> Justice Harlan therefore modified the exception because he realized that the inquiry as to innocence or guilt was not a purpose of the writ; the retroactive application of a new rule on habeas should not be determined solely by whether or

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(Harlan, J., dissenting) (finding that general principles of adjudication require courts to rule upon every decisive issue raised by the parties on direct review because there are no countervailing state interests to be considered when convictions are not yet final).

<sup>46</sup> See *Mackey*, 401 U.S. at 682 (Harlan, J., concurring); *Desist*, 394 U.S. at 260-61 (Harlan, J., dissenting) (finding that habeas corpus review involves different concerns than direct review, and finality concerns must be considered). This is typical of the deterrent theory embraced by critics of habeas corpus who generally favor the state's interest in finality over the individual's interest in obtaining relief. They would narrow the scope of the availability of the writ. See notes 28-29 and accompanying text *supra*.

<sup>47</sup> *Mackey*, 401 U.S. at 692-93 (Harlan, J., concurring). Justice Harlan gave as an example "[n]ew 'substantive due process' rules [that] free[] individuals from punishment for conduct that is constitutionally protected." *Id.*

<sup>48</sup> *Id.* at 693 (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)). Justice Harlan explained that this exception would require a conviction to be "fundamentally fair and conducted under those procedures essential to the substance of a full hearing." *Mackey*, 401 U.S. at 693. See notes 53-56 and accompanying text *infra*.

<sup>49</sup> *Desist*, 394 U.S. at 262 (Harlan, J., dissenting).

<sup>50</sup> *Mackey*, 401 U.S. at 694 (Harlan, J., concurring).

<sup>51</sup> *Id.* at 685.

not the new rule improves fact-finding procedures.<sup>52</sup>

Under the modified exception, federal courts would retroactively apply rules which ensure that convictions are "fundamentally fair and conducted under those procedures essential to the substance of a full hearing."<sup>53</sup> According to Justice Harlan, a "fundamentally fair" conviction was one that resulted from procedures that were "in accordance with the command of the Fourteenth Amendment."<sup>54</sup> Justice Harlan believed that the application of this exception would vary as societal and judicial values were altered over time and that the exception would have to be "worked out in the context of actual cases."<sup>55</sup> Thus, although Justice Harlan's general rule of nonretroactivity narrowed the scope of the availability of the writ, the modified exception broadened the scope of the writ in certain situations by allowing federal courts to apply retroactively those rules that implicate "fundamental fairness." Justice Harlan's modification is important because the Court would later adopt Justice Harlan's theory without the modification, thus narrowing the scope of availability considerably.<sup>56</sup>

Justice Harlan's theory was only applicable when a rule was new, and he recognized that it is difficult to discern whether a decision has established a new rule or whether it has simply applied a well-established constitutional principle to an analogous case.<sup>57</sup> Although Justice Harlan offered no decisive guidance on this complex issue, he did note that where the meanings of a fundamental principle are "altered slowly and subtly . . . [i]t appears very difficult to argue against the application of the 'new' rule in all habeas cases since one could never say with any

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<sup>52</sup> *Id.* at 694 ("[I]t is not a principal purpose of the writ to inquire whether a criminal convict did in fact commit the deed alleged.").

<sup>53</sup> *Id.* at 693.

<sup>54</sup> *Id.* at 689. The Fourteenth Amendment provides, in part, that "No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. XIV, § 1.

<sup>55</sup> *Mackey*, 401 U.S. at 693-94 (Harlan, J., concurring). Justice Harlan cited, as an example, *Gideon v. Wainwright*, 372 U.S. 335 (1963) (holding that a defendant's right to counsel at trial is a necessary condition precedent to any conviction for a serious crime). Justice Harlan would apply *Gideon* on habeas, even to convictions made final before that decision was rendered. Interestingly, *Gideon* was also cited by the *Parks* Court as an example of a rule that implicates both fairness and accuracy. *Saffle v. Parks*, 110 S. Ct. 1257, 1263-64 (1990). See note 120 *infra*.

<sup>56</sup> See notes 76-78 *infra*.

<sup>57</sup> *Desist v. United States*, 394 U.S. 244, 263 (1969) (Harlan, J., dissenting).

assurance that this Court would have ruled differently at the time the petitioner's conviction became final."<sup>58</sup> The difficulty of determining whether or not a rule is new continues to plague the Court in its formulation of the new standard of retroactivity.<sup>59</sup>

In 1987, in *Griffith v. Kentucky*,<sup>60</sup> the Court finally held that cases on direct review would be treated differently from those on collateral review for purposes of retroactivity. In *Griffith* the Court adopted Justice Harlan's theory with regard to cases on direct review, although the Court still applied the *Linkletter* balancing approach to cases on collateral review.<sup>61</sup> In 1989 the Court accepted Justice Harlan's theory for cases on collateral review, albeit in a modified form, in *Teague v. Lane*.<sup>62</sup>

### B. *The New Standard: Teague and its Progeny*

*Teague v. Lane* established a new standard of retroactivity for state habeas petitioners.<sup>63</sup> This new standard not only severely restricts the ability of state petitioners to obtain the benefit of new rules, but also greatly limits any meaningful review of their habeas claims on the merits. In the same term, *Penry v. Lynaugh*<sup>64</sup> broadened the scope of the *Teague* decision to include capital petitioners, although the rule in question in *Penry* was declared not to be new and therefore the petitioner obtained the benefit of the rule in question. It was not until the 1990

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<sup>58</sup> *Id.* at 263-64.

<sup>59</sup> See notes 73, 96-99, 107-17 & 123-27 and accompanying text *infra* for the Court's recent definitions of what constitutes a new rule.

<sup>60</sup> 479 U.S. 314 (1987).

<sup>61</sup> *Griffith*, 479 U.S. at 316 ("In Justice Harlan's view, and now in ours, failure to apply a newly declared constitutional rule to criminal cases pending on direct review violates basic norms of constitutional adjudication."). The Court was expanding, with some modification, its holding in *United States v. Johnson*, 457 U.S. 537 (1982) (holding that new decisions regarding the Fourth Amendment would be applied retroactively to all convictions not yet final at the time the new rule is rendered). The *Griffith* Court also removed an exception that the *Johnson* Court had recognized, in which there would be no retroactive application in cases where the rule was a "clear break with the past." See *Johnson*, 457 U.S. at 549. According to the *Griffith* Court, "a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a 'clear break' with the past." *Griffith*, 479 U.S. at 328.

<sup>62</sup> 489 U.S. 288 (1989). See notes 74-78 and accompanying text *infra* for the *Teague* plurality's adoption and modification of Justice Harlan's theory.

<sup>63</sup> 489 U.S. at 299-310.

<sup>64</sup> 492 U.S. 302 (1989).

term, with *Butler v. McKellar*,<sup>65</sup> *Saffle v. Parks*,<sup>66</sup> and *Sawyer v. Smith*,<sup>67</sup> that the true impact of the new standard on the ability of state capital petitioners to obtain federal habeas review of their cases on the merits became apparent. In each of these three cases, the capital petitioner was unable to obtain relief because of the new retroactivity standard.

### 1. The Creation of the New Standard

In *Teague v. Lane* a plurality of the Court adopted Justice Harlan's approach to retroactivity for cases on collateral review.<sup>68</sup> *Teague* involved a habeas petitioner who urged the Court to apply retroactively the benefit of a rule of law that was announced by the Court after the petitioner's conviction had become final.<sup>69</sup> The plurality, adopting a new standard of retroactivity *sua sponte*, concluded that, "Retroactivity is properly treated as a threshold question, for, once a new rule is applied to the defendant in the case announcing the rule, even-handed justice requires that it be applied retroactively to all who are similarly situated."<sup>70</sup> The plurality therefore would not apply a new rule to the defendant at hand unless all who were in the same situation as the defendant would also gain the benefit of the

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<sup>65</sup> 494 U.S. 407 (1990).

<sup>66</sup> 494 U.S. 484 (1990).

<sup>67</sup> 110 S. Ct. 2822 (1990).

<sup>68</sup> *Teague v. Lane*, 489 U.S. 288, 292 (1989). The *Teague* opinion gained the support of only four members of the Court for those parts of the opinion in which the Court announced and applied the new retroactivity standard; the central opinion was written by Justice O'Connor and joined by Justices Scalia, Rehnquist, and Kennedy. Justices White, Blackmun and Stevens did not join in the announcement and application of the new standard, although they joined in the judgment. Justice Brennan wrote the dissent, joined by Justice Marshall.

<sup>69</sup> *Teague* urged the Court to apply *Batson v. Kentucky*, 476 U.S. 79 (1986), retroactively, a case that made it easier for a defendant to make out a *prima facie* case of racial discrimination under the Equal Protection Clause by diminishing the necessary evidentiary showing. See *Teague*, 489 U.S. at 295-96; *Batson*, 476 U.S. at 96. The Court applied its new retroactivity analysis. See notes 70-78 and accompanying text *infra*. Because the Court decided that the rule *Teague* sought to have applied was "new" and the rule did not meet either of the two exceptions to nonretroactivity, the Court denied *Teague* relief. *Teague*, 489 U.S. at 317.

