Categorical and Individualized Rights-Ordering on Federal Habeas Corpus

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When courts talk about whether to upset a state prisoner's criminal conviction, any consideration beyond the guilt of the defendant begins to sound like makeweight. This applies not only to defenders' favorite soft variables—dignity, privacy, and adversarialness—but prosecutors' also—federalism, inter-court friction, and finality—as well as to those soft variables both sides share—deterrence, timeliness, and procedural regularity. A prisoner is substantively guilty when the evidence shows that she committed the crime for which she is being punished. The court's concern is with the unexcused, unjustified, not-inadvertent conduct for which the prisoner was arrested, not with the actions of her captors, prosecutors, judges, or attorneys. But, unless the defendant pleads guilty, substantive guilt is not enough to support a conviction. For that, courts also require

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1. See Arnold H. Loewy, The Fourth Amendment as a Device for Protecting the Innocent, 81 Mich. L. Rev. 1229, 1268 n.177 (1983) ("Preservation of judicial integrity, if not entirely out of judicial favor, is little more than a makeweight argument.").


legal guilt, which is substantive guilt "demonstrated in a forum, the criminal trial, that has the competence and inclination to apply factual guilt defeating doctrines that protect the accused and the integrity of the process."4

If the state trial forum fails in that role and that failure contributes to the verdict or involves one of those exotic rights whose violation is never forgivable, state appellate courts will order the process re-done.5 If the state appellate courts rule against the defendant, she can present her federal constitutional claims to a federal district judge, who, in deciding whether to grant a petition for habeas corpus,6 acts very much like an appellate court.7 The redundancy of process excites a range of questions: What are state prisoners doing in federal court? Why doesn't res judicata apply? What about the prisoner who failed to preserve her claim, or argues that the law has changed in her favor since her conviction, or presses for a change now?8

In answering these questions, no one argues that a prisoner should be allowed "to retry the issue of [her] guilt on each day of [her] confinement."8 Nor is there much lobbying for giving up altogether on the "cumbersome adversarial determination of guilt at trial" in favor of "the informal, ex parte, administrative factfinding of the police and prosecutor."9 In their place, the Supreme Court and legal commentators have proposed less catastrophic choices. On the left end of the spectrum is the giddy optimism of Brown v Allen's habeas-for-everyone;10 on the

9. Arenella, supra note 3, at 210 (citing PACKER, supra note 4, at 160, 162).
11. See Brown v Allen, 344 U.S. 443, 485 (1953) (any claim of constitutional deprivation is within reach of writ of habeas corpus).
right, the "epistemological skepticism" of curtain-closing naysayers, who see one reasoned resolution in a court of competent jurisdiction—which could be the state trial court—as all the process that is due.12

The mainstream conception of habeas is somewhere in between. Some redundancy in criminal cases is a given, even for those who push for court-initiated appeals.13 Despite the special status of criminal cases, our system of party-initiated review, with its endless reruns and lack of meaningful laches, "is deficient as a process."14 Yet, if some limits on access to review are as necessary and evil a part of federal review of state convictions as negotiated guilty pleas are of the right to trial by jury,15 then how much is "some"?

To limit access to review and raise the obstacles to relief when review is granted, the Court calls some rights core,16 which means "important," and some "prophylactic,"17 which means "not important." Likewise, a "personal trial right"18 is good, but a "judicially created remedy"19 is bad. "Structural" rights are more important than those


13. See Harlon L. Dalton, Taking the Right to Appeal (More or Less) Seriously, 95 Yale L.J. 62, 102 (1985) ("Before it officially stigmatizes a citizen as standing outside the law and as deserving of society's condemnation, the state must satisfy itself several times over that such a judgment is warranted.").


15. We need plea bargaining because providing jury trials for all defendants who wish to contest their guilt is too expensive. See Arenella, supra note 3, at 220 (quoting Lloyd L. Weinreb, Denial of Justice: Criminal Process in the United States 82 (1977) ("We can offer a trial to all only if few accept the offer."); see also Keeney v. Tamayo-Reyes, 112 S. Ct. 1715, 1718 (1992) (relitigation in federal court "places a heavy burden on scarce judicial resources"). Not everyone agrees that limits on habeas review are necessary. See Yackle, supra note 4, at 704-05 (number of petitions increased by 36% between 1978 and 1987, but prison population increased by 94%).


involving the "presentation of the case to the jury." 20  Old rules, 21 issues of law, 22 and strict liability 23 trump new rules, 24 issues of fact, 25 and errors requiring some level of governmental culpability 26. Finally, claims that assert a defendant's "actual innocence," 27 particularly when "individualized" 28 rather than categorical, 29 are best of all.

Individualized claims ask whether the defendant is substantively innocent, not whether she is the victim of constitutional error at the investigative, proof, or appellate stages of her case. Under an individualized approach, what the defendant did to get arrested is more important than what the government did to catch and convict her. Categorical claims, conversely, focus on the claim, not on the defendant's putatively criminal act. The consequences of constitutional error under a categorical approach depend not on the strength of the untainted portion of the State's case, but on whether police, counsel, and the court obeyed constitutional norms.

This Article criticizes the Supreme Court's treatment of both individualized and categorical bases of relief on federal habeas corpus. Part I notes the Court's trend toward trimming the process that is due in criminal and prisoner litigation generally. This trend may explain the drop in process on habeas as well, but generally declining process cannot explain which rights, if any, should survive the decline. That would require our weighting, if not reconciling, accuracy and dignitary norms, which is the subject of Part II. In Part II, I examine Withrow v. Williams, 30 a case from the Court's 1992 Term, which, for reasons that are not altogether

clear, preserved federal habeas review of state prisoners' claims that their confessions violated the familiar *Miranda* rules.\(^{31}\)

Part III tracks the Court's last three decades of rights-ordering on habeas corpus. From 1965, when the Court began the ongoing struggle with the concept of retroactivity,\(^{32}\) through the evolving and ubiquitous raise-or-waive and harmless error doctrines, the Court's search for accurate verdicts has made an unconvincing case for treating some rights better than others. Indeed, next to the five other habeas cases argued in the 1992 Term, the *Withrow* case looks comparatively thoughtful and "Supreme."\(^{33}\) Ultimately, *Withrow* shows that barring the federal courthouse door to any constitutional right is far from light work, especially as long as procedure seeks to promote competing ideals like dignity, accuracy, and procedural regularity. But to say that reconciling competing values is difficult is not to say that the Court's attempts at doing so have been good. Rather, the Court continually treats some claims and claimants as superior to others for reasons that lack adequate explanation.

This Article concludes that if too many prisoners sue for their freedom, then categorical decisions of inclusion and exclusion of classes of claims would be a more principled form of winnowing out undeserving claims than that which the current, individualized regime provides. To be sure, ordering rights so as to bar some rights from federal review would be difficult—difficult enough that I make no attempt to answer how to select rights for sacrifice, other than by recognizing, as others have, that some out-of-the-courthouse executive behavior might be adequately redressed without

\(^{31}\) *See* *Miranda v Arizona*, 384 U.S. 436, 478-79 (1966) (statements taken in setting of custodial interrogation not preceded by warnings and valid waiver of rights to silence and to counsel are presumed to be compelled and thus inadmissible).

\(^{32}\) *See* Linkletter v Walker, 381 U.S. 618, 622-29, 636-40 (1965); *see also* Teague v Lane, 489 U.S. 288, 299-316 (1989) (plurality opinion).

\(^{33}\) Collectively, those cases tolerated misleading jury instructions issued at the guilt, *see* Gilmore v Taylor, 113 S. Ct. 2112, 2117-19 (1993), and penalty, *see* Graham v Collins, 113 S. Ct. 892, 903 (1993), phases of criminal trials, redefined ineffective counsel in a manner stingy enough to distort accuracy, *see* Lockhart v Fretwell, 113 S. Ct. 838, 842-44 (1993), and reviewed the impact of constitutional trial error under a standard previously reserved for nonconstitutional error, *see* Brecht v Abrahamson, 113 S. Ct. 1710, 1721-22 (1993). Each mentioned the importance of accurate verdicts, but that commitment never rose above the blurbish (e.g., one sentence in a 32 page case), *see* Graham, 113 S. Ct. at 903, and the smug (e.g., the unconstitutionality of executing the innocent has "elemental appeal"), *see* Herrera v Collins, 113 S. Ct. 853, 859 (1993).
the habeas remedy \(^{34}\) What matters more is that those hard choices, if made, could vindicate more prisoners than does the Court’s increasingly individualized approach to the review of criminal convictions and sentences, an approach that too rarely forms the basis of a prisoner’s release from custody \(^{35}\)

I. Rights-Ordering and the Declining Value of Process

The Court’s articulation of criminal defendants’ postconviction remedies\(^{36}\) looks like a sort of triage,\(^{37}\) likely designed to give states their due and to preserve limited federal resources for those most deserving.\(^{38}\)

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34. So long as in-court consequences are to influence out-of-court actors, the spectre of alternative remedies will continue to haunt those rights in their quest for full respect at trial and thereafter:

We recognize the perils of trying to categorize rights as either promoting fair and accurate adjudication or remedying out-of-court conduct. Yet we see no alternative to drawing that distinction in this context, and can think of no better way to frame the question than to ask whether the judicial conduct in question would compromise the fundamental fairness of the trial and thereby deprive the defendant of due process of law. In borderline cases, this question will have no clearly correct answer.


35. See infra notes 73, 283 and accompanying text.


38. Defendants themselves have reason to endorse triage as well, if only to give the limited Article III resource the time to approach criminal cases carefully enough to counter prosecutors’ strong-party advantages. See Gilbert S. Merritt, The Decision Making Process in Federal Courts of Appeals, 51 Ohio St. L.J. 1385, 1394-95 (1990) (deference to authority
Yet, rarely does the Court declare right \( A \) to be more important than right \( B \); indeed, the Court goes out of its way to do quite the opposite:

We here stress that the choice between retroactivity and nonretroactivity in no way turns on the value of the constitutional guarantee involved. The right to be represented by counsel at trial has been described as "by far the most pervasive [of] all of the rights that an accused person has." Yet Justice Brandeis even more boldly characterized the immunity from unjustifiable intrusions upon privacy, which was denied retroactive enforcement in \( \text{Linkletter} \), as "the right most valued by civilized men." We do not disparage a constitutional guarantee in any manner by declining to apply it retroactively.

This passage, written by Chief Justice Warren, seems uneasy about its norm-ducking explanation, and for good reason: A system that treats some rights more deferentially than others is necessarily evaluative; here, by saying some rights command retrospective application while others do not.

But ordering rights is a fact of constitutional litigation. Even those who oppose rights-ordering "envision something other than a featureless plane of undifferentiated rights" where, for example, the Second and Tenth Amendments are considered just as important as the First and Fourteenth.

of state who is party to suit against individual and "[t]he need for haste may make [a] court search for 'safe' rather than just decisions and may push the process toward ritual rather than reflection").

39. Compare \( \text{Withrow v Williams, 113 S. Ct. 1745, 1767 (1993) (Scalia, J., dissenting)} \) (denying that his approach to habeas deems some claims "particularly worthless"); \( \text{with Brecht v Abrahamson, 113 S. Ct. 1710, 1728 (1993) (White, J., dissenting)} \) ("Our habeas jurisprudence is a confused patchwork in which different constitutional rights are treated according to their status, and in which the same constitutional right is treated differently depending on whether its vindication is sought on direct or collateral review").


