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THE ANATOMY OF AN EXECUTION: FAIRNESS VS. "PROCESS"

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In this Madison Lecture, Judge Stephen Reinhardt tells the story of the case of Thomas Thompson, a man without a prior criminal record who was executed in California in July of 1998 despite substantial doubt about his guilt of capital murder and an unrefuted decision by the en banc court of the Ninth Circuit that his trial was blatantly unconstitutional. The Ninth Circuit's decision was based on egregious conduct of the prosecution and ineffective assistance of Thompson's counsel. The district judge previously had reversed Thompson's capital sentence on the latter ground.

Judge Reinhardt provides a firsthand account of the unusual events that took place within the Ninth Circuit, including the passing of the deadline within which a judge could request an en banc rehearing; the extraordinary rejection by three judges of a request by colleagues for an extension of time within which to vote on rehearing; a good faith effort, that backfired, by a majority of the Ninth Circuit to comply with the Supreme Court's arcane procedural rules; and, ultimately, a dramatic en banc rehearing in which the Ninth Circuit ruled in Thompson's favor. The story then turns to the United States Supreme Court, which, in a wholly unprecedented action, held that the Ninth Circuit's en banc hearing was invalid because it came too late and offended purported principles of comity and finality, abstract concerns that increasingly predominate over substantive rights in the jurisprudence of the Rehnquist Court.

By telling the story from start to finish, including a report on the factual errors made by the Supreme Court, Judge Reinhardt illustrates the dramatic consequences

* Circuit Judge, United States Court of Appeals for the Ninth Circuit. This is the revised text of the thirtieth annual James Madison Lecture on Constitutional Law delivered at New York University School of Law on October 20, 1998. I owe a great debt to two of my law clerks, one present and one former, for their invaluable assistance. They both worked tirelessly on, and contributed immeasurably to, this project in addition to doing their regular work—which in itself is far more than a full-time job. Jeff Fisher, 1997-98, is presently a law clerk to Justice Stevens, and Stacey Leyton, 1998-99, will serve as a law clerk next year to Judge Susan Y. Illston of the United States District Court for the Northern District of California. The views expressed are those of Judge Reinhardt and not of the United States Court of Appeals for the Ninth Circuit.

> *of the current Court's elevation of procedural rules over substantive justice and the dictates of the Constitution, particularly in death penalty cases. In Judge Reinhardt's opinion, the Court's philosophy in this instance cost Thomas Thompson his life and in its general application seriously tarnishes the integrity and reputation of the American justice system.*
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> [R]eversal by a higher court is not proof that justice is thereby better done.[1]

The year I graduated from law school, the Warren Court decided *Brown v. Board of Education*.[2] *Brown*, perhaps the most important Supreme Court decision in history, introduced a new judicial era, an era in which the courts became the protectors of the rights of the poor, the disenfranchised, and the underprivileged. The Warren Court—the Warren-Brennan era—will be remembered for that legacy. The Court's decisions were guided by a broad, humanitarian vision of the role of the judiciary and of the Constitution as a living document. The Warren Court expanded concepts of equality, due process, and individual liberty, handing down decisions that redefined notions of justice and fairness.

In the area of civil rights, the Warren Court helped usher in revolutionary and irreversible changes in race relations. It also issued landmark First Amendment decisions such as *New York Times Co. v. Sullivan*[3] and *Engel v. Vitale*,[4] expanding the protections afforded the free press and strengthening freedom from state-sponsored religion. It implemented "one person, one vote" in *Reynolds v. Sims*,[5] changing our entire political system.[6] And in its criminal justice decisions, the Warren Court established groundbreaking rules in cases such as *Gideon v. Wainwright*,[7] *Miranda v. Arizona*,[8] and *Mapp v. Ohio*,[9] for

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1 Brown v. Allen, 344 U.S. 443, 540 (1953) (Jackson, J., concurring).

2 347 U.S. 483 (1954) (holding that state laws permitting segregation of black and white children into separate schools violates Equal Protection Clause of Fourteenth Amendment).

3 376 U.S. 254, 279-80 (1964) (stating that, under First and Fourteenth Amendments, state official must demonstrate actual malice to win damage award for defamation claim).

4 370 U.S. 421, 424 (1962) (declaring official state prayer recited in public schools to violate First Amendment).

5 377 U.S. 533, 558 (1964) (quoting Gray v. Sanders, 372 U.S. 368, 381 (1963)).

6 See id. at 568 (determining that Equal Protection Clause requires that seats in state legislature be apportioned on population basis); see also Baker v. Carr, 369 U.S. 186, 237 (1962) (stating that equal protection challenges to voting dilution through arbitrary apportionment is justiciable cause of action under Fourteenth Amendment).

7 372 U.S. 335, 344-45 (1963) (holding that, under Fourteenth Amendment, state courts must provide counsel for indigent defendants charged with noncapital felonies).

8 384 U.S. 436, 444-45 (1966) (stating that once taken into police custody, accused must be provided constitutionally adequate safeguards against self-incrimination).

9 367 U.S. 643, 655 (1961) (holding all evidence obtained in unconstitutional search to be inadmissible in state court criminal trial).

the first time implementing some of the Bill of Rights's most fundamental promises and giving life to the Fourth, Fifth, and Sixth Amendments. The rules were as elementary as the one holding that everyone charged with a crime has the right to be defended by counsel. And although Earl Warren had left the Court by 1969, the Warren-Brennan era continued long enough to give us *Roe v. Wade*,[10] which afforded women the most basic of rights, and *Furman v. Georgia*,[11] which for a brief period held the death penalty unconstitutional. At the time, we thought that there was no turning back, that the Supreme Court's transformation of the role of the judiciary would guarantee a new era in constitutional law, an era in which progress would be the rule, forward would be the direction, and the interests and welfare of the people would be dominant.

Today, we face a very different Court, one that has also had a major impact, and one that will be remembered for its own legacy. The Rehnquist Court will be remembered for its stark reversal of the Warren-Brennan Court's expansion of individual rights and protections and for elevating procedural rules over substantive values and limiting rights generally, especially those of racial minorities.[12] It will be remembered for erecting technical barriers that foreclose relief to

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[10] 410 U.S. 113, 154, 164-66 (1973) (holding that women have qualified right to privacy under Due Process Clause of Fourteenth Amendment that allows termination of pregnancy absent compelling state interest).

[11] 408 U.S. 238, 239-40 (1972) (per curiam) (holding death penalty to be cruel and unusual punishment in violation of Eighth Amendment).

[12] The most notable examples have come in the areas of voting rights, see, e.g., Miller v. Johnson, 515 U.S. 900, 915-17 (1995) (relaxing standing requirement and applying "predominant factor" test to strike down state redistricting plan); Shaw v. Reno, 509 U.S. 630, 658 (1993) (allowing new kind of voting rights claim when shape of district after redistricting demonstrates race was motivation), and affirmative action, see, e.g., Adarand Constructors v. Pena, 515 U.S. 200, 235 (1995) (applying strict scrutiny to federal highway affirmative action program); City of Richmond v. J.A. Croson Co., 488 U.S. 469, 507-11 (1989) (applying strict scrutiny to and striking down city's affirmative action program in construction industry). Some of the Rehnquist Court's decisions diminishing protections for racial minorities were overturned when Congress passed the Civil Rights Restoration Act of 1991, overriding five Supreme Court decisions: Patterson v. McLean Credit Union, 491 U.S. 164, 188-89 (1989) (limiting scope of 42 U.S.C. § 1981 in employer discrimination suits), Lorance v. AT&T Technologies, Inc., 490 U.S. 900, 911-13 (1989) (holding seniority system with disparate impact on women not to be unlawful without discriminatory intent), Martin v. Wilks, 490 U.S. 755, 758-59 (1989) (allowing white firefighters to attack consent decrees collaterally, including goals for hiring black firefighters, because white firefighters were not parties in original action against state), Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 651-52 (1989) (holding that there was no prima facie showing of disparate impact under Title VII when qualified nonwhite employees were not available in relevant labor market), and Price Waterhouse v. Hopkins, 490 U.S. 228, 258 (1989) (holding that even if employee proves sex discrimination in employment decision, employer can avoid liability by proving by preponderance of evidence that it would have made same decision without taking sex into account).

persons with meritorious constitutional claims. It will be known for reducing access to the federal courts and for placing the interests of the state ahead of those of its citizens. Without formally overruling the liberties and freedoms recognized by the Warren Court, the Rehnquist Court has rendered many of them virtually unenforceable,[13] the exceptions being property rights[14] and, to the surprise of most observers, free speech.[15]

The Rehnquist Court has drawn the line regarding substantive due process, refusing to recognize any new, unenumerated rights[16]—a principle which would have left us without the critical protections of privacy recognized in decisions such as *Griswold v. Connecticut*[17] and *Roe v. Wade*.[18] And one can only contemplate with dread the answer

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[13] The Burger Court, which issued decisions such as Stone v. Powell, 428 U.S. 465, 494-95 (1976) (eliminating remedies for Fourth Amendment violations in federal habeas cases), and Wainwright v. Sykes, 433 U.S. 72, 86-87 (1977) (tightening procedural default rules), took a step in that direction, but it was only with the elevation of Justice Rehnquist to Chief Justice in 1986 that procedural rules began to become more important than the rights established in the Constitution.

[14] See, e.g., Phillips v. Washington Legal Found., 118 S. Ct. 1925, 1934 (1998) (determining interest on funds in Interest on Lawyers' Trust Accounts to be private property for purposes of Takings Clause); Dolan v. City of Tigard, 512 U.S. 374, 391 (1994) (applying "rough proportionality" takings standard to invalidate city land-use requirement); Lechmere, Inc. v. NLRB, 502 U.S. 527, 540-41 (1992) (balancing employer property rights with employee statutory organizational rights and allowing employer to bar union organizers from property).

[15] The Court has stood firm on free speech cases, generally upholding the right. See, e.g., Reno v. ACLU, 117 S. Ct. 2329, 2334 (1997) (striking down regulation of indecent material on Internet); R.A.V. v. City of St. Paul, 505 U.S. 377, 381 (1992) (invalidating ordinance which prohibited certain bias-motivated expression); Sable Communications of Cal., Inc. v. FCC, 492 U.S. 115, 131 (1989) (striking down restrictions on pornographic telephone services); Texas v. Johnson, 491 U.S. 397, 399 (1989) (invalidating conviction of individual for burning American flag). The Court's protection of speech has included the area of commercial speech. See, e.g., 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 516 (1996) (striking down ban on advertising price of alcoholic beverages).

[16] See, e.g., Washington v. Glucksberg, 117 S. Ct. 2258, 2271 (1997) (refusing to recognize right to die as liberty interest); Albright v. Oliver, 510 U.S. 266, 275 (1994) (finding arrest without probable cause not to violate substantive due process); Michael H. v. Gerald D., 491 U.S. 110, 128-29 (1989) (deciding that application of presumption which deprives natural father of recognition of paternity does not violate substantive due process); Bowers v. Hardwick, 478 U.S. 186, 191 (1986) (finding no privacy right for consensual homosexual activity). Of course, the Court made a notable exception in BMW v. Gore, 517 U.S. 559, 562, 574-75 (1996), in which it held that a "grossly excessive" punitive damage award violated the Due Process Clause of the Fourteenth Amendment.

[17] 381 U.S. 479, 485 (1965) (finding that laws prohibiting use of contraceptives unconstitutionally infringe upon protected "zone of privacy").

[18] 410 U.S. 113, 154 (1973) (concluding that constitutional right to privacy includes abortion decision).

the current Court would have given had it been asked to overrule *Plessy v. Ferguson*.[19]

The Rehnquist Court has placed its greatest emphasis on the expansion of nonconstitutional doctrines such as mootness, ripeness, standing, procedural default, nonretroactivity, independent state grounds, and abuse of the writ. It also emphasizes at every opportunity nostrums such as comity and finality. Under the Rehnquist Court's jurisprudence, these rules regularly prove decisive in limiting the ability of lower federal courts to redress constitutional violations, in shutting the doors of the courthouse to ordinary people. The Court's constriction of rights has been most notable in the criminal justice area: in particular, through assaults on what was once known as "The Great Writ," the writ of habeas corpus—much of it in the name of federalism or, as it used to be known, states' rights. The Rehnquist Court has rendered a number of decisions that prohibit habeas petitioners from bringing claims they did not "properly" raise in state court or in earlier habeas petitions, unless they can overcome an increasingly strict cause and prejudice test[20] or meet an almost impossible "miscarriage of justice" standard.[21] At the same time, the

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[19] 163 U.S. 537, 550-51 (1896) (upholding constitutionality of separate but equal accommodations), overruled by Brown v. Board of Educ., 347 U.S. 483, 494-95 (1954). In fact, Chief Justice Rehnquist served as a law clerk to Justice Jackson during the Term that *Brown* was decided and wrote a memorandum arguing for continued adherence to the separate but equal doctrine. See Bernard Schwartz, Rehnquist, *Runyon*, and *Jones*—The Chief Justice, Civil Rights, and Stare Decisis, 31 Tulsa L.J. 251, 253-55 (1995).

[20] To trace the erosion of the Fay v. Noia, 372 U.S. 391, 439 (1963), standard, which allowed review of a petitioner's constitutional claims as long as he did not deliberately bypass state avenues of relief, see Wainwright v. Sykes, 433 U.S. 72, 87 (1977) (limiting deliberate bypass standard by requiring petitioner to show cause and prejudice for procedural default at state trial to obtain federal habeas review of constitutional claims); Murray v. Carrier, 477 U.S. 478, 490-91 (1986) (applying cause and prejudice standard to habeas petitioner's failure to raise particular claim in state court appeal); McCleskey v. Zant, 499 U.S. 467, 493-95 (1991) (extending cause and prejudice standard to determination of "abuse of the writ" through inexcusable neglect). *Wainwright* seriously undermined the deliberate bypass standard; Coleman v. Thompson, 501 U.S. 722 (1991), overruled it. See id. at 750 (barring federal habeas review of all claims resulting from procedural default in state court absent petitioner's showing of cause and prejudice or fundamental miscarriage of justice); see also Keeney v. Tamayo-Reyes, 504 U.S. 1, 8 (1992) (requiring cause and prejudice rather than applying deliberate bypass standard for failure to develop material fact in state court).

