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# JUDICIAL PROPOSALS TO LIMIT THE JURISDICTIONAL SCOPE OF FEDERAL POST-CONVICTION HABEAS CORPUS CONSIDERATION OF THE CLAIMS OF STATE PRISONERS

R. NILS OLSEN, JR.\*

## INTRODUCTION

*Brown v. Allen*,<sup>1</sup> decided in 1953, established that all properly preserved and exhausted federal constitutional claims of state prisoners are reviewable on the merits on federal habeas corpus. That broad construction of habeas review spawned pervasive efforts to restrict the scope of the writ. Both members of Congress and Supreme Court justices have advocated either threshold procedural barriers to curtail review<sup>2</sup> or broad rules limiting consideration to specified kinds of constitutional claims.

Justices seeking retrenchment confront a particular problem of authority, because the terms<sup>3</sup> and legislative history<sup>4</sup> of the statute that the Court construed in *Brown v. Allen* are consistent with an expansive construction. Moreover, the Court has faithfully followed and implemented *Brown's* interpretation for three decades.<sup>5</sup> Despite numerous proposals to do so, Congress has not cut back on

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I would like to thank my colleagues Lee Albert, Philip Halpern, and Al Katz for their comments and criticism of an earlier draft of this Article.

1. 344 U.S. 443 (1953).

2. See, e.g., *Wainwright v. Sykes*, 433 U.S. 72 (1977); *Rose v. Lundy*, 102 S. Ct. 1198 (1982).

3. The federal courts are authorized to grant relief to a prisoner who can establish that "[h]e is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2241(c)(3)(1966). The statute is silent as to the effect of a final judgment of conviction on that jurisdiction.

4. Compare Mayers, *The Habeas Corpus Act of 1867: The Supreme Court as Legal Historian*, 33 U. CHI. L. REV. 31 (1965); Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 474-77 (1963) (the Act was not intended to give federal courts jurisdiction to make a comprehensive review of all federal questions decided by the state trial court) with Tushnet, *Judicial Revision of the Habeas Corpus Statutes: A Note on Schneckloth v. Bustamonte*, 1975 WIS. L. REV. 484 (1976) (the Act was intended to expand the scope of the writ to its constitutional limit).

5. See *infra* note 176 and accompanying text.

*Brown v. Allen*.<sup>6</sup> Instead, post-*Brown* amendments of the statute simply accept the broad contours of habeas delineated in that decision.<sup>7</sup> Hence, modern judicial proposals to contract habeas pose serious issues of judicial authority and permissible lawmaking.

This Article examines the judicial proposals to restrict federal habeas. Initially, those proposals are placed in context through a reconsideration of the spirited attacks and defenses engendered by *Brown v. Allen*. This conflict has been primarily predicated upon assertion, without attention to empirical verification. Hence, Section I of this Article assesses the arguments against some characteristics of actual practice. Section II then examines the major judicial opinions advocating modification of the scope of habeas review and elaborates on issues of judicial authority and problems of implementation as well. The proposals considered include limiting habeas review: 1) to claimants who can establish a possibility of innocence; 2) to claims which relate to reliability of the fact-finding process; 3) to claims for which the state has not afforded an adequate process for resolution; and 4) to claims other than those founded on "quasi-constitutional prophylactic rules." Assessment of these diverse proposals produces a common conclusion: the proposed limitations are neither legitimate nor feasible. Accordingly, the question of the appropriate scope of federal habeas review should be left to Congress, and that body should know a great deal more than we now do about the costs and benefits of contemporary practice before undertaking legislative reform.

## I. BROWN V. ALLEN IN CONTEXT

The relitigation model propounded in *Brown v. Allen* has elicited an unusually vigorous and influential collection of scholarly criticism.<sup>8</sup> In attacking *Brown*, commentators argue that it was a sharp departure from prior practice and understandings of the writ. They also rely on certain assumptions about the costs engendered by present practice.

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6. See *infra* note 179 and accompanying text.

7. See *infra* notes 106-07 and accompanying text.

8. The most influential scholarly attacks on *Brown* include: H. HART & H. WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM*, 1238-39 (1953); Bator, *supra* note 4; Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142 (1970); Mayers, *supra* note 4; Mishkin, *The Supreme Court, 1964 Term Foreword: The High Court and the Due Process of Time and Law*, 79 Harv. L. Rev. 56 (1965).

### A. *Historical Criticism of Brown*

The primary source of the historical criticism is the Supreme Court's assertion in *Fay v. Noia*, a 1962 decision reaffirming and rationalizing *Brown*, that unbroken practice dating back to early England acknowledges habeas as an appropriate vehicle to litigate claims of unjust restraint, including relitigation of claims adequately considered in the criminal trial and on direct appeal.<sup>9</sup> The historic case, either for or against *Brown*, is more equivocal than the Court, or its subsequent critics,<sup>10</sup> would have it, however. Under unbroken English practice, a final judicial order of commitment flatly barred habeas review unless the return revealed a lack of subject matter or personal jurisdiction on its face.<sup>11</sup> Early American courts adopted this broad barrier to reconsideration of claims in habeas.<sup>12</sup> Over time, however, they expanded the concept of jurisdictional defect to include certain fundamental legal issues, such as the constitutionality *vel non* of the criminal charge and certain fifth amendment double jeopardy defenses.<sup>13</sup> Hence, these claims could be reconsidered on habeas, notwithstanding a final judgment of conviction.