<sup>70</sup> *Teague*, 489 U.S. at 300. Justice Brennan criticized the Court for raising the issue *sua sponte*. *Id.* at 333 (Brennan, J., dissenting) ("[T]he rationale for our decisions has not been undermined by subsequent congressional or judicial action. . . . I therefore remain mystified at where the plurality finds warrant to upset, *sua sponte*, our time-honored precedents.").

rule.<sup>71</sup> Furthermore, according to the plurality, because the issue of retroactivity is a threshold question, a federal court should not reach the merits of a case if the court has determined that the rule will not be retroactively applied.<sup>72</sup> Retroactivity only becomes an issue if the rule is new. According to the *Teague* plurality, "a case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government," or if "the result was not dictated by precedent existing at the time the defendant's conviction became final."<sup>73</sup> The plurality incorporated Justice Harlan's views regarding the general nonretroactivity of new rules to cases on collateral review, along with his original two exceptions.<sup>74</sup>

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<sup>71</sup> *Id.* at 316. Justice Brennan criticized this approach:

[A]lthough a favorable decision for a petitioner might not extend to another prisoner whose identical claim has become final, it is at least arguably better that the wrong done to one person be righted than that none of the injuries inflicted on those whose convictions have become final be redressed, despite the resulting inequality in treatment.

*Id.* at 339 (Brennan, J., dissenting). This part of the decision has also been criticized for being dishonest because the plurality does tolerate the disparate treatment between petitioners on direct and collateral review by allowing defendants on direct review to receive the benefit of all new rules even though the procedural stance of the petitioner's cases may be the result of pure chance. See notes 60-61 and accompanying text *supra* for the Court's treatment of cases on direct review under *Griffith v. Kentucky*, 479 U.S. 314 (1987). See also LIEBMAN, *supra* note 2, at 122-23 (suggesting that *Teague* will adversely affect petitioners who applied for federal habeas relief at the same time but were at different stages in their appeals when the plurality handed down its decision, and further, that perhaps *Teague* itself should not be retroactively applied to cases already final before it was decided because it is itself a "new" rule); *The Supreme Court, 1988 Term-Leading Cases*, 103 HARV. L. REV. 137, 294-96 (1989) (arguing that the sharp distinction between direct and collateral review may not be warranted because of irrelevant considerations that can affect the rate of progress of a case, such as a court reporter catching a cold).

<sup>72</sup> *Teague*, 489 U.S. at 316. The plurality's treatment of retroactivity as a threshold question before reaching the merits of a habeas claim was sharply criticized by other members of the Court. In his concurrence, Justice Stevens, joined by Justice Blackmun, stated that "the plurality invert[ed] the proper order of adjudication . . . [U]ntil a rule is set forth, it would be extremely difficult to evaluate whether the rule is 'new' at all." *Id.* at 319 n.2. According to Justice Brennan, who was joined in his dissent by Justice Marshall, "the plurality [precludes] the federal courts from considering on collateral review a vast range of important constitutional challenges; where those challenges have merit, it would bar the vindication of personal constitutional rights . . ." *Id.* at 326-27. See also notes 143-49 and accompanying text *infra* for a further discussion of the problems of treating retroactivity as a threshold question and of separating rules from the cases to which they relate.

<sup>73</sup> *Id.* at 301.

<sup>74</sup> *Id.* at 307-10.

The first exception adopted by the *Teague* plurality was that "a new rule should be applied retroactively if it places 'certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe.'" <sup>75</sup> The second exception allowed retroactive effect for "watershed rules of criminal procedure," which were defined as "those new procedures without which the likelihood of an accurate conviction is seriously diminished." <sup>76</sup> The plurality did not adopt Justice Harlan's modification of this exception, which had removed the requirement that a rule must go to the accuracy of the conviction in order to meet the exception. <sup>77</sup> The Court's narrow definition of fundamental fairness in terms of accuracy means that there will be fewer new rules that can be retroactively applied, therefore resulting in fewer instances in which a state habeas corpus petitioner will benefit from a new rule of constitutional law. <sup>78</sup>

After *Teague* the Court applied its retroactivity analysis in the capital sentencing context in *Penry v. Lynaugh*. <sup>79</sup> In *Penry* a

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<sup>75</sup> *Id.* at 311 (quoting *Mackey v. United States*, 401 U.S. 667, 692 (1971)) (Harlan, J., concurring). The plurality did not alter the first Harlan exception. See note 47 and accompanying text *supra*.

<sup>76</sup> 489 U.S. at 311, 313.

<sup>77</sup> *Id.* at 312 ("We believe it desirable to combine the accuracy element of the *Desist* version of the second exception with the *Mackey* requirement that the procedure at issue must implicate the fundamental fairness of the trial"). See notes 49-56 *supra* for a discussion of Justice Harlan's modification.

<sup>78</sup> The plurality conceded that "[b]ecause we operate from the premise that such procedures would be so central to an accurate determination of innocence or guilt, we believe it unlikely that many such components of due process have yet to emerge." *Id.* at 313. This limitation on the scope of the second exception was sharply criticized by other members of the Court. In his concurrence, Justice Stevens, joined by Justice Blackmun, stated that "[t]he plurality wrongly resuscitates Justice Harlan's early view, indicating that the only procedural errors deserving correction on collateral review are those that undermine 'an accurate determination of innocence or guilt. . . .'" *Id.* at 321. Additionally, Justice Brennan, in his dissent, joined by Justice Marshall, stated that "the plurality's decision to . . . link the availability of relief to guilt or innocence when the outcome of a case is not 'dictated' by precedent would apparently prevent a great many Fifth, Sixth, and Fourteenth Amendment cases from being brought on federal habeas." *Id.* at 334. Justice White, although he wrote separately, did not comment on this departure from Harlan's modification. See notes 153-58 & 176-83 and accompanying text *infra* for a further discussion of this exception, as well as possible legislative reform.

<sup>79</sup> 492 U.S. 302, 313 (1989). See *Teague*, 489 U.S. at 314 n.2 (plurality noted that although the issue before the Court did not involve a capital petitioner, the analysis would be properly applied in capital cases). But see *id.* at 321 n.3 (Stevens, J., concurring) (noting that finality concerns were inapplicable to the capital sentencing context).



majority of the Court firmly established the *Teague* plurality's views.<sup>80</sup> The capital petitioner in *Penry* claimed that the Texas death penalty statute, as applied in his case, was unconstitutional because the sentencing jury had not been allowed to consider fully and give effect to all of the mitigating evidence.<sup>81</sup> The Court held that granting petitioner's request for relief did not involve the application of a new rule. The rule that *Penry* sought to be applied, that, upon request, Texas juries must be given instructions that allow them to give effect to mitigating evidence in determining whether a defendant should be sentenced to death, was dictated by precedent and did not impose a new obligation on the state of Texas.<sup>82</sup>

The dissent, by Justice Scalia, vigorously attacked the majority for its reading of *Teague* with regard to what constitutes a new rule.<sup>83</sup> According to the dissent, "a 'new rule' . . . must include not only a new rule that replaces an old one, but a new rule that replaces palpable uncertainty as to what the rule might be."<sup>84</sup> According to Justice Scalia, therefore, the rule in *Penry*

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<sup>80</sup> *Penry*, 492 U.S. at 313-15. Justice O'Connor wrote the opinion and Justices Brennan, Marshall, Blackmun and Stevens joined in the judgment. Although Justice O'Connor also wrote the opinion in *Teague*, her opinion in *Penry* was joined only by the Justices who had refused to join the *Teague* plurality. See note 68 *supra*. In *Penry* the Court employed the *Teague* analysis; the primary disagreement within the Court concerned the issue of whether or not the rule that *Penry* sought to have applied was new.

<sup>81</sup> There was a second and unrelated issue in the case: whether it was "cruel and unusual punishment, prohibited by the Eighth amendment, to execute a mentally retarded person . . . with [petitioner's] reasoning capacity . . ." *Id.* at 328. This issue is not relevant to this Note, except for its minor modification of the first *Teague* exception to also cover "rules prohibiting a certain category of punishment for a class of defendants because of their status or offense." *Id.* at 330. The Court held that although this second issue would involve the creation and application of a new rule, the first exception was applicable; but, upon reaching the merits, the Court declined to announce such a rule. *Id.* at 330.

<sup>82</sup> *Id.* at 315-19. According to the Court, it was clear at the time of petitioner's conviction that *Lockett v. Ohio*, 438 U.S. 586 (1978), and *Eddings v. Oklahoma*, 455 U.S. 104 (1982), prohibited a state from "prevent[ing] the sentencer from considering and giving effect to evidence relevant to the defendant's background or character or to the circumstances of the offense that mitigates against imposing the death penalty." *Penry*, 492 U.S. at 318.

<sup>83</sup> *Id.* at 351-60 (Scalia, J., concurring in part and dissenting in part). Although Justice Scalia joined the parts with regard to the application of *Teague* to the capital sentencing context, he disagreed with the holding that the rule in question was not new.