[21] See, e.g., Sawyer v. Whitley, 505 U.S. 333, 336 (1992) (requiring "clear and convincing evidence that, but for a constitutional error, no reasonable juror would have found the [defendant] eligible for the death penalty"). The *Sawyer* standard is applied when a petitioner is barred on procedural grounds from bringing his claims but argues that he can show that he is ineligible for the death penalty. I have been unable to find any reported case in which an individual met this standard. It is not clear what effect the Antiterrorism and Effective Death Penalty Act (AEDPA), which was passed in 1996, will have on the rule. Pub. L. No. 104-132, 110 Stat. 1214 (codified at 28 U.S.C. § 2244 (Supp. II 1997)). For a discussion of the AEDPA, see infra notes 170-73 and accompanying text.

Court has made it easier for states to claim that their courts relied on independent state grounds to reach their decisions and thus to avoid any federal judicial review of their unconstitutional actions.[22] The Court's decisions have also inflated the harmless error and plain error standards beyond recognition, thereby encouraging future violations of constitutional rights.[23] Finally, the adoption of the anomalous *Teague v. Lane*[24] doctrine has foreclosed relief to most habeas petitioners unless they are able to demonstrate that courts generally recognized the particular violation they suffered before their convictions became final. In other words, after *Teague*, habeas petitioners are not entitled to raise claims on the basis of what the Court defines as "new rules."

Today, this maze of procedural barriers compels federal judges to spend up to ninety percent of our time in capital cases and other habeas proceedings trying to determine whether a defendant's rights have unwittingly been forfeited and trying to apply the Supreme

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[22] Under the current standard, federal courts must often assume that a state court relied on an independent state ground even in cases in which the decisions give virtually no indication of the reason for their dispositions. See Coleman v. Thompson, 501 U.S. 722, 740 (1991) (allowing assumption that state court which rejected petitioner's claims must have relied on procedural grounds because state's motion had sought dismissal solely on this basis); Ylst v. Nunnemaker, 501 U.S. 797, 803 (1991) (allowing federal court to look to last reasoned state court decision, even if higher state court rejected claims without explanation). These two cases limited the presumption established by Michigan v. Long, 463 U.S. 1032, 1040-41 (1983), and applied to habeas cases in Harris v. Reed, 489 U.S. 255, 265 (1989), that a state court must have based its decision upon federal law unless it "clearly and expressly" stated its reliance on an independent and adequate state ground. *Long*, 463 U.S. at 1041. *Coleman* made it clear that this presumption only applied in cases in which the most recent state court decision "'fairly appear[ed] to rest primarily on federal law, or to be interwoven with the federal law.'" *Coleman*, 501 U.S. at 735 (quoting *Long*, 463 U.S. at 1040).

[23] See United States v. Olano, 507 U.S. 725, 731-41 (1993) (plain error); Brecht v. Abrahamson, 507 U.S. 619, 635-39 (1993) (harmless error). In fact, the use of the harmless and plain error standards to frustrate the correction of constitutional errors is the untold story behind the increasing disregard for defendants' constitutional and nonconstitutional rights. The import of those two doctrines is well illustrated by the difference between the Rose E. Bird and Malcolm M. Lucas California Supreme Courts. Under Chief Justice Rose E. Bird (1977-1986), the court reversed 94% of the 71 death sentences that came before it on appeal; in contrast, the Malcolm M. Lucas Court (1986-1996) reversed 15% of the 212 death penalties it reviewed. While both courts often found errors in the defendants' trial and sentencing proceedings, "[t]he errors the Bird Court justices determined were 'reversible' were usually regarded as 'harmless' by the Lucas Court justices." John H. Culver, The Transformation of the California Supreme Court: 1977-1997, 61 Alb. L. Rev. 1461, 1486 (1998). For a detailed discussion of the difference in the harmless error standards used by the two courts, see generally C. Elliot Kessler, Death and Harmlessness: Application of the Harmless Error Rule by the Bird and Lucas Courts in Death Penalty Cases—A Comparison & Critique, 26 U.S.F. L. Rev. 41 (1991).

[24] 489 U.S. 288, 310 (1989) (foreclosing applicability of new constitutional rules of criminal procedure in cases which have become final before new rule is announced).

Court's arcane and almost impenetrable procedural rules. Unless we conclude that the defendant has somehow surmounted all of the Court-created artificial constructs, we cannot even reach what is now usually the easier question: whether the defendant was deprived of his constitutional rights. In recent years, it has become increasingly unlikely that the federal courts can correct constitutional violations occurring in state prosecutions. Frequently, all that is left to a defendant is a claim of ineffective assistance of counsel, which is, of course, one of the most pervasive problems in capital cases.[25] But even a claim of ineffective assistance is often procedurally foreclosed because in the state post-conviction proceedings the same ineffective lawyer continues to represent the defendant, or, even worse, the defendant is left without counsel at all. Either way, the ineffectiveness claim almost surely will not be raised in a timely manner and, under the rules adopted by the Rehnquist Court, will be procedurally defaulted.[26] What has been lost in the worship of abstract procedural principles is our concern for fairness and justice—our dedication to the Bill of Rights and the Fourteenth Amendment.

The epitome of this Supreme Court's death penalty jurisprudence is the case of Thomas Thompson, who was executed only three months ago, on July 14, 1998, by the State of California.[27] One year earlier, in August 1997, my court, the United States Court of Appeals for the Ninth Circuit, sitting en banc, had issued an exhaustive and forceful opinion vacating Thompson's death sentence and remanding his murder conviction.[28] We held that he had been deprived of effective assistance of counsel on the charge that made him eligible for the death penalty and that the prosecutor's highly improper conduct both at his trial and at the trial of his alleged accomplice violated the Due Process Clause.[29] In short, Thompson had not received anything re-

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[25] Stephen B. Bright's numerous articles on this subject offer compelling discussions of this problem. See, e.g., Stephen B. Bright, Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer, 103 Yale L.J. 1835, 1841-66 (1994) (describing pervasiveness of poor representation, reasons for it, and possibilities for improvement); see also Ruth E. Friedman & Bryan A. Stevenson, Solving Alabama's Capital Defense Problems: It's a Dollars and Sense Thing, 44 Ala. L. Rev. 1, 6-26 (1992) (discussing problems caused by poor legal representation in capital cases).

[26] Under *Coleman*, 501 U.S. at 752-54, ineffective assistance of counsel during state habeas proceedings cannot provide cause for a procedural default because there is no right to counsel at this stage. There may be an exception to this rule when state law guarantees the right to counsel for a state habeas petition; in that case, ineffective assistance may violate a state-created liberty interest and therefore the Due Process Clause.

[27] See Eric Bailey, Inmate Said Goodbyes, Then Died, L.A. Times, July 15, 1998, at A3.

[28] See Thompson v. Calderon, 120 F.3d 1045 (9th Cir. 1997) (en banc), rev'd, 118 S. Ct. 1489 (1998).

[29] See id. at 1048-60.

sembling a fair trial. In April 1998, the Supreme Court vacated our decision, and without uttering a single word of disagreement with our judgment that Thompson's constitutional rights had been egregiously violated, declared, through a now-familiar bare majority of five Justices, that we had committed "a grave abuse of discretion" by hearing Thompson's case en banc.[30]

The Supreme Court's decision that a person could be executed on the basis of a trial in which his fundamental constitutional rights were violated was, sadly, nothing new. By similar five-to-four margins, the Rehnquist Court had previously held that persons could be executed when the constitutional rules violated in their trials had not been "compelled by existing precedent."[31] It also had held that a man could be executed because he could not provide a good enough reason why his winning constitutional claim had been raised in his second habeas petition rather than in his first.[32] Similarly, the Court had ruled that a man could be executed because his lawyer had filed his notice of appeal in the state habeas proceedings three days late.[33]

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[30] Calderon v. Thompson, 118 S. Ct. 1489, 1494 (1998) (Kennedy, J., joined by Rehnquist, C.J., O'Connor, Scalia, and Thomas, JJ.).

[31] Most recently, see O'Dell v. Netherland, 117 S. Ct. 1969, 1973-74 (1997) (upholding death sentence because requirement of jury instruction regarding parole eligibility was "new rule"). The Court's retroactivity principle derives from another five-to-four decision, Teague v. Lane, 489 U.S. 288, 310 (1989) (denying claim based on illegal racial discrimination in jury selection because conviction became final before decision in Batson v. Kentucky, 476 U.S. 79 (1986), which announced new rule for demonstrating racial discrimination in use of peremptory challenges).

[32] See McCleskey v. Zant, 499 U.S. 467, 493-95 (1991) (Kennedy, J., joined by Rehnquist, C.J., White, O'Connor, Scalia, and Souter, JJ.). In this case, the district court had held that the defendant's *Massiah* right to counsel had been violated and that this constitutional claim merited relief. See id. at 476. Moreover, the petitioner's failure to bring the claim earlier was in large part directly attributable to the state's deception. See id. at 526-27 (Marshall, J., dissenting). It is worth noting that, as in *Coleman*, discussed infra note 33, *McCleskey* was decided when Justice Souter was still in his first Term as a member of the Court.

[33] See Coleman v. Thompson, 501 U.S. 722, 727, 752-54 (1991) (O'Connor, J., joined by Rehnquist, C.J., White, Scalia, Kennedy, and Souter, JJ.). The Court held that the ineffectiveness of Coleman's attorney, who had made the fatal mistake, could not excuse Coleman's procedural default because there is no constitutional right to counsel in a state habeas proceeding. See id. at 752-54. The Court reasoned that "[a]s between the State and the petitioner, it is the petitioner who must bear the burden of a failure to follow state procedural rules. . . . [T]he petitioner bears the risk in federal habeas for all attorney errors made in the course of representation . . . ." Id. at 754.

Once again, a comparison to how the Court treats procedural errors by the state demonstrates an inequity in the Supreme Court's doctrines—for while the Court imposes rules on lower federal courts which require us to punish defendants for any procedural errors that they make, despite the fact that habeas petitioners often receive poor legal representation or no representation at all, we are free to ignore the state's errors when its attorneys make similar omissions or mistakes. Thus, although it is very easy for a habeas petitioner to waive an issue by failing to raise it at each appropriate moment, the Court will readily

In *Coleman*, while overturning decades of jurisprudence, the Rehnquist Court explained, in a sentence exemplifying the quality of its concern for individual rights, that earlier Supreme Court habeas decisions were "based on a conception of federal/state relations that undervalued the importance of state procedural rules."[34] "We now recognize," the Rehnquist Court announced, "the important interest in finality served by state procedural rules, and the significant harm to the States that results from the failure of federal courts to respect them."[35] In other words, the Rehnquist Court proclaimed that until the present Justices came along, the United States Supreme Court had not been sufficiently perceptive to realize that state procedural rules are more important than fairness, due process, and even justice. If only Justices Warren and Brennan, and other learned predecessors of the current Court, had been possessed of the acuity and judicial wisdom that today's Justices enjoy, we could have devalued the Bill of Rights years earlier.

The surprising thing about the case of Thomas Thompson is that, in contrast to most of the other cases in which the Court refused to entertain the merits of petitioners' claims, there was no contention that any state procedural rule had been violated or that any constitutional principle involved was inapplicable because it was a "new rule," not one generally recognized before Thompson's conviction. No, against all odds, Thompson and his lawyer had scrupulously, and successfully, wound their way through what Justice Blackmun called the "[b]yzantine morass of arbitrary, unnecessary, and unjustifiable impediments to the vindication of federal rights."[36] Yet, once again, the Supreme Court majority refused even to consider whether the petitioner's constitutional rights had been violated. The ostensible reason

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excuse negligence, inattention, or errors on the part of the state. A state which fails to raise a *Teague* objection need not worry—a federal court may still apply it sua sponte. See Caspari v. Bohlen, 510 U.S. 383, 389 (1994) (holding that "a federal court may, but need not, decline to apply *Teague* if the State does not argue it"). Similarly, a state attorney's failure to argue, at the district court level, that a petitioner has not exhausted his state remedies need not preclude the attorney from raising the issue on appeal. See Granberry v. Greer, 481 U.S. 129, 133 (1987) (holding that appellate court need not regard state's omission as waiver of claim). And in a 1997 case where the state failed to raise a habeas petitioner's procedural default, the Court found numerous reasons to refuse to reach the question of whether a federal court can raise it sua sponte, thereby allowing the practice to continue in the circuits which allow it. See Trest v. Cain, 118 S. Ct. 478, 480-81 (1997) (holding that court was not required to raise procedural default sua sponte).

[34] *Coleman*, 501 U.S. at 750.

[35] Id.

[36] Id. at 759 (Blackmun, J., dissenting). It is worth noting that because Thomas Thompson's petition for habeas corpus was filed in federal district court prior to the enactment of the AEDPA, he was not subject to that statute's procedural hurdles. For further discussion of the AEDPA, see infra notes 170-73 and accompanying text.

this time was that the judges on our court had missed a deadline, the state's "final" judgment had become incrementally more final, and, as a result, the en banc hearing we held had been conducted too late. Our decision was null and void. The fact that Thompson would be executed on the basis of an unconstitutional trial was of no consequence to the majority of the members of the Supreme Court.

