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GUILT, INNOCENCE, AND FEDERALISM IN HABEAS CORPUS

> Of all the many dark corners of the law, few are so dimly lit as is the federal habeas corpus jurisdiction under which federal courts pass upon the constitutional validity of state criminal prosecutions. Here many important developments are occurring, with all the hazards of walking in the dark.
>
> —*Professor Curtis Reitz* [1]

In 1979, the Supreme Court held in *Jackson v. Virginia* [2] that a state prisoner who claimed that his conviction was supported by insufficient evidence could petition for a writ of habeas corpus. The Court regarded this conclusion as a corollary to *In re Winship,*[3] in which it held that the Constitution requires the state to prove guilt beyond a reasonable doubt.[4] But *Jackson* signifies a real shift in the Court's view of the role of habeas corpus giving special protection to rights related to guilt or innocence. This Note questions the wisdom of such a shift, and after considering the desirability of limting the habeas corpus remedy at all, suggests an alternative approach to habeas corpus relief.

I

HISTORY

A. *Development of the Habeas Corpus Remedy*

The Judiciary Act of 1789 [5] empowered federal courts to issue the writ of habeas corpus; as it existed at common law, to federal prisoners.[6] Since 1867, when Congress extended habeas corpus jurisdiction to state prisoners,[7] the Great Writ [8] has become

[1] Reitz, *Federal Habeas Corpus: Postconviction Remedy for State Prisoners,* 108 U. PA. L. REV. 461, 461 (1960) (footnote omitted).

[2] 443 U.S. 307 (1979).

[3] 397 U.S. 358 (1970).

[4] *Id.* at 364.

[5] Ch. 20, § 14, 1 Stat. 73. *See also* U.S. CONST. art. 1, § 9, cl. 2.

[6] *Ex parte* Watkins, 28 U.S. (3 Pet.) 193, 201-02 (1830). For a discussion of the early history of the writ, see *Developments in the Law—Federal Habeas Corpus,* 83 HARV. L. REV. 1038, 1042-45 (1970). *Compare* Fay v. Noia, 372 U.S. 391, 399-405 (1963) (Brennan, J.) (writ was originally broad in scope) *with* Oaks, *Legal History in the High Court—Habeas Corpus,* 64 MICH. L. REV. 451, 458-61 (1966) (writ was originally narrow in scope).

[7] Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385 (current version at 28 U.S.C. § 2254 (1976)).

[8] *See, e.g.,* Fay v. Noia, 372 U.S. 391, 399 (1963); P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1426 (2d ed. 1973).

"an untidy area of law;"[9] both courts and scholars[10] have taken conflicting views about the role of habeas corpus review. Despite the debate over the theoretical underpinnings of collateral review, courts have defined its availability with more clarity.

Early courts limited the availability of the writ to prisoners who alleged that the trial court lacked proper jurisdiction.[11] But the Supreme Court soon expanded the definition of "jurisdictional" error and thereby increased the availability of the writ.[12] Eventually only strained distinctions kept cases within the jurisdiction requirement,[13] and in *Waley v. Johnston*[14] and *Brown v. Allen,*[15] the Court finally abandoned it.

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[9] Sunal v. Large, 332 U.S. 174, 184 (1947) (dissenting opinion, Frankfurter, J.).

[10] *Compare* Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners,* 76 HARV. L. REV. 441, 488-89 (1963) (finding Moore v. Dempsey, 261 U.S. 86 (1973), consistent with Frank v. Mangum, 237 U.S. 309 (1915)) *with* Reitz, *Federal Habeas Corpus: Impact of an Abortive State Proceeding,* 74 HARV. L. REV. 1315, 1329 (1961) *and* Hart, *The Supreme Court, 1958 Term—Foreword: The Time Chart of the Justices,* 73 HARV. L. REV. 84, 105 (1959) (*Moore* overruled *Frank).*

[11] *Ex parte* Watkins, 28 U.S. (3 Pet.) 193, 202 (1830). This limitation continued after Congress extended the writ to protect state prisoners. *See, e.g., In re* Moran, 203 U.S. 97, 105 (1906) (denying federal prisoner relief although conviction allegedly violated fifth amendment); *In re* Wood, 140 U.S. 278 (1891) (denying state prisoner relief on claim of discriminatory selection of grand and petit jurors).

[12] During the nineteenth century, the expansion was so gradual that the Court may not have realized what it was doing. By 1900, the court had held that habeas corpus is proper when contemporaneous punishments are imposed for the same offense (*Ex parte* Lange, 85 U.S. (18 Wall.) 163 (1873)); when consecutive sentences are imposed for one offense (*In re* Nielsen, 131 U.S. 176 (1889); *In re* Snow, 120 U.S. 274 (1887)); for convictions without prior grand jury indictments (*Ex parte* Wilson, 114 U.S. 417 (1885)); and for convictions under unconstitutional statutes (*Ex parte* Siebold, 100 U.S. 371 (1879)). However, the Court still considered the jurisdiction requirement meaningful. Professor Bator explains that the justices "plainly did not feel that their distinctions were verbal fictions under the cover of which they could produce . . . an expansion [of the habeas corpus jurisdiction]." Bator, *supra* note 10, at 472.

[13] The decline of the jurisdiction requirement accelerated with the apparently contradictory cases of Frank v. Mangum, 237 U.S. 309 (1915), and Moore v. Dempsey, 261 U.S. 86 (1923). *Frank* held that a federal court could not grant habeas corpus relief where it would disturb a state determination that a trial was not influenced by organized crime; *Moore* approved habeas corpus review of such a state determination. Although commentators dispute the consistency of *Moore* and *Frank, see* note 10 *supra,* the decisions certainly highlight the fine Court-drawn distinctions between jurisdictional and nonjurisdictional errors. *Lange* also displays the subtlety of the distinction. "A judgment may be erroneous and not void, and it may be erroneous *because* it is void. The distinctions . . . are very nice. . . ." *Ex parte* Lange, 85 U.S. (18 Wall.) 163, 175 (1873). After *Moore* the Court loosened the jurisdictional requirement even further. *See, e.g.,* Johnson v. Zerbst, 304 U.S. 458 (1938) (holding trial court lacked jurisdiction where defendant was unconstitutionally deprived of counsel).

[14] 316 U.S. 101 (1942). The Court extended habeas corpus to cases where jurisdiction was valid but where "the conviction has been in disregard of the constitutional rights of the accused, and where the writ is the only effective means of preserving his rights." *Id.* at 105.

After *Brown,* only a procedural barrier to habeas corpus relief remained; courts would not provide collateral relief unless a prisoner had exhausted all available state remedies.[16] This limitation remained in force until 1963, when the Court, in *Fay v. Noia,*[17] approved habeas corpus relief for a prisoner who had not appealed his case at the state level. This expansion of habeas corpus relief provided the jurisdictional basis for many of the Warren Court's landmark constitutional decisions.[18]

The Court did not cut back on the scope of habeas corpus review until 1976. In *Stone v. Powell,*[19] two petitioners alleged that the prosecution had obtained important evidence through unconstitutional searches. Balancing the policies behind the exclusionary rule against interests in efficiency and state sovereignty, the Court held that search and seizure claims are not subject to collateral attack if the prisoner has an opportunity for full and fair review at the state level.[20] In a telling footnote, it characterized habeas corpus as a "safeguard against compelling an innocent man to suffer an unconstitutional loss of liberty."[21]

B. *Evidentiary Sufficiency, the Reasonable Doubt Standard, and Habeas Corpus*

Traditionally, allegations of insufficient evidence did not raise a cognizable habeas corpus issue. In 1960, the Supreme Court created an exception to this rule. In *Thompson v. City of Louisville,*[22] a state court had convicted petitioner of loitering and disorderly conduct. On habeas corpus review, the Supreme Court found the record "entirely lacking in evidence"[23] to support con-

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Although *Waley* expanded habeas corpus considerably, it still limited the writ to cases where state corrective processes were inadequate, leaving habeas as the "only effective" remedy. *See* Bator, *supra* note 10, at 493-99.

[15] 344 U.S. 443 (1953). *Brown* rejected the sole vestige of the jurisdictional requirement surviving *Waley. See* note 14 *supra.* The Court exercised habeas jurisdiction to review a jury discrimination claim although state courts had fully examined the issue. The Court later said that *Brown* symbolized a "manifest federal policy that federal constitutional rights of personal liberty shall not be denied without the fullest opportunity for plenary federal judicial review." Fay v. Noia, 372 U.S. 391, 424 (1963).

[16] Brown v. Allen, 344 U.S. 443, 482-87 (1953).

[17] 372 U.S. 391 (1963).

