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Habeas Corpus, Qualified Immunity, and Crystal Balls: Predicting the Course of Constitutional Law

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HABEAS CORPUS, QUALIFIED IMMUNITY, AND CRYSTAL BALLS: PREDICTING THE COURSE OF CONSTITUTIONAL LAW

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"Ignorance of the law is no excuse" is a principle familiar to all first-year law students and avid television viewers. The maxim means that criminal defendants cannot avoid conviction by claiming that they did not realize their conduct was illegal.[1] So long as the criminal prohibition was in effect at the time the defendant acted[2] and was not unconstitutionally vague,[3] the novelty or ambiguity of the law is typically not a relevant factor in criminal cases.

The clarity of the law is, however, an important consideration in three types of constitutional litigation. In each of these areas, the federal courts have forgiven erroneous interpretations of the law, imposing sanctions only on those whose construction of the prevailing constitutional standard was unreasonable. First, the qualified immunity defense in section 1983 suits[4] protects public officials from liability for constitutional violations if the rights they infringed were not clearly established ones.[5] Second, prisoners filing habeas corpus petitions can rely on the novelty of a constitutional claim to explain their failure to raise the claim at trial, thereby obtaining a hearing on the merits in federal court despite the procedural default.[6] Finally, the Supreme Court's recent retroactivity rulings, which provide that new rules will not be announced or applied on habeas, foreclose habeas relief if the state court's rejection of the prisoner's claim was based on a reasonable, good-faith interpretation of precedent, even though it turned out to be wrong in light of later Supreme Court decisions.[7]

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1. *See generally* 1 W. LAFAVE & A. SCOTT, SUBSTANTIVE CRIMINAL LAW 575-96 (1986).
2. *See id.* at 135-46.
3. *See id.* at 126-35.
4. 42 U.S.C. § 1983 (1982).
5. *See* Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).
6. *See* Reed v. Ross, 468 U.S. 1, 13 (1984).
7. *See* Butler v. McKellar, 110 S. Ct. 1212, 1217 (1990). For all practical purposes, the new retroactivity doctrine moots the argument that the novelty of a claim can excuse a procedural default. *See infra* notes 293-96 and accompanying text. The procedural default cases nevertheless provide a useful comparative tool for evaluating the case law in the qualified immunity and retroactivity contexts.

Although in the abstract the qualified immunity and procedural default doctrines may be appropriate means of furthering important policy concerns, the Court's new approach to retroactivity is misguided. Instead of an attempt to balance the competing interests in vindicating constitutional rights and protecting legitimate state governmental processes, the retroactivity cases are designed to serve only the states' interests.

Even if all three doctrines were defensible in theory, their actual application in many cases is completely unjustified by any relevant policy consideration. Many federal courts have been exceedingly generous in interpreting the qualified immunity defense, immunizing public officials unless direct precedent from a court in their own jurisdiction obviously signalled the unconstitutionality of their conduct. Similarly, the recent retroactivity rulings suggest that the Court favors a very deferential standard for state judges, comparable to that applied in qualified immunity cases. If the case law provided any support for the state court's rejection of the prisoner's constitutional claim, the court's erroneous ruling is deemed reasonable and thus immune from challenge on habeas. By contrast, the courts have been unwilling to forgive procedural defaults in habeas cases even when the constitutional claim the prisoner and her trial counsel failed to raise had been foreseen by only a few visionary attorneys in other jurisdictions.

Rather than using such disparate standards in determining whether public officials, defense attorneys, and state judges should have been aware of the applicable legal principles, in all three contexts the courts should ask whether the actor exercised reasonable care in interpreting the relevant cases. Application of this standard may not yield precisely the same result in each of the three settings: the reasonable defense attorney can be expected to raise constitutional issues that the reasonable public official may not be aware of or that the reasonable state judge may not accept. Nevertheless, the current level of disparity among the cases does not further any legitimate policy and therefore unnecessarily frustrates efforts to remedy violations of constitutional rights.

After describing the basic legal and policy issues surrounding the qualified immunity defense and the use of novelty to explain procedural defaults in habeas cases, Part I of this article advocates a standard for both types of cases that asks whether a person exercising reasonable diligence in the same circumstances would have been aware of the relevant constitutional principles. With this standard in mind, Part II examines the qualified immunity defense in detail, concluding that in many cases public officials are given immunity even though they unreasonably failed to recognize the constitutional implications of their conduct. Part III compares the courts' definition of "novelty" in the habeas context and finds the opposite problem: most cases needlessly require that prisoners and their trial counsel have an uncanny ability to predict future developments in the law. Part IV then addresses the concept of "new rules" introduced in the Supreme Court's recent retroactivity decisions to limit the scope of habeas. While questioning the general wisdom of this new approach, this part of the article also concludes that as applied the new retroactivity doctrine precludes habeas relief even in cases when the state courts unreasonably interpreted existing precedent. Finally, Part V compares the three sets of cases and criticizes the courts' differing expectations regarding the

ability of public officials, defense attorneys, and state court judges to predict developments in constitutional law.

I. QUALIFIED IMMUNITY AND PROCEDURAL DEFAULT: POLICIES AND PRECEDENTS

A. Qualified Immunity

1. The Relevant Law

Most state officials who find themselves defending section 1983[8] suits are entitled to raise the affirmative defense[9] of qualified immunity.[10] If successful, the immunity defense protects public officials from liability for any damages caused by the violation of the plaintiff's constitutional rights.[11] The Supreme

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8. Section 1983 creates a civil cause of action against "[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws."

In Maine v. Thiboutot, 448 U.S. 1 (1980), the Court interpreted the "and laws" language in section 1983 to permit suits alleging the violation of federal statutory rights, as well as those guaranteed by the Constitution. *See id.* at 4-8. Because analysis of the defendant's entitlement to qualified immunity does not differ depending on which type of right was allegedly violated, *see* Davis v. Scherer, 468 U.S. 183, 194 n.12 (1984), this article will not distinguish between these two types of 1983 suits.

9. *See* Gomez v. Toledo, 446 U.S. 635, 639-41 (1980). Although *Gomez* put the burden of pleading qualified immunity on the defendant, the Court has never indicated which party has the ultimate burden of proof, *see Harlow*, 457 U.S. at 815 n.24, and the federal courts of appeals differ on that issue. *See* Kinports, *Qualified Immunity in Section 1983 Cases: The Unanswered Questions*, 23 GA. L. REV. 597, 634-42 (1989) (advocating placement of the burden on the defendant).

10. Some state officials are protected by absolute immunity, which "defeats a [section 1983] suit at the outset, so long as the official's actions were within the scope of the immunity" — that is, if the official was acting within the boundaries of the protected function. Imbler v. Pachtman, 424 U.S. 409, 419 n.13 (1976) (granting prosecutors absolute immunity). *See, e.g.*, Nixon v. Fitzgerald, 457 U.S. 731 (1982) (president); Stump v. Sparkman, 435 U.S. 349 (1978) (judges); Tenney v. Brandhove, 341 U.S. 367 (1951) (legislators). For most executive officials, however, "qualified immunity represents the norm." *Harlow*, 457 U.S. at 807.

Both qualified and absolute immunity are available only when a public official is sued in her individual capacity, making her personally liable for any damages awarded to the plaintiff. These immunities are not defenses where the defendant is a state or municipality. *See* Kentucky v. Graham, 473 U.S. 159, 165-67 (1985); Owen v. City of Independence, 445 U.S. 622 (1980). Nor are they available in a suit against a public employee in her official capacity, which is in essence a suit against the defendant's governmental employer because the employer must pay any damages assessed. *See Graham*, 473 U.S. at 165-67.

11. Neither qualified nor absolute immunity normally protects state officials from suits seeking declaratory or injunctive relief because such suits are not as likely to chill the defendant's independent exercise of discretion and because the federal courts need some mechanism to prevent state officials from violating constitutional rights. *See* Pulliam v. Allen, 466 U.S. 522 (1984). When reformulating the qualified immunity defense in *Harlow*, the Court expressly limited its holding to damages suits and left open the availability of injunctive or declaratory remedies, *see* 457 U.S. at 819 n.34, and the courts of appeals have tended to find that qualified immunity is not available in suits seeking these latter forms of relief. *See, e.g.*, Lugo v. Alvarado, 819 F.2d 5, 7 (1st Cir. 1987); Littlejohn v. Rose, 768 F.2d 765, 772 (6th Cir. 1985), *cert. denied*, 475 U.S. 1045 (1986); Harris v. Pernsley, 755 F.2d 338, 343 (3d Cir.), *cert. denied*, 474 U.S. 965 (1985); Hall v. Medical College of Ohio at Toledo, 742 F.2d 299, 310 (6th Cir. 1984), *cert. denied*, 469 U.S. 1113 (1985); Hoohuli v. Ariyoshi, 741 F.2d 1169, 1175-76 (9th Cir. 1984); Walker v. Jones, 733 F.2d 923, 933 n.15 (D.C. Cir.), *cert. denied*,

Court articulated the prevailing definition of qualified immunity in *Harlow v. Fitzgerald*: "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[12] Thus, public officials are entitled to immunity even if they acted unconstitutionally, so long as the constitutional rule they breached was not clearly established at the time of the violation. If the law was clearly established, however, immunity is typically unavailable, subject to an exception for "extraordinary circumstances."[13]

Although *Harlow* did not define what the Court meant by "clearly established" rights,[14] three subsequent cases — *Davis v. Scherer*,[15] *Mitchell v. Forsyth*,[16] and *Anderson v. Creighton*[17] — discussed the proper method of ascertaining whether the constitutional right allegedly violated by the defendant was clearly established at the relevant time. In *Davis*, an employee of the Florida Highway Patrol charged that his termination without a formal hearing violated the due process clause. In analyzing the defendants' request for qualified immunity, the Court described the *Harlow* standard as a "wholly objective" one.[18] Thus, the only pertinent inquiry in that case was whether the due process rights allegedly infringed by the defendants were clearly established. The defendants did not lose their qualified immunity merely because they might have violated a right (even a clearly established one) that

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469 U.S. 1036 (1984). *But cf.* Supreme Court of Va. v. Consumers Union of U.S., Inc., 446 U.S. 719, 731-33 (1980) (observing that state legislator's absolute immunity is equally available in section 1983 suits seeking declaratory or injunctive relief, although noting that, unlike immunity accorded executive and judicial officials, legislative immunity in section 1983 suits is grounded in part on the speech or debate clause, which protects members of Congress from injunctive suits).

12. *Harlow*, 457 U.S. at 818. Prior to *Harlow*, defendants in section 1983 cases were entitled to qualified immunity if they "knew or reasonably should have known that the action [they] took within [their] sphere of official responsibility would violate the constitutional rights of the [plaintiff], or if [they] took the action with the malicious intention to cause a deprivation of constitutional rights or other injury to the [plaintiff]." Wood v. Strickland, 420 U.S. 308, 322 (1975). Because *Wood*'s subjective prong often created disputed questions of fact concerning the defendant's good faith that could not be resolved on summary judgment, *Harlow* rewrote the qualified immunity standard, deleting the subjective prong in order to "avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment." *Harlow*, 457 U.S. at 818. *But cf.* Kinports, *supra* note 9, at 607-18 (arguing that even under *Harlow*, public officials who actually know they are acting unconstitutionally are not protected by qualified immunity).

Although *Harlow* was a suit against federal officials brought directly under the Constitution pursuant to Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971), the scope of the qualified immunity defense is identical in both section 1983 and *Bivens* cases. *See* Davis v. Scherer, 468 U.S. 183, 194 n.12 (1984). Therefore, this article will not distinguish between them and will refer to both as section 1983 suits.

13. The exception comes into play if public officials can establish that they "neither knew nor should have known of the relevant legal standard." *Harlow*, 457 U.S. at 819.

14. *See id.* at 819-20 (remanding to allow district court to make that determination).

15. 468 U.S. 183 (1984).

16. 472 U.S. 511 (1985).

17. 483 U.S. 635 (1987).

18. *Davis*, 468 U.S. at 191 ("[n]o other 'circumstances' are relevant to the issue of qualified immunity" except the "'objective reasonableness of [the defendant's] conduct as measured by reference to clearly established law'") (quoting *Harlow*, 457 U.S. at 818).

emanated from some *other* source of law.[19] The Court concluded that the defendants had not breached any established due process rights because prior Supreme Court decisions had required only "some kind of a hearing"[20] before state employees with a protected interest in their jobs could be fired and had not specified what kind of hearing must be provided. Therefore, no precedent established that the plaintiff was entitled to a more formal notice or opportunity to respond than he had actually received.[21]

In *Mitchell*, the plaintiff challenged the constitutionality of a warrantless domestic security wiretap authorized by former Attorney General John Mitchell. Mitchell was entitled to qualified immunity, the Court held, because the permissibility of such wiretaps was "an open question" when he acted.[22] Although some of the Justices had debated the issue in a case decided several years before Mitchell authorized the wiretap,[23] the majority had expressly left the question unresolved,[24] and the later Supreme Court opinion requiring a warrant in such circumstances was decided more than a year *after* the wiretap was in place.[25] In addition to the uncertainty generated by the Court's own rulings, several district courts had approved similar warrantless wiretaps, and two contrary district court opinions were not decided until after the wiretap challenged by the plaintiff had been removed.[26] Nevertheless, the *Mitchell* Court indicated that it did not intend to immunize a public official simply because the constitutional provision at issue had never expressly been held to apply in a case involving identical circumstances.[27] Rather, the Court felt that Mitchell was entitled to immunity because there was "a legitimate question" whether a warrant was required for domestic security wiretaps: he could not be held liable simply because "he gambled and lost on the resolution of this open question."[28]

In *Anderson*, the plaintiffs alleged that an FBI agent had conducted a warrantless search of their home without probable cause to search, and without exigent circumstances to justify the failure to obtain a warrant. In determining whether the defendant had violated the plaintiffs' clearly established constitutional rights, the Court held that the critical issue was "the objective (albeit fact-specific) question whether a reasonable officer could have believed

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19. In *Davis*, for example, the Court thought it irrelevant that the defendants may have violated clear state administrative regulations specifying the procedures to be followed in discharging Highway Patrol personnel. *See id.* at 193-97.

20. Board of Regents v. Roth, 408 U.S. 564, 570 n.7 (1972).

21. *See Davis*, 468 U.S. at 192 & n.10. *But see id.* at 205-06 (Brennan, J., concurring in part and dissenting in part) (arguing that defendants did violate clearly established rights because they did not give plaintiff meaningful notice or any hearing whatsoever).

22. *Mitchell*, 472 U.S. at 535. Only four Justices joined this part of the Court's opinion. The other three Justices participating in the decision did not reach the question of Mitchell's entitlement to qualified immunity. *See id.* at 538-42 (Stevens, J., concurring in the judgment); *id.* at 556 n.12 (Brennan, J., concurring in part and dissenting in part).

23. Katz v. United States, 389 U.S. 347, 359-60 (1967) (Douglas, J., concurring); *id.* at 362-64 (White, J., concurring); *see Mitchell*, 472 U.S. at 531-32.

24. *Katz*, 389 U.S. at 358 n.23.

25. United States v. United States Dist. Court, 407 U.S. 297, 314-21 (1972); *see Mitchell*, 472 U.S. at 530.

26. *See Mitchell*, 472 U.S. at 533-34. The Court also noted that warrantless domestic security wiretaps had been used since the 1940's. *See id.* at 530-31.

27. *See id.* at 535 n.12.

28. *Id.* at 535.

[the defendant's] warrantless search to be lawful, in light of clearly established law and the information the searching officers possessed."[29] The defendant could not be denied immunity simply because, as a general matter, it had long been established that the fourth amendment permitted warrantless searches of private homes only if the police had both probable cause and exigent circumstances. Rather, the constitutional right allegedly violated by the defendant must have been clearly established "in a more particularized, and hence more relevant, sense: [t]he contours of the right must [have been] sufficiently clear that a reasonable official would understand that what he [was] doing violate[d] that right."[30] As in *Mitchell*, the Court made clear, however, that it was not extending qualified immunity to public officials simply because no prior court decision had expressly found their precise acts unconstitutional; rather, it was holding that they would lose their immunity if "in the light of preexisting law" the unlawfulness of their conduct was "apparent."[31]

2. The Relevant Policies

As thus interpreted by the Supreme Court, the qualified immunity defense is not a matter of statutory construction, but instead is a creature of policy, designed to accommodate two conflicting concerns.[32] The obvious purpose of creating a civil damages remedy against public officials who violate the Constitution is to remedy and deter deprivations of constitutional rights.[33] Imposing strict liability in section 1983 cases might best serve those goals, but subjecting public officials to liability for every error of judgment might

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29. *Anderson*, 483 U.S. at 641.

30. *Id.* at 640. *See also* Malley v. Briggs, 475 U.S. 335, 345 (1986) (in determining defendant's entitlement to qualified immunity, the relevant question is "whether a reasonably well-trained officer in petitioner's position would have known that his affidavit failed to establish probable cause and that he should not have applied for the warrant").

31. *Anderson*, 483 U.S. at 640. For criticism of *Anderson* on the grounds that applying the Court's standard in fourth amendment cases makes no sense because a defendant who violates the fourth amendment has, by definition, acted unreasonably, and that *Anderson* may actually redefine substantive fourth amendment law, see Rudovsky, *The Qualified Immunity Doctrine in the Supreme Court: Judicial Activism and the Restriction of Constitutional Rights*, 138 U. PA. L. REV. 23, 47-53 (1989).

32. The Court's decisions discussing the scope of absolute immunity, *see supra* note 10, purport to interpret the statute: the Court has determined that, despite section 1983's plain language, *see supra* note 8, Congress could not have meant to subject all public officials to liability and therefore must have intended to incorporate common law immunities. *See, e.g.*, Stump v. Sparkman, 435 U.S. 349, 355-56 (1978); Imbler v. Pachtman, 424 U.S. 409, 417-21 (1976). Although the Court's earliest qualified immunity decisions likewise adopted this reasoning, *see* Pierson v. Ray, 386 U.S. 547, 554-57 (1967), today the Court no longer pretends that the qualified immunity doctrine is a matter of statutory interpretation, but analyzes it strictly in terms of policy concerns. *See, e.g., Anderson*, 483 U.S. at 645 (noting that *Harlow* "completely reformulated qualified immunity along principles not at all embodied in the common law"); Freed, *Executive Official Immunity for Constitutional Violations: An Analysis and a Critique*, 72 NW. U.L. REV. 526, 538-39 (1977); Gildin, *The Standard of Culpability in Section 1983 and* Bivens *Actions: The Prima Facie Case, Qualified Immunity and the Constitution*, 11 HOFSTRA L. REV. 557, 587 (1983). For an argument that Congress may actually have intended not to immunize any defendants in section 1983 suits, see Matasar, *Personal Immunities Under Section 1983: The Limits of the Court's Historical Analysis*, 40 ARK. L. REV. 741, 765-81 (1987).

33. *See, e.g., Harlow*, 457 U.S. at 807, 813-14; *Owen*, 445 U.S. at 651; Butz v. Economou, 438 U.S. 478, 505-06 (1978); Scheuer v. Rhodes, 416 U.S. 232, 243, 248-49 (1974).

unfairly penalize them for good faith mistakes, divert their attention from their public duties, prevent them from independently exercising their discretion in the public interest, and discourage qualified persons from seeking public office at all.[34] The qualified immunity defense attempts to reconcile these competing concerns by protecting public officials who "could not reasonably be expected to anticipate subsequent legal developments, nor . . . to 'know' that the law forbade conduct not previously identified as unlawful."[35]

The balance struck by the Court is appropriate only if qualified immunity is restricted to cases where a reasonable public official in the defendant's shoes would have thought that her conduct was constitutional.[36] This objective standard will not overdeter public officials, but will instead give them an incentive to "pause to consider whether a proposed course of action can be squared with the Constitution," which, the Court noted in *Mitchell*, is "precisely the point" of qualified immunity.[37] If the defense is available more widely to defendants who should have known that their actions were constitutionally suspect, it will immunize those who can and should be deterred and will deny a remedy to those whose rights have been violated.[38] Requiring innocent plaintiffs to bear the cost of constitutional wrongs is acceptable only if it actually serves the policy interests underlying the qualified immunity defense.

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34. *See, e.g., Harlow*, 457 U.S. at 807, 813-14; Wood v. Strickland, 420 U.S. 308, 319-21 (1975); *Scheuer*, 416 U.S. at 239-48.

Commentators have noted, however, that the Court has cited no empirical data to support its overdeterrence concerns, and that some studies suggest that the specter of section 1983 suits does not unduly intimidate public officials. *See, e.g.*, Nahmod, *Constitutional Wrongs Without Remedies: Executive Official Immunity*, 62 WASH. U.L.Q. 221, 248 (1983); Rudovsky, *supra* note 31, at 31 n.43. Moreover, governmental indemnification policies, *see infra* note 99 and accompanying text, mitigate these concerns to a large extent. *See, e.g.*, Kattan, *Knocking on Wood: Some Thoughts on the Immunities of State Officials to Civil Rights Damages Actions*, 30 VAND. L. REV. 941, 986 (1977); Rudovsky, *supra* note 31, at 74, 76 n.288. *Cf. Owen*, 445 U.S. at 652-56 (refusing to extend immunity to suits against municipal defendants because employees are less likely to be chilled if they are not personally liable).

35. *Harlow*, 457 U.S. at 818.

36. *See Malley*, 475 U.S. at 344 (characterizing qualified immunity standard as one of "objective reasonableness"). *Malley* held that a police officer who conducts a search pursuant to a warrant is not necessarily entitled to qualified immunity if the magistrate mistakenly issued the warrant without requiring sufficient probable cause; the officer is protected only if her reliance on the magistrate was reasonable. *See id.* at 345-46. *Cf.* 1 W. LAFAVE & A. SCOTT, *supra* note 1, at 591-95 (mistake of law is a recognized defense in criminal cases if the defendant reasonably relied on a statute, judicial decision, or official interpretation of law). If the police officer who had express judicial authorization for her conduct is not automatically entitled to immunity, the public official who unreasonably misinterpreted the relevant constitutional principles without the aid of a judicial officer should likewise be liable.

37. *Mitchell*, 472 U.S. at 524. *See also Malley*, 475 U.S. at 343; *Harlow*, 457 U.S. at 819; *Owen*, 445 U.S. at 656.

38. *See* Nahmod, *supra* note 34, at 248-49 (observing in addition that unremedied violations generate "disrespect for authority [and] for the constitution and laws generally," and also contribute to the "erosion of fourteenth amendment values"); *Developments in the Law — Section 1983 and Federalism*, 90 HARV. L. REV. 1133, 1204 (1977). *Cf.* Freed, *supra* note 32, at 558-61 (advocating that focus on knowledge of settled law in qualified immunity cases be replaced by general analysis of the reasonableness of defendant's conduct); Gildin, *supra* note 32, at 588-94 (same).

B. Procedural Default

1. The Relevant Law

Prisoners who file federal habeas corpus petitions[39] challenging their convictions often confront the argument that the constitutional claims they are asserting on habeas were not raised at trial, as required by the state's contemporaneous objection rule.[40] Such procedural defaults do not automatically

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39. Section 14 of the Judiciary Act of 1789, 1 Stat. 73, 81-82, gave the Supreme Court and the federal district courts jurisdiction to grant writs of habeas corpus to federal prisoners. The Habeas Corpus Act of 1867, 14 Stat. 385, which was enacted during Reconstruction and extended habeas corpus to "any person . . . restrained of his or her liberty in violation of the constitution or of any treaty or law of the United States," was construed to authorize the federal courts to consider habeas petitions filed by state prisoners. For discussion of the controversy surrounding this interpretation, see L. YACKLE, POSTCONVICTION REMEDIES 85-92 (1981). The Judicial Code and Judiciary Act of 1948, 62 Stat. 869, 964-68, codified the federal habeas statutes at 28 U.S.C. §§ 2241-2255. Congress amended several aspects of the statutes in 1966, adding provisions dealing with successive petitions and evidentiary hearings, but has not changed them since that time. *See generally* Weisselberg, *Evidentiary Hearings in Federal Habeas Corpus Cases*, 1990 B.Y.U. L. REV. 131, 134-54. In 1976, the Supreme Court promulgated procedural rules governing the federal courts' treatment of habeas cases. *See* Rules Governing Section 2254 Cases in the United States District Courts; Rules Governing Section 2255 Proceedings for the United States District Courts. For an extensive treatment of the history of habeas corpus, see L. YACKLE, *supra*, at 71-92, 151-58.

The general grounds for issuance of habeas corpus writs are set out in 28 U.S.C. § 2241 (1988), and section 2254 authorizes state prisoners who are incarcerated in violation of the Constitution or federal laws to file habeas corpus petitions in federal court, typically in the jurisdiction where they are in custody. *See* 28 U.S.C. § 2241(d) (1988); L. YACKLE, *supra*, at 194-95. For discussion of the few habeas cases raising nonconstitutional claims, see *id.* at 360-62, 419-22.

Section 2255, which authorizes federal prisoners to file postconviction motions to vacate their sentences, was meant to provide federal prisoners with a remedy equivalent to habeas corpus in the court where they were sentenced, rather than in the jurisdiction where they are confined. *See* Kaufman v. United States, 394 U.S. 217, 221-22 (1969). Section 2254 and 2255 cases are treated almost identically, *see* Francis v. Henderson, 425 U.S. 536, 541-42 (1976); *Kaufman*, 394 U.S. at 227-28 & n.8 (noting, however, that federal courts have discretion to refuse to consider section 2255 motions that raise claims previously decided by the trial or appellate court during the criminal proceeding); Sanders v. United States, 373 U.S. 1, 15 (1963), and the procedural default rules discussed in this article apply equally to petitions filed by state and federal prisoners, *see* United States v. Frady, 456 U.S. 130, 152 (1982). Therefore, the article will not distinguish between state and federal prisoners and will refer to both types of cases as habeas cases.

40. A procedural default bars habeas review only if the last state court to render judgment in the case refused to consider the constitutional claim because of the procedural error. If that court disposed of the claim on the merits, the default does not prevent the federal court from likewise considering the issue on habeas. *See* Caldwell v. Mississippi, 472 U.S. 320, 327-28 (1985); County Court of Ulster County v. Allen, 442 U.S. 140, 151-54 (1979). In Harris v. Reed, 489 U.S. 255, 263 (1989), the Court held that the state court must "clearly and expressly" indicate that its decision is based on a procedural bar in order to foreclose habeas review.

Procedural defaults involve issues that are related to but distinct from those raised by the exhaustion doctrine, which requires state prisoners to assert their constitutional claims in state court prior to arguing them on habeas. *See* 28 U.S.C. § 2254(b)-(c) (1988). The exhaustion rule requires prisoners to fairly present their claims to the highest state court that will hear them, but does not mandate that the claims be raised more than once, even if additional avenues of review are available. *See* Fay v. Noia, 372 U.S. 391, 435-38 (1963) (need not file certiorari petition to the Supreme Court after highest state court affirms conviction); Brown v. Allen, 344 U.S. 443, 447 (1953) (need not exhaust state collateral remedies). *See generally* L. YACKLE, *supra* note 39, at 231-96.

bar relief because a habeas petition marks the beginning of a new civil suit independent of the criminal prosecution[41] and authorizes the federal courts to conduct de novo review of the relevant legal issues unfettered by the doctrine of res judicata.[42] As the Court explained in *Fay v. Noia*, "conventional notions of finality in criminal litigation cannot be permitted to defeat the manifest federal policy that federal constitutional rights of personal liberty shall not be denied without the fullest opportunity for plenary federal judicial review."[43]

Nevertheless, *Fay* held that federal courts had discretion to refuse to hear defaulted claims on habeas if the prisoner "deliberately by-passed the orderly procedure of the state courts" — that is, if the prisoner, "after consultation with competent counsel or otherwise, understandingly and knowingly forwent the privilege of seeking to vindicate his federal claims in the state courts, whether for strategic, tactical, or any other reasons that can fairly be described as the deliberate by-passing of state procedures."[44] Later, in *Wainwright v. Sykes*, the Supreme Court retreated from *Fay*,[45] holding that the federal courts may

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Like the rules governing procedural defaults, the exhaustion doctrine is based on notions of equity and comity; it is not a jurisdictional requirement. *See Fay*, 372 U.S. at 424-26. But the exhaustion requirement applies only to state remedies that are currently available, *see id.* at 434-35, and does not affect cases where the prisoner committed a procedural default by failing to take advantage of an opportunity to raise a claim in state court that is now foreclosed. *See* Engle v. Isaac, 456 U.S. 107, 125 n.28 (1982). As a result, the habeas court need not require exhaustion if it is clear that the state courts would simply rule that the prisoner's claim was barred by an earlier default. *See* Teague v. Lane, 489 U.S. 288, 297-99 (1989); *Harris*, 489 U.S. at 263 n.9. Although analytically different from the exhaustion doctrine, the rules governing procedural defaults are related because permitting habeas review of defaulted claims would undermine the exhaustion requirement. *See* L. YACKLE, *supra* note 39, at 297-98.

41. *See, e.g.*, L. YACKLE, *supra* note 39, at 75. *But cf. Frady*, 456 U.S. at 176 & n.* (Blackmun, J., concurring in the judgment) (noting that section 2255, unlike 2254, is a continuation of the criminal prosecution, so that the procedural rules governing criminal cases can be applied to 2255 motions); *id.* at 181-83 (Brennan, J., dissenting) (same). For a discussion of this controversy over the nature of section 2255 proceedings, see L. YACKLE, *supra* note 39, at 156-58.

42. *See, e.g.*, Wainwright v. Sykes, 433 U.S. 72, 87 (1977); *Fay*, 372 U.S. at 422. Subject to a few exceptions, however, state court findings of fact are presumed to be correct if they were made after a full and fair hearing. *See* 28 U.S.C. § 2254(d) (1988).

43. 372 U.S. at 424.

44. *Id.* at 438-39. Thus, *Fay* held that federal courts have the power to review defaulted claims on habeas, but in the exercise of their equitable discretion may choose not to entertain claims that prisoners deliberately bypassed. *See id.* Under *Fay*'s approach, habeas jurisdiction thus functions differently from direct Supreme Court review of a state conviction. On direct review, a state court's ruling that the defendant forfeited her claim by failing to comply with a contemporaneous objection rule typically serves as an independent and adequate state ground supporting the conviction and thus barring federal review. *See, e.g., Sykes*, 433 U.S. at 81-85; *Fay*, 372 U.S. at 428-32. *Fay* reasoned that the adequate state ground doctrine, an adjunct of the duty to avoid issuing advisory opinions, applies only on direct review, when the Court is passing on the judgment of a state court that will stand even if the Court reverses on the federal issue because it is equally supported by the adequate state ground. That theory is irrelevant on habeas, according to *Fay*, because the habeas court simply rules on the legality of the prisoner's detention and has no power to revise the state court's judgment. *See id.* at 429-31. *But see id.* at 463-69 (Harlan, J., dissenting). For discussion of the controversy surrounding this reasoning, see L. YACKLE, *supra* note 39, at 305-08.

45. The transition from *Fay* to *Sykes* was gradual. *Kaufman* held that a procedural default did not bar a federal prisoner from filing a section 2255 motion unless the default could be characterized as a deliberate bypass. Reasoning that the interest in finality is identical for both state and federal prisoners, the Court found no reason to give greater preclusive effect to a de-

not consider defaulted claims on habeas absent proof of both cause for the failure to object and prejudice arising from the alleged constitutional defect.[46] *Sykes* did not attempt to define the term "cause," noting only that it was narrower than the deliberate bypass standard set forth in *Fay*.[47]

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fault by a federal prisoner than that given to a comparable default by a state prisoner. *See* 394 U.S. at 228.

In Davis v. United States, 411 U.S. 233 (1973), however, the Court refused to apply the deliberate bypass standard where a federal prisoner failed to file a pretrial motion challenging the composition of the grand jury that had indicted him, as required by Federal Rule of Criminal Procedure 12(b)(2). Rule 12 provided that noncompliance constituted waiver that could be excused only "for cause shown." The Court distinguished *Kaufman* because it had not involved such an express waiver provision and concluded that Congress could not have intended to apply more liberal waiver rules on collateral review than at trial. *See id.* at 239-42.

The final step leading to *Sykes* was Francis v. Henderson, 425 U.S. 536 (1976), a case identical to *Davis* except that the prisoner had been convicted in state court. Turning *Kaufman* on its head, *Francis* held that a showing of cause and prejudice was necessary to excuse the prisoner's default. The Court reasoned that considerations of comity and federalism required the federal courts to give no less preclusive effect to a state prisoner's default than that given to the same default by a federal prisoner. *See id.* at 541-42. *See also* Estelle v. Williams, 425 U.S. 501, 508 n.3 (1976) (holding that defendant was not *forced* to dress in prison clothing during trial because he never raised an objection with the trial judge; but then suggesting retreat from *Fay* by distinguishing, in an ambiguous footnote, between the strict standard necessary to waive fundamental rights and the lesser standard required with respect to strategic and tactical decisions, which cannot be grounds for reversal absent an objection). For a critical analysis of this progression, see Guttenberg, *Federal Habeas Corpus, Constitutional Rights, and Procedural Forfeitures: The Delicate Balance*, 12 HOFSTRA L. REV. 617, 623-36 (1984).

46. *Sykes*, 433 U.S. at 87. The prisoner has the burden of showing cause and prejudice, *see Frady*, 456 U.S. at 167-68, and the Court has expressly indicated that the *Sykes* test is a conjunctive one, permitting consideration of defaulted claims on habeas only if both cause and prejudice are shown. *See* Murray v. Carrier, 477 U.S. 478, 493-94 (1986); *Engle*, 456 U.S. at 134 n.43. *But see Carrier*, 477 U.S. at 502-03 (Stevens, J., concurring) (noting that FED. R. CRIM. P. 12(b)(2), the source of the cause and prejudice standard, does not treat cause and prejudice as separate hurdles, but instead requires only a showing of cause and considers prejudice a relevant factor in determining whether cause has been shown).

47. *See Sykes*, 433 U.S. at 87. *Fay* treated procedural default cases as cases raising questions of waiver, which, like the waiver of constitutional rights, requires "an intentional relinquishment or abandonment of a known right." Johnson v. Zerbst, 304 U.S. 458, 464 (1938); *see Fay*, 372 U.S. at 439. *Sykes*, on the other hand, viewed these cases as raising questions of forfeiture, whereby rights can be lost unknowingly or inadvertently. *See* Spritzer, *Criminal Waiver, Procedural Default and the Burger Court*, 126 U. PA. L. REV. 473, 507-08 (1978).

Although the cases leading up to *Sykes* cut back on *Fay*, they did so as a matter of discretion rather than jurisdiction. They did not dispute *Fay*'s holding that the federal courts had the power to hear defaulted claims on habeas. *See Francis*, 425 U.S. at 538-39; *Kaufman*, 394 U.S. at 220 n.3.

Sykes' impact on the independent and adequate state ground doctrine was unclear, but some believe *Sykes* overruled *Fay* and revived the doctrine in habeas cases. *See* Foley, *The New Arbitrariness: Procedural Default of Federal Habeas Corpus Claims in Capital Cases*, 23 LOY. L.A.L. REV. 193, 204-05 (1989); Marcus, *Federal Habeas Corpus After State Court Default: A Definition of Cause and Prejudice*, 53 FORDHAM L. REV. 663, 675 (1985); Note, Engle v. Isaac: *The End of Innocence on Collateral Review*, 32 AM. U.L. REV. 1183, 1190 & n.48, 1193 (1983) [hereinafter AM. U. Note]. *But see Sykes*, 433 U.S. at 96 n.4 (Stevens, J., concurring); *id.* at 100 n.2 (Brennan, J., dissenting); 3 W. LAFAVE & J. ISRAEL, CRIMINAL PROCEDURE 341 (1984); 17A C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE: JURISDICTION 2D § 4266.1, at 467 (1988); Goodman & Sallett, *Wainwright v. Sykes: The Lower Federal Courts Respond*, 30 HASTINGS L.J. 1683, 1688 (1979). Even after *Sykes*, the Court suggested that it continued to follow *Fay* and viewed the cause and prejudice test as a matter of policy rather than jurisdiction. *See* Smith v. Murray, 477 U.S. 527, 533 (1986); Reed v. Ross, 468 U.S. 1, 9 (1984); *Engle*, 456 U.S. at 135. Most recently, however,

Subsequent Supreme Court opinions have provided more substance to the cause standard, but nevertheless have failed to articulate a comprehensive definition for all cases.[48] In *Engle v. Isaac*, three prisoners filed habeas petitions challenging jury instructions that required them to prove their self-defense claims by a preponderance of the evidence.[49] The prisoners sought to excuse their failure to object to the instructions at trial on two grounds: that the relevant state law appeared settled against their claim, and that the constitutional argument was a novel one at the time of their trials. The Court held that the perceived futility of raising an objection in state court does not by itself constitute cause; "[e]ven a state court that has previously rejected a constitutional argument may decide, upon reflection, that the contention is valid," the Court explained.[50]

Engle likewise rejected the prisoners' novelty argument. Without deciding whether novelty could ever satisfy the cause requirement,[51] the Court found the prisoners' showing inadequate because "the tools to construct their constitutional claim" were available at the time of trial.[52] In support of this conclusion, the Court observed that *In re Winship* had laid the groundwork for the prisoners' challenge more than four years before their trials by holding that the due process clause requires the prosecution to prove every element of the crime beyond a reasonable doubt.[53] In the years following *Winship*, *Engle*

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the Court appears to have resolved this controversy, reading *Sykes* as applying the adequate state ground doctrine to the habeas context. *See Harris*, 489 U.S. at 260. *But see id.* at 267 (Stevens, J., concurring) (indicating that adequate state ground doctrine continues to be inapplicable on habeas).

Nevertheless, the *Sykes* analysis seems to differ from the doctrine applied on direct Supreme Court review. The latter is jurisdictional and can therefore be raised at any time, *see* R. STERN, E. GRESSMAN & S. SHAPIRO, SUPREME COURT PRACTICE 168-70 (6th ed. 1986), whereas the courts routinely overlook default arguments on habeas if the state does not raise them in a timely fashion. *See* C. WRIGHT, A. MILLER & E. COOPER, *supra*, at 457; L. YACKLE, *supra* note 39, at 144 n.78 (Supp. 1989). *See also* Marcus, *supra*, at 675-79 (arguing that the *Sykes* balancing approach distorts the traditional adequate state ground doctrine).

Assuming that the adequate state ground doctrine does apply on habeas, federal courts may be required to analyze in each procedural default case whether the state's contemporaneous objection rule was in fact an independent and adequate state ground before evaluating the prisoner's showing of cause and prejudice. For discussion of both the controversy surrounding this issue and the nature of the adequate state ground analysis that would be applied on habeas, see C. WRIGHT, A. MILLER & E. COOPER, *supra*, at 454-55; L. YACKLE, *supra* note 39, at 155-56 (Supp. 1989); Goodman & Sallett, *supra*, at 1690-91 & n.40.

48. *See, e.g.*, Amadeo v. Zant, 486 U.S. 214, 221-22 (1988); Smith v. Murray, 477 U.S. 527, 533-34 (1986); *Reed*, 468 U.S. at 13.

49. 456 U.S. 107 (1982).