Perhaps a fuller discussion of what occurred in the *Thompson* case will help make clearer the sharp differences in judicial philosophy between the current Supreme Court and those who would give substance to the protections afforded all persons by the Bill of Rights and the Fourteenth Amendment. In any event, I believe it to be a tale worth recording.

I
The Trial

Thomas Thompson was convicted in 1983 in a California state court of the first-degree murder and rape of Ginger Fleischli. It was his first criminal conviction. Two years earlier, Thompson had gone out for a night of drinking with a group that included Ms. Fleischli, David Leitch, and Leitch's ex-wife. Leitch had until recently been Ms. Fleischli's lover, and they had lived together. After the breakup with Leitch, Ms. Fleischli decided to share living quarters with Leitch's ex-wife. Thompson, who was new to the group, moved in with Leitch as his roommate. At the end of the evening's carousing, Ms. Fleischli and Thompson went to the apartment in which she had lived with Leitch but which Leitch and Thompson now shared. Leitch arrived sometime later that night. By the next morning, Ms. Fleischli was dead. Her body, with multiple stab wounds to the head, was found two days later in a field ten miles away. Suspicion regarding her murder immediately focused on Leitch, because of his prior sexual relationship with her, because he had threatened her in the past, and because he had a history of violence toward women.[37]

The state arrested and eventually indicted both Leitch and Thompson. Its theory was that Leitch wanted Ms. Fleischli dead because he hoped to resume his relationship with his ex-wife and that he recruited Thompson to join in the killing and disposal of the body. Leitch, the prosecution insisted at preliminary hearings, was "the *only person* . . . who ha[d] a motive" to kill the victim.[38] At the preliminary

[37] For the facts of the murder, see Calderon v. Thompson, 118 S. Ct. 1489, 1494-95 (1998).

[38] Thompson v. Calderon, 120 F.3d 1045, 1056 (9th Cir. 1997) (en banc) (emphasis added) (quoting pretrial hearing transcript), rev'd, 118 S. Ct. 1489 (1998).

hearing, the prosecution presented four jailhouse informants who testified in support of this version of the crime. The informants stated that Thompson had confessed that Leitch had recruited him to help kill Ms. Fleischli because she was interfering with his attempt to reconcile with his ex-wife. One of these informants testified that Thompson had told him that Thompson had engaged in consensual sex with Ms. Fleischli before Leitch returned home, and that upon Leitch's return, they had killed her.[39] At a subsequent hearing a few months later, the prosecution again argued, "[Leitch] is the only person . . . who has a motive"—that motive being that Ms. Fleischli was "in the way" of a successful reconciliation with his ex-wife.[40]

The same deputy district attorney prosecuted both Leitch and Thompson.[41] He subsequently testified that his theory of the case never varied throughout the proceedings.[42] Indeed, he advocated the state's principal theory—that Leitch had recruited Thompson to help kill Ms. Fleischli—at the preliminary hearing, at the hearing on the motion to set aside the charges, at Leitch's trial, and at the post-conviction hearings.[43]

But when the preliminary proceedings were completed, a surprising development occurred: The prosecutor decided to try Thompson first, and at the Thompson trial he offered an entirely new and contradictory version of the facts. There the prosecutor insisted that Thompson was the sole killer and that his motive was to cover up the fact that he had raped Ms. Fleischli—a theory that was wholly inconsistent with the version he urged on every other occasion. The prosecutor now argued that Thompson "was the *only person* in that apartment with Miss Fleischli the night—at the time she was killed."[44] Thompson raped her, he told the jury, and "[b]ecause she said she was going to tell for what he did to her," he spontaneously "killed her to prevent being caught for rape."[45] The prosecutor declined to call any of the four prosecution witnesses the state had presented at the preliminary hearing, all of whose stories directly contradicted the tale he presented at Thompson's trial. Instead, he put on the stand two new and notoriously untruthful jailhouse informants, John Del Frate and

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[39] See id. at 1055 (recounting informant's testimony).

[40] Id. at 1056.

[41] See id. at 1055.

[42] See id. at 1055 (stating that, "[o]n his own admission, Jacobs [the prosecutor] never altered his view of the motive and the crime, either before or after he won Thompson's conviction").

[43] See id. at 1055-57 (quoting prosecutor's arguments at trials of both Thompson and Leitch).

[44] Id. at 1057 (quoting prosecutor's closing argument).

[45] Id. (alteration in original) (emphasis omitted).

the aptly named Edward Fink. The new "snitches" conveniently testified that Thompson had confessed to a version of events that corresponded with the prosecutor's newly developed rape theory.[46] Their testimony provided, in the prosecutor's own words, the "dispositive" evidence that Thompson had raped Ms. Fleischli and murdered her to cover up the crime.[47] The snitches also testified that Leitch was not involved in the murder—that he only discovered that the victim had been killed after he returned to the apartment and found her dead and that his involvement was limited to helping dispose of her body at Thompson's urging.[48] The prosecutor emphasized to the Thompson jury that Leitch was in no way involved in Ms. Fleischli's actual killing, asking "[w]hat evidence do we really have that [Leitch] did anything, had any part [except in disposing of the body]? There is no evidence we have putting him in the apartment that night."[49] He vouched for the new jailhouse informants' credibility: "[T]here's no reason whatsoever they have to lie. There's no motive to fabricate, and [Thompson] couldn't impeach them on one single point."[50] By convicting Thompson of rape as well as murder, the prosecutor succeeded in making him eligible for the death penalty, which the jury and judge then imposed.[51]

Of course, the prosecutor did not stick with this version of the events for long. After Thompson's trial, he returned to the original theory: that Leitch recruited Thompson to help him kill Ms. Fleischli because Leitch wanted Ms. Fleischli dead.[52] At Leitch's trial, the prosecutor did not call the two snitches whose reliability he had vouched for during Thompson's trial and whose testimony he had called "dispositive."[53] Instead, he subpoenaed the witnesses who had

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[46] See id. at 1056.

[47] See Reporter's Transcript at 2566, People v. Thompson, (Cal. Super. Ct. 1983) (No. C-49758) (quoting prosecution's closing argument).

[48] See *Thompson*, 120 F.3d at 1056 (referring to informant's testimony).

[49] Id. at 1057 (quoting prosecutor's argument to *Thompson* jury) (alteration in original) (emphasis omitted).

[50] Reporter's Transcript at 2637, *Thompson* (No. C-49758) (quoting prosecutor's closing argument). Of course, the statement that the informants had no motive to lie was, to use a current term, misleading, because the state had released Fink from jail and dropped his parole hold in return for his testimony. See *Thompson*, 120 F.3d at 1056.

A "parole hold" occurs when a parolee is retained in custody under the administrative authority of the parole authority, usually following a violation of a condition of parole or an arrest for a new crime. See In re Law, 513 P.2d 621, 623 n.2 (Cal. 1973) (defining parole hold).

[51] The jury recommended the death penalty, and the judge imposed it. See Calderon v. Thompson, 118 S. Ct. 1489, 1495 (1998).

[52] See *Thompson*, 120 F.3d at 1056-57.

[53] Reporter's Transcript at 2566, *Thompson* (No. C-49758) (quoting prosecutor's closing argument).

testified in Thompson's defense, whose testimony he had sought to discredit at Thompson's trial—testimony that suggested that Leitch, not Thompson, was the murderer.[54] Now, he urged that the jury credit that testimony.

Having obtained Thompson's conviction, the prosecutor returned to the theory he argued at all the other proceedings, that Leitch's violent history, his past threats toward Ms. Fleischli, and his motive—his desire to remove an obstacle to reconciliation with his ex-wife—demonstrated that Leitch was the murderer. The prosecutor argued, in direct contravention of his statements to the jury in the Thompson trial, that Leitch was "the only one with any motive for [Ms. Fleischli's] death."[55] And in perhaps the most blatant contradiction of all, he ridiculed the very version of events that he had presented in Thompson's trial, asking whether it would be "reasonable" or "logical" for Thompson to kill Ms. Fleischli, wait for her former lover to return home and discover the murder, and then request his help in disposing of the body.[56] He answered his own question: "No, it didn't happen that way."[57] In short, Thompson did not do what the state told his jury he did. Thompson did not commit the acts for which the state obtained his conviction, the acts which allowed the imposition of the death penalty.

The incompatibility of the two presentations could not have been more evident.[58] As Judge Betty Fletcher of our court later wrote, "little about the trials remained consistent other than the prosecutor's desire to win at any cost."[59]

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[54] During Thompson's trial, the prosecutor had objected to these witnesses' testimony. Then, as the witnesses left the courtroom following their testimony, he handed them subpoenas for Leitch's trial. See Thompson v. Calderon, No. CV-89-3630-RG, slip op. at 66 (C.D. Cal. Mar. 29, 1995).

[55] Reporter's Transcript at 2505, People v. Leitch, (Cal. Super. Ct. 1985) (No. C-49758) (quoting prosecutor's closing argument).

[56] *Thompson*, 120 F.3d at 1057.

[57] Id.

[58] The contradictory nature of these presentations violated the fundamental tenets that govern the performance of a prosecutor's duties. In United States v. Kattar, 840 F.2d 118 (1st Cir. 1988), the court commented that, unlike private counsel, who are free to "characterize events in contrasting ways in two separate litigations," a prosecutor's duty "is not merely to prosecute crimes, but also to make certain that the truth is honored to the fullest extent possible during the course of the criminal prosecution and trial." Id. at 127. The prosecution's interest in a criminal proceeding "is not that it shall win a case, but that justice shall be done." Berger v. United States, 295 U.S. 78, 88 (1935); accord Bruno v. Rushen, 721 F.2d 1193, 1195 (9th Cir. 1983) (stating that prosecutor "has no obligation to win at all costs and serves no higher purpose by so attempting"); Model Code of Professional Responsibility EC 7-13 (1980) (relating that prosecutor's "duty is to seek justice, not merely to convict").

[59] *Thompson*, 120 F.3d at 1059.

The prosecutor's contradictory presentations were so blatantly unethical that, in a wholly unprecedented action, seven former California prosecutors[60] with extensive death penalty experience subsequently filed an amicus brief on Thompson's behalf in the United States Supreme Court, arguing that "this is a case where it appears that our adversarial system has not produced a fair and reliable result."[61] This group of top prosecutors included the individual entrusted with the decision whether to seek the death penalty in all capital-eligible cases in Los Angeles County during 1979-1991, his counterpart in Sacramento entrusted with the same decision in that county during 1989-1995, and the drafter of the California death penalty statute under which Thompson was convicted and sentenced.[62] These highly respected prosecutors severely criticized the egregious conduct of Thompson's prosecutor and observed that "the use of three informants to support one prosecution theory and then two new informants to support another demonstrates how easy it is to manipulate facts when the prosecutor's goal is to win at all costs."[63]

In addition to facing a prosecution that made a fair trial impossible, Thompson found himself defended by an attorney who made the inexplicable decision not to contest the assertion that Ms. Fleischli had been raped, although there was very little evidence that the intercourse had been anything but consensual, and it was the rape charge that made the murder a capital offense. Incredibly, rather than questioning the state's physical evidence or putting on his own forensic testimony, Thompson's defense attorney chose to argue that it was Leitch who had raped Ms. Fleischli.[64] He thus effectively admitted, on his client's behalf, the occurrence of a rape that in all likelihood never occurred—a "rape" which made Thompson eligible for the death sentence.[65] Thompson's counsel also made only minimal efforts to impeach the jailhouse informants who testified that Thompson had confessed a rape and murder to them, failing to discover that both Fink and Del Frate often had testified about purported confessions in exchange for favors from law enforcement officials and were generally regarded as extremely unreliable;[66] that Fink's parole hold[67] had been

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[60] These former prosecutors were: Richard L. Gilbert, Donald H. Heller, Peter J. Hughes, Curt Livesay, M. James Lorenz, Wayne L. Ordos, and Steve White.

[61] Brief of Amici Curiae in Support of Petitioner at 4-5, Thompson v. Calderon, 120 F.3d 1045 (9th Cir. 1997) (No. 96-8707).

[62] See id. at 1-2, 4 n.3.

[63] Id. at 7 n.5.

[64] See *Thompson*, 120 F.3d at 1052.

[65] See id. at 1052-53.

[66] See id. at 1053-55.

[67] See supra note 50 for a definition of a parole hold.

released after he gave his statements implicating Thompson; that Del Frate's testimony matched inaccurate news reports of the crime; and that even Del Frate's own family knew him to be a "pathological liar."[68] The attorney's failure to contest the allegation that Ms. Fleischli was raped is extremely disturbing in light of Thompson's testimony that he had engaged in consensual sex with her after returning to the apartment and the evidence that Thompson later obtained which casts substantial doubt on the theory that any rape occurred. That evidence includes both forensic testimony and Leitch's own admissions against interest that he observed Thompson and Ms. Fleischli engaging in consensual sex on the night in question.[69]

All in all, Thompson's trial fell far short of minimal constitutional standards in every important respect.[70]

II
The Federal Habeas Petition

After losing his appeals in the California state courts, in 1990 Thompson finally earned the right to present his constitutional claims to a federal court. Thompson filed his petition for writ of habeas corpus in the United States District Court for the Central District of California. The case was assigned to Judge Richard Gadbois, a former state court trial judge and an appointee of President Ronald Reagan. Judge Gadbois, who, over a five-year period, read and reread thousands of pages of trial transcripts and held an evidentiary hearing at which he heard additional direct testimony, issued a meticulous and carefully considered 101-page opinion.[71]

Judge Gadbois ruled that Thompson's trial attorney rendered ineffective assistance of counsel as to the rape charge by failing to contest the state's dubious physical evidence and failing to impeach the

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[68] *Thompson*, 120 F.3d at 1054.

