# SAYING WHAT RIGHTS ARE – IN AND OUT OF CONTEXT

Ann Althouse[*]

1991 Wis. L. Rev. 929[†]

*In this Article, Professor Althouse examines the role of "context" in the lawmaking process. Specifically, she concentrates on the Supreme Court's new habeas corpus doctrine, and examines the role context plays in explaining the Court's restructuring of the lawsaying process. She concludes by comparing the Court's rhetorical techniques to the dramatic theory of Bertolt Brecht. In so doing, she observes that the Court has adopted a jurisprudence that diminishes rights by simultaneously denying their reality and restricting their articulation to contexts in which they will tend to be undervalued.*

## I. INTRODUCTION

An ideology of context permeates the law of federal courts. Numerous judicial doctrines and the very structure of judicial institutions invoke the notion that the power of judges to decide the law is proper and acceptable only to the extent that it is constrained by requirements that judges act in a context, deciding real cases, discussing and reaching conclusions through a process of interacting with other persons and institutions. When the Supreme Court uses this ideology, it is frequently to deny federal court access to those who want to litigate about rights. For example, a person who feels chilled by a state law regulating speech but has done nothing to create a detailed set of facts about the law's effect on her will be told that she does not present a sufficiently concrete case to have standing to sue in federal court.[1]

Habeas corpus[2] presents an odd paradox about context. One could say that when a federal court replaces a state court's analysis of federal constitutional rights with its own, it layers on a second and distinct voice in a dialogue about rights, adding to the context in which constitutional law is created and improving the lawmaking process.[3] But ***930** one could also argue that the federal courts consider constitutional questions out of context – away from the factual detail and varied issues and interests of a criminal trial – and, thus, that they degrade the lawmaking process. Alternatively, one might simply reject the

---

[*] Associate Professor of Law, University of Wisconsin Law School. I would like to thank Jack Beermann, Barry Friedman, Joe Singer, Avi Soifer, and Larry Yackle for their words of criticism and encouragement.



[1] See, e.g., Younger v. Harris, 401 U.S. 37 (1971).

[2] 28 U.S.C. § 2254 (1988).

[3] In *Dialectical Federalism: Habeas Corpus and the Court*, 86 YALE L.J. 1035 (1977), Professors Robert Cover and Alexander Aleinikoff spoke in these terms. They envisioned habeas corpus as a way to bring federal courts into a dialogue about rights with the state courts. The state courts would speak in the context of a criminal trial, from a characteristically "pragmatic" standpoint, and the federal courts would speak outside of the context of trial, from a "utopian" perspective. According to Professors Cover and Aleinikoff, these two different voices would, over time, generate a rich dialogue, layered with both practical and idealistic concerns about rights, and the best version of the law would gradually emerge. Their vision of habeas corpus is discussed infra text accompanying notes 40-74.

ideology of context, debunk the dialogue metaphor, and, espousing a "counter-ideology of neutrality,"[4] praise the federal courts for their independence and the writ of habeas corpus for the way it isolates the constitutional question from the distracting concerns that pressure the state trial judge.

Recently, in *Teague v. Lane*,[5] the Supreme Court eliminated federal habeas relief for nearly all petitioners who try to take advantage of newly announced rules of constitutional law. But it did much more that that. It restructured habeas doctrine so that no federal habeas corpus petitioner could argue for the creation of a new rule of constitutional law. It is one thing for the Court to restrict the retroactive application of rules of constitutional law when it announces them; it has done so for many years.[6] But it is quite another thing to say that the habeas jurisdiction of the federal courts can never again (except in two very narrow categories of cases) provide a forum for the discussion and elaboration of new constitutional law. In silencing the voices of the lower federal courts, the Supreme Court has dramatically redesigned the context in which constitutional law will develop. Henceforth, the rights applicable to criminal cases will still be discussed – by the state ***931*** courts and the United States Supreme Court – but the multi-layered dialogue about rights has ended.

This Article examines the effect of jurisdictional structuring on the lawmaking process, concentrating on the Court's new doctrine of habeas corpus. It begins by considering the "ideology of context," the notion that the best law and, indeed, the most legitimate law comes from judges who act in a context – who deal with cases based on real and immediate facts with intensely involved real parties, decided in connection with other judges and institutions.[7] The Article then examines the Court's new habeas doctrine and how notions of context and neutrality explain its restructuring of the lawsaying process.[8] In particular, it considers *Butler v. McKellar*,[9] one of a series of post-*Teague* cases in which the Court held that rules of law subject to debate between "reasonable minds" are "new law," excluded from habeas consideration.

---

[4] In writing about competing ideologies of federal courts law, I acknowledge the influence of Richard H. Fallon, Jr.'s insightful analysis in *The Ideologies of Federal Courts Law*, 74 VA.L.REV. 1141 (1988). The ideologies he describes are Federalist and Nationalist. This Article describes an ideology of context as compared with neutrality, although both Professor Fallon and I refer to ideas about the difference between federal and state courts. According to Professor Fallon, the Federalist ideology approves of decentralization and some level of immunity for the state and recognizes the equal competence of the state courts. The Nationalist ideology emphasizes federal supremacy and the importance of enforcing federal rights and considers the federal courts superior in enforcing those rights. Fallon criticizes the Court's written opinions for alternately incanting whichever ideology supports a given decision. Since the Court thus veers from one ideology to the other, its opinions look far more contradictory than they really are. He advocates a more "between-the-poles" way of talking about federal jurisdiction that acknowledges the validity of both ideologies. While Fallon's description of the two ideologies is convincing, his solution may assume that the division on the Court is not very deep, just a communications breakdown. But, as Professor Michael Wells has argued, the decision to embrace the Federalist or Nationalist ideology is a profound one, reflecting fundamental ideas about substantive rights. See Michael Wells, *Rhetoric and Reality in the Law of Federal Courts: Professor Fallon's Faulty Premise,* 6 CONST. COMMENTARY 367 (1989).

[5] 489 U.S. 288 (1990). For commentary on Teague, see Marc M. Arkin, *The Prisoner's Dilemma: Life in the Lower Federal Courts After Teague v. Lane*, 69 N. CAR. L. REV. 371 (1991); Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV.L. REV. 1733 (1991); Kit Kinports, *Habeas Corpus, Qualified Immunity, and Crystal Balls: Predicting the Course of Constitutional Law*, 33 ARIZ. L. REV. 115 (1991); Kathleen Patchel, *The New Habeas*, 42 HASTINGS L. J. 941 (1991).

[6] See infra text accompanying notes 78-81 (describing the Court's earlier approach to retroactivity).

[7] See infra text accompanying notes 11-30.

[8] See infra text accompanying notes 31-180.

[9] 110 S.Ct. 1212 (1990).

Finally, the Article takes note of the entirely different way that some members of the Court have begun to talk about what rights are, focusing in particular on the words of Chief Justice Rehnquist and Justice Scalia.[10] It compares their rhetorical technique, ironically, to the dramatic theory of Bertolt Brecht, and finds a similar, deliberate undermining of the reader's comfortable sense of reality. It contrasts this authorial strategy to that of Justice Brennan, who has dissented in the Court's recent habeas cases. Justice Brennan talks about rights in a way that encourages and enhances the reader's impression that rights are real, knowable things, for which a competent judge must diligently search. Speculating about the Chief Justice and Justice Scalia's reasons for their uncharacteristic expression of disbelief in the substantiality of law, the Article observes the complementary nature of a theory of rights that denies their reality and a jurisdictional device that restricts the articulation of rights to a context in which they will tend to be undervalued.

## II. THE IDEOLOGY OF CONTEXT

Let us consider what this Article has chosen to call the "ideology of context" – the doctrines and rhetoric expressing and developing the idea that somehow judicial power must operate within a detailed context, with judges deciding specific disputes between real persons, interacting ***932** with other persons and institutions, and aware of the actual effects of their decisions on the real world.[11]

Federal courts, we are told, can only expound the law in the context of a case.[12] They must have a concrete setting – a system of facts including injured plaintiffs, injury-causing defendants, and a real need for a remedy – to have a sufficient occasion for saying what the law is.[13] An advisory opinion – just saying the law in the abstract – is anathema. Without a context, this ideology suggests, judges cannot really think, or at least cannot think in a way that justifies giving judges the job of saying what the law is. Judges must face real-life situations, bursting with factual detail and self- interested advocacy aimed at solving real problems, or they have no business speaking at all. The idea of context extends beyond the concrete case requirement embodied in justiciability doctrines like standing. It includes the process through which numerous courts contribute their divergent views and different perspectives to articulating new rules of law and giving definition to general principles already present in the law. Thus, the Supreme Court embraces a policy of avoiding unnecessary questions of constitutional

---

[10] See infra text accompanying notes 181-96.

[11] A less detailed, less "connected" situation can also be called a "context," and indeed, needs to be included in the definition of context to avoid giving the impression that one could in fact escape from context. See Martha Minow & Elizabeth V. Spelman, *In Context*, 63 S. CAL. L. REV. 1597, 1627 (1990). While contextualized decisionmaking is often contrasted with "abstract" decisionmaking, the supposedly abstract situation is also a "context" – though it is less likely to be called a context. Without slighting this insight at this point in the Article, I am using the term "context" here to refer to the common notion that context implies detail, complexity, and interaction. See id. at 1602-03. Throughout the Article, and in particular at the Conclusion, it is shown that abstraction and isolation from "context" is itself a kind of context, that it is a context sometimes chosen for decisionmaking, and that this choice is necessarily made by considering the context. See infra text accompanying notes 57-59.

[12] Allen v. Wright, 468 U.S. 737 (1984).

[13] Id.

law.[14] Rather than rushing to say the law and to produce a final, uniform answer to a constitutional question, the Court expresses a preference for allowing lower courts, perhaps both state and federal, to continue applying the law and attempting to define it in numerous cases. The lower courts create a context: they develop legal reasoning, structure the facts and issues, demonstrate the effects of different rules on real cases, and reflect the social and political climate around the country. Supposedly, this rich context makes the ultimate reduction of the law to one uniform rule "the best it can be."[15] ***933** Similarly, the Supreme Court prefers statutory grounds for decision over constitutional ones, a preference giving rise to a dialogue with Congress about what the law should be.[16] Even if, in the end, the Court rejects Congress's choice on a constitutional ground, the idea seems to be that that going through the period of uncertainty and dialogue makes that ultimate constitutional decision better in some way, just as a concrete case between interested parties produces a better result than an isolated, abstract legal question. The ideology of context rests on the belief that the way of getting to an answer affects that answer. The point is not that judges must dutifully run through an obstacle course of procedure before saying what they would have said anyway, but rather that law strained through the textured filter of context is different – and better – law.

The context of lawsaying also extends across time. Judges must try to conform their opinions in some rational way to the opinions of those who have preceded them, or they must present good explanations for their divergence from earlier decisionmakers. The Supreme Court often uses the term "this Court" to mean some group of Justices who sat decades, even centuries ago. Ronald Dworkin has described this process of developing the law over time, dealing with precedent, by using the image of authors of a "chain novel."[17] Each Court writes a chapter and must exercise its authorship over that chapter in a way that advances the story, but is bound to fit the new chapter into the context of the whole. (The book image gives new, punning meaning to the notion of "binding" precedent.)

The structure of the Supreme Court itself represents a belief in the need for context. The choice to make final constitutional interpretations come from a group of nine Justices exhibits a preference for decisions that result from dialogue and interaction that draw on a deep fund of differing beliefs, experiences, and thinking about the world. Some of the criticism of Justice Souter's nomination to the Court revealed concerns about context: was his life too limited and shielded from the larger society?[18] Some commentators

---

[14] See Ashwander v. TVA, 297 U.S. 288, 341 (1936) (Brandeis, J., concurring).

[15] I have taken this last phrase from Ronald Dworkin, whose latest book looks at judicial interpretation and professes the aim of making law "the best it can be." Ronald Dworkin, LAW'S EMPIRE (1986). The concept of "best" may seem overly abstract and devoid of content. It is easy to object to the word by noting that different persons hold different views about what is best, and that these views relate to many factors aside from the techniques of judicial interpretation preceding the announcement of law. I am using Professor Dworkin's phrase in describing the ideology of context, because the judicial doctrines it comprises structure an elaborate setting for interpretation and seem to rest on similar beliefs that the final product of this structured process will be – in some pure and abstract sense – "better."

[16] See Alexander Bickel, THE LEAST DANGEROUS BRANCH (1961). For a use of the dialogue concept to explain Congress's power to control the jurisdiction of the federal courts, see Barry Friedman, *A Different Dialogue: The Supreme Court, Congress and Federal Jurisdiction*, 85 NW. J. L. REV. 1 (1990).

[17] Dworkin, supra note 15.