50. *Id.* at 130. *See also* Smith v. Murray, 477 U.S. 527, 534-35 (1986). By enforcing the cause and prejudice standard in this case, *Engle* made clear that the *Sykes* requirements apply to all defaulted constitutional claims, even when the alleged constitutional error calls into question the reliability of the verdict. *See Engle*, 456 U.S. at 129 (noting, however, that "the nature of a constitutional claim may affect the calculation" of cause and prejudice). *See also Carrier*, 477 U.S. at 495. *Engle*'s extension of *Sykes* to claims that raise a question about the accuracy of the conviction departed from the approach that had generally been taken by the lower courts, *see* AM. U. Note, *supra* note 47, at 1195, and has been criticized by a number of commentators, *see, e.g.*, Guttenberg, *supra* note 45, at 660-61; Comment, Lundy, Isaac *and* Frady: *A Trilogy of Habeas Corpus Restraint*, 32 CATH. U.L. REV. 169, 209 (1982) [hereinafter CATH. U. Comment].

51. *See Engle*, 456 U.S. at 131.

52. *Id.* at 133.

53. *In re* Winship, 397 U.S. 358, 364 (1970).

continued, "dozens" of other defendants in various jurisdictions had challenged the constitutionality of rules requiring them to prove various elements of the charge and affirmative defenses, and several commentators had perceived that *Winship* might alter the traditional practice of placing the burden of proving affirmative defenses on the defendant.[54]

Though rejecting the prisoners' claim of novelty, *Engle* did not suggest that the constitutional challenge was so well established that "every astute counsel" would have seen the connection between *Winship* and the allegedly defective instructions.[55] In fact, the Court recognized that "[c]ounsel might have overlooked or chosen to omit respondents' due process argument while pursuing other avenues of defense."[56] Nevertheless, because the Constitution "does not insure that defense counsel will recognize and raise every conceivable constitutional claim," the Court held that novelty will not excuse a procedural default if, as was true in *Engle*, "the basis of a constitutional claim [was] available, and other defense counsel ha[d] perceived and litigated that claim."[57]

Two years later, in *Reed v. Ross*, the Court held that the cause requirement is satisfied if the claim raised on habeas was so novel at the time of trial that "its legal basis [was] not reasonably available to counsel."[58] As in *Engle*, the prisoner in *Reed* challenged state law that required him to shoulder the burden of proving his affirmative defenses — in this case, North Carolina law regarding self-defense and the absence of malice. This time, the novelty argument was successful. The Court distinguished *Engle* on the ground that *Winship* had not yet been decided when Ross went to trial,[59] and in fact, *Leland v. Oregon* had held years before his trial that a state could require the defendant to prove an insanity defense beyond a reasonable doubt.[60] The Court also noted that questions concerning the constitutionality of the practice challenged by Ross had not arisen in the North Carolina courts until five years after his appeal.[61] Two courts in other jurisdictions — the Eighth Circuit and the Connecticut Superior Court — had struck down state rules requiring

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54. *Engle*, 456 U.S. at 131-32 & n.40.
55. *Id.* at 133.
56. *Id.* at 133-34.
57. *Id.* at 134. In *Frady*, the companion case, the Court elaborated on the prejudice prong of the *Sykes* test. The Court defined prejudice to impose a stricter standard than the "plain error" rule applied on direct appeal under Federal Rule of Criminal Procedure 52(b). *See Frady*, 456 U.S. at 162-66. Specifically, the Court held that prejudice requires a habeas petitioner who challenges erroneous jury instructions to prove that the instructions "worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." *Id.* at 170 (emphasis deleted).
58. 468 U.S. 1, 16 (1984). Both *Engle* and *Reed* were closely divided cases, with the majority opinion in each case joined by only five Justices. Justices White and Powell were the only members of the Court who voted with the majority on both occasions.

Amadeo v. Zant, 486 U.S. 214 (1988), analyzed the factual analogue to the novelty argument at issue in *Engle* and *Reed*. Just as the cause requirement is satisfied when the legal basis for a prisoner's claim is reasonably unknown, *Amadeo* held that it is satisfied when the factual basis is not reasonably discoverable — as in that case, for example, when county officials concealed a memorandum that supported the prisoner's challenge to the composition of the juries that had indicted and convicted him. *See id.* at 222. *See also* Marcus, *supra* note 47, at 724-25.
59. *See Reed*, 468 U.S. at 19.
60. 343 U.S. 790, 799 (1952); *see also Reed*, 468 U.S. at 18.
61. *See Reed*, 468 U.S. at 18.

defendants to prove, respectively, an alibi defense and a lawful excuse for possession of burglar's tools. Nevertheless, the Court concluded that those two opinions did not provide "a reasonable basis upon which Ross could have realistically appealed his conviction" because they provided only "indirect support" for his claim and "they were the only cases that would have supported [his] claim at all."[62] By contrast, the four Justices in dissent thought that those cases, decided nine and four months prior to Ross' trial, indicated that defense counsel had a reasonable basis for objecting to the defective instruction.[63]

Subsequently, in *Smith v. Murray*, the Court compared *Engle* and *Reed* and emphasized that the relevant question in evaluating claims of novelty is not "whether subsequent legal developments have made [defense] counsel's task easier, but whether at the time of the default the claim was 'available' at all."[64] Without defining "availability," the Court quickly rejected Smith's novelty argument because "various forms" of his claim had been "percolating in the lower courts for years" before his default.[65]

In *Dugger v. Adams*, the most recent Supreme Court opinion to raise the question whether novelty can excuse a procedural default, the Court did not actually rule on the prisoner's contention that novelty provided cause for his failure to object to comments by the trial judge that allegedly violated the eighth amendment.[66] Instead, the Court noted that, even if the eighth amendment issue was novel, the cause requirement was not met because any unconstitutional remarks by the judge would also have violated state law, and Adams offered no excuse for his failure to object on state law grounds.[67]

Related to these novelty cases are cases where prisoners seek to excuse procedural defaults on grounds of attorney error, ignorance, or inadvertence. In *Murray v. Carrier*, the Court held that such efforts to satisfy the cause requirement are insufficient,[68] absent proof that defense counsel failed to

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62. *Id.* at 19.
63. *See id.* at 25 & n.2 (Rehnquist, J., dissenting).
64. 477 U.S. 527, 537 (1986).
65. *Id.* In support of its conclusion, the Court also noted that defense counsel had objected to the testimony at trial, but had chosen not to appeal on that issue, and that an amicus brief had argued the point on appeal. *See id.* at 534, 537.
66. 489 U.S. 401, 407-08 (1989). The prisoner argued that the judge's comments violated the Court's ruling in Caldwell v. Mississippi, 472 U.S. 320 (1985), which had reversed a capital sentence because the prosecutor had led the jury to believe that it did not have ultimate responsibility for the sentencing decision.
67. *Adams*, 489 U.S. at 408 ("the fact that it turns out that the trial court's remarks were objectionable on federal as well as state grounds is not good cause"). The Court did not hold, however, that a defendant's failure to preserve a claim on one possible ground always bars subsequent habeas review of other claims arising from the same conduct. *See infra* notes 268-69 and accompanying text.
68. 477 U.S. 478, 486-88 (1986). The Court reasoned that the costs of habeas described in *Engle*, *see infra* notes 75-80 and accompanying text, are equally high when an unintentional default is committed through defense counsel's ignorance or inadvertence. *See Carrier*, 477 U.S. at 487. Moreover, if unintentional procedural defaults were excused, the courts would have to undertake the difficult task of determining whether or not a default was actually unintentional. *See id.* at 488. *See also* Marcus, *supra* note 47, at 689 (prisoner and trial counsel might make "self-serving characterizations of the trial forfeiture as inadvertent"); *id.* at 719 n.346 (attorney who wanted to protect her professional reputation would have incentive to describe default as strategic, whereas attorney who wanted to assist client would claim the opposite).

provide effective assistance of counsel.[69] Because the concept of cause typically refers to "some objective factor external to the defense," the Court "discern[ed]

The *Carrier* dissent noted, however, that unintentional defaults do not involve attempts to sandbag or to circumvent a state's procedural rules and therefore should not be subject to the same severe penalty. *See Carrier*, 477 U.S. at 524 (Brennan, J., dissenting). The dissent also pointed out that default rules will not deter inadvertent mistakes by defense counsel. *See id. See also* Goodman & Sallett, *supra* note 47, at 1717 (questioning whether it is just to refuse to hear a prisoner's habeas petition "in order to improve the performance of lawyers in general"); Marcus, *supra* note 47, at 691 (arguing that barring habeas review is not likely to decrease the number of inadvertent defaults by "[o]verburdened and underpaid attorneys," who "may be unwilling to pay the personal or professional costs which would be required to reduce [their] caseload and continue [their] legal education"). *But cf.* 1 W. LAFAVE & A. SCOTT, *supra* note 1, at 329, 338 (describing debate as to whether criminal liability can deter negligent conduct).

69. A prisoner who claims ineffective assistance to satisfy the cause requirement must first present the ineffective assistance claim to the state courts in order to comply with the exhaustion rule. *See Carrier*, 477 U.S. at 488-89. *See also supra* note 40. Because a prisoner lacks the expertise to evaluate defense counsel's performance and to recognize ineffective assistance on her own, and because no one reasonably expects an attorney to argue that her own performance was inadequate, the state courts generally do not consider an ineffective assistance claim defaulted unless the prisoner failed to raise the claim at some point in the proceedings after the allegedly ineffective attorney ceased representing her. *See* 3 W. LAFAVE & J. ISRAEL, *supra* note 47, at 350 n.75; *id.* at 98 n.69.3 (Supp. 1990); Friedman, *A Tale of Two Habeas*, 73 MINN. L. REV. 247, 325 (1988).

As defined in Strickland v. Washington, 466 U.S. 668 (1984), an ineffective assistance of counsel claim has two components. First, the defendant must prove that counsel's performance "fell below an objective standard of reasonableness." *Id.* at 687, 688. In making this first determination, *Strickland* instructs the courts to use a "highly deferential" standard, "indulg[ing] a strong presumption" that the attorney's performance was adequate, and making "every effort" to "eliminate the distorting effects of hindsight." *Id.* at 689. Second, the defendant must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

Carrier did not clarify the relationship between *Sykes*' requirement of prejudice, *see supra* note 57, and the prejudice showing necessary to establish a sixth amendment violation. At least one court has suggested that the prejudice requirements are equivalent, *see* Cook v. Lynaugh, 821 F.2d 1072, 1079 (5th Cir. 1987), but this approach has been criticized because it "come[s] perilously close to demanding ineffective assistance (in the Sixth Amendment sense) in every case controlled by Sykes." L. YACKLE, *supra* note 39, at 210 n.90.15 (Supp. 1989). Others believe that *Strickland*'s definition of prejudice is no stricter than that required by *Sykes*, *see* 3 W. LAFAVE & J. ISRAEL, *supra* note 47, at 97 (Supp. 1990), and may even be more lenient, *see* Marcus, *supra* note 47, at 702-03 (arguing that the interest in finality is greater in default cases, thus justifying a heavier burden there, whereas *Strickland* found that the lesser interest in finality in ineffective assistance cases called for a lighter burden that would apply on both direct appeal and collateral review) (citing *Strickland*, 466 U.S. at 697-98); Rosenberg, *Constricting Federal Habeas Corpus: From Great Writ to Exceptional Remedy*, 12 HASTINGS CONST. L.Q. 597, 618-19 (1985). *But see id.* at 619 (noting that the Court probably would not have "created a substantial disparity in the standards of prejudice, since that would invite litigants to mask procedural defaults as ineffective assistance claims").

Carrier's critics note that requiring a showing of ineffective assistance to prove cause makes the defaulted claim irrelevant. A prisoner who was denied effective assistance of counsel can raise that issue on habeas as an independent sixth amendment claim. She therefore has little incentive to pursue the defaulted claim, except in the few cases — like those raising double jeopardy claims — when relief would result in dismissal of the charges rather than a new trial. *See* 3 W. LAFAVE & J. ISRAEL, *supra* note 47, at 96-97 (Supp. 1990); Friedman, *supra*, at 300; Yackle, *The Reagan Administration's Habeas Corpus Proposals*, 68 IOWA L. REV. 609, 658, 663 (1983). *Cf.* Note, *Attorney Error as "Cause" Under* Wainwright v. Sykes: *The Case for a Reasonableness Standard After* Washington v. Downes, 67 VA. L. REV. 415, 425 (1981) (characterizing as "unduly harsh" the requirement that habeas petitioners demonstrate ineffective assistance and thus "prove two constitutional violations" in order to obtain a remedy for one). For discussion of the relationship between cases attempting to justify a procedural default on the ground that the issue was novel and those arguing ineffective assistance, see *infra* note 263.

no inequity in requiring [defendants] to bear the risk of attorney error that results in a procedural default."[70]

Applying the effective assistance of counsel standard in the companion case, *Smith v. Murray*, the Court ruled that defense counsel's failure to appeal an issue because of his perception that it had little chance of success in the state courts did not render his representation ineffective.[71] In fact, the Court seemingly applauded the attorney's default, characterizing the "process of 'winnowing out weaker arguments on appeal and focusing on' those more likely to prevail" as "the hallmark of effective appellate advocacy."[72] The fact that counsel may have chosen unwisely did not establish ineffective assistance, for "[i]t will often be the case that even the most informed counsel will fail to anticipate a state appellate court's willingness to reconsider a prior holding or

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70. *Carrier*, 477 U.S. at 488. The Court gave two examples to illustrate what it meant by "objective factor[s] external to the defense": proof that the factual or legal basis for the prisoner's claim was not reasonably available at the time of trial; and interference by state officials that prevented compliance with the contemporary objection rule.

Carrier also held that the policies underlying the cause and prejudice standard, *see infra* notes 75-80 and accompanying text, apply not only when defendants failed to comply with rules requiring contemporaneous objections at trial, but also when they omitted issues on appeal. *See Carrier*, 477 U.S. at 489-92. *See also* Smith v. Murray, 477 U.S. 527, 533 (1986). Several of the policies relied on in *Sykes*, however, seem relevant only to defaults at trial. For example, concerns about undermining the significance of the trial, ensuring full development of the trial record, and giving the trial judge an opportunity to cure the defect without necessitating a retrial are not applicable to appellate defaults. Moreover, defense counsel acts under less severe time constraints when making strategic decisions on appeal than she does at trial. As a result, she has more opportunity to consult with her client, making it less important to bind the defendants to their attorneys' decisions. *See, e.g., Carrier*, 477 U.S. at 506 (Stevens, J., concurring in the judgment); L. YACKLE, *supra* note 39, at 338-39; Note, *Procedural Defaults at the Appellate Stage and Federal Habeas Corpus Review*, 38 STAN. L. REV. 463 (1986). Nevertheless, the *Carrier* Court rejected these efforts to distinguish appellate defaults. *Carrier* left open, how-ever, the possibility that *Fay*'s deliberate bypass standard might continue to apply when a prisoner failed to appeal the conviction at all, as was the case in *Fay*. *See Carrier*, 477 U.S. at 492. For discussion of the controversy concerning whether the deliberate bypass standard retains any validity, see 3 W. LAFAVE & J. ISRAEL, *supra* note 47, at 344-46; *id.* at 94-96 (Supp. 1990); L. YACKLE, *supra* note 39, at 145-49 (Supp. 1989).

71. 477 U.S. 527, 534-36 (1986). Defense counsel's perception seemed to be quite reasonable given recent state law on the issue. *See infra* note 225 and accompanying text.

72. *Smith*, 477 U.S. at 536 (quoting Jones v. Barnes, 463 U.S. 745, 751-52 (1983)). One commentator suggested, however, that not much "winnowing" occurred in *Smith* given that defense counsel raised thirteen issues on appeal, while ignoring the one claim that later proved successful and that another participant in the case thought to raise. *See* Friedman, *supra* note 69, at 345. *See also id.* at 343-44 (arguing that if, as the Court indicated, the claim was not novel and counsel acted properly in not raising it on appeal, the "'default' occurred only because the state supreme court adhered to an evidently unconstitutional state precedent even after the matter was brought to its attention," making the state rather than the prisoner or his attorney responsible for the default).

The Court's commendation of the "winnowing" process becomes even more troubling given its holding in Jones v. Barnes, 463 U.S. 745, 745 (1983), that an attorney is not required to present every nonfrivolous argument on appeal that the defendant wants to raise. *Jones* expressly declined to decide whether the attorney's refusal to raise an issue would automatically satisfy the cause requirement, *see id.* at 754 n.7; if it does not, the combined effect of *Smith* and *Jones* could deprive a prisoner of a constitutional claim even though she did her best to convince her attorney to assert that claim. *Cf. id.* at 755 (Blackmun, J., concurring in the judgment) (cause and prejudice requirement should be satisfied in such cases). *See generally* Note, *Federal Habeas Corpus Review of State Forfeitures Resulting from Assigned Counsel's Refusal to Raise Issues on Appeal*, 52 FORDHAM L. REV. 850, 878-85 (1984).

will underestimate the likelihood that a federal habeas court will repudiate an established state rule."[73]

2. The Relevant Policies

Like the qualified immunity doctrine, the rules governing procedural defaults are based on policy considerations, rather than an interpretation of the habeas statutes.[74] The Court has suggested that the cause and prejudice requirement serves a number of policy goals: (1) showing respect for state procedural rules;[75] (2) contributing to the finality of criminal convictions;[76] (3)

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73. *Smith*, 477 U.S. at 536.

74. The Court's decisions in this area do not rely on statutory language or legislative history, and in *Carrier*, 477 U.S. at 496, the Court admitted that the cause and prejudice standard "may lack a perfect historical pedigree." *See also Engle*, 456 U.S. at 135 (noting that cause and prejudice "are not rigid concepts," but "take their meaning from . . . principles of comity and finality"). As a result, some have criticized the procedural default rules as inconsistent with congressional intent. *See, e.g.*, Francis v. Henderson, 425 U.S. 536, 548-50 (1976) (Brennan, J., dissenting) ("I fail to see how 'considerations of comity and federalism' — vague concepts that are given no content by the Court — grant this Court the power to circumscribe the scope of congressionally intended relief for state prisoners") (emphasis deleted); Foley, *supra* note 47, at 206-07; Friedman, *supra* note 69, at 290; Tague, *Federal Habeas Corpus and Ineffective Representation of Counsel: The Supreme Court Has Work to Do*, 31 STAN. L. REV. 1, 41-42 (1978).

75. *See Engle*, 456 U.S. at 129; *Sykes*, 433 U.S. at 88. *But see id.* at 111 (Brennan, J., dissenting) (pointing out that *Fay* did not invalidate any such rules, and that the state courts "remain entirely free to enforce their own rules as they choose"); *Fay*, 372 U.S. at 432 ("the only concrete impact" habeas has on the state's interest in enforcing its procedural rules is that "it prevents the State from closing off the convicted defendant's last opportunity to vindicate his constitutional rights"; "[s]urely this state interest in an airtight system of forfeitures is of a different order from that . . . in the autonomy of state law within the proper sphere of its substantive regulation").

76. *See Engle*, 456 U.S. at 126-27 & n.32; *Sykes*, 433 U.S. at 88-89. *See also, e.g.*, Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 451-53 (1963) (arguing that finality is important to conserve "the intellectual, moral, and political [as well as economic] resources involved in the legal system"; to achieve the deterrent, educational, and rehabilitative functions of the criminal justice system; and as "a psychological necessity in a secure and active society"); Friedman, *supra* note 69, at 341-42 ("[a] skilled attorney reviewing a transcript after any trial can undoubtedly identify unadjudicated constitutional claims"); Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142, 149 (1970) (finality is important because of the "human desire that things must sometime come to an end" and because it is "difficult to urge public respect for the judgments of criminal courts in one breath and to countenance free reopening of them in the next"). *But see Engle*, 456 U.S. at 147 (Brennan, J., dissenting) (wondering why "society should be eager to ensure the finality of a conviction arguably tainted by unreviewed constitutional error directly affecting the truthfinding function of the trial"); *Kaufman*, 394 U.S. at 228 ("exalt[ing] the value of finality in criminal judgments at the expense of the interest of each prisoner in the vindication of his constitutional rights" is "contrary to the most basic precepts of our system of post-conviction relief"); Bass v. Estelle, 696 F.2d 1154, 1162 (5th Cir.) (Goldberg, J., specially concurring) (although "there must be an end to criminal litigation," "[o]ur duty as judges . . . is to ensure that the ending is a *constitutional* one"), *cert. denied*, 464 U.S. 865 (1983); Supreme Court Review, *Habeas Corpus—Limiting the Availability of Habeas Corpus After a Procedural Default*, 73 J. CRIM. L. & CRIMINOLOGY 1612, 1633 (1982) (concerns about finality are overstated because so few prisoners file habeas petitions, and the vast majority of them are unsuccessful) [hereinafter J. CRIM. L. & CRIMINOLOGY Supreme Court Review]; Comment, *"Fundamental Miscarriage of Justice": The Supreme Court's Version of the "Truly Needy" in Section 2254 Habeas Corpus Proceedings*, 20 SAN DIEGO L. REV. 371, 380 (1983) (pointing out that in many cases defendants' arguments were unsuccessful until habeas, and arguing that "it is not merely the opportunity to be heard that is important; what is paramount is the correct resolution of the federal constitutional right") [hereinafter SAN DIEGO Comment].

discouraging defense counsel from "sandbagging" by eliminating the incentive to hold some constitutional claims in reserve in order to increase the chances of reversal and a second shot at acquittal should the jury convict;[77] (4) preserving comity and federalism by minimizing "[f]ederal intrusions into state criminal trials," which "seriously undermine the morale of our state judges";[78] (5)

The finality concern is based in part on the theory that habeas undermines the rehabilitative ideal because "[r]ehabilitation demands that the convicted defendant realize 'that he is justly subject to sanction, that he stands in need of rehabilitation,'" *Engle*, 456 U.S. at 127 n.32 (quoting Bator, *supra*, at 452). *But see* Davis v. United States, 411 U.S. 233, 253 (1973) (Marshall, J., dissenting) (arguing that prisoners are "more amenable to rehabilitation when they know that all their claims of unfairness have been considered"); UNITED STATES DEP'T OF JUSTICE, PERSPECTIVES ON PRISON LEGAL SERVICES: NEEDS, IMPACT AND THE POTENTIAL FOR LAW SCHOOL INVOLVEMENT, SUMMARY REPORT 14 (1972) (empirical evidence indicates that habeas is itself rehabilitative by "reducing inmate tensions caused by unresolved legal problems" and by "decreasing inmate hostility toward the institution"); Schaefer, *Federalism and State Criminal Procedure*, 70 HARV. L. REV. 1, 22 (1956) (arguing that availability of habeas remedy enhances rehabilitation because "prisoners whose energies are directed to getting out of the prison by judicial process are not so likely to be concentrating on other methods of getting out which may be less socially acceptable").

77. *See Engle*, 456 U.S. at 129 n.34; *Sykes*, 433 U.S. at 89; Davis v. United States, 411 U.S. 233, 241 (1973). *See also* Guttenberg, *supra* note 45, at 695 n.426 (sandbagging will occur if defense counsel does not want to be bound by state court's determination of the facts or if there is no advantage to litigating an issue prior to trial).

In *Fay*, by contrast, the Court thought that the deliberate bypass test, combined with the loss of all state court remedies even for inadvertent defaults, was sufficient to deter sandbagging. The Court therefore concluded that "no stricter rule is a realistic necessity": a prisoner "has an obvious inducement to do his very best to keep his state remedies open, and not stake his all on the outcome of a federal habeas proceeding which, in many respects, may be less advantageous to him than a state court proceeding." *Fay*, 372 U.S. at 433. *See also Sykes*, 433 U.S. at 98 (White, J., concurring in the judgment) (noting that *Fay*'s deliberate bypass standard adequately prevented sandbagging). The Court's fear of sandbagging thus seems unrealistic, given that habeas review will still be available for constitutional claims that are raised in the state courts. By contrast, choosing to postpone claims increases the likelihood of conviction, forfeits all state appellate remedies, and also risks the loss of habeas unless defense counsel can convince the federal court that no deliberate bypass occurred. *See id.* at 103 & n.5 (Brennan, J., dissenting). In fact, the Court's argument "assumes a fantastically risk-prone pool of defendants and attorneys" because the success rate on habeas is lower than it is at trial or on appeal, and "the odds of victory" must be "discount[ed] . . . by the years of incarceration pending adjudication." Resnik, *Tiers*, 57 S. CAL. L. REV. 837, 897 (1984). *See also, e.g.*, L. YACKLE, *supra* note 39, at 338 n.8 (appointed attorneys rarely continue to represent prisoners on habeas, and therefore are unlikely to reserve arguments for the federal courts); Guttenberg, *supra* note 45, at 694-96 & n.422 (criticizing the Court for citing no authority or evidence to support its assumption that sandbagging occurs, and arguing that attorneys are unlikely to lie to habeas court in order to help client); Tague, *supra* note 74, at 46 (most defaults result from "inattention," "ignorance of either the applicable law or the facts," or "inability to appreciate the tactical value or constitutional worth of an objection," rather than deliberate decision to sandbag). Moreover, the sandbagging argument is based on the unrealistic presumption that defense attorneys have perfect knowledge of the available constitutional claims and their relative chances of success in the state and federal courts. *See* Guttenberg, *supra* note 45, at 695 n.423; Resnik, *supra*, at 897. Finally, even if sandbagging regularly occurs, the forfeiture of habeas claims is not likely to be an effective deterrent because it punishes the innocent prisoner rather than the attorney who made the tactical decision to hold arguments in reserve. *See* Guttenberg, *supra* note 45, at 696-97.

78. *Engle*, 456 U.S. at 128 & n.33. *See also* Brown v. Allen, 344 U.S. 443, 534-35 (1953) (Jackson, J., concurring in the result); C. WRIGHT, THE LAW OF FEDERAL COURTS 344 (4th ed. 1983) ("[t]here is an affront to state sensibilities when a single federal judge can order discharge of a prisoner whose conviction has been affirmed by the highest court of a state"); Bator, *supra* note 76, at 451 (there is "nothing more subversive of a judge's sense of responsibility, of the inner subjective conscientiousness which is so essential a part of the difficult and subtle art of judging well, than an indiscriminate acceptance of the notion that all the shots

decreasing the burden that habeas petitions place on the federal courts;[79] and (6) ensuring that the trial in state court is "'the main event'" rather than a "'tryout on the road' for what will later be the determinative federal habeas hearing."[80]

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will always be called by someone else"); Marcus, *supra* note 47, at 680-81 (habeas review of defaulted claims is more intrusive on state courts because it involves de novo review, whereas a plenary hearing in federal court often will be unnecessary if the prisoner received a full and fair hearing on the issue in state court). *But see Brown*, 344 U.S. at 510 (opinion of Frankfurter, J.) (habeas corpus "is not a case of a lower court sitting in judgment on a higher court"; rather, "[i]t is merely one aspect of respecting the Supremacy Clause of the Constitution whereby federal law is higher than State law" — "Congress has authorized the district courts to be the organ of the higher law rather than a Court of Appeals or exclusively this Court"); L. YACKLE, *supra* note 39, at 299-300 (habeas cases involving procedural defaults might create less federal-state friction than other habeas cases because in default cases the federal courts are not passing judgment on a substantive decision made by the state courts); *id.* at 150-51 (Supp. 1989) (threshold procedural issues analyzed under *Sykes* may involve federal courts "in the very sort of abrasive appraisal of state court proceedings that the Noia approach avoided"); Hoffman, *Retroactivity and the Great Writ: How Congress Should Respond to* Teague v. Lane, 1990 B.Y.U. L. REV. 183, 204 (state trial court judges are much more likely to be reversed on appeal than on habeas); Resnik, *supra* note 77, at 1024 (habeas is unlikely to demoralize state judges because "hierarchical arrangements . . . are premised upon the belief that supervision and review enhance the quality of both the work and the result"); SAN DIEGO Comment, *supra* note 76, at 379 (comity concerns are adequately served by the exhaustion doctrine; moreover, state courts that do not protect constitutional rights have no "*valid* interest in preventing a federal court from stepping in").

79. *See Carrier*, 477 U.S. at 487-88; *Reed*, 468 U.S. at 26 n.3 (Rehnquist, J., dissenting); Brown v. Allen, 344 U.S. 443, 537 (1953) (Jackson, J., concurring in the result) ("[h]e who must search a haystack for a needle is likely to end up with the attitude that the needle is not worth the search"); Norris v. United States, 687 F.2d 899, 900 (7th Cir. 1982). *But see* Eisenberg & Schwab, *The Reality of Constitutional Tort Litigation*, 72 CORNELL L. REV. 641, 693 & n.212 (1987) (between 1975 and 1984, federal court filings by prisoners, including both habeas petitions and civil rights suits, increased at about half the rate of total civil filings); Resnik, *supra* note 77, at 939-47, 958 n.558, 1031-35 (percentage of prisoners filing habeas petitions has decreased, while the number of federal judges has increased; because most habeas petitions are dismissed at the prehearing stage, they constitute only a small part of the district courts' workload); *id.* at 957-61 (creating additional procedural barriers to habeas relief has expanded the list of issues that must be resolved for each habeas petition, thereby perhaps increasing the amount of time federal judges must devote to habeas cases); Weisselberg, *supra* note 39, at 160-68; CATH. U. Comment, *supra* note 50, at 217-18 & n.314; SAN DIEGO Comment, *supra* note 76, at 394 (default rules give defense attorneys an incentive to object more frequently in state court, so that prisoners might ultimately find more issues on which to base habeas petitions). *See generally* Immigration & Naturalization Serv. v. Chadha, 462 U.S. 919, 958-59 (1983) ("it is crystal clear from the records of the [Constitutional] Convention, contemporaneous writings and debates, that the Framers ranked other values higher than efficiency"); Stanley v. Illinois, 405 U.S. 645, 656 (1972) ("the Constitution recognizes higher values than speed and efficiency"; in fact, the Bill of Rights was "designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy").

80. *See Sykes*, 433 U.S. at 90. The *Sykes* majority also reasoned that the *Fay* test might discourage state courts from enforcing their own contemporaneous objection rules in order to give themselves an opportunity to rule on defaulted constitutional claims before they reached the federal courts, *see id.* at 89-90, and that the cause and prejudice standard provided an incentive for making a record when the witnesses' memories were fresh before trial judges who could observe the demeanor of those witnesses, rather than later, when memories had faded and retrial might be difficult. *See Engle*, 456 U.S. at 127-28; *Sykes*, 433 U.S. at 88; Davis v. United States, 411 U.S. 233, 241 (1973). *But see Engle*, 456 U.S. at 147-48 (Brennan, J., dissenting) (if habeas relief is granted, "it is at least as reasonable to blame the State" for "the logistical and temporal difficulties arising from retrial" because the state did not comply with constitutional norms at the outset); Davis v. United States, 411 U.S. at 250 (Marshall, J., dissenting) (in many cases, a witness' prior testimony can be used at the second trial if the witness has become

These may be worthy policy considerations, but (as is true in the qualified immunity context) they must be balanced against the goals of remedying and deterring constitutional errors.[81] In fact, the prisoner's interest in obtaining a hearing on a defaulted constitutional claim is particularly strong because otherwise *no* court will consider the claim on the merits. In other habeas cases, by contrast, the prisoner at least obtained a ruling on the question in state court.[82]

The *Reed* Court properly recognized the importance of accommodating the relevant policies, concluding that procedural defaults of novel claims can be excused without undermining the legitimate goals underlying the cause and prejudice doctrine. As the Court explained, requiring defense counsel to raise novel objections at trial would serve little purpose: "[a]lthough there is a remote possibility that a given state court will be the first to discover a latent constitutional issue and to order redress if the issue is properly raised, it is far more likely that the court will fail to appreciate the claim and reject it out of hand."[83] Accordingly, permitting prisoners to present claims on habeas that were novel at the time of trial will not exacerbate the intrusion caused by federal review of state court decisions — if the prisoner had raised the claim, the state court would most likely have rejected it, and ultimately habeas review would still be necessary. In fact, refusing to excuse defaults of novel claims encourages defense counsel to raise all sorts of frivolous issues for fear that otherwise they might be barred on habeas. As a result, attorneys have no incentive to engage in the process of "winnowing out weaker arguments" that the Court has commended,[84] but instead have reason to raise meritless claims that increase the length of the trial and consume additional state court resources, and therefore perhaps aggravate rather than alleviate federal-state tensions.[85] Moreover, defense counsel's failure to make a truly novel challenge at trial is likely to be inadvertent rather than a deliberate attempt to sandbag, and considering those claims on habeas therefore does not detract from the importance of the trial or encourage disrespect for contemporaneous objection rules. Concerns about finality and the burden on the federal courts are somewhat undermined, but that is true any time habeas review is granted; giving these considerations paramount importance would lead to the wholesale elimination of habeas jurisdiction. As the Court observed in *Reed*, therefore, "finality, standing alone," cannot provide "a sufficient reason for federal courts to compromise their protection of constitutional rights" in habeas cases.[86]

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unavailable); Resnik, *supra* note 77, at 960 n.565, 957 (statistics indicate that most habeas petitions are filed within two years after conviction and are disposed of in less than six months).

81. *But cf.* Friedman, *supra* note 69, at 269-70 (the Court attempts to balance two very different things when it weighs prisoner's interest in raising constitutional claim against state's interest in procedural rules, and its refusal to balance on case-by-case basis "increas[es] the difficulties inherent in balancing dissimilar interests").

82. *See Sykes*, 433 U.S. at 108 (Brennan, J., dissenting).

83. *Reed*, 468 U.S. at 15.

84. Smith v. Murray, 477 U.S. 527, 536 (1986); *see supra* text accompanying note 72.

85. *See, e.g., Reed*, 468 U.S. at 15-16; L. YACKLE, *supra* note 39, at 187 (Supp. 1989). *Cf. Engle*, 456 U.S. at 131 (Court "might hesitate to adopt a rule that would require trial counsel . . . to object to every aspect of the proceedings in the hope that some aspect might mask a latent constitutional claim").

86. *Reed*, 468 U.S. at 15.

These same reasons that justify recognition of novelty as cause demonstrate that *Engle* and *Smith v. Murray* wrongly suggested that futility[87] can never satisfy the cause requirement.[88] Requiring counsel to raise claims that settled law indicates are futile is not necessary to further the legitimate policy concerns underlying *Sykes*. In *Reed*, for example, defense counsel failed to present an argument that became valid only after a subsequent Supreme Court opinion overturned "'a near-unanimous body of lower court authority.'"[89] The Court concluded that the default should not bar habeas relief because no attorney could reasonably have been expected to "urge[] a state court to adopt the position that this Court . . . ultimately adopted."[90] The prisoner who fails to raise an objection in the face of overwhelming adverse precedent is not flouting state procedural rules or attempting to detract from the importance of the trial.[91] Punishing her for failing to object contemporaneously does little

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87. In theory, the novelty as cause argument differs from the futility argument in that the latter involves a deliberate decision to ignore a known claim that defense counsel believes is unlikely to succeed, whereas the former involves an unintentional failure to recognize an unknown claim. *See* Note, Reed v. Ross: *Does "Novelty" as* Sykes *"Cause" Signify New Hope for Federal Habeas Corpus Review of Procedurally Defaulted Constitutional Claims?*, 14 CAP. U.L. REV. 269, 297 (1985) [hereinafter CAP. U. Note]. By describing futility cases as cases involving a conscious decision to forego a constitutional claim, both *Engle* and *Smith v. Murray* seemingly endorsed this distinction. *See* Smith v. Murray, 477 U.S. 527, 534-35 (1986); *Engle*, 456 U.S. at 130. In fact, *Engle* analogized futility cases to deliberate bypasses, *see id.* at 130 n.36, even though arguments thought to be futile are not omitted in order to gain a tactical advantage.

In many situations, however, this theoretical distinction breaks down. Cases where claims are not made because of a perception of futility are similar to cases where the legal argument was novel at the time of the default because often some subsequent change in the law makes the claim seem less futile by the time of habeas. *See* L. YACKLE, *supra* note 39, at 202 n.56.15 (Supp. 1989). Given that both types of cases may therefore involve changes in the law, the only way to distinguish them is to ask the habeas court to determine whether defense counsel thought about raising the issue but decided not to, or simply failed to perceive the claim. Although the courts may be able to use inferential reasoning to make this determination if the objection was either very familiar or completely unknown at the time of the default, the many cases in the middle of the spectrum will require the courts to make the difficult findings concerning individual motives that the Court wished to avoid in *Carrier*, 477 U.S. at 487-88. *See supra* note 68.

88. *See* Smith v. Murray, 477 U.S. 527, 534-35 (1986); *Engle*, 456 U.S. at 130. Relying on *Engle*'s statement that "perceived futility alone cannot constitute cause," *id.* at 130 n.36, however, some commentators question whether the Court really has foreclosed the use of futility to satisfy the cause requirement in all cases. *See* Guttenberg, *supra* note 45, at 651 n.182 (observing that *Engle* addressed only the issue of perceived futility, and not questions of actual futility, where state courts are in fact bound by precedent from a higher court that rejected the constitutional claim); Yackle, *supra* note 69, at 655-56 & n.219, 651 n.197 (pointing out that *Engle* dealt only with deliberate decisions to withhold claims deemed futile and that the Court held only that futility "alone" was insufficient to satisfy cause requirement; arguing that this language must be read in light of the Court's earlier suggestion that futility can excuse a procedural default) (citing Estelle v. Smith, 451 U.S. 454, 468 n.12 (1981)).

89. *Reed*, 468 U.S. at 17 (quoting United States v. Johnson, 457 U.S. 537, 551 (1982)).

90. *Id.* The argument made in the text is supported by this language in *Reed*, but is not required by the actual holding in that case. The jury instructions at issue in *Reed* had been used for more than a century in North Carolina, but the constitutional challenge to the instructions was not raised, much less rejected, in the state courts until years after Ross' trial. *See id.* at 18. Apparently, therefore, the default did not occur because counsel consciously reasoned that a challenge to the instructions was unlikely to succeed.

91. The failure to object should not be excused, of course, if defense counsel believes that state law is adverse to her client but hopes that the federal courts will recognize the claim on

to serve comity or federalism, to contribute to the early correction of error, or to minimize the intrusion on the state courts: although the court might have been persuaded to change its mind,[92] more likely it would have summarily rejected the argument. In fact, encouraging prisoners to repeatedly urge state judges to rethink old precedents shows little respect for state courts and their decisions, but instead encourages defense counsel to raise issues the state courts consider settled, thereby wasting judicial time and resources and perhaps exacerbating federal-state tensions.[93] Again, *any* limitation on habeas review contributes to finality and reduces federal judicial burdens, but these concerns alone cannot support the otherwise unjustified narrowing of the concept of cause.

The proper balance between protecting constitutional rights and promoting comity and finality is thus achieved only if habeas courts excuse procedural defaults when the reasonable defense attorney[94] would not have been aware of the claim subsequently raised on habeas, or would have had no reasonable basis to believe that any court would accept the claim. If defendants and their attorneys are required to predict the course of constitutional law with greater accuracy, meritorious habeas claims will be denied and constitutional violations will go unremedied without contributing substantially to the policy interests underlying the cause and prejudice test.