[69] Leitch's admission was against interest because it established his presence in the apartment before Ms. Fleischli was killed. See Thompson v. Calderon, 151 F.3d 918, 934-36 (9th Cir. 1998) (en banc) (Reinhardt, J., concurring and dissenting). For elaboration on the forensic evidence that no rape occurred, see *Thompson*, 120 F.3d at 1052-53. For discussion of Leitch's statements, see *Thompson*, 151 F.3d at 920, 925-26; id. at 934 (Reinhardt, J., concurring and dissenting). For a discussion of the Supreme Court's characterization of the evidence of rape as "ample," Calderon v. Thompson, 118 S. Ct. 1489, 1503 (1998), see infra notes 162-64 and accompanying text.

[70] While Thompson was sentenced to death, Leitch was not. At his trial, Leitch was convicted of second degree murder and sentenced to 15 years to life. He is currently eligible for parole. See Eric Bailey et al., Protests, Appeals Mark Convict's Last Hours, L.A. Times, July 14, 1998, at A1.

[71] See Thompson v. Calderon, No. CV-89-3630-RG, slip op. at 2 (C.D. Cal. Mar. 29, 1995) (describing court's involvement over five-year period).

state's two jailhouse informants.[72] The district court found that this deficient performance prejudiced Thompson in light of the insubstantiality of the evidence that any rape had occurred.[73] The court did not conclude, however, that the prosecutor's use of inconsistent theories reached the level of a constitutional violation.[74] Judge Gadbois's ruling meant that Thompson's death sentence would be vacated, but his murder conviction would stand.[75] The state appealed and so did Thompson.

On June 19, 1996, a three-judge panel of the Ninth Circuit reversed the part of the decision in Thompson's favor.[76] It did so on the ground that any errors made by his lawyer were not prejudicial.[77] The decision gave short shrift to Thompson's arguments, saying, for instance, that the panel "[could not] say that" the informants' testimony "formed a crucial part of the case"[78] even though the prosecutor had called their testimony "dispositive."[79] The panel's essential message was contained in the first sentence of its analysis, where it chanted the Rehnquist Court's mantra: "We are mindful of the limited role of federal courts in habeas review of state convictions."[80] That message of course bore no relation to what the panel actually did in Thompson's case—which was to reexamine, reweigh, and reevaluate the evidence and reject the findings of the district judge. This task is one for which conservative jurists regularly proclaim appellate judges are ill-suited, insisting that such judgments should be left to district judges who, like Judge Gadbois, have conducted the evidentiary hearings. Nonetheless, the panel reached a conclusion contrary to the district judge's conclusion and reinstated Thompson's death sentence.[81]

On August 5, 1996, Thompson filed a timely petition for rehearing and suggestion for rehearing en banc, which was circulated to the judges of our court.[82] Toward the end of September, a judge requested that the panel provide a 5.4(b) notice.[83] A request for such a

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72 See id. at 13, 23-24, 30-31.

73 See id. at 12-13, 23, 100.

74 See id. at 69-70.

75 See id. at 100.

76 See Thompson v. Calderon, 109 F.3d 1358, 1369-70 (9th Cir. 1996).

77 See id. at 1366-69.

78 Id. at 1369.

79 Reporter's Transcript at 2566, People v. Thompson, (Cal. Super. Ct. 1983) (No. C-49758) (quoting prosecutor's closing argument).

80 *Thompson*, 109 F.3d at 1364.

81 See id. at 1370, 1374.

82 See Petition for Rehearing with Suggestion for Rehearing En Banc, Thompson v. Calderon, 120 F.3d 1045 (9th Cir. 1997) (No. 96-8707).

83 See Thompson v. Calderon, 120 F.3d 1045, 1067 (9th Cir. 1997) (Kozinski, J., dissenting).

notice, which is known by the number and letter of one of our internal rules,[84] is ordinarily a precursor to a judge's calling for a rehearing en banc and a signal to the court that the judge is likely to so call.

The procedure by which the full court decides whether to hear cases en banc is provided by statute.[85] As caseloads have proliferated, en banc hearings have become increasingly important.[86] Under our internal rules, if any active or senior judge believes that a decision by a three-judge panel of the court merits rehearing by the court sitting en banc, that judge is entitled to request a vote for rehearing by all of the active judges. If a majority of the active judges then votes for rehearing en banc, an en banc court of eleven judges is convened, the case is argued anew, and the en banc court may then issue a decision that supersedes the three-judge panel's decision.[87] An en banc call—that is, a request for a vote on whether to rehear a case en banc—provides a check on unconstitutional executions and leads to reversals in capital as well as noncapital cases.[88]

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[84] See U.S. Court of Appeals for the Ninth Circuit, General Orders § 5.4(b) (1997) (on file with the *New York University Law Review*).

[85] See 28 U.S.C. § 46(c) (1994) ("[A] hearing or rehearing before the court en banc [may be] ordered by a majority of the circuit judges of the circuit who are in regular active service.").

[86] Justice Kennedy has repeatedly suggested that we hear more cases en banc, most recently in his letter to the White Commission, a commission considering structural changes to the Ninth Circuit. He commented, "[T]he Ninth Circuit does not come close to the number of en banc hearings necessary to resolve intra-circuit conflicts, much less to address questions 'of exceptional importance.'" Letter from Justice Anthony M. Kennedy, United States Supreme Court, to Justice Byron R. White, Chair, Commission on Structural Alternatives for the Federal Courts of Appeals 3 (Aug. 17, 1998) (quoting Fed. R. App. P. 35(a)) (on file with the *New York University Law Review*). Justice O'Connor similarly suggested in her letter to the White Commission that our court heard an insufficient number of cases en banc. See Letter from Justice Sandra Day O'Connor, United States Supreme Court, to Justice Byron R. White, Chair, Commission on Structural Alternatives for the Federal Courts of Appeals 2 (June 23, 1998) (on file with the *New York University Law Review*).

[87] See U.S. Court of Appeals for the Ninth Circuit, General Orders § 5.5(d) (1997) (on file with the *New York University Law Review*).

[88] In fact, four times in the past two years our court has employed the en banc process to overturn panel decisions denying relief in death penalty cases in which serious constitutional violations had occurred. See Dyer v. Calderon, 151 F.3d 970, 985 (9th Cir.) (en banc) (finding denial of right to fair trial when juror lied during voir dire), cert. denied, 119 S. Ct. 575 (1998); Carriger v. Stewart, 132 F.3d 463, 479-82 (9th Cir. 1997) (en banc) (holding prosecutor's failure to disclose evidence bearing on key witness's credibility to have denied defendant due process under law), cert. denied, 118 S. Ct. 1827 (1998); McDowell v. Calderon, 130 F.3d 833, 837-41 (9th Cir. 1997) (en banc) (finding jury's lack of consideration of mitigating evidence due to trial judge's failure to address jury confusion violative of Eighth Amendment), cert. denied, 118 S. Ct. 1575 (1998); Jeffries v. Wood, 114 F.3d 1484, 1490-92 (9th Cir.) (en banc) (holding that extrinsic information conveyed by juror to jury regarding defendant's criminal record violates Sixth Amendment right to confront witnesses), cert. denied, 118 S. Ct. 586 (1997).

When a judge requested a 5.4(b) notice in the *Thompson* case, the three-judge panel became obligated to notify the full court after it had ruled on Thompson's petition for rehearing and suggestion for rehearing en banc before the original panel—in layman's terms, after it had considered the losing party's objections and decided to stand by its opinion.[89] Once a judge requests a notice, the other judges who might be concerned about the opinion ordinarily assume that the judge who made the request will take responsibility for the case and, at the appropriate time, will call for an en banc vote or notify the other members of the court that he or she has decided not to make a call, so that any other judge wishing to take up the cause will have the chance to do so.

The *Thompson* panel waited approximately four months, until January 17, 1997, to forward a 5.4(b) notice stating that it had voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.[90] The sending of that notice triggered a fourteen-day period in which to make the formal en banc call.[91] The fourteen days passed, however, and somehow, for reasons we will probably never fully know, the judge who requested the notice failed to take the next step in time. It is not clear even now how or why the time that our internal rules provided for requesting an en banc hearing slipped by not only that judge—who is, in my opinion, unquestionably the ablest, hardest working, and most conscientious judge on our court—but all the rest of the judges of the court as well. It is not even clear whether the error was entirely human or mechanical, or whether the panel's inclusion in its notice of its intent to amend the opinion played a part.[92]

What is clear is that although more than half the members of the court thought that the issues were sufficiently troubling that an en banc hearing was required, and, although that same majority even thought that we should go to the unusual lengths of recalling the mandate in order to hear Thompson's case en banc,[93] none of us made the

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[89] See U.S. Court of Appeals for the Ninth Circuit, General Orders § 5.4(b)(2) (1997) (on file with the *New York University Law Review*). The circuit waits for the panel to rule on a petition for rehearing—often for months—because if the panel itself grants a rehearing, an en banc call becomes unnecessary.

[90] See Thompson v. Calderon, 120 F.3d 1045, 1067 (9th Cir. 1997) (Kozinski, J., dissenting) (noting that request for 5.4(b) notice was made on September 27, 1996 and that notice was issued on January 17, 1997).

[91] See U.S. Court of Appeals for the Ninth Circuit, General Orders § 5.4(b)(2) (1997) (on file with the *New York University Law Review*).

[92] See *Thompson*, 120 F.3d at 1067 (Kozinski, J., dissenting).

[93] A mandate is the official notice of action taken by an appellate court, directed to the court below, advising the lower court of the appellate court's action and ordering the lower court to recognize, obey, and execute the appellate court's judgment. See 5 Am. Jur. 2d

call in time. The best explanations seem to lie in our assumption that the judge who had requested the 5.4(b) notice would make the call; in the fact that we receive dozens of email messages a day, many containing brief declarations of formal actions such as the filing of notices and technical orders; in the fact that our system of transmitting such notices is mechanically imperfect;[94] and in the overwhelming volume of the caseload all federal judges face these days, a caseload that often prevents us from being as meticulous in our tasks as we should be.[95] In that regard, I would add only that at the time the *Thompson* case was before our court we were missing one-third of our authorized judges, having just nineteen of our complement of twenty-eight.[96] The

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Appellate Review § 776 (2d ed. 1995). Issuance of the mandate occurs when certified copies of the judgment of the court of appeals are received by the district court. See id. § 777. Federal courts of appeals have the inherent power to recall a mandate issued to an inferior court and may recall a mandate sua sponte. See id. § 797.

[94] An illustration of the imperfection of our system for mechanical transmissions of important communications is provided by events which took place just 10 days before delivery of this lecture. Our court was involved in another death penalty proceeding in which last minute actions were required. We heard telephone argument in the case on a Saturday morning and the majority opinion was prepared and sent to the other two members of the panel via fax late Saturday night. The concurring judge received the opinion at 11:30 p.m. and responded with his concurrence and proposed modifications at 1:30 a.m. Sunday. The dissenting judge included a footnote in his dissent complaining that he had not yet received the proposed majority opinion and that he was forced to write his dissent mid-Sunday morning without knowing the contents of the majority opinion. See Vargas v. Lambert, No. 98-99028, 1998 WL 727340, at *12 n.1 (9th Cir. Oct. 11, 1998) (Kleinfeld, J., dissenting). The fact is that the proposed opinion was transmitted by its author to the dissenting judge at the same time that it was transmitted to the concurring judge. Nevertheless, the fax system somehow malfunctioned and the opinion was not received by one of the two judges to whom it was sent. There is no failsafe method in the current state of the mechanical arts for preventing failures in communication of this nature.

[95] In the last year alone, our court issued over 800 published and 4000 unpublished opinions. See Report of the Director of the Administrative Office of the U.S. Court, Year Ending 12/31/97, tbl. S-3 (1998). At any given time, it is not at all uncommon for active judges on our court to have a couple hundred cases in various stages pending before them, as well as emergency motions and other matters that are not part of our regular docket. Monitoring all of the decisions by other panels to ensure that the law is being applied consistently and that the system is operating fairly is an additional major responsibility. In 1997, for example, parties filed suggestions for rehearing en banc in 1092 cases. These suggestions resulted in 39 en banc calls by members of the court, of which 20 failed and 19 were heard en banc. Unpublished data from Clerk's Office, United States Court of Appeals for the Ninth Circuit, August 1998.

[96] Federal judges representing every political and jurisprudential philosophy, among them the Chief Justice of the United States and the Chief Judge of the Ninth Circuit, have commented publicly on the fact that the federal judiciary will not be able to ensure that cases are decided fairly and that justice is done unless the extraordinary number of vacancies that currently exist is substantially reduced. See, e.g., Henry Weinstein, Lack of Judges Leaves Federal Courts Jammed, L.A. Times, May 30, 1997, at A1 (quoting Chief Justice Rehnquist and Chief Judge Hug). Less than two weeks before the delivery of this lecture, a nominee to our court was confirmed after waiting more than 41 months. Congress recessed, however, without acting on the nomination of Richard Paez, a respected district

critical point, however, is the fact that at least ten of us—a majority of the active judges and the judges who ultimately voted to take the case en banc—failed to make a timely call.[97]

On March 6, 1997, the three-judge panel released an order amending its opinion (in technical, not substantive ways) and again, superfluously, denied Thompson's requests for further proceedings.[98] The day after the order was published in legal newspapers, I became aware for the first time that Thompson's suggestion for a rehearing en banc had been denied and that no judge had sought an en banc vote. I immediately sent a memorandum to the panel.[99] In my opinion, the case necessitated further review. I presumed that if no request for a vote had been made, an error of some type had occurred, and the panel would be willing to grant an extension of time to any judge requesting one, in line with the uniform past practice within our court.