[18] See, e.g., Ruth Marcus & Joe Pichirallo, *Seeking Out the Essential David Souter; Bookish, Insular Justice-Designate to Face Senate Panel This Week*, WASH. POST, Sept. 9, 1990, at A1.

seemed to think him disqualified because he lived alone in a small town in a small state. It is not enough, ***934** for these critics, to be just another individual on the Court; a justice needs to bring along the spirit of some significant slice of society into the conference room.[19] The Court, consisting of nine persons, representing substantial portions of society,[20] forms a context, a little society, that we trust more than a single decisionmaker. We also require the Justices to think through dialogue with each other and to engage in a process of moving toward consensus, or, at least, an agreement of five.[21]

Another aspect of the concern about Justice Souter was simply that he represented the key fifth vote, added to the conservative side of the Court and subtracted from the liberal side.[22] With a greater likelihood of a built-in majority on many issues, the need for all of the justices to talk to each other will decrease: voices that would have added dimension to the decisionmaking process can now be ignored.[23]

The structure of the lower federal courts also reveals a preference for context. Court of appeals judges make their decisions in panels of three and come together into larger en banc panels for the most momentous decisions. District judges sit alone, but appellate panels will review their work. When there is a heightened need for sensitive and important lawsaying at the district court level, the device chosen has ***935** been the three-judge panel.[24] Three-judge panels are rare today, but juries routinely interrupt the solitude of the district judges' work. The jury is a dramatic affirmation of the belief in context as a necessary condition of decisionmaking. Of all the persons involved in deciding cases, jurors bring the most wide-ranging ideas, thought processes, and background experiences into the courtroom. And the law includes requirements, such as the "fair cross-section of the community" imperative, designed to insure and increase the depth of the context in which decisions are made.[25] Requiring twelve jurors to reach a decision together through

---

[19] Note that even if we accept this vision of what a Supreme Court justice should be, Justice Souter does represent a background that is not insubstantial. Many Americans share a small town background and quite a few people live alone. To the extent that the criticism of Souter betrays a view that the Court should be peopled with those who have fit themselves into the conventions of the nuclear family, it was truly invidious. See id. (noting that Republican Senator Orrin G. Hatch had said – and retracted – that "he would feel more comfortable if Souter were a family man"). The Court's role in enforcing individual rights demands sensitivity to those who deviate from the society's dominant conventions. We should therefore welcome those who have not embraced them. Interestingly, most (adult) Americans are unmarried and of those who are married only a fraction fit the idealized nuclear family type. Consequently, Souter in fact shares the marital status of the majority. The controversy about him reflects not the facts but our illusions about the facts.

[20] This representation concept is, of course, imperfectly played out. The justices do tend to come from a limited social class. See, Henry J. Abraham, JUSTICES AND PRESIDENTS 61-62 (2d ed. 1985). Moreover, it seems that one woman and one person of color are all that is needed to represent portions of society that, taken together, constitute far more than fifty percent. Interestingly enough, Professor Burt Neuborne, in his famous article *The Myth of Parity*, argued that federal judges can better protect individual rights because of their upper middle class background. See Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105, 1126 (1977). Because of their status, they were more likely to believe in the "libertarian tradition" behind those rights and to mistrust the kind of person usually accused of violating rights, who would represent another social class (e.g., a police officer). Id.

[21] Cf. Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1625-29 (1986) (characterizing law as acts violence rather than mere interpretation and tying this quality to a need for collective decisionmaking).

[22] See Neil A. Lewis, *Souter's Views Trouble Groups Opposed to Bork*, N.Y. TIMES, Sept. 7, 1990, at A14.

[23] The Justices are already beginning to take advantage of the freedom not to talk to each other. See Pennsylvania v. Union Gas Co., 491 U.S. 1, 29 (1989) (Scalia, J., dissenting)(dismissing an argument by stating that it does not "warrant response"); Webster v. Reprod. Health Serv., 492 U.S. 490, 532 (1989) (Scalia, J., concurring) (same).

[24] 28 U.S.C. § 2284 (1988) (limited to suits "challenging the constitutionality of the apportionment of congressional districts of any statewide legislative body"). In the past, the device has received wider use. See Paul M. Bator et al., HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1334-35 (3d ed. 1988).

[25] See Taylor v. Louisiana, 419 U.S. 522 (1975).

dialogue and consensus – unanimity in federal court – further evidences the belief in the importance of contextualized thinking in courts.

Ideas about federalism also embrace an ideology of context. Justice Brandeis described state legislatures as laboratories of democracy, which can experiment with different programs on a small scale, setting an example which, if successful, other states might follow.[26] Eventually, federal law can adopt the best approach formulated and tested at the state level. Federal lawmakers can impose a general rule with greater confidence in its advisability because of the experimentation that has already taken place. The same point extends beyond state legislatures to the state courts. Left alone to resolve questions about individual rights, free of binding Supreme Court pronouncements of federal law, state courts may articulate rights in a different form or expand rights to a new scope. One might call them laboratories of countermajoritarianism, varying Justice Brandeis's famous phrase, for the courts act not as agents of democracy but of individuals claiming rights against the excesses of democracy.[27]

One must remember that the "innovations" of the Warren Court were in many cases adoptions of rights some states had recognized for many years, and that the imposition of a uniform federal rule served only to bring the laggard states up to the level many others had already ***936** achieved.[28] Thus, the context of evolving state law provides a kind of authorization to the Supreme Court to go ahead and make federal constitutional law. The Supreme Court has not outlawed the death penalty under the federal Constitution in part because it lacks the foundation of a solid mass of state decisions outlawing the death penalty on state constitutional grounds (or of state legislatures rejecting it).[29] If the state courts and legislatures in the future change this context, we may expect the Supreme Court to reshape its own interpretation of the federal Constitution accordingly. Hence, state court decisions create a context that enriches the Supreme Court lawsaying process.

There is another aspect of federalism that invokes an ideology of context: the allocation of cases between the federal and state courts. Generally, portrayals of the state courts emphasize their contextualized nature. They are close to the everyday problems of their locality. State judges see the rough and tumble of the world as it is, life around them. They have no time for ideas in the abstract, unconnected to the job to be done. They worry about reelection and feel the constant pressure of the will of the people who could oust them from their jobs. They are, in short, more connected to their social and political environment. Commentators tend to regard the contextualized nature of state judges as a definite disadvantage: rights will suffer if left to these biased, pragmatic,

---

[26] New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

[27] For some reason, courts and commentators refer to state courts as "laboratories of democracy," though Brandeis referred to legislatures. When speaking of the value of courts, however, the point is their ability to counterbalance the excesses of democracy. Perhaps the continued use of the term "democracy" reflects the widespread belief that state courts engage in political decisionmaking to a far greater extent than federal judges. See, e.g., Neuborne, supra note 20; Martin H. Redish, *Judicial Parity, Litigant Choice, and Democratic Theory: A Comment on Federal Jurisdiction and Constitutional Rights*, 36 UCLA L. REV. 329 (1988).

[28] See, e.g., Shirley Abrahamson, *Reincarnation of State Courts*, 36 TEX. L. REV. 951 (1982).

[29] For example, in Penry v. Lynaugh, 492 U.S. 302 (1989), the Court declined to bar categorically the execution of mentally retarded persons (though it did require the consideration of mental retardation as a factor) because not enough states had taken this position under their own law. The states' opinion has the effect of controlling federal law, odd though it may seem given the Supremacy Clause, because it provides a measure of whether a punishment is "cruel and unusual," the standard of the Eighth Amendment.

unidealistic judges. Rights, they argue, must go to federal court, where the judges are insulated from political pressures and do not see the day-to-day difficulties of applying, say, a new rule of criminal procedure in an endless series of violent crime prosecutions.[30] (Federal courts will, of course, see some criminal cases, but these will tend to be white collar crimes of various sorts – abstract and sanitized in comparison to the violent crimes that fill the state courts.)

The next section considers how these ideas about context feed habeas doctrine. Here, we find paradox. One can say that federal courts add to the context of decisionmaking by layering an additional and different statement about constitutional rights onto the state court's ***937** version – the dialogue image. But one can also say that the federal courts take the constitutional question out of context, deciding it in isolation from manifold considerations affecting the decision in state court. Let us then examine the complexities of this paradox.

## III. THE PARADOX OF CONTEXT IN HABEAS

The Court's restrictions of habeas corpus over the last fifteen years have attracted a tremendous amount of criticism.[31] With these restrictions, many whose rights have been violated cannot call on the federal courts for a remedy. Under *Stone v. Powell*,[32] for example, persons who claim Fourth Amendment violations can no longer take advantage of the remedy once offered by habeas corpus, unless they can manage to show that the state court failed to offer a "full and fair opportunity to litigate."[33] And, under *Wainwright v. Sykes*,[34] persons who have defaulted under state procedural rules must either make the difficult showing of "cause and prejudice"[35] or convince the court that they are "the victim[s] of a fundamental miscarriage of justice" and "probabl[y] innocen[t]" [36] in order to have their petitions heard. These restrictions have not only deprived particular prisoners of the chance for a remedy in federal court, but they have also deprived the federal courts of the opportunity to discuss constitutional law. Yet until *Teague v. Lane*,[37] a variety of different and vital questions of constitutional law could

---

[30] See, e.g., Cover and Aleinikoff, supra note 3; Neuborne, supra note 20; Redish, supra note 27. See also Erwin Chemerinsky, *Parity Reconsidered: Defining a Role for the Federal Judiciary*, 36 UCLA L. REV. 233 (1988) (impossibility of determining whether parity exists); Michael E. Solimine & James L. Walker, *Constitutional Litigation in Federal and State Courts: An Empirical Analysis of Judicial Parity*, 10 HASTINGS L. Q. 13 (1983) (finding a rough equivalence between state and federal courts).

[31] See, e.g., Erwin Chemerinsky, *Thinking About Habeas Corpus*, 37 CASE W. RES. L. REV. 748 (1987); Barry Friedman, *A Tale of Two Habeas*, 73 MINN. L. REV. 247 (1988); Gary Pellar, *In Defense of Habeas Corpus Relitigation*, 16 HARV. C.R.-C.L.L. REV. 579 (1982); Judith Resnik, *Tiers*, 57 S. CAL. L. REV. 837 (1984); Larry Yackle, *Explaining Habeas Corpus*, 60 N.Y.U.L. REV. 991 (1985). For criticism of the Warren Court's approach under Brown v. Allen, see Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142 (1970); Herbert Wechsler, *Habeas Corpus and the Supreme Court: Reconsidering the Reach of the Great Writ*, 59 U. COLO. L. REV. 167 (1988); Paul M. Bator, *Finality of Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV.L. REV. 441 (1963).

[32] 428 U.S. 465 (1976).

[33] Id. at 489. Federal courts also handle federal criminal cases, in which fourth amendment issues can arise, thus giving them an opportunity to address these questions, albeit in the context of federal law enforcement practices.

[34] 433 U.S. 72 (1977).

[35] Id. at 90-91. See also Coleman v. Thompson, 111 S.Ct. 2546 (1991) (extending Sykes).

[36] Murray v. Carrier, 477 U.S. 478 (1986). Note how Carrier's alternative escape from procedural default resembles the second exception to Teague v. Lane, discussed at infra text accompanying notes 99-112.

[37] 489 U.S. 288 (1990).

reach the federal courts. Although *Stone v. Powell* systematically excluded Fourth Amendment cases, the other restrictions had a fairly random effect on the federal courts' role in discussing and elaborating the law. But in *Teague* the Court devised a doctrine specifically aimed ***938** at the federal courts' lawsaying role. Under *Teague*, federal courts can no longer apply any constitutional law that is not already firmly established.[38] Thus, their task is now limited to parceling out habeas relief in cases where the law is obvious and there is nothing new to say about it. Their voice in the once-vigorous dialogue about rights is reduced to an ineffectual repetition of things the Supreme Court has already said.

Constitutional cases serve two broad goals: they provide relief to those deprived of their rights, and they announce rules of law. They speak to the parties to the case and they speak to the rest of society. Cases are disputes that the courts must address, but they are also occasions for saying what the law is.[39]

When the Supreme Court restricts habeas jurisdiction, we may complain that persons whose rights have been violated must remain in prison, deprived of relief, but we may also complain that courts will lose the opportunity to discuss and define constitutional law. In *Dialectical Federalism: Habeas Corpus and the Court*,[40] Professors Robert Cover and Alexander Aleinikoff focused their attention on this lawsaying function of habeas. They valued habeas not just as a method of giving relief to individuals, but as a way to establish a dialogue about the meaning of rights.[41] State courts would first expound rights in the context of the criminal trial, influenced by that context to take a pragmatic approach.[42] Federal courts would then, on habeas, consider the constitutional questions isolated from the trial, in a context of reflection, and, influenced by that different context, speak about rights in a distinctly utopian way.[43] The two different courts would thus engage in a dialogue, enriching the process of articulating the law.[44]

Cover and Aleinikoff did not contend that there was anything inherently better about the federal voice, indeed they denied it,[45] though it is difficult to read their work and not perceive their high regard for federal judges. They also wrote of the value of the state judge's voice, articulating rights as they appear in the thick of a trial – with a real, perhaps obviously guilty, criminal defendant, real, ugly violence, and ***939** real, frightening effects of overextending constitutional rights.[46] Cover and Aleinikoff described an ideal of dialogue between the state and federal courts about the meaning of rights.

---

[38] Id. at 295-96.

[39] An additional possibility, not accepted by the current Court, see, e.g., Los Angeles v. Lyons, 461 U.S. 95 (1983), is the provision of remedies (rather than merely stated guidelines) that extend to persons other than the litigants. This is the unrealized ideal of public law litigation, described by Professor Abram Chayes in *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976).