It was against this background that Congress, in 1867, for the first time succinctly defined the federal writ to encompass claims of custody "in violation of the Constitution and laws of the United States," and also extended it to state prisoners.<sup>14</sup> The intended

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9. 372 U.S. 391, 399-406, 422 (1963).

10. See, e.g., Bator, *supra* note 4; Oaks, *Legal History in the High Court—Habeas Corpus*, 64 MICH. L. REV. 451 (1966). While Professor Bator's meticulous historical analysis was published immediately prior to the Court's decision in *Fay*, it has been the fountainhead for subsequent criticism of that decision's historical conclusions. See *infra* note 96.

11. See, e.g., Habeas Corpus Act, 1679, 31 Car. 2, § 14; Oaks, *supra* note 10, at 459-68.

12. *Ex parte Watkins*, 28 U.S. (3 Pet.) 193, 202-03 (1830).

13. *Ex parte Siebold*, 100 U.S. 371 (1879); *Ex parte Wilson*, 114 U.S. 417 (1885); *In re Snow*, 120 U.S. 274 (1887); *Ex parte Lange*, 85 U.S. (18 Wall.) 163 (1873). These developments have been deprecated as a pragmatic response to the absence of appellate jurisdiction for the Court over federal criminal convictions. See Bator, *supra* note 4, at 473-74. Unquestionably, the need for uniformity played a role in the extension of post-conviction habeas consideration to the constitutionality of the underlying charge. However, the lack of appellate jurisdiction also cut strongly against any post-conviction practice for the Court. See, e.g., *Ex parte Watkins*, 28 U.S. (3 Pet.) 193, 203 (1830) (Marshall, J.); *Ex parte Kearney*, 20 U.S. (7 Wheat.) 38, 42 (1822) (Story, J.). It is noteworthy that despite both the substantial historical and practical pressures to bar any post-conviction practice, the Court still employed the writ to consider claims apparently deemed to require correction.

14. Act of Feb. 5, 1867, ch. 28, § 1 [3], 14 Stat. 385. Earlier statutory authorization was silent as to the writ's intended scope. See, e.g., Act of Sept. 24, 1789, ch. 20, § 14, 1 stat. 81.

scope of the writ was not further defined and pertinent legislative history suggests various positions.<sup>15</sup> The Supreme Court interpreted the 1867 Act as adopting the unclear but flexible jurisdictional exception, and thus provided a forum for collateral review of constitutional claims of fundamental error.<sup>16</sup>

This history, coupling a general barrier to relitigation in habeas with a jurisdictional exception of uncertain scope, can be seen as both supporting and undermining *Brown*. But it does not permit a categorical conclusion. What Congress intended in the 1867 Act is equally indeterminate, particularly in light of the limited and narrow constitutional protections afforded criminal defendants in the 19th century.<sup>17</sup> Since the rights recognized were indeed fundamental, post-conviction habeas review of such claims can be understood as exception for core violations.<sup>18</sup>

Although the history is impenetrably ambiguous, it does allow us to determine whether modern proposals are or are not supported in the older conventions of habeas. Hence we have a benchmark for measuring whether the proposed judicial modifications of habeas review have as much historical credibility as the interpretation they seek to displace.

15. See *supra* note 4.

16. See, e.g., *Minnesota v. Brundage*, 180 U.S. 499 (1901); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886); *Ex parte Royall*, 117 U.S. 241 (1889). Justices Frankfurter, Rutledge, and Murphy all understood post-conviction habeas review to have long been available to correct constitutional error deemed fundamental prior to *Brown*. See *Sunal v. Large*, 332 U.S. 174, 184-87 (Frankfurter, J., dissenting); *id.* at 187-93 (Rutledge and Murphy, J.J., dissenting).

17. In *Frank v. Mangum*, 237 U.S. 309 (1915), the Court stated:

[A] criminal prosecution in the courts of a State, based upon a law not in itself repugnant to the Federal Constitution, and conducted according to the settled course of judicial proceedings as established by the law of the State, so long as it includes notice, and a hearing, or an opportunity to be heard, before a court of competent jurisdiction, according to established modes of procedure, is "due process" in the constitutional sense.

*Id.* at 326. See also *Palko v. Connecticut*, 302 U.S. 319, 325 (1937) (fourteenth amendment applicable against states only when state criminal procedures fail to provide the very essence of a scheme of ordered liberty) (overruled in *Benton v. Maryland*, 395 U.S. 784 (1969)).

18. Compare, e.g., *Johnson v. Zerbst*, 304 U.S. 458, 466 (1937); *Moore v. Dempsey*, 261 U.S. 86, 91 (1923); *Frank v. Mangum*, 237 U.S. 309, 327, 331, 334 (1915); *In re Nielsen*, 131 U.S. 176, 183-84 (1889) (due process violations are cognizable under the flexible "jurisdiction" standard) with, e.g., *Ex parte Hawk*, 321 U.S. 114, 118 (1944); *Mooney v. Holohan*, 294 U.S. 103 (1935); *In re Jugiro*, 140 U.S. 291, 296-97 (1891); *In re Wood*, 140 U.S. 278, 285-87 (1891) (federal courts will not act on a habeas corpus petition unless the state trial court is not competent to decide the due process claims or state remedies are inadequate). See also cases cited *infra* note 174.