I explained to the panel that I, for one, must have made a mistake in not making the call, that it could have been due to an administrative error that occurred at the time of a change in law clerks, and that after reviewing the opinion I was worried that the panel's decision, along with my mistake, "might lead to the execution of a person who may possibly be innocent and whose constitutional rights appear to have been violated."[100] I closed by asking "whether the panel might be willing to . . . permit me to make a prompt en banc call."[101]

The next day, the judge who had requested the 5.4(b) notice sent a memorandum to the panel, which made it clear that that judge also

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court judge who was nominated for a Ninth Circuit judgeship almost 33 months ago. Furthermore, according to the statistics that determine the appropriate number of judges per circuit, the actual number to which we should be entitled is not the presently authorized 28, but 33 to 38. See Chief Judge Procter Hug, Jr., United States Courts of Appeals 1999 Biennial Survey of Judgeship Needs 4, attach. (1998) (assessing entitlements based on number of cases filed, adjusted for reinstated and pro se cases).

[97] Despite vigorous opposition by myself and others, and despite the overwhelming vote of the judicial and lawyer delegates to the 1995 Ninth Circuit Judicial Conference, our court maintains a rule prohibiting disclosure of the actual vote totals on whether to take cases en banc. See U.S. Court of Appeals for the Ninth Circuit, General Orders § 5.1(b)(3) (1997) (on file with the *New York University Law Review*). For criticism of this practice, see, e.g., United States v. Koon, 45 F.3d 1303, 1309-10 & 1309 n.4 (9th Cir. 1995) (Reinhardt, J., dissenting from denial of suggestion of rehearing en banc); Harris v. Vasquez, 949 F.2d 1497, 1539-40 (9th Cir. 1991) (Reinhardt, J., dissenting from denial of suggestion of rehearing en banc).

[98] See Thompson v. Calderon, Nos. 95-99014, 99-99015 (9th Cir. Mar. 6, 1997) (order and amended opinion).

[99] See Internal Ninth Circuit Memorandum from Judge Reinhardt (Mar. 12, 1997). This and other internal memoranda are unavailable for public review due to confidentiality concerns.

[100] Id.

[101] Id.

had not realized that the notice had been circulated.[102] That judge wrote:

> My first awareness that the petition for rehearing and en banc request in this case had been acted on was the receipt of the March 6 amended opinion and order, received yesterday.
>
> I have just received Judge Reinhardt's memo. I second his request . . . . I wonder whether in any event an amended opinion triggers a new 5.4(b) period?[103]

The judge quickly followed up with another memorandum asking: "Was a 5.4(b) notice circulated? Did I miss it?"[104] The initial question whether technical amendments to an opinion would trigger a new en banc period serves only to illustrate how complicated and ambiguous our en banc rules are.[105] Judge Alex Kozinski later suggested, for reasons of his own, that a call might still have been timely in view of the proposed technical amendment. The judge who requested the 5.4(b) notice and I conferred, however, and concluded that under our rules the amendment did not alter the time requirements.

On March 20, Judge Robert Beezer responded on behalf of the three-judge panel.[106] He informed us that "[t]he panel has unanimously agreed that nothing will be done by the panel to extend the time within which an en banc call can be made. We see no reason to delay further consideration of this case by the Supreme Court."[107] This response was remarkable. For the first time of which I am aware, a panel of our court took the extraordinary step of refusing a request by a judge of the court for an extension of time in which to call for rehearing en banc. It refused our request even though no one questioned our explanation that the failure to make a timely en banc call was due to nothing more than human error or some other miscalculation or malfunction. Finally, it did so even though the error was one made by members of the court—not by the petitioner or his attorney—and the result would be that the full court would be deprived of the opportunity to review the panel's decision that a person should die. I was, frankly, shocked by the cold-blooded and uncollegial response of my colleagues. I consulted with the other judge who had

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102 See Internal Ninth Circuit Memorandum (Mar. 13, 1997).

103 Id.

104 Internal Ninth Circuit Memorandum (Mar. 17, 1997).

105 A special committee of judges has been working laboriously for many months to try to correct a number of the procedural ambiguities and problems in our en banc rules. With luck, the court will be able to ameliorate some of the problems shortly.

106 Judge Beezer was the author of the panel opinion. The other members of the panel were Judges Cynthia Holcomb Hall and Edward Leavy. All three were appointed by President Ronald Reagan.

107 Internal Ninth Circuit Memorandum from Judge Beezer (Mar. 20, 1997).

joined in my request. The reply came swiftly. There was nothing further we could do. From a practical standpoint, I agreed.[108]

Thompson then, on April 21, 1997, petitioned the Supreme Court for certiorari.[109] It was at that point that the brief of the seven former top prosecutors was filed.[110] The Supreme Court denied Thompson's petition on June 2, 1997.[111] Our court received notice of the denial on June 5 and on June 11 issued the mandate to the district court, an act that subsequently took on enormous significance.

After the Supreme Court denied certiorari, I obtained a copy of the brief that the seven former prosecutors had filed. The strong law-and-order views of the signers were well known to me, as were their reputations for integrity. The brief's description of Thompson's prosecutor's misconduct was startling. I discussed the case with a number of judges on our court, including the Chief Judge, Procter Hug, Jr. One of the judges I spoke with, a former prosecutor, told me that he was personally aware that one of the key jailhouse witnesses against Thompson had a penchant for testifying that he had obtained confessions from others in the jail and that his testimony was generally known to be unreliable. Finally, I spoke with Judge Jerome Farris, a highly respected senior judge who is extremely conservative on criminal justice issues. I sent him a copy of the seven prosecutors' amicus brief. Judge Farris told me that he found the facts to be shocking, if true, and that he thought that we had an obligation to review the case through the en banc process. He was confident that the panel would now accede to a request to let the court rehear the case and that, if not, an overwhelming majority of the court would agree to do so.

Judge Farris's optimism proved unfounded. He sent a memorandum on July 7, less than thirty days after we issued our mandate, in which he asked that he be permitted to call for an en banc vote.[112]

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[108] The Supreme Court later suggested that we could have moved to suspend the rules at this point. See Calderon v. Thompson, 118 S. Ct. 1489, 1499 (1998). However, suspension of the rules requires a two-thirds vote, see U.S. Court of Appeals for the Ninth Circuit, General Orders § 11.11 (1997) (on file with the *New York University Law Review*), and the procedure has never been employed with respect to the court's handling of appeals or petitions for review, only with respect to nondispositional administrative matters, such as the agenda for court meetings.

[109] See Telephone Interview with Missy Pratte, Office of the Clerk of the United States Supreme Court (Mar. 2, 1999).

[110] The brief was filed on May 7, 1997. See Brief of Amici Curiae in Support of Petitioner, Thompson v. Calderon, 120 F.3d 1045 (9th Cir. 1997) (No. 96-8707).

[111] See Thompson v. Calderon, 117 S. Ct. 2426 (1997). The Court's denial of certiorari in this case, like in any other, was not a decision on the merits and did not indicate anything of substance. See Teague v. Lane, 489 U.S. 288, 296 (1989) (noting that "'denial of a writ of certiorari imports no expression of opinion upon the merits of the case'" (quoting United States v. Carver, 260 U.S. 482, 490 (1923) (Holmes, J.))).

[112] See Internal Ninth Circuit Memorandum from Judge Farris (July 7, 1997).

The panel swiftly denied his request.[113] The Chief Judge immediately scheduled a vote by the entire court on Judge Farris's request to recall the mandate. Judge Farris offered the following eloquent plea:

> How does injustice happen, and why does it persist throughout human history, are questions that I have long pondered. I've concluded that its primary cause is that most of the strong have little concern for the rights of the weak. Civilization survives because from time to time some of the strong step forward and say "enough." Those who care cannot correct all of the wrongs nor do they owe an apology for those wrongs they cannot impact. However, in my view, they must step forward when the question of appropriate action is presented. In such moments, inaction or indifference—not failure—is the deadly sin.[114]

The debate was interrupted shortly after the panel's denial of Judge Farris's request when two judges, our en banc coordinator and the judge who had until recently been our death penalty coordinator, sent memoranda on July 10 and 11 respectively that temporarily put the brakes on everything—memoranda that were sent with the best of intentions but which led to a decision for which the Supreme Court would later castigate us and impugn our integrity as a court. In the first memorandum, the judge who serves as en banc coordinator informed us of a development in the case: Thompson had filed a new petition in state court and the state courts had resumed their proceedings.[115] The judge urged us to delay any action. The memorandum said:

> [C]onsistent with the [Supreme Court's] exhaustion jurisprudence with which we must live, state and federal courts should not have the same prisoner's life in their hands at the same time. . . . To withdraw the mandate now would appear at the very least to provoke a confrontation with California and its courts that will pull Thompson in two directions.[116]

The judge who had been the death penalty coordinator agreed and urged us to wait until Thompson had exhausted his state court remedies on his second petition before taking any further action on the first.[117] Chief Judge Hug consulted with those of us who had urged immediate action. Aware that the positions of the two coordinators would make it impossible to prevail if an immediate vote were held, the en banc proponents bowed to the coordinators' suggestion. We

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[113] See Internal Ninth Circuit Memorandum from Judges Beezer, Hall, and Leavy (July 9, 1997).

[114] Internal Ninth Circuit Memorandum from Judge Farris (July 14, 1997).

[115] See Internal Ninth Circuit Memorandum (July 10, 1997).

[116] Id.

[117] See Internal Ninth Circuit Memorandum (July 11, 1997).

reluctantly agreed to postpone the vote. In fact, the conflict was not what the two judges had feared. The district court had not yet taken its final action. It had not yet spread the mandate.[118] In practical terms, Thompson's first habeas petition remained before the federal courts. Because the district court still had jurisdiction over that petition, we could have recalled the mandate without intruding on the prerogatives of the state courts. It was in fact the state judicial system that had jumped the gun by resuming jurisdiction over Thompson's proceedings before the federal courts' actions on his first petition had become final. Yet, critical details frequently get lost in the rush of complex death penalty struggles within our circuit, and, as a result, the seemingly reasonable but mistaken view of the two proceduralists prevailed.

So we waited. The California Supreme Court denied Thompson's petition on July 16.[119] Several days later Thompson turned to our court again. He filed a motion to recall the mandate.[120] When the panel finally denied the motion, after a six-day delay,[121] our Chief Judge reactivated Judge Farris's sua sponte call.[122]

Finally, on July 29, less than a week before the scheduled execution, we were able to vote on whether to go en banc to correct the panel's clearly erroneous decision. A majority of the active judges voted to recall the mandate and rehear the case.[123] Oral argument was scheduled for August 1, four days later.[124]

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[118] Spreading the mandate is the issuance of an order stated and entered on the record by the district court noting its compliance with the mandate of the appellate court. See Integrated Computer Sys. Publ'g Co. v. Learning Tree Open Univ., Nos. 93-56656, 94-55799, 1995 WL 444664, at *3 (9th Cir. July 25, 1995).

The district court spread the mandate a week later, on July 14, 1997. It was on this day that the federal decision became final. See Calderon v. United States Dist. Court, 128 F.3d 1283, 1286 n.2 (9th Cir. 1997) ("[A] judgment does not become final following appeal until the case is returned to district court and the mandate is spread." (citing 16A Charles Alan Wright et al., Federal Practice and Procedure § 3987, at 687 n.2 (2d ed. 1996))), cert. denied, 118 S. Ct. 899 (1998), rev'd en banc on other grounds, 163 F.3d 530 (9th Cir. 1998).

[119] See Calderon v. Thompson, 118 S. Ct. 1489, 1496 (1998).

[120] See id.

[121] See id. at 1497.

[122] See id.

[123] See id.

[124] A number of the court's more conservative judges signed dissents to the order taking the case en banc. Judge Stephen S. Trott's dissent, joined by Judge Andrew Kleinfeld and later by Judges Ferdinand Fernandez and Pamela Rymer, argued without a hint of irony that our decision to correct internal procedural errors and more fully consider a decision allowing an execution violated "the Eighth Amendment's command that arbitrariness not be a part of the process by which the death penalty is administered." Thompson v. Calderon, 120 F.3d 1042, 1044 (9th Cir. 1997) (Trott, J., dissenting). Judge Beezer also authored a dissent, joined by Judges Hall, Brunetti, Trott, Fernandez, Rymer, and

Let me take a moment to assure you that, despite what some Supreme Court Justices and United States Senators might think, the Ninth Circuit was not and is not a "liberal" court. At the time the majority of the court decided to recall the mandate, a majority of the judges eligible to vote on the question were appointees of Presidents Reagan or Bush, and they reflected the judicial philosophy of those Presidents. That a court composed of a majority of Republican appointees who shared the values of the Rehnquist Court could be considered a liberal body, simply because on occasion it issues a decision that shows respect for human rights or individual liberties, demonstrates just how far the judicial system has come—or gone—from the Warren-Brennan era.[125]

In any event, on August 1, four days before Thompson's scheduled execution, the en banc court heard oral argument.[126] Immediately afterward, we voted seven to four to recall the mandate and reverse the three-judge panel. The opinion was assigned to Judge Fletcher, who circulated a draft the following day, August 2, and filed the final version on August 3.[127] In that opinion, we affirmed the district court's partial grant of Thompson's writ—the order that had reversed Thompson's rape conviction on the ground of ineffective assistance of counsel—and directed that that conviction be set aside.[128] The majority also held that the prosecution's presentation of directly contradictory theories and evidence in the two trials violated the Due Process Clause, and it returned the murder conviction to the district court for further review in light of our decision.[129]

Kleinfeld. See id. at 1043 (Beezer, J., dissenting). Judge Rymer filed her own belated dissent. See id. at 1045 (Rymer, J., dissenting).