[40] Cover and Aleinikoff, supra note 3.

[41] Id. at 1052-54.

[42] Id. at 1050-51.

[43] Id. at 1051-52.

[44] Id. at 1052-54.

[45] Id. at 1050-51.

[46] Id.

Having two different voices in an ongoing lawmaking dialogue, one could say, enriches the context and yields better law. But opponents of expansive habeas corpus can argue that only the state courts perform contextualized decisionmaking, because only they decide issues as they arise within the criminal case. On habeas, the federal courts take the constitutional questions out of context, because habeas petitioners can only raise constitutional questions, and because the habeas decision is made by a district judge, alone in a comfortable room, with a printed, cold record in hand and a vague image of a prisoner in mind.

But many proponents of broad habeas availability value it precisely because it isolates the federal constitutional question from all of the other legal issues, as well as from the factual and evidentiary matters, and the procedural logistics of trial.[47] Yet to favor habeas because it isolates the constitutional question is to turn away from the ideology of context. If context is good, state judges have more of it. On the other hand, if rights are good, perhaps context is dangerous. If the ideology of context drives us to restrict the decision of constitutional questions to judges who most directly experience the sacrifices that come with the enforcement of rights and the political backlash rights enforcement can unleash, then a countervailing ideology of neutrality may seem more appealing. In the ideology of neutrality, the best decisions come from a disinterested institution, insulated from political pressure and removed from "distasteful and troubling fact patterns."[48] Federal judges, with their life tenure and salary protection, possess the trappings of neutrality.[49] Habeas corpus, by isolating constitutional questions and distancing them from the criminal trial, also taps neutrality ideology. Free of the pull of majority pressures, the neutral judge can advocate the countermajoritarian position, protecting the minority, the individual, and the social deviant – that is, expanding and enforcing rights. Or so the story goes. The idealized neutral judge decides constitutional questions on what is conceived of as a high level of principle, using exquisitely refined powers of reasoning, untainted by the surrounding social context. In this ideology, federal judges receive praise in part because they are considered a smarter, better-educated, more elite group.[50] Their decisions are better because they (presumably) can better ***940*** understand complex arguments and produce more "competently written, persuasive opinions."[51] Judging is seen as a technical skill, best played out in the abstract.

This counterideology of neutrality exists alongside the ideology of context. For perhaps every reference to the neutrality ideal, there is a reference to the ideal of context. Early on in my course on Federal Courts, I point to two consecutive sentences in *Marbury v. Madison*[52] that set up this grand opposition. First, Chief Justice Marshall states, "[i]t is emphatically the province and duty of the judicial department to say what the law is."[53] And then he adds, "[t]hose who apply the rule to particular cases must of

---

47 See Butler v. McKellar, 110 S.Ct. 1212, 1226 n.12 (1990) (Brennan, J., dissenting).

48 Neuborne, supra note 20, at 1125.

49 See, e.g., Butler, 110 S.Ct. at 1224 n.8 (1990) (Brennan, J., dissenting).

50 Neuborne, supra note 20, at 1121-22.

51 Id. at 1120. Professor Neuborne considered persuasively written opinions particularly important because they would influence other courts and give guidance beyond the parties to the case. Id.

52 5 U.S. (1 Cranch) 137 (1803).

53 Id. at 177.

necessity expound and interpret that rule."[54] Frequently, I ask my class whether a particular judicial opinion represents the dominance of "the first *Marbury* sentence" or the second. Within the shorthand of my class, that means: is the Court concerned about shaping jurisdiction to make it possible to fulfill the role of "saying the law," or is the Court concerned about tying the "lawsaying function" to the existence of a case? Put in terms of the ideologies described here, the first sentence emphasizes the special role of articulating the law, a role tied to the courts' disinterest and neutrality as compared to, say, Congress, which *Marbury* characterized as an inappropriate interpreter of the constitutionality of its own statutes.[55] The second sentence emphasizes the need for a context to provide an appropriate occasion for saying the law: judges say the law because they have to in order to resolve a specific dispute between parties. That is, judging is right because it is out of context and because it is in context.[56] Both notions exist side by side in *Marbury*, without obvious contradiction. But later jurisdictional disputes can often be characterized according to which notion has seized the imagination of the Court.

Whether context or neutrality seizes the imagination of the Court – or any given Justice of the Court – is itself a matter that depends upon context. A particular Justice may feel inclined to stretch in the direction of making it possible to hear a case, based on perceptions about the importance of getting a judicial pronouncement on a particular issue of law or giving a remedy to a particular class of persons; that is, the neutral judging role seems appealing because of the context.[57] That ***941** doctrine will, however, use the phraseology of neutrality. Another Justice may find the requirement for context compelling and decide there is not enough context for proper judging because the particular kind of remedy requested seems too difficult for the courts to manage or too burdensome for the defendant to provide.[58] If the dispute's context inspires judicial restraint, the Justice may tap the ideology of context and create doctrine that requires a more "distinct and palpable" injury than the present litigants can provide.[59] It is not that saying the law or requiring a concrete context are abstract values, assessed in a vacuum, embraced or spurned in a spirit of neutrality. They are values that float in relation to one another, depending on the context. Seen this way, the ideology of neutrality collapses into the ideology of context.

In *Dialectical Federalism*, Cover and Aleinikoff found another way to merge neutrality and context.[60] In the dialogue they describe, federal judges are not merely a neutral counterweight to the contextualized decisionmaking of the state courts. The

---

[54] Id.

[55] Id. at 176-77.

[56] For a discussion of the contradictory values of generalized and contextualized decisionmaking, see Minow & Spelman, supra note 11.

[57] For examples of cases in which some members of the Court thought the substantive issues raised were so important that they would shape jurisdictional standards to make federal jurisdiction possible despite minimal context (an insufficient "injury in fact"), see Whitmore v. Arkansas, 495 U.S. 149 (1990) (Marshall, J., dissenting) (stating need to consider the constitutionality of a death sentence despite criminal defendant's unwillingness to appeal); Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 234 (1974) (Douglas, J., dissenting) (stating need to determine whether members of Congress had conflict of interest and indirectly, for judicial assessment of the Vietnam War); Sierra Club v. Morton, 405 U.S. 727, 741 (1972) (Douglas, J., dissenting) (stating need to protect the environment).

[58] See, e.g., Allen v. Wright, 468 U.S. 737 (1984); Moore v. Sims, 442 U.S. 415 (1979).

[59] See Los Angeles v. Lyons, 461 U.S. 95 (1983).

[60] Cover and Aleinikoff, supra note 3 at 1052-54.

federal judge in a habeas proceeding actually adds to the context, so that there are two voices speaking about rights in different ways, producing a rich dialogue, and, ultimately the best answer to the question of what rights are. This dialogue differs from the dialogue of nine Supreme Court Justices or twelve jurors, in which the participants must reach a consensus. The federal judges simply speak second and override the state judges whenever they want, regardless of what the state judges think.[61] It may seem disingenuous to call this a dialogue. Cover and Aleinikoff shore up the weak spot in their argument by pointing out that the federal judge's view, although undeniably dictating the outcome in any particular case, does not create a binding precedent (as a Supreme Court decision would).[62] In other cases, state courts can go on saying the law in their distinct voices.[63] Federal courts can again come in and change the results in particular cases with habeas corpus, but the federal statement ***942** of the law never becomes final, and so the conversation about the law can go on and on. Federal courts may determine the remedies that individuals will actually receive, but saying what the law is remains an ongoing project. Eventually, the Supreme Court can step in and end the dialogue, but, when it does, it will have the benefit of all of the dialogue, layered with both pragmatic and utopian thought.[64] The resulting uniform and final pronouncement will have traveled through a thick, textured filter of context making it better law – according to the ideology of context.[65] If the conversation about the meaning of rights described by Professors Cover and Aleinikoff ever really existed, it began in 1953, with *Brown v. Allen*.[66] It was at this point that federal habeas corpus began to redo the constitutional interpretation conducted by the state court, without first analyzing whether the state court had somehow fallen short in performing its work.[67] The federal courts began to speak routinely about the meaning of the rights applicable to criminal cases,[68] and the state courts' interpretations would not be impugned by any threshold finding of inadequacy. Each

---

[61] Id. at 1052.

[62] Id. at 1052-53.

[63] Id. at 1053-54.

[64] Id.

[65] If this all sounds like making coffee, consider the frequent use of the word "percolate" to describe the process of making law. See Butler, 110 S.Ct. at 1226 n.12 (1990) (Brennan, J., dissenting) (citing Samuel Estreicher & John E. Sexton, *A Managerial Theory of the Supreme Court's Responsibilities: An Empirical Study*, 59 N.Y.U. L. REV. 681, 716 (1984)). On the use of the hidden concrete metaphors in statements of abstract ideas, see the immensely enlightening George Lakoff & Mark Johnson, METAPHORS WE LIVE BY 46-47 (1980), which discusses, among other things the pervasive metaphor of ideas as food (though not specifically law as coffee). An important lesson to be learned is that the concrete image may seem more meaningful than it is. Law is not coffee and analogies to coffee-making technology may misleadingly suggest ways to improve lawmaking.

[66] 344 U.S. 443 (1953).

[67] See Stone, 428 U.S. at 465 (discussing the historical progression from Frank v. Mangum, 237 U.S. 309 (1915)). See also Friedman, supra note 31, at 252 (observing that the Brown opinion itself never articulated this new approach, but merely began it and is so credited by later cases).

[68] Of course, federal courts also had the opportunity to discuss these rights in criminal cases originally filed in federal courts, so to some extent the dialogue had already begun. Perhaps that smaller dialogue, the dialogue in unrelated criminal cases, was really more of a conversation between equals. Both faced the whole context of a criminal trial, and neither was in a position to undo the work of the other. The outcome of the conversation did not depend on power, but on the ability to persuade and win true agreement. This dialogue survives Teague. Of course, in this conversation, the voices are more alike, since both decide within the context of a criminal case. Lost is the "out of context," idealistic habeas voice. In Cover and Aleinikoff's vision, habeas was special not just because it was federal but also because it looked at constitutional questions isolated from the criminal trial, in a context conducive to careful reflection about enduring principles. If the federal voice is to come only from the criminal trial setting, one may expect much of that idealism to give way to the immediate interests vividly present at trial.

equal voice would articulate the law as it appeared from a different perspective,[69] and a long, detailed dialogue would emerge over the years. ***943**

One could argue that the structure chosen in *Brown* implicitly expresses distrust of the states. But the important thing, with respect to creating the dialogue, is that it eliminates a preliminary inquiry about the state court's adequacy.[70] *Brown* had the two conversants directly expressing what they think on the subject. The second speaker does not talk about what is wrong with the first speaker, but simply states its own separate view. The dialogue metaphor, invoking the dynamics of an ordinary conversation between two human beings, suggests that *Brown* sets up the opportunity for promising interchange. In ordinary conversation, one might predict a better evolution of ideas and a shared desire to cooperate[71] if the two speakers refrain from making personal attacks on each other and stick to expressing their own thoughts – as many a marriage counselor has advised.[72] Respectful disagreement on the merits, stated cogently and frequently, may have a more salutary effect than persistent probing about the state court's competence, with very little talk about the merits.

But the dialogue image, seductive though it is, is only a metaphor.[73] Ways of improving a dialogue between human beings may only ***944** mislead when applied to the question of how to improve the lawmaking process. The previous paragraph suggests that the habeas dialogue will engender a shared spirit in the state courts, heightening their sense that they are equal partners in the federal law enforcement project. But it seems also possible that habeas might demoralize the state judges.[74] If they perceive habeas as an inevitable later stage, invariably correcting their work, instead of feeling that they work as equal partners, they may feel that they are the mistrusted, inferior subjects of continued federal supervision. This position may nevertheless lead them to enforce federal law (in order to avoid reversal), but the relationship will not rest on a shared spirit

---

[69] As noted above, the federal view would dispose of the particular dispute. See supra text accompanying note 61.

[70] See Chemerinsky, supra note 31 (finding review of the adequacy of state court procedures under the Burger Court's standards more insulting than redoing their work outright, per Brown).

[71] Professor Neuborne wrote that federal judges share an *esprit de corps* about enforcing rights that was lacking in the state courts. Neuborne, supra note 20. This shared spirit made the federal courts better at enforcing rights and was one of many factors that induced Neuborne, as a litigator, to select federal court whenever possible. But one might instead ask what can be done to inspire state judges to share that spirit. For a vision of federalism resting on this sort of shared mission of enforcing federal rights, see Ann Althouse, *Tapping the State Court Resource*, 44 VAND. L. REV. 953 (1991); Paul M. Bator, *The State Courts and Federal Constitutional Litigation*, 22 WM. & MARY L.REV. 605, 624 (1981).