<sup>84</sup> *Id.* at 352. According to Justice Scalia, "[I]f *Teague* does not apply to a claimed 'inherency' as vague and debatable as that in the present case, then it applies only to habeas requests for plain overruling . . ." *Id.* at 353. In the 1990 term, Justice Scalia would be assured that this was not true—that *Teague* would indeed apply to a broad

was new because it was neither dictated nor compelled by precedent, and the Court's holding therefore demonstrated that "*Teague* [was] adopted and gutted in the same Term."<sup>85</sup>

## 2. The Application of the Standard to Capital Petitioners: The *Butler-Parks-Sawyer* Trilogy

Although the dissenters in *Penry* were disturbed by the decision, they formed the majority in *Butler v. McKellar*, *Saffle v. Parks*, and *Sawyer v. Smith*, and applied the *Teague* analysis to deny the application of a new rule to a state capital petitioner in each case.<sup>86</sup> The Court not only embraced the reasoning of the *Teague* plurality on the definition of a new rule, it extended the analysis and declared, "The 'new rule' principle . . . validates reasonable, good-faith interpretations of existing precedents made by state courts even though they are shown to be contrary to later decisions."<sup>87</sup>

As a result of *Butler*, *Parks*, and *Sawyer* a federal court that reviews a state capital petitioner's application for federal habeas corpus relief must first determine the threshold question of whether or not the rule sought to be applied is capable of retroactive application.<sup>88</sup> The court will not consider the merits of the case unless the rule is capable of retroactive application.<sup>89</sup> If the rule is not clearly dictated by precedent and state courts could not have reasonably anticipated it, the court will declare it to be new and will not apply it retroactively unless one of two

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range of situations. Cf. *Butler v. McKellar*, 110 S. Ct. 1212, 1222 (1990) (Brennan, J., dissenting) ("Under the definition of 'prevailing law' embraced today, federal courts may not entertain habeas petitions challenging state-court rejections of constitutional claims unless those state decisions are clearly erroneous."). See notes 86-131 and accompanying text *infra* for the Court's most recent retroactivity decisions.

<sup>85</sup> *Penry*, 492 U.S. at 353 (Scalia, J., concurring in part and dissenting in part).

<sup>86</sup> Justice Rehnquist wrote the opinion in *Butler v. McKellar*, and Justice Kennedy wrote the opinions in *Saffle v. Parks* and *Sawyer v. Smith*. Justices White, O'Connor, and Scalia joined all three opinions, and Justice Brennan wrote dissents for all three decisions and was joined in each one by Justices Marshall, Blackmun, and Stevens.

<sup>87</sup> *Butler v. McKellar*, 494 U.S. 407 (1990). This is the view embraced by habeas critics, those who adopt the narrow view of the scope of habeas corpus. This view posits that state court final judgments should be interfered with only under limited circumstances, thus expressing a high regard for federal-state comity. See notes 28-29 and accompanying text *supra*.

<sup>88</sup> *Teague v. Lane*, 489 U.S. 288, 300-01 (1989).

<sup>89</sup> *Id.* at 316.

narrow exceptions is met.<sup>90</sup> The Court's application of the exceptions in *Butler*, *Parks*, and *Sawyer* demonstrates that the exceptions can be difficult, if not almost impossible, to meet. Thus most petitioners will be denied the benefit of new rules and will have to suffer the consequences of their convictions—in some cases death. The Court's interpretation of the retroactivity analysis in these cases may result in the execution of a prisoner who could not constitutionally be convicted on the law as it exists today.

In *Butler* a capital petitioner sought to have the Court retroactively apply the rule announced in *Arizona v. Roberson*,<sup>91</sup> which barred police-initiated interrogation following a suspect's request for counsel in the context of a separate investigation.<sup>92</sup> *Roberson* was decided on the same day that *Butler*'s conviction became final.<sup>93</sup> The Court held that *Roberson* had announced a new rule since its result had not been dictated by precedent existing at the time *Butler*'s conviction became final, and the Court denied *Butler* habeas relief.<sup>94</sup>

*Butler* contended that *Roberson* was not a new rule, because the *Roberson* Court had said that *Roberson*'s case was directly controlled by *Edwards v. Arizona*,<sup>95</sup> which was decided before

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<sup>90</sup> *Id.* at 311-14; *Butler*, 110 S. Ct. at 1217-18.

<sup>91</sup> 486 U.S. 675 (1988).

<sup>92</sup> *Id.* *Roberson* was arrested for burglary and after the arresting officer informed him of his constitutional rights, *Roberson* requested an attorney and chose to remain silent. *Id.* at 678. While *Roberson* was in custody, another officer interrogated him about a second and unrelated burglary. *Id.* After this officer informed *Roberson* of his rights, *Roberson* gave an incriminating statement with regard to the second burglary. *Id.* The Court held that the interrogation regarding the second burglary was barred by *Roberson*'s earlier request for counsel on the initial burglary charge. *Id.*

<sup>93</sup> It is clear that *Butler*'s situation would have been covered by *Roberson*'s restrictions if *Roberson* had been decided before *Butler*'s case became final on direct review. *Butler* was arrested on an assault and battery charge, for which he requested and retained an attorney. *Butler*, 110 S. Ct. at 1214. While in custody, *Butler* was informed that he was a suspect in a separate murder investigation. *Id.* at 1215. After receiving *Miranda* warnings, *Butler* signed waiver of rights forms and made incriminating statements during the police interrogation that followed. *Id.* Under *Roberson* the police interrogation concerning the murder would have been barred by *Butler*'s earlier request for counsel on the assault and battery charge.

<sup>94</sup> 110 S. Ct. at 1217-18.

<sup>95</sup> 451 U.S. 477 (1981). In *Edwards* the Court held that "when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing that he responded to further police-initiated custodial interrogation even if he has been advised of his rights." *Id.* at 484-85. In *Edwards* the second interrogation involved the same offenses as the first interrogation. *Id.*

Butler's conviction became final. The *Butler* Court responded by stating that "the fact that a court says that its decision is within the 'logical compass' of an earlier decision, or indeed that it is 'controlled' by a prior decision, is not conclusive for purposes of deciding whether the current decision [was] a 'new rule' under *Teague*."<sup>96</sup> In addition, the fact that other courts reached "reasonable contrary conclusions" on the same issue is evidence that the rule is new and not "dictated by precedent."<sup>97</sup> The Court emphasized its deference to state court decisions as it applied its analysis to the case at hand:

That the outcome in *Roberson* was susceptible to debate among reasonable minds is evidenced further by the differing positions taken by [various lower courts] . . . . It would not have been an illogical or even a grudging application of *Edwards* to decide that it did not extend to the facts of *Roberson*.<sup>98</sup>

According to the Court, "The 'new rule' principle . . . validates reasonable, good-faith interpretations of existing precedents made by state courts even though they are shown to be contrary to later decisions."<sup>99</sup> Since the Court concluded that *Roberson* was indeed a new rule, the Court next inquired whether one of the two *Teague* exceptions to nonretroactivity had been met.

The first exception was deemed "clearly inapplicable" because *Roberson* had not proscribed the prosecution of murder nor had it addressed any "categorical guarantees accorded by the Constitution."<sup>100</sup> The second exception was deemed similarly inapplicable because "a violation of *Roberson*'s added restrictions on police investigatory procedures would not seriously diminish the likelihood of obtaining an accurate determination" of innocence or guilt.<sup>101</sup>

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at 478-79.

<sup>96</sup> *Butler*, 110 S. Ct. at 1217.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* at 1217-18.

<sup>99</sup> *Id.* at 1217. Justice Brennan criticized the majority for its broad definition of a new rule. See *id.* at 1225 (Brennan, J., dissenting) ("[T]he Court's decision today denies federal courts the role on habeas review that Congress envisioned because it limits them to remedying only clearly unreasonable state-court applications of federal law, rather than all erroneous ones.").

<sup>100</sup> *Id.* at 1218 (quoting *Penry v. Lynaugh*, 109 S. Ct. 2934 (1989)). See note 81 *supra*.

<sup>101</sup> *Butler*, 110 S. Ct. at 1218. The Court added that in this case a violation of *Roberson*'s added restrictions might actually increase the likelihood of an accurate determi-

Butler's death sentence therefore remained intact because the guarantees of *Roberson* were new and did not fall within a special exception for those new rules that should be retroactively applied to cases on collateral review. However, *Butler* did not clarify when it is that a rule is not new or suggest what types of new rules may be given retroactive effect. *Parks* and *Sawyer* did not clear up these issues; what they did make clear was the Court's strong commitment to nonretroactivity as a defense to the request for federal habeas corpus relief. Additionally, *Parks* and *Sawyer* revealed that sentencing procedures, like police interrogations, are not likely to fall within either of the nonretroactivity exceptions.

In *Parks* a capital petitioner contended that the antisympathy instruction delivered in the penalty phase of his trial amounted to constitutional error.<sup>102</sup> According to *Parks*, the instruction in effect told the jury to disregard the mitigating evidence that he had presented, in violation of the Eighth Amendment as interpreted by *Lockett v. Ohio*<sup>103</sup> and *Eddings v. Oklahoma*,<sup>104</sup> both decided before his conviction became final.<sup>105</sup> *Parks* contended that the result he sought, that "jurors be allowed to base the sentencing decision upon the sympathy they feel for the defendant after hearing his mitigating evidence," did not involve the creation of a new rule.<sup>106</sup> The Court disagreed. The Court held that the principle *Parks* sought involved the creation of a new rule as defined in both *Teague* and *Butler*.<sup>107</sup>

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nation of innocence or guilt. *Id.*

<sup>102</sup> 110 S. Ct. 1257, 1259 (1990). The following was the challenged instruction: "You are the judges of the facts . . . You must avoid any influence of sympathy, sentiment, passion, prejudice or other arbitrary factor when imposing sentence." *Parks v. Brown*, 840 F.2d 1496, 1503-04 (10th Cir. 1987), *aff'd*, 110 S. Ct. 1257 (1990).