125 In the little over a year since we voted to recall the mandate, the composition of the court has changed, and a majority of the active judges are no longer appointees of Republican presidents. Nevertheless, the philosophical bent of the court remains unchanged. It is as moderate to conservative as it was before the most recent group of appointments, with a strong emphasis on conservative. This characterization is accurate even without taking into account the changes in status of Judges Betty Fletcher and William Fletcher or the prospective appointment to our court of Chief Justice Barbara Durham of the State of Washington, an arrangement that will help move the court even more squarely into the conservative camp.

126 The members of the en banc court were Chief Judge Procter Hug, Jr. and Judges James R. Browning, Betty B. Fletcher, Harry Pregerson, Stephen Reinhardt, Cynthia Holcomb Hall, Alex Kozinski, Thomas G. Nelson, Andrew J. Kleinfeld, A. Wallace Tashima, and Sidney R. Thomas.

127 See Thompson v. Calderon, 120 F.3d 1045 (9th Cir. 1997) (en banc), rev'd, 118 S. Ct. 1489, 1506 (1998).

128 See id. at 1048.

129 Four judges concluded that the prosecutor's conduct constituted an independent reason to reverse Thompson's conviction without any further hearing. Two others agreed that it violated the Due Process Clause but voted to remand to allow the district court to make the initial ruling on whether it was Thompson or Leitch who suffered from this unconstitu-

Our opinion noted that the authority to recall our court's mandate had long been recognized as within our discretionary power and had been invoked in numerous other cases presenting extraordinary circumstances.[130] Judge Fletcher wrote: "Our interest both in protecting the integrity of our processes and in preventing injustice are implicated in the case before us."[131] The integrity of our processes had been violated as a result of the inadvertent errors of judges, including myself, who failed to make a timely en banc call, thus allowing the three-judge panel arbitrarily to foreclose review of its opinion by the full court. The threat of injustice resulted from "fundamental errors of law"[132] made by the three-judge panel, which made imminent the execution of a man who had unquestionably been denied a fair trial—a man who was in all likelihood innocent of the crime that made the death penalty possible, if not of all the charged criminal conduct.

Because some judges in the majority insisted that it was inadvisable to expose the details of our internal circuit disputes, the opinion left fairly general the description of the steps that various members of the court had taken in attempting to make an en banc call and the manner in which our efforts had been rebuffed and frustrated. Ultimately, it was precisely this failure to discuss the details of the procedural errors and departures from the court's longstanding practices that enabled Judge Kozinski to put his own spin on "the facts" and to write a separate dissent purportedly describing what had occurred within our court but omitting or mischaracterizing crucial details.[133] Judge Kozinski insisted that "nothing at all unusual happened; the process operated just as it's supposed to."[134] He recounted a version of events which bore little relationship to practical reality. To him, all that had happened was that two judges had missed a routine en banc call, while thirty-five others—all of the remaining active and senior

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tional conduct. While it appears fairly apparent from the prosecutor's own comments and from the record as a whole that it was Thompson who was the victim of the unethical conduct, the two judges concluded that it was appropriate to require the district judge to make the initial determination on that point. See id. at 1063-64 (Tashima, J., concurring).

130 See id. at 1048.

131 Id.

132 Id.

133 See id. at 1067 (Kozinski, J., dissenting). Judge T.G. Nelson joined in Judge Kozinski's dissent. Judge Hall, joined by Judges Nelson and Kleinfeld, also filed a dissent, characterizing the recall of the mandate as an attempt to circumvent the AEDPA's prohibition of successive habeas petitions; this dissent also expressed agreement with Judge Kozinski's assessment that Thompson's case presented no circumstances or considerations that were out of the ordinary. See id. at 1064-66 (Hall, J., dissenting). Judge Kleinfeld also authored a separate dissent arguing, incredibly, that the evidence of rape was strong and that Thompson's lawyer was effective. See id. at 1072-75 (Kleinfeld, J., dissenting).

134 Id. at 1067 (Kozinski, J., dissenting).

members of the court—had independently determined that the case "did not meet the rigorous standards for en banc review."[135]

Of course, this was neither an accurate nor a fair rendition of the practices of our court or the events that had occurred. Nothing was usual about the *Thompson* case; nothing worked the way it was supposed to. Thirty-five judges clearly had not made the decision Judge Kozinski attributed to them,[136] and a panel of our court had acted in a highly atypical and uncollegial manner. Never before had a panel precluded review of its decision to end someone's life because their colleagues had made inadvertent errors in the timing of an en banc call. The action by the panel was in fact more than unusual; it was unprecedented. While misstatements made in a dissent ordinarily would be of little concern, here the circumstances were different.[137] Judge Kozinski's highly articulate dissents on en banc matters are frequently written with a dual purpose and appear to be aimed at particular members of the Supreme Court. That is why they are often referred to as "cert. petitions." This time there was no doubting my able colleague's objective.[138]

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[135] Id. at 1068-69 (Kozinski, J., dissenting).

[136] The erroneous nature of Judge Kozinski's representation that no other judge found the case en banc worthy is demonstrated by the fact that a majority of the court voted for en banc review when the call was ultimately made. Moreover, contrary to the impression left by Judge Kozinski, the practice of the 37 judges on the court at the time was not to review personally each of the over one thousand petitions for en banc review that are filed every year; just as the Supreme Court Justices cannot personally review every petition for certiorari, and eight out of nine of the Justices rely primarily on a memorandum prepared for their joint use by one of the Court's law clerks.

In our court, as I explained earlier, once one judge requests a 5.4(b) notice, the other judges presume that, when the time is ripe, he or she will make the en banc call or give notice to the contrary, obviating any need for each of them to follow all of the procedural aspects of the process in every case. In reliance on this practice, other judges refrain from stepping in to issue their own en banc call.

Moreover, Judge Kozinski is demonstrably wrong for another reason when he asserts that 35 of the 37 active and senior judges decided that the case did not meet the standards for en banc review. Many of the senior judges do not even receive the suggestions for rehearing en banc that parties file. At the time Thompson filed his suggestion, only eight of the 18 senior judges received such filings.

[137] There are two other examples of Judge Kozinski's misleading statements and omissions that appear to merit some discussion here. His assertion that the controversy over the missed deadline did not come to the full court's attention until after the Supreme Court had denied certiorari is patently erroneous. The memoranda by the two judges requesting that the panel allow a belated en banc call were circulated to the entire court when they were written, in January 1997, before the mandate had even issued. Additionally, Judge Kozinski speaks of a January 1997 ruling by the en banc coordinator clarifying that January 31, 1997 was the last date for an en banc call. See *Thompson*, 120 F.3d at 1067-68 (Kozinski, J., dissenting). As far as I can ascertain, this memo was not circulated to the full court, but only to the panel.

[138] Shortly after publication of what some considered to be a strongly worded concurrence, objecting to and correcting some of the inaccuracies in Judge Kozinski's dissent, I

Judge Kozinski's dissent was disturbing for another reason. He argued that because no individual petitioner has a right to an en banc hearing, any "error can be corrected in a future case where the problem again manifests itself."[139] The idea that a court should not concern itself with whether it has erroneously upheld the execution of a human being who is under an unconstitutional death sentence, and who is probably innocent of at least the death-qualifying offense, is disturbing enough. The argument that we need not review en banc because we can resolve the legal issues in another case, after the condemned individual is dead, should shock the conscience of anyone who believes that the objective of our courts is to ensure fairness or justice. In my opinion, Judge Kozinski's dissent called into question the very purpose and legitimacy of our judicial system.[140] Unfortunately, that dissent foreshadowed the approach that the nation's highest court would shortly employ.

Soon after we issued our opinion, the State of California filed a petition for a writ of mandamus with the Supreme Court.[141] Although the Court was in the middle of its summer vacation, the Justices quickly determined to treat the state's request as a petition for certio-

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received a letter from a very recent James Madison lecturer. This judge sharply condemned my concurrence, asking why it needed to be so strong since my side had prevailed. Although this jurist is the Chief Judge of another circuit, I had to assume that he was either being disingenuous or completely naive in not understanding both the purpose of Judge Kozinski's actions and the very real danger that the erroneous statements would have an extremely serious and deleterious effect on the ultimate outcome of Thompson's case. Given my correspondent's reputation for intellectual ability, I suspected it was not naiveté. In any event, I was quite aware—even if the Chief Judge purported not to be—that winning at the en banc level is no assurance that constitutional principles will prevail over procedural rules. So, I readily consigned his letter to the round file.

[139] *Thompson*, 120 F.3d at 1069-70 (Kozinski, J., dissenting). Justice Souter's dissent also commented on this notion: "[S]urely it is . . . reasonable to resort to en banc correction that may be necessary to avoid a constitutional error standing between a life sentence and an execution." Calderon v. Thompson, 118 S. Ct. 1489, 1507 (1998) (Souter, J., dissenting). In actuality, the potential effect of the en banc hearing was greater than the difference between an execution and a life sentence because our reversal and remand on the prosecutorial misconduct issue would likely have led to Thompson's retrial on all charges.

[140] Although I vehemently disagree with Judge Kozinski's dissent in every respect—from his unprecedented decision to quote from internal court memoranda, to his misstatement of what occurred within the court's processes, to his view that we can resolve the legal issues affecting Thompson after Thompson's death, to his other more fundamental legal conclusions that I believe to be erroneous—I should note that my colleague is an extremely able jurist who is ordinarily not inflexible. In fact, Judge Kozinski's legal talent is extraordinary, and he makes a major contribution to the functioning of our court. The nationwide respect he enjoys is well deserved. As far as I am concerned, Judge Kozinski's dissent proves only that when he goes off base, he really goes way off. Unfortunately, the consequences can be severe.

[141] See Petition for Writ of Mandamus, Thompson v. Calderon, 120 F.3d 1042 (9th Cir. 1997) (Nos. 95-99014, 99015).

rari and granted it.[142] The Court's order provided that the Court would not decide whether a condemned man's constitutional rights had been violated, but only whether the Ninth Circuit had the authority to recall its mandate.[143] For a High Court that is supposed to consider only important questions of national concern, this was a strange and most unusual action.[144] As Justice Souter later wrote, on behalf of the Court's four moderate Justices, the Supreme Court took action to solve "a systemic problem that does not exist."[145]

III
The Supreme Court Decision

Given the composition of the Rehnquist Court, the outcome of the *Thompson* case was undoubtedly inevitable.[146] Still, the Court's five to four opinion was a shock to many, both for its hostile, indeed vituperative, tone and for the unprecedented restrictions it placed on

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[142] See Calderon v. Thompson, 118 S. Ct. 14 (1997) (mem.), amended by 118 S. Ct. 16 (1997) (mem.).

[143] The Supreme Court initially granted certiorari on two questions: whether Thompson's motion to recall the mandate was an impermissible attempt to evade the restriction on successive habeas petitions and whether the Ninth Circuit had exceeded its power by granting the recall of the mandate. See *Calderon*, 118 S. Ct. at 14; Brief for Petitioner at i, *Calderon* (No. 97-215). It later amended its grant to add the following third question: "Did the Ninth Circuit, sitting en banc, err in concluding that the three-judge panel 'committed fundamental errors of law that would result in manifest injustice' sufficient to justify recalling the mandate?" *Calderon*, 118 S. Ct. at 16.

The framing of issues is an art in itself, and the way in which questions are posed is often determinative of the outcome of the case. Among constitutional scholars, the best known example is Bowers v. Hardwick, 478 U.S. 186, 191 (1986) (holding Georgia antisodomy law not to violate Due Process Clause), in which Justice White's majority opinion began its discussion by claiming: "The issue presented is whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy and hence invalidates the laws of the many States that still make such conduct illegal and have done so for a very long time." Id. at 190. Justice Blackmun's dissent, in contrast, stated the issue as being "about 'the most comprehensive of rights and the right most valued by civilized men,' namely, 'the right to be let alone.'" Id. at 199 (Blackmun, J., dissenting) (quoting Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)).

[144] Supreme Court Rule 10 states that a certiorari petition "will be granted only for compelling reasons" and specifically articulates the following reasons: the existence of a conflict among federal courts of appeals or state courts of last resort or between lower courts and the Supreme Court on an "important federal question." The rule finally states: "A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Sup. Ct. R. 10.

[145] Calderon v. Thompson, 118 S. Ct. 1489, 1509 (1998) (Souter, J., dissenting). The exercise of the power to recall a mandate in a habeas case is so rare that the Court did not find one prior case to which to cite. Thus, Justice Souter's statement that no systemic problem existed was a polite understatement.

[146] See id. at 1506 (reversing court of appeals and reinstating mandate denying habeas relief to petitioner).

the authority of the federal courts to correct their own errors—particularly in cases in which errors result in the most drastic consequence possible. The majority opinion, authored by Justice Kennedy, echoed Judge Kozinski's version of the events within the court of appeals, even quoting his conclusion that "[t]he process operated just as it's supposed to."[147] The majority did not base its analysis upon its reading of the record of our internal correspondence or actions, or on any independent and objective knowledge of the occurrences that had preceded our recall of the mandate; the Justices had no such record before them and were possessed of no such knowledge.

Given the confusion surrounding the events, one might have thought that the Court would not reach such critical conclusions in so cavalier and irregular a manner. But it did. Justice Kennedy simply adopted the erroneous representations of a dissenting judge and incorrectly characterized the procedural errors of the Ninth Circuit as solely a "mishandled law clerk transition in one judge's chambers, and the failure of another judge to notice the action proposed by the original panel."[148] That Justice Kennedy would draw such patently erroneous conclusions is especially surprising. He had served on our court himself, and, in fact, Judge Kozinski had served as his law clerk during a part of that time. Justice Kennedy certainly should have known how our court functions and how our en banc process actually works. Nonetheless, he concluded: First, the failure of two judges to make their views known on time had no practical consequences other than that the court did not receive the benefit of their views, and second, those two judges had then deliberately delayed making an en banc call until they did so just before the execution.