[72] See Harriet Goldhue Lerner, THE DANCE OF ANGER: A WOMAN'S GUIDE TO CHANGING THE PATTERNS OF INTIMATE RELATIONSHIPS (1983). In *Our Judicial Federalism*, Justice O'Connor analogized federal and state courts to husband and wife: "Our founding fathers joined our state and federal court systems in a marriage for better or for worse, a marriage requiring each partner to have appropriate respect and regard for the other." Justice Sandra Day O'Connor, *Our Judicial Federalism*, 35 CASE W. RES. L. REV. 1, 4-5 (1984). One way in which Justice O'Connor's analogy falls short is that there is no equivalent of the Supremacy Clause in a marriage. But O'Connor's use of the metaphor may betray a different understanding of the relationship between the states and the federal government. Alternatively, it may betray a conception of the family in which the husband, though he may for functional reasons accord his wife a separate sphere, exercises final authority. The use of the term "separate spheres" also reveals a tendency to equate the relationship between husband and wife, see Gerda Lerner, THE CREATION OF PATRIARCHY 27-28 (1986) (nineteenth century use of term to describe sex roles), with the relationship between the federal and state courts; Ann Althouse, *How to Build a Separate Sphere: Federal Courts and State Power*, 100 HARV. L. REV. 1485 (1987).

[73] On the use of the metaphors, see supra note 65. Observations of the sort made in the text can go on and on. I have, I see, just written that an idea is "seductive," invoking a hidden metaphor. The following sentence's use of the word "mislead" implies that lawmaking is a journey. The next sentence has at least five metaphors, which if less hidden would seem ludicrously mixed.

[74] See, e.g., Sandra D. O'Connor, *Trends in the Relationship Between the Federal and State Courts From the Perspective of a State Court Judge*, 22 WM. & MARY L. REV. 801, 801 (1981): "[S]tate appellate court judges occasionally become so frustrated with the extent of federal court intervention that they simply abdicate in favor of the federal jurisdiction."

or equal partnership in the enforcement of federal rights. In that case, the dialogue metaphor is just a sugar coating on the real message of mistrust.

# IV. RESHAPING THE HABEAS CONTEXT: *TEAGUE V. LANE*

## A. Introduction

In 1989, *Teague v. Lane* ended the habeas dialogue by virtually eliminating the federal voice. It did not restore the pre-*Brown v. Allen* analysis of whether the state court had fallen below minimum standards of adequacy.[75] Rather, it undertook a revision of its treatment of retroactivity which had begun in *Griffith v. Kentucky*,[76] a case that expanded rights enforcement by making all new rules retroactive on direct appeal. Unlike *Griffith*, *Teague* had nothing to do with the expansion of rights enforcement. *Teague* has almost completely eliminated the lower federal courts from the process of developing new rules of constitutional law applicable in criminal cases. It is difficult to believe that this exclusion will not contract the enforcement of rights.[77] ***945**

## B. Shaping Retroactivity for the Expansion of Rights

Time was when the Supreme Court would take the cases it chose, announce the necessary rules of law, apply them in that case, and leave for another day the question whether any newly announced rule of law would apply to cases that had already been tried.[78] When the next case came along, the Court would attempt to follow the so-called "*Linkletter* standard"[79] and determine retroactivity. *Linkletter*, a 1960s-style "three-pronged test," required the Court to weigh the purpose of the newly announced rule, the

---

[75] See Frank v. Mangum, 237 U.S. 309 (1915). Under Frank, federal habeas jurisdiction would only begin upon a showing of some sort of inadequacy on the part of the state court. To adopt Frank is to reject the dialogue characterization and to see habeas as an expression of mistrust, since the required showing of inadequacy would identify courts that really did deserve the intrusion of supervision and would leave other judges alone. Yet aside from Stone v. Powell, 428 U.S. 465 (1976), the Court has not openly taken the Frank approach. Stone restricted habeas jurisdiction for fourth amendment claims to cases in which the state court had failed to provide a full and fair opportunity to litigate, thus using the same framework as Frank, though only in the limited area of the fourth amendment.

[76] 479 U.S. 314 (1987).

[77] The Court's voting pattern in these two cases is interesting. The Griffith majority consisted of Blackmun (who wrote the opinion), Brennan, Marshall, Stevens, and Scalia, with Rehnquist, White, and O'Connor dissenting. In Teague, Justice O'Connor wrote the plurality opinion joined by Chief Justice Rehnquist, and Justices Scalia and Kennedy. Justice White concurred (still objecting to Griffith but feeling that, given Griffith, Teague must follow), providing the fifth vote needed for a majority. Justice Stevens, joined by Justice Blackmun, also accepted the rejection of retroactivity on habeas, though he did not think this rule ought to prevent the first habeas petitioner from arguing in favor of a new rule, and thus would not cut off the habeas dialogue. Justice Brennan, joined by Justice Marshall, dissented. The neutral, coherent approach to retroactivity represented by the Teague-Griffith combination loses some of its luster when the voting pattern is examined, particularly in the cases of Chief Justice Rehnquist and Justices O'Connor, Brennan, and Marshall. The connection to the expansion or contraction of rights seems to have had much more of a pull than abstract conceptions about retroactivity.

[78] See Teague, 489 U.S. at 299 (citing cases and also noting some conflicting examples in which the Court resolved the retroactivity question in the first case).

[79] Linkletter v. Walker, 381 U.S. 618 (1965) (denying retroactive application to the exclusionary rule announced in Mapp v. Ohio, 367 U.S. 643 (1961)).

state's reliance on prior law, and the effect retroactivity would have on the administration of justice.[80]

Delaying resolution of the retroactivity question made sense in terms of Article III lore: the issue of retroactivity has no effect (it seemed) on the parties in the first case, a case only activates the Court to decide the questions that will resolve the controversy between the parties to that case, and, therefore, the Court has no business talking about retroactivity. That explanation, framed in the classic, principled terms of justiciability, contrasted starkly with the *Linkletter* standard itself. *Linkletter* prescribes policy analysis: measures of "purpose," "reliance," and "effect" teetering on an imaginary scale. *Linkletter* is not about the magnitude of the right but about the practical effects of remedying violations after the trial is over.

Fastidiously principled judicial behavior in the first case gave way to blatant consideration of practical realities in the second. But this decisional structuring insured that nasty administrative practicalities would not interfere with the Court's ability to announce new rights. The choice to be fastidiously principled in case one was itself a pragmatic decision.[81] Context led the Court to neutrality. The Court shaped the context for announcing rights to maximize the scope of those rights. Free of the problem of retroactivity, the Court could rhapsodize in the ***946*** abstract about rights and ignore the difficulties of implementation. The Court's doctrine shaped the context in which the law would be said: a rights-expanding Court swept practical considerations of administration out of the case in which the Court would state new rules of law. Not surprisingly, the two-step approach flourished during the historical period when new rights were burgeoning.[82]

## C. Shaping Retroactivity After the Expansion Is Over

Almost a quarter of a century after *Linkletter*, the Court would shift the analysis. It would say that *Linkletter* had proven unsatisfactory, in practical terms, and was, in principled terms, unfair. It would say that the issue of retroactivity should advance in the order of decisionmaking. Retroactivity would no longer be an afterthought, not even considered in the first case, it would become the crucial first step in the first case. Moreover, the standard of retroactivity would have to change. No more three-pronged uncertainties: according to *Griffith v. Kentucky*,[83] all new rules would apply retroactively on direct review and, according to *Teague v. Lane*,[84] virtually none would apply at the habeas stage.

---

[80] Linkletter, 381 U.S. at 636-40.

[81] See supra text accompanying notes 57-59 (discussing how the ideology of context collapses into the ideology of neutrality).

[82] This two-step quality was not limited to criminal procedural rights. For example, in Brown v. Bd. of Educ., 347 U.S. 483 (1954), the Court announced its new rule in rhapsodic abstraction and, with its infamous "all deliberate speed" language, put the question of implementation off until some vague time in the future.

[83] 479 U.S. 314 (1987).

[84] Both Griffith and Teague concerned the racial composition of petit juries. Both defendants were black, and both charged that the prosecutor had deliberately excluded blacks from the jury. In Batson v. Kentucky, 476 U.S. 79 (1986), the Court held that prosecutors could not use their peremptory challenges to keep jurors of a particular race off the jury. Randall Lamont Griffith, accused of first degree robbery, was tried by an all-white jury after the prosecutor had used peremptory challenges to exclude all four black prospective jurors. Griffith first was convicted and sentenced to ten years, then found by the same jury to be a "persistent felony

This new approach to retroactivity would not simply cut off habeas relief for the masses of prisoners who would like to avail themselves of new rules of law, for that much usually happened even under *Linkletter*. ***947*** It would also mean that no habeas petitioner could ever ask for a new rule (unless the rule fit into one of the narrow exceptions, described below), because the retroactivity question to be decided in the first case would now include whether the new rule could be applied to the first petitioner. Invoking classic justiciability principles, the Court held that if the proposed new rule would not apply in the case before the federal habeas court, it could not even articulate the law. So, even as the old *Linkletter* approach had cleared the way for the announcement of more new rules and the expansive development of constitutional law, the new *Teague* approach to retroactivity would silence the federal habeas courts and cut off virtually all development of new law at the habeas stage.

Of course, the Supreme Court could still announce new rules on direct appeal, and under *Griffith* those new rules would generously extend to everyone else still in the direct review process. But the lower federal courts drop out of the lawmaking enterprise. To the extent that cases raising issues of constitutional criminal procedure arise in state court cases,[85] the lower federal courts play no role outside of habeas.[86] So the *Teague* rule functions effectively to restrict much of the articulation of this area of law to the Supreme Court. Because the Supreme Court's jurisdiction is wholly discretionary, it can, if it chooses, simply leave the states alone to use whatever rules of federal law they see fit. Indeed, Justice Scalia has written that the Supreme Court ought to avoid taking cases in areas of law governed by standards that do not translate easily into definite rules. According to Justice Scalia, "We should take one case now and then, perhaps, just to establish the margins of tolerable diversity."[87] If the goal is to leave the states to develop their own style of federal law and to interfere only when they have ***948*** strayed too far from what the Supreme Court perceives as a "tolerable" variation of federal law, then the habeas interference of the lower federal courts presented a serious problem. The habeas courts would enforce a strict, "federalized" version of federal law in every case coming

---

offender," a finding which under Kentucky law doubled his sentence to twenty years. Griffith, 479 U.S. at 317-18. An all-white jury convicted Frank Dean Teague of two counts each of attempted murder and armed robbery. The prosecutor had exercised peremptory challenges against the ten prospective jurors who were black. Teague, 489 U.S. at 292-93. (Justice O'Connor is quick to add that the defendant himself used a peremptory challenge against a black (the wife of a police officer)). In both cases, at the trial level and on appeal, the state courts had relied on the established, pre-Batson, law that racially discriminatory peremptory challenges only violated the federal Constitution if they were shown to be part of an intentional and systematic plan to exclude blacks from juries in many cases. See Swain v. Alabama, 380 U.S. 202 (1965). (Batson's innovation was to lighten the showing the defendant would need to make: the defendant could focus on the behavior before the court in his own case and would not need to gather data about other cases.) Griffith received a new trial and Teague did not. The difference between the two cases was that Griffith came to the Supreme Court as a direct appeal; Teague's case arose on habeas.

[85] Lower federal courts hear cases prosecuted in federal court, so the effect of Teague and its progeny is not complete. It is particularly important to recognize, however, that the federal courts will decide these constitutional questions under the same kind of pressure from criminal trial that contributed to the "pragmatic" outlook of the state courts. See supra text accompanying notes 40-74 (discussing Cover and Aleinikoff, supra note 3). Thus, the special "utopian" voice characteristic of habeas is lost.

[86] The Younger doctrine prevents the Court from hearing a separate case brought by the state criminal defendant affirmatively asserting his constitutional rights. See Yackle, supra note 31 (unavailability of pretrial federal relief because of Younger dictates need for habeas access to federal relief post-trial).

[87] See Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1186 (1989). In this view, Justice Scalia sounds very much like Justice Harlan in his arguments to limit the incorporation of rights into the Fourteenth Amendment. As discussed infra, text accompanying notes 102- 03, Justice Harlan would only have incorporated rules "implicit in the concept of ordered liberty." As long as the states stayed reasonably within the limits of fundamental fairness, they did not violate the law. Justice Scalia is not saying, however, that the states would not be violating federal constitutional law, only that there is no need for the Supreme Court to bother with the delineation of precise rules of criminal procedure law or even the policing of violations of law in this area as long as the states do not go too far afield.

before them, because the lower federal courts have a duty to exercise their jurisdiction. *Teague* works perfectly to prevent the routine interference that is habeas, freeing the states to operate within the bounds of "tolerable diversity."[88]

If *Linkletter* fit neatly into the context of the Warren Court's expansion of constitutional rights, *Teague* seems to fit just as neatly into the Rehnquist Court's context of limiting them. By restricting the law-saying function to the state courts, the Court has established the conditions under which the law will develop. Rights will be considered in the context of all of the legal and evidentiary issues raised in the case, by a court confronted directly with the countervailing interests of victims and society. Rights will be considered by the state courts, from what Professors Cover and Aleinikoff would call the "nonutopian" or "pragmatic" perspective. Moreover, because of *Griffith* and the abandonment of the *Linkletter* two-step approach (considering the issue of law in case one and reserving the retroactivity question for case two), the Supreme Court will make decisions about new rights in the context of a full awareness that if the right is accepted all defendants raising the issue on appeal will be able to avail themselves of that new right. The Court has ensured that the only federal voice on the subject will be its own, thus preserving for itself the ability to control the conversation about law.[89] Given the present Court's demonstrated tendency ***949** to restrict the meaning of rights, excluding the voice of the lower federal courts seems very suspiciously like an attempt to structure procedure to support its substantive goals. Lacking the capacity to review all lower federal court decisions expanding rights, the Court has conveniently reshaped habeas to eliminate the decisions altogether.