## B. Policy Attacks on *Brown*

*Brown* is also criticized because of three purported costs of federal relitigation of the constitutional claims of state prisoners. First, it is charged that broad habeas review imposes an unacceptable burden of cases on the federal judiciary.<sup>19</sup> Precious and limited judicial resources should be allocated to other cases more deserving of federal consideration. Second, it is argued that systemic reconsideration by lower federal courts of the constitutional claims of state prisoners subverts the state judicial process and the integrity of its decision-makers.<sup>20</sup> Unnecessary friction between the state and federal judicial systems is the product of such review. Finally, it is asserted that extensive habeas review undermines the finality of criminal convictions and thereby weakens the educative and deterrent effect of the criminal sanction.<sup>21</sup> Public respect for the criminal justice system is compromised because adjudications of guilt are perceived as being perpetually subject to judicial revision.<sup>22</sup>

This policy attack on *Brown* has been taken seriously by both

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19. See, e.g., Bator, *supra* note 4, at 451; Friendly, *supra* note 8, at 143-44, 147-48. Justice Jackson, concurring in the denial of relief in *Brown*, observed that "floods" of frivolous petitions, numbering 541 in 1952, inundated the docket of the lower federal courts. 344 U.S. at 536-37. The number of petitions had increased dramatically to 7,786 by 1981. See 1981 DIRECTOR AD. OFF. U.S. CTS. ANN. REP. 367. Accordingly, concern over the burden has intensified. Justice Powell has stated recently: "To the extent the federal courts are required to re-examine claims on collateral attack, they deprive primary litigants of their prompt availability and mature reflection. After all, the resources of our system are finite: their overextension jeopardizes the care and quality essential to fair adjudication." *Schneekloth v. Bustamonte*, 412 U.S. 218, 260-61 (1973) (Powell, J., concurring) (footnotes omitted).

20. Professor Bator forcefully states: "I could imagine nothing more subversive of a judge's sense of responsibility, of that 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 of the shots will be called by someone else." Bator, *supra* note 4, at 451. This theme has been forcefully posited by state jurists and prosecutors urging modification of *Brown*. See also Desmond, *Federal Habeas Corpus Review of State Court Convictions*, 50 GEO. L.J. 755 (1962); see *Schneekloth v. Bustamonte*, 412 U.S. at 263-64 (Powell, J., concurring) (quoting remarks of Massachusetts Supreme Court Justice Paul C. Reardon); Smith, *Halt the Abuse of Habeas Corpus Unlimited*, N.Y. Times, Apr. 25, 1982, at 20E, cols. 3-5 (Jim Smith is Attorney General of Florida). Federal judges, uncomfortable with the power to review final state court judgments of conviction, have also vigorously concurred in calls for modification. See, e.g., Aldisert, *State Courts and Federalism in the 1980s: Comment*, 22 WM. & MARY L. REV. 821 (1981); Friendly, *supra*, note 8, at 164-69; see also *United States ex rel. Carminito v. Murphy*, 222 F.2d 698, 706 (2d Cir. 1955) (Clark, Cir. J., concurring).

21. Bator, *supra* note 4, at 452.

22. Friendly, *supra* note 8, at 149.

members of Congress and the Supreme Court.<sup>23</sup> But, the assumptions underlying these objections have not been subjected to empirical scrutiny<sup>24</sup> and certain aspects of current habeas practice cast doubt on the significance of the charges.

To put the matter in proper perspective, the minuscule percentage of convicted state defendants who even seek habeas relief diminishes the force of all three objections. Both functional and practical considerations bar access to the remedy for most such individuals.<sup>25</sup> For instance, in 1979, only 7,113 petitions were filed in federal district court<sup>26</sup> out of the myriad of criminal defendants convicted in the state system.<sup>27</sup> Further, no more than about four

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23. See *Schneckloth v. Bustamonte*, 412 U.S. at 250 (Powell, J., concurring) (the Chief Justice and Justice Rehnquist joined in Justice Powell's concurring opinion); *Rose v. Lundy*, 102 S. Ct. at 1213-20 (Stevens, J., dissenting). See also *infra* note 179 and accompanying text.

24. But see, e.g., Shapiro, *Federal Habeas Corpus: A Study in Massachusetts*, 87 HARV. L. REV. 321 (1973) (a statistical study of federal habeas actions brought by state prisoners in Massachusetts for the fiscal years 1970-72); ROBINSON, AN EMPIRICAL STUDY OF FEDERAL HABEAS CORPUS REVIEW OF STATE COURT CONVICTIONS (1979) (a statistical study of federal habeas actions in six selected districts and one court of appeal for the fiscal years 1975-77). Cf. Avichai, *Collateral Attacks on Convictions (1): The Probability and Intensity of Filing*, 1977 A.B.F. RES. J. 319 (a study encompassing state post-conviction proceedings in Illinois, California, Texas, and Colorado).

25. A large majority of criminal convictions result from guilty pleas. The limited state appellate rights prevailing for such defendants sharply circumscribe the availability of federal habeas review. Compare *Lefkowitz v. Newsome*, 420 U.S. 283 (1975) with *McMann v. Richardson*, 397 U.S. 759 (1970). Moreover, many convicted defendants fail to exercise their rights to direct appeal. See Y. KAMISAR, W. LAFAVE & J. ISRAEL, *MODERN CRIMINAL PROCEDURE* 24-25 (5th ed. 1980). This failure effectively bars most from obtaining collateral relief. Compare *Fay v. Noia*, 372 U.S. 396 (1973) with *Engle v. Isaac*, 102 S. Ct. 1558 (1982). Finally, the "in custody" prerequisite for federal habeas consideration, 28 U.S.C. § 2241(c)(3) (1976), has the effect of preventing the vast majority of offenders convicted of minor felonies, misdemeanors and offenses, who are sentenced to comparatively short terms of custody or to non-custodial penalties, from seeking federal habeas review.

26. ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, UNITED STATES DISTRICT COURTS, CIVIL AND TRIALS, STATISTICAL TABLES, TWELVE MONTH PERIODS ENDING JUNE 30, 1970-1979, at 35 (1980).

27. In 1981, in New York State alone, for example, there were 34,113 criminal convictions in the state's Supreme Courts and 197,493 misdemeanors and other minor convictions, excluding traffic offenses, in the lower municipal courts. See Letter from Ida Zamist, Sr., Management Analyst, State of New York, Unified Court System, Office of Management Support to R. Nils Olsen, Jr., (Sept. 29, 1982). Moreover, the annual number of habeas petitions is small even in comparison to the inmate population incarcerated in state correctional facilities (usually limited to those sentenced to more than one year's imprisonment). Thus, in September 1982, 27,772 inmates were in the custody of the New York Department of Corrections alone. See *Buffalo Evening News*, Sept. 30, 1982, at A2, col. 5.

percent of habeas petitioners are successful in obtaining relief.<sup>28</sup> The autonomy and independence of the state criminal justice system from the adverse effects of federal collateral reconsideration thus seems to be substantially intact.<sup>29</sup>

The demoralizing effect of habeas review by federal trial courts on state judges may also be overstated.<sup>30</sup> Federal court resolution of federal questions presented in state cases has always been constitutionally permissible.<sup>31</sup> Indeed, Supreme Court review was mandatory from 1874 until 1916 when docket pressures resulted in the imposition of discretionary *certiorari* jurisdiction.<sup>32</sup> Federal habeas as defined by *Brown* may best be viewed as essentially an

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28. Friendly, *supra* note 8, at 148 nn.24 & 25. The Administrative Office of the United States Courts apparently has published the number of successful petitioners only for the period from 1946 through 1957. The percentage of successful petitioners during these twelve years was 1.4%. *Hearings on H.R. 6742, H.R.4958, H.R.3216, H.R.2269 Before Subcomm. No. 3 of the House Comm. on the Judiciary*, 86th Cong., 1st Sess. 49 (1959) (statement submitted by the Administrative Office of the United States Courts on Habeas Corpus Cases in Federal Courts by State Prisoners). Judges Wright and Sofaer cite more recent statistics indicating success rates of 2.5% in 1963, 3.8% in 1964, and 3.6% in 1965. See Wright & Sofaer, *Federal Habeas Corpus For State Prisoners: The Allocation of Fact-Finding Responsibility*, 75 YALE L.J. 895, 899 n.16 (1966). Professor Robinson's empirical study of federal habeas practice in six representative districts between July 1, 1975 and June 30, 1977 confirms the continuity of this low success ratio, with only 3.2% of petitions resulting in any form of relief. Robinson, *supra* note 24, at 4(c). While these figures obviously are dated, the consistently low success rate over time strongly suggests that a significant majority of petitions continue to be rejected.

29. One special and limited area in which federal post-conviction habeas review does have more than a symbolic effect on the operations of the state criminal justice systems is in capital cases. The remedy, in conjunction with state collateral procedures, can be used to delay imposition of the sanction for a significant period of time. See *Estelle v. Jurek*, 450 U.S. 1001, 1014 (1981) (Rehnquist, J., dissenting); *Coleman v. Balkcom*, 451 U.S. 949 (1981) (Stevens, J., concurring); *id.* at 956 (1981) (Rehnquist, J., dissenting). A reasonable statute of limitations, coupled with enforcement of stricter rules of finality concerning the effects of a prior denial of collateral relief, however, would substantially mitigate the part federal habeas plays in this special problem. See Weick, *Apportionment of the Judicial Resources in Criminal Cases: Should Habeas Corpus Be Eliminated?*, 21 DE PAUL L. REV. 740, 748-56 (1972). See also *infra* notes 40 & 46.

30. The very small percentage of convicted state defendants who ever use the writ certainly suggests that the possibility of ultimate habeas reversal does not weigh heavily on the mind of the state judiciary. See *supra* note 27 and accompanying text. Similarly, the fact that no more than 400 habeas petitions are likely to be successful in any given year posits a different effect. Since the large majority of petitions result in an affirmance of the state court's resolution of the claims by the federal court, ultimate habeas review should have a positive effect on the self-confidence and integrity of the state judiciary.

31. U.S. CONST. art. III, § 2.

32. See Rev. Stat. 1874 § 709, 18 Stat. 133 (1878); Act of Sept. 6, 1916, ch. 448, § 2, 39 Stat. 726-27 (present version at 28 U.S.C. § 1257 (1976)).



appellate mechanism for review of constitutional claims: for practical reasons, the district court sits not as a trial court, but as the Supreme Court's designee to fulfill the function of individual corrective review.<sup>33</sup>

Moreover, district court reversal of the considered and thoughtful decisions of the states' highest courts<sup>34</sup> rarely occurs in actual practice. A near majority of states, including those population centers from which most habeas petitions originate, restrict review of criminal convictions to intermediate appellate courts and these often affirm without stated reasons.<sup>35</sup> An insignificant number of cases reach the state's highest court on discretionary review.<sup>36</sup> Thus, most federal habeas claims have not been considered by the state's supreme court.