41. \( \text{Cf. James B. Haddad, "Retroactivity Should Be Rethought": A Call for the End of the Linkletter Doctrine, 60 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 417, 433 (1969) ("[O]nce it has been decided that some constitutional rights will be treated differently from others in that only some will receive retrospective application, no better distinction exists than one based upon the reliability function of the various constitutional safeguards.").} \)

42. \( \text{John C. Jeffries, Jr. & William J. Stuntz, Ineffective Assistance and Procedural Default in Federal Habeas Corpus, 57 U. CHI. L. REV 679, 706-07 (1990); cf. Fallon & Meltzer, supra note 34, at 1808-09 n.425 ("limited differentiation is appropriate").} \)
the Constitution and Congress do not authorize a hierarchy of rights, they do not prohibit one. Accordingly, some ordering is likely valid, even if unwieldy or unwise. The hierarchy of rights could begin with the substantive criminal law, which is concerned with prevention, control, and deserts. But because predicting dangerousness and influencing would-be criminals' conduct through the criminal law are entirely speculative, coupled with the fact that even strict retributivists would stack the deck in favor of false acquittals, and because the criminal law entails governmental protection from private actors rather than from the government itself, the criminal law's justifications offer our hierarchy little guidance. The shape of the hierarchy becomes clearer when we consider the procedural goals for enforcing substantive norms.

For the past two decades, the High Court has emphasized the need for accurate verdicts. For the Court's critics, there are more important goals, such as preventing unjust punishment (even in investigatory practices) and competing, noninstrumentalist goals like participation and equality. Accuracy is important under any view, but the Court has yet to come up with a coherent, accuracy- or result-based theory of criminal procedure.


45. But cf. Seidman, supra note 2, at 441, 497-501 (Burger Court's main goals of crime prevention and control explain its obsession with procedural regularity).


47. Cf. Barry Friedman, Habeas and Hubris, 45 VAND. L. REv 797, 816 (1992) ("[A]n innocence approach finds no support in the [habeas] statute, and its only historical pedigree is a 21-year-old law review article.").


49. Arenella, supra note 3, at 201.

50. See Seidman, supra note 2, at 459-83; Tom Stacy, The Search for the Truth in Constitutional Criminal Procedure, 91 COLUM. L. REv 1369 (1991); cf. Robert M. Cover
Some rights contribute more than others to accurate verdicts; plus, values other than accuracy also matter, even though finding which of those is captured by any given set of facts is a tortuous task. If the most respected rights in criminal cases must "seriously" enhance accuracy or make accuracy their "major purpose," and it is hard to see why we would require so much, we must try carefully to isolate that aspect of the right from, or reconcile it with, other values that the right promotes. This sounds hard, and it is; thus the paucity of categorical rules that claim to do so.

With an emphasis on the importance of accurate verdicts, the Court does not deny that all criminal defendants are entitled to fundamental fairness, but the Court does suggest that the "fundamental" part of fairness is nearly, if not fully, realized. Consider, for example, the validity of a waiver of the rights to silence and to counsel obtained from a suspect who, after requesting counsel, met with counsel and, following a fresh set of Miranda warnings, confessed. Whatever we may think of the

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51. See Fallon & Meltzer, supra note 34, at 1775-76 n.233 ("Even if the core constitutional values that underlie Miranda could be identified with precision, it frequently would be impossible to make tolerably accurate judgments about their implication in individual cases.").


54. See infra notes 174-211 and accompanying text.

55. See Erwin Chemerinsky, Thinking About Habeas Corpus, 37 Case W Res. L. Rev. 748, 788 (1986-87) ("[R]ight to a speedy trial, protection against unreasonable bail, and the prohibition against cruel and unusual punishments serve values other than accurate determination of guilt or innocence."); Fallon & Meltzer, supra note 34, at 1774 n.231 (courts are obliged to recognize rights that protect dignitary or other interests unrelated to accuracy).


57. See Friedman, supra note 47, at 820-30.

58. See Minnick v Mississippi, 498 U.S. 146, 148-49 (1990); cf. Solem v Stumes, 465 U.S. 638, 654 (1984) (Powell, J., concurring) (per se rule later ratified in Minnick "is not a rule necessary to assure fundamental fairness").
police in that case, certainly that confession poses a closer call than confessions obtained by whipping, burning, or torture,\textsuperscript{59} or capital convictions of uncounselled, Negro youths.\textsuperscript{60} In fact, the gap between the conspicuous and fringe violations of fundamental fairness\textsuperscript{61} may be responsible in part for the Court's increasing willingness to forgive constitutional violations committed by "reasonable" government officials.\textsuperscript{62} Now constables must flout, not just blunder, before error will lie.\textsuperscript{63} That, in turn, gives us less to talk about at later stages of review.

Federal habeas review of criminal convictions has changed profoundly since the "Utopian"\textsuperscript{64} approach associated with bombshells like \textit{Brown v Allen}\textsuperscript{65} and \textit{Fay v Noia},\textsuperscript{66} whose user-friendly habeas has become a

\begin{footnotesize}
\begin{enumerate}
\item See \textit{Brown v Mississippi}, 297 U.S. 278, 281-83 (1936).
\item See \textit{Powell v Alabama}, 287 U.S. 45, 49 (1932).
\item See \textsc{Peter H. Schuck}, \textsc{Suing Government} at xix (1983) (noting examples of official misbehavior). For example, when
\begin{quote}
[p]olice officers use firearms unnecessarily to apprehend fleeing burglars[,] [s]uch illegality is usually caused by honest error, simple neglect, excessive zeal, poor judgment, unconscious bias, legal uncertainty, deficient execution, and inadequate training or supervision. It tends to be more routinized and repetitive, more deeply embedded in the standard operating procedures and adaptations of public office, than the illegality in \textit{Monroe v. Pape} or Watergate. [These practices] may come to be seen as inseparable from the intractable operating realities of government, necessary evils of our public life.
\end{quote}
\textit{Id.}, see also \textsc{Graham v. Collins}, 113 S. Ct. 892, 915 (1993) (Thomas, J., concurring) (mitigating factors sweep ridiculously far if they encompass "antisocial personality").
\item See \textsc{Ann Woolhandler}, \textsc{Demodeling Habeas}, 45 STAN. L. REV 575, 637-38 (1993) (referring to Court's "reasonableness juggernaut"); see also \textsc{Michigan v Tucker}, 417 U.S. 433, 447 (1974) ("The deterrent purpose of the exclusionary rule assumes that the police have engaged in willful, or at the very least negligent, conduct which has deprived the defendant of some right. Where the official action was pursued in complete good faith, the deterrence rationale loses much of its force.").
\item See \textsc{Yale Kamisar}, \textsc{Remembering the "Old World" of Criminal Procedure: A Reply to Professor Grano}, 23 U. MICH. J.L. REF 537, 555 (1990).
\item \textsc{Cover & Aleinikoff}, \textit{supra} note 50, at 1049-51.
\item 344 U.S. 443 (1953).
\item 372 U.S. 391 (1963).
\end{enumerate}
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In its place is a pragmatic system of "ad hoc structures upon egregious behavior by presumptively legitimate authority." "Egregious" refers to those violations which can completely abort the adversarial process through mob-dominated trials, crooked judges, and other narrowly defined instances of "inexcusable inequity." For some, like the second Justice Harlan, curtailing the habeas corpus remedy was a way to "limit the impact of constitutional decisions which seemed profoundly unsound in principle." For Chief Justice Rehnquist, it reflects "a presumption of finality and legality [that] attaches to the conviction and sentence" after trial and appeal, to which the "secondary and limited" function of habeas is subject.

The trend toward narrow readings of rights and remedies simply may be a product of the Court's hostility toward prisoner suits, which at their worst are court-clogging forms of recreation for the incarcerated. Almost all state prisoners lose in the Supreme Court; some are put to death. No one seriously disputes that the heyday of liberty- and rights-based concep-

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68. Cover & Alemikoff, supra note 50, at 1050.


70. Mackey v United States, 401 U.S. 667, 701 (1971) (Harlan, J., dissenting in part); see Yale L. Rosenberg, Kaddish for Federal Habeas Corpus, 59 GEO. WASH. L. REV 362, 376 (1991) (recent habeas decisions capture "the popular sentiment that the accused in a criminal case is entitled to freedom only if he is innocent and has had the hell beaten out of him").

71. Desist v United States, 394 U.S. 244, 258 (1969) (Harlan, J., dissenting); see 3 WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE § 27 4, at 335 n.27 (1984) (Fay may have contributed to non-retroactivity and harmless error doctrines). But see Jenkins v Delaware, 395 U.S. 213, 222 (1969) (Harlan, J., dissenting) ("As one who has never agreed with the Miranda case ..., I now find myself in the uncomfortable position of having to dissent from a holding which actually serves to curtail the impact of that decision.").


73. See Wechsler, supra note 67, at 181 ("[O]nly fragmentary data are available [But] Professor Paul Robinson's [study of] the Seventh Circuit indicate[s] a rate of success somewhat in excess of three percent of all petitions.").
tions of habeas corpus, 74 now considered "profoundly wrong," 75 is over. Under jarringly pessimistic standards, term-by-term the "new habeas" 76 gives full review to fewer and fewer claims. The Court has shut down federal review of state court transgressions of that "right most valued by civilized men" 77 and is quick to bind prisoners to their attorneys' mistakes. 78 A majority of the Court apparently thinks that habeas is bad. 79

Habeas certainly has become a "confused patchwork" 80 of "petty procedural barriers" 81 supported by a "vacuum of rhetoric about federalism" 82 designed to privilege rules of preclusion over the "meager benefits"

74. See, e.g., Smith v. Murray, 477 U.S. 527, 543-44 (1986) (Stevens, J., dissenting) ("Today, the Court leaves to one side the question whether constitutional rights have been preserved, and considers only petitioner's innocence or guilt."); Fay v Noia, 372 U.S. 391, 424 (1963) ("manifest policy" to protect "federal constitutional rights of personal liberty" makes redundancy necessary); Moore v Dempsey, 261 U.S. 86, 87 (1923) (what matters "is not the petitioners' innocence or guilt but whether their constitutional rights have been preserved").


76. See Patchel, supra note 37, at 941-43 (Court's "new habeas" has removed state criminal justice from federal supervision).


78. See Coleman v. Thompson, 111 S. Ct. 2546, 2566-67 (1991) (basic agency principles apply); Reed v. Ross, 468 U.S. 1, 13 (1984) ("[A]bsent exceptional circumstances, a defendant is bound by the tactical decisions of competent counsel.").

79. See Herrera v Collins, 113 S. Ct. 853, 881 (1993) (Blackmun, J., dissenting) (majority believes "habeas relief should be denied whenever possible").


81. Coleman, 111 S. Ct. at 2569 (Blackmun, J., dissenting); Murray v Carner, 477 U.S. 478, 501 (1986) (Stevens, J., concurring) (quoting Hensley v. Municipal Court, 411 U.S. 345, 350 (1973)) (Court's default doctrine threatens to "suffocate the writ in stifling formualisms or hobble its effectiveness with the manacles of arcane and scholastic procedural requirements"); Judith Resnik, Tiers, 57 S. CAL. L. REV 840, 874 (1984) (habeas is "a law of closure that preclude[s] adjudication on the merits").