[18] *See* Cover & Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court,* 86 YALE L.J. 1035, 1041-44 (1977).

[19] 428 U.S. 465 (1976).

[20] *Id.* at 481-82.

[21] *Id.* at 491-92 n.31.

[22] 362 U.S. 199 (1960).

[23] *Id.* at 204.

viction under the applicable city ordinances, and reversed the conviction.[24]

The *Thompson* court did not explicitly limit federal habeas corpus review of evidentiary sufficiency claims. Noting that its decision turned "not on the sufficiency of the evidence, but on whether this conviction rest[ed] upon any evidence at all,"[25] the Court held that "it [is] a violation of due process to . . . punish a man without evidence of his guilt."[26] This doctrine was rooted in the notion that deference to state courts is unnecessary if a conviction is contrary to fundamental fairness,[27] "the whole proceeding is a mask,"[28] or no evidence supports a civil punishment.[29]

Although the Court failed to define the scope of this new doctrine,[30] it subsequently relied on *Thompson* not only to issue writs of habeas corpus on claims of "no evidence,"[31] but also to deny relief when the petitioner alleged only that insufficient evidence supported his conviction.[32] The writ was available only if the record was "totally devoid" of evidence of guilt.[33]

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[24] The trial court found that Thompson was dancing alone to jukebox music in a cafe, that the manager of the cafe denied selling him anything to eat, that the petitioner told the arresting officers he was waiting for a bus, and that he argued with the officers when they tried to arrest him. *Id.* at 199-200.

These evidentiary findings are interesting because presence in a cafe is surely evidence of loitering, just as arguing with police is *some* evidence of disorderly conduct. Commentators criticized the decision, accusing the Court of redefining the evidence necessary to convict under a local statute rather than finding the record devoid of evidence. *See, e.g.*, Note, *No Evidence to Support a Conviction—The Supreme Court's Decisions in* Thompson v. City of Louisville *and* Garner v. Louisiana, 110 U. PA. L. REV. 1137, 1140-42 (1962).

[25] 362 U.S. at 199.

[26] *Id.* at 206.

[27] *See* Akins v. Texas, 325 U.S. 398, 402 (1945).

[28] Moore v. Dempsey, 261 U.S. 86, 91 (1923).

[29] *See* Schware v. Board of Bar Examiners, 353 U.S. 232, 246-47 (1957) (denial of due process for state to prevent applicant from taking bar exam when record lacks evidence of bad character); United States *ex rel.* Vajtauer v. Commissioner, 273 U.S. 103, 106 (1927) ("Deportation . . . on charges unsupported by any evidence is a denial of due process which may be corrected on *habeas corpus*.") (sufficient evidence found).

[30] Debate over the meaning of *Thompson* continued until Jackson v. Virginia, 443 U.S. 307 (1979). *See, e.g.*, Speigner v. Jago, 603 F.2d 1208, 1211, 1216-17 (6th Cir. 1979) (debating whether *Thompson* necessarily incorporated a sufficiency standard or whether the words "no evidence" should be read literally).

[31] *See, e.g.*, Johnson v. Florida, 391 U.S. 596 (1968) (vagrancy); Garner v. Louisiana, 368 U.S. 157 (1961) (disturbing the peace; Negroes taking seats at white lunch counter).

[32] *See, e.g.*, Cunha v. Brewer, 511 F.2d 894, 898 (8th Cir. 1975); Faust v. North Carolina, 307 F.2d 869, 872 (4th cir. 1962); *cert. denied*, 371 U.S. 964 (1963).

[33] The Fourth Circuit explained:

> There is a difference between a conviction based upon evidence deemed insufficient as a matter of state criminal law and one so totally devoid of evidentiary support as to raise a due process issue. It is only in the latter situation that

In *In re Winship,*[34] a case that did not involve habeas corpus, the Court held that the due process clause required proof of guilt beyond a reasonable doubt. In *Winship,* a state family court had adjudged a juvenile "delinquent"[35] by a preponderance of the evidence. Noting that "[t]he reasonable-doubt standard plays a vital role in the American scheme of criminal procedure,"[36] the Supreme Court reversed, holding that the state conviction violated the due process clause:

> Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.[37]

Arguably, this language encompasses claims of evidentiary insufficiency in habeas corpus cases, but courts did not immediately construe *Winship* to affect the *Thompson* "no evidence" standard. Federal courts continued to follow the "well-established"[38] doctrine that a cognizable federal habeas corpus claim must allege a total lack of evidence supporting the conviction.[39] Lower courts, however, immediately recognized *Winship*'s importance in other contexts of criminal law. State statutes that required a defendant to disprove an element of the crime succumbed to the new doctrine,[40] and convictions based on improper jury instructions regarding the reasonable doubt standard were set aside.[41]

> there has been a violation of the Fourteenth Amendment, affording tbe state prisoner a remedy in a federal court on a writ of habeas corpus.

Faust v. Nortb Carolina, 307 F.2d 869, 872 (4th Cir. 1962) (citation omitted), *cert. denied,* 371 U.S. 964 (1963).

[34] 397 U.S. 358 (1970).

[35] The state statute defined a juvenile delinquent as "a person over seven and less than sixteen years of age who does any act which, if done by an adult, would constitute a crime." N.Y. FAM. CT. ACT § 712 (McKinney 1975) (amended 1978).

[36] 397 U.S. at 363.

[37] *Id.* at 364.

[38] United States *ex rel.* Johnson v. Illinois, 469 F.2d 1297, 1300 (7th Cir. 1972), *cert. denied,* 411 U.S. 920 (1973).

[39] *See, e.g.,* Brooks v. Rose, 520 F.2d 775, 777 (6th Cir. 1975); Robinson v. Wolff, 468 F.2d 438, 440 (8th Cir. 1972); United States *ex rel.* Johnson v. Illinois, 469 F.2d 1297, 1300 (7th Cir. 1972), *cert. denied,* 411 U.S. 920 (1973).

[40] Mullaney v. Wilbur, 421 U.S. 684 (1975). *Cf.* Patterson v. New York, 432 U.S. 197 (1977) (no violation of *Winship* to shift burden of proving emotional disturbance to defendant when not an element of crime).

[41] *Cf.* Cool v. United States, 409 U.S. 100 (1972) (per curiam) (due process denied where jury instructed to ignore defense testimony unless it believed beyond a reasonable doubt testimony was true).

No court perceived the relationship between *Thompson* and *Winship* until 1977. In *Freeman v. Zahradnick*,[42] the petitioner was convicted of possessing a shotgun found in the trunk of a car in which he had been riding. Because the record contained *some* evidence of possession, a federal court refused to grant a writ of habeas corpus.[43] Justice Stewart dissented from the Court's denial of certiorari, arguing that *Winship* may require a different standard for challenges to evidentiary sufficiency:

> If, after reviewing the evidence in the light most favorable to the state, . . . a federal court determines that *no rational trier of fact could have found a defendant guilty beyond a reasonable doubt* of the state offense with which he was charged, it is surely arguable that the court must hold, under *Winship*, that the convicted defendant was denied due process of law.[44]

II

A New Direction

A. *Jackson v. Virginia*[45]

A Virginia county judge convicted James Jackson of first-degree murder for the shooting death of Mary Houston Cole, a prison employee who had befriended Jackson while he was incarcerated for another offense. Although even the prosecutor apparently did not believe that the evidence supported a finding of premeditation,[46] the trial judge did, and sentenced Jackson to thirty years imprisonment.[47]

After an unsuccessful state appeal,[48] Jackson petitioned a federal district court for a writ of habeas corpus, claiming that the evidence was insufficient to support his conviction.[49] The court

[42] 429 U.S. 1111 (1977), *denying cert. to* Freeman v. Slayton, 550 F.2d 909 (4th Cir. 1976) (district court opinion unreported).

[43] 429 U.S. 1111 (1977).

[44] *Id.* at 1112-13 (emphasis added).

[45] 443 U.S. 307 (1979).

[46] Brief for Petitioner at 7, Jackson v. Virginia, 443 U.S. 307 (1979). Jackson admitted shooting the victim, but claimed he did so without premeditation or specific intent, necessary elements of first-degree murder in Virginia. *See* VA. CODE § 18.2-32 (1975). He argued that the killing was accidental, and, alternatively, that he was too intoxicated at the time of the killing to formulate the specific intent necessary to sustain a conviction under Virginia law. 443 U.S. at 311.