Claims of the virtual destruction of finality are also exaggerated. Even accepting the importance of finality to a viable criminal sanction,<sup>37</sup> federal post-conviction review does not significantly delay imposition of final judgment, since most petitions are disposed of expeditiously. For example, in 1979, of 6,633 habeas cases terminated, 5,433 were resolved before pretrial, with a median time interval of three months from filing to disposition.<sup>38</sup> Adverse finality effects are further weakened by the fact that many petitioners

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33. See *infra* notes 51-58 and accompanying text. See also *The Federalist No. 82*, at 379 (A. Hamilton) (1842 ed.).

34. See Bator, *supra* note 4, at 451. See also *supra* note 20. Cf. *Brown*, 344 U.S. at 510 (Frankfurter, J., concurring) (the process of federal trial court review of state supreme court decisions is merely one aspect of the Supremacy Clause of the Constitution, whereby federal law is superior to state law).

35. A survey of the direct appellate rights of convicted defendants, excluding those sentenced to death, in the 50 states reveals that 23 states provide only discretionary review by the state's highest court. Industrial states providing discretionary review include: Florida, Illinois, Maryland, Massachusetts, Michigan, Missouri, New Jersey, New York, Ohio, Pennsylvania, Virginia, and Wisconsin. See *infra* note 54.

36. In 1981, for example, nearly 200,000 state criminal convictions were rendered in New York State. See *supra* note 27. The New York Court of Appeals, however, considered only 177 criminal appeals that year. Of 1,795 applications for discretionary leave to appeal by convicted criminal defendants, only 92 were granted. 1981 N.Y. CT. APP. ANN. REP. 11 app., 18 app.

37. As has been persuasively noted, "we currently know too little about and do too little for prisoner education and deterrence to warrant firm judgments that liberal habeas corpus impairs these objectives." Schwartz, *Retroactivity, Reliability and Due Process: A Reply to Professor Mishkin*, 33 U. CHI. L. REV. 719, 744 (1966).

38. ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, UNITED STATES DISTRICT COURTS, CIVIL AND TRIALS, STATISTICAL TABLES, TWELVE MONTH PERIODS ENDING JUNE 30, 1970-1979, at 141 (1980).

elect collateral review without first seeking discretionary appellate consideration in the Supreme Court.<sup>39</sup>

Moreover, habeas actions usually terminate in federal district court.<sup>40</sup> Unsuccessful petitioners may not appeal adverse judgments to the courts of appeals of right, but must first obtain a discretionary certificate of probable cause.<sup>41</sup> While standards for issuing a certificate vary among circuits,<sup>42</sup> few are granted.<sup>43</sup> Therefore, since the district courts act expeditiously, interference with finality should not be substantial.

The critics also point to petitioner-induced delay without verification.<sup>44</sup> Intuition suggests that few prisoners, incarcerated in crowded and, at times, dangerous state penitentiaries, intentionally delay custody challenges in hope that retrial would become impossible. Moreover, the doctrine of laches is applicable upon a showing

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39. Since *Fay v. Noia*, habeas petitioners need not seek *certiorari* prior to obtaining collateral review. 372 U.S. at 435-36.

40. Many of the dismissals are predicated on failure to exhaust state judicial remedies, see *Rose v. Lundy*, 102 S. Ct. at 1198, or inartful pleading, see *Aubut v. Main*, 431 F.2d 688 (1st Cir. 1970). Refilings are, of course, possible. Little recent empirical evidence has been developed concerning the number of multiple filings that result. Compare *Speck, Statistics on Federal Habeas Corpus*, 10 OHIO ST. L.J. 337 (1949) (suggesting that repeat petitions of state prisoners contributed substantially to the number of writs in several federal districts for the years 1940-49) with *Avichai, supra* note 24 (a study encompassing state post-conviction practice in Illinois, California, Texas, and Colorado indicating that most filings are made by a small percentage of prisoners, each of whom files several petitions). If these refilings impose an unacceptable delay in the imposition of finality, a reasonable statute of limitations would mitigate the harm. Similarly, if abuse of the writ through refilings after a prior dismissal on the merits is a problem, such abuse could be limited by application of more stringent *res judicata* doctrine than is presently imposed by 28 U.S.C. § 2244 (1976) and modification of the generous rule of *Sanders v. United States*, 373 U.S. 1 (1963). See *Weick, supra* note 29, at 748-56.

41. 28 U.S.C. § 2253 (1976).

42. Of the 837 state prisoner habeas petitions reviewed by the courts of appeal in fiscal 1977, for example, more than half were in the Fourth, Fifth, and Sixth Circuits. There were only 72 in the First Circuit, 59 in the Seventh Circuit and 52 in the Eighth Circuit. ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, UNITED STATES COURT OF APPEALS: WORKLOAD STATISTICS FOR THE DECADE OF THE 1970S, at 76 (1980).

43. Of 15,718, 15,649, and 16,322 appeals to the courts of appeals for fiscal 1977, 1978, and 1979 respectively, state habeas petitions numbered 837, 676, and 859. *Id.* at 76, 78, 80. No statistics are available as to how many of these appeals were resolved without argument and/or opinion.