C. Comparing Qualified Immunity and Procedural Default

Although both public officials and defense attorneys should therefore be presumed to be reasonably familiar with relevant constitutional standards, the two groups should not necessarily be required to have the same level of legal expertise. Rather, they should be asked only to exercise reasonable diligence for one in their circumstances. In comparing what can reasonably be expected in the two situations, the courts should focus on two factors: the actor's access

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habeas. Futility satisfies the cause requirement only if the constitutional claim reasonably appears futile under both state and federal law.

92. *See Engle*, 456 U.S. at 130.

93. *See, e.g.*, L. YACKLE, *supra* note 39, at 187 (Supp. 1989); Guttenberg, *supra* note 45, at 655-56.

94. Most procedural defaults occur during the trial or first appeal, when defendants have a constitutional right to counsel. *See* Gideon v. Wainwright, 372 U.S. 335 (1963); Douglas v. California, 372 U.S. 353 (1963). If a default occurs while the defendant is exercising her sixth amendment right to represent herself at trial, *see* Faretta v. California, 422 U.S. 806 (1975), or is acting pro se during later stages of the criminal process when she has no constitutional right to appointed counsel, *see* Ross v. Moffitt, 417 U.S. 600 (1974), some courts refuse to require proof of cause and prejudice and instead apply *Fay*'s deliberate bypass test. *See, e.g.*, 3 W. LAFAVE & J. ISRAEL, *supra* note 47, at 95 n.60, 98 (Supp. 1990); L. YACKLE, *supra* note 39, at 150-51 n.10.15 (Supp. 1989). *Cf. Reed*, 468 U.S. at 11 n.7 (expressing no opinion on the applicability of the cause and prejudice standard in such cases). Given that a defendant who chooses to proceed pro se cannot later claim that she received ineffective assistance of counsel, *see* Faretta v. California, 422 U.S. at 834-35 n.46, perhaps the defendant who represents herself and fails to comply with a contemporaneous objection rule should be held to the same standards of cause and prejudice as the defendant who was represented at trial. Thus, novelty would not excuse a pro se defendant's failure to object unless the reasonable attorney would have been unaware of the claim. If, on the other hand, the prisoner had no choice but to represent herself at the time of the default because she had no right to appointed counsel, her default should not bar habeas review unless it can be characterized as a deliberate bypass.

to legal information, and the consequences of punishing inaccurate predictions of constitutional norms.

The accessibility of legal information varies depending on the status of the public official claiming immunity. For example, a police officer is probably less familiar with the relevant precedents than a criminal defense attorney. But a state attorney general, with a staff of advisors and time to evaluate the constitutionality of her decisions, can be expected to know more about constitutional doctrine than a lower level government official who has neither legal training nor ready access to legal advice.[95] In fact, a defense attorney may operate under greater time constraints in deciding whether to voice objections than an attorney general does when deciding whether to authorize conduct with constitutional implications. The defense attorney may therefore have less time to digest the relevant constitutional principles.[96]

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95. Concerns that public officials "possess no unique competency in divining the law" therefore do not serve to distinguish defense attorneys in procedural default cases from those defendants in section 1983 cases who are attorneys or have access to legal advice. Wood v. Strickland, 420 U.S. 308, 331 (1975) (Powell, J., concurring in part and dissenting in part). *See also, e.g.*, Tarantino v. Baker, 825 F.2d 772, 774-75 (4th Cir. 1987), *cert. denied*, 489 U.S. 1010 (1989); Colaizzi v. Walker, 812 F.2d 304, 308 (7th Cir. 1987); Ward v. County of San Diego, 791 F.2d 1329, 1332 (9th Cir. 1986); Briggs v. Malley, 748 F.2d 715, 719 (1st Cir. 1984), *aff'd on other grounds*, 475 U.S. 335 (1986); Saldana v. Garza, 684 F.2d 1159, 1165 (5th Cir. 1982), *cert. denied*, 460 U.S. 1012 (1983); Kattan, *supra* note 34, at 979-81. *See generally* Kinports, *supra* note 9, at 622-25.

For a general discussion of the circumstances that should be used in section 1983 cases to evaluate whether a public official in similar circumstances would have been aware of the relevant constitutional norms, see *id.* at 622-30.

96. In addition to the inherent constraints of trial practice, which often require defense counsel to make instantaneous decisions about possible objections, the economic realities of criminal litigation make it difficult for many attorneys to devote the time or resources necessary to research legal issues that are not apparent at first glance. A number of defense attorneys manage very large caseloads or receive inadequate compensation and therefore cannot justify spending the time required to do a thorough job. As one commentator noted, "[r]esource constraints on the public side and market incentives on the private side result in the divergence of attorneys' and clients' interests at discrete and identifiable points." Resnik, *supra* note 77, at 1008. *See also* N. LEFSTEIN, CRIMINAL DEFENSE SERVICES FOR THE POOR 56-60 (1982); Benner, *Tokenism and the American Indigent: Some Perspectives on Defense Services*, 12 AM. CRIM. L. REV. 667 (1975); Cover & Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 YALE L.J. 1035, 1080-83 (1977); J. CRIM. L. & CRIMINOLOGY Supreme Court Review, *supra* note 76, at 1636-37 & nn.167-70; Comment, *Federal Habeas Corpus Review of Unintentionally Defaulted Constitutional Claims*, 130 U. PA. L. REV. 981, 996-98 (1982).

Given the wide disparity in the quality of legal services available to different defendants, the standard proposed in the text would ideally take into account circumstances like the extent of the attorney's prior criminal trial experience and the amount of time and resources available to her in determining whether a reasonable attorney in the same circumstances would have raised the defaulted constitutional claim. *Cf.* United States v. Cronic, 466 U.S. 648, 652-53, 663 (1984) (refusing to presume ineffective assistance based on attorney's inexperience and lack of time to prepare and investigate, but concluding that such factors are "relevant to an evaluation of a lawyer's effectiveness in a particular case"). But a more generic reasonable attorney standard, although less precise, is obviously much easier to apply. Even under a generic approach, however, the courts should not assume that all defendants receive the same thorough representation as defendants like John Hinckley and John DeLorean. Using those cases as the benchmark would limit habeas to "the highly educated, the intelligent, and the wealthy who can hire the finest legal service" to ensure that all avenues of potential defense are explored. Jones v. Estelle, 722 F.2d 159, 173 (5th Cir. 1983) (Williams, J., dissenting), *cert. denied*, 466 U.S. 976 (1984). Instead, the reasonable attorney standard must be more realistic, taking into account the constraints under which many defense lawyers function. This standard will not be completely

Comparing the consequences of punishing erroneous interpretations of constitutional norms may suggest that the courts should extend qualified immunity in section 1983 cases more quickly than they excuse procedural defaults in habeas cases. In the qualified immunity context, the government official who makes the wrong choice is personally liable for any damages resulting from the constitutional breach.[97] Although the fear of damages may give her an incentive to avoid violating the Constitution in close cases, it may also chill the independent exercise of her discretion and inhibit the effective discharge of her duties. By contrast, the defense attorney, anxious to avoid a mistake that will forfeit her client's constitutional rights on habeas, may tend to object too frequently and raise insubstantial claims. As a result, her attention may be diverted from the main task at hand, and she may waste the court's time and perhaps aggravate the judge.[98] But these risks seem less detrimental to societal interests than the impact of overdeterrence in the qualified immunity context.

On the other hand, a defense attorney's miscalculation may forfeit a constitutional claim that would entitle her client to a new trial, and perhaps even to an acquittal or a prison term instead of the death penalty. Awarding money damages against the public official seems less drastic in comparison, especially if, as is often true, the governmental entity reimburses its employees for damages assessed in section 1983 suits.[99] Moreover, in the qualified immunity context, the government official is responsible only for her own mistaken interpretations of constitutional requirements.[100] In habeas cases, the innocent client pays for the mistakes of her attorney — in many cases, an attorney she did not even select.[101] The equities may therefore justify readier

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accurate when a defendant receives exceptionally able representation, but absolute precision is not as important here as it is in the qualified immunity context, where failing to consider the circumstances confronting the defendant in determining whether she should have known of the relevant constitutional principles will either unfairly subject some public officials to liability or improperly deny damages to some aggrieved plaintiffs. *See* Kinports, *supra* note 9, at 618-22.

97. Public officials will not ultimately have to pay, however, if their employer indemnifies them for section 1983 damage awards. *See infra* note 99 and accompanying text.

98. *See* Honeycutt v. Mahoney, 698 F.2d 213, 219 (4th Cir. 1983) (Murnaghan, J., dissenting) ("[i]mpatience or undisguised incredulity on the part of the judge all too easily may be translated in the minds of the jury into a suggestion of insubstantiality of defense and of grasping at straws"); Cole v. Stevenson, 620 F.2d 1055, 1071 n.25 (4th Cir.) (Murnaghan, J., dissenting) ("[t]here are judges who could be affected subconsciously, if not consciously, by what they regard as attempts to get them to depart from clearly established law," so that objecting might be "worse than futile" because the trial judge might conclude that "if the defendant had to assert such a far-out or apparently preposterous claim, his other contentions were of less merit than they might otherwise appear to be"), *cert. denied*, 449 U.S. 1004 (1980).

99. *See, e.g.*, Eisenberg & Schwab, *supra* note 79, at 686 & n.186; Gildin, *supra* note 32, at 561 n.20; Jeffries, *Compensation for Constitutional Torts: Reflections on the Significance of Fault*, 88 MICH. L. REV. 82, 88 n.31 (1989); Rudovsky, *supra* note 31, at 76 n.288. *See generally* P. SCHUCK, SUING GOVERNMENT: CITIZEN REMEDIES FOR OFFICIAL WRONGS 85-88 (1983).

100. *See, e.g.*, S. NAHMOD, CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION: THE LAW OF SECTION 1983, at 170-75 (2d ed. 1986) (supervisor may not be held liable for constitutional wrongs of her subordinates without some personal involvement on her part).

101. A large percentage of criminal defendants charged with felonies are indigent, and are therefore entitled to appointed counsel at trial. *See* BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, REPORT TO THE NATION ON CRIME AND JUSTICE 75 (2d ed. 1988) (more than 40% of felony defendants are indigent); Benner, *supra* note 96, at 668 (putting the figure at 65%, for a total of four million a year). These defendants have no right to choose their own

forgiveness of erroneous constitutional interpretations in procedural default cases than in section 1983 suits.

Nevertheless, the Court seems to have made the choice to hold defense counsel to the stricter standard. By rejecting *Fay*'s deliberate bypass test and changing the focus in procedural default cases from the defendant's personal choices to the attorney's decisions, *Sykes* permitted the courts to bind criminal defendants to their attorneys' actions.[102] In theory, the stricter standard may be warranted, given the Court's repeated warning that the cause and prejudice test should not be applied if it would lead to a miscarriage of justice.[103] If the miscarriage of justice exception is interpreted to permit habeas review of defaulted claims that might have affected the verdict or sentence, it could alleviate some of the inequity that results from binding defendants by the

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counsel, *see* 2 W. LAFAVE & J. ISRAEL, *supra* note 47, at 34, or even to have "a meaningful relationship" with their attorneys, Morris v. Slappy, 461 U.S. 1, 13-14 (1983).

102. *Compare Fay*, 372 U.S. at 439 ("[a] choice made by counsel not participated in by the petitioner does not automatically bar relief"), *with Sykes*, 433 U.S. at 91 n.14 (referring to "the burden on a defendant to be bound by the trial judgments of his lawyer"). *See also Carrier*, 477 U.S. at 485; *Reed*, 468 U.S. at 13.

The Court has articulated two justifications for binding criminal defendants to their attorneys' choices: that the deliberate bypass standard was not designed to apply to errors committed during trial because in that context "decisions must, as a practical matter, be made without consulting the client," *Sykes*, 433 U.S. at 93 (Burger, C.J., concurring), and that any other approach would "undermine the entire representational system," *Fay*, 372 U.S. at 471 (Harlan, J., dissenting).

Both rationales have been criticized. First, although interrupting a trial to allow the defendant to consult with her attorney about every evidentiary objection would obviously be disruptive, giving defense counsel free rein in making trial decisions does not necessarily mean that the defendant should inevitably be penalized for erroneous decisions. *See* Goodman & Sallett, *supra* note 47, at 1710 (noting that in civil cases, damage awards for malpractice can compensate for attorney negligence, whereas in criminal cases, a malpractice action cannot remedy unjust imprisonment). Second, the representational system cannot accurately be analogized to a principal-agent relationship because defendants do not have the expertise necessary to assume the role of principal in supervising their attorney-agents. *See* Waltz, *Inadequacy of Trial Defense Representation as a Ground for Post-Conviction Relief in Criminal Cases*, 59 NW. U.L. REV. 289, 297 (1964). *See also* Resnick, *supra* note 77, at 895-98 (*Sykes* is based on unrealistic assumption that defendants exercise control over their attorneys). Moreover, to the extent that the representational system is flawed due to the economic realities of criminal litigation, *see supra* note 96, the agency rationale breaks down either because the attorney may not have the same interests as her client, *see* Guttenberg, *supra* note 45, at 707-08; Seidman, *Factual Guilt and the Burger Court: An Examination of Continuity and Change in Criminal Procedure*, 80 COLUM. L. REV. 436, 467-68 (1980); *see also* Marcus, *supra* note 47, at 685 n.141 (procedural default should not bar habeas when defendant objects to attorney's decision); *supra* note 72, or because the attorney may not do an adequate job in representing the client, *see Sykes*, 433 U.S. at 118 (Brennan, J., dissenting) (if defendants are to be bound by counsel's decisions, the courts "will have to reconsider whether they can continue to indulge the comfortable fiction that all lawyers are skilled or even competent"); Comment, *The Burger Court and Federal Review for State Habeas Petitioners After* Engle v. Isaac, 31 U. KAN. L. REV. 605, 624 (1983) ("[a] habeas standard that gives paramount importance to attorney competence creates an anomalous result given that Chief Justice Burger criticizes one-third to one-half of all trial attorneys as being improperly qualified") (citing *Burger not all that wrong?*, 64 A.B.A. J. 832 (1978)).

103. In *Carrier*, for example, the Court expressed "confiden[ce] that, for the most part, 'victims of a fundamental miscarriage of justice will meet the cause-and-prejudice standard'"; in the "extraordinary case" where that is not true, "where a constitutional violation has probably resulted in the conviction of one who is actually innocent," the Court continued, the courts may grant habeas relief even without a showing of cause. 477 U.S. at 495-96 (quoting *Engle*, 465 U.S. at 135). *See also Harris*, 489 U.S. at 262; *Sykes*, 433 U.S. at 90-91.

decisions of their attorneys.[104] Unfortunately, however, in practice the Court does not seem committed to strict enforcement of the exception.[105]

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104. Relying on the miscarriage of justice exception, however, is likely to lead to more ad hoc decisionmaking and therefore more inconsistent results than simply recognizing that defendants should not be penalized for their attorneys' mistakes.

105. For example, the Court refused to find a potential miscarriage of justice in Dugger v. Adams, 489 U.S. 401 (1989), even though the trial judge's improper comments might have undermined the accuracy of the capital sentencing decision and the judge had found an equal number of aggravating and mitigating circumstances. The Court explained that "[d]emonstrating that an error is by its nature the kind of error that might have affected the accuracy of a death sentence is far from demonstrating that an individual defendant probably is 'actually innocent' of the sentence he or she received." *Id.* at 411 n.6. Similarly, in a separate opinion in *Harris*, 489 U.S. at 271 (O'Connor, J., concurring), three Justices characterized the exception as a "narrow" one, requiring "a strong showing of probable factual innocence." *See also* Smith v. Murray, 477 U.S. 527, 537-38 (1986) (no miscarriage of justice involved in admission during capital sentencing hearing of testimony of court-appointed psychiatrist obtained in violation of fifth amendment); *Engle*, 456 U.S. at 129 (applying cause and prejudice requirements even in cases where constitutional claims implicated accuracy of verdict).

By suggesting that a miscarriage of justice has not occurred despite a substantial possibility that the constitutional error affected the jury's verdict, and thus limiting the exception to prisoners who are probably innocent, the Court is apparently endorsing an approach associated with Judge Friendly, who advocated restricting habeas relief to those who could make "a colorable showing of innocence." Friendly, *supra* note 76, at 150. *See also* Jeffries & Stuntz, *Ineffective Assistance and Procedural Default in Federal Habeas Corpus*, 57 U. CHI. L. REV. 679 (1990). But even Judge Friendly's standard seems less extreme, requiring only "a fair probability that, in light of all the evidence, . . . the trier of the facts would have entertained a reasonable doubt." Friendly, *supra* note 76, at 160.

The emphasis on factual innocence leads to an exceedingly narrow view of the scope of habeas that is inconsistent with the Court's prior opinions. *See, e.g.*, Kimmelman v. Morrison, 477 U.S. 365, 379-80 (1986) (allowing habeas petitioner to raise ineffective assistance claim based on counsel's failure to object to illegally seized evidence, even though that evidence is often a reliable indicator of guilt); Rose v. Mitchell, 443 U.S. 545, 560-61 (1979) (permitting prisoners to challenge selection of nonvoting foreperson of grand jury even though claim was not guilt-related); Stone v. Powell, 428 U.S. 465, 494 (1976) (barring fourth amendment claim on habeas only if the prisoner received a full and fair opportunity to litigate the claim in state court). More important, this emphasis on factual innocence conflicts with habeas' traditional role in remedying all fundamentally unconstitutional incarcerations. *See* L. YACKLE, *supra* note 39, at 395-98 (also noting that Congress has repeatedly rejected attempts to limit habeas to claims related to guilt); Hoffman, *supra* note 78, at 213-14. Additionally, the emphasis on factual innocence contradicts the established notion that habeas is not supposed to serve as an appeal, *see, e.g.*, Teague v. Lane, 489 U.S. 288, 305-06 (1989), and therefore is more concerned with reviewing the procedures used at trial than with determining the defendant's guilt or innocence, a function that can be left to the state courts. *See* L. YACKLE, *supra* note 39, at 353-54; Friedman, *supra* note 69, at 320. Finally, the focus on actual innocence fails to recognize that even the guilty have a constitutional right to a fair trial, *see, e.g.*, Smith v. Murray, 477 U.S. 527, 544-45 (1986) (Stevens, J., dissenting); Stone v. Powell, 428 U.S. at 524 (Brennan, J., dissenting); L. YACKLE, *supra* note 39, at 396, and creates a hierarchy of constitutional rights that finds no support in either the Constitution or the habeas statutes, *see id.* at 409-10; Friedman, *supra* note 69, at 320. *See generally* Peller, *In Defense of Habeas Corpus Relitigation*, 16 HARV. C.R.-C.L. L. REV. 579 (1982).

Accordingly, the miscarriage of justice exception should apply whenever the defaulted claim substantially affected the accuracy of the trial or sentencing process. *See* Foley, *supra* note 47, at 211. *But cf.* L. YACKLE, *supra* note 39, at 398-99 (arguing that it is difficult to determine whether some claims — such as the right to speedy trial and prohibition of double jeopardy — are guilt-related).

For examples of the limited circumstances in which the courts of appeals have found a potential miscarriage of justice, see Callanan v. United States, 881 F.2d 229, 231 (6th Cir. 1989) (suggesting that the cause requirement may not apply to defaulted claim based on a new Supreme Court opinion that had repudiated the intangible rights theory used to convict the de-

Even assuming that it is appropriate to overlook constitutional errors in some section 1983 cases when they would not be forgiven in procedural default cases, the federal courts tend to interpret the qualified immunity standard much more leniently and the cause standard much more strictly than necessary to properly accommodate the competing interests. They grant qualified immunity in circumstances when the reasonable public official should have recognized the constitutional implications of her decisions, and they deny habeas review when the reasonable defense counsel could not reasonably have been aware of a novel constitutional claim. The following two sections examine the case law in these areas.

II. DEFINING "CLEARLY ESTABLISHED" RIGHTS IN QUALIFIED IMMUNITY CASES

Four issues arise in defining clearly established constitutional rights for purposes of ruling on a public official's request for qualified immunity. First, what courts — at what level, from what jurisdictions, and in what number — must speak in order to establish a constitutional right? What significance should be attached to divided opinions, dicta, and conflicts among the courts? Second, must some period of time elapse before the relevant precedents clearly establish a right? Third, how similar must the plaintiff's case be to the prior case law that articulated the applicable constitutional norms? And finally, are the defendant's violations of other legal standards relevant in evaluating her entitlement to qualified immunity? As will become obvious, the courts of appeals take different approaches in answering most of these questions. In doing so, some make qualified immunity an almost impossible hurdle for a section 1983 plaintiff to overcome, refusing to consider the law settled unless courts in the defendant's own jurisdiction have issued a number of decisions directly on point.

A. Number, Weight, and Consistency of Precedents

Harlow expressly declined to decide whether lower court case law can clearly establish a constitutional right.[106] The Court did, however, cite its earlier opinion in *Procunier v. Navarette*, which concluded that the right allegedly infringed by the defendants in that case was not clearly established whether the Court looked to precedents from the Supreme Court, the courts of appeals, or the local district court.[107] Moreover, in ruling that the defendants in *Davis v. Scherer* and *Mitchell v. Forsyth* had not violated clearly established rights, the Court observed that decisions from, respectively, the local court of appeals and two district courts in other jurisdictions had sanctioned similar conduct.[108]

Nevertheless, some courts of appeals suggest that Supreme Court precedent may be necessary to clearly establish a constitutional right. These courts have granted qualified immunity either on the ground that the Supreme

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fendants of mail fraud), *cert. denied*, 110 S. Ct. 1816 (1990); United States v. Shelton, 848 F.2d 1485, 1490 n.4 (10th Cir. 1988) (same).

106. *Harlow*, 457 U.S. at 818 n.32.

107. 434 U.S. 555, 565 (1978); *see Harlow*, 457 U.S. at 818 & n.32.

108. *See Mitchell*, 472 U.S. at 533; Davis v. Scherer, 468 U.S. 183, 192 (1984).

Court issued the controlling decision after the violation occurred,[109] or that the Supreme Court left the issue open in an earlier opinion.[110] In *Affiliated Capital Corp. v. City of Houston*, for example, the Fifth Circuit concluded that the relevant law was not established prior to a dispositive Supreme Court decision, even though a plurality of the Supreme Court and several other federal courts, including the Fifth Circuit itself, had issued opinions favorable to the plaintiff by the time the defendant acted.[111] Likewise, in *Schlothauer v. Robinson*, the Eighth Circuit granted qualified immunity in the face of its own precedent prohibiting the defendants' conduct because the Supreme Court did not resolve the issue until the following year and had expressly refused to rule on the question on previous occasions.[112]

Requiring Supreme Court precedent to clearly establish a constitutional principle is unnecessarily restrictive. Supreme Court opinions are much less frequent than lower court decisions,[113] and holding out for a Supreme Court ruling may therefore be as productive as waiting for Godot. In fact, if the lower courts reach a consensus on a particular issue, the Supreme Court has no particular reason to grant review to clarify something that should already be clear to everyone — including government officials.[114] Therefore, other courts of appeals have been satisfied that Supreme Court cases are not required to clearly establish a constitutional right. These courts have denied immunity even though the Supreme Court previously refused to resolve the question or did not rule on the issue until after the defendant acted.[115]

In some cases, however, these courts suggest that precedent from the court of appeals in the defendant's own jurisdiction is required, refusing to find a right clearly established by decisions from other courts of appeals or even the local district or state courts.[116] In *Knight v. Mills*, for example, the First

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109. *See, e.g.*, Howe v. Baker, 796 F.2d 1355, 1358 (11th Cir. 1986); Johnson by Johnson v. Brelje, 701 F.2d 1201, 1211 (7th Cir. 1983); Trejo v. Perez, 693 F.2d 482, 484 (5th Cir. 1982). *Cf.* Gargiul v. Tompkins, 790 F.2d 265, 273 (2d Cir. 1986) (granting immunity because the Supreme Court had never ruled on the issue).

110. *See, e.g.*, Knight v. Mills, 836 F.2d 659, 667 (1st Cir. 1987); Borucki v. Ryan, 827 F.2d 836, 842 (1st Cir. 1987); Daniel v. Taylor, 808 F.2d 1401, 1403 (11th Cir. 1986) (per curiam); Moore v. Marketplace Restaurant, Inc., 754 F.2d 1336, 1342 (7th Cir. 1985).

111. 735 F.2d 1555, 1569-70 (5th Cir. 1984) (en banc), *cert. denied*, 474 U.S. 1053 (1986).

112. 757 F.2d 196, 197 (8th Cir. 1985) (per curiam).

113. The Court allots time for only about 160 oral arguments each year. *See* R. STERN, E. GRESSMAN & S. SHAPIRO, *supra* note 47, at 5.

114. *See, e.g.*, Sawyer v. Smith, 110 S. Ct. 2822, 2835 (1990) (Marshall, J., dissenting); Estelle v. Gamble, 429 U.S. 97, 115 (1976) (Stevens, J., dissenting). *Cf. Mitchell*, 472 U.S. at 534 (suggesting that Supreme Court grants certiorari when it finds a question "sufficiently doubtful"); R. STERN, E. GRESSMAN & S. SHAPIRO, *supra* note 47, at 199 n.30 (at times, the Court denies certiorari even when the relevant cases conflict, hoping that a consensus or "a satisfactory majority view among the lower courts" will emerge).

115. *See, e.g.*, Maldonado Santiago v. Velazquez Garcia, 821 F.2d 822, 830 (1st Cir. 1987); Garcia by Garcia v. Miera, 817 F.2d 650, 657-58 (10th Cir. 1987), *cert. denied*, 485 U.S. 959 (1988); LeClair v. Hart, 800 F.2d 692, 695 (7th Cir. 1986); Patzner v. Burkett, 779 F.2d 1363, 1370 (8th Cir. 1985); Joseph v. Brierton, 739 F.2d 1244, 1249-50 (7th Cir. 1984); Arebaugh v. Dalton, 730 F.2d 970, 973 (4th Cir. 1984). *See also* Kattan, *supra* note 34, at 984.

116. *See, e.g.*, Davis v. Holly, 835 F.2d 1175, 1180, 1182 (6th Cir. 1987); Hawkins v. Steingut, 829 F.2d 317, 321 (2d Cir. 1987) ("district court decision does not 'clearly establish' the law even of its own circuit, much less that of other circuits"); Garcia by Garcia v.

Circuit dismissed certain cases cited by the plaintiff because, even if indistinguishable on their facts, they originated from other jurisdictions. Such cases, the court said, cannot clearly establish rights "binding on this Court."[117] Likewise, in granting the defendant qualified immunity in *Gagne v. City of Galveston*, the Fifth Circuit observed that "the possible existence and scope" of the right asserted by the plaintiff "has only very recently begun to attract attention *in this circuit*."[118]

Although the reasonable public official may not be aware of every district court opinion issued in distant jurisdictions,[119] in some circumstances it is reasonable to expect her to respect a constitutional right recognized in numerous other jurisdictions or in the federal district court or state court in her own jurisdiction. Public officials should not be absolved of liability when they choose to ignore those decisions and wait for the local court of appeals to rule on the issue, unless they reasonably believe that that court is likely to disagree with the other courts and sustain the constitutionality of their conduct. A number of courts agree, relying on opinions from other courts of appeals[120] and

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Miera, 817 F.2d 650, 658 (10th Cir. 1987), *cert. denied*, 485 U.S. 959 (1988); Howe v. Baker, 796 F.2d 1355, 1359 (11th Cir. 1986); Azeez v. Fairman, 795 F.2d 1296, 1301, 1302 (7th Cir. 1986); Hall v. Medical College of Ohio at Toledo, 742 F.2d 299, 309 (6th Cir. 1984), *cert. denied*, 469 U.S. 1113 (1985); Bailey v. Turner, 736 F.2d 963, 967, 969 & n.7 (4th Cir. 1984). *Cf.* Walnut Properties, Inc. v. City of Whittier, 861 F.2d 1102, 1112-13 (9th Cir. 1988) (court admits that absence of Ninth Circuit precedent might not lead it to grant immunity in other types of cases, but concludes that it must do so here, where there was no "indication of what analysis this circuit would employ"; court thus grants immunity despite six federal cases supporting plaintiff and none to the contrary), *cert. denied*, 490 U.S. 1006 (1989); Ohio Civil Serv. Employees Ass'n v. Seiter, 858 F.2d 1171, 1177 (6th Cir. 1988) (cases from other courts may establish rights, but only in "extraordinary" cases where they "point unmistakably to the unconstitutionality of the conduct complained of and [are] so clearly foreshadowed by applicable direct authority as to leave no doubt in the mind of a reasonable officer that his conduct . . . would be found wanting"); Robinson v. Bibb, 840 F.2d 349, 352 (6th Cir. 1988) (requiring case law from Supreme Court, local court of appeals, or local state supreme court); Savidge v. Fincannon, 836 F.2d 898, 908 & n.48 (5th Cir. 1988) (citing D.C. Circuit opinion, but noting that it is not binding precedent); Hershey v. City of Clearwater, 834 F.2d 937, 941 n.5 (11th Cir. 1987) (noting that prior state court decision striking down identical statute was "an apparently unpublished decision of a trial court in a state judicial circuit that did not encompass Clearwater," where the arrest had occurred); Daniel v. Taylor, 808 F.2d 1401, 1404 (11th Cir. 1986) (per curiam) (citing Fourth Circuit case, but noting that it is not binding precedent); Chinchello v. Fenton, 805 F.2d 126, 134 (3d Cir. 1986) (refusing to look to law of other circuits in the absence of Supreme Court precedent or a consensus among the courts of appeals); Blackburn v. Snow, 771 F.2d 556, 575 n.2 (1st Cir. 1985) (Aldrich, J., dissenting) (referring to case relied on by majority as "a mere district court case from another circuit").

117. 836 F.2d 659, 668 (1st Cir. 1987). *See also id.* at 667.

118. 805 F.2d 558, 560 (5th Cir. 1986) (emphasis added), *cert. denied*, 483 U.S. 1021 (1987).

119. *See* Raffone v. Robinson, 607 F.2d 1058, 1062 (2d Cir. 1979) (rejecting plaintiff's reliance on district court opinion from another jurisdiction because "one district court does not alone clearly establish a right"; defendants cannot "fairly be required, upon pain of money damages, to stay abreast of district court caselaw from across the country").

120. *See, e.g.*, Watertown Equip. Co. v. Norwest Bank Watertown, N.A., 830 F.2d 1487, 1492-93 (8th Cir. 1987), *cert. denied*, 486 U.S. 1001 (1988); Borucki v. Ryan, 827 F.2d 836, 845-48 (1st Cir. 1987); Maldonado Santiago v. Velazquez Garcia, 821 F.2d 822, 830 (1st Cir. 1987); Rios v. Lane, 812 F.2d 1032, 1039 (7th Cir.) (distinguishing cases from other jurisdictions in finding right clearly established), *cert. dismissed*, 483 U.S. 1001 (1987); Weber v. Dell, 804 F.2d 796, 803-04 (2d Cir. 1986), *cert. denied*, 483 U.S. 1020 (1987); Bonitz v. Fair, 804 F.2d 164, 171 & n.8 (1st Cir. 1986); LeClair v. Hart, 800 F.2d 692, 695 (7th Cir. 1986); Ward v. County of San Diego, 791 F.2d 1329, 1332 (9th Cir. 1986) (in absence of

from the local district courts[121] and state courts[122] in evaluating the defendant's entitlement to immunity.

In addition to ignoring cases from outside the defendant's jurisdiction, some courts of appeals have granted immunity despite case law favoring the plaintiff because the number of cases was insufficient,[123] or because the language supporting the plaintiff's claim appeared in dictum.[124] The Seventh

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binding precedent, courts should look to all available cases, including those from other circuits, to determine whether right was clearly established), *cert. denied*, 483 U.S. 1020 (1987); Fernandez v. Leonard, 784 F.2d 1209, 1216, 1217 (1st Cir. 1986); Davis v. Mansfield Metro. Hous. Auth., 751 F.2d 180, 187 (6th Cir. 1984); Bilbrey by Bilbrey v. Brown, 738 F.2d 1462, 1466 (9th Cir. 1984) (denying qualified immunity despite absence of Supreme Court or Ninth Circuit precedent because cases from other courts settled the law); Arebaugh v. Dalton, 730 F.2d 970, 973 (4th Cir. 1984).

121. *See, e.g.*, Bonitz v. Fair, 804 F.2d 164, 171 (1st Cir. 1986); Thorne v. City of El Segundo, 802 F.2d 1131, 1139 (9th Cir. 1986); Culbreath v. Block, 799 F.2d 1248, 1250 (8th Cir. 1986); Adams v. Brierton, 752 F.2d 546, 547-48 (11th Cir.) (per curiam), *cert. denied*, 474 U.S. 1010 (1985); Davis v. Mansfield Metro. Hous. Auth., 751 F.2d 180, 187 (6th Cir. 1984); Harris v. Young, 718 F.2d 620, 623 (4th Cir. 1983). For examples of cases considering district court opinions from other jurisdictions, see Borucki v. Ryan, 827 F.2d 836, 846 (1st Cir. 1987); Culbreath v. Block, 799 F.2d at 1250; Ward v. County of San Diego, 791 F.2d 1329, 1332-33 (9th Cir. 1986), *cert. denied*, 483 U.S. 1020 (1987); Blackburn v. Snow, 771 F.2d 556, 570 (1st Cir. 1985); Davis v. Mansfield Metro. Hous. Auth., 751 F.2d at 186; Bilbrey by Bilbrey v. Brown, 738 F.2d 1462, 1466 (9th Cir. 1984); Crowder v. Lash, 687 F.2d 996, 1003-04 (7th Cir. 1982).

122. *See, e.g.*, Horwitz v. State Bd. of Medical Examiners of State of Colo., 822 F.2d 1508, 1517-18 (10th Cir.), *cert. denied*, 484 U.S. 964 (1987); Patzner v. Burkett, 779 F.2d 1363, 1370 (8th Cir. 1985); Bilbrey by Bilbrey v. Brown, 738 F.2d 1462, 1466 (9th Cir. 1984). For examples of cases considering state court opinions from other jurisdictions, see Ward v. County of San Diego, 791 F.2d 1329, 1332 (9th Cir. 1986), *cert. denied*, 483 U.S. 1020 (1987); Arebaugh v. Dalton, 730 F.2d 970, 973 (4th Cir. 1984). *But cf.* Hershey v. City of Clearwater, 834 F.2d 937, 941 n.5 (11th Cir. 1987) (granting qualified immunity despite local state court decisions recognizing constitutional right because the state supreme court had not ruled on the issue and courts in other states had reached the contrary conclusion); Williams v. Smith, 781 F.2d 319, 322 (2d Cir. 1986) (questioning whether one local state trial court decision can clearly establish federal constitutional rights).

123. *See, e.g.*, Walnut Properties, Inc. v. City of Whittier, 861 F.2d 1102, 1113 (9th Cir. 1988) (referring to three federal court of appeals decisions and three federal district court decisions as only a "few cases"), *cert. denied*, 490 U.S. 1006 (1989); Ohio Civil Serv. Employees Ass'n v. Seiter, 858 F.2d 1171, 1177 (6th Cir. 1988) ("a mere handful of decisions of other circuit and district courts, which are admittedly novel"); Davis v. Holly, 835 F.2d 1175, 1181-82 (6th Cir. 1987) ("[a] single idiosyncratic" court of appeals decision from another circuit); Thorne v. Jones, 765 F.2d 1270, 1277 (5th Cir. 1985) (one district court opinion from another jurisdiction), *cert. denied*, 475 U.S. 1016 (1986); Raffone v. Robinson, 607 F.2d 1058, 1062 (2d Cir. 1979) (one district court opinion from another jurisdiction). *See also* Kattan, *supra* note 34, at 984 ("paucity of decisions on an issue would suggest that the issue was not so settled as to preclude state officials from acting because of it"). *Cf.* Affiliated Capital Corp. v. City of Houston, 735 F.2d 1555, 1569 (5th Cir. 1984) (en banc) (cases supporting plaintiff "were breaking new ground and were not clearly established"), *cert. denied*, 474 U.S. 1053 (1986).

124. *See, e.g.*, Cox v. Cook, 420 U.S. 734, 737 n.3 (1975) (per curiam) (dismissing opinion from another circuit as dictum); Craft v. Wipf, 836 F.2d 412, 416-17 (8th Cir. 1987) (dismissing South Dakota Supreme Court decision because although one portion of the opinion suggested plaintiffs had a protected property interest, another part declined to address the due process claims on ripeness grounds); Hall v. Medical College of Ohio at Toledo, 742 F.2d 299, 309 (6th Cir. 1984) (dismissing opinions from Sixth Circuit and district court in another jurisdiction as dictum), *cert. denied*, 469 U.S. 1113 (1985).

Some courts have also immunized a public official in the face of case law supporting the plaintiff because the relevant decisions were on appeal, *see, e.g.*, Williams v. Smith, 781 F.2d

Circuit has adopted the most extreme position on this front, requiring "caselaw which clearly and consistently recognized the constitutional right."[125] The court may be right that "[a] reasonable government official cannot necessarily be expected to recognize the significance of a few scattered cases from disparate areas of the law for a right that is just evolving."[126] Nevertheless, it went too far when it suggested that a single Seventh Circuit opinion cannot clearly establish a constitutional right — even when there are no contrary rulings from other courts.[127]

Other courts of appeals have granted qualified immunity despite precedent supporting the plaintiff because divided courts,[128] or a plurality of the Supreme Court,[129] issued the relevant decisions. If the judges hearing the prior cases could not agree, these courts have explained, the right at issue could not be considered clearly established.[130] The Fourth Circuit succinctly rejected this

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319, 322 (2d Cir. 1986), or were unpublished opinions, *see, e.g.*, Hershey v. City of Clearwater, 834 F.2d 937, 941 n.5 (11th Cir. 1987); Ward v. Johnson, 690 F.2d 1098, 1112 (4th Cir. 1982) (en banc). *But cf.* Jones v. Preuit & Mauldin, 808 F.2d 1435, 1442 (11th Cir.) (even assuming that "private defendants cannot reasonably be held accountable for unpublished opinion[]," it indicates that they should have realized that their conduct was unconstitutional based on Supreme Court decisions relied on in the opinion), *vacated on other grounds on reh'g*, 822 F.2d 998 (11th Cir. 1987), *aff'd on other grounds*, 851 F.2d 1321 (11th Cir. 1988) (en banc), *vacated*, 489 U.S. 1002 (1989).

125. Coleman v. Frantz, 754 F.2d 719, 730 n.15 (7th Cir. 1985). *See also* Lojuk v. Johnson, 770 F.2d 619, 628, 631 (7th Cir. 1985) (quoting *Coleman* and granting qualified immunity because plaintiff could cite only one district court opinion and one court of appeals decision from other jurisdictions, and several other "distantly related" cases), *cert. denied*, 474 U.S. 1067 (1986).

126. *Lojuk*, 770 F.2d at 628.

127. *See* Danenberger v. Johnson, 821 F.2d 361, 365 (7th Cir. 1987) (alternative holding).