[47] *Id.*

[48] *Id.*

[49] *Id.* at 312.

apparently found that no evidence supported the conviction, and issued the writ under the *Thompson* standard.[50] The Fourth Circuit reversed, finding some evidence of premeditation.[51] The court noted that *Winship* might warrant a different standard,[52] but applied the "no evidence" standard in the absence of further guidance from the Supreme Court.[53]

The Supreme Court shortly provided that guidance. In *Jackson*,[54] the Court held that the *Thompson* standard failed to protect the constitutional rights established by *Winship*.[55] The two cases were based on different rights: *Thompson* on "freedom from a wholly arbitrary deprivation of liberty,"[56] and *Winship* on the right to acquittal if guilt is not proved beyond a reasonable doubt.[57] The Court held that because *Winship* extended beyond *Thompson,* the "trial ritual"[58] of instructing the jury on the reasonable doubt standard was insufficient: "[a] properly instructed jury may occasionally convict even when it can be said that no rational trier of fact could find guilt beyond a reasonable doubt, and the same may be said of a trial judge sitting as jury."[59] Instead, the Court interpreted *Winship* to require federal courts to examine the facts of each case:[60]

> After *Winship* the critical inquiry on review of the sufficiency of the evidence to support a criminal conviction must be not simply to determine whether the jury was properly instructed, but to determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt.[61]

Because only this standard would "guarantee the fundamental protection of due process of law,"[62] the Court considered a chal-

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[50] *Id.* (district court opinion unreported).

[51] *Id.* at 312 (circuit court opinion unreported).

[52] *Id.* The court cited Justice Stewart's dissent from the denial of certiorari in Freeman v. Zahradnick, 429 U.S. 1111 (1977). *See* notes 42-44 and accompanying text *supra*.

[53] 443 U.S. at 312.

[54] Justice Stewart, author of the *Freeman* dissent, wrote the majority opinion in *Jackson.*

[55] 443 U.S. at 313-16.

[56] *Id.* at 314.

[57] *Id.*

[58] *Id.* at 316-17.

[59] *Id.* at 317.

[60] *Id.* at 318.

[61] *Id.* (footnote omitted).

[62] *Id.* at 319.

lenge to evidentiary sufficiency a constitutional claim cognizable on habeas corpus.[63]

The Court rejected several objections to the new standard. First, it dismissed concerns about federal intrusion into state criminal trials, reasoning that "[c]ourts can and regularly do gauge the sufficiency of the evidence without intruding into any legitimate domain of the trier of fact . . . ."[64] Similarly, the Court regarded fears of additional burdens on the judiciary as "exaggerated."[65] Federal courts had been hearing sufficiency claims since *Thompson,*[66] and the new standard would merely expand an existing class of habeas claims. The Court also dismissed "problems of finalty and federal-state comity," because they "arise whenever a state prisoner invokes the jurisdiction of a federal court to redress an alleged constitutional violation."[67] Finally, the Court rejected the state's argument, based on *Stone v. Powell,*[68] that habeas corpus review should be unavailable to state prisoners who have received a "full and fair hearing" in the state system,[69] noting that Congress empowered federal courts to ensure that state determinations are "in accord with federal constitutional law."[70] Secure in its formulation, the court focused on the facts of the case before it, found the conviction to be supported by sufficient evidence, and denied the writ.[71]

In re Winship[72] does not compel the Court's result in *Jackson.*[73] *Winship* is ambiguous, containing both broad and nar-

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[63] *Id.* at 321. *Cf.* Stone v. Powell, 428 U.S. 465 (1976) (limiting habeas corpus jurisdiction in fourth amendment claims).

[64] 443 U.S. at 321.

[65] *Id.*

[66] *Id.* at 321-22.

[67] *Id.* at 322.

[68] 428 U.S. 465 (1976).

[69] *Id.* at 323.

[70] *Id.* The court distinguished Stone v. Powell, 428 U.S. 465 (1976), on the ground that the right in *Jackson,* the requirement that the prosecution prove guilt beyond a reasonable doubt, was central to the basic question of guilt or innocence. 443 U.S. at 323.

[71] *Id.* at 324-26. Justice Stevens, joined by the Chief Justice and Justice Rehnquist, concurred. They shared the majority's opinion of the evidence but called the new standard a "gratuitous directive to our colleagues on the federal bench." *Id.* at 339. The decision, Stevens argued, was not compelled by the facts of the case or by any "general dissatisfaction with the adequacy of the factfinding process. . . ." *Id.* at 328. Nor, he continued, was it compelled by *Winship,* which focused on the *application* of the reasonable doubt standard by the factfinder, not its enforcement. *Id.* at 331-35. Finally, he warned of dangers inhereut in the new rule, especially its intrusion on state courts, *id.* at 336, and the burden it would impose on federal courts. *Id.* at 337-39.

[72] 397 U.S. 358 (1970).

[73] *See id.* at 316. *See also* Pilon v. Bordenkircher, 444 U.S. 1 (1979) (per curium) (applying *Jackson).*

row language,[74] and focuses only on the application of the reasonable-doubt standard at trial.[75] Narrowly read, *Winship* holds only that the due process guarantee requires proof of guilt beyond a reasonable doubt in juvenile proceedings.[76] The decision does not consider the relevance of that guarantee on collateral attack.[77]

Even read broadly,[78] *Winship* does not require habeas corpus review of allegations of evidentiary insufficiency. Although the Court assumed otherwise,[79] habeas corpus review of an alleged infringement of a right is not compelled simply because that right derives from the Constitution. This principle, dormant for many years after *Brown v. Allen,*[80] was reestablished in *Stone v. Powell,*[81] in which the Court held that courts should not review alleged violations of fourth amendment rights on habeas corpus unless the state failed to provide the defendant an opportunity for full and fair review of his claim.[82]

The *Stone* approach to the role of habeas corpus would protect the defendant's due process rights prescribed by *Winship* without incurring many of the problems of *Jackson.*[83] Under

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[74] *See* notes 76 & 78 *infra.*

[75] 397 U.S. at 363-64. *See* Jackson v. Virginia, 443 U.S. 307, 330-31 & n.3 (concurring opinion, Stevens, J.).

[76] 397 U.S. at 359 ("This case presents the single, narrow question whether proof beyond a reasonable doubt is . . . required during the adjudicatory stage when a juvenile is charged with an act which would constitute a crime if committed by an adult.") (footnote omitted).

[77] *See* 443 U.S. at 330-31 (concurring opinion, Stevens, J.) ("[N]othing in the *Winship* opinion suggests that it also bore on appellate or habeas corpus procedures.").

[78] "Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon *proof* beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." 397 U.S. at 364 (emphasis added).

[79] Justice Stewart reasoned that the habeas corpus statute, 28 U.S.C. § 2254 (1976), permits claims from prisoners held in violation of the Constitution, and that a conviction on insufficient evidence violates a constitutional right. He concluded: "[i]t follows that such a claim is cognizable in a federal habeas corpus proceeding." 443 U.S. at 321. For a discussion of the dangers of relying on the statutory language to support broad habeas corpus review, see text accompanying notes 125-37 *infra.*

[80] 344 U.S. 443 (1953). *See* note 15 *supra.*

[81] 428 U.S. 465 (1976).

[82] Id. at 481-82.

[83] Although *Stone* was a search-and-seizure case, its concern with the cost of habeas corpus is underscored when due process issues are at stake. The Court frequently stressed that due process is not absolute, but a relative concept. Courts must strike a balance between the interests involved and the costs of protective procedures. *See, e.g.,* Mathews v. Eldridge, 424 U.S. 319, 334 (1976) ("'[d]ue process,' unlike some rules, is not a technical conception with a fixed content unrelated to time, place, and circumstances.");

Stone federal courts would examine only whether the trial court applied the reasonable doubt standard,[84] and whether the state provided an adequate opportunity to review the *correctness* of the application.[85] A writ would issue if the answers to both inquiries are negative. Indeed, the Court read *Winship* this way for seven years.[86]

The *Jackson* Court supplemented its justifications for a new standard by pointing to the "absurdly unjust results"[87] of applying the no-evidence standard after *Winship*. In theory, the Court observed, a defendant convicted by a mere shred of evidence would be denied habeas review under *Thompson*, whereas a defendant convicted by overwhelming evidence could get habeas review if the trial court incorrectly instructed the jury on the standard of proof.[88] Such an anomaly is quite unlikely. The statute[89] re-

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Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950) (balancing cost to litigant and right to notice of suit). *But see* Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974) (requiring individual notice to all identified members of a FED. R. CIV. P. 23(b)(3) class action).

[84] *See, e.g.*, Cool v. United States, 409 U.S. 100 (1972) (per curiam) (improper jury instruction).