<sup>103</sup> 438 U.S. 586, 605 (1978) (the sentencer may not be precluded from considering, as a mitigating factor, any aspect of a defendant's character that is proffered as a basis for a sentence less than death).

<sup>104</sup> 455 U.S. 104, 113-15 (1982) (state conviction vacated because state court refused to allow the sentencer to consider defendant's unhappy upbringing and emotional disturbance as a mitigating circumstance).

<sup>105</sup> *Parks*, 110 S. Ct. at 1258-60 (1990).

<sup>106</sup> *Id.* at 1260.

<sup>107</sup> *Id.* Additionally, the Court could not announce the new rule that *Parks* sought because of the *Teague* plurality's declaration that it would "refuse to announce a new rule in a given case unless the rule would be applied retroactively to the defendant in the case at hand and to all others similarly situated." *Teague v. Lane*, 489 U.S. 288, 316 (1989). See also *Penry v. Lynaugh*, 492 U.S. 302, 313 (1989) ("Under *Teague*, new rules will not be applied or announced in cases on collateral review unless they fall into one of

The Court concluded that neither *Lockett* nor *Eddings* dictated the result urged by Parks because the issues in those cases differed from the issue before the Court.<sup>108</sup> Those cases dealt with *what* mitigating evidence the jury must be permitted to consider, and Parks's claim dealt with *how* the jury must consider mitigating evidence.<sup>109</sup> According to the Court, because the issue presented was different, it followed that the state courts which rejected challenges similar to Parks's were not unreasonable in doing so.<sup>110</sup> The Court noted that its "task [was] to determine whether a state court considering Parks' claim at the time his conviction became final would have felt compelled by existing precedent to conclude that the rule Parks [sought] was required by the Constitution."<sup>111</sup> According to the Court, the rule was not so compelled and therefore was new.<sup>112</sup>

Parks had also contended that the reasoning in *California v. Brown*,<sup>113</sup> decided after his conviction became final, was applicable to his case because *Brown* specifically discussed *how* evi-

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two exceptions.").

<sup>108</sup> According to the majority:

[T]here is no dispute as to the precise holding in each of the two cases: that the State cannot bar relevant mitigating evidence from being presented and considered during the penalty phase of a capital trial.

*Lockett* and *Eddings* do not speak directly, if at all, to the issue presented here: whether the State may instruct the sentencer to render its decision on the evidence without sympathy.

*Id.* at 1261.

<sup>109</sup> *Id.* The Court also compared the claim here with that in *Penry*, where the relief sought did not call for the creation of a new rule. *Penry* was commanded by precedent, because the issue there was whether or not mitigating evidence could be given any effect at all. *Id.* at 1261-62. See notes 79-82 and accompanying text *supra*.

<sup>110</sup> *Id.* at 1261. According to the dissent, this reliance on state courts was misplaced. See *id.* at 1265 (Brennan, J., dissenting) ("the Court's novel 'reasonableness' review of state court convictions is incompatible with the fundamental purposes of habeas corpus").

<sup>111</sup> *Id.* at 1260.

<sup>112</sup> *Id.* at 1261. ("Even were we to agree with Parks' assertion that our decisions . . . inform, or even control or govern, the analysis of his claim, it does not follow that they compel the rule that Parks seeks."). In his dissent, Justice Brennan accused the majority of mischaracterizing Parks's claim. According to Justice Brennan, Parks's argument was that the jury could have misinterpreted the antisympathy instruction as barring a consideration of mitigating evidence. *Id.* at 1265 (Brennan, J., dissenting). The issue would therefore be *what* evidence the jury must consider, and not *how* the jury must consider mitigating evidence, and would fall within the ambit of *Lockett* and *Eddings*. *Id.* at 1266.

<sup>113</sup> 479 U.S. 538 (1987) (antisympathy instruction during penalty phase of capital trial that prevented jurors from considering emotional responses not based on the evidence did not violate the Constitution).

dence must be considered.<sup>114</sup> Although the Court in *Brown* approved an antisympathy instruction that prevented jurors from considering emotional responses not based on the evidence, Parks argued that the jury instruction in this case was distinguishable and dictated a different result.<sup>115</sup> The Court was skeptical whether *Brown* was even pertinent to Parks's claim;<sup>116</sup> nevertheless, even if *Brown* was pertinent, Parks could not gain any benefit from *Brown*. *Brown* was decided after Parks's conviction had become final, and the Court found that *Brown* was not dictated by precedent because no past cases were relevant to that issue.<sup>117</sup> It was a new rule.

Since the relief Parks sought was inevitably based on a new rule, the Court investigated the *Teague* exceptions.<sup>118</sup> The first exception was deemed inapplicable, because the rule did not "place a class of private conduct beyond the power of the state to proscribe," nor did the rule "prohibit a certain category of punishment on a particular class of persons."<sup>119</sup> The second exception was also deemed inapplicable because "the objectives of fairness and accuracy [were] 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."<sup>120</sup> The Court therefore

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<sup>114</sup> *Parks*, 110 S. Ct. at 1263. In *Brown*, the judge instructed the jury not to be "swayed by 'mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling.'" *Brown*, 479 U.S. at 542.

<sup>115</sup> According to the Court:

Parks' argument relies upon a negative inference: because we concluded in *Brown* that it was permissible under the Constitution to prevent the jury from considering emotions not based upon the evidence, it follows that the Constitution requires that the jury be allowed to consider and give effect to emotions that are based upon mitigating evidence.

*Parks*, 110 S. Ct. at 1263.

<sup>116</sup> *Id.* ("[W]e doubt that this inference follows from *Brown* or is consistent with our precedents.").

<sup>117</sup> The Court again distinguished the issue of *what* evidence the jury must consider from the issue of *how* the jury must consider it; because *Lockett* and *Eddings* dealt with the former issue and *Brown* dealt with the latter, those cases did not dictate the result in *Brown*. See *id.*

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* at 1263-64. The Court cited *Gideon v. Wainwright*, 372 U.S. 335 (1963), which held that a defendant had the right to be represented by counsel in all criminal trials for serious offenses, as an example of the type of rule that would fall within this second

would not overturn Parks's death sentence because this would have required the retroactive application of a new rule, and the method by which sentencing juries consider mitigating evidence was not the kind of rule that deserved retroactive effect. *Parks* signified that the Court would closely scrutinize rules which implicate sentencing procedures and would hesitate to give such rules retroactive effect.

*Sawyer* not only continued the nonretroactivity trend of *Parks*, but it also demonstrated the Court's unwillingness to broaden the exceptions to nonretroactivity to meet the needs of state capital petitioners. In *Sawyer* a capital petitioner claimed that the prosecutor's closing argument violated the Eighth Amendment by diminishing the jury's sense of responsibility for the capital sentencing decision.<sup>121</sup> *Sawyer* relied on *Caldwell v. Mississippi*,<sup>122</sup> decided one year after *Sawyer*'s conviction became final, which held that the Eighth Amendment prohibits the imposition of the death sentence by a sentencer that has been led to the false belief that the responsibility for determining the appropriateness of a capital sentence rests elsewhere. The Court held that *Caldwell* was a new rule.<sup>123</sup>

According to the Court, *Caldwell* was the first case to invalidate a prosecutorial argument as impermissible under the Eighth Amendment.<sup>124</sup> At the time that *Sawyer*'s conviction became final, there had been indications in the Court's decisions that the *Caldwell* rule was not required by the Eighth Amendment.<sup>125</sup> Even though state courts may have been incorrect in

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exception. *Id.* Interestingly, Justice Harlan cited the same case in *Mackey* when he modified this exception to eliminate the "accuracy" requirement. See note 55 *supra*.

In his dissent, Justice Brennan argued that capital sentencing procedures should fall within this exception because the refusal to apply this exception to a capital sentencing error was "remarkably insensitive to the fundamental premise upon which our Eighth Amendment jurisprudence is built." *Id.* at 1269. See notes 166-70 *infra* for a discussion of "death is different" arguments.

<sup>121</sup> 110 S. Ct. 2822, 2825 (1990). The following were among the challenged remarks: "The law provides that if you find [aggravating] circumstances then what you are doing as a juror, you yourself will not be sentencing Robert Sawyer to the electric chair" and "All you are saying is that this man from his actions could be prosecuted to the fullest extent of the law. No more and no less." *Id.*

<sup>122</sup> 472 U.S. 320 (1985).

<sup>123</sup> *Sawyer v. Smith*, 110 S. Ct. 2822, 2826 (1990).

<sup>124</sup> *Id.* at 2828.