128. *See, e.g.*, Hershey v. City of Clearwater, 834 F.2d 937, 941 n.5 (11th Cir. 1987); People of Three Mile Island v. Nuclear Regulatory Comm'rs, 747 F.2d 139, 147 (3d Cir. 1984) (noting that four judges on D.C. Circuit voted to grant rehearing en banc in case relied on by plaintiff because they found the panel's decision a "'startling proposition'") (quoting Sholly v. United States Nuclear Regulatory Comm'n, 651 F.2d 792, 792 (D.C. Cir. 1981) (statement of Tamm, J., on denial of rehearing en banc), *vacated*, 459 U.S. 1194 (1983)); Hall v. Medical College of Ohio at Toledo, 742 F.2d 299, 308 (6th Cir. 1984) (noting that relevant Supreme Court opinion was issued by divided Court), *cert. denied*, 469 U.S. 1113 (1985); Harris v. Young, 718 F.2d 620, 623-24 (4th Cir. 1983); Sapp v. Renfroe, 511 F.2d 172, 178 (5th Cir. 1975). *Cf.* Horwitz v. State Bd. of Medical Examiners of State of Colo., 822 F.2d 1508, 1518 (10th Cir.) (noting that relevant state supreme court decision finding no constitutional violation was unanimous), *cert. denied*, 484 U.S. 964 (1987).

129. *See, e.g.*, Danenberger v. Johnson, 821 F.2d 361, 364 (7th Cir. 1987); Affiliated Capital Corp. v. City of Houston, 735 F.2d 1555, 1569 (5th Cir. 1984) (en banc), *cert. denied*, 474 U.S. 1053 (1986); Bever v. Gilbertson, 724 F.2d 1083, 1092-93 (4th Cir.) (Hall, J., dissenting), *cert. denied*, 469 U.S. 948 (1984).

130. *See, e.g.*, Harris v. Young, 718 F.2d 620, 623-24 (4th Cir. 1983). *Cf.* Wood v. Strickland, 420 U.S. 308, 329 (1975) (Powell, J., concurring in part and dissenting in part) ("One need only look to the decisions of this Court — to our reversals, our recognition of evolving concepts, and our five-to-four splits — to recognize the hazard of even informed prophecy as to what are 'unquestioned constitutional rights.'"); Koch v. City of Hutchinson, 814 F.2d 1489, 1496 (10th Cir. 1987) (district court's grant of judgment notwithstanding the verdict in favor of municipal defendant and "the close call" presented by plaintiff's first amendment claim "indicate the murky nature of this claim's viability" and thus support qualified immunity), *aff'd*, 847 F.2d 1436 (10th Cir.) (en banc), *cert. denied*, 488 U.S. 909 (1988); Chapman v. Pickett, 801 F.2d 912, 924 (7th Cir. 1986) (Easterbrook, J., dissenting) (arguing that law could not have been clearly established when defendants acted because his dissent in this case and district court opinion in defendants' favor indicate that "judges still disagree about

line of reasoning in *Arebaugh v. Dalton*: "It is hard not to look askance at the contention [that because] the Supreme Court vote on the point . . . [was] 'only' 6-3, there was some justification for a failure to comply with fully established constitutional law as authoritatively laid down by our highest judicial authority."[131]

Most courts of appeals conclude that a constitutional right is not clearly established if the relevant cases in the defendant's own jurisdiction[132] or in other jurisdictions[133] are conflicting. Although the law may not be settled when the plaintiff and defendant can cite a roughly equal number of precedents supporting their respective positions, public officials should be subjected to

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the constitutional standards"), *vacated*, 484 U.S. 807 (1987); Gargiul v. Tompkins, 790 F.2d 265, 273 (2d Cir. 1986) (noting that district court's ruling against plaintiff in this case indicates law was not clearly established); McSurely v. McClellan, 753 F.2d 88, 100 (D.C. Cir.) (per curiam) (concluding that constitutional right could not have been clearly established in 1967 because in 1976 half of the ten members of the court of appeals thought the defendants' conduct was lawful), *cert. denied*, 474 U.S. 1005 (1985); Albers v. Whitley, 743 F.2d 1372, 1378 (9th Cir. 1984) (Wright, J., dissenting) (arguing that disagreement among the panel in this case indicated that constitutional right was not clearly established), *rev'd on other grounds*, 475 U.S. 312 (1986); Ward v. Johnson, 690 F.2d 1098, 1112 (4th Cir. 1982) (en banc) (granting qualified immunity because a prior Fourth Circuit case upholding similar conduct indicated that judges who decided that case did not think the constitutional right was clearly established).

131. 730 F.2d 970, 972 n.2 (4th Cir. 1984). *See also* LeClair v. Hart, 800 F.2d 692, 694 n.3 (7th Cir. 1986) (referring to defendants' observation that controlling Supreme Court case was decided on divided vote as "a curious argument," and noting that "[t]he obvious response is that six members of the Court took the position that the recordings were seizures"); *Arebaugh*, 730 F.2d at 972 n.2 ("we do not condone a suggestion that a judgment of a split Fourth Circuit Court of Appeals three judge panel may be disregarded").

132. *See, e.g.*, Davis v. Scherer, 486 U.S. 183, 203-05 (1984) (Brennan, J., concurring in part and dissenting in part) (noting that majority found the relevant due process principles unclear based on precedent from defendant's circuit so holding, despite prior opinion from same circuit specifying the due process protections required); Colaizzi v. Walker, 812 F.2d 304, 309 (7th Cir. 1987); Moore v. Marketplace Restaurant, Inc., 754 F.2d 1336, 1342-43 (7th Cir. 1985); O'Hagan v. Soto, 725 F.2d 878, 879 (2d Cir. 1984) (per curiam); Ward v. Johnson, 690 F.2d 1098, 1112 (4th Cir. 1982) (en banc).

133. *See, e.g.*, Procunier v. Navarette, 434 U.S. 555, 563 (1978); Borucki v. Ryan, 827 F.2d 836, 848 (1st Cir. 1987); Thorne v. City of El Segundo, 802 F.2d 1131, 1139 (9th Cir. 1986); Azeez v. Fairman, 795 F.2d 1296, 1301 (7th Cir. 1986); Benson v. Allphin, 786 F.2d 268, 275 n.16 (7th Cir.), *cert. denied*, 479 U.S. 848 (1986); Snyder v. Kurvers, 767 F.2d 489, 497 (8th Cir. 1985); People of Three Mile Island v. Nuclear Regulatory Comm'rs, 747 F.2d 139, 146-47 (3d Cir. 1984); Affiliated Capital Corp. v. City of Houston, 735 F.2d 1555, 1569 (5th Cir. 1984) (en banc), *cert. denied*, 474 U.S. 1053 (1986); Crowder v. Lash, 687 F.2d 996, 1003-04 (7th Cir. 1982). *See also* Kattan, *supra* note 34, at 984; *The Supreme Court, 1974 Term*, 89 HARV. L. REV. 1, 224 (1975) ("prior to an authoritative Supreme Court decision on an issue, disagreements among courts . . . about the applicable law should be sufficient to bar liability") [hereinafter *The Supreme Court, 1974 Term*]. *Cf.* Hershey v. City of Clearwater, 834 F.2d 937, 940-41 n.5 (11th Cir. 1987) (immunizing defendants because cases from local state courts supporting plaintiff conflicted with cases from other jurisdictions); Culbreath v. Block, 799 F.2d 1248, 1250-51 (8th Cir. 1986) (granting immunity where local precedent favoring defendant conflicted with ruling in another jurisdiction). *But see* Garcia by Garcia v. Miera, 817 F.2d 650, 658 (10th Cir. 1987) (conflict between Fourth and Fifth Circuits is relevant, but not controlling, because "[t]o give preclusive effect to a conflict among the circuits would effectively bind this circuit by the decisions of others"), *cert. denied*, 485 U.S. 959 (1988); Ward v. County of San Diego, 791 F.2d 1329, 1333 (9th Cir. 1986) ("the pronouncement of one state court on a constitutional issue does not necessarily shield a government official" when other federal decisions have found similar conduct unconstitutional), *cert. denied*, 483 U.S. 1020 (1987). *But cf.* Arebaugh v. Dalton, 730 F.2d 970, 973 & n.3 (4th Cir. 1984)

liability when they refuse to comply with constitutional norms adopted by a majority of the federal courts or by the courts in their own jurisdiction. Nevertheless, a few courts have granted immunity even under those circumstances.[134] Extending qualified immunity to every case where the defendant can point to a conflict in the cases improperly protects public officials who deliberately ignore constitutional principles until they receive express judicial orders to the contrary, so long as they can point to some case law supporting their actions.[135]

Some courts go even further, immunizing defendants on the theory that disagreement between the parties or their attorneys indicates that the right is not clearly established.[136] In *Ross v. Reed*, for example, the Fourth Circuit reasoned that the dispute between the plaintiff's attorney, on one side, and the defendants' attorney and the state attorney general, on the other, over the legality of the defendants' treatment of the plaintiff "indicate[s] that, at the least, from the layman's perspective with which we are concerned, the constitutional rights claimed here were not 'clearly established' at the critical time."[137] The obvious response is that the self-interested views of litigants and their attorneys should not dictate a court's legal conclusion about the settled state of the

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(denying immunity despite conflict among circuits because Supreme Court opinion issued 12 days earlier had resolved the conflict).

134. *See, e.g.*, Walnut Properties, Inc. v. City of Whittier, 861 F.2d 1102, 1112-13 (9th Cir. 1988) (granting immunity despite admitting that case law favored plaintiff; six federal decisions supported plaintiff with none to the contrary), *cert. denied*, 490 U.S. 1006 (1989); Borucki v. Ryan, 827 F.2d 836, 846 (1st Cir. 1987) (granting immunity despite acknowledging that majority view favored plaintiff); Capoeman v. Reed, 754 F.2d 1512, 1514-15 (9th Cir. 1985) (same); Affiliated Capital Corp. v. City of Houston, 735 F.2d 1555, 1569-70 (5th Cir. 1984) (en banc) (granting immunity even though one of the six cases supporting plaintiff was Fifth Circuit opinion and another was Supreme Court plurality opinion, and the only decision favoring the defendants was a case from another jurisdiction that had been contradicted by a later ruling from that court), *cert. denied*, 474 U.S. 1053 (1986); Zeller v. Donegal School Dist. Bd. of Educ., 517 F.2d 600, 609 (3d Cir. 1975) (en banc) (Rosenn, J., concurring and dissenting) (advocating immunity despite two Third Circuit opinions recognizing constitutional right because other courts conflicted). *Cf.* Benson v. Allphin, 786 F.2d 268, 275 n.16 (7th Cir.) (concluding that rights can never be clearly established if circuits conflict until the Supreme Court resolves the issue), *cert. denied*, 479 U.S. 848 (1986).

135. *See* Garcia by Garcia v. Miera, 817 F.2d 650, 658 (10th Cir. 1987), *cert. denied*, 485 U.S. 959 (1988).

136. *See, e.g.*, Tubbesing v. Arnold, 742 F.2d 401, 406 (8th Cir. 1984) (dispute between parties as to whether personnel policy manual creating property interest in employment applied to plaintiff's job suggested that law was not clearly established). *Cf.* Hartley v. Fine, 780 F.2d 1383, 1388 (8th Cir. 1985) (disagreement between state personnel advisory board and trial court as to whether plaintiff's job was nonpolicymaking position subject to protection from politically motivated dismissals supported grant of qualified immunity); Okeson v. Tolley School Dist. No. 25, 766 F.2d 378, 379-80 (8th Cir. 1985) (McMillian, J., dissenting) (criticizing majority for basing immunity on defendants' reliance on attorney's advice that contradicted Eighth Circuit precedent supporting plaintiff); Arnsberg v. United States, 757 F.2d 971, 981, 982 (9th Cir. 1985) (given that reasonable attorneys could disagree whether defendants had probable cause to arrest, immunity is appropriate because "[w]e . . . should not expect [defendants] to have determined independently whether probable cause existed"), *cert. denied*, 475 U.S. 1010 (1986); Green v. White, 693 F.2d 45, 48 (8th Cir. 1982) (granting qualified immunity despite Eighth Circuit precedent supporting plaintiff because defendant relied on contrary prison regulations), *cert. denied*, 462 U.S. 1111 (1983); *The Supreme Court, 1974 Term*, *supra* note 133, at 224 (suggesting that disagreement among commentators may suffice to justify qualified immunity).

137. 719 F.2d 689, 696 n.8 (4th Cir. 1983).

relevant constitutional principles. Moreover, the fact that a lawyer erred in interpreting well-established law does not make her judgment reasonable.[138]

The rigorous scrutiny to which some courts subject the precedents supporting the plaintiff's case seems particularly inappropriate because the same courts would likely grant qualified immunity to a public official who could point to *any* case that suggested her conduct was constitutional.[139] If the defendant can cite lower court decisions, cases from other jurisdictions, and opinions issued over strong dissents to demonstrate the reasonableness of her interpretation of constitutional standards, the plaintiff should be able to rely on such cases to help prove the contrary. Denying immunity on the presumption that the public official knew of precedents from other jurisdictions recognizing a constitutional right seems no different from granting immunity on the theory that she relied on similar precedents reaching the opposite conclusion.[140]

Nevertheless, qualified immunity is available in some cases when a constitutional issue is unsettled, not because the defendant was presumptively aware of and relied on case law that supported the constitutionality of her actions, but because of the concern that she will be chilled when she knows she can be exposed to liability if some district court opinion somewhere has suggested that her conduct is unconstitutional — even if she is not actually familiar with that decision.[141] Thus, qualified immunity should not necessarily be unavailable merely because one court has recognized a constitutional right: the reasonable public official cannot be expected to be aware of every such decision, and she needs a margin of error within which to operate. It does not follow, however, that case law from other jurisdictions or from lower courts

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138. *See* Harden v. Adams, 760 F.2d 1158, 1166 n.3 (11th Cir.), *cert. denied*, 474 U.S. 1007 (1985). The force of *Harden*'s reasoning is further supported by section 1983 cases holding that qualified immunity is not automatically available simply because the police conducted a search pursuant to a warrant that a judge had mistakenly issued without probable cause, *see* Malley v. Briggs, 475 U.S. 335, 345-46 (1986), or because an attorney erroneously advised a public official that her conduct was constitutional, *see, e.g.*, Watertown Equip. Co. v. Norwest Bank Watertown, N.A., 830 F.2d 1487, 1495-96 (8th Cir. 1987), *cert. denied*, 486 U.S. 1001 (1988); Shank v. Naes, 773 F.2d 1121, 1126 (10th Cir. 1985); Tanner v. Hardy, 764 F.2d 1024, 1027 (4th Cir. 1985); Arnsberg v. United States, 757 F.2d 971, 982 (9th Cir. 1985), *cert. denied*, 475 U.S. 1010 (1986); Wentz v. Klecker, 721 F.2d 244, 247 (8th Cir. 1983). *See generally* Kinports, *supra* note 9, at 624-25. *Cf.* 1 W. LAFAVE & A. SCOTT, *supra* note 1, at 595-96 (attorney's advice that conduct is legal is not recognized as defense in criminal cases).

139. *See, e.g.*, *Mitchell*, 472 U.S. at 533 (two district court decisions from other jurisdictions); Hershey v. City of Clearwater, 834 F.2d 937, 940-41 n.5 (11th Cir. 1987) (two court of appeals opinions from other states, which conflicted with local state court rulings recognizing constitutional right); McConnell v. Adams, 829 F.2d 1319, 1325 (4th Cir. 1987) (dictum in Fourth Circuit opinion that three other courts adopted), *cert. denied*, 486 U.S. 1006 (1988); Horwitz v. State Bd. of Medical Examiners, 822 F.2d 1508, 1518 (10th Cir.) (local state supreme court opinion), *cert. denied*, 484 U.S. 964 (1987); Augustine v. McDonald, 770 F.2d 1442, 1445 (9th Cir. 1985) (local state court of appeals opinion and federal court of appeals decision from another jurisdiction); Batiste v. Burke, 746 F.2d 257, 260-61 (5th Cir. 1984) (one court of appeals opinion from another jurisdiction).

140. *Cf.* Kattan, *supra* note 34, at 1003 (advocating that the unsettled nature of the law should be a defense only if the defendant was aware of the uncertainty); Rudovsky, *supra* note 31, at 80 (arguing that qualified immunity should not protect defendant who was "aware of a constitutional ambiguity").

141. *Mitchell*'s observation that a defendant should not lose her immunity merely because she "gambled and lost" on an "open question" suggests, however, an awareness of the relevant precedents on the part of the defendant. *Mitchell*, 472 U.S. at 535.

can never help demonstrate that a right is clearly established. A lone district court decision from another jurisdiction may be insufficient to put the reasonable public official on notice of applicable constitutional principles, but it is as relevant to the qualified immunity inquiry as the one district court opinion rejecting the constitutional claim.

B. Timing of Precedents

A second issue that divides the courts of appeals in qualified immunity cases involves the timing of the relevant precedents: is the right clearly established as soon as a court issues a dispositive opinion, or must some period of time elapse before the reasonable public official learns of the court's decision?

Some courts of appeals give public officials an inordinate amount of time to bring their conduct into compliance with controlling case law. In *Harris v. Young*, for example, the Fourth Circuit granted qualified immunity to defendants accused of denying a prisoner access to an adequate law library even though the Supreme Court had guaranteed such access fourteen months before the events in question.[142] Although the court of appeals rightly noted that "a law library cannot be built in one day,"[143] it did not discuss what steps the defendants had taken to collect library materials during the fourteen-month period, or why they had not relied on some alternative mechanism to satisfy their constitutional obligations in the interim.[144] Moreover, in one sense, the *Harris* defendants had more than fourteen months to find a way to provide adequate access to legal materials. In *Arebaugh v. Dalton*, the same court pointed out that because the Supreme Court had granted certiorari almost a year before it issued the controlling decision, "[t]welve days may . . . have been sufficient time for someone with a direct interest to have learned of, read and digested" the opinion.[145] Completing the spectrum between the two Fourth Circuit rulings, other courts of appeals have reached conflicting results in ruling on qualified immunity claims when the defendant had several months to learn of the dispositive case law.[146]

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142. 718 F.2d 620, 624 (4th Cir. 1983).

143. *Id.*

144. In Bounds v. Smith, 430 U.S. 817, 830-31 (1977), the Court suggested several alternative ways of providing prisoners with access to legal materials: using law students, working either as volunteers or in clinical programs; organizing volunteer attorneys through bar associations; and hiring lawyers as part-time consultants or full-time staff attorneys.

145. 730 F.2d 970, 973 (4th Cir. 1984). *See also* Muzychka v. Tyler, 563 F. Supp. 1061, 1065 (E.D. Pa. 1983) (three weeks is sufficient time for police officers to learn of Supreme Court opinion). *But cf.* Robinson v. Bibb, 840 F.2d 349, 350 (6th Cir. 1988) (four days may not have been sufficient time for average police officer to learn of controlling Supreme Court ruling); Schlothauer v. Robinson, 757 F.2d 196, 197-98 (8th Cir. 1985) (per curiam) (granting qualified immunity in the face of dispositive Eighth Circuit decision handed down 11 days before plaintiff's arrest, without expressly indicating whether the short lapse of time was crucial to the decision).

146. *Compare* Garcia by Garcia v. Miera, 817 F.2d 650, 657 n.10 (10th Cir. 1987) (five-month interval sufficient to put defendants on notice of Tenth Circuit decision), *cert. denied*, 485 U.S. 959 (1988), *and* Schiff v. Williams, 519 F.2d 257, 263 (5th Cir. 1975) (Gee, J., specially concurring) (advocating denial of qualified immunity when Fifth Circuit opinion had been issued two months prior to defendant's conduct), *with* Williams v. Smith, 781 F.2d 319, 322 (2d Cir. 1986) (reasonable prison official would not have been aware of local state trial court decision issued almost two months earlier), *and* Affiliated Capital Corp. v. City of Houston, 735 F.2d 1555, 1569-70 (5th Cir. 1984) (en banc) (granting immunity despite Fifth

Supreme Court rulings are available via computer research services the same day they are decided, and other federal and state court opinions typically follow within a week.[147] Although the cost of those services may be prohibitive for some government employers, *United States Law Week* provides access to all Supreme Court opinions within approximately one week of their release and to selected significant lower court opinions within two to four weeks. Supreme Court opinions usually appear in advance sheets within a month; although there is some variation, federal court of appeals decisions are typically available in advance sheets within two to three months, and federal district court decisions within two to five months. Therefore, it seems reasonable to require at least those government officials with ready access to legal advice to comply promptly with relevant constitutional precedents.

C. Similarity of Precedents

A third issue that divides the courts of appeals in defining clearly established rights in qualified immunity cases is the extent to which the precedents recognizing a constitutional right must be factually similar to the particular case at issue.[148] In both *Mitchell v. Forsyth* and *Anderson v. Creighton*, the Supreme Court emphasized that a public official was not entitled to immunity merely because the relevant constitutional provision had never expressly been held to apply in identical circumstances.[149] If the Court had adopted that approach, qualified immunity would almost always be granted because clever defense counsel could usually point to some factual difference to distinguish prior cases. As one commentator noted, "[a]t the fringes, even the most well-settled doctrines lapse into vagueness and unpredictability."[150]

On the other hand, *Anderson* made clear that courts could not deny qualified immunity simply because a constitutional right like free speech or due process is clearly established when stated as an abstract proposition outside the context of a specific case.[151] Otherwise, the Court feared, plaintiffs could overcome the defendant's qualified immunity defense by broadly stating the right that needed to be clearly established. *Anderson* held, therefore, that courts can deny qualified immunity only if "in the light of preexisting law" the unlawfulness of the defendant's conduct was "apparent" — that is, if a rea-

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Circuit opinion decided almost five months before defendant took final action, and two district court opinions from same state issued about eight months and six weeks before defendant acted, along with two other opinions from other courts issued during the same time period), *cert. denied*, 474 U.S. 1053 (1986).

147. Telephone interviews with Dorothy Molstad, Westlaw Public Relations Department, West Services, Inc. (August 8, 1990), and Michelle Love, Lexis Public Communications Department, Mead Data Central (August 9, 1990).

148. For a general discussion of this issue, see Comment, Harlow v. Fitzerald: *The Lower Courts Implement the New Standard for Qualified Immunity Under Section 1983*, 132 U. PA. L. REV. 901, 922-34 (1984) [hereinafter U. PA. Comment].

149. *Anderson*, 483 U.S. at 640; *Mitchell*, 472 U.S. at 535 n.12. *But cf.* Nahmod, *supra* note 34, at 251-52 & n.168 (interpreting Davis v. Scherer, 468 U.S. 183 (1984), and Procunier v. Navarette, 434 U.S. 555 (1978), as in effect requiring a "case on point").

150. Yudof, *Liability for Constitutional Torts and the Risk-Averse Public School Official*, 49 S. CAL. L. REV. 1322, 1341 (1976). *See also* Illinois v. Krull, 480 U.S. 340, 367-68 (1987) (O'Connor, J., dissenting); Kattan, *supra* note 34, at 981.

151. *See Anderson*, 483 U.S. at 639-40.

sonable public official would have recognized that her actions violated the plaintiff's constitutional rights.[152]

By rejecting the two extremes and focusing the inquiry on public officials' "ability 'reasonably [to] anticipate when their conduct may give rise to liability for damages,'"[153] the Court has properly avoided determining precisely how close a connection is required between the case at hand and the preceding cases recognizing a constitutional right. Although some factual resemblance is obviously necessary, *Harlow*'s reasonableness standard can only be resolved on a case-by-case basis. In determining how much similarity is required, the courts of appeals vary in their fidelity to the Supreme Court's attempt to protect constitutional rights while also minimizing the chilling effect on legitimate governmental conduct.

Some courts impose an overly demanding standard, requiring precedent that makes the unconstitutionality of the defendant's conduct "a foregone conclusion."[154] In *Azeez v. Fairman*, for example, the Seventh Circuit conceded that it was well-recognized that "prisoners retain their constitutional rights to the extent compatible with prison discipline and safety."[155] Nevertheless, the court granted immunity because that general principle had not clearly been applied to a prison's refusal to recognize an inmate's religiously motivated name change "in circumstances like those of the present case."[156] Likewise, in granting immunity in *Horwitz v. State Board of Medical Examiners*, the Tenth Circuit suggested that none of the due process cases cited by the plaintiff were relevant because they did not involve "suspensions of licenses of medical practitioners under 'emergency' determinations of the governing board" and therefore were not sufficiently similar to the challenged conduct.[157] These cases come too close to requiring precedent with identical facts, the very approach rejected in both *Mitchell* and *Anderson*.

Likewise, some courts improperly refuse to require public officials to reason by analogy and apply existing precedents to cases with somewhat dif-

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152. *Id.* at 640.

153. *Id.* at 646 (quoting Davis v. Scherer, 468 U.S. 183, 195 (1984)).

154. Howe v. Baker, 796 F.2d 1355, 1360 (11th Cir. 1986). *See also* Dartland v. Metropolitan Dade County, 866 F.2d 1321, 1323 (11th Cir. 1989) ("inevitable conclusion"); Lojuk v. Johnson, 770 F.2d 619, 628 (7th Cir. 1985) (requiring "case law in a closely analogous area"), *cert. denied*, 474 U.S. 1067 (1986). *Cf.* Colaizzi v. Walker, 812 F.2d 304, 308 (7th Cir. 1987) ("We must be wary . . . of imagining that public officials have the training and experience in extracting legal rules from case law that appellate judges have.").

155. 795 F.2d 1296, 1301 (7th Cir. 1986).

156. *Id.*

157. 822 F.2d 1508, 1518 (10th Cir.), *cert. denied*, 484 U.S. 964 (1987). *See also* Lappe v. Loeffelholz, 815 F.2d 1173, 1180 & n.7 (8th Cir. 1987) (granting immunity because even if defendants knew of the state statute on which plaintiff's due process argument was premised, it was not clear whether they knew "how it applied to an inmate in these circumstances"; "[a] defendant who knows the appropriate legal standard . . . does not necessarily know how to apply that standard when faced with a unique situation"); Howe v. Baker, 796 F.2d 1355, 1360, 1359 (11th Cir. 1986) (dismissing Supreme Court decision cited by plaintiff because it "set forth a general test" that "had to be interpreted and applied in any given situation," and noting that "[n]o decision of either the Supreme Court or this court . . . addressed the effect of 'cause' limitations on a State's ability to transfer or temporarily suspend one of its employees"); Gargiul v. Tompkins, 790 F.2d 265, 273 (2d Cir. 1986) (granting immunity because the Supreme Court had never held that the constitutional right to privacy includes the right to refuse an examination by a doctor of the opposite sex).

ferent facts. For example, in *Lojuk v. Johnson*, the Seventh Circuit granted immunity to a psychiatrist who allegedly violated a patient's due process rights by subjecting him to involuntary electroshock therapy. In concluding that the relevant constitutional standards were unclear, the court distinguished prior cases forbidding forced treatment of prisoners because those rulings had been based on the eighth amendment rather than the due process clause[158] — even though the due process clause extends at least as far as, and usually further than, the eighth amendment.[159] In a similar case, *Johnson by Johnson v. Brelje*, the same court immunized employees of a state mental health facility whose restrictive telephone policy unconstitutionally denied access to the courts to a group of criminal defendants found unfit to stand trial. The court recognized that the constitutional right to meaningful access to the courts was clearly established, but found "no prior case that has relied on this right to [invalidate] a regulation of a mental health facility."[160] In *Harris v. Young*, the Fourth Circuit granted immunity to prison officials who were sued for failing to provide the plaintiff access to an adequate law library because prior cases recognizing that right had involved state rather than local prisons.[161] And in *Walnut Properties, Inc. v. City of Whittier*, the Ninth Circuit granted immunity even though six other federal courts had found similar zoning ordinances violative of the first amendment when they failed to set up alternative locations for adult businesses. The court explained that the prior cases "necessarily turned upon the particular geographical characteristics of the city involved"[162]

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158. 770 F.2d 619, 629 (7th Cir. 1985), *cert. denied*, 474 U.S. 1067 (1986). *Cf.* Davis v. Holly, 835 F.2d 1175, 1180 n.1, 1181 (6th Cir. 1987) (cases involving prisons cannot clearly establish the rights of mental patients; also distinguishing other cases because they involved right to protection from harm caused by others, not from self-inflicted injury).

159. *See, e.g.*, Davidson v. Cannon, 474 U.S. 344, 358 (1986) (Blackmun, J., dissenting); City of Revere v. Massachusetts Gen. Hosp., 463 U.S. 239, 244 (1983); Garrett v. Rader, 831 F.2d 202, 204 (10th Cir. 1987) (denying qualified immunity to state hospital officials because "'[i]f it is cruel and unusual punishment to hold convicted criminals in unsafe conditions, it must be unconstitutional to confine the involuntarily committed — who may not be punished at all — in unsafe conditions'") (quoting Youngberg v. Romeo, 457 U.S. 307, 315-16 (1982)).

160. 701 F.2d 1201, 1210 (7th Cir. 1983). The court had no trouble finding the telephone policy unconstitutional because prisoners have a right to "a reasonable opportunity to seek and receive the assistance of attorneys," and the plaintiffs, who were facing criminal charges, were entitled to that right even though they were housed in a maximum security mental health facility rather than a prison. *Id.* at 1207.

161. 718 F.2d 620, 623 (4th Cir. 1983). The court drew the distinction on the theory that constitutional requirements for prisoners in local jails might differ from those applicable to inmates in state jails, both because the types of crimes for which the inmates are incarcerated are different and because the average length of commitment is longer for the latter group. Nevertheless, the court acknowledged that the plaintiff had been convicted of grand larceny and had spent two-and-one-half years in the local jail, nine months of which had occurred after his appeal was completed and he was no longer represented by counsel. *Id.*

162. 861 F.2d 1102, 1112-13 (9th Cir. 1988), *cert. denied*, 490 U.S. 1006 (1989). *See also* Hawkins v. Steingut, 829 F.2d 317, 320-21 (2d Cir. 1987) (granting immunity because Supreme Court opinions barring politically motivated discharges did not clearly establish the law "with respect to every governmental position" and none of the cases cited involved an administrative law judge or similar position; distinguishing case involving liquor control board hearing examiner because hearing examiner only finds facts and does not exercise any discretion); Howe v. Baker, 796 F.2d 1355, 1358-59 (11th Cir. 1986) (although plaintiff had a clearly established constitutional right to due process protections prior to discharge and it was clear that state law prohibited suspension or transfer without cause, it was not clearly established that transfer and suspension implicated due process concerns).

— a distinction that could be made with respect to almost every ruling on the constitutionality of zoning ordinances and variances.

Obviously, the qualified immunity defense should protect public officials who failed to anticipate unforeseeable changes in the law. But the Supreme Court has refused to immunize defendants simply because the plaintiff could not point to a case with identical facts, thereby imposing a duty on public officials to apply existing case law to analogous situations. As one commentator aptly noted, "[i]t is one thing to be held liable for failure to predict entirely new constitutional rules, and quite another to be held liable when a constitutional holding is entirely foreseeable and the court is more accurately 'finding' a pre-existing rule than creating a new one."[163] Immunizing defendants in the latter situation essentially gives public officials "one liability-free violation."[164] Thus, other courts of appeals recognize that a "slight uncertainty" about the legitimacy of one's conduct,[165] or the fact that the current case presents a "new factual wrinkle,"[166] is an insufficient basis for immunity.

For example, in *Blackburn v. Snow*, the First Circuit relied on cases holding strip searches unconstitutional in the school and border search contexts when denying qualified immunity to prison officials who had a policy of strip-

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Nevertheless, some courts have not hesitated to reason by analogy in *granting* qualified immunity based on precedent involving different facts. *See, e.g.*, Wilkinson v. Forst, 832 F.2d 1330, 1341 (2d Cir. 1987) (granting immunity in case involving indiscriminate magnetometer searches for weapons at political rally based on case law upholding similar searches in prisons, military bases, and airports), *cert. denied*, 485 U.S. 1034 (1988); Donta v. Hooper, 774 F.2d 716, 721 (6th Cir. 1985) (per curiam) (defendants arrested plaintiff after receiving teletype from out-of-state police requesting that plaintiff be picked up because there was information that he was in possession of stolen firearms; although the court distinguishes the most analogous Supreme Court case because there the radio bulletin received from the other department indicated that a warrant had been issued for the suspect's arrest, the court nevertheless grants immunity based on another Supreme Court opinion permitting police to detain suspect temporarily, not to arrest, based on a "wanted flyer" if the flyer is premised on reasonable suspicion sufficient to justify the stop), *cert. denied*, 483 U.S. 1019 (1987). *See also supra* notes 139-41 and accompanying text.

163. Freed, *supra* note 32, at 554 n.139 (emphasis deleted). *See also* U. PA. Comment, *supra* note 148, at 929-30.

164. People of Three Mile Island v. Nuclear Regulatory Comm'rs, 747 F.2d 139, 145 (3d Cir. 1984). If the courts rule on the defendant's request for qualified immunity prior to evaluating whether the plaintiff was deprived of a constitutional right, public officials may actually receive an infinite number of "liability-free violations." *See infra* note 314.

165. McCann v. Coughlin, 698 F.2d 112, 125 (2d Cir. 1983). *See also* Bauer v. Bosley, 802 F.2d 1058, 1068 (8th Cir. 1986) (Heaney, J., dissenting) ("some uncertainty" or "some question" is not enough), *cert. denied*, 481 U.S. 1038 (1987).

166. People of Three Mile Island v. Nuclear Regulatory Comm'rs, 747 F.2d 139, 148 (3d Cir. 1984). *See also* Lappe v. Loeffelholz, 815 F.2d 1173, 1177 (8th Cir. 1987); Hicks v. Feeney, 770 F.2d 375, 380 (3d Cir. 1985); Zweibon v. Mitchell, 720 F.2d 162, 173 (D.C. Cir. 1983) (requiring "real and substantial" distinctions rather than "trivial" ones to justify qualified immunity), *cert. denied*, 469 U.S. 880 (1984).

For other cases requiring public officials to apply existing case law to analogous factual situations, see, *e.g.*, McConnell v. Adams, 829 F.2d 1319, 1325 (4th Cir. 1987), *cert. denied*, 486 U.S. 1006 (1988); Garcia by Garcia v. Miera, 817 F.2d 650, 657 (10th Cir. 1987), *cert. denied*, 485 U.S. 959 (1988); Jefferson v. Ysleta Indep. School Dist., 817 F.2d 303, 305 (5th Cir. 1987); Rios v. Lane, 812 F.2d 1032, 1040 (7th Cir.), *cert. dismissed*, 483 U.S. 1001 (1987); McIntosh v. Weinberger, 810 F.2d 1411, 1434 (8th Cir. 1987), *cert. denied*, 487 U.S. 1212 (1988); Sourbeer v. Robinson, 791 F.2d 1094, 1103 (3d Cir. 1986), *cert. denied*, 483 U.S. 1032 (1987).

searching all visitors to the prison.[167] Similarly, in *Sourbeer v. Robinson*, a prisoner awaiting sentencing argued that perfunctory periodic reviews of the decision to confine him in administrative custody denied him a meaningful opportunity to be heard. The Third Circuit found his due process rights clearly established by prior cases that required formal procedures before prisoners who had already been sentenced could be transferred to administrative custody for the first time.[168] And in *Savidge v. Fincannon*, the Fifth Circuit denied qualified immunity where a retarded child's parents claimed that officials at the school where the child lived had violated his constitutional right to adequate care and treatment. The court reasoned that prior cases involving involuntarily committed mental patients clearly established the child's right to treatment.[169]

Courts often take the contrary, more restrictive approach in cases involving constitutional provisions, like the first amendment and due process clause, whose application depends on balancing the interests of the state against those of the plaintiff.[170] In fact, a number of courts have indicated that

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167. 771 F.2d 556, 570 (1st Cir. 1985). Although greater limits on the authority to search might reasonably be imposed in the school setting than in prisons, where the security risks are greater, the same distinction cannot be made between prison searches and border searches, where government officials enjoy "plenary authority to conduct routine searches and seizures." United States v. Montoya de Hernandez, 473 U.S. 531, 537 (1985).

168. 791 F.2d 1094, 1103 & n.7, 1104 n.8 (3d Cir. 1986), *cert. denied*, 483 U.S. 1032 (1987). The court could think of no reason for a reasonable prison officer to assume that "an unsentenced inmate is entitled to less process than sentenced inmates," or that "less process is due to prisoner[s] facing a second or third 'term' in restrictive housing than is due upon initial placement." *Id.*

169. 836 F.2d 898, 908-09 (5th Cir. 1988). The court rejected the notion that the defendants might have reasoned, "'[w]e can safely give Jonathan Savidge inadequate treatment; he was not committed . . . through formal judicial proceedings and so the rationale in [earlier cases involving plaintiffs who had been so committed] may not apply to him.'" *Id.* at 909. The court could not "envision reasonable doctors and administrators calibrating their responsibility to each child on the basis of such narrow distinctions." *Id. See also* Bennis v. Gable, 823 F.2d 723, 733 (3d Cir. 1987) (dismissing defendants' argument that prior cases established the impropriety only of politically motivated discharges and transfers, but not of demotions); Wade v. Hegner, 804 F.2d 67, 71-72 (7th Cir. 1986) (denying qualified immunity to defendant who warned black schoolchildren's parents of racial unrest in the public schools because similar subtle tactics used to perpetuate segregated schools had previously been held unconstitutional); LeClair v. Hart, 800 F.2d 692, 694-95 (7th Cir. 1986) (denying qualified immunity where IRS agents photocopied plaintiffs' records because prior cases involving tapping of telephones and taking notes of serial numbers indicated that the fourth amendment prohibits more than the physical removal of property); Freeman v. Blair, 793 F.2d 166, 178-79 (8th Cir. 1986) (denying qualified immunity to defendants who allegedly retaliated against plaintiffs for exercising their fourth amendment rights because punishing those who assert their first amendment rights had previously been held unconstitutional), *vacated*, 483 U.S. 1014 (1987); Bilbrey by Bilbrey v. Brown, 738 F.2d 1462, 1466 (9th Cir. 1984) (relying in part on Supreme Court cases recognizing students' due process and first amendment rights in denying qualified immunity to school officials whose search of students allegedly violated fourth amendment); Bever v. Gilbertson, 724 F.2d 1083, 1088-89 (4th Cir.) (denying immunity despite defendants' attempt to distinguish prior decisions striking down politically motivated discharges on the ground that this case involved reduction in force necessitated by economic constraints; prior decisions established unconstitutionality of using political criteria to choose which employees to select for fiscally motivated reduction in force), *cert. denied*, 469 U.S. 948 (1984).