Being one of the two judges, I was in a unique position to know that both of Justice Kennedy's conclusions were wholly incorrect, although I am admittedly not a disinterested or unbiased observer. Still, there are facts that are indisputable—facts that Justice Kennedy and the majority of the Supreme Court simply got wrong. The "only consequence of the oversights" was not, as Justice Kennedy put it, that the two judges failed to contribute "their views to [the] determination."[149] The actual consequence of the errors made by the two judges, and by the majority of the members of the court, was that the court itself was deprived of the opportunity to convene en banc to correct a grievous constitutional error that one of its panels had committed and that a majority of the court desired to correct.

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[147] Id. at 1499 (quoting Thompson v. Calderon, 120 F.3d 1045, 1067 (9th Cir. 1997) (Kozinski, J., dissenting)).

[148] Id.

[149] Id.

Next, Justice Kennedy's accusation that the two judges deliberately delayed and then made an en banc call just before the execution is false. In fact, the two judges did not make an en banc call at any time. Judge Farris did. And the reason for the critical part of the delay—the part that resulted in the "adverse consequences" Justice Kennedy stressed in his opinion—was not, as Justice Kennedy charged, because the court of appeals "lay in wait,"[150] but, ironically, because the court attempted to follow what two other judges believed to be our obligation to respect the Supreme Court's oft-expressed concerns for comity and federalism.

Notably, Justice Kennedy also failed to acknowledge that our court gave two reasons for recalling the mandate. The first I have discussed sufficiently—the procedural errors in the implementation of our en banc process. The second and more important reason was our desire to correct the serious substantive errors our court had made in an unreviewed panel decision—a decision that would, unless recalled, result in the execution of a human being in violation of the Constitution. This reason the Supreme Court majority never even mentioned.

The Supreme Court's opinion acknowledged the inherent power of courts of appeals to recall their mandates but nonetheless termed our decision a "grave abuse of discretion."[151] The Court, which had never before in its history held that a court of appeals had erred in recalling a mandate, whatever the appellate court's reason for doing so,[152] here ruled that we had seriously erred by taking that action in order to correct one of the most grievous errors a court could make—authorizing an unconstitutional execution. To reach this result, the Supreme Court created a new rule[153] that a federal court of appeals

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150 Id.

151 Id. at 1494.

152 See 16 Charles Alan Wright et al., Federal Practice and Procedure § 3938, at 712 (2d ed. 1996) ("The power of a court of appeals to recall its mandate once issued has long been recognized. . . . *[N]o formal rules have yet emerged to define and cabin the power* . . . ." (emphasis added)); see also Hawaii Hous. Auth. v. Midkiff, 463 U.S. 1323, 1324 (1983) (upholding court of appeals recall of mandate and stating that "[a]lthough recalling a mandate is an extraordinary remedy, I think it probably lies within the inherent power of the Court of Appeals and is reviewable only for abuse of discretion"); Cahill v. New York, New Haven & Hartford R.R., 351 U.S. 183, 184 (1956) (recalling own "erroneous" order "in the interest of fairness"); Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238, 248-50 (1944) (upholding power to vacate judgment after term has ended when fraud has been revealed).

153 Justice Souter's dissent, joined by Justices Stevens, Ginsburg, and Breyer, pointed out that not only was the rule a new one but that it also departed from the traditional deference granted to a court's "reasonable selection of factors" that justify recalling its own mandate and to the administration of en banc procedures by the courts of appeals. *Calderon*, 118 S. Ct. at 1507 (Souter, J., dissenting). In addition, the dissent found the Ninth Circuit's factors reasonable. See id (Souter, J., dissenting).

cannot recall its mandate in a death penalty habeas case regardless of the egregiousness of the constitutional error unless the defendant can establish his "actual innocence,"[154] a feat rendered nearly impossible by the stringent requirements the Court has established for meeting that test in other contexts. As Justice Kennedy acknowledged, "'"in virtually every case, the allegation of actual innocence has been summarily rejected."'"[155] Recognizing that its opinion departed drastically from prior law, the Court distinguished the *Thompson* case from more "ordinary" recalls of mandates on the ground that Thompson sought relief from constitutional errors in a state criminal trial.[156] Citing other cases in which it had severely limited the right of federal habeas petitioners to raise meritorious constitutional claims, the Supreme Court said that the state court judgment ordering Thompson's execution must be honored because the "finality" of that judgment would deter future crimes, allow the "victims of the crime [to] move forward," and "serve[ ] . . . to preserve the federal balance."[157] The Court waxed philosophical about the state's interest in the finality of its judgments, an interest which, it said, took on an "added moral dimension" once the mandate issued.[158] Finally, the Court asserted that "[t]his case well illustrates the extraordinary costs associated with a federal court of appeals's recall of its mandate denying federal habeas relief."[159]

The Rehnquist Court's *Teague* doctrine prohibits courts from retroactively applying new procedural rules which benefit criminal defendants and expand constitutional rights. See Teague v. Lane, 489 U.S. 288, 310 (1989) (holding that new criminal procedure rules are not applicable to cases that were final before rules were announced). Nevertheless, here the Court applied a new rule to bar relief for Thompson—because the Court's jurisprudence permits applying a new rule that restricts constitutional rights and harms the interests of criminal defendants. The Court has concluded that "[a] federal habeas petitioner has no interest in the finality of the state-court judgment under which he is incarcerated" nor "any claim of reliance on past judicial precedent as a basis for his actions." Lockhart v. Fretwell, 506 U.S. 364, 373 (1993) (holding that *Teague* doctrine does not apply against state in federal habeas cases). Thus, the application of new rules disadvantaging habeas petitioners has been a routine practice of the Supreme Court. See, e.g., Brecht v. Abrahamson, 507 U.S. 619, 623 (1993) (applying new standard of harmless error to disadvantage of petitioner); McCleskey v. Zant, 499 U.S. 467, 502-03 (1991) (applying new abuse-of-writ doctrine to disadvantage of petitioner). In fact, the nonretroactivity rule, although new, was applied in *Teague* itself and since then has always been applied retroactively. See, e.g., Sawyer v. Smith, 497 U.S. 227, 229 (1990) (applying *Teague* doctrine retroactively to foreclose relief to petitioner).

154 *Calderon*, 118 S. Ct. at 1502.

155 Id. at 1503 (quoting Schlup v. Delo, 513 U.S. 298, 324 (1995) (quoting Jordan Streiker, Innocence and Federal Habeas, 41 U.C.L.A. L. Rev. 303, 377 (1993))).

156 See id. at 1499.

157 Id. at 1501.

158 Id.

159 Id.

And what were those extraordinary costs? In the forty-eight days between the date on which our mandate left the court of appeals for further action to be taken in the district court and the date on which we recalled it—in fact in the entire 120 days that passed between the date on which we first could have taken an en banc vote and the day on which we actually voted[160]—two things occurred: The state courts prematurely reasserted jurisdiction over Thompson's case and denied a petition that they should not even have been considering, and the Governor of California denied Thompson clemency after a "hearing" that lasted approximately two hours.[161] These two decisions, plus the injury to the state's general, and the victim's particular, interest in "finality," constituted the extraordinary costs involved.

It was those indefinable costs, flowing from the briefest of delays, that, according to the Supreme Court, outweighed the benefit of allowing the courts of the United States to enforce the United States Constitution and correct an egregious constitutional error. In my opinion, the Supreme Court's analysis in *Thompson* represents a nadir for the cost-benefit approach to decisionmaking in constitutional cases or otherwise. Most remarkable of all, in making its assessment of the costs, the United States Supreme Court never even mentioned the costs to our legal system of allowing the state's violation of the defendant's constitutional rights to go unremedied. It never even considered the costs to society—let alone to the defendant—of permitting a person to be executed on the basis of an unconstitutional trial or for a crime of which he might well be innocent. In short, the Supreme Court never even took into account the interest we all have in upholding the Constitution or the costs we all incur when the federal courts are precluded from performing their basic constitutional functions.

There was another major problem with the *Thompson* decision, a problem that ultimately would make Thompson's execution almost inevitable. By requiring Thompson to meet an actual innocence standard before permitting the recall of the mandate, the Supreme Court imposed a nigh impossible requirement. Thompson certainly had no chance of meeting the standard because in assessing his actual innocence the Court relied for its basic evidence on the record made at a

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[160] If a timely call had been made on January 31, our en banc procedures would have dictated that a memorandum in support of the call be due on February 14, supplemental briefing occur on February 21, and memoranda in support of or against the call be due from all judges by March 14. However, these schedules frequently are extended for substantial periods of time. Thus, while the earliest time at which voting could have been completed was March 31, it would not have been surprising had we not completed voting until May 31 or later. We actually voted to go en banc on July 28.

[161] See Decision in the Matter of the Clemency Request of Thomas Martin Thompson, July 31, 1997, at 11-12 (on file with the *New York University Law Review)*.

trial in which the factfinding process was irremediably distorted.[162] In considering that record, the Court did not mention that when the facts were developed Thompson was without the benefit of effective counsel or that the prosecutor's evidence was fatally flawed by his unconscionable and unconstitutional conduct. Instead, the Court weighed evidence that had never been subjected to a true adversarial process, made its own subjective factual findings on the basis of tainted evidence, disregarded the contrary evidence that disproved the theory on which Thompson was convicted, and characterized physical evidence that was, at best, highly questionable, as "ample evidence" of rape.[163] It's no wonder the Court concluded that Thompson could not meet the actual innocence standard.[164]

The *Thompson* case illustrates sharply the values, interests, and concerns weighed in death penalty habeas cases and, to some extent, in habeas cases generally. On the one hand, federal courts consider the state's interest in finality and comity; on the other hand, they consider the interest of the defendant and the public in preserving constitutional values. The various judicial bodies that considered Thompson's claims made dramatically different decisions about the appropriate weight to be afforded the various interests. The district court and the en banc court found Thompson's interest, and society's, in the preservation of life, liberty, and the right to a fair trial important enough to justify vacating an unconstitutional conviction. The original three-judge panel found the most important interest to be preserving the "limited role" of federal courts in reviewing state convictions. Justice Kennedy, on behalf of the Supreme Court majority, found the weightiest interest to be the state's need for finality, even when that need was compromised by only a 48- or 120-day delay. These decisions, of course, were made in connection with Thompson's

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[162] The Court also examined, and discounted, forensic testimony and other evidence that Thompson had presented at his state habeas evidentiary hearing, although its inhospitable view of that evidence was obviously colored by its unquestioning acceptance of the tainted evidence introduced by the prosecution at trial. The Court did not consider recently discovered evidence of Thompson's innocence because doing so would have converted the recall of the mandate into a successive habeas petition under the AEDPA. See *Calderon*, 118 S. Ct. at 1500 (finding that recall of mandate did not contravene AEDPA).

[163] Id. at 1503-05 (reviewing evidence of rape).

[164] Of course, disregard for questions relating to actual innocence is not a novel principle for the Rehnquist Court, which in Herrera v. Collins, 506 U.S. 390 (1993), refused to hold that execution of an innocent individual would violate the Constitution's prohibition of cruel and unusual punishment. See id. at 418-19 (holding that showing of innocence came too late in criminal process to trigger constitutional claim). The Court left the question open but stated that if actual innocence could be a basis for relief without an additional constitutional violation, the standard for showing innocence "would necessarily be extraordinarily high." Id. at 417.

first habeas petition—the first and only opportunity Thompson would ever have to vindicate his constitutional rights in the federal courts.

As we can see from the proceedings regarding Thomas Thompson, grandiloquent generalizations about values of finality and comity—grandiloquent formulations of concepts of federalism—are often not so grand when viewed in light of the facts of a particular case and its practical consequences. In Thompson's case, did a short delay really threaten the state-federal structure? Was it really necessary to dismiss without mention the constitutional obligations of the federal courts to ensure due process of law and to adjudicate fairly the legal questions involving the guilt of a man who was in all likelihood innocent of any capital offense, and whose role in a noncapital crime remains dubious and uncertain? Is a state court in which supreme court justices—some of whom have in recent years been recalled for being too "soft" on capital punishment—are subject to popular vote really as well equipped to protect constitutional rights in death penalty cases as a federal court with life-tenured Article III judges?[165] The answers should be apparent to anyone who places the substantive protections of the Constitution above abstract interests in finality and comity. They should be obvious to anyone who does not think that the costs of a brief delay in a court's deliberative process outweigh the importance of human life and the obligation of the federal judiciary to ensure that the states comply with the United States Constitution.

IV
The Final Chapter

Given the tone and content of the Supreme Court's decision, the end to the Thompson story would come as no surprise. Still, one final chapter remained to be played out. Because our en banc court had voted to grant Thompson's habeas petition, we had found it unnecessary to rule on a separate motion he had filed. In that motion, Thompson had sought a new trial on the basis of newly discovered evidence that the state allegedly had withheld.[166] The evidence consisted of admissions by Thompson's roommate, David Leitch, that he had walked into the apartment the two men shared at approximately

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[165] For one discussion of the dangers of the politicization of state courts that results from state judges' need to face reelection, see generally Gerald F. Uelmen, Crocodiles in the Bathtub: Maintaining the Independence of State Supreme Courts in an Era of Judicial Politicization, 72 Notre Dame L. Rev. 1133 (1997).