[85] Professor Bator, who argues that courts should limit federal habeas corpus review in most cases, would allow review of the state process. Bator, *supra* note 10, at 455-60 ("plainly appropriate" to review "*whether the conditions and tools of inquiry were such as to assure a reasoned probability that the facts were correctly found and the law correctly applied.*") (emphasis in original). Limiting collateral attack to questions of trial court application and adequacy of state process does not vitiate *Winship*. *But see The Supreme Court, 1978 Term*, 93 HARV. L. REV. 60, 218 (1979) (standard "inherently unreceivable") [hereinafter cited as *1978 Supreme Court Term*]. This statement ignores the state courts' ability to adjudicate federal claims. THE FEDERALIST No. 82 (A. Hamilton).

[86] *Freeman* first recognized *Winship's* potential effect on the *Thompson* standard. Freeman v. Zahradnick, 429 U.S. at 1111 (1977) (dissent from denial of certiorari, Stewart, J.). *See, e.g.*, Vachon v. New Hampshire, 414 U.S. 478 (1974); Douglas v. Buder, 412 U.S. 430 (1973); United States *ex rel.* Johnson v. Illinois, 469 F.2d 1297 (7th Cir. 1972), *cert. denied*, 411 U.S. 920 (1973); Robinson v. Wolff, 468 F.2d 438 (8th Cir. 1972) (all applying *Thompson* without regard to *Winship*).

The Court did, however, immediately recognize *Winship*'s significance in areas other than habeas corpus. *See, e.g.*, Patterson v. New York, 432 U.S. 197 (1977) (no violation of due process clause to shift burden of proof to defendant when issue not an element of crime); Mullaney v. Wilbur, 421 U.S. 684 (1975) (statute requiring defendant to prove element of crime violates due process clause); Cool v. United States, 409 U.S. 100 (1972) (improper jury instruction as to reasonable doubt standard violates due process clause); Ivan V. v. City of New York, 407 U.S. 203 (1972) (*Winship* applied retroactively); Lego v. Twomey, 404 U.S. 477, 486 (1972) (in voluntariness hearing, admissibility of confession under preponderance standard does not violate due process clause).

[87] 443 U.S. at 320 n.14.

[88] Cool v. United States, 409 U.S. 100 (1972). *See* 443 U.S. at 320 n.14 ("Such results would be wholly faithless to the constitutional rationale of *Winship*.").

[89] 28 U.S.C. § 2254(b), (c) (1976). *See Ex parte* Royall, 117 U.S. 241 (1886) (origin of exhaustion doctrine).

quires the defendant to exhaust state remedies before availing himself of habeas corpus relief.[90] State courts, therefore, will invariably examine the sufficiency issue before a federal court considers it on collateral review, and will, in most cases, prevent "absurdly unjust," and other unmeritorious convictions.[91] Although these courts are not infallible, occasional error does not require such drastic change[92] in the "well established"[93] law of evidentiary review. The Court's decision in *Jackson* reflects an assumption about the nature of habeas corpus review: that the purpose of habeas corpus is to seek out errors, however rare, in the determination of guilt.

B. *Adequacy of State Process and the Emerging Emphasis on Guilt*

Recent Supreme Court decisions suggest two categories of cognizable claims on writs of habeas corpus. These two categories reflect different theories about the proper role of habeas corpus review in the federal system. First, *Jackson* and *Stone v. Powell*[94] reflect the Court's emerging view that collateral review should protect constitutional rights bearing directly on the determination

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[90] *See* Johnson v. Metz, 609 F.2d 1052 (2d Cir. 1979) (right must be raised at state level in constitutional form).

[91] Justice Stevens praised state review in his concurring opinion. "I am aware of no general dissatisfaction with the accuracy of the factfinding process or the adequacy of the rules applied by state appellate courts when reviewing claims of insufficiency.... In short, there is simply no reason to tinker with an elaborate mechanism that is now functioning well." 443 U.S. at 328-30. Judge Friendly has commented,

> [W]e do not know how many of these [releases of state prisoners on federal habeas corpus] represented prisoners "whom society has grievously wronged and for whom belated liberation is little enough compensation," Fay v. Noia, ... or how many were black with guilt. The assumption that many of them fall in the former category is wholly unsupported.

Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142, 148 n.25 (1970).

[92] *Jackson*'s impact on habeas corpus relief is unclear. Courts applying it have been reluctant to overturn state convictions. *See* Moore v. Duckworth, 443 U.S. 713 (1979) (per curiam); Davis v. Campbell, 608 F.2d 317 (8th Cir. 1979); United States v. Bailey, 607 F.2d 237 (9th Cir. 1979). Analytically, however, *Jackson* is significant because of its new standard of review and its willingness to discard the most important of the state factual determinations—guilt or innocence.

[93] United States *ex rel.* Johnson v. Illinois, 469 F.2d 1297, 1300 (7th Cir. 1972) (applying *Thompson* as well-settled law, without regard to *Winship*), *cert. denied*, 411 U.S. 920 (1973).

[94] 428 U.S. 465 (1976).

of guilt.[95] Second, the Court's decision in *Rose v. Mitchell*[96] indicates that collateral review should ensure the availability of state appellate procedures that adequately examine the accuracy and validity of the guilt-determination process.[97]

In *Stone,* the Court concluded that when examining fourth amendment claims on collateral attack, interests in efficiency and federal-state comity outweighed the benefits of the exclusionary rule.[98] A footnote in the opinion, however, reveals the determinative factor in the balance—the notion that habeas corpus should protect the innocent, not the guilty:

> Resort to habeas corpus, especially for purposes other than to assure that no innocent person suffers an unconstitutional loss of liberty, results in serious intrusions on values important to our system of government. . . .
>
> We nevertheless afford broad habeas corpus relief, recognizing the need in a free society for an additional safeguard against compelling an innocent man to suffer an unconstitutional loss of liberty.[99]

The Court's emphasis on innocence presaged a new hierarchy of rights in habeas corpus review, in which only those rights

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[95] *See generally* Cover & Aleinikoff, *supra* note 18, at 1072-1100. *But see* Friendly, *supra* note 91, at 142 ("with a few important exceptions, convictions should be subject to collateral attack only when the prisoner supplements his constitutional plea with a colorable claim of innocence.").

[96] 443 U.S. 545 (1979).

[97] *See 1978 Supreme Court Term, supra* note 85, at 205. The "waiver decisions"—Wainwright v. Sykes, 433 U.S. 72 (1977) (involuntary confession); Francis v. Henderson, 425 U.S. 536 (1976) (unconstitutionally composed grand jury); and Estelle v. Williams, 425 U.S. 501 (1976) (trial in prison clothing)—are difficult to reconcile in the two pronged standard suggested here. In each case the petitioner failed to raise his claim properly under the state procedural rules, and in each case the Court rejected federal court review on writ of habeas corpus. Nevertheless, the claims presented were closely related to the determination of guilt. *See, e.g.,* Cover & Aleinikoff, *supra* note 18, at 1078-86 (discussing *Henderson* and *Williams*). In addition, *Stone* is arguably limited to rights related to search-and-seizure. 428 U.S. at 494-95 n.37. *See also* Rose v. Mitchell, 443 U.S. 545, 560 (1979) (*Stone* "made it clear that it was confining its ruling to cases involving the . . . exclusionary rule . . . ."). Finally, other factors, such as judicial burden, federalism concerns, and weighing of costs and benefits, appear in some or all of these opinions, while the emphasis on guilt often appears in footnotes or dicta. Relation to guilt and quality of the state process, however, is a unifying concern in these cases.

[98] 428 U.S. at 489-91.

[99] *Id.* at 491 n.31. The footnote concludes, "[B]ut in the case of the typical Fourth Amendment claim, asserted on collateral attack, a convicted defendant is usually asking society to redetermine an issue that has no bearing on the basic justice of his incarceration." *Id.* For the origins of this view of habeas corpus, see text accompanying notes 6-18 *supra.* The "serious intrusions in values important to our system of government," are discussed in text at notes 125-37 *infra.*

most related to guilt-determination would be cognizable on habeas corpus.[100]

With its decision in *Jackson,* the Court firmly established this hierarchy. In distinguishing *Stone,* the Court stated,

> The constitutional issue presented in this case is far different from the kind of issue that was the subject of the Court's decision in *Stone* .... The question whether a defendant has been convicted upon inadequate evidence *is central to the basic question of guilt or innocence.*[101]

The true significance of *Jackson,* therefore, does not lie simply in the Court's expansion of the no-evidence standard to comport with *Winship.* More than the logical corollary to *Winship, Jackson* confirms the Court's emerging view that habeas corpus relief should protect constitutional claims directly concerning the process of guilt-determination.