82. Coleman, 111 S. Ct. at 2572 (Blackmun, J., dissenting); cf. Stone v. Powell, 428 U.S. 465, 522-23 (1976) (Brennan, J., dissenting) ("[E]ffective utilization of scarce judicial resources, finality principles, federal-state friction, and notions of 'federalism' carry no more force with respect to non- 'guilt-related' constitutional claims than they do with respect to claims that affect the accuracy of the fact-finding process.").
of relitigation. Those benefits sometimes accrue "years after trial" when exclusion or reversal can "strike like lightning" without adequate justification. Obvious[ly] exasperat[ed] with the breadth of substantive federal habeas doctrine, the Court claims to reject "the proposition that denying relief whenever possible is an unalloyed good" and even calls, although with a "resounding hollowness," for "restraint" and "caution" in this area.

When viewed in light of the generally sagging value of process, including a renewed forgiveness of ad hoc official illegality, the new habeas appears to follow naturally. Process is playing an increasingly instrumental, accuracy-oriented role in federal constitutional law; habeas is simply playing along. For example, in civil due process cases involving some nonfundamental liberty and property rights, a plaintiff must show governmental mens rea and a post-hoc failure to deliver a remedy (although no remedy at all can be adequate), and the plaintiff is not entitled to presumed damages. If a litigant's participation in potentially adverse legal processes lacks inherent value, and remedies for clear-cut
wrongs are regularly denied, then the Court’s disdain for federal court relitigation of state court criminal processes should come as no surprise.

Then again, civil procedural due process rights may be more susceptible to an instrumentalist analysis than are criminal cases, where the concern is with substantive, conscience-shocking state action. Civil litigants may not deserve the higher order entitlements that criminal defendants get, given both the fundamental nature of the defendant’s liberty or life interest and the fact that even the fairest predeprivation hearing could not authorize the government conduct in question. But most of these higher order process rights are themselves derivative of selective incorporation cases, whose conception of fundamental fairness has little to recommend them. Thus, while a criminal defendant’s claim to trial or appellate process for process’s sake may be stronger than that of a prisoner who sues over a $23.50 lost hobby kit, even criminal due process enjoins only government action that offends "hardened sensibilities."

Cutbacks on the process due in criminal and prisoner cases no doubt have insulated more governmental conduct from challenge. And not all of those changes have been articulated or defended adequately. Specifically,

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95. Fallon & Meltzer, supra note 34, at 1784-85 (officer and governmental immunity "depart decisively from the notion that the Constitution requires effective remedies for all victims of constitutional violations").


97 Cf. Larry Alexander, Constitutional Torts, the Supreme Court, and the Law of Noncontradiction: An Essay on Zinermon v. Burch, 87 Nw. U. L. Rev 576, 588 (1993) (substantive due process "forbids government to deprive persons of life, liberty, and property for certain reasons that the clause deems inadequate—either because those reasons are not sufficiently compelling given the interest at stake, or because they are illegitimate or not reasons at all").

98. See Dripps, supra note 44, at 601 (referring to doctrine of selective incorporation as "intellectual landfill").

99 See Parratt v. Taylor, 451 U.S. 527, 529 (1981). The criminal and prisoner cases are more similar than we often admit. See Alexander, supra note 97, at 588-89 (courts mischaracterize claims as procedural due process when there is "no claim by the plaintiffs that their losses would have been justified had only they been preceded by a hearing"); Woolhandler, supra note 62, at 642 nn.392-95.

100. Rochin, 342 U.S. at 172.
the Court's strong preference for individualized rather than categorical standards of review makes little sense in light of the function of appellate and habeas review. Moreover, even when the Court does resort to categorical standards, the standards are either too stingy or too permissive to reflect a principled system of rights-ordering.

II. Withrow v Williams: Accuracy and Other Values

*Withrow v Williams*¹⁰¹ illustrates an overly permissive approach to a categorical, as opposed to an individualized, system of rights-ordering. *Withrow* addresses the *Miranda* rights, which require police to obtain a suspect's permission before interrogating her while she is in custody lest her statements be deemed inadmissible at trial.¹⁰² In *Withrow*, a 5-4 Court declined to "Stone" *Miranda*; that is, the Court refused to deny relief to any habeas petitioner who had a chance to litigate her *Miranda* claim in state court.¹⁰³ Along the way, the Court emphasized *Miranda*'s contribution to accurate verdicts and the wide range of dignitary norms that *Miranda* protects.¹⁰⁴ *Withrow* is a clear and high example of why a categorical approach to rights-ordering on federal habeas corpus is exceedingly difficult.

*Stone* is *Stone v Powell*,¹⁰⁵ which gave state courts the last word on federal search and seizure law.¹⁰⁶ Authored by Justice Powell, *Stone* betrayed a profound distrust for the exclusionary rule and federal review of state proceedings. When asked several times after *Stone* to extend *Stone*’s reasoning to rights healthier than the Fourth Amendment exclusion-

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106. Anyone who was afforded a full and fair opportunity to litigate her Fourth Amendment claim in the state courts is barred from obtaining federal habeas relief. *Stone v Powell*, 428 U.S. 465, 494 (1976).
ary rule, the Court refused to make state court rulings res judicata, even on matters unrelated to substantive guilt.

Stone depends entirely on the Court's still-unsubstantiated claim that review of a criminal trial—that "decisive and portentous event"—diminishes severely and steadily in value after judgment. If "significant institutional problems" prevent federal courts from acting like postconviction triers of fact, the argument runs, little is gained by asking those courts to relitigate more claims (some of them unpreserved for review), or to backdate more new rules, just to get to the merits of disputes they cannot competently decide. Under an accuracy-centered view of habeas, therefore, a habeas court's primary mission exploits its greatest weakness: deciding out of context what a defendant really did.

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109. Wainwright v Sykes, 433 U.S. 72, 90 (1977) ("state trial on the merits is the 'main event,' rather than a 'tryout on the road' for what will later be the determinative federal habeas hearing."); see Engle v Isaac, 456 U.S. 107, 127 (1982) ("Liberal allowance of the writ degrades the prominence of the trial ").

110. Stone, 428 U.S. at 493.


112. See Cover & Alemikoff, supra note 50, at 1052 ("The guilt, innocence, or dangerousness of the defendant can rarely be the object of focused inquiry in federal court."); Friedman, supra note 7, at 320-21 ("One of the best supported and least controverted principles of habeas is that it is not to serve as a retrial of the prisoner."); id. at 321 (citing Stacy & Dayton, supra note 43, at 93-94) (appellate courts are being asked to "resolve questions of actual innocence or prejudice, a task to which they are ill-suited"); Patchel, supra note 37, at 971 ("[H]ow does a federal district court on habeas, let alone the Supreme Court on certiorari review, determine the factual innocence of a petitioner who has been found guilty beyond a reasonable doubt by a jury of her peers?"); see also Barbara A. Babcock, Introduction: Taking the Stand, 35 WM. & MARY L. REV 1, 10-11 (1993) ("The idea of the trial as a one-time event, defying accurate reconstruction, is not unfamiliar to a Court which has reshaped federal habeas corpus in that image.").

113. Cf. Ann Althouse, Saying What Rights Are—In and Out of Context, 1991 WIS. L. REV 929, 939 ("If context is good, state judges have more of it. On the other hand, if rights are good, perhaps context is dangerous.").
Together, the primacy of accuracy and institutional incompetency support any argument in favor of limiting habeas review. Nonetheless, Withrow illustrates that Stone’s limit on review will not extend beyond the Fourth Amendment exclusionary rule. In Withrow, Robert Allen Williams, Jr. was arrested and questioned three times while in custody during an investigation of a double murder in Romulus, Michigan. Only the first session’s un-Mirandized statements were admitted in Williams’s bench trial. Williams was convicted, and his appeal was unsuccessful. After a federal district judge granted Williams relief on habeas, the United States Court of Appeals for the Sixth Circuit and the Supreme Court affirmed, rejecting the State’s argument that the Michigan

114. The purported weaknesses of habeas corpus go beyond its deficiency as a vehicle for determining substantive guilt. Epistemological skeptics reject any error-correction value of the review of criminal convictions. See Seidman, supra note 2, at 458 (citing Bator, supra note 12, at 463-99). But cf. Barclay v Florida, 463 U.S. 939, 988 (1983) (Marshall, J., dissenting) (“If appellate review is to be meaningful, it must fulfill its basic historic function of correcting error in the trial court proceedings.”). Yet skeptics ignore that the value of investing in knowing what may be unknowable also is unknowable. That added uncertainty should tip the scale in favor of review once we account for the aspirational value of review, which is knowable. Thus, I agree that Justice Powell’s marriage of the familiar work of Professor Paul Bator, see generally Bator, supra note 12 (doubling error-correction value of review), with that of Judge Henry Friendly, see generally Henry J. Friendly, Is Innocence Irrelevant? Collateral Attack on Criminal Judgments, 38 U. Chi. L. Rev. 142 (1970) (reserving review for substantive innocence), was a mismatch. See Stone v. Powell, 428 U.S. 465, 486-87 (1976) (doubling error-correction value of review except for claims that go to substantive innocence); see also Patchel, supra note 37, at 970 (“[T]he innocence standard demeans the importance of process by suggesting that, although a prisoner has been found guilty beyond a reasonable doubt after a process that the Court considers adequate, the prisoner still can prove her innocence.”); Seidman, supra note 2, at 456-59 (“Whereas Judge Friendly wishes to limit habeas to questions of ultimate fact, Professor Bator wishes to limit habeas because questions of ultimate fact are ultimately unanswerable.”). Particularly, it is Bator’s exaggerated skepticism about the value of review of legal or so-called “mixed” questions, not Friendly’s concern solely for the substantively innocent, that doomed Powell’s crusade to give states the final word on more constitutional questions. See Seidman, supra note 2, at 459 n.133; cf. Yackle, supra note 4, at 713-14 (the only way to test error-correction value of federal habeas is to “observe the state courts operating without the federal district courts waiting in the wings”).


116. Id. at 1749.

117 Id.
courts' rulings on Williams's *Miranda* claim should preclude their reconsideration in a federal habeas court.  

Justice Souter's majority opinion retained federal review in part because *Miranda*, while overbroad and prophylactic, protects a "fundamental trial right"119 connected at some level to "the correct ascertainment of guilt."120 Justice O'Connor, joined by Chief Justice Rehnquist, objected to every line of Souter's opinion, except Souter's description of *Miranda* as "prophylactic." Unlike the Fifth Amendment that it protects, she observed, *Miranda* excludes some truly voluntary statements, so *Miranda* must be something less than a fundamental trial right.121 Consequently, as with the exclusion of reliable evidence at issue in *Stone*, *Miranda* is "at war," potentially "intolerabil[y]," with "the quest for truth."122

As is customary, both sides cited "deterrence" for contrary propositions. Each recognized law enforcement’s general compliance with *Miranda*, but disagreed over whether federal review was (Justice Souter) or was not (Justice O'Connor) necessary to maintain compliance. Given that deterrence, without more, is no more a reason to grant or deny relief than are federalism, finality, and friction (I have yet to hear of a constitutional violation that we do not want to deter), these were appropriately the least spirited and least important portions of Souter's and O'Connor's opinions.