170. *See, e.g.*, Walnut Properties, Inc. v. City of Whittier, 861 F.2d 1102, 1111-12 (9th Cir. 1988) (granting immunity in first amendment case after noting that constitutionality of zoning ordinances often depends on factors such as the need for the ordinance, the motivations underlying it, and the extent to which alternative sites for protected speech are available), *cert. denied*, 490 U.S. 1006 (1989); Juarbe-Angueira v. Arias, 831 F.2d 11, 13 (1st Cir. 1987)

qualified immunity should be granted almost automatically in such cases: because the outcome of a balancing test is heavily dependent on the facts of a particular case, prior case law applying the test cannot clearly establish much of anything for future cases.[171]

The balancing tests applied in due process and first amendment cases do not seem much different, however, from the analysis used in fourth amendment cases to determine whether the search was unreasonable[172] or the amount of force excessive,[173] or in fifth amendment cases to evaluate whether police tactics in eliciting the confession were unduly coercive.[174] Therefore, if the case law is clear enough to suggest that the balancing will come out in the plaintiff's favor in a specific situation, qualified immunity should not be

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(because public employees can constitutionally be discharged on the basis of their political party affiliation in some circumstances, and because the Supreme Court has not defined which jobs may legitimately be conditioned on party affiliation, qualified immunity is appropriate in the absence of precedent governing this particular plaintiff's job), *cert. denied*, 485 U.S. 960 (1988); Borucki v. Ryan, 827 F.2d 836, 848 (1st Cir. 1987) (assuming a clearly established constitutional right to privacy is implicated by unwanted disclosure of medical information, "the facts of decided cases did not provide sufficient indication of how that right would be weighed against competing interests in a case such as this"); Bilbrey by Bilbrey v. Brown, 738 F.2d 1462, 1472-73 (9th Cir. 1984) (Kilkenny, J., dissenting) (because fourth amendment reasonableness standard requires balancing students' interests against those of the school, school officials are entitled to qualified immunity "absent controlling case authority"); Bailey v. Turner, 736 F.2d 963, 969-70 (4th Cir. 1984) (granting immunity because using mace on prisoner is not per se unconstitutional, but depends on factors such as provocation, amount of gas used, and purposes for which gas was used). *Cf.* Preston v. Smith, 750 F.2d 530, 535 (6th Cir. 1984) (Krupansky, J., concurring in part and dissenting in part) (suggesting that the "somewhat vague standards" used to analyze eighth amendment claims — evolving standards of decency, wanton and unnecessary infliction of pain, punishment grossly disproportionate to the severity of the crime — make qualified immunity appropriate in many such cases). *But cf.* Albers v. Whitley, 743 F.2d 1372, 1376 (9th Cir. 1984) (qualified immunity is by definition unavailable if defendant violates eighth amendment by acting with deliberate indifference), *rev'd on other grounds*, 475 U.S. 312 (1986); Miller v. Solem, 728 F.2d 1020, 1024-25 (8th Cir.) (same), *cert. denied*, 469 U.S. 841 (1984); Rudovsky, *supra* note 31, at 59 n.210 (same). *But see* Chapman v. Pickett, 801 F.2d 912, 925 (7th Cir. 1986) (Easterbrook, J., dissenting), *vacated*, 484 U.S. 807 (1987).

171. *See, e.g.*, Dartland v. Metropolitan Dade County, 866 F.2d 1321, 1323 (11th Cir. 1989); Rakovich v. Wade, 850 F.2d 1180, 1213 (7th Cir.) (en banc), *cert. denied*, 488 U.S. 968 (1988); Noyola v. Texas Dep't of Human Resources, 846 F.2d 1021, 1025-26 (5th Cir. 1988); Benson v. Allphin, 786 F.2d 268, 276, 277-78 (7th Cir.), *cert. denied*, 479 U.S. 848 (1986); Benson v. Scott, 734 F.2d 1181, 1184-85 (7th Cir.), *cert. denied*, 469 U.S. 1019 (1984).

172. *See* Ward v. County of San Diego, 791 F.2d 1329, 1332-33 (9th Cir. 1986) (denying qualified immunity in fourth amendment case even though reasonableness of search depends on balancing competing interests), *cert. denied*, 483 U.S. 1020 (1987).

173. *See* Fernandez v. Leonard, 784 F.2d 1209, 1217 (1st Cir. 1986) (denying qualified immunity in excessive force case even though reasonableness of seizure turns on balancing competing interests). *See also* Vizbaras v. Prieber, 761 F.2d 1013, 1018-19 n.3 (4th Cir. 1985) (Winter, C.J., concurring and dissenting) (majority's decision to grant immunity in excessive force case in the absence of precedent specifying "the exact quantum of force that constitutes excessive force" "render[s] *Harlow* a virtual nullity and mistakenly 'turn[s] qualified into absolute immunity'" because "many, perhaps most, constitutional deprivations involve questions of degree where the precise contours of the constitutional protections have not been drawn") (quoting Hobson v. Wilson, 737 F.2d 1, 26 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1084 (1985)), *cert. denied*, 474 U.S. 1101 (1986).

174. *See* Rex v. Teeples, 753 F.2d 840, 844 (10th Cir.) (denying qualified immunity because the law governing involuntary confessions was clear), *cert. denied*, 474 U.S. 967 (1985).

available. As the Sixth Circuit observed in *Stern v. Shouldice*, qualified immunity is inappropriate even in a first amendment case requiring a balancing of competing factors if "a straightforward application" of the relevant considerations indicates that the plaintiff's constitutional rights were violated.[175] Other courts have agreed, showing no hesitation in denying immunity in similar cases.[176]

Courts that are generous in granting qualified immunity sometimes combine the various factors described above, leading to results like those in *Danenberger v. Johnson*[177] and *Noyola v. Texas Department of Human Resources*.[178] In *Danenberger*, a public employee brought a section 1983 suit claiming that the defendants had denied her a promotion because she had refused to support their political party. In concluding that the relevant constitutional principles were not clearly established, the Seventh Circuit dismissed the plaintiff's reliance on the Supreme Court's decision in *Elrod v. Burns*[179] because it was a plurality opinion, and distinguished the Court's ruling in *Branti v. Finkel*[180] because it prohibited only politically motivated discharges and therefore did not necessarily apply to a promotion case.[181] The court responded to the plaintiff's citation of a favorable Seventh Circuit opinion by noting that it had been decided several months after the events at issue, and also by suggesting that one case was insufficient to indicate that the constitutional right alleged by the plaintiff had been "clearly recognized in existing case law."[182]

In *Noyola*, the Fifth Circuit granted immunity to defendants who had allegedly discharged the plaintiff in violation of the first amendment. Because the scope of the constitutional protection depended on balancing the plaintiff's interests against those of the employer, the court noted that "[t]here will rarely be a basis for *a priori* judgment that the termination or discipline of a public employee violated 'clearly established' constitutional rights."[183] After suggesting that the plaintiff in a first amendment case will rarely be able to find *any* precedent sufficiently similar to her case, the court went even further, finding immunity appropriate because "[n]o *Fifth Circuit* case as of 1981 had found a first amendment violation on facts like these."[184] This type of reasoning forces innocent plaintiffs to bear the cost of constitutional violations,

175. 706 F.2d 742, 749 (6th Cir.), *cert. denied*, 464 U.S. 993 (1983).

176. *See, e.g.*, Southside Pub. Schools v. Hill, 827 F.2d 270, 275 (8th Cir. 1987) (defendants violated plaintiffs' clearly established first amendment right to speak on matters of public concern); Harden v. Adams, 760 F.2d 1158, 1166 n.3 (11th Cir.) (denying qualified immunity after finding no ambiguity concerning first amendment protections owed to faculty members), *cert. denied*, 474 U.S. 1007 (1985); Fujiwara v. Clark, 703 F.2d 357, 360-61 (9th Cir. 1983) (defendant violated clearly established rights by firing plaintiff for exercising her first amendment right to speak on issues of public importance); Berdin v. Duggan, 701 F.2d 909, 912-13 (11th Cir.) (rejecting immunity defense in first amendment case even though protection owed public employee's speech depended on balancing competing interests), *cert. denied*, 464 U.S. 893 (1983). *See also* Rudovsky, *supra* note 31, at 60-61.

177. 821 F.2d 361 (7th Cir. 1987).

178. 846 F.2d 1021 (5th Cir. 1988).

179. 427 U.S. 347 (1976).

180. 445 U.S. 507 (1980).

181. *See Danenberger*, 821 F.2d at 364.

182. *Id.* at 365. *See also supra* notes 125-27 and accompanying text.

183. *Noyola*, 846 F.2d at 1025.

while doing nothing to deter unconstitutional conduct or to protect the legitimate exercise of public employees' discretion.

D. Relevance of Other Sources of Law

In *Davis v. Scherer*, the Supreme Court held that the only relevant question in ruling on a qualified immunity claim is whether the constitutional right on which the section 1983 suit is based was clearly established at the time the defendant allegedly violated that right.[185] The Court therefore rejected the plaintiff's argument that the defendants lost their immunity by violating clear state regulations specifying the procedures to be followed prior to discharging an employee.[186] Because state regulations contain "a plethora of rules, 'often so voluminous, ambiguous, and contradictory, and in such flux that officials can only comply with or enforce them selectively,'" the Court explained, it is not "always fair, or sound policy, to demand official compliance with statute[s] and regulation[s] on pain of money damages."[187] Therefore, the Court concluded that government employees should not be "liable in an indeterminate amount" for damages resulting from a constitutional violation "merely because their official conduct also violated some statute or regulation."[188] Obviously bound by that ruling, the courts of appeals consistently immunize defendants who

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184. *Id.* at 1026 (emphasis added).

185. 468 U.S. 183, 197 (1984).

186. *See id.* at 193-97. *Cf.* PROSSER & KEETON ON THE LAW OF TORTS § 43 (W. Keeton 5th ed. 1984) (describing similar controversy in tort law as to whether negligent defendant may be held liable for unforeseeable risks, or whether liability is instead limited to risk as to which defendant was negligent).

Davis distinguished cases where the violation of state law is somehow related to the plaintiff's constitutional claim — for example, where state law determines whether the plaintiff has a property interest protected by the due process clause. *See* 468 U.S. at 193 & n.11. For examples of cases picking up on this distinction and therefore looking to other sources of law to resolve the defendant's entitlement to immunity, see, *e.g.*, Merritt v. Mackey, 827 F.2d 1368, 1373 (9th Cir. 1987); Wolfenbarger v. Williams, 826 F.2d 930, 933-34 (10th Cir. 1987); Lappe v. Loeffelholz, 815 F.2d 1173, 1178-80 (8th Cir. 1987); Washington v. Kirksey, 811 F.2d 561, 563, 565 (11th Cir.), *cert. denied*, 484 U.S. 827 (1987); Howe v. Baker, 796 F.2d 1355, 1358-60 (11th Cir. 1986); Shouse v. Ljunggren, 792 F.2d 902, 905-06 (9th Cir. 1986); Huron Valley Hosp., Inc. v. City of Pontiac, 792 F.2d 563, 568-70 (6th Cir.), *cert. denied*, 479 U.S. 885 (1986); Spruytte v. Walters, 753 F.2d 498, 510-11 (6th Cir. 1985), *cert. denied*, 474 U.S. 1054 (1986).

187. *Davis*, 468 U.S. at 196 (quoting P. SCHUCK, *supra* note 99, at 66). The Court also reasoned that qualified immunity should not turn on interpretations of state regulations because often federal judges might be unable to resolve such questions on summary judgment. *See id.* at 195-96. If the Court meant to suggest that state law issues pose difficult interpretive problems for federal courts, it seems to have ignored the fact that federal judges are often required to interpret state law in both diversity and section 1983 cases. *See* City of St. Louis v. Praprotnik, 485 U.S. 112, 125-26 (1988) (plurality) (predicting that federal courts will not "face greater difficulties here than those that they routinely address in other contexts," and thus instructing courts to look to state law to determine whether municipal employees had policymaking authority sufficient to make city liable for their conduct in section 1983 suit); Shapiro, *Public Officials' Qualified Immunity in Section 1983 Actions Under* Harlow v. Fitzgerald *and Its Progeny: A Critical Analysis*, 22 U. MICH. J.L. REF. 249, 263 & n.103 (1989). Alternatively, if the Court was suggesting that resolving immunity questions at the summary judgment stage might be more difficult when state law is relevant, it provided no explanation for the assumption that state law questions are any more likely to involve disputed issues of fact and are therefore less susceptible to summary judgment than questions of constitutional law.

188. *Davis*, 468 U.S. at 195.

violated constitutional norms that were not yet settled, but who should have known that their actions were impermissible under some other source of law.[189]

The *Davis* decision does not appear to take into account the purpose of immunizing public officials for constitutional errors that do not violate clearly established law — to avoid chilling government employees in the exercise of their discretion. Denying immunity to the defendant who fails to comply with clearly established law of whatever source does nothing to undermine that goal. In such cases, the defendant behaved in a way that a reasonable public official would have recognized as improper. Even if the defendant is subjected to section 1983 liability, other government officials can act with the assurance that they will not suffer the same fate so long as their conduct is consistent with established law. State regulations may well be contradictory or ambiguous, as the Court feared in *Davis*, but a defendant who breaches those regulations is not violating settled law. On the other hand, there is no apparent reason to immunize a public official who acts contrary to established state law and, in the process, also fails to fulfill her constitutional obligations.[190] Imposing liability in such cases may not deter future constitutional violations, if the constitutional principles remain unclear, but it will compensate the plaintiff for damages caused by the violation without jeopardizing any of the goals qualified immunity was designed to serve.

III. DEFINING "NOVEL" CLAIMS IN PROCEDURAL DEFAULT CASES

The federal courts tend to adhere to a more consistent path in evaluating whether a constitutional principle was sufficiently novel at the time of a prisoner's trial to provide cause for the failure to make a contemporaneous objection. Following the Supreme Court's lead, they consistently reject habeas petitioners' efforts to establish cause for procedural defaults. Apparently, if any other defendant had raised the defaulted claim in any court in the country before the prisoner's trial, the prisoner forfeits her right to habeas review when her attorney failed to foresee the validity of the claim. The courts are thus far less forgiving when defense attorneys inaccurately predict the course of the law than they are when public officials seek the protection of a qualified immunity defense. Although the same results are not necessarily appropriate in both contexts, public officials and criminal defense attorneys should each be required to exercise a reasonable amount of diligence in ascertaining the relevant constitutional standards. Instead, the courts are reluctant to subject government employees to liability for conduct that the reasonable public official should have known was unconstitutional, but refuse to excuse procedural defaults when the reasonable defense attorney would not have

189. *See, e.g.*, Davis v. Holly, 835 F.2d 1175, 1180-81 (6th Cir. 1987); Childress v. Small Business Admin., 825 F.2d 1550, 1553 (11th Cir. 1987) (per curiam); Whatley v. Philo, 817 F.2d 19, 21 (5th Cir. 1987); Rodriguez v. Munoz, 808 F.2d 138, 141-42 (1st Cir. 1986); Gagne v. City of Galveston, 805 F.2d 558, 559, 560 n.2 (5th Cir. 1986), *cert. denied*, 483 U.S. 1021 (1987); Lojuk v. Johnson, 770 F.2d 619, 629 (7th Cir. 1985), *cert. denied*, 474 U.S. 1067 (1986); Ricci v. Key Bancshares of Maine, Inc., 768 F.2d 456, 467 (1st Cir. 1985); Coleman v. Frantz, 754 F.2d 719, 728-29 (7th Cir. 1985).

190. *Cf.* Shapiro, *supra* note 187, at 263-64 (arguing that public officials should be liable whenever they had reason to know their actions were improper).

recognized the validity of the forfeited claim. Comparing the same four issues that arise in defining clearly established rights in the qualified immunity context demonstrates the point.

A. Number, Weight, and Consistency of Precedents

The courts properly recognize that an issue is not novel merely because the Supreme Court has yet to resolve it.[191] It may well be reasonable to expect defense counsel to raise a claim that has been recognized in a number of other jurisdictions or in the federal or state courts in her own jurisdiction.[192] Thus, in evaluating whether the prisoners had the tools to challenge jury instructions requiring them to shoulder the burden of proving their self-defense claims in *Engle v. Isaac*, the Supreme Court did not confine its analysis to rulings from the federal courts of appeals and state supreme courts or to cases from the prisoners' own jurisdiction.[193] Likewise, in *Smith v. Murray*, the Court rejected a claim of novelty on the ground that "various forms" of the prisoner's constitutional challenge had been "percolating in the lower courts for years" at the time of his default.[194]

In *Reed v. Ross*, however, the Court observed that one of the factors courts should consider in determining whether a prisoner had a reasonable basis for objecting to a procedure that the Supreme Court had arguably approved is "how well entrenched the practice was *in the relevant jurisdiction* at the time of defense counsel's failure to challenge it."[195] One reason the Court ultimately found the cause requirement satisfied in *Reed* was that the North Carolina courts had used the challenged jury instruction for more than a century, and no question as to its constitutionality had arisen in that state until five years after Ross' appeal.[196]

Despite *Reed*'s language, the courts of appeals do not consider a constitutional claim novel simply because the Supreme Court or the courts in the prisoner's jurisdiction have yet to recognize the claim. Thus, the courts refuse to excuse defaults of claims whose validity was left open by the Supreme Court

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191. As noted above, *see supra* note 113 and accompanying text, Supreme Court opinions are relatively scarce. During the 1989 Term, for example, the Court issued 151 opinions, only 45 of which came in criminal or habeas cases. *See The Supreme Court, 1989 Term*, 104 HARV. L. REV. 40, 363, 365-66 (1990). In addition, the Court often sees no reason to grant review if the lower courts have reached a consensus on a particular issue. *See supra* note 114 and accompanying text.

192. *Cf.* Marcus, *supra* note 47, at 723 & n.368 (defense attorneys should be familiar with cases from all federal courts of appeals and state supreme courts, but not with those from federal district courts or lower state courts in other jurisdictions); CAP. U. Note, *supra* note 87, at 300-01 (defense attorneys should usually be aware of cases within their own state system and federal circuit).

193. *See* 456 U.S. at 131-32 & nn.39-40.

194. 477 U.S. at 537.

195. 468 U.S. at 17 (emphasis added). *Cf.* CAP. U. Note, *supra* note 87, at 288 n.122 (interpreting *Reed*'s reference to "the relevant jurisdiction" to refer only to state court system and not to federal courts).

The other relevant considerations, the Court said, were "how direct this Court's sanction of the prevailing practice had been" and "how strong the available support [was] from sources opposing the prevailing practice." 468 U.S. at 17-18. The latter factor may refer to opposition both inside and outside the prisoner's jurisdiction. *See* Marcus, *supra* note 47, at 722-23.

196. *See Reed*, 468 U.S. at 18. *See also* Delo v. Stokes, 110 S. Ct. 1880, 1884 (1990) (Brennan, J., dissenting).

in prior cases.[197] Similarly, they do not hesitate to rely on opinions from other jurisdictions[198] or from lower courts[199] to justify the conclusion that the relevant constitutional principles were not novel when the prisoner went to trial. In *Roman v. Abrams*, for example, the Second Circuit cited an intermediate court of appeals decision from another state that was later reversed on appeal to support its finding that the prisoner's constitutional claim was available at the time of his appeal.[200]

Although defense attorneys should have some familiarity with case law from other jurisdictions, the Supreme Court has apparently recognized that they cannot reasonably be expected to be aware of every such decision. In *Engle*, the Court rejected the prisoners' novelty argument because "dozens" of other defendants had objected to jury instructions similar to those challenged there.[201] The Court then reached the contrary conclusion in *Reed*, despite two rulings from other courts adopting the prisoner's constitutional argument, in part because "they were the only cases that would have supported Ross' claim at all."[202]

Nevertheless, many federal courts define novelty much more narrowly than the Supreme Court, refusing to characterize an issue as novel if it was raised by any other defendant or even by a commentator in a legal or social science journal.[203] This approach differs substantially from that taken in the

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197. *See, e.g.*, Landry v. Lynaugh, 844 F.2d 1117, 1122 (5th Cir.), *cert. denied*, 488 U.S. 900 (1988); Briley v. Booker, 594 F. Supp. 1399, 1405-06 (E.D. Va.), *aff'd*, 746 F.2d 225 (4th Cir. 1984) (per curiam).

198. *See, e.g.*, Clanton v. Muncy, 845 F.2d 1238, 1242 (4th Cir.) (per curiam), *cert. denied*, 485 U.S. 1000 (1988); Leggins v. Lockhart, 822 F.2d 764, 767 (8th Cir. 1987), *cert. denied*, 485 U.S. 907 (1988); Bryan v. Warden, Ind. State Reformatory, 820 F.2d 217, 222 (7th Cir.), *cert. denied*, 484 U.S. 867 (1987); United States v. Bonnette, 781 F.2d 357, 361 (4th Cir. 1986); Rault v. Louisiana, 772 F.2d 117, 134 n.29 (5th Cir. 1985), *cert. denied*, 476 U.S. 1178 (1986); Briley v. Booker, 746 F.2d 225, 227 (4th Cir. 1984) (per curiam); Watters v. Hubbard, 725 F.2d 381, 383 (6th Cir.), *cert. denied*, 469 U.S. 837 (1984); United States *ex rel.* Hudson v. Brierton, 699 F.2d 917, 921-22 & n.8 (7th Cir.), *cert. denied*, 464 U.S. 833 (1983). *But cf.* Selvage v. Lynaugh, 842 F.2d 89, 92 (5th Cir. 1988) (observing that the "legal basis" for habeas petitioner's claim "enjoyed virtually no support in this circuit" until six years after his trial), *vacated on other grounds sub nom.* Selvage v. Collins, 110 S. Ct. 974 (1990) (per curiam); Frye v. Procunier, 746 F.2d 1011, 1013 (4th Cir. 1984) (finding cause requirement satisfied because Fourth Circuit ruling on which habeas claim was based was not decided until after prisoner's trial), *cert. denied*, 472 U.S. 1010 (1985).

199. *See, e.g.*, Leggins v. Lockhart, 822 F.2d 764, 767 (8th Cir. 1987), *cert. denied*, 485 U.S. 907 (1988); United States v. Bonnette, 781 F.2d 357, 361-62 (4th Cir. 1986); Johnson v. Blackburn, 778 F.2d 1044, 1047-48 (5th Cir. 1985); Briley v. Booker, 594 F. Supp. 1399, 1403 (E.D. Va.), *aff'd*, 746 F.2d 225 (4th Cir. 1984) (per curiam).

200. 822 F.2d 214, 223 (2d Cir. 1987), *cert. denied*, 489 U.S. 1052 (1989). The court also relied on two state court rulings from other jurisdictions, which had cited federal constitutional precedents to support their decision to recognize similar claims under their own state constitutions. *See id.*

201. 456 U.S. at 131-33 & n.40 (citing twenty-five cases).

202. 468 U.S. at 19. The Court also concluded that the two cases provided only "indirect" support for the prisoner's claim, presumably because they involved somewhat different issues. *Id.*

203. *See, e.g.*, Moore v. Kemp, 824 F.2d 847, 874 (11th Cir. 1987) (Tjoflat, J., concurring in part and dissenting in part), *vacated sub nom.* Zant v. Moore, 489 U.S. 836 (1989) (per curiam); Bates v. Blackburn, 805 F.2d 569, 577 (5th Cir. 1986), *cert. denied*, 482 U.S. 916 (1987); Johnson v. Blackburn, 778 F.2d 1044, 1048 (5th Cir. 1985); Briley v. Booker, 746 F.2d 225, 227 (4th Cir. 1984) (per curiam). *See also Engle*, 456 U.S. at 132 n.40 (noting that commentators had recognized defaulted claim).

qualified immunity cases, where the federal courts generally do not expect public officials to be aware of a few scattered opinions from other jurisdictions.[204] Nevertheless, some courts have refused to excuse procedural defaults in habeas cases after finding only one[205] or two[206] decisions from other jurisdictions where defendants presented similar constitutional claims. In fact, the four Justices who dissented in *Reed* would have rejected the prisoner's novelty argument, in part because of the two rulings — from the Eighth Circuit and the Connecticut Superior Court — recognizing the validity of his claim.[207]

Determining how many prior decisions suffice to put the reasonable defense attorney on notice of a constitutional issue presents a difficult line-drawing problem. But it does seem, as one commentator noted, "a bit far-fetched" to require a defense attorney in North Carolina to be familiar with a Connecticut trial court ruling issued a few months earlier:

> It is reasonable to assume that most diligent counsel make efforts to keep abreast of new developments in the law through legal publications, seminars, and the like. However, the position adopted by the [*Reed*] dissent would require a public defender in a New York Superior Court to present a previously unheard constitutional claim recently adjudicated on the merits by one state court in South Dakota.[208]

Another difference between the qualified immunity and procedural default cases is that no court in the latter context apparently accords any significance to the fact that a divided court issued the prior opinion accepting the validity of the defaulted claim. In fact, some courts — including the Supreme Court in *Engle*[209] — have even cited helpful language in *dissenting* opinions to support a finding that the issue was reasonably available to defense counsel.[210]

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204. *See supra* note 126 and accompanying text.

205. *See, e.g.*, Bryan v. Warden, Ind. State Reformatory, 820 F.2d 217, 222 (7th Cir.), *cert. denied*, 484 U.S. 867 (1987); Rault v. Louisiana, 772 F.2d 117, 134 n.29 (5th Cir. 1985), *cert. denied*, 476 U.S. 1178 (1986); Briley v. Booker, 594 F. Supp. 1399, 1403 (E.D. Va.), *aff'd*, 746 F.2d 225 (4th Cir. 1984) (per curiam). *Cf.* Harich v. Dugger, 844 F.2d 1464, 1479-80 (11th Cir. 1988) (Hill, J., specially concurring) (arguing that the prisoner's claim was reasonably available at time of his trial even though no other defendant had raised the issue because there was "a simpler explanation for the scarcity of such claims, namely, the scarcity of . . . violations"), *cert. denied*, 489 U.S. 1071 (1989).

206. *See, e.g.*, Briley v. Booker, 594 F. Supp. 1399, 1402-03 (E.D. Va.), *aff'd*, 746 F.2d 225 (4th Cir. 1984) (per curiam). *Cf.* Clanton v. Muncy, 845 F.2d 1238, 1242 (4th Cir.) (per curiam) (one local state supreme court opinion and one case from another jurisdiction), *cert. denied*, 485 U.S. 1000 (1988).

207. *Reed*, 468 U.S. at 25 & n.2 (Rehnquist, J., dissenting). *See also Engle*, 456 U.S. at 131 n.39.

208. CAP. U. Note, *supra* note 87, at 299-300 & n.201. *See also* Marcus, *supra* note 47, at 723 (requisite number of decisions depends on which courts issued them); CAP. U. Note, *supra* note 87, at 299-300 (same).

209. *See* 456 U.S. at 132 n.40.

210. *See, e.g.*, Leggins v. Lockhart, 822 F.2d 764, 767 (8th Cir. 1987), *cert. denied*, 485 U.S. 907 (1988); Roman v. Abrams, 822 F.2d 214, 223 (2d Cir. 1987), *cert. denied*, 489 U.S. 1052 (1989).

In Delo v. Stokes, 110 S. Ct. 1880, 1881 (1990) (per curiam), the Supreme Court likewise cited a dissenting opinion in support of its finding that the claim raised by the prisoner in his fourth habeas petition was not novel at the time he filed his first petition. Accordingly, the Court dismissed the petition as an abuse of the writ.

Similarly, other courts have relied on dictum in opinions from courts within the prisoner's jurisdiction, as well as from other courts, in rejecting attempts to use novelty to excuse a procedural default.[211] Although defense attorneys should not ignore defenses recognized only by divided courts or in dictum, it does not necessarily follow, as the Fourth Circuit concluded in *Briley v.*

Under the common law, the principle of res judicata did not apply to habeas cases, and prisoners were not barred from bringing successive habeas petitions. *See* Sanders v. United States, 373 U.S. 1, 7-8 (1963). The Supreme Court endorsed the common law view in *Sanders*, reasoning that "[t]he inapplicability of res judicata to habeas . . . is inherent in the very role and function of the writ" — to ensure that "'government . . . [is] always [to] be accountable to the judiciary for a man's imprisonment.'" *Id.* at 8 (quoting *Fay*, 372 U.S. at 402). According to *Sanders*, a federal court could refuse to consider a second habeas petition that raised an issue already presented in an earlier habeas petition only if the courts had resolved the first claim against the prisoner on the merits and "the ends of justice would not be served by reaching the merits of the subsequent application." *Id.* at 15. Successive petitions raising different claims could be dismissed, however, only if the prisoner had abused the writ by, for example, deliberately withholding the second claim "in the hope of being granted two hearings rather than one," or deliberately abandoning one of the claims during the first proceeding — although again the federal courts had discretion to consider such claims on the merits. *Id.* at 18. In defining an abuse of the writ, *Sanders* instructed the courts to follow the deliberate bypass test announced the prior month in *Fay*. *Id.* Congress later codified the *Sanders* rules in 28 U.S.C. § 2244(b), Rule 9(b) of the Rules Governing Section 2254 Cases in the United States District Courts, and Rule 9(b) of the Rules Governing Section 2255 Proceedings for the United States District Courts. *See* Rose v. Lundy, 455 U.S. 509, 521 (1982); L. YACKLE, *supra* note 39, at 550.

Since the Court rejected the deliberate bypass test for procedural default cases, it has been unclear whether the new cause and prejudice test and its definition of novelty now govern abuse of the writ cases as well. Some courts of appeals have applied standards very similar to those currently used in procedural default cases to determine whether the prisoner's failure to raise a claim in her first habeas petition can be excused because the claim was novel at that time. *See, e.g.*, Moore v. Blackburn, 774 F.2d 97, 98 (5th Cir. 1985) (per curiam) (issue must be included in first petition "if a competent attorney should have been aware of the claim[]"), *cert. denied*, 476 U.S. 1176 (1986). *Cf.* Moore v. Zant, 885 F.2d 1497, 1506-08 & n.11 (11th Cir. 1989) (en banc) (adopting reasonably competent attorney standard analogous to *Engle* for prisoners who were represented by counsel during first habeas proceeding). Others, however, have favored continued use of the more lenient deliberate bypass test in this context. *See, e.g.*, Witt v. Wainwright, 470 U.S. 1039, 1043-44 (1985) (Marshall, J., dissenting); L. YACKLE, *supra* note 39, at 563-64. The Supreme Court recently resolved this debate, opting to apply the cause and prejudice requirements in abuse of the writ cases. *See* McCleskey v. Zant, 59 U.S.L.W. 4288 (U.S. Apr. 16, 1991). *Cf. infra* note 315 (discussing recent efforts to enact legislation that would limit the number of habeas petitions that could be filed in capital cases).

Even before *McCleskey* made clear that the courts should treat procedural default and abuse of the writ cases identically, those court of appeals decisions that relied on *Sykes* and *Engle* to resolve abuse of the writ questions involving prisoners who attempted to use novelty to explain their failure to present a claim during the first habeas proceeding were obviously relevant in determining when novelty would excuse the failure to object contemporaneously at trial. Even in circumstances where the courts applied *Fay*'s more lenient deliberate bypass standard in the abuse of the writ context, those cases where the courts rejected novelty arguments and dismissed second petitions were also relevant to the procedural default cases: by definition, those courts would likewise have rejected the prisoner's attempt to use novelty to show cause. Therefore, this article does not distinguish between these two categories of pre-*McCleskey* abuse of the writ cases and the procedural default cases.

211. *See, e.g.*, Clanton v. Muncy, 845 F.2d 1238, 1242 (4th Cir.) (per curiam), *cert. denied*, 485 U.S. 1000 (1988); Breest v. Cunningham, 784 F.2d 435, 436 (1st Cir.), *cert. denied*, 479 U.S. 842 (1986); Dietz v. Solem, 677 F.2d 672, 675 (8th Cir. 1982); Breest v. Perrin, 655 F.2d 1, 4 (1st Cir.), *cert. denied*, 454 U.S. 1059 (1981). *Cf.* Moore v. Kemp, 824 F.2d 847, 872 n.31 (11th Cir. 1987) (Tjoflat, J., concurring in part and dissenting in part) (fact that prior discussion occurred in plurality opinion irrelevant), *vacated sub nom.* Zant v. Moore, 489 U.S. 836 (1989) (per curiam).

Booker, that the prisoner's claim was "well known" at the relevant time because it had been raised in various legal and sociological journals and in dictum in one Fifth Circuit opinion.[212]

Likewise, habeas petitioners have not succeeded in arguing that a conflict concerning the validity of the constitutional claim demonstrates that the issue was novel at the time of trial.[213] In rejecting the novelty argument in *Engle*, the Court admitted that some courts had not been receptive to the prisoners' constitutional claim in the "dozens" of instances where other defendants had raised the issue prior to the prisoners' trials.[214] Nevertheless, the Court observed, "[e]ven those decisions rejecting the defendant's claims" suggested that the challenge was not novel because they "show[ed] that the issue had been perceived by other defendants and that it was a live one in the courts at the time."[215]

Obviously, defense attorneys should be expected to raise a defense that has been accepted by half the courts that have reached the issue, even though qualified immunity may be appropriate to prevent chilling the independent exercise of public employees' discretion when the relevant cases are evenly split. Nevertheless, the existence of a conflict should be relevant in determining how a reasonable defense attorney would have acted in the procedural default cases, just as it is relevant in evaluating how a reasonable public official would have acted in the qualified immunity cases. If a constitutional challenge has been summarily rejected by the overwhelming majority of courts, defense counsel's failure to raise the issue may be reasonable even though one court in another jurisdiction has accepted the claim.

Not only are the courts unsympathetic to novelty claims when the relevant precedents conflict, but some courts of appeals take an even more extreme position, finding that a claim was not novel at the time of the prisoner's trial even though no court had ever accepted the claim.[216] In fact, some courts refuse to consider a claim novel even though the court in which the trial occurred was bound by precedent rejecting the claim.[217] In *Jones v. Butler*,[218]

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212. 746 F.2d 225, 227 (4th Cir. 1984) (per curiam).

213. *See, e.g.*, Leggins v. Lockhart, 822 F.2d 764, 767 (8th Cir. 1987), *cert. denied*, 485 U.S. 907 (1988); United States v. Bonnette, 781 F.2d 357, 361-62 (4th Cir. 1986); United States *ex rel.* Hudson v. Brierton, 699 F.2d 917, 921-22 (7th Cir.), *cert. denied*, 464 U.S. 833 (1983). *Cf.* United States v. Gaylor, 828 F.2d 253, 256-57 (4th Cir. 1987) ("The law is often in a state of flux. The mere fact that certain legal principles are unsettled does not deprive a competent attorney of a 'reasonable basis' for asserting a claim.").

214. 456 U.S. at 131-33.

215. *Id.* at 133 n.41.

216. *See, e.g.*, Clanton v. Muncy, 845 F.2d 1238, 1242 (4th Cir.) (per curiam), *cert. denied*, 485 U.S. 1000 (1988); Landry v. Lynaugh, 844 F.2d 1117, 1122 (5th Cir.), *cert. denied*, 488 U.S. 900 (1988); Selvage v. Lynaugh, 842 F.2d 89, 94 (5th Cir. 1988), *vacated on other grounds sub nom.* Selvage v. Collins, 110 S. Ct. 974 (1990) (per curiam); Bass v. Estelle, 696 F.2d 1154, 1157 (5th Cir.), *cert. denied*, 464 U.S. 865 (1983); Ford v. Strickland, 696 F.2d 804, 817 (11th Cir.) (en banc), *cert. denied*, 464 U.S. 865 (1983).

217. *See, e.g.*, Clanton v. Muncy, 845 F.2d 1238, 1242 (4th Cir.) (per curiam), *cert. denied*, 485 U.S. 1000 (1988); Landry v. Lynaugh, 844 F.2d 1117, 1122 (5th Cir.), *cert. denied*, 488 U.S. 900 (1988); Selvage v. Lynaugh, 842 F.2d 89, 94 (5th Cir. 1988), *vacated on other grounds sub nom.* Selvage v. Collins, 110 S. Ct. 974 (1990) (per curiam); Roman v. Abrams, 822 F.2d 214, 223 (2d Cir. 1987), *cert. denied*, 489 U.S. 1052 (1989); Bass v. Estelle, 696 F.2d 1154, 1157 (5th Cir.), *cert. denied*, 464 U.S. 865 (1983); Ford v. Strickland, 696 F.2d 804, 817 (11th Cir.) (en banc), *cert. denied*, 464 U.S. 865 (1983).

for example, the Fifth Circuit concluded that objections to the prosecution's use of peremptory challenges to exclude blacks from juries were familiar at the time of the prisoner's trial because other defendants had made the argument and because the Supreme Court had laid the basis for the claim in *Swain v. Alabama*.[219] The court reached this conclusion even though it acknowledged that *Swain* had expressly held that a defendant could *not* establish a constitutional violation simply by relying, as the prisoner had in *Jones*, on the prosecutor's behavior at her trial,[220] and that *Batson v. Kentucky*,[221] the case that overruled this aspect of *Swain*, thus constituted "'an explicit and substantial break with prior precedent.'"[222]

These decisions may be exactly what *Engle* had in mind when it said that procedural defaults cannot be excused "[w]here the basis of a constitutional claim is available, and other defense counsel have perceived and litigated that claim."[223] Nevertheless, the policies underlying the cause and prejudice standard are not undermined if habeas review is permitted when defense counsel failed to raise an issue because of a reasonable perception of futility. The state court would most likely have rejected the claim, and objecting contemporaneously therefore would not have contributed to comity and federalism or resulted in early correction of the error.[224] Accordingly, the cause requirement should be satisfied in a case like *Smith v. Murray*, when defense counsel failed to appeal an issue that the state supreme court had "decisively barred" just two years earlier.[225] Defense attorneys should not be asked to continue fighting old battles when they reasonably believe they are not risking loss of a meritorious claim.[226]

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218. 864 F.2d 348 (5th Cir. 1988), *cert. denied*, 490 U.S. 1075 (1989).
219. 380 U.S. 202 (1965); *see Jones*, 864 F.2d at 364.
220. *See* 864 F.2d at 364 (citing *Swain*, 380 U.S. at 220-26).
221. 476 U.S. 79 (1986).
222. *Jones*, 864 F.2d at 363 (quoting Allen v. Hardy, 478 U.S. 255, 258 (1986)).
223. 456 U.S. at 134. The year before the *Engle* petitioners went to trial, the state legislature passed a new criminal code, which most Ohio courts assumed made no change in the traditional practice requiring defendants to prove self-defense and other affirmative defenses. *See id.* at 110-11. At the time of the prisoners' trials, no court had published an opinion suggesting that the statute altered the common law rule, and the code's legislative history suggested no such change. *See* Isaac v. Engle, 646 F.2d 1129, 1133 (6th Cir. 1980) (en banc), *rev'd*, 456 U.S. 107 (1982). In fact, two months before the last of the three *Engle* prisoners went to trial, the Ohio Supreme Court issued a decision noting that "self-defense is an affirmative defense, which must be established by a preponderance of the evidence." State v. Rogers, 43 Ohio St. 2d 28, 30, 330 N.E.2d 674, 676 (1975), *cert. denied*, 423 U.S. 1061 (1976). Nonetheless, the Court refused to excuse the prisoners' default. *But cf. supra* note 88 (suggesting that *Engle* might not have intended to preclude use of futility to satisfy cause requirement in all cases).
224. *See supra* notes 87-93 and accompanying text.
225. 477 U.S. at 540 (Stevens, J., dissenting). *See also* L. YACKLE, *supra* note 39, at 187 (Supp. 1989); Guttenberg, *supra* note 45, at 646 (suggesting that default should be excused when the forfeited claim had been rejected by the state's highest court within some limited time frame with no significant intervening circumstances).
226. *Cf. Mitchell*, 472 U.S. at 535 (granting qualified immunity to the Attorney General when he "gambled and lost" on an open question, even though various members of the Supreme Court had debated the constitutionality of similar actions in prior concurring opinions, and he therefore presumably realized he was taking a risk). *See also supra* notes 22-28 and accompanying text.