The Court has not limited collateral review, however, to guilt-related claims. In *Stone,* the Court recognized the importance of "an opportunity for full and fair" review at the state level.[102] In *Rose v. Mitchell,*[103] the Court authorized collateral review of alleged discrimination in the selection of grand jurors, holding that when the defendant "claims that the state judiciary itself has ... violated" the Constitution "[a] federal forum must be available if a full and fair hearing of such claims is to be had."[104]

III

THREE APPROACHES TO HABEAS CORPUS

The Supreme Court at different times has held two different views of the role of habeas corpus. The first, the basis of *Brown*

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[100] Commentators and judges immediately predicted *Stone*'s potential effect on other rights, both guilt-related and nonguilt-related. *See* Stone v. Powell, 428 U.S. 465, 515-19 (1976) (dissenting opinion, Brennan, J.); Cover & Aleinikoff, *supra* note 18, at 1086-1100; *1978 Supreme Court Term, supra* note 85, at 219. Some anticipated *Jackson,* having viewed *Stone* as broadening habeas corpus to include evidentiary sufficiency claims, while closing collateral review to rights only tangentially related to guilt. *See* Cover & Aleinikoff, *supra* note 18, at 1086-88, 1097-100.

[101] 443 U.S. at 323 (emphasis added). *Stone* could have been distinguished simply by limiting it to the exclusionary rule. The Court suggested this distinction in *Stone* itself. *See* Stone v. Powell, 428 U.S. 465, 494 n.37 (1976); note 105 *infra.*

[102] 428 U.S. at 494.

[103] 443 U.S. 545 (1979).

[104] *Id.* at 561. The *Rose* Court limited collateral review of nonguilt-related claims to instances where the state judiciary itself is the alleged perpetrator of the constitutional violations. *Stone* is in harmony if confined to authorize state court review of police conduct.

and *Fay*, is that habeas corpus should be available to review all constitutional violations. Ironically, this plenary view has not entirely disappeared; a crucial link in Justice Stewart's reasoning in *Jackson* is that because Jackson had "stated a federal constitutional claim," "such a claim is cognizable in a federal habeas corpus proceeding."[105] The second view, underlying *Jackson* and *Stone*, is that habeas corpus should be available to review only violations of rights related to the guilt determination. Both approaches are unsatisfactory; this Note, therefore, proposes a third.

A. *Plenary Review*

The Vinson and Warren Courts allowed plenary review of constitutional claims on habeas corpus.[106] As *Jackson* and *Stone* demonstrate, however, the Court in recent years has, appropriately, abandoned this view.

The Court had justified plenary review on the "expansive language," "mandatory tone," and "historical context" of the habeas corpus statute.[107] Indeed, the broad language of the original statute did seem to authorize collateral review of all alleged constitutional violations:

> [The Federal courts], in addition to the authority already conferred by law, shall have power to grant writs of habeas corpus in all cases where any person may be restrained of his or her liberty in violation of the constitution, or of any treaty or law of the United States . . . .[108]

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[105] 443 U.S. at 321.

[106] *See, e.g.*, Fay v. Noia, 372 U.S. 391 (1963) (alleged coerced confession examined on collateral review although petitioner failed to appeal at state level); Brown v. Allen, 344 U.S. 443 (1953) (alleged discrimination in jury selection examined on habeas corpus even though claim fully heard at state level). *Cf.* Sanders v. United States, 373 U.S. 1, 11-12 (statute prohibiting second habeas petition only bars petition for identical claim).

Plenary review forms the basis for many criticisms of Burger Court decisions limiting habeas corpus. *See* dissenting opinions of Justices Brennan and White in Stone v. Powell, 428 U.S. 465, 536-37, 543 (1976); Francis v. Henderson, 425 U.S. 536, 543 (1976) (dissenting opinion, Brennan, J.); *1978 Supreme Court Term, supra* note 85, at 206-09; Comment, *Federal Habeas Corpus: The Relevance of Petitioner's Innocence*, 46 U. MO. K.C. L. REV. 382 (1978).

[107] 28 U.S.C. § 2254 (1976). Congress originally enacted the statute in 1867. Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385. Language changes resulting from codification in the United States Code were intended only to consolidate the various habeas corpus statutes, not to change the import of the Act. Note, *The Freedom Writ—The Expanding Use of Federal Habeas Corpus*, 61 HARV. L. REV. 657, 659 n.22 (1948).

[108] Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385.

Viewing this language against "the background of post-Civil War efforts in Congress to deal severely with the States of the former Confederacy,"[109] Justice Brennan in *Fay v. Noia*[110] reached the "inescapable"[111] conclusion that Congress intended the statute to protect all constitutional rights. According to *Fay*, Congress intended the statute to give federal courts the broadest possible power to enforce the many rights that it was about to create by the Reconstruction Act and the fourteenth amendment.[112]

Some scholars, however, do not regard this conclusion as inescapable.[113] Professor Lewis Mayers concludes that Congress did not intend the 1867 Act to apply to state prisoners at all, arguing that it was a poorly drafted law intended only to release legally-freed blacks who were still enslaved.[114] Mayers claims the sparse congressional debates on the Act fail to support Justice Brennan's interpretation[115] and argues that Congress passed the Act with neither the Reconstruction Acts[116] nor the fourteenth amendment[117] in mind. Contemporary courts did not believe that the 1867 Act increased the number of issues cognizable on collateral review, and courts did not abandon the traditional requirement that the petitioner allege "jurisdictional error"[118] until 1942.[119]

The *Fay* Court also stated that the 1867 Act empowered courts to review all rights because it codified the common law writ of habeas corpus.[120] The Court asserted that the purpose of the common law writ was to redress any governmental restraint in violation of fundamental law.[121] Professor Dallin Oaks, however,

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[109] Fay v. Noia, 372 U.S. 391, 415 (1963).

[110] 372 U.S. 391 (1963).

[111] *Id.* at 415.

[112] *Id.* at 415-16.

[113] Bator, *supra* note 10, at 474-77; Mayers, *The Habeas Corpus Act of 1867: The Supreme Court as Legal Historian*, 33 U. CHI. L. REV. 31 (1965). *But see 1978 Supreme Court Term*, *supra* note 85, at 106; Comment, *supra* note 106, at 399-415.

[114] Mayers, *supra* note 113, at 35. Today, however, the statute's application to state prisoners is unquestioned. *See* Stone v. Powell, 428 U.S. 465, 475 (1976); Bator, *supra* note 10, at 465.

[115] Mayers, *supra* note 113, at 33-43. *See also* Bator, *supra* note 10, at 475-77.

[116] Mayers, *supra* note 113, at 48-52.

[117] *Id.* at 52-55.

[118] *See* notes 11-13 and accompanying text *supra*.

[119] Waley v. Johnston, 316 U.S. 101 (1942). *See* Bator, *supra* note 10, at 478-83; *Developments in the Law—Federal Habeas Corpus*, *supra* note 6, at 1049-50.

[120] 372 U.S. at 402-05.

[121] *Id.*

rejects the Court's argument: "[The] broad license to 'remedy any kind of governmental restraint contrary to fundamental law' originates in the United States Reports, not the annals of English history."[122]

Clearly, then, the statute was not intended to authorize plenary review. Nor has Congress shown any such intent since the Act was passed. It has never clarified the scope of the writ,[123] despite widely varying judicial constructions.[124]

Finally, policy considerations militate against plenary review. Plenary review impairs judicial efficiency, strains federal-state comity, and undermines the finality of state court judgments. As the Court expands the scope of the due process clause, the number of habeas corpus claims increases.[125] This poses two problems. First, it contributes to the already overloaded dockets of the federal courts. The volume of habeas petitions filed by state prisoners in the district courts swelled from 541 in 1953[126] to over 18,000 in 1979.[127] Although few petitions require retrial or even a hearing,[128] each petition requires at least a few hours of careful scrutiny, lest the occasional deserving petition be overlooked.[129] Habeas review also unnecessarily duplicates the use of judicial resources.[130] There is no reason to presume that the sec-

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[122] Oaks, *supra* note 6, at 466 (quoting Fay v. Noia, 372 U.S. at 405) (footnote omitted). *See generally id.* at 458-68. Professor Oaks restricted his objection to the Court's use of history; he did not criticize the Court's conclusion. *Id.* at 453, 457, 471-72.

[123] *But see* Stone v. Powell, 428 U.S. 465, 522 (1976) (dissenting opinion, Brennan, J.); Mayers, *supra* note 113, at 32 (both arguing congressional silence indicated approval of the "expansive" reading of the statute). For a review of bills that were intended to affect habeas corpus jurisdiction but were not enacted, see Mayers, *supra* note 113, at 32 n.6; Note, *Relieving the Habeas Corpus Burden: A Jurisdictional Remedy*, 63 IOWA L. REV. 392, 403-05 (1977).