Finally and "most importantly," even if *Miranda* claims were barred from the front door of habeas review because most involve involuntary statements, Justice Souter was convinced that these claims "would simply be recast" as due process claims and thus would sneak in the back doors of federal courthouses and bring with them inquiries more subjective and cumbersome than *Miranda*’s.123 Justice O'Connor rejected this "pragmatic" assessment of *Miranda* claims.124 O'Connor found voluntary-but-

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118. Id.
119 Id. at 1753 (quoting United States v Verdugo-Urquidez, 494 U.S. 259, 264 (1990)).
120. Id.
121. Id. at 1760-62 (O'Connor, J., dissenting in part).
122. Id. at 1762 (O'Connor, J., dissenting in part).
123. Id. at 1754.
124. Id. at 1762 (O'Connor, J., dissenting in part).
improperly-taken confessions far less unusual and the question of voluntari-
ness much easier to adjudicate than did Souter, who in her view overlooked
that Miranda "creates as many close questions as it resolves."125

Justices Souter and O'Connor had much more to say about Miranda than they did about Stone. Not so with Justice Scalia who, joined by Justice Thomas, dissented. Scalia, who thinks Stone was a great idea, said that it was time that Stone reached not only Miranda, but other claims not crucial to the fairness or accuracy of the trial.126 On these grounds, Scalia explained past refusals to extend Stone:127 ineffective counsel128 and discriminatorily selected grand juries129 are unfair, and anything short of demanding appellate review of the factual sufficiency of a verdict risks the accuracy of that verdict.130 For unstated reasons, Scalia saw Miranda as too remote from fairness or accuracy to warrant similar treatment absent "unusual equitable factors" showing the defendant's substantive innocence.131

As is typical of Miranda cases, the Justices could not avoid addressing Miranda's status as a lowly prophylactic rule. Also typical is the Justices' disagreement about the legal consequences of that label. In Withrow, the labeling was ultimately dicta.132 Whatever meaning "pro-
phylactic" had for the Withrow majority was overwhelmed by Miranda's status as a personal, accuracy-enhancing trial right.133 But, despite the rhetoric, whether Justice Souter successfully proved that Miranda belongs above the Fourth Amendment exclusionary rule in the Court's hierarchy of rights is a much closer question than the three Withrow opinions recognize.

125. Id. at 1764 (O'Connor, J., dissenting in part) (citing Miranda v Arizona, 384 U.S. 436, 544-45 (1966) (White, J., dissenting)). Indeed, Justice O'Connor noted that the Miranda doctrine has retained much of the contextual nature of the voluntariness doctrine. Id. (O'Connor, J., dissenting in part).
126. Id. at 1767-68 (Scalia, J., dissenting in part).
127 Id. at 1768 (Scalia, J., dissenting in part).
131 Withrow, 113 S. Ct. at 1767-68 (Scalia, J., dissenting).
133 Withrow, 113 S. Ct. at 1753.
Conservatives believe a prophylactic rule is one that can be violated without a violation of the Constitution and, therefore, has no force in state criminal cases. To the extent that Miranda strikes at potentially (rather than actually) compelled statements, they say, it is broader than the constitutional text. Thus, Miranda's self-described "prophylactic standards" cannot legitimately dictate exclusion where the defendant's statements are not "involuntary in traditional terms." Liberals, on the other hand, describe prophylactic rules as handy tools that compensate for courts' incompetency in unraveling highly factualized problems: in this case, secret encounters. The conservative approach has prevailed in limiting Miranda as a basis for exclusion by attacking its overbreadth. For conservatives, Miranda makes a perfect candidate for issue preclusion because alternatives to the warning-waiver catechism may be constitutionally adequate.

Indeed, the Fourth Amendment exclusionary rule at issue in Stone, although a judge-made remedy (which is bad), is not a judge-made prophylactic rule (which is worse) even though it frequently has been referred to as such. The exclusionary rule applies "only after an actual constitutional violation occurs" and thus is not overly broad. This important distinction would seem to privilege Mapp v Ohio's Fourth Amendment exclusionary rule.

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135. See U.S. CONST. amend. V


141. Grano, supra note 134, at 103-04.

Amendment exclusionary remedy over Miranda's, but Withrow did quite the opposite. In Withrow, Justice Souter mentioned Miranda's status as a "fundamental trial right," but Souter offered not a word as to why Miranda is suddenly respected as such on habeas, while illegally obtained statements pass through Miranda like a sieve at suppression hearings.

As a personal trial right, Miranda, for Justice Souter, is more important than out-of-the-courthouse rights, such as the guarantee against unreasonable quests for evidence, or in-court rights raised at later stages of review, such as those based on counsel's performance on federal habeas. A Miranda violation occurs not when the incriminating speech-act first occurs, but when it is admitted at trial on the issue of guilt. Mapp, by contrast, protects the citizen only at the situs of the officials' invasion. A trial judge's admission of evidence that police obtained by an illegal search and seizure is said to perform no new wrong, but the need to deter future unlawful police misconduct makes reversal proper for purely utilitarian, not personal, reasons.

Justice Souter's defense of Miranda as a personal trial right, however, while rejecting the notion that Miranda, too, is primarily concerned with deterring police, refers repeatedly to the need to do just that. In so doing, Souter borrowed a variety of soft variables from a pre-Miranda opinion by Justice Goldberg, which perseverated over out-of-court


144. See Kimmelman v Morrison, 477 U.S. 365, 374 (1986) ("[T]he Fourth Amendment is not a trial right; the protection it affords against governmental intrusion into one's home and affairs pertains to all citizens.").


146. Accordingly, no civil action under 42 U.S.C. § 1983 lies against police who flout Miranda. See generally Cooper v Dupnik, 963 F.2d 1220 (9th Cir. 1992). Although Miranda obsessed over police practices, ultimately it is pitched at trial courts, not police. See Johnson v New Jersey, 384 U.S. 719, 730 (1966) (Miranda applies to persons whose trials, not confessions, were completed before Court's decision in Miranda).

147 See Elkins v United States, 364 U.S. 206, 217 (1960) ("The [exclusionary] rule is calculated to prevent, not to repair. Its purpose is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it.")
police behavior.148 Consequently, Miranda’s strengths—a personal trial right with a built-in exclusionary remedy—and weaknesses—its status as judge-made prophylaxis149 and susceptibility to a deterrence-of-police rather than trial-right foundation150—leave unresolved whether it should be cognizable on habeas. Certainly, Miranda violations can be less odious to judicial integrity than incompetent defense attorneys151 and discriminatory grand jury processes.152 And given that a trial judge’s error on a dignity-based right does not necessarily compromise judicial integrity,153 it must be Miranda’s deeper concern for the “innocent man” who challenges “the basic justice of his incarceration” that better explains why federal review is appropriate there, but not for truth-impairing Fourth Amendment claims.154


149. *But cf.* Kamisar, *supra* note 63, at 546-47 (due process requirement that involuntary confession be suppressed at trial also is judge-made rule).


152. *See* Rose v Mitchell, 443 U.S. 545, 555-56, 561-63 (1979); *id.* at 587 n.10 (Powell, J., concurring) (“[T]he right not to be indicted by a discriminatorily selected grand jury, like the right not to have improperly obtained evidence introduced at trial, has nothing to do with the guilt or innocence of the petitioner.”).

153. *See* United States v Johnson, 457 U.S. 537, 564-65 (1982) (White, J., dissenting) (exclusionary rule preserves judicial integrity, which is not offended by trial judge’s admission of evidence that police obtained in good-faith but still unconstitutional search and seizure); United States v Payner, 447 U.S. 727, 736 n.8 (1980) (judicial integrity gives way to law of standing); *cf.* Arenella, *supra* note 3, at 203 (“[T]he ‘judicial integrity’ label is misleading because the issue is not whether the courts are ‘condoning’ improper executive action or whether they are ‘vicariously responsible’ for the executive’s misconduct. The issue is not the court’s integrity but the criminal process’ integrity as a self-regulating legal order.”).

Miranda's concern for innocence, however, is not all that deep. Its categorical, per se rule was designed to avoid questions about the reliability of confessions. But both Justice Souter and Justice O'Connor treated the reliability aspect of Miranda as important. In fact, both cited Johnson v New Jersey to support opposite conclusions about whether Miranda cares about untrustworthy confessions. Yet what matters is not whether Miranda has a reliability component, but whether it needs one. The forces of self-interest may make most confessions true, but Miranda was more about dignity, privacy, and a preference for enlightened investigative techniques than about correcting perversions of the truth-finding mission.

Souter's opinion, therefore, dusts off some respect both for rights that only marginally enhance the accuracy of a verdict and for a complex of soft variables unrelated to accuracy. That was not Justice Souter's stated purpose, however. Instead, Souter said efficiency is the primary reason for preserving federal court review of Miranda claims. To Stone Miranda would, in Souter's view,

155. See Withrow v Williams, 113 S. Ct. 1745, 1753 (1993) ("Nor does the Fifth Amendment 'trial right' protected by Miranda serve some value necessarily divorced from the correct ascertainment of guilt.") (emphasis added); see also Teague v Lane, 489 U.S. 288, 335 (1989) (Brennan, J., dissenting) (quoting Tehan v Shott, 382 U.S. 406, 416 (1966)) ("[T]he privilege against self-incrimination is not an adjunct to the ascertainment of truth."); Fallon & Melzer, supra note 34, at 1775 n.233 ("[Miranda's] relationship to accurate fact-finding is indirect and often insubstantial.").


157. Withrow, 113 S. Ct. at 1753; id. at 1759 (O'Connor, J., dissenting in part).


160. See Smith v Murray, 477 U.S. 527, 544 (1986) (Stevens, J., dissenting) ("[M]any protections are not only irrelevant to accuracy, but possibly counterproductive too, such as self-incrimination.); Engle v Isaac, 456 U.S. 107, 149 (1982) (Brennan, J., dissenting) ("Evidence procured in violation of [Mapp or Miranda] has not ordinarily been rendered untrustworthy by the means of its procurement.").

161. Cf. Kimmelman v Morrison, 477 U.S. 365, 380-82 (1986) (Strickland test, which gives prisoners burden of proving ineffectiveness of counsel, is sufficient incentive for rational attorneys to pursue search-and-seizure claims in state court); Jackson v Virginia, 443 U.S. 307, 322 (1979) (while "[a] more stringent standard will expand the contours of this type
discourage few confessors from filing habeas petitions; most would simply recast their confessions as coerced or involuntary and thus governed by the Due Process Clauses.162

Justice Souter did not suggest that Miranda and due process claims are coterminous; clearly they are not, even though in recent confessions cases the Court has tolerated "subtle compulsion"163 and insisted on "compelling influences"164 and a suspect’s objective experience of "coercion"165 before Miranda attaches. The Court’s recent decisions, therefore, may have brought the two standards closer together by abandoning an irrebuttable presumption of compulsion in favor of a search for compulsion in fact.166 But, other than to make Miranda’s prophylactic label less descriptive,167 this convergence is nowhere near complete. Noncompliance with Miranda remains neither a necessary nor a sufficient condition of a due process violation, which requires a showing of more police overreaching than does Miranda.

None of this likely was lost on Justice Souter. His fear was that whatever gain to federalism there would be from denying relief to Miranda claimants forced to fit their claims into the more exacting due process standard would be lost by the extra burden on habeas courts from the comparatively complicated claims Stoned Miranda prisoners would be sure to file.168 Despite Souter's contention, however, filing a claim and prevailing under it are two entirely different matters. Prior to concerning

of claim," they would not be "an entirely new class of cases," and would not necessitate federal evidentiary hearings because basis of claim is right on record).

162. See Withrow v Williams, 113 S. Ct. 1745, 1754 (1993).


167 While individualizing and therefore weakening Miranda’s categorical rule should please conservatives because Miranda is taken away from more suspects, weakened as well is the claim that Miranda is unconcerned with the Fifth Amendment’s textual ban on compelled self-incrimination. As the right weakens, police must do more to violate it, which should strengthen Miranda’s claim to the status of pure constitutional right.

itself with whether Miranda claimants would return in due process garb if barred from federal habeas, the Withrow Court should have addressed whether Miranda belongs in federal court in the first place. To best answer that, we should imagine a habeas not only absent Miranda, but also unreceptive to due process claims. Only then can we isolate whether Miranda claimants deserve federal relief; if they do not, then Stoning them certainly would be efficient.

