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FOREWORD

THE ROLE OF APPELLATE JUDGES IN INTERMEDIATE COURTS

One consequence of the significant discretion accorded trial courts in the performance of the fact-finding function is that appellate judges quite often defer to decisions that they would not have themselves made.[1] This is a natural and logical consequence of a system in which the roles of different courts in the judicial hierarchy are fairly clearly spelled out and judges are content to work within the framework established.

Justice Gene Franchini's brief personal essay serves to contrast the perspectives afforded trial and appellate judges by that framework. The trial judge, who undoubtedly has the greatest opportunity to exercise discretion within that framework, may still feel compelled by personal conviction to resign from the bench because discretion has been eliminated by the legislature. No doubt many trial judges have come to resent the encroachment on their ability to exercise sentencing judgment by enactment of mandatory sentencing statutes or creation of sentencing guidelines in which decisions are preempted by grid.[2] But a supreme court

1. Indeed, one court describes the process of reviewing for abuse of discretion as determining whether a trial court's decision "was so clearly wrong as to lie outside that zone within which reasonable persons might disagree." Cantu v. State, 842 S.W.2d 667, 682 (Tex. Crim. App. 1992).

2. *See, e.g.*, KATE STITH & JOSE A. CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS (1998).

justice, serving on a court of last resort, may experience the same sense of constraint, as Justice Franchini notes in his recent concurrence to an affirmance in a capital case, where he expresses his personal belief that capital punishment reflects bad public policy.[3] To the extent that sentencing policy is a matter of legislative prerogative, judges at all levels within that framework may experience frustration when addressing the circumstances of an individual case.[4]

Given the considerable discretion afforded trial judges and other primary decisionmakers, such as legislatures[5] and administrative agencies—noted by Professor Martha Davis in this issue—and the potential for limiting review accorded to courts of last resort, the role of intermediate courts is, in a sense, professionally compromised. While the workload of those courts

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3. State v. Clark, 1999 N.M. 035, 990 P.2d 793. Justice Franchini reiterated his personal opposition to the death penalty in a separate opinion in State v. Allen, 2000 N.M. 002, ¶ 121. A similar concurrence was authored by Senior Judge Gerald W. Heaney of the United States Court of Appeals for the Eighth Circuit in *Singleton v. Norris*, 108 F.3d 872, 876 (8th Cir. 1997), with his conclusion: "[A]lthough I am compelled to adhere to the law, I nonetheless announce my personal view that this nation's administration of capital punishment is simply irrational, arbitrary, and unfair. The problems are inherent in the enterprise itself."

4. For example, in affirming a mandatory sentence for an Arkansas felon convicted of possession of a firearm, the Eighth Circuit panel observed, in light of the facts developed at trial:

> We are not unmindful of the *apparent absurdity* in sentencing an individual to fifteen years imprisonment for the equivalent of duck hunting. We are equally aware, however, that Congress has tied our hands and removed a much-needed measure of judicial discretion through its enactment of the fifteen year mandatory minimum provision of § 924(e)(1) of the Armed Career Criminal Act. For the aforementioned reasons, we affirm Bates's conviction and sentence.

United States v. Bates, 77 F.3d 1101, 1106 (8th Cir. 1996) (emphasis added).

5. Legislators may conclude that courts have failed to give adequate deference to their action and move to restrict judicial activism. For example, in "reforming" Arkansas workers' compensation law, the General Assembly criticized such activism:

> The Seventy-Ninth General Assembly realizes that the Arkansas workers' compensation statutes must be revised from time to time. Unfortunately, many of the changes made by this act were necessary because administrative law judges, the Workers' Compensation Commission, and the Arkansas courts have continually broadened the scope and eroded the purpose of the workers' compensation statutes of this state. . . . When, and if, the workers' compensation statutes of this state need to be changed, the General Assembly acknowledges its responsibility to do so. It is the specific intent of the Seventy-Ninth General Assembly to repeal, annul, and hold for naught all prior opinions or decisions of any administrative law judge, the Workers' Compensation Commission, or courts of this state contrary to or in conflict with any provision of this act.

1993 Ark. Acts 796, § 35 (codified at ARK. CODE ANN. § 11-9-101 (1998)).

increases, the opportunities for intellectual creativity are seemingly contracting. An example of this tendency is the restriction imposed on federal habeas courts by the Supreme Court's decision in *Teague v. Lane*,[6] followed by the 1996 amendments to the federal habeas statute in the Antiterrorism and Effective Death Penalty Act.[7]

Teague limited the discretion afforded federal habeas and circuit courts to announce new principles of federal constitutional law in disposing of meritorious claims raised by habeas petitioners. There are significant values expressed in the Court's rationale that restrict federal courts from articulating "new" rules of federal constitutional criminal procedure in the process of collateral review, including the Court's respect for comity, finality, and federalism as critical to the maintenance of a federalized judicial system. In the process, of course, as a cost of balancing the interests of state and federal judicial systems, some habeas petitioners simply do not benefit from arguments that might have warranted relief on direct appeal.