[124] *Compare* Sanders v. United States, 373 U.S. 1, 11-12 (1963) (statute prohibiting second habeas petition for similar relief bars only petitions for identical claim) *and* Fay v. Noia, 372 U.S. 391 (1963), *with* Wainwright v. Sykes, 433 U.S. 72 (1977) *and* Francis v. Henderson, 425 U.S. 536 (1976) *and* Estelle v. Williams, 425 U.S. 501 (1976).

[125] *See* Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 CALIF. L. REV. 929 (1965) (reprinted with alterations in H. FRIENDLY, BENCHMARKS 235 (1967)).

[126] Brown v. Allen, 344 U.S. 443, 536 n.8 (1953) (concurring opinion, Jackson, J.).

[127] [1979] ADMIN. OFFICE OF UNITED STATES COURTS ANN. REP. 61. *See generally id.* at 48, 59-62.

[128] *See Developments in the Law—Federal Habeas Corpus, supra* note 6, at 1041-42; Comment, *supra* note 106, at 416-17.

[129] *See* Brown v. Allen, 344 U.S. 443, 537 (1953) (concurring opinion, Jackson, J.) ("He who must search a haystack for a needle is likely to end up with the attitude that the needle is not worth the search."); Friendly, *supra* note 91, at 147-49.

[130] Judge Friendly argues:

> Indeed, the most serious single evil with today's proliferation of collateral attack is its drain upon the resources of the community—judges, prosecutors, and

ond tribunal is more competent than the first, especially in matters of evidence and fact-finding.[131]

Plenary review severely impairs federal-state comity.[132] By expanding due process requirements, courts inflate many routine findings of fact into constitutional issues cognizable on collateral review.[133] Plenary review can also chill the relationship between state and federal courts; the knowledge that any conviction can be attacked collaterally may engender insecurity and resentment in state court judges.[134]

Finally, excessive use of habeas corpus greatly impinges on the finality of state trials.[135] It promotes seemingly endless litigation of insignificant evidentiary questions,[136] and thereby undermines public confidence in the criminal justice system and its deterrent function.[137]

Of course, habeas corpus should not be eliminated.[138] In some circumstaces, the writ is proper and necessary.[139] However, the Court's assumption in *Fay* and perhaps even in *Jackson*—that

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> attorneys appointed to aid the accused, and even of that oft overlooked necessity, courtrooms. Today of all times we should be conscious of the falsity of the bland assumption that these are in endless supply.

Friendly, *supra* note 91, at 148 (footnote omitted). *See also* Bator, *supra* note 10, at 451.

[131] *See* Bator, *supra* note 10, at 509-10.

[132] The arguments in this paragraph rely heavily on the excellent articles by Professor Bator, *supra* note 10, and Judge Friendly, *supra* note 91. *See also* Rose v. Mitchell, 443 U.S. 545, 583-85 (1979) (concurring opinion, Powell, J.) and Stone v. Powell, 428 U.S. 465, 491 n.31 (1976).

[133] *See* Friendly, *supra* note 125, at 929.

[134]
> I could imagine nothing more subversive of a judge's sense of responsibility, of the inner subjective conscientiousness which is so essential a part of the difficult and subtle art of judging well, than an indiscriminate acceptance of the notion that all the shots will be always be called by someone else.

Bator, *supra* note 10, at 451.

[135]
> It is a point difficult to formulate because so easily twisted into an expression of mere complacency. . . . Somehow, somewhere, we must accept the fact that human institutions are short of infallible; there is reason for a policy which leaves well enough alone and which channels our limited resources of concern toward more productive ends.

Bator, *supra* note 10, at 452-53. *But see* Brennan, *Federal Habeas Corpus and State Prisoners: An Exercise in Federalism,* 7 UTAH L. REV. 423 (1961) (broad habeas corpus encourages states to improve post-conviction remedies); Cover & Aleinikoff, *supra* note 18, at 1045-46 (duplication reduces possibility of error and encourages states to improve their methods of review).

[136] *See* Friendly, *supra* note 91, at 147.

[137] *See* Bator, *supra* note 10, at 452.

[138] Indeed, the Constitution forbids total elimination of the remedy. U.S. CONST. art. I, § 9, cl. 2.

[139] *See* text accompanying notes 139-41 and 180-91 *infra.*

habeas corpus should be available to hear *all* constitutional violations—is clearly inappropriate.

B. *Quality of State Process and Relevance to Guilt*

The Burger Court, however, appears to have rejected plenary habeas corpus review. Instead, it has fashioned a two-pronged analysis based upon the relationship of the right to the determination of guilt, and the adequacy of state review processes. Only the latter withstands close scrutiny.

Federal collateral review of the adequacy of state processes is both desirable and necessary. No strong state policies support withholding review. For example, although courts are properly reluctant to intrude on state adjudications, if the state has not given the case sufficient consideration,[140] collateral review constitutes no intrusion. Similarly, if the state fails to provide the defendant with an adequate opportunity to raise constitutional claims, federal review is neither inefficient nor duplicative. A defendant's constitutional rights demand protection by adequate judicial process, be it state or federal. At a minimum habeas corpus must be available for all claims of constitutional violations that fail to receive a fair hearing by a state court.[141]

The second basis of review—the guilt-relatedness of the right—suffers from three flaws: historical inaccuracy, internal conflict, and conceptual shortsightedness.

Proponents of this approach claim the historical function of habeas corpus is to free the unjustly imprisoned, the innocent.[142] But this analysis is, as Professor Mayers said in a similar context, "an illustration of the way in which an undocumented and seemingly ill-founded historical assertion can, by dint of repetition, gain acceptance even by the Supreme Court."[143]

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[140] *See, e.g.*, Moore v. Dempsey, 261 U.S. 86, 90-91 (1923); Rose v. Mitchell, 443 U.S. 545 (1979); note 104 *supra*.

[141] *See* Bator, *supra* note 10, at 455. The Court might question not only whether the opportunity for review is actually denied, but also whether the violation claimed is unlikely to receive fair review at the state level. An example of the latter is where the violation was by the state court system itself, as with domination of a trial by organized crime, *see* Bator, *supra* note 10, at 483-93 (*comparing* Moore v. Dempsey, 261 U.S. 86 (1923) *with* Frank v. Mangum, 237 U.S. 309 (1915)) or discrimination in grand jury selection, *see* Rose v. Mitchell, 443 U.S. 545 (1979).

[142] Justice Powell, for example, is a proponent of this view. *See* Stone v. Powell, 428 U.S. 465, 491 n.31 (1976); Lefkowitz v. Newsome, 420 U.S. 283, 303 (1975) (dissenting opinion, Powell, J.); Schneckloth v. Bustamonte, 412 U.S. 218, 258 (1973) (concurring opinion, Powell, J.). *See also* Cover & Aleinikoff, *supra* note 18, at 1086.

[143] Mayers, *supra* note 113, at 32.

Justice Powell, the author of the *Stone* opinion, is the strongest advocate of this view of habeas corpus.[144] To support his position,[145] he relies on a well-known article by Judge Friendly,[146] and Justice Black's dissent in *Kaufman v. United States.*[147] Judge Friendly's article, however, does not adequately support Justice Powell's historical analysis,[148] and the support it does provide also relies on the *Kaufman* dissent.[149] In that dissent, Justice Black claimed that "the great historic role of the writ of habeas corpus has been to insure the reliability of the guilt-determining process."[150] For support, Justice Black cited Professor Mishkin,[151] who in turn relied upon the broad language of *Fay v. Noia.*[152]

But *Fay*'s account of the historical role of habeas corpus is inaccurate.[153] Indeed, early cases almost uniformly indicate that the Court regarded the writ not as a tool to correct erroneous determinations of guilt,[154] but rather as one to redress procedurally infirm convictions. Indeed, this theory provided the basis for the long reigning "jurisdictional error" limitation.[155]

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[144] *See* note 142 *supra.*

[145] *See* Stone v. Powell, 428 U.S. 465, 491 n.31 (1976); Schneckloth v. Bustamonte, 412 U.S. 218, 258 (1973).

[146] Friendly, *supra* note 91.

[147] 394 U.S. 217, 231 (1969) (search and seizure claims of federal prisoners cognizable on habeas corpus).

[148] *See* note 38 *supra.*

[149] Friendly, *supra* note 91, at 142.

[150] 394 U.S. at 234. This formulation differs from Justice Powell's; the reasonable doubt standard, for example, protects the innocent but does not always improve the accuracy of the criminal process. *See generally In re* Winship, 397 U.S. 358 (1970).