Some courts of appeals have agreed, excusing defaults when the local courts had previously rejected the claim later raised on habeas.[227] As the Second Circuit noted in *Ingber v. Enzor*, "[w]ere we to penalize [prisoners] for failing to challenge such entrenched precedent, we would ascribe to attorneys and their clients the power to prognosticate with greater precision than the judges of this court."[228]

B. Timing of Precedents

Unlike the qualified immunity cases, the procedural default cases contain almost no discussion of timing issues. There is no indication that any time must elapse after issuance of the precedents laying the groundwork for a constitutional challenge before the argument becomes reasonably available to defense counsel. Rather, the courts seem to assume that, so long as the other decisions preceded the prisoner's trial, the claim was not a novel one.

The four dissenters in *Reed*, for example, thought that the four- and nine-month intervals between the prisoner's trial in North Carolina and prior decisions issued by the Connecticut Superior Court and the Eighth Circuit were "certainly . . . enough time" to justify a finding that "the legal basis for making [the prisoner's] claim was reasonably available to him."[229] Likewise, in *Engle*, the Court cited a number of cases to support its assertion that "dozens" of other defendants were making the argument that the prisoners in *Engle* failed to raise, but apparently thought it irrelevant that some of those cases were decided *after* the *Engle* petitioners' trials.[230] Following that lead, the Eleventh Circuit held in *Smith v. Kemp* that defense counsel's unawareness of a Supreme Court decision issued only six days before trial did not excuse a procedural default.[231] Similarly, in *Briley v. Booker*, the Fourth Circuit affirmed the district court's

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227. *See, e.g.*, Callanan v. United States, 881 F.2d 229, 231 (6th Cir. 1989) ("the cause requirement . . . should not be applied in a way that would encourage efforts to relitigate well settled points of law, and the fact that the point appeared to be settled constituted cause for not raising it") (citation omitted), *cert. denied*, 110 S. Ct. 1816 (1990); Dalton v. United States, 862 F.2d 1307, 1310 (8th Cir. 1988); Bridge v. Lynaugh, 860 F.2d 162, 163-64 (5th Cir. 1988) (per curiam); United States v. Shelton, 848 F.2d 1485, 1490 (10th Cir. 1988); Hargrave v. Dugger, 832 F.2d 1528, 1531-33 (11th Cir. 1987) (en banc), *cert. denied*, 489 U.S. 1353 (1989). *Cf.* Songer v. Wainwright, 469 U.S. 1133, 1141 n.14 (1985) (Brennan, J., dissenting from denial of certiorari) (cause requirement satisfied because defense counsel reasonably interpreted state law to foreclose objection).

In three of the six court of appeals decisions cited above, however, the prisoners failed to raise a claim later recognized by the Supreme Court in a "'blockbusting'" decision that was "'wholly unexpected'" and contrary to settled law in every circuit that had previously considered the issue. *Callanan*, 881 F.2d at 231 (quoting United States v. Ochs, 842 F.2d 515, 521 (1st Cir. 1988)). The Supreme Court opinion, McNally v. United States, 483 U.S. 350 (1987), held that the mail fraud statute prohibited only acts intended to deprive others of *tangible* rights. The mail fraud conviction in *Callanan* was based on the theory that the defendants had schemed to deprive others of *intangible* rights, an obviously impermissible basis for conviction after *McNally*. *See also Dalton*, 862 F.2d at 1308; *Shelton*, 848 F.2d at 1487. It is not obvious that these courts would have used the same standard if the defaulted claim had involved an issue that did not similarly point to the prisoners' innocence.

228. 841 F.2d 450, 454 (2d Cir. 1988). *See also* O'Connor v. Ohio, 385 U.S. 92, 93 (1966) (per curiam).

229. 468 U.S. at 25 n.2 (Rehnquist, J., dissenting).

230. Of the twenty-five cases cited by the Court, six were decided after all three prisoners were convicted, one was decided after petitioner Hughes' trial, and two others were decided only the month before Hughes' trial. *See* 456 U.S. at 132 nn.39 & 40.

finding that the prisoner should have been aware of a district court decision issued the previous month in another jurisdiction.[232]

As discussed above in the qualified immunity context, federal court opinions are available relatively quickly through computer research tools, looseleaf services, and advance sheets.[233] It therefore seems reasonable to presume that criminal defense attorneys — like public officials with ready access to legal advice — will be familiar with relevant opinions soon after they are decided.[234] Nevertheless, a defense attorney in the midst of preparing for trial cannot reasonably be expected to be aware of a case that discusses a previously unknown legal argument the moment that decision is issued.

The courts' failure to recognize the timing issue in the procedural default cases is thus an unwarranted departure from *Reed*'s reasonableness standard: it impedes the protection of constitutional rights without significantly promoting the interests underlying the cause and prejudice test. Expecting defense counsel to be familiar with an opinion immediately after its release, without allowing reasonable time for her to learn of the case, does not serve the goals of comity and federalism. The attorney who fails to make an argument discussed in a newly decided case is not showing disrespect for the state courts or attempting to hold the issue in reserve; rather, she is probably not yet aware of the decision. Moreover, forgiving procedural defaults and granting habeas review in such cases will not intrude on the state courts more so than any other exercise of habeas jurisdiction.

C. Similarity of Precedents

In addition to asking defense counsel to be aware of relevant cases as soon as they are decided, the courts of appeals often conclude that an issue was reasonably available at the time of the prisoner's trial despite the absence of precedent on point. The courts therefore expect attorneys to draw analogies from similar — and sometimes not so similar — cases. In *Engle*, for example,

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231. 715 F.2d 1459, 1470-71 (11th Cir. 1983).

232. 746 F.2d at 226-27; *see* Briley v. Booker, 594 F. Supp. 1399, 1402 (E.D. Va.), *aff'd*, 746 F.2d 225 (4th Cir. 1984) (per curiam). *See also* Presnell v. Kemp, 835 F.2d 1567, 1582 (11th Cir. 1988) (seven months sufficient to learn of Supreme Court decision), *cert. denied*, 488 U.S. 1050 (1989); Bates v. Blackburn, 805 F.2d 569, 577 (5th Cir. 1986) (basing refusal to excuse default in part on Fifth Circuit opinion issued three weeks before prisoner's trial), *cert. denied*, 482 U.S. 916 (1987); Hitchcock v. Wainwright, 745 F.2d 1332, 1341 (11th Cir. 1984) (one of the major cases that provided a basis for the prisoner's claim was a Supreme Court ruling decided seven months before default), *aff'd on other grounds*, 770 F.2d 1514 (11th Cir. 1985) (en banc), *rev'd on other grounds sub nom.* Hitchcock v. Dugger, 481 U.S. 393 (1987); Gibson v. Spalding, 665 F.2d 863, 866 (9th Cir. 1981) (four months sufficient to learn of Supreme Court decision), *vacated and remanded sub nom.* Washington v. Gibson, 456 U.S. 968 (1982). *Cf. Frady*, 456 U.S. at 168 n.16 (although the Court did not reach the question of cause, the government argued that the prisoner's constitutional claim was not novel at the time of his trial because D.C. Circuit opinion issued two years *after* prisoner's appeal, which was the first case to reject similar instructions, seemed to consider the law clearcut).

233. *See supra* note 147 and accompanying text. In addition to the sources cited there, the *Criminal Law Reporter* publishes selected state and federal decisions on criminal law topics, typically within three to six weeks after they are released.

234. As is true for public officials, however, the cost of computer research tools may prevent some criminal defense attorneys from taking advantage of that service, *see supra* note 96. *Cf.* Marcus, *supra* note 47, at 723 (suggesting that a constitutional claim is reasonably available once supportive cases have been published in advance sheets).

the Court cited twenty-five cases to support its assertion that "dozens" of defendants were making challenges similar to the defaulted claim, but none of the cases both preceded the prisoners' trials and involved challenges to instructions requiring defendants to prove self-defense claims.[235]

Nevertheless, the Court concluded that the prisoners' constitutional challenge was not novel because *In re Winship*'s requirement that the prosecution prove "every fact necessary to constitute the crime" beyond a reasonable doubt[236] provided a basis for their claim.[237] Although *Engle* disclaimed any intent to require defense counsel to "exercise extraordinary vision,"[238] *Winship* had said nothing about the burden of proving affirmative defenses, as opposed to elements of the crime, and traditionally that burden had been placed on the defense.[239] In fact, at the time of the three trials in *Engle*, the most recent Supreme Court decision on affirmative defenses had permitted the states to require the defendant to prove an insanity defense beyond a reasonable doubt.[240]

Moreover, some ingenuity was necessary to foresee the possibility that *Winship* might apply when the affirmative defense of self-defense arguably did not rebut any element of the crime. In *Engle*, for example, two of the prisoners were charged with aggravated murder, which was defined as "purposely, and with prior calculation and design, caus[ing] the death of another."[241] Defense counsel might reasonably have assumed that the prosecutor could satisfy *Winship* by proving that the defendant acted purposely, leaving it to the defense to prove that the killing, though intentional, was an act of self-defense.[242] In fact, in a number of the cases cited by the *Engle* majority, the courts had upheld statutes requiring defendants to prove various defenses on the theory that the defenses did not negate any element of the crime.[243] As one commentator noted, later Supreme Court opinions that ultimately imposed

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235. *See Engle*, 456 U.S. at 131-32 & nn.39 & 40.
236. 397 U.S. at 364.
237. *See Engle*, 456 U.S. at 131.
238. *Id.*
239. *See* Martin v. Ohio, 480 U.S. 228, 235 (1987); Cole v. Stevenson, 620 F.2d 1055, 1065 (4th Cir.) (Murnaghan, J., dissenting), *cert. denied*, 449 U.S. 1004 (1980).
240. Leland v. Oregon, 343 U.S. 790 (1952).
241. OHIO REV. CODE ANN. § 2903.01 (1975), *quoted in Engle*, 456 U.S. at 112 n.5. The third was charged with felonious assault, which was defined as "knowingly [c]aus[ing] serious physical harm to another" or "knowingly . . . [c]aus[ing] or attempt[ing] to cause physical harm to another by means of a deadly weapon." OHIO REV. CODE ANN. § 2903.11 (1975), *quoted in Engle*, 456 U.S. at 114 n.12.
242. *See* Martin v. Ohio, 480 U.S. 228, 233-34 (1987) (relying on this theory in upholding Ohio's requirement that defendant prove self-defense claim). *But cf.* Dripps, *The Constitutional Status of the Reasonable Doubt Rule*, 75 CAL. L. REV. 1665 (1987) (advocating that prosecution should have burden of proving all facts that make a substantial difference in punishment, whether elements of the crime or affirmative defenses).
243. *See, e.g.*, In re Foss, 10 Cal. 3d 910, 931-32, 519 P.2d 1073, 1087 (1974) (en banc) (entrapment); Woods v. State, 233 Ga. 347, 348-49, 211 S.E.2d 300, 301-02 (1974) (authority to sell narcotics), *appeal dismissed*, 422 U.S. 1002 (1975). Likewise, the courts that had accepted burden of proof challenges had reasoned that the issue the defendant was required to prove negated some element of the crime and therefore was not an affirmative defense. *See, e.g.*, Retail Credit Co. v. Dade County, 393 F. Supp. 577, 585-86 (S.D. Fla. 1975) (consumer reporting agency must maintain reasonable procedures to ensure accuracy of investigative consumer reports); State v. Commenos, 461 S.W.2d 9, 13 (Mo. 1970) (en banc) (intent to return stolen item).

limits on the states' ability to require defendants to prove affirmative defenses "represent[ed] a sophisticated extension of the concepts articulated in *Winship*."[244]

In *Reed*, however, the Court appeared to adopt a different, less demanding approach. Finding that the prisoner did not have the tools to challenge the state's requirement that he prove his affirmative defenses, the Court distinguished *Engle* on the ground that the prisoners in *Engle* had had the benefit of *Winship* at their trials.[245] Although *Winship* may have been the first Supreme Court decision to hold clearly that the Constitution imposes a reasonable doubt standard in criminal cases,[246] the ruling merely clarified, as the *Reed* dissent pointed out, what had "long been assumed."[247] Accordingly, *Reed*'s efforts to distinguish *Engle* may signal more realistic expectations on the part of the Court regarding the reasonable defense attorney's predictive capabilities.[248]

Nevertheless, the courts of appeals tend to follow the stricter *Engle* approach, requiring criminal defendants and their attorneys to read precedents with a good deal of imagination and then use them to make innovative constitutional arguments in related contexts. In *Leggins v. Lockhart*,[249] for example, the prisoner argued that the jury should not have been permitted to sentence him to life imprisonment after the more lenient sentence imposed by the first jury had been reversed on appeal. In support of his claim, the prisoner relied on the Supreme Court's decision in *Bullington v. Missouri* that the double jeopardy clause bars imposition of the death penalty at a second capital murder trial after the first jury sentenced the defendant to life imprisonment.[250] One of the tools the Eighth Circuit thought defense counsel could have used to raise this issue prior to *Bullington* was the Supreme Court's holding in *Burks v. United States* that a defendant may not be retried if her conviction is reversed on grounds of insufficient evidence.[251] However, the Court had never applied *Burks* to sentencing decisions. In fact, prior Supreme Court opinions had suggested that the double jeopardy clause did not preclude a harsher sentence — including even the death penalty — when a defendant was reconvicted after a second trial,[252] and four Justices therefore characterized the majority's decision

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244. Rosenberg, *supra* note 69, at 617. *See also* Cole v. Stevenson, 620 F.2d 1055, 1070-71 (4th Cir.) (Murnaghan, J., dissenting), *cert. denied*, 449 U.S. 1004 (1980); Allen, *The Restoration of* In re Winship: *A Comment on Burdens of Persuasion in Criminal Cases After* Patterson v. New York, 76 MICH. L. REV. 30, 63 (1977). *But see Reed*, 468 U.S. at 26 (Rehnquist, J., dissenting) (characterizing later cases as following "a fortiori" from *Winship*).

245. *See Reed*, 468 U.S. at 19.

246. *See Winship*, 397 U.S. at 377 (Black, J., dissenting).

247. *Winship*, 397 U.S. at 362 (citing numerous cases); *see Reed*, 468 U.S. at 22-23 (Rehnquist, J., dissenting) (arguing that the only novel issue in *Winship* was whether the reasonable doubt requirement applied in juvenile trials). *See also* 1 W. LAFAVE & A. SCOTT, *supra* note 1, at 68-69 (Supreme Court had no opportunity prior to *Winship* to rule on the constitutional implications of the placement of the burden of proof in criminal cases because reasonable doubt standard was in place in all jurisdictions).

248. Alternatively, the tension between *Engle* and *Reed* may simply reflect the divisions on the Court. *See supra* note 58.

249. 822 F.2d 764 (8th Cir. 1987), *cert. denied*, 485 U.S. 907 (1988).

250. 451 U.S. 430 (1981).

251. 437 U.S. 1 (1978); *see Leggins*, 822 F.2d at 766-67.

252. *See* North Carolina v. Pearce, 395 U.S. 711, 719-20 (1969) (increased prison term); Stroud v. United States, 251 U.S. 15, 18 (1919) (death penalty).

in *Bullington* as "irreconcilable in principle with the precedents of this Court."[253]

Similarly, in *Bates v. Blackburn*,[254] the Fifth Circuit refused to excuse the prisoner for failing to attack the sufficiency of the evidence supporting his conviction, even though the default occurred more than a year prior to the Supreme Court's decision in *Jackson v. Virginia*. *Jackson* had made clear, for the first time, that constitutional challenges to burden of proof requirements were not limited to cases where the jury received improper instructions concerning the reasonable doubt standard, but could also be made when no rational factfinder would have convicted.[255] Nevertheless, the court of appeals determined that the *Jackson* issue was not novel, in part because *Winship* already required the prosecution to prove each element of the crime beyond a reasonable doubt.[256] The court relied on *Winship* even though three Justices had criticized the *Jackson* majority for extending *Winship* and creating "a new rule of law" by requiring evidence sufficient to persuade not only the trier of fact beyond a reasonable doubt, but also the appellate and habeas judges.[257]

In *Thompson v. Lynaugh*,[258] the same court refused to excuse the prisoner's failure to object contemporaneously to the prosecutor's introduction of a victim impact statement in a capital case, which the Supreme Court prohibited five years later in *Booth v. Maryland*.[259] The court of appeals reasoned that this argument had been available at the prisoner's trial because several Supreme Court decisions had already emphasized that the eighth amendment requires death penalty hearings to focus on the individual character of the defendant and the circumstances of the crime.[260] The court of appeals thus expected defense counsel to draw the connection between the generalized goal of individualized sentencing and the inadmissibility of evidence concerning the crime's impact on the victims, even though the four *Booth* dissenters thought it obvious that "the amount of harm one causes does bear upon the extent of his 'personal responsibility.'"[261]

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253. 451 U.S. at 447 (Powell, J., dissenting).
254. 805 F.2d 569 (5th Cir. 1986), *cert. denied*, 482 U.S. 916 (1987).
255. 443 U.S. 307, 316-17 (1979).
256. *See Bates*, 805 F.2d at 575. The court also noted that the state supreme court had indicated that it would reverse a conviction if there was no evidence to prove an essential element of the charge. *See id.*
257. *Jackson*, 443 U.S. at 326, 330-31 (Stevens, J., concurring in the judgment).
258. 821 F.2d 1080 (5th Cir.), *cert. denied*, 483 U.S. 1035 (1987).
259. 482 U.S. 496 (1987).
260. *See Thompson*, 821 F.2d at 1082.
261. *Booth*, 482 U.S. at 519 (Scalia, J., dissenting). *See also* Moore v. Zant, 885 F.2d 1497, 1510-12 (11th Cir. 1989) (en banc) (prisoner had the tools to argue that fifth and sixth amendments barred admission during death penalty hearing of statements he had made to probation officer during presentence interview because due process protections had been extended to capital sentencing hearings; likewise, claim that admission of presentence report violated confrontation rights was available because "[t]he clear trend . . . was toward expanding the full panoply of Sixth Amendment rights, including confrontation rights, into new contexts," such as probation revocation hearings); Landry v. Lynaugh, 844 F.2d 1117, 1119-20 (5th Cir.) (prisoner argued that hypotheticals used by prosecutor during voir dire to illustrate cases where the requirement in death penalty statute that defendant have acted "deliberately" was not met involved acts that were not capital murder, and therefore might have led jury to believe that all capital murder cases involved deliberate acts; claim held not novel because general language in prior Supreme Court death penalty cases required juries to exercise informed discretion and

Although the reasonable defense attorney — like the reasonable public official — does not need a case directly on point to alert her to a potential constitutional argument, the policies underlying the cause requirement do not require that habeas petitioners forfeit valid constitutional claims simply because their trial attorneys were not prescient enough to foresee such extensions of prior case law.[262] The attorney who is not quite so visionary is not flouting state procedures or saving her best card to be played later; instead, she has understandably failed to draw the link between the existing precedents and the newly recognized claim. Moreover, she is probably not depriving the state court of an opportunity to resolve the issue itself at an early stage of the proceedings without federal interference: if the argument represents an innovative extension of previous cases, the state court would most likely have rejected it had the issue been raised.[263]

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mandated that states narrow the class of persons eligible for the death penalty), *cert. denied*, 488 U.S. 900 (1988); Johnson v. Blackburn, 778 F.2d 1044, 1047 (5th Cir. 1985) (argument challenging jury instruction that one is presumed to intend the natural and probable consequences of her acts was "an entirely foreseeable extension of *Winship*" and thus available prior to Supreme Court opinion prohibiting that instruction); McBee v. Grant, 763 F.2d 811, 816-17 (6th Cir. 1985) (same); Dietz v. Solem, 677 F.2d 672, 675 (8th Cir. 1982) (same).

262. *See Reed*, 468 U.S. at 15, *quoted supra* at text accompanying note 83. *Cf.* Rosenberg, *supra* note 69, at 632-33 (contrasting strict standard to which defense attorney is held in default cases with the Court's application of the requirement that a prisoner fairly present her claim to the state courts in order to satisfy the exhaustion doctrine; in the latter context, the Court does not seem to require state courts to recognize the ramifications of Supreme Court precedents in other factual contexts).

For examples of cases adopting a more realistic approach, see Hargrave v. Dugger, 832 F.2d 1528, 1531-33 (11th Cir. 1987) (en banc) (prisoner's argument that instructions improperly limited jury's consideration of mitigating circumstances at death penalty hearing was not reasonably available prior to Supreme Court decision holding that jurors may not be precluded from considering any relevant mitigating circumstances, whether or not they are specified in the state's death penalty statute), *cert. denied*, 489 U.S. 1071 (1989); Adams v. Dugger, 816 F.2d 1493, 1497-1500 (11th Cir. 1987) (per curiam) (prisoner could not be faulted for failing to anticipate Supreme Court decision in Caldwell v. Mississippi, 472 U.S. 320 (1985), which prohibited prosecutorial statements suggesting that the jury is not really responsible for making the sentencing decision in a capital case), *rev'd on other grounds*, 489 U.S. 401 (1989). *But see* Harich v. Dugger, 844 F.2d 1464, 1479 (11th Cir. 1988) (Hill, J., specially concurring) (*Caldwell* did not represent a significant change in the law because in any suit — even, for example, in a civil damages case — "an instruction or argument which led the jury to underestimate its role in the decision making process would be error"), *cert. denied*, 489 U.S. 401 (1989).

263. A more realistic definition of novelty is particularly important because the Supreme Court has decided that ignorance or inadvertence on the part of defense counsel that does not rise to the level of ineffective assistance cannot satisfy the cause requirement. *See Carrier*, 477 U.S. at 486-88. *See also supra* notes 68-73 and accompanying text. The Supreme Court has also suggested that an issue can be reasonably available at the time of the prisoner's trial — thereby preventing the use of novelty to excuse a procedural default — but not so obvious that defense counsel's failure to object contemporaneously will constitute proof of ineffective assistance. Specifically, although *Engle* held that the constitutionality of requiring defendants to prove affirmative defenses was not a novel question at the time of the prisoners' trials, the Court acknowledged that not "every astute counsel" would have recognized the issue. 456 U.S. at 133. Similarly, the Court indicated that the sixth amendment right to effective assistance of counsel "does not insure that defense counsel will recognize and raise every conceivable constitutional claim." *Id.* at 134. Moreover, an ineffective assistance claim involves examination of defense counsel's "overall performance," Kimmelman v. Morrison, 477 U.S. 365, 386 (1986), and therefore typically requires proof of more than the one error involved in failing to preserve the habeas claim. *See* Guttenberg, *supra* note 45, at 713; Marcus, *supra* note 47, at 702 n.263. *But cf. Carrier*, 477 U.S. at 496 (one isolated error can demonstrate ineffective assistance if it is "sufficiently egregious"); *Kimmelman*, 477 U.S. at 383-87 (finding representation inadequate

D. Relevance of Other Sources of Law

A public official's violation of a legal obligation imposed by anything other than the Constitution is irrelevant in deciding whether she is entitled to qualified immunity.[264] The Supreme Court has hinted, however, that other sources of law may be important in habeas cases when a prisoner seeks to excuse a procedural default.

In *Dugger v. Adams*,[265] the prisoner relied on the Court's opinion in *Caldwell v. Mississippi*[266] to challenge the constitutionality of the trial judge's comment that the ultimate responsibility for deciding whether to impose the death penalty lay with him, rather than the jury. The Court did not address the prisoner's contention that the novelty of the *Caldwell* argument excused his failure to object to the remarks at trial. Even if the constitutional claim was novel, the Court said, the cause requirement was not met because any remarks by the judge that violated the eighth amendment were also inconsistent with state law, and no excuse was proffered for the failure to object to the comments on state law grounds. The Court justified its decision by relying on the policies underlying the cause requirement: because the prisoner had failed to make an

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when defense counsel failed to file timely suppression motion because he had conducted no pretrial discovery due to his mistaken belief that the prosecutor was required to disclose inculpatory evidence to the defense).

Accordingly, the courts of appeals often reject a prisoner's dual attempt to satisfy the cause requirement by arguing both novelty and, in the alternative, ineffective assistance. *See, e.g.*, Presnell v. Kemp, 835 F.2d 1567, 1581 (11th Cir. 1988) (refusing to excuse failure to object to instruction creating rebuttable presumption that one intends the natural and probable consequences of her acts; court rejects prisoner's arguments that attorney did not realize instruction violated seven-month-old Supreme Court decision striking down similar instruction creating irrebuttable presumption and, in the alternative, that issue was novel until later Supreme Court ruling barring rebuttable presumptions), *cert. denied*, 488 U.S. 1050 (1989); Leggins v. Lockhart, 822 F.2d 764, 766-68 & n.5 (8th Cir. 1987) (rejecting ineffective assistance claim although attorney failed to present a claim that court did not consider novel because it had been recognized by a number of other courts and flowed from several Supreme Court decisions), *cert. denied*, 485 U.S. 907 (1988); McBee v. Grant, 763 F.2d 811, 816-17 (6th Cir. 1985) (relying on *Engle* in refusing to find cause when attorney failed to object to instruction creating presumption that one intends the natural and probable consequences of her acts; court concludes that claim was not novel because Supreme Court had already held that prosecution must prove every element of crime beyond a reasonable doubt and also rejects prisoner's claim of ineffective assistance); Honeycutt v. Mahoney, 698 F.2d 213, 216-17 (4th Cir. 1983) (in case similar to *Engle*, rejecting argument that attorney's ignorance of First Circuit opinion that recognized the constitutional claim constitutes ineffective assistance); Henderson v. Jago, 681 F.2d 471, 474 (6th Cir. 1982) (similar to *Engle*).

Such cases have been defended on the theory that any other approach would nullify the cause requirement: procedural defaults would be excused either because of novelty or because of ineffective assistance. *See, e.g.*, Jones v. Jago, 701 F.2d 45, 47 (6th Cir.), *cert. denied*, 464 U.S. 914 (1983). But, as one commentator observed, that argument is based on a "syllogism [that] is fundamentally flawed" because in most cases one default will not constitute ineffective assistance. Yackle, *supra* note 69, at 658 n.234. Thus, as the concepts of both novelty and ineffective assistance become narrower and the middle ground between them expands, there is a corresponding increase in the number of prisoners who are punished for defaults committed by defense counsel who were marginally competent but not visionary enough to foresee future developments in the law.

264. *See supra* notes 185-89 and accompanying text.
265. 489 U.S. 401 (1989).
266. 472 U.S. 320 (1985).

available objection, he had deprived the state court of the opportunity to correct the error during trial.[267]

The Court did not hold that a defendant's failure to preserve one possible objection will always bar subsequent habeas review of other claims arising from the same conduct. The Court limited its decision to cases like *Adams*, where the state law objection — that the judge's comments misinformed the jury about its role in the capital sentencing process — was a "necessary element" of the federal claim.[268] But the Court's analysis of the relevant policies does not seem limited to the context of related claims, and the *Adams* rule may therefore be extended to cases where the challenge ultimately raised on habeas is completely distinct from the state law objection.[269]

Nevertheless, the Court's policy arguments tend to support the approach taken in *Adams*: defense attorneys, like public officials, can reasonably be expected to be aware of precedents that are relevant to their responsibilities but are not constitutionally based. Obviously, however, the *Adams* rule should not apply when defense counsel had no reason to know of the state law objection or to believe any court would accept that claim.[270] In those cases, the procedural default does not evidence an intent to circumvent state procedures. Moreover, the failure to object is not likely to deprive the state court of an opportunity to correct the error and avoid the intrusion of federal review because the court would probably have rejected the argument if it had been made.[271]

IV. DEFINING "NEW" RULES IN RETROACTIVITY CASES

Five Supreme Court opinions issued in the past two years have, without ever mentioning the cause and prejudice requirement, substantially mooted the argument that novelty can excuse a procedural default. These decisions — *Teague v. Lane*[272] and *Penry v. Lynaugh*,[273] decided during the 1988 Term, and *Butler v. McKellar*,[274] *Saffle v. Parks*,[275] and *Sawyer v. Smith*,[276] decided

267. *See Adams*, 489 U.S. at 408.

268. *Id.* at 410. Nevertheless, the dissent pointed out that other defendants might seek to establish a *Caldwell* violation by showing that the judge's comments unconstitutionally downplayed the jury's responsibility in the sentencing process even though they were accurate under state law. *See id.* at 422 n.11 (Blackmun, J., dissenting). *But see* Hopkinson v. Shillinger, 888 F.2d 1286, 1290 n.4 (10th Cir. 1989) (en banc), *cert. denied*, 110 S. Ct. 3256 (1990); Sawyer v. Butler, 881 F.2d 1273, 1285 (5th Cir. 1989) (en banc), *aff'd on other grounds sub nom.* Sawyer v. Smith, 110 S. Ct. 2822 (1990).

269. *See* Cole v. Stevenson, 620 F.2d 1055, 1073 n.29 (4th Cir.) (Murnaghan, J., dissenting) (pre-*Adams* opinion suggesting that failure to object on state law ground waives constitutional objection, without limiting the waiver to related objections), *cert. denied*, 449 U.S. 1004 (1980).

270. *Cf.* Adams v. Dugger, 816 F.2d 1493, 1496 n.2 (11th Cir. 1987) (per curiam) (prisoner's failure to challenge judge's remarks on due process grounds, an argument already rejected in prior similar cases, does not suggest that failure to challenge comments on eighth amendment grounds in earlier habeas petition was the result of "intentional abandonment or inexcusable neglect"), *rev'd on other grounds*, 489 U.S. 401 (1989).

271. *See supra* notes 83-94 and accompanying text.

272. 489 U.S. 288 (1989) (plurality).

273. 492 U.S. 302 (1989).

274. 110 S. Ct. 1212 (1990).

275. 110 S. Ct. 1257 (1990).

276. 110 S. Ct. 2822 (1990).

last Term — have revolutionized the law governing retrospective application of new constitutional rules in habeas cases.

The new approach came in response to *Griffith v. Kentucky*, which mandated that even a Supreme Court opinion making "a 'clear break' with the past" be applied retroactively to cases that were not yet final when the decision was announced.[277] *Griffith* explained that applying new decisions to cases pending on direct review is essential both to maintain the "integrity of judicial review," which requires the Court to resolve all such cases "'in light of [its] best understanding of governing constitutional principles,'" and to ensure that similarly situated defendants are treated alike.[278]

Griffith represented yet another step in the Court's long search for an appropriate retroactivity rule for criminal cases.[279] Historically, new constitutional rulings were given complete retrospective application, consistent with the Blackstonian view that judicial decisions merely describe the law as it already exists.[280] In *Linkletter v. Walker*, the Court rejected that notion, observing that courts do not simply "discover" the law, but actually "make it interstitially."[281] Concluding that the Constitution neither requires nor forbids retrospective application of new constitutional rulings,[282] *Linkletter* adopted a three-pronged test for determining the retroactivity of new criminal procedure rulings. The *Linkletter* test required examination of the purposes of the new rule, the extent to which law enforcement authorities had relied on the prior doctrine, and the effect of retroactive application on the administration of justice.[283] If these three factors required retroactive application, the new ruling governed convictions that were already final as well as those still proceeding through the trial and appellate process.[284]

In several separate opinions written at this time, Justice Harlan advocated an alternative approach. He suggested that new constitutional decisions be applied retroactively to all cases pending on direct review when the new rule

277. 479 U.S. 314, 328 (1987).

278. *Id.* at 323 (quoting Mackey v. United States, 401 U.S. 667, 679 (1971) (Harlan, J., concurring in the judgment)).

279. The retroactivity rules applicable in criminal cases differ from those used in civil cases. In Chevron Oil Co. v. Huson, 404 U.S. 97 (1971), the Court set out three factors relevant in determining whether a decision in a civil case should apply retroactively. First, the courts must apply the decision retroactively unless it "establish[ed] a new principle of law, either by overruling clear past precedent on which litigants may have relied, . . . or by deciding an issue of first impression whose resolution was not clearly foreshadowed." *Id.* at 106 (citation omitted). Second, the courts must examine the history, purpose, and effect of the new rule and evaluate whether "'retrospective operation will further or retard its operation.'" *Id.* at 107 (quoting Linkletter v. Walker, 381 U.S. 618, 629 (1965)). Finally, the courts must analyze any unfairness resulting from retroactive application, declining to apply the rule retroactively if doing so "'could produce substantial inequitable results.'" *Id.* (quoting Cipriano v. City of Houma, 395 U.S. 701, 706 (1969)).

280. *See* 1 W. LAFAVE & J. ISRAEL, *supra* note 47, at 119-20. For a general discussion of the history of the Court's retroactivity rulings, see *id.* at 119-29; Hoffman, *supra* note 78, at 189-200.

281. 381 U.S. 618, 623-24 (1965).

282. *See id.* at 629.

283. *See id.* at 636.

284. *See* Stovall v. Denno, 388 U.S. 293, 296-97, 300-01 (1967).

was announced. But he would not apply the new rule to any case that had already become final.[285]

In *United States v. Johnson*,[286] the Court moved away from *Linkletter* and accepted Harlan's approach, at least for some search and seizure cases. *Johnson* held that a new fourth amendment rule would apply retroactively to all cases pending on direct review at the time it was decided, unless the new decision represented a "'clear break' with the past."[287] The Court defined a "clear break" case as one that "explicitly overrules a past precedent of this Court, or disapproves a practice this Court arguably has sanctioned in prior cases, or overturns a longstanding and widespread practice to which this Court has not spoken, but which a near-unanimous body of lower court authority has expressly approved."[288]

In rejecting the clear break exception and extending *Johnson* beyond the fourth amendment context, *Griffith* adopted Justice Harlan's approach with respect to cases on direct appeal. The Supreme Court's five recent decisions endorse the second half of Harlan's retroactivity theory, holding that cases already final when a new constitutional rule[289] is articulated are not entitled to the benefit of that rule, subject to two exceptions. The exceptions come into play when the new rule prohibits the state[290] from punishing certain types of conduct or executing certain classes of persons,[291] or when the new rule is

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285. *See* Mackey v. United States, 401 U.S. 667, 677-95 (1971) (Harlan, J., concurring in the judgment); Desist v. United States, 394 U.S. 244, 258-69 (1969) (Harlan, J., dissenting).

286. 457 U.S. 537 (1982).

287. *Id.* at 562, 558.

288. *Id.* at 551 (citations omitted). *See also* Shea v. Louisiana, 470 U.S. 51, 58-59 (1985) (extending *Johnson* to fifth amendment case).

289. All five retroactivity cases raised questions concerning the retrospective application of constitutional rules, and some language in the Court's opinions suggests that the new retroactivity doctrine is limited to such cases. *See Sawyer*, 110 S. Ct. at 2826; *Teague*, 489 U.S. at 299, 309, 310. Other language, however, suggests that the *Teague* approach is applicable more broadly to any new rule a prisoner attempts to invoke on habeas. *See Butler*, 110 S. Ct. at 1216; *Penry*, 492 U.S. at 313. Nonetheless, some lower courts have limited the *Teague* doctrine to constitutional issues. *See* Hopkinson v. Shillinger, 888 F.2d 1286, 1291 (10th Cir. 1989) (en banc) (applying the *Teague* doctrine itself retroactively because it is not a constitutional rule, but is based on "an interpretation of the statutory scope of habeas corpus"), *cert. denied*, 110 S. Ct. 3256 (1990); Callanan v. United States, 881 F.2d 229, 232 n.1 (6th Cir. 1989) (limiting *Teague* to new constitutional rules of criminal procedure), *cert. denied*, 110 S. Ct. 1816 (1990). *Cf.* Young v. Herring, 917 F.2d 858, 862 n.1 (5th Cir. 1990) (limiting *Teague* to rules of criminal procedure). *But cf.* Sawyer v. Butler, 881 F.2d 1273, 1305 (5th Cir. 1989) (King, J., dissenting) (suggesting, without discussing *Teague*'s possible limitation to constitutional rules, that *Teague* itself announced a new rule and therefore should not be applied retroactively), *aff'd on other grounds sub nom.* Sawyer v. Smith, 110 S. Ct. 2822 (1990).

290. Although all five of the recent Supreme Court cases involved habeas petitions filed by state prisoners, at least one court of appeals judge has suggested that the *Teague* doctrine applies equally to section 2255 motions filed by federal prisoners. *See* Dodson v. Zelez, 917 F.2d 1250, 1265 n.6 (10th Cir. 1990) (Anderson, J., dissenting). *Cf.* Callanan v. United States, 881 F.2d 229, 232 n.1 (6th Cir. 1989) (court ignores retroactivity question on the ground that *Teague* applies only to new constitutional rules of criminal procedure without mentioning any distinction between state and federal prisoners), *cert. denied*, 110 S. Ct. 1816 (1990). This suggestion is supported by *Teague*'s definition of a new rule as one that "imposes a new obligation on the States or the Federal Government." 489 U.S. at 301.

291. *See Penry*, 492 U.S. at 329-30; *Teague*, 489 U.S. at 311. The Court found this exception applicable to the prisoner's argument in *Penry* that executing mentally retarded persons like himself violated the eighth amendment. *See* 492 U.S. at 330. Aside from death penalty

"'implicit in the concept of ordered liberty'" in the sense that the "likelihood of obtaining an accurate conviction" is "seriously diminish[ed]" when it is not applied.[292]

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cases of this type, the first exception is apparently quite narrow because most criminal procedure rulings do not render the defendant's conduct constitutionally protected. *See, e.g., Butler*, 110 S. Ct. at 1218 (defendant charged with murder cannot take advantage of this exception because nothing bars the states from prohibiting such conduct); Wickham v. Dowd, 914 F.2d 1111, 1115-16 (8th Cir. 1990) (finding exception inapplicable to prisoner's argument that the ban on cruel and unusual punishment prohibits a court from conditioning a known alcoholic's probation on abstinence from alcohol and then revoking probation when he violates that condition). *But cf.* 1 W. LAFAVE & J. ISRAEL, *supra* note 47, at 10 (Supp. 1990) (observing that *Teague* did not address the possibility that the first exception also applies to rulings, like those interpreting the double jeopardy clause, that deprive the state of authority to attempt to convict defendant).

292. *Teague*, 489 U.S. at 311, 313 (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937)). As examples of rules falling within this second exception, the *Teague* plurality listed the right to counsel at trial, the prohibition on the prosecutor's knowing use of false testimony, and the ban on confessions obtained by police brutality. *See id.* at 311-12, 313. But *Teague* expressly warned of the narrow scope of this exception, noting that it was "unlikely that many such components of basic due process have yet to emerge." *Id.* at 313. *But cf. Sawyer*, 110 S. Ct. at 2839 (Marshall, J., dissenting) ("[t]he majority cannot bind the future to present constitutional understandings of what is essential to due process"). Finding the exception inapplicable to Teague's challenge to the composition of the jury, the plurality reasoned that "the absence of a fair cross section on the jury venire does not undermine the fundamental fairness that must underlie a conviction or seriously diminish the likelihood of obtaining an accurate conviction," *Teague*, 489 U.S. at 315, despite the fact that in such a case the jury's "impartiality might have been eroded by racial prejudice." *Id.* at 322 (Stevens, J., concurring in part and concurring in the judgment). *See also id.* at 343 (Brennan, J., dissenting).