44. See *Desmond, supra* note 20; *Friendly, supra* note 8, at 147; *Smith, supra* note 20. But see *Robinson, supra* note 24, at 4 (study of six districts over a two year period showed an average delay of only one and one-half years from judgment of conviction to the filing of a federal habeas corpus petition).

of prejudice from delay.<sup>45</sup> Finally, if stale claims are really prevalent, a reasonable statute of limitations would eliminate the problem.<sup>46</sup>

The judicial burden argument also is problematic.<sup>47</sup> As a general matter, assertions premised on burdening courts are inconclusive. All categories of cases impose burdens and the argument is thus indiscriminate. Examination of actual practice again places this asserted cost in context, however.<sup>48</sup> Since 1970, the number of state prisoner petitions filed in the district courts has remained remarkably constant, varying between a low of 6,862 in fiscal 1977 and a high of 8,693 in fiscal 1970.<sup>49</sup> As indicated above, the vast majority of these cases were resolved within months of filing with-

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45. See Rule 9(a), Rules Governing 28 U.S.C. § 2254 Petitions (1982). See also *Honeycutt v. Ward*, 612 F.2d 36, 41-42 (2d Cir. 1979); *Davis v. Adult Parole Auth.*, 610 F.2d 410, 414 (6th Cir. 1979); *Sutton v. Lash*, 576 F.2d 738, 744 (7th Cir. 1978).

46. A three year statute of limitations has recently been proposed in Congress. See, e.g., S. 653, 97th Cong., 1st Sess. § 2 (1981); H.R. 134, 97th Cong., 1st Sess. § 2 (1981); H.R. 3416, 97th Cong., 1st Sess. § 2 (1981). Any limitation which is imposed should take into consideration the problems created by the prevailing *pro se* nature of present practice, the burden on filing resulting from the incarceration of the petitioner, and the appropriate role of retroactivity and newly-discovered facts in a post-conviction practice. Compare S. 2903, 97th Cong., 2d Sess. § 302(e) (1982) (proposing a one year statute of limitations for federal habeas petitions).

47. Moreover, judicial perceptions concerning overburden are not persuasive predicates for a judicially-imposed limitation of federal jurisdiction. The Constitution envisions the scope of federal judicial cognizance determined by congressional resolution of the question of effective utilization of limited resources. U.S. CONST. art. II, § 2. See *Green, Stone v. Powell: The Hermeneutics of the Burger Court*, 10 CREIGHTON L. REV. 655, 673-77 (1977).

48. It has been argued that, no matter how equivocal the actual burden is, the fact that so few habeas petitions result in relief for the petitioner requires a shifting of resources to more meritorious claims. See *Friendly, supra* note 8, at 148. Denigrating the merits of federal habeas practice based on lack of remedial success in comparison to other types of claims is difficult, however, since the habeas petitioner nearly always proceeds *pro se*, is often unschooled, not only in the intricacies of the law, but also in basic educational skills, and is suffering from the extraordinary limitations imposed by incarceration. See *Pollak, Proposals to Curtail Federal Habeas Corpus For State Prisoners: Collateral Attack on the Great Writ*, 66 YALE L.J. 50, 54 (1956).

49. For the period 1970-1980, total state prisoner habeas petitions filed in the district courts numbered: fiscal 1970, 8,963; fiscal 1971, 8,282; fiscal 1972, 7,888; fiscal 1973, 7,777; fiscal 1974, 7,618; fiscal 1975, 7,838; fiscal 1976, 7,814; fiscal 1977, 6,862; fiscal 1978, 7,019; fiscal 1979, 7,113; fiscal 1980, 7,786. ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, UNITED STATES DISTRICT COURTS, CIVIL AND TRIALS, STATISTICAL TABLES, TWELVE MONTH PERIODS ENDING JUNE 30, 1970-1979, at 22, 24, 26, 28, 30-35 (1980); 1981 DIRECTOR AD. OFF. U.S. CTS. ANN. REP. 360. Misperceptions concerning a continuing dramatic increase in the number of state prisoner habeas petitions during recent years may be the result of an indiscriminate combination of such petitions with unrelated and distinct civil rights actions challenging conditions of confinement. See generally *Preiser v. Rodriguez*, 411 U.S. 475 (1973).

out extensive proceedings. Thus, particularly in comparison to other categories of cases, the actual burden imposed by state prisoner petitions seems limited.<sup>50</sup>

### C. *Defenses of Brown*

The dubious force of the attacks on *Brown* does not by itself establish the continuing validity of that decision, however. The affirmative case remains to be made. Moreover, that case should be one which can be validated by the same characteristics of actual practice which undermine the criticism of relitigation.