[151] Misbkin, *The Supreme Court, 1964 Term—Foreword: The High Court, The Great Writ, and the Due Process of Time and Law,* 79 HARV. L. REV. 56 (1965).

[152] *Id.* at 79. The language in *Fay* is so broad that it provides authority for all positions. *See* 372 U.S. at 400-02. The Court even cited the decision to support the curtailment of habeas corpus in Stone v. Powell, 428 U.S. 465, 491 n.31 (1976).

[153] Bator, *supra* note 10, at 465-83; Mayers, *supra* note 113; Oaks, *supra* note 6. *See* text accompanying notes 113-24 *supra.*

[154] *See, e.g., Ex parte* Watkins, 28 U.S. (3 Pet.) 193 (1830) (Court would not review claim of improper indictment); *Ex parte* Kearney, 20 U.S. (7 Wheat.) 38 (1822) (Court refused to review claim where prisoner convicted of contempt refused to answer incriminating questions at trial). The modern cases applying the exclusionary rule on habeas are notable. *See* Kaufman v. United States, 394 U.S. 217 (1969). Justice Harlan's dissent in *Fay* reflects the role that guilt plays in Warren Court habeas decisions:

> Whether or not Noia was guilty of the crime of felony murder, and whether the evidence of his guilt was accurate and substantial, are matters irrelevant to the question of coercion [of Noia's confession] and also irrelevant here.

372 U.S. at 472 n.26.

[155] *See* text accompanying notes 11-15 *supra.*

The guilt or innocence distinction also poses serious analytical problems. *Jackson* suggests that the concept of guilt may be interpreted in two ways. On the one hand, the Court seemed to focus on flaws in the process of guilt determination, rather than the effects of those flaws on the decision of the fact-finder.[156] On the other hand, the Court's rationale often revealed a desire to redress only those determinations that are actually mistaken.[157] The two concepts can conflict. If the prisoner alleges that his conviction is invalid because of a violation of a right that is directly related to the guilt determination process, but the conviction clearly appears to be correct,[158] the court is faced with two unsatisfactory choices. If it denies the writ, the function of collateral review becomes transformed into a harmless error standard. Courts will review violations of rights that bear upon the determination of guilt, but will not grant habeas relief if the conviction is otherwise valid.[159] This limitation is at odds with thorough review of alleged violations of guilt-related rights. On the other hand, if the court issues a writ,[160] the primary goal of habeas review under this view—insuring the correct adjudication of criminal cases—is lost, and a guilty defendant freed.[161]

More important, this view of habeas corpus relief improperly balances the interests of state and federal courts. States have a strong interest in the accurate determination of guilt. Public outrage over an erroneous outcome,[162] the cost of supporting a prisoner who is unjustly incarcerated, and the danger to society pre-

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[156] *See* Jackson v. Virginia, 443 U.S. at 323:

> The question whether a defendant has been convicted upon inadequate evidence is central to the basic question of guilt or innocence. The constitutional necessity of proof beyond a reasonable doubt is not confined to those defendants who are morally blameless.

[157] *See id.* at 320 n.14 (concern for hypothetically incorrect results under *Thompson* standard).

[158] The Supreme Court faced this problem twice in 1977, reaching different conclusions. *Compare* Manson v. Brathwaite, 432 U.S. 98 (1977) (suggestive identification procedure) *with* Brewer v. Williams, 430 U.S. 387 (1977) (denial of effective counsel).

[159] Manson v. Brathwaite, 432 U.S. 98, 114-17 (1977) (holding due process clause did not compel the exclusion of identification evidence in part because the likelihood of misidentification was minor).

[160] Brewer v. Williams, 430 U.S. 387 (1977) (defendant who located victim's body freed on writ of habeas corpus because of denial of constitutional right to counsel).

[161] In many cases, the court will condition the writ to allow the state to retry the defendant within a limited time. However, successful retrial may only be a theoretical possibility. Friendly, *supra* note 91, at 147.

[162] An outcome is "erroneous" when an innocent defendant is adjudged guilty, or a guilty defendant adjudged innocent when he is in fact guilty. Such statements, of course, must be used with caution.

sented by erroneously released prisoners provide states with strong incentives to insure proper guilt determinations. Even if correct determinations are required by the due process clause,[163] the states can be expected to achieve this goal as well as the federal courts, because the states have an equally strong interest in accuracy.[164]

Of course, district court judges will not completely ignore considerations of guilt or innocence. But a conscious distinction between constitutional rights based on their relation to the determination of guilt or innocence is inappropriate. Although it may present interesting possibilities for development,[165] and is predictable, the distinction is historically unjustified, internally conflicting, and unrelated to the real needs habeas corpus must serve.

C. *A Federalism Approach*

Habeas corpus review should not be plenary, nor based on the guilt-relatedness of the asserted right. Instead, courts should limit collateral review to alleged violations of constitutional interests most in need of federal protection. These fall into two categories. First, habeas corpus relief should be available to prisoners who allege violations of rights that are in special danger of inadequate protection in state courts.[166] Usually this danger is greatest for federal rights that may interfere with the state's interest in accurately determining guilt or innocence.[167] Second,

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[163] *See In re* Winship, 397 U.S. 358, 364 (1970) ("[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.").

[164] *See* Jackson v. Virginia, 443 U.S. 307, 328 (1979) (concurring opinion, Stevens, J.) ("[I] am aware of no general dissatisfaction with the accuracy of the factfinding process"); Brown v. Allen, 344 U.S. 443, 537 (1953) (concurring opinion, Jackson, J.) ("It must prejudice the occasional meritorious application to be buried in a flood of worthless ones."); Friendly, *supra* note 91, at 147-48.

This is not to deny that an occasional defendant falls victim to a "conviction of passion," the utterly unfounded pronouncement of guilt. But even this unjustice does not justify shifting the focus of habeas corpus to the problem-ridden area of guilt-related rights. They can be dealt with in other ways—some by habeas review; in many such cases rights are violated that *should* be reviewed on habeas. *See* text accompanying notes 185-89 *infra*. Others can be remedied by executive clemency. But if habeas corpus must be restricted, there are rights which need more protection than those related to guilt.

[165] *See* Cover & Aleinikoff, *supra* note 18, at 1086-1100.

[166] *See 1978 Supreme Court Term, supra* note 85, at 207-09; *Developments in the Law—Federal Habeas Corpus, supra* note 6, at 1059-61.

[167] When enforcement of the right interposes an obstacle to correctness, as in fourth amendment cases, the state's interest in protecting it is not as strong. Even when state judges try to avoid this conflict, their active role in the trial endangers these constitutional

the writ should be available to prisoners who allege that the state did not provide an opportunity for meaningful state review of their claims.

An analysis of federal and state interests will identify those rights appropriate for federal review. For example, federal rights that lack state counterparts or directly affect intergovernmental relationships[168] require special attention by the federal judiciary.[169] Even when state review is as full and fair as possible, these rights require review in federal court.[170] Habeas corpus fills this need.[171]

Conversely, if states have strong interests in preserving federal rights, federal review of alleged violations is unnecessary. Such rights include those that comport with the state interest in correct adjudication. Likewise, where a state's interest in its own processes is much stronger than federal interests in overseeing enforcement of a right, federal review is improper.[172] These con-

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questions. Justice Schaefer of the Supreme Court of Illinois has said that "even though those requirements come with the ultimate sanction of a constitutional command, I can testify that it is not always easy to focus upon the procedural requirement and shut out considerations of guilt or innocence." Schaefer, *Federalism and State Criminal Procedure,* 70 HARV. L. REV. 1, 13 (1956). This is especially true where there is clear evidence of guilt.

[168] *See* Fasano v. Hall, 615 F.2d 555 (1st Cir. 1980) (state conviction allegedly violated Interstate Agreement on Detainers Act); Petition of Carmen, 165 F. Supp. 942 (N.D. Cal. 1958) (exclusive federal jurisdiction under Ten Major Crimes Act).

[169] Federal judges frequently face these issues and escape parochial pressures and concerns, such as reelection politics.

[170] *Cf.* Mapp v. Ohio, 367 U.S. 643, 657-58 (1961) (questioning states' willingness to enforce unpopular federal constitutional requirements).