But *Teague* also served to limit the creativity of federal district and circuit judges as legal thinkers. Faced with novel claims that might have otherwise warranted relief, or at least serious discussion in the forum of direct appeal, judges bound by *Teague* have essentially been barred from exercising their intellectual skills in expanding legal doctrine. While they are still permitted to consider whether a rule is "new" or is dictated by precedent, *Teague* precludes judges from relying on analytical processes traditionally used to resolve novel questions of law when confronted with novel constitutional issues.

For example, reasoning by analogy is commonplace in the legal system. We struggle to teach law students to rely on analogy in resolving hypothetical questions in the classroom. The Eighth Circuit used precisely this approach in *Bohlen v. Caspari*[8] to conclude that double jeopardy protections afforded by the federal constitution would apply to non-capital sentencing proceedings. The circuit court relied on the holding in *Bullington v. Missouri*[9]

6. 489 U.S. 288 (1989).

7. Antiterrorism and Effective Death Penalty Act, 28 U.S.C. §§ 2244, 2253-2255, 2261-2266 (1998).

8. 979 F.2d 109 (8th Cir. 1992), *rev'd*, 510 U.S. 383 (1994).

9. 451 U.S. 430 (1981).

that the double jeopardy bar prevented imposition of a death sentence after a prior jury had imposed life in a capital sentencing proceeding resembling a trial in significant respects,[10] and reasoned by analogy that the same protection should be afforded in non-capital proceedings.[11] The Supreme Court reversed on the basis of *Teague*.[12] This application of the *Teague* bar served to forewarn lower federal courts that the extension of doctrine, even through the logical process of analogous application of existing rules, would violate the "new" rule doctrine.[13] The simple reasoning skill stressed in legal education was denied to judges struggling with the resolution of an arguably meritorious, if relatively obscure, constitutional claim.[14]

Similarly, the standard of review of claims of federal constitutional violations in habeas actions brought by state inmates, once set by the federal courts,[15] has now been limited by Congress in the amendment of the federal habeas statute. A federal habeas court cannot afford relief unless the state court's disposition of the federal claims is contrary to or reflects an unreasonable application of United States Supreme Court

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10. The circuit court first identified a core fact essential to whether the *Bullington* principle would extend to non-capital cases: "The persistent offender sentencing enhancement procedure in Missouri has protections similar to those in the capital sentencing hearing in *Bullington*." *Bohlen*, 979 F.2d at 112.

11. The court then applied the rationale underlying the holding in *Bullington*, to hold that double jeopardy protections are applicable in non-capital sentencing proceedings: "According to its plain language, *Bullington* is applicable to any sentencing procedure that is sufficiently similar to a trial of guilt or innocence to implicate the double jeopardy clause." *Id.* at 113.

12. Caspari v. Bohlen, 510 U.S. 383 (1994).

13. The circuit court had considered the impact of *Teague* and concluded that application of *Bullington* to all sentencing proceedings, including non-capital proceedings, would not constitute imposition of a "new rule" in the habeas process. Instead, the court concluded that *Bullington* itself had simply applied the preexisting rule regarding evidentiary insufficiency announced in *Burks v. United States*, 437 U.S. 1 (1978) (citing *Bullington*, 451 U.S. at 442-43). *Bohlen*, 979 F.2d at 111-12.

14. The Supreme Court ultimately rejected the Eighth Circuit's reasoning in *Bohlen*, holding in *Monge v. California*, 524 U.S. 721, 724 (1998) that double jeopardy protections are implicated in non-capital sentencing proceedings in which the issue was raised on direct appeal.

15. In a series of decisions in the early 1990s, the Supreme Court reaffirmed the principle of de novo review of federal constitutional claims by federal habeas courts, Wright v. West, 505 U.S. 277 (1992), and imposed a burden on federal habeas petitioners to demonstrate first, that constitutional trial error "had substantial and injurious effect or influence in determining the jury's verdict," Brecht v. Abrahamson, 507 U.S. 619, 622 (1993), and second, that "grave doubt" involving the prejudicial effect of constitutional trial error should be resolved in favor of the federal habeas petitioner, O'Neal v. McAninch, 513 U.S. 432, 435 (1995).

precedent.[16]