The most persuasive justification for *Brown* is that it provides convicted defendants deprived of their liberty uniform access to a federal judicial forum in which their constitutional defenses will receive careful consideration.<sup>51</sup> The Supreme Court's *certiorari* jurisdiction cannot accomplish this function since that Court does not, and cannot, review convictions merely for error.<sup>52</sup>

The summary and opaque character of many state court dispositions of constitutional questions in criminal cases underscores

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50. Compare Friendly, *supra* note 8, at 144, 148-49 (the most serious evil in the proliferation of collateral attacks is the drain on legal resources; specifically judges, prosecutors, and lawyers could be better utilized trying cases than pursuing frivolous collateral attacks) with Comment, *Proposed Modification of Federal Habeas Corpus for State Prisoners—Reform or Revocation*, 61 GEO. L.J. 1221, 1246-47 (1973) (statistics concerning the time spent by federal judges on habeas petitions and the declining volume of habeas petitions during 1971 and 1972 indicate that the burden on the judicial system is less than popularly imagined). It is instructive to compare federal habeas practice with federal diversity jurisdiction. While their similarities may be overstated, both have been founded upon federal mistrust of state judicial resolution of discrete classes of claims over which they have clear power. See, e.g., *Bank of United States v. Deveaux*, 9 U.S. (5 Cranch) 61, 87 (1809). But see *infra* notes 53-58 and accompanying text. Post-conviction habeas has been attacked as redundant relitigation. See, e.g., Bator, *supra* note 4, at 451. Diversity jurisdiction, which results in the anomaly of federal resolution of purely state law questions, is equally open to challenge as unnecessary. In fiscal 1977, of the 6,884 federal habeas petitions disposed of in the district courts, 6,569 were resolved before pretrial, with only 3.1% reaching trial. During the same period, 17,171 diversity cases were disposed of, with only 5,646 being resolved before pretrial, and with a full 12% reaching trial. ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, UNITED STATES DISTRICT COURTS, CIVIL AND TRIALS, STATISTICAL TABLES, TWELVE MONTH PERIODS ENDING JUNE 30, 1970-1979, at 141 (1980).

51. See, e.g., Bator, *supra* note 4, at 507-21; Hart, *The Supreme Court 1958 Term, Foreword: The Time Chart of the Justices*, 73 HARV. L. REV. 84, 106-07 (1959); Reitz, *Federal Habeas Corpus*, 108 U. PA. L. REV. 461, 464 (1960).

52. See, e.g., SUP. CT. R. 17. Moreover, the continued expansions of federal criminal and civil jurisdiction, and the often incomprehensible *pro se certiorari* petitions of prisoners combine to severely limit the number of state criminal appeals which the Court can or will review during a term.

the case for careful habeas review. State trial courts need not provide findings of fact or legal conclusions when disposing of federal claims,<sup>53</sup> and they often do not elaborate their reasoning. Similarly, intermediate state appellate courts—the primary appellate forum in criminal cases—consider most appeals on submission and affirm in conclusory orders without opinion.<sup>54</sup>

Further, federal habeas review is not a redundant process premised on distrust of the motives or abilities of the state judiciary. The federal court, most often situated at the place of confinement,<sup>55</sup> and considering claims long after the commission of the offense, is insulated from the victim's tragedy and the community's outrage. This in conjunction with the habeas court's diminished involvement with the guilt-and-innocence determination and independence from the political process,<sup>56</sup> posits a different perspective with respect to elaboration of federal constitutional rights. Thus, availability of the federal forum can be viewed, not as a check on state court inadequacies, but as an attempt to provide, for those whose liberty is compromised by state conviction, the benefits of diversity resultant from our dual judicial system.<sup>57</sup>

53. The failure to make express findings and conclusions does not even entitle a habeas petitioner to a factfinding hearing. *See, e.g.,* LaVallee v. Delle Rose, 410 U.S. 690 (1973); Townsend v. Sain, 372 U.S. 293, 314-15 (1963). *See also* Wright & Sofaer, *supra* note 28, at 919-22.

54. For example, of the 1,258 criminal appeals reported in the 1981 New York Appellate Division Second Reports, Volumes 74-81, 847 were affirmed or modified in brief memoranda opinions, or without opinion. Judge Friendly is a sharp critic of present post-conviction practice. *See infra* text accompanying notes 73-93. He concedes, however, that "[t]he main difficulty [in assessing the need for federal reconsideration] is when one cannot be sure that the state courts, or at any rate the state appellate courts, have focused on the issue. Greater writing of opinions, however brief and informal, would alleviate the problem." Friendly, *supra* note 8, at 165 n.125.

55. Venue lies both in the district in which the petitioner is "in custody" and in the district within which he was originally convicted. 28 U.S.C. § 2241(d) (1976).

56. Too much may be made of the political involvement of the state judiciary. As pointed out by Justice Sandra Day O'Connor, then an Arizona Court of Appeals Judge, at least twenty states have merit selection for judges rather than popular elections. *See* O'Connor, *Trends in the Relationship Between the Federal and State Courts From the Perspective of a State Court Judge*, 22 WM. & MARY L. REV. 801, 812-13 (1981).

57. Professor Cover and T. Alexander Aleinikoff have referred to the "utopian" approach to adjudication which characterizes the lower federal habeas courts and the "pragmatic" methodology employed by the state courts which are at the firing line of guilt-innocence disposition. *See* Cover & Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 YALE L.J. 1035, 1050-52 (1979). *See also* Sofaer, *Federal Habeas Corpus for State Prisoners: The Isolation Principle*, 39 N.Y.U. L. REV. 78 (1964). *Cf.* Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977) (the assumption that state and federal trial courts are

*Brown* may thus be justified as providing a measured and careful federal review of the state courts' resolution of constitutional defenses. Such a system qualifies finality; but it also provides an assurance of fairness and care within the criminal judicial process. Appearance of the just imposition of punishment is as important to efficacious deterrence and rehabilitation as early finality. It is also a component of public confidence and respect for the criminal justice system itself.<sup>58</sup>

While these asserted benefits of habeas review provide a counterpoint to the costs asserted by *Brown's* critics, here too there has been virtually no attempt to ascertain whether the benefits are in fact being realized. The attributes of practice discussed above cast doubt on the benefit side of the ledger as well.