[171] *See* United States *ex rel.* Radich v. Criminal Ct., 459 F.2d 745, 748 (2d Cir. 1972) ("The writ's objective . . . is to assure that when a person is detained unlawfully or in violation of his constitutional rights he will be afforded an independent determination by a federal court . . ., even though the issue may already have been decided on the merits by a state tribunal."), *cert. denied,* 409 U.S. 1115 (1973). This conception of the writ's main purpose survived *Stone v. Powell.* In 1977, the Supreme Court approved the issuance of a writ to a man who had undeniably murdered a young girl but had been tricked into incriminating himself in the absence of counsel. The Court concluded:

> Although we do not lightly affirm the issuance of a writ of habeas corpus in this case, so clear a violation of the Sixth and Fourteenth Amendments as here occurred cannot be condoned. The pressure on state executive and judicial officers charged with the administration of the criminal law are great, especially when the crime is murder and the victim a small child. *But it is precisely the predictability of those pressures that makes imperative a resolute loyalty to the guarantees that the Constitution extends to us all.*

Brewer v. Williams, 430 U.S. 387, 406 (1977) (emphasis added). *See also 1978 Supreme Court Term, supra* note 85, at 209; *Developments in the Law—Federal Habeas Corpus, supra* note 6, at 1059-61.

[172] Most would agree, for example, the federal interest in preserving the right to bear arms is weaker than the state's interest in controlling possession of weapons.

siderations provide a useful framework for analyzing specific rights.

Under this "federalism" approach, both *Stone*[173] and *Jackson*[174] would be resolved differently. Because strict enforcement of the exclusionary rule[175] often allows "[t]he criminal . . . to go free because the constable [had] blundered,"[176] it conflicts with the state's interest in punishing the guilty.[177] Indeed, state determinations of exclusionary rule claims may often be inadequate because the rule can negate a correct determination of guilt.[178] Habeas corpus, therefore, must be available to protect this right, and any other[179] that tends to impair the guilt or innocence determination at the state level.

Those rights compatible with state interests will be adequately protected by state courts, and do not require federal review. Evidentiary sufficiency is a good example. Here federal review strikes at the very purpose of the state criminal trial—a correct outcome.[180] Further, although after *Jackson* sufficiency claims are of constitutional dimension, state courts have an equally strong interest in such claims. For example, state courts apply a test similar to that suggested by the *Jackson* court[181] when reviewing directed verdicts and judgments not withstanding the verdict.[182] Charges of invalid identification techniques and claims

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[173] Stone v. Powell, 428 U.S. 465 (1976) (fourth amendment claims not cognizable on habeas where opportunity for full and fair state review was provided).

[174] Jackson v. Virginia, 443 U.S. 307 (1979) (evidentiary sufficiency claims cognizable on habeas).

[175] *See* Mapp v. Ohio, 367 U.S. 643, 654-55 (1961) *overruling* Wolf v. Colorado, 338 U.S. 25 (1949); Weeks v. United States, 232 U.S. 383 (1914).

[176] People v. Defore, 242 N.Y. 13, 21, 150 N.E. 585, 587 (1926).

[177] *See* notes 162-64 and accompanying text *supra*.

[178] *See* text accompanying note 167 *supra*.

[179] Such rights might include, for example, *Miranda* warnings, *see* Miranda v. Arizona, 384 U.S. 436, 467-73 (1966), and coerced confessions. *See* Achcraft v. Tennessee, 332 U.S. 143 (1944) (confession obtained after 36 hours of continuous interrogation); Chambers v. Florida, 309 U.S. 227 (1940) (confessions obtained after five days of prolonged interrogations); Brown v. Mississippi, 297 U.S. 278 (1936) (confessions obtained through use of extreme physical force).

[180] Post-*Jackson* experience confirms this: federal courts only reluctantly overturn state court sufficiency findings. *See, e.g.*, Moore v. Duckworth, 443 U.S. 713, 714 (1979) (approving district court refusal to issue writ); Jacobs v. Redman, 616 F.2d 1251 (3d Cir. 1980) (conditionally approving district court refusal to issue writ); Davis v. Campbell, 608 F.2d 317 (8th Cir. 1979) (per curiam); United States v. Bailey, 607 F.2d 237 (9th Cir. 1979).

[181] "[T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." 443 U.S. at 319 (emphasis in original).

[182] *See, e.g.*, Teller v. Anchorage Asphalt Paving Co., Inc., 545 P.2d 177, 180 (Alaska 1976); Williams v. Dade County, 237 So. 2d 776, 777 (Fla. Dist. Ct. App. 1970); Dan Hayes

that a prisoner's conviction was based upon hearsay or perjured testimony should also be limited to state review.[183] These allegations involve the reliability of the evidence, which affects the accurate determination of guilt or innocence—the heart of the state interest.[184]

This suggested federalism approach is superior to both plenary review and a guilt-relatedness standard. It will not excessively impinge upon state tribunals. Indeed, the approach guarantees the protection of state interests because they are components of the test itself. And, finally, it meshes well with the proper role of habeas corpus in the federal-state relationship.

Habeas corpus review would often remain available to redress the "absurdly unjust"[185] cases. First, the federal court may review the trial proceedings to insure that the state court applies the reasonable doubt standard.[186] As Justice Stevens points out in his concurring opinion in *Jackson*, the required application is more than a "trial ritual."[187] Second, the federal court may examine the process for state court review of the right. To survive, the state review procedure must be meaningful, considered, and thorough.[188]

Boiler & Repair Co. v. Illinois Masonic Medical Center, 30 Ill. App. 3d 616, 620, 332 N.E. 2d 463, 466 (1975).

[183] Several commentators favor the *Jackson* and *Stone* treatment of these rights. *See* Cover & Aleinikoff, *supra* note 18, at 1091-95; Note, *The Search for a New Equilibrium in Habeas Corpus Review: Resolution of Conflicting Values,* 32 U. MIAMI L. REV. 637, 660-64 (1978).

[184] Other rights are more problematic, and this Note will not attempt to treat them all. The strongly competing interests involved in the right to a jury trial, for example, have already divided the Supreme Court, which has balanced these interests by requiring a minimum on the number of jurors and degree of unanimity. *See* Apodaca v. Oregon, 406 U.S. 404, 410-12 (1972) (sanctioning nonunanimous jury); Williams v. Florida, 399 U.S. 78 (1970) (sanctioning six man jury). *But cf.* Ballew v. Georgia, 435 U.S. 223 (1978) (prohibiting five man jury). On the other hand, federal courts should hear claims that state processes allegedly transgress federal but not constitutional law. State courts are reluctant to undertake this often difficult and technical review. *See In re* Carmen, 165 F. Supp. 942 (N.D. Cal. 1958) (violation of Ten Major Crimes Act, 18 U.S.C. § 1151-54 (1976)), *aff'd per curiam,* 270 F.2d 809 (9th Cir. 1959), *cert. denied,* 361 U.S. 934 (1960); *but see* Fasano v. Hall, 615 F.2d 555, 557 (lst Cir. 1980) (federal court would not review violation of Interstate Agreement on Detainers Act, 18 U.S.C. App. § 2 (1976), because it was not a "fundamental defect which inherently result[ed] in a complete miscarriage of justice.") (*quoting* Davis v. United States, 417 U.S. 333, 346 (1974)).

[185] Jackson v. Virginia, 443 U.S. at 320 n.14.

[186] *See* Cool v. United States, 409 U.S. 100 (1972) (per curium) (reasonable doubt standard improperly applied).

[187] Jackson v. Virginia, 443 U.S. 307, 333 n.7 (1979).

[188] The court must be careful, of course, to avoid applying the *Jackson* standard itself when reviewing its use below.

The Court in *Jackson,* then, should not have reviewed the evidence directly. Instead, it should have carefully examined the Virginia proceedings. If it had found that the trial court had applied the reasonable doubt standard and that the state provided adequate review under a correct standard of the sufficiency question, the Court should have affirmed the state court under *Thompson v. City of Louisville.*[189]

CONCLUSION

In recent years, the Supreme Court's delineation of rights that are cognizable on habeas corpus review has been confused and unprincipled. Two concerns—adequacy of state review and protection of rights that affect the guilt or innocence determination—dominate the Court's approach. Although its attempt to limit the scope of habeas corpus is laudable, and its emphasis on adequate state review necessary, the Court's distinction between rights based on their relation to guilt does little for the integrity of the habeas remedy. An approach based on federalism concerns would limit, clarify, and strengthen the doctrine of habeas corpus.

Anne Willis Reed

If an unjust case were to survive all this review—a "conviction of passion" with no federal violations of any kind—it would seems that executive clemency would be the proper remedy. *See* Gregg v. Georgia, 428 U.S. 153, 168 (1976); Fay v. Noia, 372 U.S. 391, 476 (1963) (dissenting opinion, Harlan, J.) ("I recognize that Noia's predicament may well he thought one that strongly calls for correction. But the proper course to that end lies with the New York Governor's powers of executive clemency, not with the federal courts.")

[189] 362 U.S. 199 (1960).