Justice Souter’s efficiency rationale leapfrogged the issue of whether Miranda belongs in federal court at all and instead assessed how many prisoners would recast their claims as something they are not. A host of prisoners whose wills were not overborne but who were interrogated in violation of Miranda no doubt would love to get new trials, even if the new trial means missing out on the Due Process Clause’s greater evidentiary protections. In short, a claim’s cognizability has nothing to do with whether it might be translated into the language of another amendment, but instead turns on whether federal court is an appropriate forum in the first instance.

Recast or not, neither sort of confessions claim seeks primarily to ensure the admissibility of trustworthy evidence. Absent Justice Souter’s spurious efficiency theory, what are we to make of the Court’s retaining habeas review for an entire class of claims only barely concerned with the so-called truth-seeking mission of habeas? If efficiency really were the test, then Justice Scalia’s individualized approach, which would preserve review only for the Miranda claim accompanied by "unusual equitable factors" such as a showing of substantive innocence, should have prevailed. But Scalia’s view is not the law. Because Miranda is not

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169. See Harris v New York, 401 U.S. 222, 224-26 (1971) (holding that voluntary statement taken in violation of Miranda may be used by State on cross-examination to impeach credibility of defendant’s testimony).

170. See Kamisar, supra note 63, at 543-44 & n.27 (quoting Rogers v Richmond, 365 U.S. 534, 543-44 (1961)) ("[A]dmissibility of an involuntary confession must be determined ‘with complete disregard of whether or not petitioner in fact spoke the truth.’"). Indeed, even the early confessions cases "adumbrate an enlarged test of due process transcending the simple one of untrustworthiness." Roger J. Traynor, The Devils of Due Process in Criminal Detection, Detention, and Trial, 33 U. Chi. L. Rev 657, 665 (1966). But cf. Mishkin, supra note 8, at 83-86 (concern for unreliability of coerced confessions not "entirely abandoned").

171. See supra notes 126-31 and accompanying text.
really about accuracy, the best explanation for Withrow is that Miranda's scant contribution to accuracy, its various dignitary values, or both, make Miranda too important to leave to state court processes.

The compliment that Withrow paid to soft, dignity norms was too muted, by itself, to give those process ideals much currency elsewhere. Indeed, the vindication of soft variables was more likely a result rather than a purpose of Withrow. Nonetheless, Withrow shows that habeas is not dedicated solely to vindicating the substantively innocent or unlawfully sentenced. By pitching its ruling at a class of claims and thereby avoiding questions of Withrow’s innocence vel non, the Court deviated not only from its trend toward individualized standards of review, but also from a history of trivializing categorical approaches through crude and unsubstantiated classifications of rights. Ultimately, however, Withrow’s virtue (its Brown v Allen-esque open-door policy) may also be the vice (an unwillingness to attach legal consequences to differences among rights) that stifles rather than sparks a thoughtful approach to rights-ordering in criminal cases.

172. If, as Withrow suggests in part, the beleaguered Miranda can be justified by reference to accuracy, then so could any claim "not necessarily divorced from the correct ascertainment of guilt." Withrow, 113 S. Ct. at 1753. As a result, any categorical rule that would exempt from preclusion or forfeit claims only tenuously related to accuracy would be far too capacious to trim habeas in the name of accuracy; it would trim nothing. Even Justice Brennan, who favored categorical exemptions from raise-or-waive rules for claims with sufficient guilt-relatedness, apparently was willing to sacrifice full review of some nonqualifying claims. See Wainwright v Sykes, 433 U.S. 72, 110 (1977) (Brennan, J., dissenting). Compare Teague v. Lane, 489 U.S. 288, 335-37 (1989) (Brennan, J., dissenting) (listing array of claims unrelated to accuracy and denying existence of accuracy-first theory of habeas review) and Stone v Powell, 428 U.S. 465, 517-18 & n.13 (1976) (Brennan, J., dissenting) (fixation on guilt would bar door to more than Fourth Amendment) with Engle v Isaac, 456 U.S. 107, 149 (1982) (Brennan, J., dissenting) (quoting Kaufman v United States, 394 U.S. 217, 237 (1969) (Black, J., dissenting)) ("A defendant's Fourth Amendment rights or his Miranda rights may arguably be characterized as 'crucially different from many other constitutional rights' in that evidence procured in violation of those rights has not ordinarily been rendered untrustworthy by the means of its procurement."). For this reason, Withrow, ostensibly a victory for one of the Warren Court's highest profile precedents, also explains the same day's counterweight—the exceedingly forgiving standard for assessing the influence of constitutional error announced in Brecht v Abrahamson, 113 S. Ct. 1710 (1993). See infra notes 317-38 and accompanying text; see also supra note 71 and accompanying text (quoting Desist v United States, 394 U.S. 244, 258 (1969) (Harlan, J., dissenting)) (remedial curtailment checks constitutional decisions which go too far)).

III. Categorical Versus Individualized Guilt

The failure to develop a more refined perspective of rights-ordering based on a right's contribution to ensuring accurate verdicts has not resulted from lack of opportunity. An early attempt at rights-ordering based on a claim's guilt-relatedness appeared in the Court's retroactivity cases, in which soft variables played no role. The 1960's Linkletter/Stovall\(^ {174} \) balancing test retroactively applied all new, accuracy-enhancing rules unless doing so would undermine the government's good-faith reliance on the old rule or would swing open the jailhouse doors too widely.\(^ {175} \) Although not known for its complicity in the Court's heave-ho-to-dignity movement, the Warren Court, through its retroactivity doctrine, made a big deal of accuracy, but did little to back up its pronouncements that a given right was or was not accuracy-enhancing enough to backdate.\(^ {176} \)

Under the Linkletter/Stovall test, as designed by the Warren Court and embellished by the Burger Court, accuracy-enhancement was a "matter of degree,"\(^ {177} \) of "probabilities,"\(^ {178} \) dependent on a right's "peculiar traits,"\(^ {179} \) and by no means an "inflexible" or "ironclad" doctrine.\(^ {180} \)

Its built-in flexibility may sound value-neutral, but once animated, it took on a value-laden, rights-crabbing style. As always, so-called "jurisdictional" challenges to the trial court's authority received special treatment.\(^ {182} \)


\(^{175}\) Cf. Mackey v. United States, 401 U.S. 667, 714 (1971) (Douglas, J., dissenting) (citing Tehan v Shott, 382 U.S. 406, 419 (1966)) (accuracy-enhancing rules apply prospectively "when the majority thinks that the impact of the new rule would be 'devastating'").

\(^{176}\) Cf. id. at 695 (Harlan, J., dissenting in part) ("I find inherently intractable the purported distinction between those rules that are designed to improve the factfinding process and those designed principally to further other values."); Haddad, supra note 41, at 434 (Court's use of accuracy prong of Linkletter/Stovall tends to "ignore its own articulated rationale for a particular decision").


\(^{178}\) Mackey, 401 U.S. at 674.

\(^{179}\) Johnson, 384 U.S. at 728.


Beyond those, though, retroactivity was reserved for the "sine qua non of accuracy"—rules whose "major" or "central" purpose was to "correct serious flaws" that had a "fundamental impact" on fact-finding by creating a "substantial likelihood," "serious risk," or "significant chance" that innocent persons had been wrongfully punished in the past. However, it was "quite different where the purpose of the new constitutional standard [was] not to minimize or avoid unreliable results but to serve other ends." Those other ends, such as recognition of counsel's role in helping her client gain pretrial release or dismissal altogether, the avoidance of "arbitrariness and repression," judicial vindictiveness, discrimination, or low public confidence in the administration of justice, the Court would "lay aside." Some rights, arguably the most important ones, involve a "complex of values" and could not be reduced to a "single and distinct 'purpose.'"


184. Williams, 401 U.S. at 653.
188. Williams v United States, 401 U.S. 646, 655 n.7 (1971).
191. Id.
192. Williams, 401 U.S. at 653.
193. See Adams v Illinois, 405 U.S. 278, 281-82 (1972) (plurality opinion).
197. Id. at 259.
200. Id. at 413-14.
Sadly then, a right that encompassed the broadest range of values, but raised no more than "marginal doubts"\textsuperscript{201} about the guilt of defendants convicted in prior trials,\textsuperscript{202} had only a weak claim to retroactivity.

The trick to obtaining retroactive application of a new rule, it seemed, was for the prisoner to convince the Court that the issue of accuracy was more than marginal.\textsuperscript{203} But when victims of condemned practices such as uncounselled identifications\textsuperscript{204} and interrogations,\textsuperscript{205} unwelcomed bench trials in serious cases,\textsuperscript{206} and potentially retaliatory sentencing practices\textsuperscript{207} satisfied this condition, they were nonetheless denied retroactive benefit because either: 1) those practices sometimes yield reliable results;\textsuperscript{208} 2) an alternative constitutional guarantee would vindicate their claim;\textsuperscript{209} or 3) other, similar rights already had been denied retroactive application.\textsuperscript{210} Even the Court's liberal number tolerated this problematic aspect of the Court's retroactivity decisions.\textsuperscript{211}

Without discussing \textit{Linkletter/Stovall}'s uninspired accuracy-first dialogue, which at the time was in full swing, Professors Robert Cover and Alexander Alemikoff in 1977 offered a hopeful account of the possibilities
for accuracy-based review. After noticing that recent habeas rulings had begun to change the Court's prior neutral, trans-substantive view of process by elevating the importance of accurate verdicts, the authors concluded that the change could be good. They were hard on the Court's sense of combative individualism, which bound prisoners to their attorneys' errors through an unforgiving notion of waiver, but optimistic about the "substantive integrity" of the new accuracy-based habeas.

Concededly, the new approach would establish a substantive and remedial hierarchy of constitutional rights, but they predicted that the hierarchy will channel the cascade of prisoner petitions in new directions [and] articulate innocence-relevant claims in old and new ways. This channel will deepen as state and lower federal courts consider such claims and rule on novel innocence-relevant rights rather than upon rights which are older, more established, but less closely related to these hierarchically superior values.

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212. See Cover & Alemikoff, supra note 50, at 1047-49. Fay v. Noia, 372 U.S. 391 (1963), they wrote, unconsciously advanced a dialectic between state and federal courts in which "two distinct voices" engage in a lively dialogue on "notions of fundamental fairness" until the Supreme Court, drawing on the teachings of the dialogue, resolves it. Cover & Alemikoff, supra note 50, at 1047-49. Redundancy of process need not be based on equality of justice. It could just as easily be directed by another value, like innocence, and still retain its potential for creating new rights and expanding categories of collateral relief. Id. at 1067

213. See Patchel, supra note 37, at 964-65, 1052 ("Th[e] denial of the trans-substantive nature of habeas review in favor of tests based on the nature of the constitutional claim has had serious consequences for the concept of neutrality of procedure.").

214. Cover & Alemikoff, supra note 50, at 1077-78, 1086.

215. See id. at 1072-85 (discussing, inter alia, Estelle v. Williams, 425 U.S. 501 (1976), which held that prisoner tried and convicted in his prison garb violated due process, but failure to object at trial constituted waiver, even though prisoner had objected earlier to his jailer).