<sup>125</sup> *Id.* at 2828-29. However, according to Justice Brennan, the rule that *Sawyer* sought to have applied was not new at all. See *id.* at 2834 (Brennan, J., dissenting) ("The



their characterization of these decisions, it was because the courts were not put on notice; there was some reason for doubt as to how the Court would eventually decide the issue.<sup>126</sup> While there were state courts that did prohibit prosecutorial comments such as those in *Caldwell*, this did not support the notion that the rule was not new, since state courts do not inform the Court's decisions or impose standards upon the Court.<sup>127</sup>

Looking to the *Teague* exceptions to nonretroactivity, the Court noted that the first exception was inapplicable because the rule which Sawyer sought to have applied was not one which "place[d] an entire category of primary conduct beyond the reach of the criminal law," nor did the rule "prohibit imposition of a certain type of punishment for a class of defendants because of their status or offense."<sup>128</sup> With regard to the second exception, Sawyer contended that it should have been read to include new rules of capital sentencing that improve the accuracy and fairness of capital sentencing judgments.<sup>129</sup> The Court rejected this reading of the exception.<sup>130</sup> The Court was unwilling to expand the scope of this exception; according to the Court, "It [was] difficult to see any limit to the definition of the second exception if cast as proposed by petitioner."<sup>131</sup> The *Sawyer* Court thus made it clear that it would not expand the reach of this exception because to do so would weaken the nonretroactivity defense.

### 3. The Present Standard and the "Habeas Debate"

From *Teague* to *Sawyer* the Supreme Court's habeas debate has raged. The members of the Court who support the new stan-

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roots of the *Caldwell* rule can be traced directly to this Court's Eighth Amendment decisions demanding heightened reliability in capital sentencing.").

<sup>126</sup> *Id.* at 2828-29.

<sup>127</sup> *Id.* at 2830-31.

<sup>128</sup> *Id.* at 2831.

<sup>129</sup> *Id.* Although Justice Brennan did not agree that the rule was new, see note 125 *supra*, he argued in the alternative that even if it were new the second exception should have applied because the accuracy of the sentencing jury's determination was undermined by virtue of the prosecutorial comments. *Sawyer*, 110 S. Ct. at 2838-41 (Brennan, J., dissenting).

<sup>130</sup> *Id.* at 2831-32. According to the Court, "In practical effect, petitioner asks us to overrule our decision in *Penry* that *Teague* applies to new rules of capital sentencing. This we decline to do." *Id.* at 2832.

<sup>131</sup> *Id.* at 2831-32.

dard of retroactivity in each case emphasized the views of the critics of habeas corpus. These critics advocate a narrow scope of the writ and focus on the protection of the state interest and how this interest will be furthered or hindered by the retroactive application of the new rule.<sup>132</sup> This focus was so strong in the recent cases that the importance of ensuring the rights of the individual was not even mentioned as a supplementary purpose.<sup>133</sup> There was no discussion of a "balance" that must be struck between competing objectives.

On the other hand, the members of the Court who disagreed with the new standard of retroactivity stressed the role of individual rights as the primary purpose of habeas corpus.<sup>134</sup> According to the dissenters, while concerns for state sovereignty are not irrelevant, they cannot form the sole basis for the writ.<sup>135</sup> It is therefore true that state courts need only adjudicate cases on the basis of prevailing law, but "prevailing law" must not be defined too narrowly.<sup>136</sup> The dissenters contended that state courts must be encouraged to adjudicate federal claims not only

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<sup>132</sup> The majority opinions of *Butler*, *Parks*, and *Sawyer* demonstrate the Court's preoccupation with the state courts' interpretations of existing law. This is apparent in the Court's repeated declaration that the "new rule" principle "validate[s] reasonable, good-faith interpretations of existing precedents made by state courts even though they are shown to be contrary to later decisions." *Sawyer*, 110 S. Ct. at 2827; *Saffle v. Parks*, 110 S. Ct. 1257, 1260 (1990); *Butler v. McKellar*, 110 S. Ct. 1212, 1217 (1990).

<sup>133</sup> The majority opinions stressed the needs of the state courts upon federal habeas review without considering the other party that exists in every habeas proceeding—the defendant. The entire retroactivity analysis was focused on the state courts and not at all on the individuals for whom the writ was initially designed.

<sup>134</sup> See, e.g., *Sawyer* 110 S. Ct. at 2833 (1990) (Brennan, J., dissenting) ("I continue to regard the Court's effort to curtail the scope of federal habeas as inconsistent with Congress's intent."); *Parks*, 110 S. Ct. at 1265 (1990) (Brennan, J., dissenting) ("the Court's novel 'reasonableness' review of state court convictions is incompatible with the fundamental purposes of habeas corpus."); *Butler*, 110 S. Ct. at 1225 (Brennan, J., dissenting) ("[T]oday's decision . . . overrides Congress' will and leaves federal judicial protection of fundamental constitutional rights during the state criminal process solely to this Court upon direct review.").

<sup>135</sup> See *Butler*, 110 S. Ct. at 1226 (Brennan, J., dissenting) ("This Court has never held . . . that finality, standing alone, provides a sufficient reason for federal courts to compromise their protection of constitutional rights under § 2254' . . . until today.") (quoting *Reed v. Ross*, 468 U.S. 1, 15 (1984)).

<sup>136</sup> See *Butler*, 110 S. Ct. at 1222 (Brennan, J., dissenting) ("[A]djudication according to prevailing law means far more than obeying precedent by perfunctorily applying holdings in previous cases to virtually identical fact patterns. Rather, such adjudication requires a judge to evaluate both the content of previously enunciated legal rules and the breadth of their application.").

in accordance with existing precedent but with the principles that underlie existing precedent.<sup>137</sup> The dissenters criticized the majority for defeating the "purpose" of federal habeas corpus—to both ensure that state courts abide by established constitutional standards and provide state petitioners with a remedy for unlawful state deprivations of their federally protected rights.<sup>138</sup>

The debate within the Court over the present retroactivity standard thus reflects the traditional habeas debate over the primary purpose of the writ. This is apparent in the majority's and the dissent's differing emphases on the interests of the state and the individual in the determination of the proper standard of retroactivity for cases on collateral review. This debate is far from academic for the state capital petitioner: the way the Court has resolved the habeas debate on retroactivity could mean the difference between life and death.

### III. THE IMPACT OF THE NEW STANDARD

The application of the new standard of retroactivity in *Butler*, *Parks* and *Sawyer* reveals the tension between the new standard of retroactivity and the situation that confronts state capital petitioners. The application of the *Teague-Perry* analysis to *Butler*, *Parks* and *Sawyer* demonstrates how states can carry out death sentences that, although once valid, could not be imposed today because of subsequent rulings. In Justice Brennan's view, the application of the retroactivity analysis to capital cases means that "despite constitutional defects in the state processes leading to their conviction or sentencing, state prisoners . . . will die . . . because state courts were reasonable, even though wrong."<sup>139</sup> Nonetheless, in *Butler*, *Parks* and *Sawyer* the Court did not focus on the fact that the petitioners were facing the death penalty, except to note that *Perry* extended the *Teague* analysis to cover both capital and noncapital cases.<sup>140</sup>

Although *Perry* extended the *Teague* analysis to capital cases, the petitioner in *Perry* was able to benefit from the con-

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<sup>137</sup> See *Butler*, 110 S. Ct. at 1221-23 (Brennan, J., dissenting).

<sup>138</sup> *Id.* at 1224.

<sup>139</sup> *Butler*, 110 S. Ct. at 1225-26 (Brennan, J., dissenting).

<sup>140</sup> *Sawyer v. Smith*, 110 S. Ct. 2822, 2832 (1990); *Saffle v. Parks*, 110 S. Ct. 1257, 1261 (1990); *Butler*, 110 S. Ct. at 1216.

stitutional rule in question because the rule was held not to be new.<sup>141</sup> According to Justice Brennan in his *Parks* dissent, "The Court display[ed] undue eagerness to apply the new standard for retroactivity . . . at the expense of thoughtful legal analysis. I cannot countenance such carelessness when a life is at stake."<sup>142</sup> Not until *Butler*, *Parks* and *Sawyer* did a capital petitioner suffer because of the "new rule" analysis. These cases uncover how restrictions on the availability of habeas corpus can be particularly devastating for the capital petitioner.

The restrictions on habeas corpus created by the new retroactivity analysis are particularly problematic for several reasons. First, the Court's treatment of retroactivity as a threshold question is problematic because federal courts will often not reach the merits of habeas claims.<sup>143</sup> The constitutional issue involved in a habeas petition, for example the assurance of an individual's constitutional rights, often implicates concerns other than finality, but the the treatment of retroactivity as a threshold question allows the federal habeas court to ignore these other concerns.<sup>144</sup> This is harmful to state habeas petitioners who have valid constitutional claims—especially those petitioners facing death row. In the words of Justice Brennan, "under the guise of fine-tuning the definition of 'new rule,' the Court strips state prisoners of virtually *any* meaningful federal review of the constitutionality of their incarceration."<sup>145</sup> Accordingly, the Court strips capital petitioners of a meaningful review of the constitutionality of their executions.<sup>146</sup>

Second, although a federal court will address the merits of a habeas claim if the rule is capable of retroactive application, the "retroactivity threshold" is a tough one for state petitioners to meet: a petitioner's constitutional claims must either involve

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<sup>141</sup> See *Sawyer v. Butler*, 881 F.2d 1273, 1287-88 (5th Cir. 1989), *aff'd*, 110 S. Ct. 2822 (1990) (discussing the *Teague/Penry* analysis, and how these two cases left the "new rule" inquiry in a state of flux).