Regardless of the merits of congressional retooling of the federal habeas remedy, the clear goal of restricting the use of federal habeas as a vehicle for constitutional interpretation can hardly be missed.[17] This may eventually prove to be a foreseeable consequence of the national struggle over re-implementation of the death penalty following *Furman v. Georgia*,[18] or an expected casualty in the War Against Drugs. Neither is the focus of these observations. Rather, the latest trends in deference required of intermediate appellate judges suggest a diminished intellectual expectation of those jurists. Compelled by traditional or legislatively imposed standards of deferential review, intermediate appellate judges may be relegated to the mundane task of affirming, virtually disregarding serious claims for justice in the process.[19]

If the intellectual demands made of intermediate judges continue to be watered down, the question that likely follows is who will aspire to these very important benches. Unlike trial judges, who at least have the option of enjoying the work involved in unobtrusively supervising a well-tried case, appellate judges

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16. Title 28 of the United States Code § 2254(d)(1) now limits federal habeas relief to cases in which the state court's rejection of a federal constitutional claim asserted by a state inmate "resulted in a decision that was contrary to, or involved an unreasonable application of clearly established Federal law, as determined by the Supreme Court of the United States." The question of how much deference to state court decisionmaking is now required of federal habeas courts has now been addressed by the Supreme Court in *Williams v. Taylor*, 120 S. Ct. 1495, 1516 (2000) (O'Connor, J., concurring).

17. *See* Alan K. Chen, *Shadow Law: Reasonable Unreasonableness, Habeas Theory, and the Nature of Legal Rules*, 2 BUFF. CRIM. L. REV. 535 (1999). Professor Chen observes that the changes in federal habeas corpus implicit in Congressional action has been clear:

> Section 2254(d)(1) transforms the nature and scope of federal habeas review by prohibiting federal habeas courts from reviewing erroneous, but reasonable, state court decisions on federal questions. For better or worse, this is now the law of federal habeas review. There is not much to be gained from attempting to piece the remains of *Brown v. Allen*, like Humpty Dumpty, back together again, at least not in the academic world.

Id. at 633-34.

18. 408 U.S. 238 (1972).

19. My colleague, Professor Morell E. (Gene) Mullins, refers to this as "cookie-cutter jurisprudence" in our conversations. Professor Chen concludes that the revision of federal habeas law has fundamentally altered the "structure of constitutional criminal procedure," resulting in "the reasonable unreasonableness standard's distorting effect on the deterrent function of constitutional standards and its subversive impact on the exposition of criminal procedure law." Chen, *supra* note 17, at 634.

necessarily must face a less-active social setting for their work. With a decline in the significance and, perhaps, quality of oral argument, the number of occasions for professional interaction will diminish as caseloads increase and the use of digital research tools limits trips to the library. Will the intermediate bench attract intellectually acute and scholarly perceptive lawyers if the opportunity for interpretation is so restricted that issuance of *pro forma* opinions becomes more commonplace? Will the best legal minds seek out this opportunity for service, and will it offer a training ground for the best judicial minds to continue their work on courts of last resort?

Certainly, the most able attorneys will always be able to earn more money in practice than in judicial service. Sacrifice of financial rewards often results from an appointment to the bench. Service on the trial bench offers the skilled practitioner the opportunity to exercise personal judgment in the scores of discretionary decisions that must be made in an individual case. Service on a court of last resort offers a different opportunity afforded a truly privileged minority to participate in shaping the developing law. Service on the many intermediate courts in this nation is particularly important because of their role in maintaining both an orderly development of the law in directions set by the legislature and higher courts and in ensuring that trials are events thoughtfully and fairly administered. Imposition of too many restrictions on the intellectual abilities of intermediate appellate judges, like reduced demands for creative thinking, may lead to atrophy. Undoubtedly, these benches will always be attractive to many lawyers. The key is to ensure that bright, able, intellectually active lawyers continue to view these courts as offering new challenges for service.

THE SUCCESS OF APPELLATE MEDIATION

Richard Becker's discussion of the implementation of the appellate mediation program in New Mexico (Vol. 1/No. 2) suggests the question of how successful mediation can be at the appellate level. The initial annual report on the program shows that 45 cases settled during the first twelve months of its operation,

representing a settlement rate in eligible cases of 23%, up from 6%, or 12 eligible cases annually, during the preceding three years.[20] The New Mexico Court of Appeals has extended the program indefinitely.

PROSECUTORIAL MISCONDUCT IN CLOSING ARGUMENT

Many readers have written with regard to the schedule for publication of Paul Spiegelman's second part to his study of prosecutorial misconduct published in our first issue. Professor Spiegelman has been delayed by serious family medical problems, but expects to publish the second part of his work in a future issue.

JTS/Editor
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20. 38 N.M. B. BULL., Sept. 23, 1999, at 1.