The Court likewise found the second exception inapplicable to the prisoner's contention in *Saffle* that an instruction warning the jury in a death penalty hearing to avoid any influence of sympathy violated the eighth amendment. The prisoner's challenge was based on the theory that the instruction in effect permitted the jury to disregard evidence of mitigating circumstances, and "[r]ules ensuring the jury's ability to consider mitigating evidence . . . are integral to the proper functioning of the capital sentencing hearing" and to protection of the fundamental right to individualized sentencing. *Saffle*, 110 S. Ct. at 1270 (Brennan, J., dissenting). Nevertheless, the Court concluded that the second exception did not apply, explaining that "[t]he objectives of fairness and accuracy are more likely to be threatened than promoted by a rule allowing the sentence to turn . . . on whether the defendant can strike an emotional chord in a juror." 110 S. Ct. at 1264.

Similarly, the Court refused to apply the exception in *Sawyer*, where the prisoner challenged remarks made by the prosecutor during a capital sentencing hearing that minimized the jury's responsibility for the sentencing decision. Although the jury's understanding of its role in a capital case is important in ensuring the reliability of the jury's decision, the Court held that the second exception is not available simply because a new rule is intended to improve the accuracy of the trial or sentencing process. All eighth amendment decisions would satisfy that criterion, the Court reasoned. *See* 110 S. Ct. at 2831-32. Rather, the rule must not only be designed to enhance accuracy, but must also constitute a "watershed rule[] of fundamental fairness." *Id.* at 2831. The Court found the latter element missing in *Sawyer*. Specifically, it concluded that its prior opinion holding similar statements barred by the eighth amendment because they created an "unacceptable risk" of unreliable sentencing was not "'an absolute prerequisite to fundamental fairness'" because the due process clause already prohibited any improper prosecutorial remarks that in fact made a proceeding fundamentally unfair. *Id.* at 2832 (quoting *Teague*, 489 U.S. at 314). *See also supra* note 105 (describing Supreme Court opinion concluding that similar comments by trial judge did not constitute a miscarriage of justice sufficient to excuse procedural default).

For examples of other cases finding the second exception inapplicable, see *Butler*, 110 S. Ct. at 1218 ("a violation of . . . added restrictions on police investigatory procedures would not seriously diminish the likelihood of obtaining an accurate determination — indeed, it may increase the likelihood"); Barker v. Estelle, 913 F.2d 1433, 1441-42 (9th Cir. 1990) (exception does not apply to prisoner's contention that he was entitled to confront witnesses at juvenile fit-

Because a conviction is deemed "final" once the defendant has exhausted the avenues of direct appeal in the state courts, and either the Supreme Court has denied certiorari or the time for filing a petition for certiorari has passed,[293] the Court's new approach means that "new rules will not be applied or announced in cases on collateral review."[294] Therefore, the prisoner who successfully explains her procedural default on the ground that her claim was novel at the time of her trial now faces an additional barrier to habeas relief: if the argument was truly a novel one, it almost certainly will involve application of a new rule that is not available on habeas.[295] If the court determines that the prisoner is invoking a new rule, it will likely dismiss the habeas petition without reaching the merits of the claim because even if the claim is a valid one, it is not applicable on habeas.[296] The procedural default cases discussing novelty as cause, and the policy concerns underlying them, thus become superfluous.

A. Evaluating the New Approach

The new approach was initially advocated by a plurality in *Teague v. Lane* (although a majority of the Court seemed to agree with the plurality's

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ness hearing; although confrontation rights are designed to ensure the accuracy of the factfinding process, fitness hearing was not meant to be adversarial or to find facts, but only to determine propriety of juvenile court's exercise of jurisdiction over defendant); Smith v. Black, 904 F.2d 950, 986 (5th Cir. 1990) (exception inapplicable where prisoner challenged state's practice of automatically affirming death sentence based on unconstitutional aggravating circumstance if the jury also based sentence on another, valid aggravating circumstance, even though the jury considered the invalid aggravating circumstance when balancing the aggravating and mitigating circumstances and ultimately sentencing prisoner to death); Collins v. Zant, 892 F.2d 1502, 1512 (11th Cir. 1990) (per curiam) (similar to *Butler*); Sawyer v. Butler, 881 F.2d 1273, 1294 (5th Cir. 1989) (en banc) (second exception is not necessarily applicable simply because new rule "implicates both the integrity of [the capital sentencing] procedure and the accuracy of the determination"; rather, it must have an "overwhelming influence upon accuracy" or an "intimate connection with factual innocence"), *aff'd sub nom.* Sawyer v. Smith, 110 S. Ct. 2822 (1990). *But see* Swindler v. Lockhart, 110 S. Ct. 1938, 1940 n.* (1990) (Marshall, J., dissenting from denial of certiorari) (argument that venue should not have been changed to place with small black population comes within exception because reliability of conviction is "diminished when a defendant is tried by a jury that has prejudged his case"); Ostrosky v. Alaska, 913 F.2d 590, 594 (9th Cir. 1990) (exception applies where prisoner argues that he lacked mens rea necessary to commit crime because he relied on prior lower court decision invalidating criminal statute he allegedly violated; prisoner's argument goes to his "guilt or innocence" and thus to "the core of the second exception"); Harris v. Vasquez, 901 F.2d 724, 727 (9th Cir.) (Noonan, J.) (exception arguably applies to rule requiring appointment of psychiatrist to aid indigent defendant's defense), *motion to vacate denied*, 110 S. Ct. 1799 (1990); Hall v. Kelso, 892 F.2d 1541, 1543 n.1 (11th Cir. 1990) (exception applies when prisoner challenges instructions that shifted burden of proof).

293. *See* Griffith v. Kentucky, 479 U.S. 314, 321 n.6 (1987). *See also Penry*, 492 U.S. at 314. *But cf.* Hoffman, *The Supreme Court's New Vision of Federal Habeas Corpus for State Prisoners*, 1989 SUP. CT. REV. 165, 184 (describing ambiguity in the Court's recent retroactivity cases concerning the stage of the criminal proceedings at which federal law becomes "fixed" for purposes of habeas review).

294. *Penry*, 492 U.S. at 313.

295. *See* Friedman, *supra* note 69, at 301 n.286 (referring to this dilemma as "Catch-2254").

296. This scenario is especially likely because the Court has suggested that the retroactivity question is a threshold issue that should be resolved prior to consideration of the merits of the underlying constitutional claim. *See infra* note 314.

reasoning[297]), and ultimately was adopted by the majority in *Penry v. Lynaugh*.[298] The Court has articulated a number of policy concerns to justify the distinction it has drawn between habeas petitions and cases on direct review: (1) that equal treatment should be given to similarly situated defendants on direct review, as well as to similarly situated prisoners who are collaterally attacking their convictions;[299] (2) that the goal of finalizing criminal convictions outweighs the interest in making new rules available to habeas petitioners;[300] (3) that invoking new rules on habeas is particularly intrusive "for it *continually* forces the States to marshall resources in order to keep in prison defendants whose trials and appeals conformed to then-existing constitutional standards";[301] (4) that "'[s]tate courts are understandably frustrated when they faithfully apply existing constitutional law only to have a federal court discover, during a [habeas] proceeding, new constitutional commands'";[302] and (5) that requiring habeas courts to ensure that the prisoner's trial was conducted according to then-prevailing constitutional standards will sufficiently sensitize state courts to constitutional concerns.[303] None of these policy interests is sufficiently compelling to justify the Court's reworking of the retroactivity doctrine.

First, although the Court purports to share *Griffith*'s goal of treating similarly situated defendants alike,[304] the principle of equal treatment is not

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297. Although only three other Justices joined the retroactivity analysis in Justice O'Connor's opinion, Justice Stevens' separate opinion, joined by Justice Blackmun, agreed generally with the plurality's approach to retroactivity, though not with the narrow scope of the second exception. *See* 489 U.S. at 319-21 (Stevens, J., concurring in part and concurring in the judgment). In addition, Justice White thought that O'Connor's retroactivity discussion was "an acceptable application" of the Court's prior decisions in *Johnson* and *Griffith*, with which White still disagreed. *See id.* at 317 (White, J., concurring in part and concurring in the judgment).

298. *Penry* also extended the *Teague* doctrine to habeas petitions challenging capital sentencing procedures, reasoning that the finality concerns underlying *Teague* apply equally when a prisoner collaterally attacks her sentence. *See* 492 U.S. at 313-14. The dissent, by contrast, found it "intolerable that the difference between life and death should turn on . . . a fortuity of timing, and beyond my comprehension that a majority of this Court will so blithely allow a State to take a human life though the method by which sentence was determined violates our Constitution." *Id.* at 341 (Brennan, J., dissenting).

299. *See Teague*, 489 U.S. at 304, 315-16.

300. *See id.* at 309-10. *See also Penry*, 492 U.S. at 314.

301. *Teague*, 489 U.S. at 310 (emphasis in original).

302. *Id.* (quoting *Engle*, 456 U.S. at 128 n.33).

303. *See id.* at 306. *See also Saffle*, 110 S. Ct. at 1260.

304. The *Teague* plurality observed that courts applying the new retroactivity approach must "refus[e] to announce a new rule in a given case unless the rule would be applied retroactively to the defendant in the case and to all others similarly situated." 489 U.S. at 316. Moreover, *Teague* criticized the three-pronged *Linkletter* test, *see supra* text accompanying note 283, because at times its application had resulted in "disparate treatment of similarly situated defendants on direct review." 489 U.S. at 303. *Griffith*, of course, had already resolved that problem by mandating that all defendants whose cases were still pending on direct review were entitled to the benefit of any new rules. *See supra* text accompanying note 278.

The *Teague* plurality also noted that *Linkletter* had resulted in unequal treatment of similarly situated defendants on collateral review because the lower courts often disagreed about the applicability of the relevant decisions on habeas. Until the Supreme Court resolved the issue, habeas petitioners in different jurisdictions were treated differently. *See* 489 U.S. at 305. The Court attributed this disparity to its own failure to deal with retroactivity questions as a threshold matter, as well as *Linkletter*'s "inability to account for the nature and function of collateral review." *Id.* Given the Court's suggestion that according precedence to retroactivity issues

served by denying retrospective application to any defendant whose appeal process fortuitously ended the day before a new rule was announced. In fact, some of these cases will not involve procedural defaults because the defendant will have astutely raised the claim ultimately validated in the new decision, and therefore will be no less deserving of a new trial than the defendant whose case the Court happened to use as the vehicle for announcing the new rule.[305] In addition, as two of the four Justices making up the plurality in *Teague* noted in their earlier dissent in *Griffith*, "'the Court's new approach equalizes nothing except the numbers of defendants within the disparately treated classes'" because "'identically situated defendants may be subject to different constitutional rules, depending on how long ago now-unconstitutional conduct occurred and how quickly cases proceed through the criminal justice system.'"[306]

Second, the Court's concerns about finality and state resources will always lead to cutbacks in habeas jurisdiction. Moreover, the Court does not indicate why these interests trump the goal of ensuring error-free convictions only on habeas and not on direct review, or as the *Griffith* dissent put it, why granting a new trial is more acceptable on direct review than on habeas when the disruption is the same in both cases. As Justice White noted in that dissent, applying new rules on habeas rather than limiting their application to cases still on direct review would be more burdensome "'in the aggregate,'" but likewise "'it would be less burdensome to apply [new rules] retroactively to all cases involving defendants whose last names begin with the letter 'S' than to make the decision fully retroactive.'"[307]

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would solve the first problem, *see infra* note 314, it is difficult to see why additional modifications in the retroactivity doctrine were necessary to provide the lower courts with the guidance necessary to avoid such conflicts.

305. For example, each of the claims Penry raised on habeas had been litigated in both the trial court and the court of appeals. *See* 492 U.S. at 310-12. But because one of those arguments involved the application of a new rule, it was barred on habeas. *See infra* note 324.

306. *Griffith*, 479 U.S. at 331-32 (White, J., dissenting) (quoting Shea v. Louisiana, 470 U.S. 51, 62-64 (1985) (White, J., dissenting)). White's dissent in *Griffith* was joined by Justice O'Connor, the author of the *Teague* plurality opinion, and by Chief Justice Rehnquist, who joined O'Connor's opinion in *Teague*. *See also* Schaefer, *Prospective Rulings: Two Perspectives*, 1982 SUP. CT. REV. 1, 11 (equality "can be achieved only by focusing steadily on the time of the police conduct, without regard to the irrelevant rate of progress of cases through our judicial system").

In his dissent in *Butler*, Justice Brennan described another inequity resulting from the new approach to retroactivity: a prisoner whose trial did *not* conform to then-existing constitutional standards is nevertheless unlikely to prevail on habeas if the federal court decides to issue a new rule of law rejecting her constitutional claim. *See Butler*, 110 S. Ct. at 1221 n.4 (Brennan, J., dissenting). *See also Saffle*, 110 S. Ct. at 1264 n.1 (Brennan, J., dissenting) (criticizing majority for applying new retroactivity rules to bar relief on claim litigated prior to *Teague*). *Cf.* Hunt v. Vasquez, 899 F.2d 878, 880 (9th Cir. 1990) (prisoner who received ineffective assistance of counsel on appeal is entitled to new appeal governed by current state law, not by more favorable law that was in effect at time of his original appeal).

307. *Griffith*, 479 U.S. at 333-34 n.2 (White, J., dissenting) (quoting Shea v. Louisiana, 470 U.S. 51, 64 n.1 (1985) (White, J., dissenting)).

One commentator has argued that the finality costs are greater for habeas petitions raising new law claims than for "almost any other category" of habeas petitions because a significant percentage of successive habeas petitions raise new law claims and those cases are "the most stale" and therefore the most difficult to retry. Hoffman, *supra* note 78, at 203. But he admits that no available statistics measure what percentage of successive petitions consist of new law claims. *See id.* Moreover, there is no necessary correlation between the number of habeas peti-

Third, the Court does not explain why state courts are not equally "frustrated" when the Supreme Court changes the rules of the game by imposing new constitutional requirements on direct review of state court convictions. Moreover, even assuming that concern about state courts' hurt feelings should ever outweigh the interest in remedying constitutional violations, the new form of habeas review envisioned by the *Teague* line of cases may be more insulting to state court judges. Focusing the habeas inquiry on the question whether the state court unreasonably interpreted then-existing precedent seems like a more direct attack on the judge's decision, and therefore more likely to engender bad feelings, than evaluating the current status of constitutional law, which may have been impossible for the judge to foresee.[308]

That leaves deterrence. *Teague*'s reliance on deterrence concerns follows from Justice Harlan's theory of retroactivity, but neither Harlan nor the current members of the Court have cited any support in the habeas statutes or the common law history of habeas for the view that the writ's purpose is to deter state courts from ignoring constitutional commands. Nor has the Court explained why the goal of encouraging state courts to comply with constitutional norms dictates its current approach to retroactivity. For example, deterrence concerns might be adequately served by ensuring that the defendant

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tions that a prisoner raising a new law claim previously filed and the amount of time since her conviction. *See Griffith*, 479 U.S. at 333 n.2 (White, J., dissenting) (if the Court is concerned about the difficulties of retrying old cases, "it could accomplish its purpose far more precisely by applying new constitutional rules only to conduct of appropriately recent vintage"). Finally, concerns about the burdens imposed by successive petitions have generally been overstated. *See, e.g.*, L. YACKLE, *supra* note 39, at 567; Guttenberg, *supra* note 45, at 678 & n.342 (although approximately one-third of habeas petitioners file more than one petition, statistics show a 60% decrease in number of petitions filed as a percentage of prison population between 1971 and 1981, as well as an overall decline in the total number filed). *See generally supra* note 79. *But cf. infra* note 315 (discussing recent efforts to enact legislation that would impose a statute of limitations on habeas petitions in capital cases and would limit the number of petitions that could be filed in such cases).

308. One commentator has raised a point similar to that made in *Teague*. *See* Hoffman, *supra* note 78, at 204-06. He argues that the federal-state friction created by habeas petitions does not arise simply because reversal is possible (a state appellate court is more likely than a habeas court to overturn a trial court's ruling), or even because the reversal comes at the hands of a federal court (there is always a remote possibility that the Supreme Court will reverse a conviction on direct review). *Id.* at 204-05. Rather, habeas relief generates greater hostility because of the manner in which reversal occurs. A trial judge who is reversed on appeal soon after the trial ends probably perceives the process as fair because she had "the same opportunity as the reviewing court to consider the relevant precedents" and simply made "an honest mistake." *Id.* at 205. On habeas, by contrast, the judge tends to feel "judged" because a reversal "send[s] the state judge the implicit message that he or she has not 'toe[d] the constitutional mark.'" *Id.* (quoting Mackey v. United States, 401 U.S. 667, 687 (1971) (Harlan, J., concurring in the judgment)). In cases involving new rules, habeas relief is especially likely to offend the trial judge because the federal court has the advantage of "twenty-twenty hindsight." *Id.* at 206. Moreover, the state judge will probably believe that "his or her best attempt to make the 'right' choice, based on the materials and information available at the time, is unappreciated, and impliedly if not expressly criticized by the federal habeas court." *Id.*

Nevertheless, as suggested in the text, reversing a judge's ruling on appeal when there has been no intervening change in the law seems like the most direct challenge to the judge's decision and therefore the most likely to create hurt feelings. In those cases, using the same "materials and information" that were available to the trial judge, the appellate court decides that she was simply wrong. The trial judge is less likely to feel "judged" or "criticized" if a habeas court reverses her decision based on some new development in constitutional law that she could not have foreseen. It is difficult to imagine a more "honest mistake."

received the benefit of the constitutional rules prevailing at the time of her trial, rather than at the time her conviction became final.

The Court's single-minded focus on the deterrent purpose of habeas also completely ignores its other function — to provide an independent federal review of constitutional questions in order to vindicate constitutional rights.[309] The *Teague* plurality may well be right in pointing out that comity and finality concerns deserve recognition because "'[t]he Court never has defined the scope of the writ *simply* by reference to a perceived need to assure that an individual accused of crime is afforded a trial free of constitutional error.'"[310] But the Court never again mentions the latter set of policies and instead focuses solely on deterrence, finality, and comity.[311] In fact, the *Teague* line of cases does more than merely ignore the goal of safeguarding constitutional rights: by recharacterizing habeas as essentially another form of appellate review that applies a clearly erroneous standard,[312] the Court actively undermines the writ's traditional role as an independent, plenary review of constitutional issues.

Moreover, the *Teague* approach drastically limits the ability of the federal courts, including the Supreme Court, to develop constitutional principles in criminal cases. If habeas effectively becomes another stage of the appeal process, with the federal court asking only whether the state court's ruling was clearly erroneous under the legal standards prevailing at the time, the federal courts will be able to mold the constitutional principles governing criminal cases only in state cases on direct review to the Supreme Court or in federal criminal cases. Given the relative rarity of those opportunities,[313] the *Teague* doctrine is likely to stagnate the development of federal constitutional law.[314]

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309. *See supra* notes 41-43 and accompanying text.

310. 489 U.S. at 308 (quoting Kuhlmann v. Wilson, 477 U.S. 436, 447 (1986) (plurality)) (emphasis added).

311. *See Griffith*, 479 U.S. at 332 n.1 (White, J., dissenting) ("'the majority offers no reasons for its conclusion that finality should be the decisive factor'") (quoting Shea v. Louisiana, 470 U.S. 51, 64-65 (1985) (White, J., dissenting)); Hoffman, *supra* note 78, at 201 ("where the two purposes [of habeas] diverge, . . . nothing in the history or nature of federal habeas suggests that the 'deterrence' purpose inevitably should prevail").

312. *See Butler*, 110 S. Ct. at 1221 (Brennan, J., dissenting).

313. *Compare* NATIONAL CENTER FOR STATE COURTS, STATE COURT CASELOAD STATISTICS: ANNUAL REPORT 1988, at 10 (1990) (in 1988, almost twelve million criminal cases began in the state courts), *with* BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS — 1989, at 480 (1990) (43,670 criminal cases were filed in the federal courts in 1988). *See also supra* notes 113 & 191 and accompanying text.

314. *See Butler*, 110 S. Ct. at 1226 n.12 (Brennan, J., dissenting); 1 W. LAFAVE & J. ISRAEL, *supra* note 47, at 11 (Supp. 1990); Hoffman, *supra* note 78, at 214-15 (noting that defendants cannot raise some kinds of constitutional claims on direct review; therefore, these claims will not reach the federal courts except in the context of federal criminal prosecutions).

Constitutional principles are especially likely to stagnate because the Supreme Court has characterized the retroactivity issue as a "threshold question" to be considered prior to the merits of the prisoner's constitutional claim. *Teague*, 489 U.S. at 300. *See also Sawyer*, 110 S. Ct. at 2826; *Saffle*, 110 S. Ct. at 1259; *Penry*, 492 U.S. at 313. *But see id.* at 349 (Stevens, J., concurring in part and dissenting in part) (noting that "it is neither logical nor prudent to consider a rule's retroactive application before the rule itself is articulated").

Commentators charge that the qualified immunity defense likewise hinders the development of constitutional law. *See, e.g.*, McCann, *The Interrelationship of Immunity and the* Prima Facie *Case in Section 1983 and* Bivens *Cases*, 21 GONZ. L. REV. 117, 139-41 (1985-1986); Nahmod, *supra* note 34, at 259; Rudovsky, *supra* note 31, at 53-55. *Harlow* did note that

Thus, the recent retroactivity rulings cannot be justified as an attempt to accommodate competing policies. The Court's emphasis on the reasonable government official and the reasonable defense attorney in the qualified immunity and procedural default cases may represent, in the abstract, an appropriate balancing of the interests in vindicating constitutional rights and avoiding disruption of state governmental processes. But the same cannot be said of the retroactivity cases. These cases are designed to serve only the interests on one side of the scale.[315]

The problems associated with the *Teague* doctrine do not necessarily require, however, that the courts give all Supreme Court rulings complete retroactive application. Absolute retroactivity would create enormous administrative difficulties for the criminal justice system, especially when the Supreme Court issued an opinion that departed substantially from prior practice. In fact, the specter of those administrative problems might even discourage the Court from issuing such rulings. Perhaps the best solution is a step backward: a return to the three-part *Linkletter* test.[316] Although *Griffith*'s concerns — ensuring that cases on direct appeal are resolved in light of the courts' "best understanding of governing constitutional principles" and treating

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courts ruling on summary judgment motions raising a qualified immunity defense could analyze the current status of the relevant constitutional law as well as the question whether that law was clearly established when the defendant acted. *See Harlow*, 457 U.S. at 818. Nevertheless, the Court also made it clear that ideally qualified immunity issues should be resolved prior to trial. *See id.* at 815-16. *See also Anderson*, 483 U.S. at 640 n.2, 646 n.6; *Mitchell*, 472 U.S. at 526, 528. As a result, courts can dismiss section 1983 cases on immunity grounds without evaluating whether the plaintiff's constitutional rights were infringed, leaving only suits against municipalities and injunctive or declaratory judgment suits in which to develop the law in section 1983 cases. *See supra* notes 10 & 11. *But cf.* City of Los Angeles v. Lyons, 461 U.S. 95 (1983) (requiring section 1983 plaintiffs who seek an injunction not only to satisfy the general prerequisites for such relief, but also to prove a likelihood of future injury and to overcome the federal courts' reluctance to intrude on state prerogatives); Monell v. Department of Social Servs., 436 U.S. 658 (1978) (requiring plaintiffs who seek to subject city to section 1983 liability to establish that constitutional violation was result of city's official policy or custom). Resolving section 1983 suits in this way not only contributes to a stagnation of constitutional standards, but also facilitates public officials' arguments in subsequent cases that the relevant constitutional principles are unclear. Recognizing this potential problem, a few courts suggest that the merits of a plaintiff's section 1983 claim be addressed prior to disposition of the qualified immunity issue. *See* Garcia by Garcia v. Miera, 817 F.2d 650, 656 n.8 (10th Cir. 1987), *cert. denied*, 485 U.S. 959 (1988); Coleman v. Frantz, 754 F.2d 719, 722-23 (7th Cir. 1985); Egger v. Phillips, 710 F.2d 292, 314 n.27 (7th Cir.) (en banc), *cert. denied*, 464 U.S. 918 (1983). *But see* Benson v. Allphin, 786 F.2d 268, 279 n.26 (7th Cir.) (criticizing that approach as inconsistent with both *Mitchell* and Article III), *cert. denied*, 479 U.S. 848 (1986).

315. Last year, Congress attempted to reform habeas procedures in capital cases. The bill originally presented on the floor of the House would have overruled the *Teague* doctrine in capital cases. *See* 136 Cong. Rec. H8769 (daily ed. Oct. 3, 1990). But, so long as the state provided competent counsel in state postconviction proceedings, the bill would have imposed a statute of limitations for habeas petitions in capital cases and in most cases would have allowed only one stay of execution in order to permit the prisoner to file a habeas petition. The measures ultimately passed in both the House and the Senate left the *Teague* doctrine intact but retained the other features of the bill. *See id.* at H8876-78 (daily ed. Oct. 4, 1990); *id.* at S10,190-91 (daily ed. July 20, 1990). The conferees were unable to reach a compromise between the House and Senate versions of the bill, however, and the habeas reform package therefore died at the end of the session. *See id.* at S17,602 (daily ed. Oct. 27, 1990) (remarks of Sen. Thurmond). A new bill has been introduced in the Senate identical to the one the Senate passed last summer. S. 146, 102d Cong., 1st Sess., 137 Cong. Rec. S836 (daily ed. Jan. 14, 1991).

316. *See supra* notes 281-84 and accompanying text.

similarly situated defendants alike[317] — would be compromised in some cases, the *Linkletter* approach forces the courts to consider seriously the relevant competing interests. In any event, the *Teague* doctrine is not the answer to the Court's search for the optimal approach to retroactivity.

B. Applying the New Approach

Even if the Court's deterrence theory, or an effort to accommodate all the relevant policies, supports adoption of the *Teague* approach in some form, it justifies at best refusing to permit habeas petitioners to take advantage of rules that are truly new — that is, those that a reasonable state judge would not have recognized at the time the prisoner's conviction became final. Unfortunately, the definition of "new rules" that the Court currently favors is too expansive to enjoy any such justification. The Court has been much too eager to forgive the state courts' erroneous constitutional interpretations, especially when compared to the strict standard applied to defense attorneys in procedural default cases. As a result, the retroactivity doctrine will not provide a sufficient incentive for state courts to faithfully apply constitutional norms.

Teague and *Penry* indicated that a "case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government," in other words, when its "result was not *dictated* by precedent existing at the time the defendant's conviction became final."[318] A decision that overrules past precedent obviously is not dictated by existing case law and thus articulates a new rule.[319] The Court therefore had no trouble concluding that Teague was invoking a new rule by urging, contrary to statements the Court had made in prior opinions, that the sixth amendment's requirement that the jury venire be drawn from a fair cross-section of the community be extended to the petit jury.[320]

Most Supreme Court opinions, however, apply and extend prior cases rather than overruling them; determining whether such decisions announce a new rule is more difficult.[321] *Penry* was such a case. The Court held that Penry was not seeking a new rule when arguing that the trial judge should have given an instruction at his capital sentencing hearing to aid the jury's evaluation of mitigating evidence concerning his mental retardation and abused background. The Court noted that prior Supreme Court decisions had held that capital sentencing juries could not be precluded from considering any relevant

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317. *Griffith*, 479 U.S. at 323; *see supra* note 278 and accompanying text.

318. *Teague*, 489 U.S. at 301 (emphasis in original). *See also Penry*, 492 U.S. at 314. *Teague* gave two examples of recent Supreme Court decisions that announced new rules: Rock v. Arkansas, 483 U.S. 44 (1987), which struck down an evidentiary rule excluding all hypnotically refreshed testimony as an infringement of the defendant's right to testify in her own behalf; and Ford v. Wainwright, 477 U.S. 399 (1986), which held that the eighth amendment prohibits executing prisoners who are insane. *But cf.* Hoffman, *supra* note 293, at 182 (noting that *Rock* "involved a relatively minor extension of long-standing federal constitutional precedent," and "the only question" in *Ford* was whether a right recognized by "several centuries of common law, as well as the statutes of virtually every state" was protected by the eighth amendment as well).

319. *See Butler*, 110 S. Ct. at 1216. *But cf. infra* note 382 and accompanying text (describing Justice Harlan's contrary views).

320. *See Teague*, 489 U.S. at 292, 301 (citing Taylor v. Louisiana, 419 U.S. 522, 538 (1975), and Akins v. Texas, 325 U.S. 398, 403 (1945)).

mitigating evidence,[322] and, in fact, had upheld the very death penalty statute at issue in *Penry* based on assurances that it would permit consideration of any mitigating circumstance the defendant could show.[323] The Court concluded that Penry was merely arguing that "[these] assurances were not fulfilled in his particular case because, without appropriate jury instructions, the jury could not fully consider and give effect to the mitigating evidence."[324]

Last Term, in *Butler v. McKellar*, *Saffle v. Parks*, and *Sawyer v. Smith*, the Court refined and seemingly broadened the concept of "new" rules, adopting a "functional view" that denies habeas relief so long as the state courts interpreted then-existing case law reasonably and in good faith.[325] If the constitutionality of the practice challenged by the prisoner was "susceptible to debate among reasonable minds" at the time her conviction became final,[326] such that a state court would not have "felt compelled by existing precedent to conclude that the rule [she] seeks was required by the Constitution,"[327] the rule is a new one that will not be available on habeas. Even cases that make "gradual developments in the law" will not be applied on habeas if reasonable judges might have disagreed; only decisions that are "'predictable development[s] in [the] law'" will be extended to habeas petitioners.[328]

Applying this standard, the Court decided in all three cases that the prisoner was improperly seeking to take advantage of a new rule on habeas. In *Butler*, the prisoner argued that the police had violated the Court's recent decision in *Arizona v. Roberson*[329] by continuing to question him after he had asked for an attorney. *Roberson* involved an application of the Court's earlier ruling in *Edwards v. Arizona*,[330] which prohibits the police from interrogating a suspect who invokes her right to counsel until she has an opportunity to consult with an attorney. *Roberson* rejected the state's attempt "to craft an exception" to the *Edwards* rule when the police conduct a second interrogation involving a different crime after the initial questioning session ended with the defendant's request for counsel.[331] The *Roberson* Court characterized the state's efforts to distinguish *Edwards* on the ground that the second interrogation in *Edwards* had involved the same subject as an attempt to rely on a factual difference with no "'legal significance for fifth amendment purposes.'"[332] Nevertheless, *Butler* held that "the fact that a court says that its decision is within the 'logical compass' of an earlier decision, or indeed that it

321. *See Butler*, 110 S. Ct. at 1216.
322. *See Penry*, 492 U.S. at 318 (citing Lockett v. Ohio, 438 U.S. 586 (1978), and Eddings v. Oklahoma, 455 U.S. 104 (1982)).
323. *See id.* at 316 (citing Jurek v. Texas, 428 U.S. 262, 272-73 (1976)).
324. *Id.* at 318 (emphasis deleted). *Penry* concluded, however, that the prisoner's second claim — that executing a mentally retarded person like himself would violate the eighth amendment — was a new rule because it was not dictated by precedent and would impose a new obligation on the states. *See id.* at 2952.
325. *Saffle*, 110 S. Ct. at 1260. *See also Butler*, 110 S. Ct. at 1217.
326. *Butler*, 110 S. Ct. at 1217.
327. *Saffle*, 110 S. Ct. at 1260.
328. *Sawyer*, 110 S. Ct. at 2827, 2828 (quoting Brief for Petitioner at 8).
329. 486 U.S. 675 (1988).
330. 451 U.S. 477 (1981).
331. *Roberson*, 486 U.S. at 677.
332. *Id.* at 678 (quoting State v. Routhier, 137 Ariz. 90, 97, 669 P.2d 68, 75 (1983), *cert. denied*, 464 U.S. 1073 (1984)).

is 'controlled' by a prior decision, is not conclusive for purposes of deciding whether the current decision is a 'new rule' under *Teague*."[333] Because the result in *Roberson* was susceptible to reasonable debate, as evidenced by the conflict among the lower courts, and because "[i]t 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*," the Court concluded that *Roberson* announced a new rule.[334]

Likewise, *Saffle* held that the prisoner was invoking a new rule when arguing that an instruction in a capital case warning the jury to avoid any influence of sympathy violates the eighth amendment because in effect it tells the jury to disregard the defendant's mitigating evidence. Although the Supreme Court's prior decisions in *Lockett v. Ohio*[335] and *Eddings v. Oklahoma*[336] had prohibited states from limiting the presentation and consideration of relevant mitigating evidence in death penalty hearings, those cases, the Court said, "do not speak directly, if at all," to the issue in *Saffle*: "[t]here is a simple and logical difference between rules that govern what factors the jury must be permitted to consider in making its sentencing decision, and rules that govern how the State may guide the jury in considering and weighing those factors in reaching a decision."[337] Because the prisoner was complaining that the state had "limited the manner in which his mitigating evidence may be considered," and not that it had "altogether prevented [the] jury from considering" that evidence, his argument did not "come under the rule of *Lockett* and *Eddings*."[338] Even if those precedents "inform, or even control or govern, the analysis of [this] claim," the Court concluded, "it does not follow that they compel the rule that Parks seeks."[339] Therefore, the state and federal decisions upholding antisympathy instructions after *Lockett* and *Eddings* could not be considered unreasonable, and Parks was improperly seeking to assert a new rule on habeas.

Finally, *Sawyer* concluded that the Court announced a new rule in *Caldwell v. Mississippi*, when it held that the eighth amendment prohibits prosecutorial statements that lead the jury in a capital case to believe that it does not have responsibility for the sentencing decision.[340] In characterizing this holding as a new rule, *Sawyer* distinguished *Caldwell* from *Donnelly v.*

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333. *Butler*, 110 S. Ct. at 1217.
334. *Id.* at 1217-18.
335. 438 U.S. 586 (1978).
336. 455 U.S. 104 (1982).
337. *Saffle*, 110 S. Ct. at 1261.
338. *Id.* at 1262. *Saffle* thus distinguished *Penry* on two grounds: that Penry alleged that the state had completely barred the jury from considering his mitigating evidence; and that resolution of Penry's claim did not involve application of the reasoning in *Lockett* and *Eddings*, but simply required application of the Court's holding in *Jurek v. Texas*, *see supra* notes 322-24 and accompanying text. *See Saffle*, 110 S. Ct. at 1261-62. *But see id.* at 1267-69 (Brennan, J., dissenting). *But cf. Penry*, 492 U.S. at 355 (Scalia, J., concurring in part and dissenting in part) (dissenting from Court's holding that Penry was not invoking a new rule, and distinguishing *Jurek*'s rule that the state must "render all mitigating circumstances relevant to the jury's verdict" from Penry's claim concerning "the precise manner of their relevance — the precise effect of their consideration") (emphasis deleted).
339. *Saffle*, 110 S. Ct. at 1261.
340. 472 U.S. 320 (1985).

DeChristoforo,[341] an earlier case involving improper prosecutorial comments, on two grounds. First, *Donnelly* was not a capital case and was based on the due process clause, rather than the eighth amendment.[342] Second, *Donnelly* refused to reverse a conviction when the prosecutor's remarks were only "potentially" misleading,[343] whereas *Caldwell* found that "the need for reliable sentencing in capital cases" mandates reversal whenever "false prosecutorial comments created an 'unacceptable risk'" of arbitrary imposition of the death penalty.[344] *Sawyer* admitted that earlier Supreme Court opinions provided "general support" for the *Caldwell* ruling by stressing that the capital sentencing process must be a reliable one and "must be carried out by jurors who . . . view all of the relevant characteristics of the crime and the criminal, and take their task as a serious one."[345] Nevertheless, the Court dismissed those precedents as too general to dictate *Caldwell*'s result, noting that prior death penalty cases had reversed capital sentences only when the statutory scheme was unconstitutional or improper evidence was admitted. None of the previous cases had involved inappropriate prosecutorial arguments.[346]

As discussed above, the retroactivity cases — unlike the qualified immunity and procedural default cases — cannot be justified as an attempt to balance competing policies.[347] Even if it were appropriate to focus the retroactivity analysis on the reasonable state court judge, the Court has not fairly applied that standard in defining what constitutes a new rule. In explaining this conclusion, the discussion that follows evaluates the retroactivity cases by examining the same four issues that arise when determining whether erroneous constitutional interpretations should be forgiven in qualified immunity and procedural default cases.

1. Number, Weight, and Consistency of Precedents

The Court's seemingly broad definition of "new" rules parallels the approach some courts of appeals take in qualified immunity cases. Apparently state courts need not respect a constitutional right unless a precedent directly on point gives them no alternative.

The Supreme Court has not indicated whether a habeas petitioner is seeking a new rule unless the Supreme Court has already recognized her claim, or whether lower court rulings can establish "controlling" precedent. None of the Court's recent cases directly raised that issue, but in evaluating whether the prisoners were invoking new rules in those cases, the Court analyzed primarily

341. 416 U.S. 637 (1974).
342. *See Sawyer*, 110 S. Ct. at 2827.
343. *Donnelly*, 416 U.S. at 641.
344. *Sawyer*, 110 S. Ct. at 2827 (quoting *Caldwell*, 472 U.S. at 343 (O'Connor, J., concurring in part and concurring in the judgment)).
345. *Id.* at 2828.
346. *See id. See also* Hopkinson v. Shillinger, 888 F.2d 1286, 1290 (10th Cir. 1989) (en banc) (in distinguishing Supreme Court cases stressing the need for reliability in capital sentencing, court notes that "[a] command of that generality may justify any result the Supreme Court wants to reach in a particular case, but it does not adequately describe or compel a result in *any* specific matter") (emphasis added), *cert. denied*, 110 S. Ct. 3256 (1990). *But cf. supra* notes 260-61 and accompanying text (describing cases that refuse to excuse procedural defaults where defense attorneys failed to draw similar connection between general standards prescribed in precedents and specific facts of a subsequent case).

the extent to which the claims deviated from its own precedents.[348] Without even mentioning the issue, however, several courts of appeals have suggested that lower court decisions adopting a prisoner's constitutional argument help establish that the claim asserted on habeas is not new.[349]

Nevertheless, in *Sawyer v. Butler*, the Fifth Circuit expressly refused to decide whether a prisoner can cite state court opinions supporting her constitutional claim to prove that she is not invoking a new rule.[350] If a right is new until it has been recognized in one of the relatively few Supreme Court opinions,[351] the *Teague* doctrine limits the scope of habeas even more unjustifiably. Like public officials and criminal defense attorneys, state judges should be expected to familiarize themselves with constitutional principles that have not yet received Supreme Court attention.

The Supreme Court's repeated use of the term "precedent" in the *Teague* line of cases suggests that a prisoner may not be able to rely on case law from other jurisdictions to help demonstrate that a constitutional principle is not new.[352] Again, the Court has not directly addressed that issue. In *Wickham v. Dowd*, however, the Eighth Circuit dismissed two decisions from other jurisdictions because they were "not binding in Missouri" and therefore could not have "compelled" the state court to adopt the rule sought by the prisoner.[353]

Nevertheless, as one court of appeals judge recently observed, cases from other jurisdictions should be relevant in determining whether a constitutional principle is new because "[a]t a minimum," opinions issued by other courts prior to a dispositive Supreme Court opinion "reveal[] the degree to which the Court's [previous] jurisprudence compelled the result" the Court ultimately

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347. *See supra* notes 297-315 and accompanying text.