216. Id. at 1086.

217 See id. at 1096 (guilt-innocence theory "is as rich, as vague, as promising, and as problematic as equality").

218. Id. at 1087
Eventually, if not already, they concluded, an emphasis on accuracy not only would form remedial contours, but would become "the principal doctrine for restricting existing rights and creating new ones."219

Cover and Alemikoff were willing to live with the injury this approach could do to the "symbolic" and "evocative" qualities of truth-obstructing rights like Mapp and Miranda.220 For truth-neutral rights (like speedy trial and collateral estoppel) and "cherished ideals" (like bans on grand jury discrimination), they cautioned against an overzealous search for accuracy, which could become a "mockery—a euphemistic dressing for inaction"221 and result in a "drastic impoverishment of the language of rights."222 They then rightly anticipated the constitutionalization of burdens, presumptions, and the sufficiency of evidence, but understated the Court's commitment to indictments by fairly selected grand juries.

Cover and Alemikoff were correct that the emphasis on accurate verdicts would become a basis of substantive-rights articulation, and unfortunately, the Court has ignored their admonition against overzealousness.223 Despite the potentially bright future that Cover and Alemikoff saw for an accuracy-first theory of review, its development in the Court has been disappointing, whether directed at retroactivity, the raise-or-waive doctrine known as "procedural default," or the Court's harmless error rule, which permits appellate courts to overlook some trial-level defects of constitutional magnitude.

In the retroactivity context, Linkletter/Stovall and its "myriad verbalisms"224 was a "perfectly good rule" for Justice White,225 but proved too "simplistic" for Justice Blackmun226 and a demeaning "morass"

219. Id., see also Patchel, supra note 37, at 1051 ("Habeas is no longer a neutral procedural mechanism for litigating constitutional rights; instead it is part of the substantive scope of some rights.").
221. Cover & Alemikoff, supra note 50, at 1100.
222. Id. at 1095.
223. See Stacy, supra note 50, at 1376-1400.
for Justice Marshall. What the Court has come up with in its place is *Teague v Lane*, a grotesque version of *Linkletter/Stovall*. Under the so-called second *Teague* exception, a prisoner who has no remaining direct appellate avenues can benefit from a new constitutional rule on habeas if the rule is one of those exotic tenets of "ordered liberty"—those "'watershed rules of criminal procedure' implicating the fundamental fairness and accuracy of the criminal proceeding." Of the seven claims to which the Court has applied *Teague*’s second exception to nonretroactivity, none has satisfied it. In fact, five of the seven decisions discuss the exception only in one sentence, while two dismiss the claim in brief paragraphs. All seven race to unadorned conclusions that say nothing about the relationship of the claimed error to an accurate verdict. The Court concedes that "the precise contours of this

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228 489 U.S. 288 (1989) (plurality opinion).
229 Cf. Althouse, supra note 113, at 949-53 (Teague relied on failure of Linkletter, even though better solutions were available, and doctrine cast aside by Justice Harlan was resurrected in his name); Fallon & Meltzer, supra note 34, at 1742 ("The Stovall regime proved somewhat unpredictable."); Friedman, supra note 47, at 811-12.
230 The first exception to *Teague*’s preference for nonretroactivity is when a new rule places "certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe." *Teague v Lane*, 489 U.S. 288, 307 (1989) (O’Connor, J.) (quoting Mackey v United States, 401 U.S. 667, 692 (1971) (Harlan, J., dissenting in part)).
232 Saffle v Parks, 494 U.S. 484, 495 (1990) (quoting *Teague*, 489 U.S. at 311 (O’Connor, J.)).
233 See Gilmore v Taylor, 113 S. Ct. 2112, 2119 (1993); *Graham*, 113 S. Ct. at 903; Wright v West, 112 S. Ct. 2482, 2503 (1992) (Souter, J., concurring in judgment); Sawyer v Smith, 497 U.S. 322, 345 (1990); *Saffle*, 494 U.S. at 495; Butler v McKellar, 494 U.S. 407, 416 (1990); *Teague*, 489 U.S. at 314-15; see also Swindler v Lockhart, 495 U.S. 911, 914 (1990) (Marshall, J., dissenting from denial of certiorari) (rigid application of state’s change-of-venue rules applied in criminal case involving substantial pretrial publicity diminishes "[t]he likelihood of an accurate conviction when a defendant is tried by a jury that has prejudged his case").
234 See Althouse, supra note 113, at 953 ("The second *Teague* exception seems to exist only to remind us of just how highly exceptional and unusual a form of relief habeas is.").
exception may be difficult to discern, but, given that few rights having the "primacy and centrality" of an indigent felony defendant's right to trial counsel "have emerged," the failure of any new-rule-seeking petitioner to meet this exception is unsurprising. Some new rules fail for lack of watershedness of fundamental fairness, others for their dilute effect on accuracy, still others for both.

Consider Frank Teague himself. Teague claimed that his right to an impartial jury required that the petit jury reflect a cross-section of his community. The Court disagreed: the systematic exclusion of identifiable groups from juries is not fundamental to fairness; in fact, it is "a far cry"

235. Saffle, 494 U.S. at 495.
236. Id.
238. Graham v Collins, 113 S. Ct. 892, 903 (1993) (quoting Teague v Lane, 489 U.S. 288, 313 (1989)); see Friedman, supra note 47, at 824-26 (despite relatively recent bedrock developments, and more certain to come alongside "technological and epistemological advances," Court still "seems to suggest that enlightenment has come upon us and we need look no further"); Karl N. Metzner, Note, Retroactivity, Habeas Corpus, and the Death Penalty: An Unholy Alliance, 41 DUKE L.J. 160, 186 (1991) (death-penalty jurisprudence dates back only to 1972); see also Harris v Vasquez, 901 F.2d 724 (9th Cir.) (Noonan, J.) (Harris' claim to competent psychiatric assistance at penalty phase of capital trial comes within second Teague exception), rev'd, 913 F.2d 606 (9th Cir. 1990) (odd opinion holding that Harris' claim was novel and available at once).
239. See Gilbert S. Merritt, Access to Federal Courts in Habeas Corpus Cases, 58 TENN. L. REV 145, 146 (1990) (Teague means that defendants must show in advance, which few can, "that the odds are great that the defendant would be acquitted upon retrial if his or her proposition of law were adopted"); Rosenberg, supra note 70, at 367, 374 (second exception is "arguably not an exception at all," but rather is dead end).
240. Cf. Adams v Illinois, 405 U.S. 278, 293 (1972) (Douglas, J., dissenting) (rights important enough to incorporate should be retroactive); Williams v United States, 401 U.S. 646, 666 (1971) (Marshall, J., dissenting in part) ("If the purposes of a new rule implicate decisively the basic truth-determining function of the criminal trial, the required constitutional procedure itself would then stand as a concrete embodiment of 'the concept of ordered liberty'"); Marc M. Arkin, The Prisoner's Dilemma: Life in the Lower Federal Courts After Teague v Lane, 69 N.C. L. REV 371, 403-04 (1991) ("The interests of fairness and accuracy are not mutually exclusive, and the examples of watershed rules given by the Teague plurality would qualify under both analyses."); David R. Dow, Teague and Death: The Impact of Current Retroactivity Doctrine on Capital Defendants, 19 HASTINGS CONST. L.Q. 23, 38 (1991) ("If the new procedures are genuinely implicit in the concept of ordered liberty, how does it make any sense to call them 'new'?").
The next Term, defendant Robert Sawyer attempted to rely on the Court's intervening decision in *Caldwell v Mississippi*, which held cruel and unusual the execution of someone when the sentencing jury has been misled into believing responsibility for the sentence rests elsewhere. The Court denied Sawyer relief because while *Caldwell* "was designed as an enhancement of the accuracy of capital sentencing," it was merely "added to an existing guarantee of due process" and thus was not an "absolute prerequisite to fundamental fairness." Even more recently, when Kevin Taylor sought unsuccessfully to challenge his murder conviction through an intervening ruling of the United States Court of Appeals for the Seventh Circuit, the Court admitted that the trial court's jury instructions on murder and manslaughter threatened to confuse the jury about the effect of provocation on murder culpability. But Taylor lost anyway because the need for a better instruction fell outside that "small core of rules requiring "observance of those procedures that are implicit in the concept of ordered liberty""

During the same Term as *Gilmore v Taylor*, the Court decided that Gary Graham's jury instruction obscured "his mitigating evidence of youth, family background, and positive character traits," but did not "seriously diminish the likelihood of obtaining an accurate sentencing proceeding." Before *Taylor*, Horace Butler's petition also foundered on accuracy grounds. When Butler sought to take advantage of a recent

244. Sawyer v Smith, 497 U.S. 227, 244 (1990) (quoting Teague, 489 U.S. at 314). *But see id.* at 255 n.3 (Marshall, J., dissenting) ("The majority's extensive effort in its 'new rule' analysis to demonstrate that Caldwell's 'additional' protections marked a departure in our Eighth Amendment jurisprudence, however, seems disingenuous in light of its conclusion that the departure did not amount to much.").
246. *Id.* (quoting Graham v Collins, 113 S. Ct. 892, 903 (1993) (quoting Teague v Lane, 489 U.S. 288, 311 (1989))); *see id.* at 2123 (O'Connor, J., concurring in judgment) (offering only bare conclusion that neither accuracy nor fundamental fairness prongs of second *Teague* exception were met).
decision preventing police from badgering suspects into waiving their right to counsel, the Court replied only that the new decision might actually decrease the likelihood of obtaining an accurate verdict. Finally, capital defendant Robyn Leroy Parks lost on both the watershedness of his new rule and on its accuracy-enhancing contribution. Parks had objected to the sentencing judge's antisympathy charge to the jury, which the Court considered a quest by Parks for "an emotional chord," somehow a less worthy inquiry than whether he "is morally deserving of the death sentence."  

Never mind that the Court's conclusions in each of these cases may be wrong. What is worse is that the reasoning mentioned above reproduces the Court's entire investment in defending those conclusions. This brisk approach to retroactivity—this "euphemistic dressing for inaction"—ultimately slights both fairness and accuracy, the values the Court purports to celebrate. And the Court's willingness to disregard fairness and accuracy is by no means unique to retroactivity jurisprudence. The pervasive raise-or-waive and harmless error doctrines are as disagreeable to accuracy as they are to the soft variables purported to comprise settled notions of fairness. Raise-or-waive rules and complementary examples of the Court's unforgiving treatment of prisoners who violate the technical rules of trial, appellate, and habeas pleading also obsess over innocence. Outside the context of capital sentencing, the concept of "actual" or substantive

250. Id. (citing Arizona v Roberson, 486 U.S. 675 (1988) (police cannot avoid suspect's decision to deal with police only through counsel by confining subsequent interrogation to separate offense)).


252. Id. But see id. at 507 (Brennan, J., dissenting) ("Rules ensuring the jury's ability to consider mitigating evidence guarantee that the jury acts with full information when formulating a moral judgment about the defendant's conduct.").


254. Opposition to the second Teague exception's rights-choking version of guilt-innocence theory appears sporadically in separate opinions, see Gilmore v Taylor, 113 S. Ct. 2112, 2123-30 (1993) (Blackmun, J., dissenting); Sawyer v Smith, 497 U.S. 227, 254-59 (1990) (Marshall, J., dissenting); Saffle, 494 U.S. at 503-09 (Brennan, J., dissenting); Teague v Lane, 489 U.S. 288, 318-26 (1989) (Stevens, J., concurring); id. at 333-44 (Brennan, J., dissenting), and academic commentary, see Chemerinsky, supra note 55, at 788; Fallon & Meltzer, supra note 34, at 1774 n.231 (deriding Court for unauthorized ordering of rights and for subordinating other values to accurate verdicts).
innocence is, in the Court's view, "easy to grasp."