<sup>142</sup> *Parks*, 110 S. Ct. at 1264 (Brennan, J., dissenting).

<sup>143</sup> See notes 70-72 and accompanying text *supra*.

<sup>144</sup> See *Teague v. Lane*, 489 U.S. 288, 327 (Brennan, J., dissenting) (this method of analysis "stymies the resolution of substantial and unheralded constitutional questions").

<sup>145</sup> *Butler v. McKellar*, 110 S. Ct. 1212, 1219 (1990) (Brennan, J., dissenting).

<sup>146</sup> See *Marcia Coyle et. al., High Court's Divide Deepens on Death Penalty*, NAT'L L.J., May 7, 1990, at 5 (expressing concern about the Court's elevation of procedure over constitutional merits in capital cases).

rules that are not new or, if the rules involved are new, they must be recognized by an exception. Federal courts will not generally apply new rules retroactively, and with the Court's broad definition of a "new rule," the courts may declare most, if not all, rules to be new. The Court's exceptions to the general rule of nonretroactivity thus become extremely important because the exceptions may provide the only method by which a federal court will be able to review the merits of a state capital petitioner's claim; unfortunately, the exceptions are also limited in scope and may not enable a federal court to reach the merits.

When examining whether a "new rule" can be retroactively applied through one of the two exceptions to the general rule, the Court examines the new rule apart from the particular facts of the case under review.<sup>147</sup> The exceptions "apply to rules that *in the run of cases* affect reliability or fairness, irrespective of whether the rule would have that effect in the particular case before the Court."<sup>148</sup> The court will look at the type of rule to determine if the rule meets the exception; if the rule does not meet the exception the court will not look at the factual setting of a case to see if the petitioner's situation is deserving of retroactive application.<sup>149</sup> The problem is intensified for the state capital petitioner who attempts to gain the benefit of a new rule which implicates the constitutional validity of her conviction or sentence because the application of one of these exceptions may be the only way for her to avoid death. Moreover, because the exceptions are so narrowly defined, they offer little solace to the capital petitioner.

The first exception, which applies to "rules that place an entire category of primary conduct beyond the reach of the

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<sup>147</sup> See LIEBMAN, *supra* note 2, at 118 (both exceptions are "rule—not petitioner—specific"). See also note 72 *supra* for a discussion of the problems of considering rules separately from the cases to which they relate.

<sup>148</sup> *Id.*

<sup>149</sup> The Court ran afoul of Justice Harlan's admonition that exceptions to the general rule of nonretroactivity should take into consideration the facts of actual cases. See *Mackey v. United States*, 401 U.S. 667, 694 (1971) (Harlan, J., concurring) ("Other possible exceptions to the finality rule I would leave to be worked out in the context of actual cases brought before us that raise the issue."). See also *Butler v. McKellar*, 110 S. Ct. 1212, 1224 (1990) (Brennan, J., dissenting) ("[T]he federal court must determine for itself the proper scope of constitutional principles and their application to the particular factual circumstances.").

criminal law to proscribe,"<sup>150</sup> is not as controversial as the second exception, which applies to new "watershed rules of criminal procedure," rules "without which the likelihood of an accurate conviction would be seriously diminished."<sup>151</sup> Both exceptions are extremely difficult to meet, but the first one is not as controversial because it is clear and not frequently invoked. It has not been significantly altered since Justice Harlan first recognized it as an exception in *Desist* and further refined it in *Mackey*.<sup>152</sup> The second exception is particularly controversial because it specifically focuses on new rules that improve fact-finding and ignores other types of new rules that serve different, although equally important, goals.<sup>153</sup> The second exception does not recognize that certainty as to the guilt of the defendant is not dispositive of whether the defendant's conviction or sentence has been fairly rendered.<sup>154</sup> Using factual innocence as a guide is particularly inappropriate when applied to capital petitioners. In *Butler* the new rule that Butler sought to apply concerned the constitutional validity of his confession, but the Court decided that this should be subordinated because he had admitted his guilt.<sup>155</sup> Additionally, in the capital sentencing context a fundamentally unfair sentencing process may have occurred regardless of the petitioner's conviction. In *Parks* the Court would not announce and retroactively apply a rule that affected the jury's ability to consider mitigating evidence because the value of such a rule was outweighed by the fact that Parks was guilty and may have been "morally deserving of the death sentence."<sup>156</sup> And in *Sawyer* the Court would not retroac-

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<sup>150</sup> See note 75 and accompanying text *supra*.

<sup>151</sup> See notes 76-78 and accompanying text *supra*.

<sup>152</sup> See notes 47 & 75 and accompanying text *supra*.

<sup>153</sup> See *Leading Cases*, *supra* note 71, at 298 ("Teague ignores the difficulty in distinguishing between those new constitutional rules directed towards improving factfinding and those designed to further other important values.").

<sup>154</sup> See Bruce Fein & William B. Reynolds, *High Court Closes Door on Mixed Session*, *LEGAL TIMES*, July 9, 1990, at 18 (discussing the general trend of the Court to circumscribe the grounds for attacking convictions when the guilt of the accused is not in doubt).

<sup>155</sup> See *Butler v. McKellar*, 110 S. Ct. 1212, 1218 (1990) (the Court stated that a violation of the rule in question might actually increase the accuracy of the conviction). See also *Saffle v. Parks*, 110 S. Ct. 1257, 1263-64 (1990) (the Court stated that fairness and accuracy were more likely to be threatened than promoted by the application of the new rule).

<sup>156</sup> *Parks*, 110 S. Ct. at 1264 (Brennan, J., dissenting).

tively apply a new rule which was "designed as an enhancement of the accuracy of capital sentencing," indicating that the Court will distinguish rules which enhance the accuracy of the sentencing phase of a trial from rules which enhance the accuracy of the guilt phase of a trial.<sup>157</sup> Needless to say, a penalty of death is different from all other sentences in terms of severity and irreversibility, and it is important that fairness and reliability are ensured as to both the conviction and the imposition of the death sentence.<sup>158</sup>

Under the Court's new retroactivity analysis, a state capital petitioner must confront not only the possible denial of her request for federal habeas corpus relief, but even more painful, must first confront the possibility that the reviewing court will not even address the merits of her case. The court will analyze the rule she seeks to apply independent of her particular claims. If the rule is not new, or if the new rule happens to fit within one of the narrow exceptions to the general standard of nonretroactivity for cases on collateral review, the court will review the merits of her case. However, with the analysis as it now stands, this will be the rare case.

#### IV. RECOMMENDATIONS FOR LEGISLATIVE ACTION

The Court's "bright-line retroactivity rule,"<sup>159</sup> as established in *Teague* and *Penry* and applied in *Butler*, *Parks* and *Sawyer* is extremely controversial. Aside from the typical issues involved in the habeas debate, habeas defenders have attacked the inappropriate way in which the Court has reached its decisions. The dissenters claim that the Court's decisions have been reached "at the expense of thoughtful legal analysis"<sup>160</sup> and have been propelled by "[r]esult, not reason."<sup>161</sup> The Court has been consistent in erecting barriers to state petitioners' attainment of federal habeas corpus relief,<sup>162</sup> and the Court seems to have reached its recent retroactivity decisions with this goal in mind.

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<sup>157</sup> *Sawyer v. Smith*, 110 S. Ct. 2822, 2832 (1990).

<sup>158</sup> See generally George W. Sherrell, Note, *Successive Chances for Life: Kuhlmann v. Wilson, Federal Habeas Corpus and the Capital Petitioner*, 64 N.Y.U. L. REV. 455, 475 (1989).

<sup>159</sup> *Leading Cases*, *supra* note 71, at 297.

<sup>160</sup> *Parks*, 110 S. Ct. at 1264 (Brennan, J., dissenting).

<sup>161</sup> *Butler v. McKellar*, 110 S. Ct. 1212, 1219 (1990) (Brennan, J., dissenting).

<sup>162</sup> See notes 21-22 and accompanying text *supra*.

Retroactivity has been transformed—but without a method of principled decision making.<sup>163</sup>

Now that the Court has spoken, it is essential for Congress to amend the statute providing federal habeas corpus review for state petitioners in order to protect state capital petitioners from the new standard of retroactivity. If Justice Brennan is correct in his assessment that “the Court has finally succeeded in its thinly veiled crusade to eviscerate Congress’ habeas corpus regime,”<sup>164</sup> Congress must take action. Justice White, in his *Teague* concurrence, stated, “If we are wrong in construing the reach of the habeas corpus statutes, Congress can of course correct us . . . .”<sup>165</sup> It is time for new legislation on the availability of federal habeas corpus for state petitioners.

Change is necessary. The question is how this change should be accomplished in order to alleviate the plight of capital habeas petitioners. The basic problem is that the current retroactivity analysis is a strict standard which defines a new rule in broad terms and generally denies the state petitioner relief based on new rules, and further provides only very narrow and unaccommodating exceptions which do not even ensure that petitioners will receive a meaningful review of their claims. This is especially problematic for capital petitioners. Any changes in the retroactivity standard must address this problem; there are a few potential solutions.