The *Teague* Court purported to be responding to the difficulties encountered in applying *Linkletter* over the years. That is to say, the avowed new context for rewriting the doctrine of retroactivity was not the current Court's hostility to the expansion of rights, it was the quarter century of experience in trying to apply *Linkletter*. Since *Linkletter* was a fluid standard, lower courts would differ about whether particular new rules of law would apply at the habeas stage. One circuit might view a new rule as retroactive and another might not. One criminal defendant would receive a new trial, and another, subjected to the same violation, would not.[90] Yet this problem could have been solved by allowing the first petitioner, the one who gives the courts the lawsaying opportunity, to seek relief and then denying habeas to later petitioners who seek relief,

---

[88] There is also an exception to Teague that to some extent revives habeas when the states have exceeded the bounds of "tolerable diversity." See infra text accompanying notes 99-112.

[89] The only exception to this silencing of the lower federal courts is the opportunity these courts have to decide issues of constitutional law during federal criminal trials. (These trials, however, place the federal courts in a different context, in which their "utopian" tendencies are discouraged. See supra note 85). The Supreme Court has also structured its own jurisdiction with its control of federal law in mind. In Michigan v. Long, 463 U.S. 1032 (1983), the Court established a presumption in favor of its own jurisdiction and limited the reach of the independent and adequate state ground doctrine to ensure that state courts do not issue unreviewable pronouncements of federal law by mixing federal law with state law. And in ASARCO, Inc. v. Kadish, 490 U.S. 605 (1989), the Court found standing in a case that began in state court and that could not have satisfied the federal standing test if it had been filed in federal court. The Court looked at the state court defendants, who were the petitioners for certiorari, and said that they had suffered an injury in fact when the state court ruled in favor of the plaintiffs. Interestingly, in both these cases the Court cut off the states' ability to adopt their own versions of federal law when the state courts had favored the federal rights. Does intolerance for diversity arise more quickly when the states take an expansive view of federal law? Note that the tolerable diversity insulated by Teague only involves state court deviations from "federalized federal law" that narrow rights. For an argument that the Court should shape its jurisdiction to control possible narrowing of federal rights but to leave possible overenforcement alone, see Harris v. Reed, 489 U.S. 255, 266 (1989) (Stevens, J., concurring).

[90] Teague, 489 U.S. at 303.

but do not invoke the lawsaying function. Its solution did not require the devastating other aspect of *Teague* – barring habeas petitioners from arguing for the adoption of new rules. That is, the Court could have kept the *Linkletter* two-step approach of considering the argument for a new rule of law in the first case and only worrying about retroactivity in the second case. It could have solved the practical problems by merely replacing the nebulous three-factor retroactivity analysis with a flat rule against retroactivity on habeas, while still permitting the first petitioner to argue in favor of a new rule of law.[91] It was only this additional fillip of doctrine that cut off the federal courts' voice in the dialogue about rights.

To support barring the first petitioner – and to achieve the goal of cutting the lower federal courts out of the dialogue – the Court removed itself from the context of pragmatic problems to the lofty realm of abstract principle. A fine abstract principle proved adequate to the task: treat similarly situated persons equally.[92] Why should the person whose case happens to become the vehicle for announcing a rule of law get the advantage of a rule of law that will be denied similarly situated persons? Why should the mere fortuity of being first to seek a new rule give one person a new trial, while everyone else subjected to the same treatment at trial would simply have to accept his fate? How will all those prisoners feel if they have to stay in prison without a remedy when another prisoner who suffered no worse treatment than they receives ***950*** a new trial? Out of sincere regard for their sensibilities about justice, that other prisoner, like them, ought to have to stay in prison – or even die.[93] But only one of the goals of constitutional litigation is directed at giving remedies to those who deserve them. If there were no other goal, one could fairly say that unless all similarly situated persons will receive a new trial, no one should. But the goal of articulating the law stands apart from the goal of remedy. The reason for allowing the first petitioner to raise the question is tied to the lawmaking process. It is appropriate to listen to this petitioner because he gives the habeas court an opportunity to say what the law is. Once the law is established, the habeas function is reduced to the goal of remedy. Even if pragmatic considerations about finality and the purpose of habeas corpus justify denying the remedy to those who would like to take advantage of the newly announced law, the petitioner who argues for the law invokes the lawsaying function. To cut this petitioner off too, out of professed regard for the principle of equal treatment, is to cut off the habeas court's voice in the dialogue about the meaning of rights. That is not a step lightly taken because of an abstract principle meditated upon in a vacuum.[94] It is a deliberate choice to restrict the lawsaying function to the state courts, a choice that indirectly affects what law will be said.

---

[91] Justices Stevens and Blackmun argued in favor of this doctrinal structure. See id. at 319 (Stevens, J., concurring).

[92] Id. at 315.

[93] Id. In The Rule of Law as a Law of Rules, Justice Scalia writes that having a rule and applying it in a uniform way – treating similarly situated persons the same – is more fundamental to the human sense of justice than the actual content of the rule. As an illustration, he writes that his children would react with less outrage to a family rule against watching television than to a decision to allow television – watching by one child but not another. Concludes Justice Scalia, "The Equal Protection Clause epitomizes justice more than any other provision of the Constitution." Scalia, supra note 87, at 1178.

[94] See supra text accompanying notes 57-59 (noting how the ideology of neutrality collapses into the ideology of context).

## D. Two Narrow Exceptions

### 1. The State's power to punish

In *Teague*, the Court established two exceptions, two instances in which a new rule of law will apply retroactively. These exceptions are exceedingly narrow. The first exception allows the petitioner to argue that the Constitution protects the conduct for which the state prosecuted him.[95] The Court as it has before[96] reveals a belief that habeas ***951** is not just an unusual form of relief, but that its appropriate function is to provide a remedy to an innocent person. While a petitioner within this exception may have indeed committed the act the state proved he did, the act itself is one that the Constitution forbids the state to criminalize. For example, if the state enacts an antipornography statute and the defendant publishes a magazine that fits squarely within the definition of the statute, the defendant may argue on habeas that the statute violates the First Amendment and may argue for a revision of the law in the process.

In the first Supreme Court case implicating *Teague*, the Court found a situation fitting the first exception. Indeed, the Court even took an expansive view of the exception. *Penry v. Lynaugh* [97] raised the question whether the state could constitutionally execute a mentally retarded person. In a unanimous portion of the *Penry* opinion, Justice O'Connor wrote that the first exception should not refer only to the petitioner's primary conduct: "a new rule placing a certain class of individuals beyond the state's power to punish by death is analogous to a new rule placing certain conduct beyond the state's power to punish at all."[98]

### 2. The concept of ordered liberty

The second exception too looks at innocence. The petitioner can also argue for a new rule of law that would significantly increase "the likelihood of an accurate conviction" and that also "implicates the fundamental fairness of the trial."[99] In constructing this exception the Supreme Court combined two alternative exceptions proposed by Justice Harlan in *Desist v. United States* [100] and *Mackey v. United States*.[101] The entire reframing of retroactivity doctrine in *Griffith* and *Teague* relied on the earlier writings of Justice Harlan in these two cases. Harlan proposed full retroactivity on direct appeal and no retroactivity on habeas, except in two instances. His first exception coincided with the

---

[95] Teague, 489 U.S. at 311.

[96] See, e.g., Murray v. Carrier, 477 U.S. 478 (1986); Stone v. Powell, 428 U.S. 465 (1976) (relying on Friendly, supra note 31). For a recent attempt to revise all of the Court's habeas doctrine within the innocence framework, see John C. Jeffries, Jr. & William J. Shintz, *Ineffective Assistance and Procedural Default in Federal Habeas Corpus*, 57 U. CHI. L. REV. 679 (1990).

[97] 492 U.S. 302 (1989).

[98] Penry, 492 U.S. at 330. Five members of the Court (O'Connor, joined by Rehnquist, White, Scalia, and Kennedy) then went on to deny the claim on the merits. Penry's other Eighth Amendment claim, that the jury was required to consider mental retardation as a mitigating factor before imposing the death penalty, was accepted by O'Connor and the Teague opponents, Brennan, Marshall, Blackmun, and Stevens. This claim, which did not fit the Teague exceptions, raised the question of whether the petitioner sought a pronouncement of new law and is therefore discussed in the next section. See infra text accompanying notes 111-22.

[99] Teague, 489 U.S. at 312-13.

[100] 394 U.S. 244 (1969).

[101] 401 U.S. 667 (1971).

first exception adopted in *Teague*.[102] In *Desist*, Harlan defined his second ***952** exception as applying to rules that "significantly improve the pre-existing fact-finding procedures."[103] Two years later, in *Mackey*, Harlan abandoned this approach, because he had decided that the accuracy of fact finding did not correlate with the purposes of habeas and because determining which rules affected fact finding was "inherently intractable."[104] He entirely shifted his analysis, centering it on whether the new rule invoked considerations of fundamental fairness – or rules "implicit in the concept of ordered liberty."[105] This concept overlapped with the resolution of the Fourteenth Amendment incorporation problem adopted in *Palko v. Connecticut*,[106] which Harlan continued to adhere to after the majority of the Court shifted to a different approach. In *Teague*, the Court referred to the *Palko* standard as "unnecessarily anachronistic." Nevertheless it still used the anachronism, it just further narrowed it with the addition of the "accuracy-enhancing" requirement that even Harlan rejected. (Did combining two standards that Harlan proposed alternately create less of an anachronism?) The *Teague* Court went on to predict that few, if any, new rules could fit into this aggressively narrowed exception. It wrote that the exception was "best illustrated by recalling the classic grounds for the issuance of a writ of habeas corpus,"[107] implying that the genuinely "fundamental rights" are not new, undiscovered ones, but old, "classic" ones. It heightened this implication with the following statement:

> Because we operate from the premise that [rules within the exception] would be so central to an accurate determination of innocence or guilt, we believe it unlikely that many such components of basic due process have yet to emerge.[108]

A year later, Justice Kennedy echoed this idea that the second exception was reserved for "classic" rights. Writing for a majority of the Court in *Saffle v. Parks*,[109] he conceded that the "contours of this exception may be difficult to discern,"[110] but that one can gather what it means by considering *Gideon v. Wainwright* [111] as a paradigm. In other words, find a right on the order of *Gideon* and you can have retroactive application! One senses that the message is that the Warren Court found all the big rights, that there are none left for the Rehnquist ***953** Court to discover, and thus that the second exception has no application. Put less kindly, the message is that the Rehnquist Court has decided not to find any more new rights. The second *Teague* exception seems to exist only to remind us just how highly exceptional and unusual a form of relief habeas is: it is reserved for rights so well-entrenched that state courts rarely, if ever, violate them.

---

[102] See supra text accompanying notes 93-96.

[103] Desist, 394 U.S. at 292 (Harlan, J., dissenting).

[104] Mackey, 401 U.S. 667, 695 (1971).

[105] Id. at 693-94.

[106] 302 U.S. 319 (1937) (determining which rights were incorporated into the fourteenth amendment), overruled by Benton v. Maryland, 395 U.S. 784, 794-95 (1969).

[107] Teague, 489 U.S. at 313.

[108] Id.

[109] 110 S.Ct. 1257 (1990). This case is discussed infra notes 124- 25.

[110] Id. at 1264.

[111] 372 U.S. 335 (1963) (right to counsel in all criminal trials for serious offenses).

In discussing *Teague*'s decision generally to bar retroactive application of new rules at the habeas stage, this Article noted that the Court seems to want to allow the states to develop federal law independently, within what Justice Scalia called the bounds of "tolerable diversity."[112] The second *Teague* exception, discussed in this section, reflects roughly the same notion, for when a rule adopted and followed by the states fails to fit within "the concept of ordered liberty" we can say that it has gone beyond "tolerable diversity." Yet the Court's discussion of this "concept of ordered liberty" so far indicates a high degree of tolerance indeed.