[166] See Thompson v. Calderon, 151 F.3d 918, 919-20 (9th Cir. 1998). Thompson filed the motion under Federal Rule of Civil Procedure 60(b), which allows reopening of cases under certain circumstances, including for newly discovered evidence. See Fed. R. Civ. P. 60(b)(2).

3:00 a.m. the night of the murder and discovered Thompson and Ms. Fleischli engaged in consensual sex.[167] Because the prosecution had built its case against Thompson on the theory that only Thompson had been present in the apartment with Ms. Fleischli that evening, that he had raped her, and that the "rape" had provided the motive for her murder, Leitch's statements constituted critical evidence of Thompson's actual innocence of at least one and possibly both of the charges against him. Leitch's statement directly corroborated Thompson's trial testimony, given over his counsel's objection, that he had engaged in consensual sex with Ms. Fleischli the night she was killed.[168]

Of course, Leitch's statements could not be accepted at face value. His credibility and the weight to be given his information needed testing at an evidentiary hearing, particularly given the inconsistent stories that Leitch had told over the years. However, the fact that this admission was contrary to Leitch's interest, and that it was consistent with the version of events Leitch had reported to his own lawyer at the time of his original trial,[169] provided strong indicia of credibility. Evidence also suggested that the district attorney's office had been aware of this information at the time of Thompson's trial but had failed to disclose it, in violation of Thompson's constitutional rights.[170]

When the Supreme Court overturned our en banc decision, it became necessary for us to perform our final function in the Thomas Thompson case. We reinstated the proceedings regarding Thompson's new trial motion and held oral argument on July 9, 1998—five days before his new execution date. Once again, a procedural barrier, this time erected by Congress and the President, threatened to limit our ability to consider the merits of Thompson's claims.

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167 See *Thompson*, 151 F.3d at 920.

168 See id. at 934.

169 See id. The lawyer to whom Leitch reported these facts was Ronald P. Kreber. Kreber now serves as a Presiding Judge of the South Orange County District, having been appointed to that post by California Governor Pete Wilson.

170 Thompson's motion to reopen had been denied by the district court just prior to our en banc hearing. Unfortunately, Judge Gadbois, who had been fully aware of the contents of the record and had granted Thompson's original habeas petition, never had the chance to hear the motion. He died before it was filed. Another district judge had stepped in. Judge Dickran Tevrizian decided not to hold an evidentiary hearing and concluded that Thompson's motion did not meet the requirements for a second or successive habeas petition under the newly enacted AEDPA. See Thompson v. Calderon, No. CV-89-3630 (C.D. Cal. July 25, 1997) (order regarding petitioner's motion for relief from judgment pursuant to Fed. R. Civ. P. 60(b)).

The new obstacle was a by-product of the Oklahoma City bombing. While Thompson's first habeas petition was under consideration by the courts, two conspirators had committed an infamous crime. They had blown up a federal building, killing 168 people. In the wake of that occurrence, the Antiterrorism and Effective Death Penalty Act (AEDPA) was adopted.[171] The bill was enacted by Congress at the urging of President William Jefferson Clinton. In the AEDPA, Congress and the President enshrined the philosophy and habeas jurisprudence of the Rehnquist Court in statutory law, codifying stringent barriers to review of all habeas petitions, and particularly to second or successive petitions.[172] The two branches of government each sought to appear tougher than the other in the war against terrorists, although no one bothered to explain how limiting the historic right of all state prisoners to habeas relief would help the federal government in the latest of its periodic "wars." Nor did anyone much seem to care. There was an election on the horizon. And, furthermore, as of the time the AEDPA was adopted in 1996, President Clinton had yet to show the first glimmer of interest in curbing prosecutorial excesses that might infringe the rights of persons high or low. In fact, up to that point, President Clinton had not shown any interest in protecting the constitutional rights of any individual accused of wrongdoing.

In any event, under the new AEDPA standard Thompson could not prevail on his motion based on new evidence—whether or not the evidence had been deliberately concealed by the state—unless he could show by clear and convincing proof that no reasonable juror who heard that evidence would have found him guilty of capital murder. Merely to obtain permission to file the motion in the district court, Thompson first was required to establish in the court of appeals a prima facie case of actual innocence by showing facts which if proven would be sufficient to meet the standard.

In my judgment and that of Judge A. Wallace Tashima, a moderate Clinton appointee, Thompson's new evidence met this rigorous prima facie requirement.[173] There was evidence that direct eyewitness testimony existed which, if believed, would establish Thompson's innocence of rape and his ineligibility for the death penalty—evidence that would also directly refute the prosecution's theory of the murder.

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[171] Pub. L. No. 104-132, 110 Stat. 1214 (codified at 28 U.S.C. § 2244 (Supp. II 1997)).

[172] See 28 U.S.C. §§ 2244, 2254 (Supp. II 1997). States that provide adequate mechanisms for appointment of counsel may impose even more severe time limitations on the filings of prisoners under a death sentence. See 28 U.S.C. § 2263 (Supp. II 1997) (imposing 180-day period for filing).

[173] See Thompson v. Calderon, 151 F.3d 918, 931 (9th Cir. 1998) (Reinhardt, J., concurring and dissenting); id. at 938 (Tashima, J., concurring and dissenting).

In our view, such evidence certainly warranted an evidentiary hearing, an opportunity for an objective judge to test its credibility and import using traditional methods of factfinding—especially given the constitutional violations that had tainted the previous findings of Thompson's guilt.

However, most of the judges who had been in the majority when we issued our en banc opinion felt compelled by the Supreme Court's decision—particularly by its unusually strong and specific language regarding the ample evidence of the alleged "rape"—to hold that Thompson could not make the required evidentiary showing of actual innocence.[174] From a practical standpoint, their decision may have been the right one. There was little doubt in their minds or in mine that, were we to rule in Thompson's favor, the Supreme Court would swiftly reverse us once again—and perhaps this time the five-Justice majority would order us whipped or put in the stockade. So the vote against Thompson was nine to two.

The issuance of our court's decision on the new trial motion on July 11, 1998 meant that Thompson's last real avenue for relief had been foreclosed. He was executed three days later. Thompson was the first death row inmate in California since capital punishment had been reinstituted to insist on his innocence through the time of his execution, and he was the first person in the nation ever to be executed on the basis of a trial that an unrefuted decision of a United States court of appeals had held to be unconstitutional.

Was Thompson guilty? While I am reluctant to make a judgment of any kind on the basis of the type of evidence adduced before the state trial court, it appears that Thompson may have helped Leitch conceal Ms. Fleischli's body after Leitch murdered her or possibly may have participated in the murder itself.[175] Of course, because Thompson was never tried on the theory that he helped Leitch kill Ms. Fleischli, we will never know whether a jury would have convicted him under such a theory. But even if guilty as an accessory to murder, Thompson was, in my opinion, very likely innocent of the rape charge

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[174] See id. at 924-26 (Hug, C.J., joined by Browning, Schroeder, Fletcher, and Thomas, JJ.). Four other judges, who had been in the minority in 1997, concluded that our court did not even have jurisdiction to hear the case, and they would have denied Thompson's motion on that basis. See id. at 926-31 (Kleinfeld, J., concurring in the judgment, joined by O'Scannlain and T.G. Nelson, JJ., and Kozinski, J., in part).

[175] Although there was no physical evidence or actual eyewitness testimony that established that Thompson actually participated in the murder, his testimony at trial that he had passed out from a combination of drugs and alcohol and slept through the crime, which took place less than six feet from him, raises a serious credibility question and suggests that he was trying to cover up his own involvement. See Calderon v. Thompson, 118 S. Ct. 1489, 1504 (1998).

and therefore not eligible for a death sentence under the applicable law.[176] What the actual facts were will always be unclear. Sometimes, even after a full and fair trial, and regardless of a jury's verdict, doubt remains. Without a fair trial and without a testing for truth through a fair adversary process, we are left only to speculate.

Conclusion

The *Thompson* case has ramifications that go far beyond the particular act of judicial disregard for fairness and justice that led to an execution that should never have occurred. The refusal of the Ninth Circuit panel to grant the request of other judges to extend the time to call for a rehearing en banc could not help but have an effect on the future operations of our court and on the relationships among its members. The decision of Judge Kozinski to quote selectively and publicly from our internal memoranda inevitably will have a similar adverse effect on the way we do business in the future. The brutal attack by Justice Kennedy on the good faith and competence of his former colleagues on the Ninth Circuit may have revealed more about the Justice himself than anything else, but it may also have other ramifications, such as influencing the current deliberations over whether to divide our circuit or, worse, to carve it up into bureaucratic, ineffective divisional units. Most important of all, the Supreme Court decision tells us much about the lack of concern for justice and due process of law that permeates our death penalty jurisprudence.

In *Thompson*, the Court took one further step—its most indefensible thus far—to elevate state procedural interests over concern for

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[176] In my view, the physical evidence of rape was uncertain at best. At trial, the prosecution relied primarily on forensic testimony that Ms. Fleischli's wrists, ankles, and palms were bruised in a manner consistent with physical restraint. A police officer testified that the bruising around the wrists was consistent with handcuff injuries, although he acknowledged that he had never seen such injuries on a dead body. However, at his state habeas evidentiary hearing, Thompson presented contradictory forensic testimony suggesting that these bruises were weeks old. Moreover, even if the state's expert were right about the timing of the bruises, they were no more suggestive that Ms. Fleischli had been raped than that she was harmed and restrained in the course of her murder. Similarly, evidence that Ms. Fleischli had been gagged with duct tape and that her shirt and bra had been ripped down the middle and pulled down around her elbows shows violent restraint but not necessarily in furtherance of a rape. Other physical evidence pointed against the conclusion that the sex had been anything but consensual. The state's own witness conceded in his testimony that there was "no anatomical evidence of rape." Ms. Fleischli was found without underwear but wearing tight jeans, which were zipped but not buttoned. A vaginal swab revealed recent semen but infrequent sperm, which may have suggested that Ms. Fleischli douched or washed after sex. (The absence of semen on her jeans ruled out drainage as an explanation; however, the infrequency of sperm could also have occurred if the source had a low sperm count.) Thompson's lawyer failed to pursue this line of investigation. See Thompson v. Calderon, 120 F.3d 1052, 1053 n.6 (9th Cir. 1997).

human life, over due process of law, and yes, over the Constitution itself. It even went so far as to extend, implicitly, the rule holding defendants liable for procedural errors made by their lawyers[177] to holding defendants liable for procedural errors made by their judges—a bizarre concept indeed. All in all, the Thompson case showed the criminal justice system, including both the prosecution and the judiciary, at its very worst.

Perhaps travesties are inevitable if we are to continue to enforce the death penalty. Emotions run high, even among judges. The stakes are different in kind from those in all other cases. The decision as to who deserves to die at the hands of the state is not susceptible to determination by objective, scientific, or uniformly applied rules. Chance and circumstance play the largest role in the deadly death penalty lottery. When the state is out to execute the accused at all costs, and the nation's highest court's primary interest is in establishing procedural rules that preclude federal courts from considering even the most egregious violations of a defendant's constitutional rights, it is time to step back and look at what we are doing to ourselves and to our system of justice.

Although we are not in a period in which we can expect such an examination to result in immediate positive changes, it is nevertheless the duty of the academy and the legal profession to make the record that will be necessary when the pendulum swings. And the pendulum will surely swing—not only with respect to our death penalty jurisprudence, and the harsh and inflexible means by which we today limit the historic writ of habeas corpus, but also with respect to the inimical manner in which the majority of today's judges view individual rights.

Those of us who still believe in the obligation of the courts to ensure fairness and equality for all, who share the concerns that dominated the brightly shining jurisprudence of the Warren-Brennan era, who believe that we are now in a valley in our long legal journey towards justice, may not be around to see the day when our judicial system returns to its state of glory. Obviously, this is not one of the proudest times in our nation's history—for any of our branches of government. It will take time to recover, to undo the damage, to heal the constitutional wounds. In the case of the Supreme Court, given the nature of the appointive process and the practical realities of lifetime tenure, the period required for fundamental change is a lengthy one.

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[177] See Coleman v. Thompson, 501 U.S. 722, 754 (1991) ("In the absence of a constitutional violation, the petitioner bears the risk in federal habeas for all attorney errors made in the course of the representation . . . .").

Change will not come easily. It will take hard work on the part of well-trained advocates and creative legal thinkers who refuse to accept the notion that the era of judicial progress is forever over and who will inspire those who learn from their words and deeds. Charles Black, a leading constitutional scholar for the past fifty years, recently suggested that we look to the Declaration of Independence, the Ninth Amendment, and the Privileges and Immunities Clause of the Fourteenth Amendment as sources of unenumerated rights, most particularly the right to a "decent livelihood."[178] Black's ideas are promising and challenging. It may be time, for example, to reconsider the *Slaughterhouse Cases*,[179] which so drastically and wrongfully limited the Fourteenth Amendment[180]—or at least it may be time to do so when we once again have a Court that sees our Constitution as protecting the basic freedoms and liberties of the people, and not primarily as a structure for protecting the interests of the states.

If we have faith in the nature of humanity, if we believe that the course of evolution is progress, if we are truly committed to the principles of liberty, equality, and justice, I am confident that we can return to an era in which the courts serve as the guardians of the values embodied in our Constitution, to an era in which judicial protection of the rights of the poor and the disadvantaged will once again be the order of the day. If we have the will and the determination, we will ultimately prevail. Thank you.

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[178] Charles L. Black, Jr., A New Birth of Freedom: Human Rights, Named and Unnamed 130-34 (1997).

[179] 83 U.S. (16 Wall.) 36 (1873) (eliminating substantive force of Privileges and Immunities Clause of Fourteenth Amendment).

[180] See Black, supra note 178, at 28-33, 55-85 (discussing *Slaughterhouse Cases*).