51 So easy, in fact, that nowhere in the Court's opinions does any further explication of this concept appear. The Court's silence is troubling, given that innocence is a complicated concept, rife with moral content retained in mens rea and defenses that fully or partially justify or excuse a criminal act.

Proof of whether a defendant committed a crime is mediated by the rules of evidence and other basics of trial and pretrial practice. Some of these rules and practices enhance our understanding of what the defendant did, some obscure it, some do both, and some do neither. Notwithstanding the varying levels of accuracy-influencing constitutional claims, the Justices assume they will know an innocent prisoner, frequently referred to as the victim of a "miscarriage of justice," when they see one. When a prisoner fails to develop facts or preserve a claim for review, files her appeal late, or badgers or sandbags a federal court with a successive or preserved-but-abandoned claim, she still will receive habeas review if she proves that the State probably has "convict-
ed the wrong person of the crime."^{269} Just what would satisfy this standard remains unclear. Indeed, it is telling that in two decades of review, no Supreme Court litigant has done so.

Although the "natural usage"^{270} of the term "actual innocence" "does not translate easily into the context of the sentencing phase of a trial on a capital offense,"^{271} the Court applies it to undeveloped, defaulted, successive, or abusive claims there too, despite the self-consciously moral judgments of death sentencing.^{272} To take advantage of the "very narrow exception"^{273} to the normal rules of preclusion, the Court directs habeas courts to reach the merits of a claim—individualized, not categorical^{274}—highly suggestive of the prisoner's innocence of the underlying capital offense.^{275} Innocence alone, however, is not a constitu-

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269. Sawyer v Whitley, 112 S. Ct. 2514, 2519 (1992). A petitioner's failure to comply with orderly procedures also is forgiven if she had good "cause" for her error. The narrow instances of cause lie when counsel was ineffective at trial or on the first appeal as of right, when petitioner's claim was unavailable to her at the time she was required to raise it, or if the state interfered with her timely filing of the claim as when, for example, the warden fails to file the prisoner's papers when requested to do so. Cause, coupled with a showing of "actual prejudice" flowing from the habeas court's refusal to hear a forfeited claim, lets a habeas petitioner avoid forfeit and requires the habeas court to reach the merits of her claim. See Friedman, supra note 7, at 288-302.

270. Sawyer, 112 S. Ct. at 2520.


272. See Sawyer, 112 S. Ct. at 2527-28 (Blackmun, J., concurring) (quoting Kuhlmann v Wilson, 477 U.S. 436, 471 n.7 (1986) (Brennan, J., dissenting) (capital sentencing is "only a decision made by the representatives of the community whether the prisoner shall live or die").

273. Id. at 2520.

274. See Sawyer v Smith, 497 U.S. 227, 256 (1990) (Marshall, J., dissenting) (second Teague exception, unlike the miscarriage-of-justice exception, is "rule-, not petitioner-, specific"); JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 22A.1, at 118 n.23 (Supp. 1993) (same); Patchel, supra note 37, at 969 (individualized innocence exception to cause and prejudice makes sense because it prevents guilty defendants from obtaining relief just by raising right sort of claim and prevents innocents from being demed for having raised wrong sort of claim).

275. See Sawyer v Whitley, 112 S. Ct. 2514, 2521-23, 2525 (1992) (innocence in capital sentencing requires petitioner to show by clear and convincing evidence that absent constitutional error, no reasonable juror would have found him eligible for execution); cf. id. at 2533 (Stevens, J., concurring in judgment) ("It is heartlessly perverse to impose a more
tional claim, "but instead a gateway through which [one] must pass to have [an] otherwise barred constitutional claim considered on the merits." When couched only in terms of due process and not some other guarantee, the claim requires an "extraordinarily high" showing of innocence. Also falling within the exception are prisoners whose claimed errors undermine their death-eligibility. To avoid conflict with other doctrines of preclusion, the Court's conception of death-eligibility considers only errors in aggravation, not mitigation.

The theory behind this pastiche of accuracy-first rulings is that each involves a sort of default leading to forfeiture: the defendant is punished for raising claims she (or much more likely, her attorney) should have raised or pursued earlier; or, having raised or pursued them, for not leaving well enough alone. Procedural regularity, the argument runs, promotes the values of federalism and finality and reduces the friction between the state and federal systems. The Court even claims that procedural regularity promotes accuracy (but with no regard for the preference for false acquittals) by requiring that issues be presented when evidence and memories are fresh enough to properly assess the claim and retry the prisoner if necessary. Simply put, unless the prisoner can demonstrate her substantive innocence, it is her attorney's course of pleading, not the Constitution, that matters.

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276. Herrera v. Collins, 113 S. Ct. 853, 862 (1993). Justice Blackmun found this aspect of Herrera "perverse." See id. at 880-81. (Blackmun, J., dissenting) ("[H]aving held that a prisoner who is incarcerated in violation of the Constitution must show he is actually innocent to obtain relief, the majority would now hold that a prisoner who is actually innocent must show a constitutional violation to obtain relief.").


279. Id. at 2522 n.13.

280. See Seidman, supra note 2, at 466-69 (discussing tension between jurisprudence of guilt and innocence and requirement of procedural correctness).


282. Cf. Kit Kinports, Habeas Corpus, Qualified Immunity, and Crystal Balls: Predicting the Course of Constitutional Law, 33 ARIZ. L. REV 115, 116 (1991) (Court more prone to forgive errors of judges and government officials than of defendants or their
Naturally this highly individualized approach to defaulted claims has been a disaster for prisoners and their competent, but mistaken, attorneys; the State wins a lopsided share of disputes decided under a standard which places both the risk of loss and the burden of proof on the prisoner.  

The Court first refused to adopt a more categorical approach to defaulted claims in 1982. Lincoln Isaac sought habeas relief from an aggravated assault conviction on the ground that Ohio law had re-allocated the burden of proving self-defense in his favor after his conviction. Despite the novelty of the claim, Isaac's counsel failed to show "cause" for ignoring Ohio's contemporaneous objection rule; thus, the Court ruled against Isaac without reaching the merits of his constitutional claim.

That complicated case featured Isaac's argument that no claim affecting the truth-finding aspect of the trial should be subject to forfeiture. In fact, the case credited with spreading the raise-or-waive rule at issue involved a defaulted Miranda claim—a "defect" which was "serious," but not serious enough to "affect the determination of guilt at trial." For Justice O'Connor's majority, the familiar "costs" of overlooking a prisoner's flouting of orderly state procedures "do not depend upon the type of claim attorneys).  

283. See 17A CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4266.1, at 467 (2d ed. 1988) ("To date no such extraordinary case has been found."); Friedman, supra note 7, at 320-21 ("[A] new trial, with a shifted burden of proof, is precisely what [recent habeas cases] require."). But cf. Pilehak v Camper, 935 F.2d 145, 148 (8th Cir. 1991) (extending narrow exception to cause-prejudice analysis when defendant is unjustly sentenced); Jones v. Arkansas, 929 F.2d 375, 380-81 (8th Cir. 1991) (holding that ex post facto sentence fell within actual innocence exception to cause-prejudice rule); Henderson v. Sargent, 926 F.2d 706, 713-14 (8th Cir. 1991) (holding that ineffective assistance of counsel created doubts about reliability of verdict).


286. Id. at 129.
287 Id.
raised by the prisoner. Thus, the raise-or-waive doctrine would bow to no class of claims, regardless of their truth-finding pedigree.

But Isaac was asserting a right important enough to have been held retroactive, and, at the time, one whose violation required automatic reversal if noticed on direct appeal. As Justice Brennan pointed out in his dissent, unlike Miranda or Mapp errors, "a defendant's right to a trial at which the burden of proof has been constitutionally allocated can never be violated without rendering the entire trial result untrustworthy." An error of that magnitude might be subject to deliberate waiver, but never to inadvertent forfeit.

If Justice Brennan had gotten his way, how would decisions of inclusion and exclusion regarding forfeited claims proceed? What would the substantive integrity of an accuracy-based theory, however conscientiously arrived at, look like? If accuracy is the key, but other values also matter, then which trump which, and when? Other values may themselves be subject to ordering as well. For instance, Cover and Aleinikoff saw a difference between "symbolic" or "evocative" rights and "cherished ideals." Even if we were to develop some formula or guiding principles for drawing these distinctions, Withrow v Williams would render them

288. Id.
289. Id. at 149-50 (Brennan, J., dissenting) (citing Ivan V v City of New York, 407 U.S. 203, 204 (1972)).
291. Isaac, 456 U.S. at 149 (Brennan, J., dissenting).
293. Rights-ordering has occurred "in a more ad hoc fashion than it would have if it had accepted innocence as the only value worth furthering through habeas proceedings." Patchel, supra note 37, at 1046-47; see also Sawyer v Whitey, 112 S. Ct. 2514, 2527-28 (1992) (Blackmun, J., concurring in the judgment) (innocence-matters approach leaves other values "debased, and indeed, rendered largely irrelevant"); Smith v Murray, 477 U.S. 527, 543 (1986) (Stevens, J., dissenting) (values other than accuracy should be reflected in our conception of law and justice); Murray v Carrier, 477 U.S. 478, 520 (1986) (Brennan, J., dissenting) ("The criminal justice system is structured both to determine the guilt or innocence of defendants and to resolve all questions incident to that determination, including the constitutionality of the procedures leading to the verdict.").
294. Cover & Aleinikoff, supra note 50, at 1091.
295. Id. at 1093.
illusory If, as Withrow suggests, any claim not necessarily divorced from accuracy is too important to overlook, then the class of guilt-related claims would be grossly overinclusive. A standard—which well may be the basis of Withrow—dedicated to the vindication of that complex of values (personal autonomy, limited government, adversarial balance) too important to subordinate to the blunt instrument of accuracy-first theory would sweep just as far, excluding nothing. Withrow, therefore, unwittingly made reversal or refinement of Isaac as infeasible as it is unlikely

Isaac reveals the intractable choice between accuracy and other values and also demonstrates the Court's clear preference for individualized over categorical standards of review; but Isaac accomplishes these ends no more obviously than does the Court's harmless error jurisprudence. Between 1967, when the Court wrote Chapman v California,297 and 1991, when it decided Arizona v Fulminante,298 the range of constitutional trial errors forgivable on appeal went from none to nearly all.299 To avoid reversal under Chapman, the prosecution must prove beyond a reasonable doubt that the error was harmless, which means that the error did not contribute to the verdict.300 Harmless error doctrine is at bottom only nominally categorical and almost entirely individualized: a few errors are categorically insulated from its reach,301 all others may be shrugged off if the reviewing court is sufficiently convinced of the defendant's guilt.302

299. See Rose v Clark, 478 U.S. 570, 579 (1986) (defendant with competent counsel and unbiased judge would be subject to "a strong presumption that any other errors that may have occurred are subject to harmless error analysis"); Stacy, supra note 50, at 1381-82 (listing potentially harmless errors); Stacy & Dayton, supra note 43, at 84-85 and accompanying notes (same).
300. See Yates v Evatt, 111 S. Ct. 1884, 1893 (1991) ("To say that an error did not contribute to the ensuing verdict is to find that error unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record."); Chapman v California, 386 U.S. 18, 24 (1967).
301. See 3 LAFAVE & ISRAEL, supra note 71, § 26.6, at 88-94 (Supp. 1991) (harmless error is at times inapplicable to avoid double-counting prejudice components in underlying error).
302. See Jeffrey Rosen, Bad Noose, NEW REPUBLIC, Oct. 4, 1993, at 15. Although Chapman eschewed overemphasis on the weight of untainted evidence, Chapman, 386 U.S. at 23, the analysis is in effect a counterfactual inquiry into what the jury would have done absent the error. See Milton v Wainwright, 407 U.S. 371, 372-73 (1972) ("The jury
Term by term, the Court’s Chapman analysis swallowed error after error before it culminated in Fulminante, in which the Court deemed potentially harmless any error whose impact may “be quantitatively assessed” by studying the record.\(^{303}\) For example, despite their intimacy with accuracy, jury instructions containing unconstitutional presumptions can be harmless,\(^{304}\) as can coerced confessions.\(^{305}\) Crooked judges,\(^{306}\) grand jury discrimination,\(^{307}\) and denial of the rights to counsel,\(^{308}\) to self-representation,\(^{309}\) or to a public trial,\(^{310}\) conversely, are “structural defect[s] affecting the framework within which the trial proceeds.”\(^{311}\) Because these “structural” errors prevent the trial from “reliably serv[ing] its function as a vehicle for determination of guilt or innocence,”\(^{312}\) they require automatic reversal.