# V. THE REVEALING NOTION OF "NEW" RULES OF LAW

## A. An Early Warning and a Short-Lived Respite

Justice Brennan dissented in *Teague*, expressing alarm about the degree of tolerance accorded the states. He wrote:

> Few decisions on appeal or collateral review 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. Virtually no case that prompts a dissent on the relevant legal point, for example, could be said to be "dictated" by prior decisions.[113]

At first, it seemed as if perhaps Justice Brennan had overstated his fears about *Teague*. In *Penry v. Lynaugh*,[114] decided, like *Teague*, in the 1988 Term, Justice O'Connor, allied with the *Teague* opponents (Justices Brennan, Marshall, Blackmun, and Stevens), wrote that Penry did not seek a "new rule" when he asked the Court to decide that the Eighth Amendment required that a judge instruct the jury to consider the mitigating effect of the defendant's mental retardation before imposing the death penalty.[115] Justice O'Connor looked at three earlier Supreme Court cases: *Jurek v. Texas*,[116] which upheld a state death ***954** penalty statute because it required individualized consideration of mitigating evidence; *Lockett v. Ohio*,[117] which invalidated a statute that only allowed three specified mitigating factors; and *Eddings v. Oklahoma*,[118] which ruled that the trial judge could not bar consideration of relevant mitigating evidence. Thus, according to Justice O'Connor, federal law clearly barred the state from preventing the sentencer from considering mitigating evidence.[119] But the trial court had not prevented Penry from introducing evidence of mental retardation; it had only refused to instruct the jury that it could consider the evidence in mitigation of the

---

[112] See supra text accompanying notes 85-86.

[113] Teague, 489 U.S. at 333 (Brennan, J., dissenting).

[114] 492 U.S. 302 (1989).

[115] Penry, 492 U.S. at 313-19.

[116] 428 U.S. 262 (1976).

[117] 438 U.S. 586 (1978) (plurality opinion). The plurality wrote that "any aspect of a defendant's character or record and any of the circumstances of the offense" could be presented as a mitigating factor. Id. at 604.

[118] 455 U.S. 104 (1982) (majority opinion).

[119] Penry, 492 U.S. at 318.

death penalty. As framed by Justice O'Connor, Penry sought "a rule that when such mitigating evidence is presented, Texas juries must, upon request, be given jury instructions that make it possible for them to give effect to that mitigating evidence."[120] By characterizing jury instructions as an inherent aspect of permitting consideration of the evidence, Justice O'Connor could say that Penry did not seek a "new rule" within the meaning of *Teague*.

Justice Scalia, joined by the rest of the *Teague* supporters (Chief Justice Rehnquist, and Justices White and Kennedy), strongly objected to the majority's unwillingness to view the rule sought as "new." Habeas is, according to Justice Scalia, a "threat" used to make state judges follow federal law. A state trial judge acting in good faith would not have known from the existing precedents that the Constitution required the instructions requested by Penry. On this basis, Justice Scalia assumed that the threat of reversal would have no effect.[121] Since the retroactive application of the rule could not have deterred the trial judge from violating the Constitution, it would not serve the function of habeas (as defined by Justice Scalia) and thus should be called "new." The majority went wrong, he concluded, because it departed from this pragmatic approach to habeas doctrine and fell for opinion-writing conventions that conceal the newness of new rules and make them seem "inherent" in precedent.[122] According to Justice Scalia:

> If *Teague* does not apply to a claimed "inherency" as vague and debatable as that in the present case, then it applies only to habeas requests for plain overruling – which means that it adds little if anything to the principles already in place ... It ***955** is rare that a principle of law as significant as that in *Teague* is adopted and gutted in the same Term.[123]

*Penry*'s "gutting" of *Teague* proved illusory. Justice O'Connor switched her vote,[124] creating a new majority eager to expand the "new rule" concept. Today, little more than two years after *Teague*, it has become clear that a "new rule" encompasses anything beyond a deeply-entrenched, "classic" rule.[125] ***956**

---

[120] Id. at 315.

[121] Id. at 352-53. For a discussion of the incentive structure of the Court's doctrine rejecting the notion that as long as the judge acts in good faith, reversal has no deterrent value, see infra text accompanying notes 151-60.

[122] Id. at 353.

[123] Id.

[124] Why did Justice O'Connor switch sides between the 1988 and 1989 Terms? Newspaper accounts of the Penry case speculated that she holds a special concern for retarded persons, so perhaps she stretched jurisdiction when faced with the intolerable prospect that the state might execute a man without considering the mitigating effect of his mental retardation. In the following Term, faced with the kinds questions raised in Butler v. McKeller, 110 S.Ct. 1212 (1990) (voluntary confession after Miranda warnings given), Saffle v. Parks, 110 S.Ct. 1257 (1990) (anti-sympathy instruction), and Sawyer v. Smith, 110 S.Ct. 2822 (1990) (prosecutor's statement that sentencing jury not finally responsible for the death penalty), discussed infra note 125, the pressure to stretch jurisdiction lightened. If this is the explanation, it is an example of jurisdictional rules growing out of the substantive context. Once this special context (concern for the mentally retarded) was gone, perhaps, she rejoined the Justices she agreed with in Teague. Justice Scalia's insistence on the grand principle of Teague in Penry and the need to give it meaning with a broad definition of "new rules" may have seemed more convincing to her, though she resisted it in Penry because of the especially tragic consequence impending in that case.

[125] This Article will concentrate on Butler v. McKellar, 110 S.Ct. 1212 (1990). The other cases decided in the 1989 Term are Saffle v. Parks, 110 S.Ct. 1257 (1990), and Sawyer v. Smith, 110 S.Ct. 2822 (1990). In Saffle, the petitioner, sentenced to death for killing a gas station attendant during a robbery, challenged instructions to the sentencing jury "to avoid any influence of sympathy." Justice Kennedy, joined by the Chief Justice and Justices White, O'Connor, and Scalia, wrote that the earlier Supreme Court precedents (Lockett and Eddings, discussed in connection with Penry, supra notes 116-19), dealt with the problem of excluding

## B. *Butler v. McKellar* – Coercion or Autonomy?

Horace Butler was arrested for assault and battery.[126] He invoked his right to counsel and retained counsel. Under *Edwards v. Arizona*,[127] once the accused requests counsel, the Fifth Amendment requires the police to refrain from asking him any more questions. The police, however, suspected Butler of another crime, murder.[128] Having him conveniently in custody for the unrelated assault and battery, they transported him to the police station for questioning about the murder of Pamela Lane, whose body had been found six weeks before Butler's arrest. They gave Butler his *Miranda* warnings,[129] which he said he understood. This time, he didn't ask for a lawyer. He signed two "waiver of rights" forms and submitted to questioning.[130] At first, Butler blamed one of his friends for the murder. Then, he changed his story: after a voluntary sexual encounter, Lane threatened to accuse him of rape, and, panic-stricken, he shot her to death.[131]

On trial for first-degree murder, Butler tried unsuccessfully to suppress his statements to the police.[132] The jury, using the statements, convicted him.[133] In a separate proceeding, based on their finding that he had committed the murder during a rape, they sentenced him to death.[134] Butler appealed to the South Carolina Supreme Court, which upheld his conviction.[135] The United States Supreme Court denied certiorari.[136] He sought collateral relief in state court, lost,[137] and again was denied certiorari.[138]

---

particular types of evidence and not with the question of how evidence should be considered. The difference between the precedents and the rule urged was "simple and logical." Moreover, since many state and federal courts had rejected challenges to anti-sympathy instructions, one could not say that the state judge following the same approach was "unreasonable." Justice Brennan, dissenting, characterized the instruction as capable of being understood as a bar to the consideration of mitigating evidence, and hence in line with the precedents. He also argued that the rule sought fit the second Teague exception. See supra text accompanying notes 97-109.
In Sawyer, the petitioner, sentenced to death for an extremely brutal murder of an acquaintance, challenged the prosecutor's closing argument, which erroneously informed the sentencing jury that they were not finally responsible for imposing the death sentence. Though this argument directly violated Caldwell v. Mississippi, 472 U.S. 320 (1985), Sawyer's conviction became final over a year before it was decided. Under Teague, the issue had to be whether the Caldwell rule would have been considered "new" in 1984. Justice Kennedy, joined again by the Chief Justice and Justices White, O'Connor, and Scalia, wrote that "reasonable jurists" could have disagreed at the time about whether the statements violated the eighth amendment and therefore that it was a "new rule" within the meaning of Teague. Interestingly, many state courts had invalidated statements of the kind Sawyer challenged. The majority dismissed those decisions on the ground that they were only based on state law. But state law creates the context that generates eighth amendment law. See supra note 29 and accompanying text. Caldwell itself relied on these state law decisions. See Caldwell, 472 U.S. at 333-34. Nevertheless, since everything is "new" that is at all still subject to debate, the rule was new. Justice Kennedy went on to note that these state decisions show that the state courts do recognize rights. He did not mention that the state court decisions were all generated during the period before Teague removed the threat of habeas corpus reversal for failure to anticipate developments in constitutional law.

126 Butler, 110 S.Ct. at 1214.

127 451 U.S. 477 (1981).

128 Butler, 110 S.Ct. at 1215.

129 Miranda v. Arizona, 384 U.S. 436 (1966).

130 Butler, 110 S.Ct. at 1215.

131 Id.

132 Id.

133 Id.

134 Id.

135 State v. Butler, 290 S.E.2d 1 (S.C. 1982).

136 Butler v. South Carolina, 459 U.S. 932 (1982).

137 Butler v. State, 334 S.E.2d 813 (S.C. 1985).

138 Butler v. South Carolina, 474 U.S. 1094 (1986).

Butler then petitioned for a writ of habeas corpus in federal district court.[139] To prevail under the federal habeas statute, petitioners must show that they are in custody in violation of their federal constitutional rights.[140] Butler, litigating in the Fourth Circuit, used an argument about the scope of *Edwards v. Arizona* that the Seventh Circuit had ***957** already accepted:[141] because he had invoked his right to counsel with respect to one crime, the police had to stop questioning him not only about that crime, but about any crime.

The Fourth Circuit, characterizing the argument as a "dramatic" extension of *Edwards*,[142] considered it sufficient for the police to end their inquiry into the particular matter that led to the initial request for counsel. This rule, the court wrote, would actually benefit the accused: it offered the chance to consider whether or not to enter into a dialogue with the authorities "in light of the changed circumstances" – the new accusations.[143] As long as the police scrupulously repeated the *Miranda* routine, there was no need to exclude the statements.

This view of constitutional rights, it would turn out, squared quite nicely with the dissenting opinion in the United States Supreme Court case of *Arizona v. Roberson*.[144] The Court announced its decision in *Roberson* on June 15, 1988, the same day the Fourth Circuit denied Butler a rehearing.[145] According to a Supreme Court majority composed of Justice Stevens, who wrote the opinion, and Justices Brennan, White, Marshall, Blackmun, and Scalia, the law from *Miranda* to *Edwards* to *Roberson* formed a single, coherent rule, an inevitable progression. The state in *Roberson* was asking the Court to "craft an exception" to that established rule.[146] *Miranda* established the clear, strong prophylactic rule needed to give meaning to the privilege against self-incrimination in the inherently coercive setting of custody.[147] *Edwards* assumed that coercion might push a person who has invoked his privilege to give in and respond to questions. *Roberson* involved a criminal defendant held in custody, and thus subject to the well-recognized coercion, who had invoked a right to counsel. The only twist was that the renewed questioning related to another crime. Following the established tradition of the "bright-line rule in cases following *Edwards* as well as *Miranda*,"[148] the *Roberson* Court barred questioning about any crime: "the presumption raised by a suspect's request for counsel – that he considers himself unable to deal with the pressures of custodial interrogation without legal assistance – does not disappear simply because the police have approached the suspect about a separate investigation."[149] So, to the *Roberson* majority, a complete *Miranda* vision coalesces: the all-encompassing, mind-disabling atmosphere of ***958**

---

139 Butler, 110 S.Ct. at 1215.
140 28 U.S.C. § 2254 (1988).
141 See United States ex rel. Espinoza v. Fairman, 813 F.2d 117 (7th Cir.1987).
142 Butler v. Aiken, 846 F.2d 255 (4th Cir.1988).
143 Butler, 110 S.Ct. at 1215 (characterizing the Fourth Circuit's opinion).
144 486 U.S. 675 (1988).
145 Butler, 110 S.Ct. at 1216.
146 Roberson, 486 U.S. at 677.
147 Miranda, 384 U.S. at 467.
148 Roberson, 486 U.S. at 681.
149 Id. at 683.

police custody dictates an absolute need for an inescapable, prophylactic exclusionary rule.

Justice Kennedy joined by Chief Justice Rehnquist, dissented.[150] Taking the Fourth Circuit's lead, he recharacterized everything: the state was not asking for an "exception" to the established rule, the accused was seeking an "expansion" – and an unjustified one at that.[151] The majority had portrayed the person in custody as weak, someone who had shown, by virtue of his initial request for counsel, that he was unable to deal with the coercion of custody alone and who must therefore be presumed unable to waive his Fifth Amendment privilege voluntarily. Dispelling the coherent *Miranda* vision, the dissenters restyled the accused as an autonomous person who still knew how to make decisions: he might want a lawyer for one charge, but still want the "opportunity" to decide whether or not to enter into a separate interrogation on his own.[152]

But where did all of this leave Horace Butler? Could he now wave *Arizona v. Roberson* in front of the Fourth Circuit and have his new trial? How could it not be enough to have a Supreme Court case directly on point, saying that the police had violated his Fifth Amendment rights? But, indeed, it was not enough, and with Butler's life in the balance, his fate depended on whether *Roberson* stated "new law" and thus invoked *Teague*'s nonretroactivity rule. In *Butler*, Chief Justice Rehnquist wrote an opinion for the new majority echoing Justice Scalia's *Penry* dissent.[153]

Like Scalia, he took the perspective of the state trial judge and purported to define "new rule" so that habeas corpus would only inflict the "punishment" of reversal when the trial judge could have known that the rule followed violated federal law. Defining the purpose of habeas in functional deterrence terms,[154] the Chief Justice ignored both the petitioner's interest in a remedy and the larger social interest in guidance about the meaning of rights. The Chief Justice structured doctrine so that habeas reversal could only follow if the trial judge failed to follow an indisputably established rule. The trial judge, the exclusive object of the Court's sympathy, can only be faulted, and thus deserving of reversal, for flouting precisely ascertainable law.[155] A judge who must work to divine the law may reach a different interpretation from the one the Court might ultimately choose. Indeed, the Chief Justice himself joined the dissenting opinion in *Roberson*.[156] If he had ****959*** been the trial judge, should he have been reversed on habeas for taking that undoubtedly "reasonable" position?