One solution would be to accept the *Teague* analysis but make it inapplicable to capital petitioners.<sup>166</sup> While concerns about delays in the enforcement of sentences and the state’s interest in finality are important, some have argued that such concerns should give way in the capital case, and capital prisoners should obtain the benefit of every announced constitutional rule.<sup>167</sup> Although habeas relief may involve burdens on the

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<sup>163</sup> See *Leading Cases*, *supra* note 71, at 295 (attacking the *Teague* plurality’s transformation of retroactivity as “misguided and counterproductive” with regard to the general concerns of fairness and finality).

<sup>164</sup> *Butler*, 110 S. Ct. at 1219 (Brennan, J., dissenting).

<sup>165</sup> *Teague v. Lane*, 489 U.S. 288, 317 (1989) (White, J., concurring).

<sup>166</sup> This is the proposal of the Civil Rights Committee of the Association of the Bar of the City of New York, made before *Butler*, *Parks* and *Sawyer* were decided. See LIEBMAN, *supra* note 2, at 125 (discussing Civil Rights Committee of the Association of the Bar of the City of New York, *Statement Concerning Legislative Modification of Federal Habeas Corpus in Capital Cases*, 44 REC. ASS’N. B. CITY N.Y. 848 (1989)).

<sup>167</sup> See *Teague*, 489 U.S. at 321 n.3 (Stevens, J., concurring) (explaining that the



states, these burdens should not force a capital petitioner to forego a meaningful review of substantial claims by a federal court.<sup>168</sup> While it is true that capital petitioners have suffered from the application of the *Teague* analysis, a completely different standard for capital petitioners may not be the best solution. "Death is different" arguments<sup>169</sup> are valid, but do not necessarily call for a completely different solution to accommodate the special needs and concerns of capital defendants. The goal of protecting capital defendants can be accomplished without ignoring all other valid concerns. A retroactivity standard that has as its primary aim the plight of capital habeas petitioners should not be exclusive; it should be designed with capital petitioners in mind, yet be applicable to all state habeas petitioners. This assures that not only capital petitioners but all who deserve to benefit from a particular new rule will benefit. A possible, and relatively simple, solution that promises to help all state habeas petitioners would be to return to pre-*Teague* days, to the *Linkletter* standard.<sup>170</sup>

Under the *Linkletter* standard, federal courts were able to review the merits of each claim on a case-by-case basis. Upon their review of habeas petitions, federal courts would look at the purpose of the new rule, the reliance of the states on the old

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state interest in making a conviction final, which is a major reason for limiting retroactivity in collateral proceedings, is wholly inapplicable in capital cases) (citing *Mackey v. United States*, 401 U.S. 667, 690-91 (1971) (Harlan, J., concurring)).

<sup>168</sup> See Yackle, *supra* note 22, at 1011 ("the treatment of substantial claims, particularly in death penalty cases, should not be frustrated by a rush to judgment"). See also *Sawyer v. Smith*, 110 S. Ct. 2822, 2841 (1990) (Brennan, J., dissenting) ("[T]he Court is less concerned with safeguarding constitutional rights than with speeding defendants . . . to the executioner.").

<sup>169</sup> This is a common name for arguments that propose entirely different standards for capital petitioners. See Sherrell, *supra* note 158, at 475-80. See also *Sawyer v. Butler*, 881 F.2d 1273, 1289-90 (5th Cir. 1989) (denouncing "death is different" arguments in the context of the application of the second *Teague* exception), *aff'd sub nom.* *Sawyer v. Smith*, 110 S. Ct. 2822 (1990).

<sup>170</sup> See *Linkletter v. Walker*, 381 U.S. 618 (1965). See also notes 33-38 and accompanying text *supra*. This is similar to the solution proposed by Senator Biden, Chairman of the Senate Judiciary Committee, although the Biden bill limited the approach to capital cases, perhaps unnecessarily. Senator Biden introduced S. 1757, 101st Cong., 1st Sess. (1989), called the "Habeas Corpus Reform Act of 1989" (reprinted in 135 CONG. REC. S13,472 (daily ed. Oct. 16, 1989)). Although Senator Biden introduced the bill before *Butler*, *Parks* and *Sawyer* were decided, he anticipated the harsh effects of these cases; the stated purpose of the bill is "to amend title 28, United States Code, to provide special habeas corpus procedures in capital cases." *Id.*

rule, and the effect on the administration of justice of the retroactive application of the new rule.<sup>171</sup> This approach was capable of addressing concerns other than finality by balancing competing interests.<sup>172</sup> It was flexible and a return to it would eliminate the treatment of retroactivity as a threshold question; however, it would not necessarily solve all of the problems that presently confront state habeas petitioners.

The *Linkletter* analysis may be broader and seemingly more flexible than the present standard, but questions on the types of rules that ought to be retroactively applied still exist. A controversy similar to that surrounding the "accuracy" exception of *Teague*<sup>173</sup> also existed in the years of *Linkletter*. In *Linkletter* the Court, in balancing the factors in the retroactivity analysis, implied that rules which implicate the "integrity of the fact-finding process" were more deserving of retroactive application.<sup>174</sup> The dilemma concerning whether or not accuracy and the reliability of the conviction were of overriding importance in the retroactivity decision afflicted legal scholars in the aftermath of *Linkletter* just as it does today, after *Teague*.<sup>175</sup> The problem of using accuracy as a guide to granting retroactive effect must

<sup>171</sup> *Linkletter*, 381 U.S. at 637-38.

<sup>172</sup> See *Leading Cases*, *supra* note 71, at 300 (comparing *Linkletter* and *Teague*, and how the latter obscures the confrontation of competing interests by elevating the goal of finality over all else); 135 CONG. REC. S13,474 (daily ed. Oct. 16, 1989) (statement of Sen. Biden) (discussing the necessity of reaching a compromise between the right of a state prisoner to have a full review of all constitutional claims and the interest of the state in ending unnecessary delay).

<sup>173</sup> See notes 151-58 and accompanying text *supra* for a discussion of the controversy surrounding the second exception to nonretroactivity, for rules that affect the likelihood of an accurate conviction.

<sup>174</sup> [I]n each of the areas in which we have applied our rule retrospectively the principle that we applied went to the fairness of the trial — the very integrity of the fact-finding process. Here . . . [a]ll that petitioner attacks is the admissibility of the evidence, the reliability and relevancy of which is not questioned and which may well have had no effect on the outcome.

*Linkletter*, 381 U.S. at 639.

<sup>175</sup> See Paul J. Mishkin, *Foreword: The High Court, The Great Writ, and the Due Process of Time and Law*, 79 HARV. L. REV. 56, 80 (1965) (the principal grounds for habeas corpus "serves to free prisoners as to whom there is greater doubt than the Constitution allows that they have in fact done the acts which constitute the crime for which they are being punished"); But see Herman Schwartz, *Retroactivity, Reliability, and Due Process: A Reply to Professor Mishkin*, 33 U. CHI. L. REV. 719, 747-48 (1966) ("Regardless of whether they affect reliability . . . newly declared constitutional criminal procedure rights have one important characteristic in common: they are constitutional rights, reflecting fundamental norms of the process . . .").

be solved, and here the *Linkletter* approach is of little help. A court hostile to the granting of federal habeas relief could very easily find a way to manipulate *Linkletter's* flexible balancing approach. A return to *Linkletter* is therefore not a remedy for the problems that the present retroactivity standard poses for state petitioners.

The best solution is a retroactivity standard that is flexible enough to accommodate the needs of both capital and noncapital petitioners, yet inflexible enough to withstand excessive judicial intervention. The present retroactivity standard could, with some modification, be much more accommodating to the needs of all state petitioners. The exceptions should be broadened to allow petitioners to receive retroactively the benefit of rules that enhance the fairness, although not necessarily the accuracy, of their trials.

A third possibility for change would be to accept the *Teague-Sawyer* line of cases, but with a proviso: if the new standard of retroactivity is going to be so strict, defining new rules very broadly and treating retroactivity as a threshold question, then the exceptions to nonretroactivity should be formulated so that habeas petitioners still have the benefit of a new rule when their convictions or sentences are rendered unfairly but accurately. This is what Justice Harlan eventually advocated; the misadaptation of his ideas in *Teague* is where the problems began. Although Justice Harlan, in *Desist*, had originally advocated an exception for rules that affect only fact-finding procedures, he changed his position in *Mackey*, and instead of confining his concerns to accuracy he embraced retroactivity for those procedures "implicit in the concept of ordered liberty."<sup>176</sup> The *Teague* plurality did not adopt this important modification—yet Justice Harlan's rationale for the modification demonstrates how the *Teague* plurality erred.<sup>177</sup> The Court compounded this error by applying this unmodified rule to capital petitioners in *Butler*, *Parks* and *Sawyer*.

To solve the problems that presently confront state habeas petitioners, the second exception should have "fundamental fairness" of the trial as its primary aim—in accordance with Justice

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<sup>176</sup> See notes 49-50 and accompanying text *supra*.

<sup>177</sup> See notes 51-55 and accompanying text *supra*.