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304. See Pope v Illinois, 481 U.S. 497, 501-02 (1987); Rose v Clark, 478 U.S. 570, 579-80 (1986). But see Chapman, 386 U.S. at 44 (Stewart, J., concurring in the result); id. at 52 n.7 (Harlan, J., dissenting) (citing Bollenbach v United States, 326 U.S. 607, 614-15 (1946)).
305. See Fulminante, 111 S. Ct. at 1265. All three opinions in Chapman said otherwise. In his, Justice Harlan suggested that all errors with a “devastating” or “inherently indeterminate” impact on the jury require automatic reversal, as would “certain types of [intentional] official misbehavior.” Chapman v California, 386 U.S. 18, 52 n.7 (1967) (Harlan, J., dissenting). For Chief Justice Rehnquist’s Fulminante majority, however, the impact of any error visible on the record, even the most devastating evidentiary bombshell, could, and from now on would, be coolly assessed by an appellate court.
310. See Waller v Georgia, 467 U.S. 39, 49 n.9 (1984).
Inevitably, the structural-nonstructural dichotomy of the harmless error rule elevates some dignitary norms, such as equality and participation, despite the rule's self-described accuracy basis. In this context, dignitary norms matter only when coupled with a right that does not involve the prosecution's "presentation of the case to the jury." But why should grand jury discrimination or denials of self-representation warrant zero tolerance when, "structural" or not, their ability to undermine our confidence in the accuracy of a guilty verdict is at most dilute? Certainly these rights promote a range of interests, but accuracy least of all. Despite their lack of guilt-relatedness, the harmless error rule is inapposite for some violations. Guilt-related or not, if some governmental misbehavior is hard to uncover, application of harmless error doctrine will only drive the undesired activity further underground. Consequently, the harmless error rule will overlook errors that affect the central purpose of the criminal trial, but not, perhaps ironically, those rules with ancillary purposes.

So goes the categorical aspect of the doctrine. Again, it highlights the nagging if not fatal challenge to the Court's claimed commitment to accuracy, a challenge profoundly skeptical about whether that commitment can realistically be dropped to the individualized level in settings remote from the "main event" of trial. However realistic, the Court not only has...
put habeas courts in the business of determining individualized guilt, but the Court also requires that they do so under a standard that makes state court decisions virtually conclusive of the defendant's postconviction travels.

On the same day it decided Withrow, the Court handed down Brecht v Abrahamson, 318 which relaxed the prosecution's burden for proving harmlessness on habeas. A prosecutor's comments about Todd Brecht's silence after being arrested and apprised of his rights violated the implicit assurance that his "right to silence" would be honored. 319 These improper comments, known as Doyle 320 error, occurred at Brecht's trial, at which a jury convicted Brecht of the murder of his brother-in-law. 321 The question before the Court was whether habeas courts should assess the impact of the error on a jury under a less exacting standard than a court on direct appeal. 322

A 5-4 Court, through Chief Justice Rehnquist, held that although Doyle is a core element of due process and no mere prophylaxis, 323 a Doyle error is not structural, and thus is subject to harmless error analysis. 324 Not the Chapman variety, however, but a weaker variant. 325 From now on, habeas courts must test harmlessness under Kotteakos v United States, 326 which requires reversal only when the error "had substantial and injurious effect or influence in determining the jury's verdict." 327 Federal courts already know Kotteakos, Rehnquist explained, and because Chapman still applies on direct review, knowledge of that standard will continue to pay off there and "possib[ly]" in "unusual" habeas cases

322. Id. at 1716, 1721.
323. See id. at 1717 (quoting Abrahamson v Brecht, 944 F.2d 1363, 1370 (7th Cir. 1991) (calling Doyle "a prophylactic rule designed to protect another prophylactic rule [Miranda] from erosion or misuse")).
324. Id.
325. Id. at 1721-22.
326. 328 U.S. 750 (1946).
327 Kotteakos v United States, 328 U.S. 750, 776 (1946).
featuring "deliberate and especially egregious error," or error combined with really bad prosecutorial misconduct, even absent "actual prejudice." 328

Although Kotteakos previously had applied only to nonconstitutional errors, Chief Justice Rehnquist felt Chapman's reasonable-doubt standard was too demanding for habeas, which plays only a back-up role to presumptively proper state court proceedings. After the obligatory reference to "deterrence"—a job that Kotteakos can adequately handle—Rehnquist recommended that reversal on habeas be saved for the "grievously wronged," the victim of "extreme malfunctions" in state court processes. Thus, what justifies reversal on direct appeal might not justify reversal on habeas. 329

Justice Stevens concurred and wrote separately to emphasize that Kotteakos is an "appropriately demanding" standard and not a pushover. Although three Justices wrote dissenting opinions, 331 only Justice O'Connor seemed troubled by the majority's subordination of accuracy, which showed her that the majority took habeas too lightly. 332 Because harmless-error analysis (unlike the exclusionary rule) can threaten accuracy, observed O'Connor, only the full force of Chapman's reasonable-doubt standard can restore faith in a verdict undermined by constitutional error. 333 Chapman thus expresses that the State, not the wronged prisoner, should bear the risk of an unreliable verdict. 334 To simplify the Court's

328. Brecht, 113 S. Ct. at 1722 n.9. The prosecutor's comments here comprised only 2 of 900 pages of transcript and only a few minutes in a 4-day trial in which 25 witnesses testified. Id. at 1715.

329. Id. at 1719-21.

330. Id. at 1723 (Stevens, J., concurring). Kotteakos keeps the burden on the prosecution, makes the entire record pertinent (increasing the ways in which error can infect the trial), is de novo (since it is a mixed question of law and fact), and focuses on influence, not outcome. Different outcomes thus will not come from the phrasing of the standards, but from the quality of the judgment of those applying them. Id.

331. See id. at 1725 (White, J., dissenting); id. at 1728 (Blackmun, J., dissenting); id. (O'Connor, J., dissenting).

332. Id. at 1728 (O'Connor, J., dissenting).

333. Id. at 1730-31 (O'Connor, J., dissenting).

334. Id. at 1729 (O'Connor, J., dissenting). Just whom Brecht would shoulder with the Kotteakos standard is not altogether clear. The majority seems to place the burden on the defendant/petitioner, id. at 1722, Stevens puts it on the government, id. at 1723 (Stevens, J., concurring), and White says the majority definitely puts it on the defendant, id. at 1727 (White, J., dissenting).
usually Byzantine approach to habeas, O'Connor would apply *Chapman* to all nonstructural errors without regard to the values they promote.335

If Chief Justice Rehnquist’s majority opinion did not address Justice O’Connor’s effort to hold accurate verdicts in high esteem, it is more likely due to his view of habeas than to his take on the importance of accuracy in criminal trials. Pulling from conservatives’ store of soft variables—“finality,” “comity,” “federalism,” “deterren[ce],” and “social costs”336—Rehnquist’s habeas is not on a constant alert to fix constitutional error, truth-furthering or otherwise. Instead, Rehnquist waits for the attorney to cease to act like an attorney, for cheating judges and lying prosecutors—for the trial to cease to look like a trial; as for investigative practices, civil or other alternative remedies sufficiently redress all but the most nefarious wrongs. Rehnquist’s habeas is a corrective mechanism reserved for an exclusive group: the "grievously wronged," most of whom will have been vindicated long before reaching a federal habeas court. For those who are not, the road may get rougher, but the truly deserving will prevail, even under the most demanding standards of pleading and proof.

Despite Chief Justice Rehnquist’s claim to the contrary, we have every reason to suspect the competence of trial judges if they err so often that their errors require a separate body of law. Whether driven by the Court’s frustration with the frequency of constitutional trial error, empathy for fallible trial judges, certainty about the potential superfluousness of almost any error, or uncanny willingness to demand trial-like work from the appellate sidelines, the categorical aspect of harmless error analysis excludes so few errors from its ambit that it becomes no category at all. Piled on the greedy hoard of potentially harmless errors is a standard under which, before relief will lie, a federal habeas court now must find that the state appellate courts which forgave the error under a "pro-defendant" standard erred even under a "pro-prosecution" standard.337 This threatens to preclude federal

335. *Id.* at 1730-31 (O’Connor, J., dissenting).

336. *Id.* at 1720-21.

337 Cf. *Id.* at 1725-28 (White, J., dissenting) (arguing that *Chapman* correctly placed burden on State to prove that constitutional error "did not contribute to the verdict obtained"); Daniel J. Meltzer, *Harmless Error and Constitutional Remedies*, 61 U. CHI. L. REV 1, 37-38 (1994) (dilution of *Chapman* in Brecht might have been less likely if source of harmless error rule—which is neither strictly constitutional nor strictly statutory—were closely examined); Sullivan, *supra* note 277, at 306-07.
habeas relief whenever a state appellate court finds an error harmless under Chapman—hardly the basis of a meaningful search for accurate verdicts.338

Concluson

Everyone agrees that accurate verdicts are important. Everyone agrees as well that there would be no procedures to evaluate without criminal laws to enforce. Despite their derivative nature, once we have procedures, they must be fair and decent, not just efficient and precise. Thus, the tension between reliable verdicts and the means by which they are sought has stunted development of a principled accuracy-first theory of postconviction review. And it could not be any other way in a system dedicated to promoting potentially accuracy-hindering ideals like fairness and procedural regularity.

Given the unresolvable conflict between accuracy and dignitary norms, I doubt that the answer is to fight rights-ordering if acquiescence would soften the blow that the nonretroactivity, procedural default, and harmless error doctrines have delivered. That forms one of my gripes with Withrow—if some sort of triage is necessary (I know that the number of prisoners is as much to blame for the number of prisoner petitions as is Brown or Fay, but still .), then Stoning Miranda might be a way to begin to recalibrate habeas on a categorical, rather than an individualized, basis. A meaningful commitment to categorical rulemaking could in turn insulate more errors from harmless error analysis, forgive more claims from forfeit, and maybe even produce a more realistic alternative to Teague. This, I think, is simply an updating of what I call the "hopeful account" of accuracy-first theory suggested by Professors Cover and Aleinikoff, but that has been about the extent of my task.