But why make the trial judge the centerpiece of analysis? Even if one wants to set up an incentive structure to maximize compliance with federal law, it makes sense to encourage the trial judge to study the precedents, attempt to comprehend the fundamental

---

150 Justice O'Connor did not participate in Roberson.

151 Roberson, 486 U.S. at 688.

152 Id. at 692.

153 See Penry, 492 U.S. at 350 (Scalia, J., dissenting).

154 Butler, 110 S.Ct. at 1217.

155 Id.

156 See supra text accompanying notes 147-49.

principles they embody, and make a good faith effort to answer the question at hand.[157] True, the judge may fail to predict the rule the federal habeas judge may later fix upon, but the potential for reversal could still intensify the state judge's attention to the interpretive effort. Only by viewing habeas reversal as a punishment aimed at judges do we need to structure doctrine to avoid wronging a judge who acted in good faith.[158]

One must distinguish the state judge from a defendant state actor, who under section 1983 would usually have a defense of good faith.[159] Under official immunity doctrine, if the law is not clear at the time the state actor performs the allegedly unconstitutional act, good faith is assumed and the plaintiff cannot recover.[160] *Teague* thus bears a noticable resemblance to this other body of law. Both doctrines institute deference to state employees as long as they follow the "clear law" and create federal court access to control the state employee who flouts federal authority by failing to acknowledge what is plain (the "clear law"). In fact, the similarity is highly deceptive. It makes a good deal of sense to spare a state employee personal liability when she could not have known that her action would violate federal law. Public service would be too risky and public servants might act with too much inhibition if unknown liability constantly threatened their personal financial well-being.[161] ***960**

But judges are in a different position altogether. First, they face only reversal, not personal liability. Second, judges have a special duty to interpret the law and delve into its unclarities. They have the time, the resources and the training to engage in this work, which is, after all, precisely their job. Expecting them to perform this task is far more reasonable and fair than, say, expecting a police officer to ponder subtleties of Fourth Amendment law in the midst of conducting a search.

Thus, the incentive structure works differently.[162] The threat of reversal on habeas may exert salutary pressure on state judges, pushing them a bit to engage in the serious

---

[157] See Butler, 110 S.Ct. at 1221-25 (Brennan, J., dissenting).

[158] For arguments that federal courts ought not to structure doctrine merely to avoid offending the sensibilities of state judges, see Althouse, supra note 71; Althouse, supra note 72.

[159] See, e.g., Scheuer v. Rhodes, 416 U.S. 232 (1974).

[160] See Harlow v. Fitzgerald, 457 U.S. 800 (1982).

[161] See Scheuer v. Rhodes, 416 U.S. 232. In saying that official immunity doctrine makes more sense than Teague, I do not imply that official immunity doctrine is perfectly tuned to its goals and takes adequate account of the value of erring on the side of protecting rights. See Kit Kinports, *Qualified Immunity in 1983 Cases: The Unanswered Questions*, 23 GA. L. REV. 597 (1989); Laura Oren, *Immunity and Accountability in Civil Rights Litigation*, 50 U. PITT. L. REV. 935 (1989); David Rudovsky, *The Qualified Immunity Doctrine in the Supreme Court: Judicial Activism and the Restriction of Constitutional Rights*, 138 U. PA. L. REV. (1989); Kathryn R. Urbonya, *Problematic Standards of Reasonableness: Qualified Immunity in Section 1983 Actions for a Police Officer's Use of Excessive Force*, 62 TEMPLE L. REV. 61 (1989). Moreover, the official immunity doctrine, hinging as it does on whether the law is clear, like Teague, undercuts the lawsaying function of the federal courts. If federal judges must dismiss section 1983 cases upon finding the law in not clear, they lose the opportunity to make the law clear. Judicial power ends exactly at the point where we need a judicial pronouncement. Judges are demoted from the position of lawsayers to lesser functionaries who deal out remedies when the answer is obvious. And finally, even from a remedial standpoint, official immunity doctrine is problematic. It creates a system in which some whose rights are violated are left without remedies. Of course, since the law is unclear, one cannot know which disappointed plaintiffs really had rights, but is disturbing to think that somehow ignorance makes unremedied violations acceptable.

[162] It should be noted that the Court itself adopted an incentive analysis. See Butler, 110 S.Ct. at 1217 (quoting and adding emphasis to Teague, 489 U.S. at 306):

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

Justice Brennan took the majority to task for its crabbed view of deterrence:

interpretive task the law entrusts to them. Threatening police officers with financial ruin is more likely to discourage them from taking the job at all – particularly if they are persons with a disposition to think about the law and respond to it, thus leaving less thoughtful persons to carry on policework. If they keep the job, they must tolerate an anxiety about personal liability that they are largely powerless to remove, and they may end up sacrificing other public interests and their own personal safety in order to cut a wide swath around any possible constitutional violation. So threatened liability for violations of unclear law to a state official may tend to impair performance, but threatening to reverse a state judge ought to improve performance.[163] *Butler* removed this incentive. ***961**

*Butler* adopted the broadest possible meaning of "new rules." According to the majority, if a rule is "susceptible to debate among reasonable minds," if a judge could reach a "reasonable contrary conclusion," the rule is new.[164] Just as Justice Brennan had feared in *Teague*, any time a rational judge could dissent, the rule is new.[165] The Chief Justice dissented in *Roberson*, so of course, the rule announced there was new. As he stated in *Butler*, a judge in *Roberson* could have gone the other way without being "illogical or even grudging."[166] Indeed, in the future, with the present doctrinal structure in place, every justice will understand the power of a dissenting opinion: it irrefutably establishes that the rule of law articulated by the majority – even a majority of eight justices – is a new rule of law. The lone dissenter emerges victorious.

## C. The Wholeness of the Law Dissipates

If the law were really one coherent whole, courts would never have to worry about the retroactivity of new rules of law. They would not have to ask which law applies – the law as it is now or the law as it was then. There would only be one law[167] – and the ongoing struggle to articulate it correctly. On appeal, or on a petition for a writ of habeas corpus, a court would determine whether the trial judge erroneously applied the law. Retroactivity of all new rules would simply go along with the notion of the wholeness of the law. Indeed, we would not even use such terms as "new rule" and "retroactivity."

---

> [A]t best, the threat of habeas review will deter state courts only from completely indefensible rejections of federal claims. State courts essentially are told today that, save for outright "illogical" defiance of a binding precedent precisely 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.

Butler, 110 S.Ct. at 1222 (Brennan, J., dissenting).

[163] In Butler, the majority and the dissenters also argued about the analogy to the deterrent structure of fourth amendment law. Id. at 1217, 1223 n.4. United States v. Leon, 468 U.S. 897 (1984), built a good faith exception into the exclusionary rule. There, the idea was that the police officer executing an apparently valid search warrant could not be expected to analyze its constitutionality independently. This is the same notion discussed in the text: one does not expect nonjudicial state employees to undertake a difficult legal analysis while carrying out their duties. Though there are other arguments in favor of the exclusionary rule and Leon has scarcely escaped criticism, the deterrence argument in that case still made much more sense than the Butler, majority's deterrence argument, which relieves a judge of the responsibility of undertaking a difficult legal analysis.

[164] Butler, 110 S.Ct. at 1217.

[165] See supra text accompanying notes 110-11.

[166] Butler, 110 S.Ct. at 1217-18.

[167] You could even say it in Latin, as Justice Story did in Swift v. Tyson, 16 Pet. 1 (1842) (quoting Cicero); *Non erit alia lex Romae, alia Athenis; alia nunc, alia posthac; sed et apud omnes gentes, et omni tempore una eademque lex obtinebit*. ("There will not be one law at Rome, another at Athens; one law now, another hereafter; but one eternal and immortal law shall bind together all nations throughout all time.")

Look at how the majority spoke of the rule it announced in *Roberson*; it was not "new," it was part of one big idea that over the years the Court was gradually getting around to describing.[168] It began to explain the idea in *Miranda* and went as far as it needed to resolve that case. It even went a bit farther, in the interest of giving guidance to the police. It described a bit more in *Edwards* and the picture was becoming clearer. The Court had not yet spoken of the *Roberson* issue, the problem of the police interrogating a person about a second crime, but that was only because the issue was not presented in a case and ***962** the Court adheres to a case by case method of articulating the law. Anyone who had wanted to figure out that issue, however, could simply have looked at the *Miranda-Edwards* picture as it was shaping up over the years and deduced how *Roberson* would come out. Or so the majority seemed to say.

In *Butler*, Justice Brennan, dissenting, could not see *Roberson* as a new rule.[169] "Constitutional interpretation," he wrote, "is an evolutionary process."[170] Accepting the notion, established in *Teague*, that the petitioner is only "entitled to the law prevailing at the time of his conviction,"[171] he sought to demonstrate how complex that notion really is. If the law is continually evolving, what is it at the time of trial? The trial judge must engage in the process of trying to determine what the law is. This cannot mean only that the trial judge has to look to see if there are any Supreme Court cases directly on point and, if there are none, throw the whole enterprise of applying constitutional law out the window.[172] The trial judge must discern the "principles underlying prior precedents," and must faithfully and dutifully fulfill "the obligation to draw reasoned conclusions" from those principles.[173]

Traditionally, law presents itself as a coherent, ongoing narrative.[174] Judges assume the role of humble interpreter.[175] They do not break character and say, "Oh, of course, you know we're only putting it this way for effect." This tradition of maintaining a coherent tone (and the evolution metaphor is one of coherence, albeit within a system of constant change – and improvement)[176] is well-established enough that many law professors make a lifetime career out of detecting incoherencies palmed off as coherence. How striking then to hear the Chief Justice, noting that the *Roberson* Court proclaimed itself "directly controlled by *Edwards*,"[177] say:

> But the fact that a court says that its decision is within the "logical compass" of an earlier decision, or indeed that it is ***963** "controlled" by a prior decision, is not

---

168 See supra text accompanying notes 141-46.

169 Butler 110 S.Ct. at 1219-20 (Brennan, J., dissenting).

170 Id. at 1219.

171 Id. (quoting Desist, 394 U.S. at 263 (Harlan, J., dissenting)).

172 See id. at 1222 ("As every first-year law student learns, adjudication according to prevailing law means far more than obeying precedent by perfunctorily applying holdings in previous cases to virtually identical fact patterns.").

173 Id. (citing Justice Harlan's conception in Desist).

174 See Dworkin, supra note 15.

175 Expressing this view, President Bush stated, "Judge Souter is committed to interpreting, not making the law." *Comments By President on His Choice of Justice*, N.Y. TIMES, July 24, 1990, at A18.

176 On the use of metaphor, see supra note 65. As stated in that footnote, a problem with using metaphors is that they can mislead. The evolution metaphor for law suggests that the law that "survives" is the best (the fittest) and that a natural, scientifically-knowable process connects the cases.

177 Butler, 110 S.Ct. at 1217.

> conclusive for purposes of deciding whether the current decision is a "new rule" under *Teague*. Courts frequently view their decisions as being "controlled' or "governed' by prior opinions even when aware of reasonable contrary conclusions reached by other courts.[178]

That is, judges use expressions like "controlled" and "governed," but that's just judgely style, not to be taken literally.[179] Judges make the law sound like a coherent narrative or a subtle and scientific evolution, but really they know that other choices remain available. Diversity of opinion about what the law is is not merely "tolerable,"[180] it is the actual and inevitable condition of the law. The Chief Justice's insight about the law is one shared by many observers, but it is not one generally associated with him or with the Justices who tend to vote with him. One cannot help wondering why the Chief Justice chose this occasion to voice skepticism about the coherence of the law.

## D. A Theatrical Analogy

Ronald Dworkin's lawmaking-as-chain-novel image explains Justice Brennan's opinion writing style in *Butler*: he kept a coherent narrative flowing from *Miranda*, to *Edwards*, to *Roberson*, to *Butler*. (The evolution metaphor invoked by Justice Brennan went even further than Dworkin would: it suggests that law is a natural phenomenon to be studied by judge-scientists.) But the Chief Justice openly slighted the coherent narrative approach. Let us shift literary metaphors a bit and compare opinion writing to theater. In this light we may gain some insight into the Chief Justice's motivation.