Harlan's modification.<sup>178</sup> Retroactivity of a new rule should be permitted if the rule affects the fairness of the trial. This exception must be read broadly to ensure that important constitutional guarantees are preserved. A broader exception will encompass a larger variety of important new rules of constitutional law, the retroactivity of which will properly allow federal courts to review the merits of a larger variety of claims.<sup>179</sup> The Fourteenth Amendment has incorporated many of the procedural safeguards of the federal Bill of Rights, and since federal habeas corpus empowers the federal courts to issue writs "in all cases where any person may be restrained of his or her liberty in violation of the Constitution,"<sup>180</sup> the second exception cannot ignore these protections.<sup>181</sup>

Accuracy does not have to be included in the definition of the "fundamental fairness" exception because an inaccurate conviction or sentencing procedure is by definition unfair. The reverse is not true—unfairness can occur even with accuracy. A version of the second exception that follows these suggestions would dramatically improve the situation of state capital petitioners,<sup>182</sup> because the exception would be more attentive to claims involving unconstitutional sentencing procedures, as well as to claims involving convictions that result from unconstitutional police interrogations.<sup>183</sup>

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<sup>178</sup> See *Teague v. Lane*, 489 U.S. 288, 322 (1989) (Stevens, J., concurring) ("[F]actual innocence is too capricious a factor by which to determine if a procedural change is sufficiently 'bedrock' or 'watershed' to justify application of the fundamental fairness exception."). See also note 78 *supra*, discussing the division within the *Teague* Court on this issue.

<sup>179</sup> See notes 143-58 and accompanying text *supra*.

<sup>180</sup> Habeas Corpus Act, ch. 28, 14 Stat. 385, 385 (1867) (current version codified at §§ 2241-2255)(1982)). See note 15 and accompanying text *supra*.

<sup>181</sup> See William J. Brennan, Jr., *Federal Habeas Corpus and State Prisoners: An Exercise in Federalism*, 7 UTAH L. REV. 423 (1961). Justice Brennan had predicted that "as the Supreme Court brings state criminal proceedings more and more within the protections and limitations of the Federal Bill of Rights, federal habeas corpus jurisdiction will correspondingly expand." *Id.* at 440. The Court's recent retroactivity decisions have proved his prediction to be wrong.

<sup>182</sup> I would propose the following amendment to 28 U.S.C. § 2254, the statute that provides conditions for federal habeas review for state petitioners:

All new rules of constitutional law that affect the fundamental fairness of any phase of a criminal trial must be retroactively applied to state petitioners on federal habeas corpus. Fundamental fairness includes all rules that implicate the procedural safeguards of the Fourteenth Amendment.

<sup>183</sup> See LIEBMAN, *supra* note 2, at 120-21.

The value of a modified exception is especially apparent when it is applied to *Butler*, *Parks* and *Sawyer*. The rule that Butler wanted to have applied would have been available under this "fundamental fairness" exception.<sup>184</sup> While the *Roberson* rule was established after Butler's conviction had become final, the rule implicated the constitutional fairness of a trial. *Roberson* concerned important principles of Fifth Amendment jurisprudence based on *Miranda* and its progeny.<sup>185</sup> Although it may not have been clear until after his conviction became final, Butler's privilege against self-incrimination was clearly interfered with as a result of the unconstitutional custodial interrogation followed by the use of this evidence at trial.<sup>186</sup> Butler's trial was therefore fundamentally unfair; although the rule in *Roberson* may have been new, Butler deserved to benefit from its important constitutional guarantee of fairness. The accuracy of Butler's conviction would have been irrelevant with the "fundamental fairness" exception because this version of the exception would recognize that constitutional guarantees such as *Miranda* warnings involve concerns other than accuracy.

Parks's conviction involved the constitutional issue of what mitigating evidence a sentencing jury can hear and how it must be considered.<sup>187</sup> The rule in *Brown* implicated the Eighth Amendment's need for reliability in death sentence determinations, yet the Court would not consider giving the rule retroactive application.<sup>188</sup> Instead of examining the value of the consti-

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<sup>184</sup> See notes 91-101 and accompanying text *supra*.

<sup>185</sup> *Butler v. McKellar*, 110 S. Ct. 1212, 1220 (1990) (Brennan, J., dissenting) ("In *Roberson* we simply applied the legal principle established in *Miranda* and reconfirmed in *Edwards* to a set of facts that was not dissimilar in any salient way."). Although it was debatable whether the rule was new, its constitutional implications should nevertheless require its retroactive application; the "fundamental fairness" exception would ensure this result.

<sup>186</sup> See *Arizona v. Roberson*, 486 U.S. 675, 682 n.4 (1988) (quoting *Fare v. Michael C.*, 442 U.S. 707 (1979) quoting *Miranda v. Arizona*, 384 U.S. 436, 469 (1966)):

"The rule in *Miranda* . . . was based on this Court's perception that the lawyer occupies a *critical position* in our legal system because of his unique ability to protect the Fifth Amendment rights of a client undergoing custodial interrogation . . . . [T]he Court [in *Miranda*] found that 'the right to have counsel present at the interrogation is *indispensable* to the protection of the Fifth Amendment privilege under the system' established by the Court."

(emphasis added).

<sup>187</sup> See notes 102-12 and accompanying text *supra*.

<sup>188</sup> See notes 113-20 and accompanying text *supra*.

tutional right involved in the sentencing procedure, the Court concerned itself with the accuracy of the jury's determination at the guilt phase of the trial. The "fundamental fairness" exception would require federal courts to apply retroactively any new rule involving how a jury must consider mitigating evidence under the Eighth Amendment, regardless of the innocence or guilt of the petitioner.

Sawyer's petition also concerned important Eighth Amendment issues.<sup>189</sup> *Caldwell* determined that it was unfair for a defendant to be convicted by a jury that is misinformed about its constitutional obligation.<sup>190</sup> Even if that obligation was not recognized until after Sawyer's conviction and sentencing, the fact that Sawyer did not receive this constitutional protection means that his trial was unfair. Moreover, in this case the unfair result put the accuracy of the sentencing determination in doubt.<sup>191</sup> The "fundamental fairness" exception would resolve both problems.

The unconstitutional convictions and sentences in *Butler*, *Parks* and *Sawyer* demonstrate that the real inquiry should have been whether or not the conviction and sentence were attained in accordance with fundamental constitutional protections. Providing a defendant with only the constitutional protections recognized at the time of her conviction, and not with new rules that are integrally related to these protections, ignores the purposes inherent in the protections. Because constitutional criminal procedure rules are themselves fundamental, a defendant should benefit from related new rules even when they are declared after her conviction becomes final on direct review.<sup>192</sup> It is true that federal courts should not retroactively apply *all* new constitutional rules to a state habeas petitioner—sometimes the state's interest in finality must prevail. But there are some new rules that, although they may not affect the likelihood of an accurate conviction, do implicate the fundamental fairness of a trial, and these rules ought to be retroactively applied. Although

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<sup>189</sup> See notes 121-31 and accompanying text *supra*.

<sup>190</sup> See *Caldwell v. Mississippi*, 472 U.S. 320 (1988).

<sup>191</sup> Justice Brennan noted in his dissent that it was doubtful in *Sawyer* that the verdict was accurate, as the misleading statement most likely undermined the accuracy of the capital proceeding. *Sawyer v. Smith*, 110 S. Ct. 2822, 2841 (1990).

<sup>192</sup> Schwartz, *supra* note 175, at 747-49 (discussing the inadequacies of depending on a retroactivity approach that ignores the importance of constitutional rights).

this approach does not specifically provide for the capital petitioner, it has been shaped with the hope that no state petitioner, whether guilty or innocent, will be executed because of an absence of the constitutional protections necessary for a fundamentally fair trial.<sup>193</sup>

## CONCLUSION

The traditional habeas corpus debate has intensified with the Court's recent retroactivity decisions. The Court's use of "nonretroactivity" as a defense to granting federal habeas review to state capital petitioners has resulted in the writ becoming an "exceptional remedy."<sup>194</sup> The method of analysis that the Court employed to reach this result has taken the notion of federalism to its illogical extreme.

Although Congress has not substantively amended the habeas statute for state prisoners in well over one hundred years, the recent decisions of the Court should convince Congress to counteract the harsh effects of these decisions by taking some form of action. The legislative history of the 1867 Act may reveal little as to legislative intent, but there is no doubt that Congress empowered the federal courts to free unconstitutionally restrained state petitioners. The Court has established a retroactivity doctrine that interferes with this congressional mandate—the federal courts have been stripped of their power. Congress must enforce the 1867 Act, which in this case means attacking the procedural barrier of nonretroactivity. In Justice Harlan's words, "[R]etroactivity must be rethought"<sup>195</sup>; but this time with a view towards the rights of the individual—especially the individual on death row.

Lori Bienstock

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<sup>193</sup> See *Foley*, *supra* note 22, at 211-12 (the denial of habeas corpus review for capital petitioners involves "a great risk that the undeserving and the innocent will be executed").

<sup>194</sup> See Yale L. Rosenberg, *Constricting Federal Habeas Corpus: From Great Writ to Exceptional Remedy*, 12 *HASTINGS CONST. L.Q.* 597, 598 (1985) ("[T]he Court has gone far beyond the traditional common law interpretive process and is engaging in a result-oriented jurisprudence designed to make habeas hearings on the merits almost as rare as sightings of Halley's comet.").

<sup>195</sup> *Desist v. United States*, 394 U.S. 244, 256 (1969) (Harlan, J., dissenting).