348. *See Sawyer*, 110 S. Ct. at 2827-29; *Saffle*, 110 S. Ct. at 1260-63; *Butler*, 110 S. Ct. at 1217; *Penry*, 492 U.S. at 315-19; *Teague*, 489 U.S. at 301. In *Sawyer*, however, the Court distinguished a local state supreme court opinion discussing a similar constitutional claim on its facts, suggesting perhaps that cases other than those decided by the Supreme Court are relevant. *See* 110 S. Ct. at 2830.

349. *See* Dodson v. Zelez, 917 F.2d 1250, 1254-59 (10th Cir. 1990) (citing prior Tenth Circuit decisions, as well as opinions from other lower courts and statutory and administrative materials, to support finding that prisoner was not seeking a new rule); Walton v. Caspari, 916 F.2d 1352, 1360 (8th Cir. 1990) (citing prior Eighth and Ninth Circuit decisions to support conclusion that prisoner was not seeking a new rule); Pens v. Bail, 902 F.2d 1464, 1466 (9th Cir. 1990) (per curiam) (finding that prisoner was not invoking a new rule because his claim followed from a "straightforward application" of a prior Ninth Circuit opinion as well as two Supreme Court decisions). *Cf.* Jackson v. Ylst, 921 F.2d 882, 886 (9th Cir. 1990) (concluding that prisoner was invoking a new rule because he could not cite *any* authority to support his constitutional claim and prior Ninth Circuit decisions had rejected the claim); Robinson v. Borg, 918 F.2d 1387, 1399 (9th Cir. 1990) (Trott, J., dissenting) (prior Ninth Circuit opinion established a new rule because "it addressed an area . . . for which *this circuit* had issued no definitive prescription") (emphasis added); Barker v. Estelle, 913 F.2d 1433, 1441 (9th Cir. 1990) (concluding that prisoner was invoking a new rule because neither the Supreme Court nor the Ninth Circuit had previously recognized the claim).

350. 881 F.2d 1273, 1291 (5th Cir. 1989) (en banc), *aff'd on other grounds sub nom.* Sawyer v. Smith, 110 S. Ct. 2822 (1990).

351. *See supra* notes 113 & 191 and accompanying text.

352. *See, e.g., Sawyer*, 110 S. Ct. at 2823; *Saffle*, 110 S. Ct. at 1260; *Butler*, 110 S. Ct. at 1216; *Penry*, 492 U.S. at 314; *Teague*, 489 U.S. at 301.

353. 914 F.2d 1111, 1114 n.9 (8th Cir. 1990).

reached.[354] In fact, in *Dodson v. Zelez*, the Tenth Circuit concluded that the prisoner was not seeking a new rule even though the Supreme Court had not addressed the issue raised on habeas because opinions from other jurisdictions, as well as statutory and administrative materials, supported the claim.[355]

It is very clear from the recent Supreme Court opinions, however, that lower court decisions and rulings from other jurisdictions that *reject* a constitutional claim help prove that the prisoner is attempting to take advantage of a new rule.[356] Apparently, state judges can uphold practices of questionable constitutionality and insulate those convictions from habeas review when they can cite other lower court opinions, of an unspecified number,[357] that reached the same result. If opinions from other jurisdictions support the reasonableness of the state court's denial of a claim, contrary rulings from other courts should likewise be considered evidence of the unreasonableness of the court's decision.[358]

There is some evidence that the Court may not actually have intended to be so forgiving of state courts' erroneous constitutional rulings. In both *Butler* and *Saffle*, the lower courts had divided relatively evenly on the issue.[359] Thus, those cases do not necessarily mean that a state court can safely rule against the defendant if it can find one other case that has done likewise. Nevertheless, language in both opinions suggests that even a state court decision that stands alone in rejecting a constitutional claim might be characterized as a reasonable one — so long as its interpretation of Supreme Court precedent was not "illogical" or "grudging."[360] And most recently, *Sawyer* concluded that a lone state supreme court opinion rejecting the constitutional claim ultimately adopted in *Caldwell v. Mississippi* suggested that prior Supreme Court opinions had not "put other courts on notice that [the Constitution] compelled the . . . result" in *Caldwell*.[361]

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354. Sawyer v. Butler, 881 F.2d 1273, 1303 (5th Cir. 1989) (King, J., dissenting), *aff'd sub nom.* Sawyer v. Smith, 110 S. Ct. 2822 (1990).

355. 917 F.2d 1250, 1254-59 (10th Cir. 1990). *See also* Walton v. Caspari, 916 F.2d 1352, 1360 (8th Cir. 1990).

356. *See Saffle*, 110 S. Ct. at 1261; *Butler*, 110 S. Ct. at 1217-18.

357. *See Butler*, 110 S. Ct. at 1221 (Brennan, J., dissenting) (the majority's conclusion that a result is reasonable if a certain number of courts support it is necessarily "ad hoc, both because there appears to be no principled basis for choosing any particular number of courts whose agreement is required before the result is deemed 'reasonable,' and because the criterion ultimately rests on a bootstrap to the extent that the later courts reaching the result simply rely on the earlier courts' having done the same").

358. *See Sawyer*, 110 S. Ct. at 2836 n.1 (Marshall, J., dissenting) ("[s]tate decisions cannot be deemed relevant to the *Teague* inquiry only to the extent they *disprove* the rootedness of a constitutional right") (emphasis in original). *See also supra* notes 139-41 and accompanying text (making similar argument in qualified immunity context).

359. *See Saffle*, 110 S. Ct. at 1261 (citing six decisions rejecting prisoner's claim); *id.* at 1265 n.2 (Brennan, J., dissenting) (citing two cases in addition to the court below that had accepted prisoner's claim); Arizona v. Roberson, 486 U.S. 657, 679 n.3 (1988) (citing six cases on each side of the issue).

360. *Butler*, 110 S. Ct. at 1218. *See also Saffle*, 110 S. Ct. at 1260 (requiring only reasonable, good faith interpretation of existing case law).

361. *Sawyer*, 110 S. Ct. at 2828-29. The Court reached this conclusion despite numerous opinions from other state courts upholding similar challenges under state law. *See id.* at 2929-30. *See also infra* notes 406-09 and accompanying text.

Permitting one opinion from another jurisdiction to demonstrate the reasonableness of a decision adverse to the defendant is only a short step away from saying that the decision rejecting the prisoner's claim in this very case, or even a dissenting opinion in another jurisdiction, likewise indicates that the issue is "susceptible to debate among reasonable minds."[362] In fact, in concluding that the Court announced a new rule in *Caldwell*, *Sawyer* relied in part on the dissenting opinion in that case, where three Justices complained that there was a "'lack of authority'" for the majority's decision.[363]

Even a relatively even split, like that found in *Butler* and *Saffle*, should not conclusively establish that the constitutional principle is new. As Justice Brennan noted in his dissent in *Butler*, "10 egregiously wrong decisions can be no more reasonable than 1."[364] Nevertheless, the majority seems satisfied to blindly follow the "safety in numbers" approach, seeing no need to consider whether one of the conflicting positions adopted by the lower courts might have been based on an unreasonable interpretation of Supreme Court case law.[365] Given that "some courts will misconstrue [Supreme Court] precedents notwithstanding their clarity," the Court's approach permits the state courts to ignore its decisions and "simultaneously limit the reach of those decisions as a matter of federal law."[366]

2. Timing of Precedents

Neither the recent retroactivity opinions issued by the Supreme Court nor the few court of appeals decisions interpreting those rulings mention any questions of timing: they do not discuss whether some time lapse is necessary before state courts can reasonably be expected to implement a new constitutional rule. The absence of any such discussion may mean that the state courts are presumed to be aware of any previously issued opinion, so that a prisoner is not invoking a new rule so long as the relevant decisions were issued before her conviction became final.

This presumption is probably inaccurate as a factual matter, especially if lower court rulings are taken into account in determining whether a rule is new for retroactivity purposes. Moreover, the presumption is inconsistent with the Court's emphasis on deterrence: even a state judge who faithfully applies constitutional principles may act contrary to a newly issued decision that has not yet filtered down to her chambers.

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

363. *Sawyer*, 110 S. Ct. at 2828 (quoting *Caldwell*, 472 U.S. at 350 (Rehnquist, J., dissenting)).

364. *Butler*, 110 S. Ct. at 1221 n.2 (Brennan, J., dissenting).

365. *Butler* contained no analysis whatsoever of the reasonableness of the view that the *Edwards* doctrine was limited to cases where both interrogations involved the same subject matter. The Court merely made the conclusory statement that refusing to apply *Edwards* to second interrogations involving different crimes "would not have been an illogical or even a grudging application of *Edwards*." 110 S. Ct. at 1217-18. The Court then based its finding that *Roberson* had announced a new rule entirely on the difference of opinion among the lower courts. *See id.* Likewise, although *Saffle* and *Sawyer* spent some time distinguishing the prisoners' habeas claims from the questions at issue in prior related cases, the Court did not explain in either case why the supposed distinctions should reasonably have made any difference. *See Sawyer*, 110 S. Ct. at 2827-29; *Saffle*, 110 S. Ct. at 1261-63.

366. *Sawyer*, 110 S. Ct. at 2835 (Marshall, J., dissenting).

Nevertheless, the approach may be a reasonable one. On direct review, the Supreme Court decides cases in light of its "'best understanding of governing constitutional principles,'"[367] even though reversing a lower court for failing to follow a new ruling that the court could not reasonably have been aware of will not deter similar errors in the future. The procedure followed on habeas should not differ.

Moreover, the justifications for allowing an interval of time for new decisions to trickle down to public officials and defense counsel in the qualified immunity and procedural default cases do not apply in the retroactivity context. In the former cases, unfamiliarity with a new constitutional principle leads to the loss of valuable rights: in section 1983 suits, the government official is liable for damages, and in procedural default cases, the defendant forfeits her constitutional claims. Imposing these sanctions on one who could not reasonably be expected to be aware of a newly issued decision is unfair. On the other hand, the state judge who fails to recognize a recently articulated constitutional right is not punished in the same sense for her mistake. The prisoner may be entitled to habeas relief and perhaps a new trial, but that remedy does not unfairly impose a penalty on the judge who erred. Given the difference in impact, it makes sense to allow a prisoner to take advantage of a new rule so long as it was announced prior to the time her conviction became final. Although finality interests are somewhat affected, finality by itself does not constitute "a sufficient reason for federal courts to compromise their protection of constitutional rights under § 2254."[368]

3. Similarity of Precedents

The language used by the Court in defining "new" rules suggests that state courts are expected only to follow precedent that is directly on point and need not even apply established constitutional principles to analogous cases. A state court's decision to reject a constitutional claim is not deemed unreasonable unless the contrary result was "dictated"[369] or "compelled"[370] by precedent; the existing case law must "speak directly"[371] to that issue. The state court can rule against the defendant and foreclose habeas review even though prior cases supporting recognition of the constitutional claim "inform" or even "control" or "govern" the case in question.[372] So long as they do not "compel" adoption of the defendant's argument, the state court can reject it.[373]

The Court's application of these standards last Term implies that any factual difference between the governing precedents and the pending case renders the state court's refusal to adhere to those precedents a reasonable, good faith interpretation that cannot be disturbed on habeas. *Butler* characterized *Roberson* as a new rule even though the state itself acknowledged in *Roberson* that it was seeking an "exception" to the Court's earlier ruling in

367. *Griffith*, 479 U.S. at 323 (quoting Mackey v. United States, 401 U.S. 667, 679 (1971) (Harlan, J., concurring in the judgment)).
368. *Reed*, 468 U.S. at 15.
369. *Teague*, 489 U.S. at 301.
370. *Saffle*, 110 S. Ct. at 1260.
371. *Id.* at 1261.
372. *Id.*
373. *Id.*

Edwards. Moreover, nothing in *Edwards* suggested that the Court's decision turned on the fact that both interrogations involved the same subject matter.[374] Likewise, in *Saffle*, the majority drew a forced distinction between rules that *prevent* the jury in a capital sentencing hearing from considering the defendant's mitigating evidence and those that merely *limit* the manner in which that evidence may be considered.[375] Finally, in *Sawyer*, the Court distinguished *Caldwell* from prior related opinions because they were grounded on different provisions in the Constitution, applied a different standard of review, and condemned statutes, not prosecutorial remarks, that threatened the reliability of the capital sentencing process.[376] Given the relative ease of finding some slight distinction between any two cases, and the fact that the Supreme Court usually does not agree to hear cases merely to correct lower court errors in applying settled law,[377] every Supreme Court decision could potentially be considered a new rule.[378]

This generous notion of what constitutes a reasonable state court ruling cannot be justified by even *Teague*'s narrow deterrent-driven view of habeas. Defining new rules as broadly as the Court appears to have done gives state courts little incentive to enforce constitutional principles in criminal cases. Instead, they will learn that, absent precedent directly on point, "their interpretations of federal constitutional guarantees — no matter how cramped and unfaithful to the principles underlying existing precedent — will no longer be subject to oversight through the federal habeas system."[379] Although rea-

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374. *Cf.* 1 W. LAFAVE & J. ISRAEL, *supra* note 47, at 9 (Supp. 1990) (case does not announce a new rule where "the logic" of earlier precedents "clearly would extend to the situation now before the Court, and the only uncertainty was as to whether the Court might back away from that logic after seeing its full ramifications").

375. As Justice Brennan observed in dissent, the Court's approach would permit a state legislature to pass a statute "requiring the jury to discount the weight of *all* . . . mitigating factors" — a statute with "obvious preclusive effect" — "so long as the majority could describe the statute as relating to the 'manner' in which the jury considers the evidence." *Saffle*, 110 S. Ct. at 1268 (Brennan, J., dissenting) (emphasis added).

376. The Court also distinguished a state court opinion that disapproved of a prosecutor's comment that might have led the jury to feel less responsible for the capital sentencing decision because the comment there referred to pardon rather than appellate review. *See Sawyer*, 110 S. Ct. at 2830.

377. *See* R. STERN, E. GRESSMAN & S. SHAPIRO, *supra* note 47, at 221. *But cf.* Florida v. Rodriguez, 469 U.S. 1, 7 (1984) (Stevens, J., dissenting) (noting that Court is willing to take the "unusual" step of granting review in order to correct state court error "when it becomes transfixed by the specter of a drug courier escaping the punishment that is his due").

378. *See Teague*, 489 U.S. at 333 (Brennan, J., dissenting) ("Few decisions on appeal or collateral attack are 'dictated' by what came before. Most such cases involve a question of law that is at least debatable, permitting a rational judge to resolve the case in more than one way.") (emphasis omitted).

379. *Butler*, 110 S. Ct. at 1222 (Brennan, J., dissenting). *See, e.g., Sawyer*, 110 S. Ct. at 2840 (Marshall, J., dissenting) (criticizing the majority's ruling that *Caldwell* established a new rule by imposing a lesser burden on defendants who challenged improper prosecutorial comments in the capital sentencing context than that previously applied in noncapital cases, because "the State's claimed interest in having its intentional misconduct reviewed under a less demanding standard is hardly worth crediting"). *Cf.* United States v. Johnson, 457 U.S. 537, 561 (1982) (applying fourth amendment decisions that "resolv[ed] unsettled Fourth Amendment questions" prospectively would "'encourage police or other courts to disregard the plain import of our decisions and to adopt a let's-wait-until-it's-decided approach'"; "[o]fficial awareness of the dubious constitutionality of a practice would be counterbalanced by official certainty that, so long as the Fourth Amendment law in the area remained unsettled, evidence obtained through the

sonable state judges, like reasonable public officials, may well be surprised by Supreme Court decisions that work substantial changes in constitutional doctrine, they should be expected to apply established constitutional principles to similar cases. As the *Butler* dissent noted, "[i]t is one thing to preclude federal habeas petitioners from asserting claims based on legal principles contrary to or at least significantly dissimilar from those in existence at the time their convictions became final," but "[i]t is a far different thing to say that concerns for repose and resource scarcity justify . . . protect[ing] States from the consequences of retrying or resentencing defendants whose trials and appeals did not conform to then-existing constitutional standards but are viewed as suffering from only 'reasonable' defects."[380]

The apparent breadth of the Court's concept of new rules is not even faithful to the view taken by Justice Harlan, the original advocate of the Court's new retroactivity theory. Harlan distinguished cases that articulated new rules from those that "simply applied a well-settled constitutional principle" to analogous circumstances.[381] According to Harlan, even a Supreme Court opinion that overruled past precedent should apply retroactively on habeas if prior cases had foreshadowed the demise of the earlier decision.[382] Thus, in Harlan's view, a rule was new only if one could say with "assurance" that the Court would have ruled differently — that is, that it would have *rejected* the constitutional claim — at the time the petitioner's conviction became final.[383] Although the Court endorsed Harlan's approach not long ago,[384] most recently it seems to take the opposite view, characterizing a rule like *Roberson* as a new one because it could not say with assurance that it would have reached the same result — that is, that it would have *accepted* the constitutional claim — before the prisoner's conviction became final.[385]

The federal courts have yet to fully digest the recent retroactivity cases, but the early returns suggest that they are not all following the Supreme Court's broad definition of new rules. In *Walton v. Caspari*,[386] for example, the Eighth Circuit held that its prior decision in *Garrett v. Morris*[387] had not articulated a

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questionable practice would be excluded only in the one case definitively resolving the unsettled question") (quoting *Desist*, 394 U.S at 277 (Fortas, J., dissenting)).

380. *Butler*, 110 S. Ct. at 1226 (Brennan, J., dissenting) (emphasis omitted). *See also Desist*, 394 U.S. at 268 (Harlan, J., dissenting) (prisoner is entitled "to have his case judged by the constitutional standards dominant at the time of his conviction").

381. *Desist*, 394 U.S. at 263 (Harlan, J., dissenting).

382. *See id.* at 264-65 (Harlan, J., dissenting). As evidenced by the majority's decision, however, this opinion was not universally held. *See id.* at 247-48.

383. *Id.* at 264 (Harlan, J., dissenting).

384. *See* Yates v. Aiken, 484 U.S. 211, 216-17 (1988); United States v. Johnson, 457 U.S. 537, 549 (1982). *But cf.* Solem v. Stumes, 465 U.S. 638, 646, 647 (1984) (using *Linkletter* standards, the Court refuses to apply Edwards v. Arizona, 451 U.S. 477 (1981), retroactively to habeas cases because *Edwards* resolved conflict among the lower courts and the police could not be faulted for failing to anticipate it, even though the Court admits that *Edwards* "established a bright-line rule to safeguard pre-existing rights, not a new substantive requirement" and that prior opinions had "'strongly indicated'" that some additional safeguards might be necessary) (quoting *Edwards*, 451 U.S. at 484).

385. *See Butler*, 110 S. Ct. at 1223-24 (Brennan, J., dissenting). *See also Sawyer*, 110 S. Ct. at 2827-28 (suggesting that state courts can be expected only to follow "predictable" developments and not "gradual" developments in the law).

386. 916 F.2d 1352, 1359 (8th Cir. 1990).

387. 815 F.2d 509, 511-13 (8th Cir.), *cert. denied*, 484 U.S. 898 (1987).

new rule. *Garrett* had refused to apply the Supreme Court's holding in *Swain v. Alabama*[388] that a prosecutor's use of peremptory challenges is presumed lawful unless the defendant can establish a systematic exclusion of blacks from other juries because the prosecution in *Garrett* had explained its reasons for striking the black members of the venire. In *Walton*, the Eighth Circuit explained that *Garrett* followed from *Swain*'s holding that purposefully excluding blacks from juries violates the equal protection clause and therefore "merely applied extant principles to a different factual situation."[389]

Similarly, in *Pens v. Bail*,[390] the Ninth Circuit granted habeas relief to a prisoner who argued that sentencing a defendant in a noncapital case based on statements made during postconviction, court-ordered confidential therapy sessions violated the fifth amendment. The court explained that its decision was merely a "straightforward application" of *In re Gault*'s general rule that the applicability of the privilege against self-incrimination "turn[s] upon . . . the nature of the statement or admission and the exposure which it invites,"[391] of *Estelle v. Smith*'s decision that the fifth amendment prohibits use during a capital sentencing hearing of statements the defendant made in a court-ordered pretrial competency examination,[392] and of a prior Ninth Circuit holding that the defendant's fifth amendment rights were infringed when his sentence was partly based on his admission to a probation officer that he had committed other crimes.[393]

Finally, in *Hill v. McMackin*,[394] the Sixth Circuit held that the Supreme Court did not announce a new rule in *Harris v. Reed* when it required the state courts to indicate clearly that they were rejecting a defendant's claim on procedural grounds in order to trigger application of the default rules on habeas.[395] The court of appeals reasoned that *Harris* merely clarified how the "plain statement" rule originally adopted in *Michigan v. Long*[396] applied to habeas cases.[397]

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388. 380 U.S. 202 (1965).
389. *Walton*, 916 F.2d at 1359-60.
390. 902 F.2d 1464 (9th Cir. 1990) (per curiam).
391. 387 U.S. 1, 49 (1967).
392. 451 U.S. 454, 461-69 (1981).
393. Jones v. Caldwell, 686 F.2d 754, 756-57 (9th Cir. 1982); *see Pens*, 902 F.2d at 1465-66. The court thus rejected the state's attempt to limit *Jones* to confessions of additional crimes, as distinguished from admissions of deviant behavior and other statements not amounting to a confession. *See id.*
394. 893 F.2d 810 (6th Cir. 1989).
395. 489 U.S. 255, 262 (1989). If the state court rules on the merits of a defaulted claim, the prisoner can raise the issue on habeas without first satisfying the cause and prejudice test. *See supra* note 40.
396. 463 U.S. 1032, 1040-41 (1983) (holding that a state court must state plainly that its decision is based on an independent and adequate state ground in order to avoid direct review in the Supreme Court).
397. *See Hill*, 893 F.2d at 814. *Cf.* Young v. Herring, 917 F.2d 858, 862 n.1 (5th Cir. 1990) (holding that *Teague* does not bar retrospective application of *Harris v. Reed* because *Harris* did not articulate a rule of criminal procedure). *But cf. supra* notes 44 & 47 (describing controversy concerning whether adequate state ground analysis applies on habeas). For examples of other cases applying a narrower definition of new rules, see Mallett v. Missouri, 110 S. Ct. 1308, 1310 (1990) (Marshall, J., dissenting from denial of certiorari) (habeas petitioner was not seeking new rule in challenging change of venue to a place with insubstantial minority population because argument "flow[ed] necessarily" from earlier Supreme Court decision striking

Nevertheless, other court of appeals decisions are seemingly applying a broader definition of new rules. In *Collins v. Zant*,[398] for example, the Eleventh Circuit held that the Supreme Court announced a new rule in *Michigan v. Jackson*[399] when it reversed two convictions because police had questioned the defendants after they had asked the arraigning magistrate to appoint counsel to represent them. In reaching this conclusion, *Jackson* relied on *Edwards v. Arizona*, which prohibits the police from continuing to interrogate a suspect after she requests an attorney.[400] *Jackson* applied the *Edwards* rule even though the defendants in *Jackson* were asserting a sixth amendment right to counsel, whereas *Edwards* involved the fifth amendment right to counsel. The Court explained that "the reasons for prohibiting the interrogation of an uncounseled prisoner who has asked for the help of a lawyer are even stronger after he has been formally charged with an offense than before," and thus "the Sixth Amendment right to counsel at a postarraignment interrogation requires *at least as much* protection as the Fifth Amendment right to counsel at any custodial interrogation."[401] Nevertheless, the Eleventh Circuit held that *Jackson* established a new rule because it was not dictated by prior precedent and it imposed a new obligation on the police.[402]

Likewise, in *Jackson v. Ylst*,[403] the Ninth Circuit held that a prisoner's request for a state-appointed expert witness to testify concerning the dangers of eyewitness testimony required creation of a new rule. The prisoner relied on the Supreme Court's opinion in *Ake v. Oklahoma*, which had interpreted the due process clause to guarantee indigent defendants access to the "'basic tools of an adequate defense'" and therefore had required the state to appoint a psychiatrist to assist a defendant who wished to raise an insanity defense.[404] Nevertheless, the Ninth Circuit reasoned that Jackson was invoking a new rule because "[n]o issue was presented to the Supreme Court in *Ake* concerning the right . . . to the appointment of an expert on eyewitness identification."[405]

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down purposeful discrimination in jury selection); Newlon v. Armontrout, 885 F.2d 1328, 1333 (8th Cir. 1989) (habeas petitioner's argument that statutory aggravating circumstance was unconstitutionally vague was dictated by precedent, and therefore he was not invoking a new rule; Supreme Court opinion decided after his conviction became final was merely an application, not an extension, of prior cases), *cert. denied*, 110 S. Ct. 3301 (1990).

398. 892 F.2d 1502 (11th Cir. 1990) (per curiam).

399. 475 U.S. 625 (1986).

400. 451 U.S. at 484-85; *see supra* text accompanying note 330.

401. *Jackson*, 475 U.S. at 631, 632 (emphasis added). The Court also noted that its "*settled approach* to questions of waiver requires us to give a broad, rather than a narrow, interpretation to a defendant's request for counsel." *Id.* at 633 (emphasis added).

402. *Collins*, 892 F.2d at 1512.

403. 921 F.2d 882 (9th Cir. 1990).

404. 470 U.S. 68, 77 (1985) (quoting Britt v. North Carolina, 404 U.S. 226, 227 (1971)).

405. *Jackson*, 921 F.2d at 886. *See also* Wickham v. Dowd, 914 F.2d 1111, 1113-15 (8th Cir. 1990) (prisoner invoked a new rule by arguing that the ban on cruel and unusual punishment prevents a court from conditioning a known alcoholic's probation on abstinence from alcohol and then revoking probation when he violates that condition, even though "well-settled rules" established the standard to be applied in eighth amendment cases and prohibited punishing defendants because of their status as alcoholics); Epps v. State, 901 F.2d 1481, 1483 (8th Cir. 1990) (prisoner raising equal protection challenge to trial court's decision to change venue to place with no real minority population sought new rule because court was unaware of any authority supporting claim). *Cf.* Robinson v. Borg, 918 F.2d 1387, 1399 (9th Cir. 1990) (Trott, J., dissenting) (arguing that all decisions implementing the *Miranda* doctrine articulate

4. Relevance of Other Sources of Law

Like the qualified immunity cases, and unlike the procedural default cases, the retroactivity cases apparently ignore other sources of law in determining whether the state court that denied the prisoner's claim reasonably interpreted existing case law.

In holding that the Court announced a new rule in *Caldwell v. Mississippi*, *Sawyer* rejected as irrelevant the prisoner's contention that state law had long prohibited the type of prosecutorial arguments proscribed by *Caldwell*.[406] In *Caldwell*, the Court observed that legal authorities "almost uniformly [had] strongly condemned" such remarks, and that almost all of the state supreme courts to consider the issue had reached the same conclusion.[407] Moreover, the supreme court in the state that convicted Sawyer had expressly said that *Caldwell* "did not change our previous case law."[408] Nevertheless, *Sawyer* concluded that *Caldwell* established a new rule, reasoning that "'the availability of a claim under state law does not of itself establish that a claim was available under the United States Constitution.'"[409] Although *Caldwell* therefore imposed no additional obligation on the prosecution beyond that already required by state law, the Court refused to apply the decision on habeas because it announced new *federal* law.

Thus, state judges, like public officials defending section 1983 suits, are apparently forgiven for violating their own state rules — even when they uphold a practice that the reasonable state court judge would realize contravened established state law principles. Although this result is consistent with the Court's emphasis on deterring constitutional violations, barring habeas review when the state courts acted contrary to settled state law is not necessary to protect either the feelings of responsible state judges or legitimate state processes.

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new rules; prophylactic rules like *Miranda* are "transient" and "less permanent" than constitutional requirements because they "reflect the federal judiciary's judgment of what is necessary to protect those rights"); Harris v. Vasquez, 901 F.2d 724, 726 (9th Cir.) (Noonan, J.) (describing as a debatable issue the question whether the Supreme Court announced a new rule when it interpreted prior decisions guaranteeing defendants the basic tools of an adequate defense to require assistance of expert psychiatrist in preparing insanity defense), *motion to vacate denied*, 110 S. Ct. 1799 (1990); Russell v. Lynaugh, 892 F.2d 1205, 1217 n.1 (5th Cir. 1989) (Clark, C.J., specially concurring) (characterizing as a "substantial question" the issue whether subsequent Supreme Court decisions interpreting the Court's holding that members of the jury venire may not be excused because they express conscientious objections to the death penalty "so clarified [that holding] as to announce a 'new rule'").

406. *See Sawyer*, 110 S. Ct. at 2829-30.

407. *Caldwell*, 472 U.S. at 333.

408. State *ex rel.* Busby v. Butler, 538 So. 2d 164, 173 (La. 1988).

409. *Sawyer*, 110 S. Ct. at 2830 (quoting Dugger v. Adams, 489 U.S. 401, 409 (1989)). *Sawyer* also reasoned that the Court had previously indicated that Ford v. Wainwright, 477 U.S. 399 (1986), announced a new rule by holding that the eighth amendment prohibits executing the insane even though a number of state statutes had prohibited such executions prior to *Ford*. *See* 110 S. Ct. at 2830 (citing *Penry*, 492 U.S. at 329).

V. THE VARYING SHADES OF CRYSTAL BALLS

Although the Court observed years ago that "[d]efendants can no more be charged with anticipating [new] decision[s] than can the States,"[410] today it applies vastly different standards to state judges in retroactivity cases than it applies to defense attorneys in procedural default cases.[411] Defense attorneys are expected to make an objection based on a constitutional principle raised in a different context by a few defendants in other states (or by a few law professors), even though the courts have soundly rejected the argument. State judges, on the other hand, are asked only to follow precedent — perhaps only Supreme Court case law — that is directly on point. Under the procedural default cases, a prisoner is deprived of a hearing on her habeas claim if she was not fortunate enough to find an attorney with a crystal ball that clearly forecast future developments in the law. Under the recent retroactivity cases, she also loses her federal forum even if the crystal ball the state court consulted in denying her constitutional claim was extremely unreliable.

One commentator has suggested a justification for this discrepancy: he maintains that the definition of novelty used in the procedural default context should not apply in defining new law for retroactivity purposes because of the "difference between the kinds of claims we reasonably expect a defendant's attorney to be able to make, and the kinds of claims we reasonably expect a state judge to adopt as part of the governing law."[412] Admittedly, the reasonable defense attorney will make arguments on behalf of a client that, although not frivolous, the reasonable state judge is unlikely to accept. But that observation suggests only that a standard requiring attorneys in default cases and judges in retroactivity cases to exercise a reasonable amount of diligence given their own circumstances will not necessarily lead to precisely the same results. In some cases, the reasonable defense attorney will react differently to a legal argument than will the reasonable state court judge. This difference does not, however, justify the great disparity in predictive capabilities currently attributed to defense attorneys and state judges. Nor does it explain why the default cases have adopted a definition of "novel" claims that is much too limited, requiring defense counsel to be unnecessarily perceptive, while the retroactivity cases have applied a concept of "new" rules that is much too broad, expecting too little from state court judges. If, as the Court has suggested, both the procedural default rules and the new retroactivity doctrine are aimed at deterrence (of sandbagging by defense attorneys and insensitivity to constitutional rights by state courts), the foresight and reasoning ability expected of the reasonable defense attorney and the reasonable state court judge — both of whom are lawyers presumably familiar with the constitutional principles applicable in criminal cases — should be much more similar.

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410. O'Connor v. Ohio, 385 U.S. 92, 93 (1966) (per curiam).

411. *But cf.* Hopkinson v. Shillinger, 888 F.2d 1286, 1290 (10th Cir. 1989) (en banc) (arguing that "there is far more ground for congruence than for distinction" in the definition of novel claims used in procedural default and retroactivity cases), *cert. denied*, 110 S. Ct. 3256 (1990).

412. Hoffman, *supra* note 78, at 212 n.126. *See also* Sawyer v. Butler, 881 F.2d 1273, 1291 (5th Cir. 1989) (en banc), *aff'd on other grounds sub nom.* Sawyer v. Smith, 110 S. Ct. 2822 (1990).

In fact, the current disparity may be tilted in the wrong direction: if a different concept of novelty is to be used in the two situations, perhaps the more demanding standard should apply to judges in retroactivity cases. The defense attorney who misinterprets the law and fails to raise an objection at trial thereby forfeits her client's constitutional claims on habeas. The client, rather than the guilty party, pays for the mistake. The state judge who errs in rejecting a constitutional claim may be compelled to preside over a second trial or hear a second appeal, but she is not personally subjected to sanction in the same sense. Moreover, the maximum punishment in the retroactivity cases is an unnecessary trial,[413] whereas in the default cases, the maximum penalty is loss of a constitutional claim that might establish the prisoner's innocence.[414] The harsher consequences flowing from error in the procedural default context therefore suggest that state judges should be held to the higher standard.

Where does qualified immunity fit into this picture? As currently interpreted by some courts, the standard applied in the immunity context is similar to that used in the retroactivity cases, penalizing only those interpretations of constitutional norms that were clearly contrary to precedent directly on point from the actor's own jurisdiction.[415] In fact, if a case announces a new rule unless Supreme Court precedent compelled the result, the retroactivity doctrine may be even more lenient than the qualified immunity defense — most courts consider a right clearly established for immunity purposes when there is sufficient lower court support, even in the absence of a Supreme Court decision.[416]

Treating state judges more leniently than other public officials is not appropriate. Many public officials have no legal training and therefore cannot be assumed to have the familiarity with constitutional principles that can be expected of state judges. In addition, public officials who are denied immunity are liable for any damages caused by a constitutional violation. The qualified

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413. In some cases, the prisoner may ultimately go free because the prosecutor is no longer able to present sufficient evidence to convict. Nevertheless, in most circumstances the prosecutor will be able to use the testimony given at the previous trial even if the witnesses are no longer available, *see* Davis v. United States, 411 U.S. 233, 250 (1973) (Marshall, J. dissenting), and if the loss of evidence is attributable to the constitutional violation, the prosecutor should never have had the advantage of that evidence in the first place. Even if some prisoners are unjustifiably released, the number is not likely to be great, *see* J. CRIM. L. & CRIMINOLOGY Supreme Court Review, *supra* note 76, at 1633, and that danger is outweighed by the risk that otherwise some prisoners may be unconstitutionally incarcerated. *Cf. Winship*, 397 U.S. at 372 (Harlan, J., concurring) ("it is far worse to convict an innocent man than to let a guilty man go free").

414. This danger is mitigated somewhat by the court's ability to consider a defaulted claim on habeas even in the absence of cause and prejudice when necessary to avoid a miscarriage of justice. *See supra* note 103 and accompanying text. But as currently applied, the miscarriage of justice exception to the *Sykes* doctrine has not proven particularly useful. *See supra* note 105 and accompanying text.

415. In fact, *Sawyer* explicitly drew the parallel, citing a qualified immunity case to support the proposition that the *Teague* doctrine would be "meaningless" if it was inapplicable whenever the prisoner's claim was generally supported by prior cases articulating a broad constitutional principle. 110 S. Ct. at 2628 (citing *Anderson*, 483 U.S. at 639). *Cf.* Peery v. Brakke, 826 F.2d 740, 744 (8th Cir. 1987) (simultaneously analyzing qualified immunity and retroactivity of Supreme Court's decision in civil case because both turn in part on whether the decision changed clearly established law); Nahmod, *supra* note 34, at 253 (observing that Supreme Court's immunity cases are similar to retroactivity doctrine applied in civil cases).

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

immunity defense is therefore designed to ensure that the fear of damages does not deter them from independently exercising their discretion. The retroactivity doctrine also serves a deterrent function, but the risk of overdeterrence poses a greater threat to the public interest in the qualified immunity context. State court judges who wish to minimize the number of prisoners entitled to habeas relief will have an incentive to bend over backwards to ensure that criminal defendants receive error-free trials — not such a terrible result.[417] On the other hand, public officials who wish to avoid damages liability may shade their decisions in ways that do not serve the public interest. Accordingly, the standard to which judges are held in retroactivity cases should, if anything, be higher than that imposed on public officials in qualified immunity cases.[418]

CONCLUSION

Although legitimate policy considerations cannot justify requiring criminal defense attorneys to predict future developments in the law with much greater accuracy than is expected of public officials or state judges, the courts have used the common framework of foreseeability to lead to precisely that result. While coming to inconsistent conclusions, the qualified immunity, procedural default, and retroactivity cases have nevertheless sounded a common theme: in the interest of protecting state courts and state officials, the federal courts have closed their doors to those who have suffered a deprivation of constitutional rights. In each case, concerns about federalism and state prerogatives have trumped the interests in safeguarding constitutional rights and providing a remedy for constitutional violations.

The courts, many of which denounce judicial activism in other contexts,[419] have seemingly lost sight of the habeas and civil rights statutes that created a remedy and provided for federal jurisdiction while saying nothing about qualified immunity defenses, cause and prejudice requirements, or limited application of new rules. Apparently, the courts have forgotten the lesson Justice Frankfurter tried to teach almost forty years ago: "[u]nder the guise of

417. *Cf. Harris*, 489 U.S. at 267 (Stevens, J., concurring) (concerns about "overly expansive interpretations of federally protected rights" are "necessarily secondary to the federal courts' principal role as protector of federally secured rights").

418. *Cf.* Illinois v. Krull, 480 U.S. 340, 368 (1987) (O'Connor, J., dissenting) (opposing extension of good faith exception to the exclusionary rule in case where police reasonably relied on statute authorizing warrantless search, and noting that although "fairness to the defendant, as well as public policy, dictates that individual government officers ought not be subjected to damages suits for arguable constitutional violations," "[t]he need for a rule so difficult of application outside the civil damages context is, in my view, dubious"). *But cf.* Rudovsky, *supra* note 31, at 79 (arguing that governmental interests are sufficiently safeguarded if qualified immunity is limited to suits where a civil case would not be applied retroactively; public officials are thereby protected from "changes in the law and other unpredictable developments," but are liable if the constitutional right is "likely to be recognized," even if not yet clearly established).

419. *See, e.g.*, Minnick v. Mississippi, 111 S. Ct. 486, 497-98 (1990) (Scalia, J., dissenting); Webster v. Reproductive Health Servs., 109 S. Ct. 3040, 3064-67 (Scalia, J., concurring in part and concurring in the judgment). *Cf.* New York Times, July 24, 1990, § A, at 18, col. 1 (President Bush praises Supreme Court nominee David Souter as a judge "committed to interpreting, not making the law," who "recognizes the proper role of judges in upholding the

fashioning a procedural rule, we are not justified in wiping out the practical efficacy of a jurisdiction conferred by Congress on the District Courts."[420] The only explanation for the discrepancies among the three sets of cases is one Justice Brennan recently offered: "Result, not reason, propels the Court today."[421]

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democratic choices of the people through their elected representatives, with constitutional constraints").

420. Brown v. Allen, 344 U.S. 443, 498-99 (1953) (opinion of Frankfurter, J.). *See also Butler*, 110 S. Ct. at 1224-25, 1226-27 (Brennan, J., dissenting); *Carrier*, 477 U.S. at 518-19 (Brennan, J., dissenting).

421. *Butler*, 110 S. Ct. at 1219 (Brennan, J., dissenting).