Traditional theater invites you to look at that stage, allow the proscenium arch to dissolve, and see the illusion of life. Seduced by luxurious sets and actors who seem to become their characters, you suspend your disbelief and witness – reality! The playwright seeks to ease your transition into the state of belief. In the twentieth century, some theorists of the modern theater turned away from the production of illusions.[181] Bertolt Brecht, notably, sought a more direct theater that ***964** deprived the playgoer of the seductions of illusion.[182] Actors should be recognizably actors, recounting their stories like an ordinary person who had witnessed a street scene would tell the gathered crowd what had happened.[183] Brecht drew attention to the staginess of the stage, with its lights and wires and scaffolding. He wanted to prevent you from falling for the usual illusion of theater. He did not want the playgoer to experience the play as a natural event, because he thought that a feeling of alienation would "allow the spectator to criticize constructively from a social point of view."[184] Brecht had distinct and decidedly political goals in mind,

---

178 Id.

179 Id. See also Penry, 492 U.S. at 353 (Scalia, J., dissenting) ("In a system based on precedent and stare decisis, it is the tradition to find each decision 'inherent' in earlier cases (however well concealed its presence might have been), and rarely to replace a previously announced rule with a new one.")

180 See supra text accompanying notes 87-88 (Justice Scalia on "tolerable diversity").

181 It should be noted that Dworkin's novel image refers to the traditional novel and that one could make the same traditional-to-modern analogy even within the novel metaphor.

182 See Bertolt Brecht, *The Street Scene: A Basic Model for Epic Theatre*, in THE THEORY OF THE MODERN STAGE 86 (Eric Bentley ed. 1968).

183 See id. Interestingly, Brecht compares his ideal actor to a witness at trial, recounting the story, and doing so for the specific purpose of allowing the listener to form an opinion about what happened. Id. at 93.

184 Id. at 91.

and letting theatergoers sit back and enjoy their accustomed illusions did not impress him as an effective way to achieve these goals.[185] Like the traditional theater Brecht rejected, written legal decisions represent attempts to convey the illusion that law is a natural and total phenomenon (like evolution).[186] Whatever the judges may realize about the process of judging, they phrase their final product to allow the reader to suspend disbelief.[187] Judicial writing facilitates belief that the rule announced in a case is "dictated" by precedent, a necessary outcome.

Anyone attending a play, even a play that does all it can to reproduce real life, can easily call to mind the fact that it's only a play. The proscenium arch only dissolves because you want it to, for your own benefit, for your own pleasure. Brecht had to act affirmatively to rip that pleasure away from the spectator. Judges are unlikely to leave exposed the judicial equivalent of wires and lights. Like traditional dramatists, they generally apply their writing powers to encourage us to indulge in the pleasures of belief. Most law professors, when they don't want us to believe in what the judges are saying, tend to point to the stray wire left hanging, the ***965** painted set that doesn't quite cover the rear curtain. When they want us to believe, they are more likely to praise the elegant set and to insist that the ladder you could see in the wings was actually part of the play. (Stanley Kowalski was also fixing up his spare room – the set designer's brilliant touch of characterization! Did you ever think about it that way?) Some law professors are like theater companions, who, no matter how perfect the play's illusion of reality, point to the proscenium and the rows of coiffed heads in front of you and repeatedly whisper, "Don't you see? It's only a play! We're sitting here watching a play!" It's no wonder most professors react to Critical Legal Studies by saying something on the order of "Shhh. I'm trying to watch this play."[188]

*Butler v. McKellar* was a startlingly modernist scene in a longrunning and usually highly traditional play we might call "The Unfolding Constitutional Rights of the Criminally Accused." In *Butler*, the author himself, Chief Justice William Rehnquist,[189] wandered onto the stage and announced – essentially – "Of course, you must realize, this is only a play."[190] When Brecht started calling attention to the fact that a play was a play, he had a reason. His intensely political theatrical mission pushed him to deprive his audience of their comfortable oblivion. Though the Chief Justice is often accused of politically-motivated decisionmaking,[191] one would not expect him to use the technique of openly forswearing the usual trappings of judgely reasoning. Quite the opposite, one would expect him carefully to disguise any political motives with the comforting

---

[185] See Bertolt Brecht, *On Experimental Theatre*, in THE THEORY OF THE MODERN STAGE, supra note 182 at 97.

[186] This is essentially the illusion that Dworkin advocates in *Law's Empire*. Dworkin, supra note 15.

[187] For an interesting depiction of the similarity between judges and playwrights, see SEPARATED AT BIRTH? 2: THE SAGA CONTINUES 61 (SPY Magazine ed. 1990) (striking physical resemblance between Louis Brandeis and Samuel Beckett). Brandeis, in the field of federal courts, is most famous for his enthusiastic listing of threshold issues courts can use to avoid reaching the merits of a case: as a federal courts scholar, I keep Ashwander in my computer glossary. Ashwander v. TVA, 297 U.S. 288, 341 (1936) (Brandeis, J., concurring) Beckett's most famous play concerns a couple of characters on the threshold of a long awaited event that never occurs. See Samuel Beckett, WAITING FOR GODOT - A TRAGICOMEDY IN TWO ACTS (2d ed. 1965).

[188] See, e.g., Paul D. Carrington, *Of Law and the River*, 34 J. LEGAL EDUC. 222, 227 (1984).

[189] The Chief Justice, author of this particular scene, is only one of many joint authors of the play, though he has written some of its most disturbing scenes.

[190] I'm paraphrasing. For the verbatim quotation, see supra text accompanying note 178.

[191] See, e.g., David L. Shapiro, *Mr. Justice Rehnquist: A Preliminary View*, 90 HARV.L.REV. 293, 307 (1976).

language of inexorable logic.[192] Why, then, did he embrace the revolutionary technique of calling our attention to the illusionary qualities of judicial decisionmaking? It takes a jarring break from the traditional format to rip us away from our indulgence in belief in the reality of what we perceive, whether it's a play or a legal ***966** decision. And, usually both the author and the audience cooperate in making the play seem real, the case seem true. When Brecht held the unreality of his plays in people's faces, he had his reasons. So we should wonder what reasons drove the Chief Justice to break with tradition. It is a strange comparison: this playwright, who openly expressed revolutionary views, and this judge, who does not hold himself out as political at all, and whom others associate with conservative politics. Why then the striking similarity in cutting through the established, comfortable illusions of art and artful writing?

This break from traditional format, this concession that all of this illusion of reality is mere illusion, means something.[193] The enforcement of rights depends on the belief in the reality of rights. By destroying the faith you can then get away with destroying the rights and even the legitimacy of the rights-making endeavor.[194] Breaking the longstanding faith is a deliberate choice, dependent upon a substantial motivation. The illusion of reality serves the interests of the judges who want to preserve the legitimacy of the judicial role in enforcing and expanding rights. To dispel the illusion is to undermine the power of judges, to undercut the reverence for the rights they create, and to reveal the needlessness of their antidemocratic role.[195] The doctrine established in *Teague* and *Butler* takes federal judges out of the lawmaking process and, on doing so, creates the very real possibility that constitutional rights will enter a state of decline. Describing the lawmaking process as the Chief Justice did in *Butler* alienates opinion readers from their comfortable belief in the integrity of the judicial method and encourages them to "criticize rights constructively from a social point of view"[196] – thus facilitating their decline.

---

[192] One would expect him to reveal the kind of demeanor for which supporters praised Justice Souter during the confirmation process. See Jason DeParle, *Souter Approval Urged by Conservative Groups*, N.Y. TIMES, Aug. 22, 1990, at A20; Robert H. Bork, *At Last an End to Supreme Court Activism*, N.Y. TIMES, Aug. 29, 1990, at A21. By contrast, Robert Bork had held himself aloof and ironic, and did not set up the humble judge illusion. See Ruth Marcus & Joe Pichirallo, *Souter's Life in the Law: Detached Intellect Over Ideology*, WASH. POST, Sept. 10, 1990, at A1 (contrasting Souter's and Bork's styles). But you have to be a good actor to get the part. Did Justice Souter study the Bork audition/judiciary committee hearings for a lesson in how not to act? Bork stepped outside of the appointed role – and got rejected. Perhaps once they have their life tenure, judges may start to indulge in revealing little asides, as did Chief Justice Rehnquist in Butler.

[193] In Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89 (1984), the Court decided to call Ex parte Young, 209 U.S. 123 (1908), a "fiction," to rip away the illusion that violating federal law really does make an agent of the state not the state for Eleventh Amendment purposes. It was done for a reason, the Court essentially says: we draw the line here; we don't care if you can take the theme of this narrative and develop it quite logically in the direction that serves your interests; we just aren't going in that direction, and if we cannot go in our chosen direction by torturing the fiction, we will come out and say "This is only a fiction" and do as we see fit.

[194] See *Symposium, Minority Critiques of the Critical Legal Studies Movement*, 22 HARV.C.R.-C.L.L.REV. 297 (1987).

[195] See William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693, 706 (1976) (appointed federal judges should not "impose on other individuals a rule of conduct that the popularly elected branches of government would not have enacted and the voters have not and would not have embodied in the Constitution. [The notion of a living Constitution] is genuinely corrosive of the fundamental values of our democratic society.").

[196] Brecht, supra note 182, at 91.

# VI. CONCLUSION

What are rights? The two factions on the Court do not even talk about rights in the same way. To Justice Brennan, most notably, the ***967** law is a grand, unfolding evolutionary process, and a judge cannot step outside of that process. Rights are real, alive, part of an integrated whole. Judges may disagree, but they are still bound by an inexorable obligation to adhere to principle and to search for right answers. Judges must work diligently to ascertain what the law is, and federal courts should be available not just to bring the "completely indefensible" or "illogical"[197] state judge into line, but also to ensure precise and constant adherence to the rights that really are.

To Chief Justice Rehnquist and Justice Scalia rights are not specific, precise, knowable things. There is a vague and ambiguous range of possibility. There is "tolerable diversity." If forced to come up with a specific, precise answer to a constitutional question, the Justices can perform the task, and their answer will become the supreme law. But they seem to feel no pressure to get to that answer and certainly they do not feel pressure to ensure that federal lower courts stand ever ready in every criminal case to supply a federal answer to every federal question. There is a special value to a Supreme Court answer, for it efficiently settles the law for all,[198] but there is no reason for a lower federal court to replace the state court's answer with its own. Indeed, such federal involvement is a detriment, because it adds a second case where one will do. The only reason for habeas corpus then, is to make sure that state courts comply with the federal law that the Supreme Court has fixed. Habeas doctrine need only control the renegade state judge who flouts federal law. The diligent state judge, who acts in good faith and thus deserves no interference, can be left alone. As long as the state judge keeps within reasonable bounds, the painstaking duplication of habeas can give way to a system of striking, if not chilling, efficiency-unburdening the federal courts, speeding up the administration of state criminal law, and expediting the death penalty.[199]

If one shares Justice Brennan's vision of the law, the majority's jurisdictional choices are easy to condemn. But if one lacks his faith in the continuity and integrity of the law, the majority's position becomes much harder to dismiss. The Chief Justice and Justice Scalia describe the law realistically and strip away the illusions encouraged ***968** by opinion-writing conventions. That description is highly compelling. But accepting their realistic picture and forfeiting comfortable, traditional illusions need not lead us inevitably to the jurisdictional choices of "tolerable diversity."

---

[197] Butler, 110 S.Ct. at 1222 (Brennan, J., dissenting).

[198] See Scalia, supra note 87, at 1177.

[199] The Court has continued in its tendency to restrict habeas corpus in other ways. After the 1989 Term's emphasis on the development of new law at the habeas stage, the Court turned its attention in the 1990 Term to doctrine relating to procedural default. See Ylst v. Nunnemaker, 111 S.Ct. 2590 (1991) (presuming that a state procedural bar underlay an unexplained order, thus making it unreviewable on habeas, despite earlier precedent presuming that an ambiguous state opinion was on the merits and thus reviewable); Coleman v. Thompson, 111 S.Ct. 2546 (explicitly overruling Fay v. Noia, 372 U.S. 391 (1963), and requiring a petitioner who has procedurally defaulted on appeal to show cause and prejudice or fundamental miscarriage of justice); McCleskey v. Zant, 111 S.Ct. 1454 (1991) (extending "cause and prejudice" analysis to question whether filing a second or subsequent petition is "abuse of the writ" within the meaning of 28 U.S.C. § 2244, Rule 9(b)).

If rights are as Justice Brennan described them, real, knowable things, it might make sense to say if only a judge has a high enough level of technical skill and diligently strives in good faith to ascertain what their rights are. One could then rehearse the parity debate and decide whether or not state judges can perform the lawmaking task adequately. But if rights are as the Chief Justice and Justice Scalia describe them, vague and changeable devices, then the context in which they are defined becomes intensely important. The social and political pressures on state judges and the complex and conflicting concerns interwoven in the criminal trial setting must dramatically affect what rights emerge. By eliminating the federal court's contribution to the dialogue, the Court has shaped a lawmaking context that will tend to narrow rights. This is a specific and deliberate decision that stands apart from the realization that the context affects what the law becomes. Seeing this distinction, one can accept the justices' realistic, illusion-dispelling depiction of rights and still decline to tolerate diversity that comes in the form of second-rate treatment for criminal defendants.