The infrequency with which habeas relief is granted suggests that the need for such post-conviction review has been seriously overstated.<sup>59</sup> Of course, if habeas is intended to provide the appearance of careful, detached review, the dearth of favorable results may not be significant. A deliberate affirmance after inquiry imparts credibility to the judicial process. But this appearance is undermined by the fact that well over eighty percent of the state prisoner petitions filed in federal court are promptly dismissed prior to pretrial proceedings.<sup>60</sup> While the claims presented by habeas petitioners may be receiving close and careful consideration, the facility and dispatch with which they are discarded certainly suggests the contrary. Indeed, the statistics indicate that current federal habeas practice suffers from many of the same deficiencies as the state process and compounds the appearance of imprisonment without searching judicial inquiry.<sup>61</sup>

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equally competent to enforce federal constitutional rights is incorrect due to the lower technical competence of state judges, the psychological predilections of federal judges, which lie in favor of plaintiffs asserting constitutional claims, and the isolation of federal judges from majoritarian pressures).

58. See also *Brown*, 344 U.S. at 511 (Frankfurter, J., concurring).

59. See *supra* note 28 and accompanying text. Curiously, the very lack of success by the vast majority of federal habeas petitioners has been urged as justification for the *Brown* relitigation model by its principle judicial defenders. See *Brown*, 344 U.S. at 510 (Frankfurter, J., concurring); *Fay v. Noia*, 372 U.S. at 440-41.

60. See generally ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, UNITED STATES DISTRICT COURTS, CIVIL AND TRIALS, STATISTICAL TABLES, TWELVE MONTH PERIODS ENDING JUNE 30, 1970-1979, at 197-205 (1980).

61. The substantial complexities of the doctrines of specific fact pleading, exhaustion of state judicial remedies, forfeiture, and custody which impede so many prisoners' attempts to

The *Brown* relitigation standard has also been defended as providing a remedial framework for a broad-based dialogue between the federal and state judicial systems on the scope of constitutional defenses for criminal defendants. There is a case for such a colloquy.<sup>62</sup> Practical considerations certainly prevent the Supreme Court from fulfilling this function. But summary dispositions, many without opinion, coupled with few federal orders to release or retry petitioners, reveals that no meaningful or extensive dialogue is occurring under present habeas practice. Indeed, the dialogue, if any, has been one mainly between the Supreme Court and lower federal courts, the primary product of which has been the creation of a thicket of technical procedural rules to bar habeas review without regard to substance.<sup>63</sup>

Recognition of incongruence between the arguments of both the critics and proponents of *Brown* and certain characteristics of actual practice is unsettling. The practice does not appear to serve or disserve the weighty competing policy objectives invoked by the commentators. Why then has habeas availability produced such impassioned debate? The critics and apologists alike have addressed *Brown* from an Olympian perspective, presenting their assessments not in the context of what it is, but of what it might be. Concern has been directed to the writ as a symbol rather than as an effective remedial device to accomplish a stated goal.

In light of the mistrust in some quarters concerning state judicial resistance to the expansion of constitutional defenses and to elimination of racial bias in the criminal process,<sup>64</sup> emphasis by proponents of the broad post-judgment writ of its potential for

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obtain federal collateral reconsideration of the merits of their claims contribute to this perception. See *Lundy*, 102 S. Ct. at 1218-20 (Stevens, J., dissenting). Professor Robinson's study indicated that at least 55% of the habeas filings in the six districts he examined were never considered on their merits prior to disposition. Robinson, *supra* note 24, at 13.

62. Cover & Aleinikoff, *supra* note 57.

63. The *Brown* standard has also been rationalized as providing deterrence against misapplication of federal constitutional defenses by state appellate courts. See *Desist v. United States*, 394 U.S. 244, 262-63 (1969) (Harlan, J., dissenting). The need for such deterrence certainly has not been demonstrated by the number of successful petitioners since *Brown*.

64. Cf. Amsterdam, *Criminal Prosecutions Affecting Federally Guaranteed Civil Rights: Federal Removal and Habeas Corpus Jurisdiction to Abort State Court Trial*, 113 U. PA. L. REV. 793, 794-99 (1965) (suggesting that racial prejudice has infected the state criminal process in the South); Bator, *supra* note 4, at 523 (acknowledging the existence of legitimate fears concerning receptivity of state courts to the expansions of federal constitutional criminal defenses and to a racially neutral criminal process).

correcting error is not surprising. Similarly, countervailing concern for fostering mutual respect between the state and federal judicial systems, and overriding solicitude for stemming the problem of violent crime, produce a preoccupation by *Brown's* critics with the competing potential of the writ to impede legitimate state efforts to enforce the criminal law. While such concerns might explain the intensity and dimensions of the debate over habeas, they do not provide the Supreme Court with meaningful direction for limiting federal post-conviction relief. Nonetheless, members of the Court have joined the critics of *Brown* in seeking, with passion, change in the scope of the writ.

## II. JUDICIAL PROPOSALS TO LIMIT THE SCOPE OF FEDERAL POST-CONVICTION HABEAS CORPUS PRACTICE

There are several judicial proposals to limit the scope of post-conviction federal habeas corpus; certain ones have attracted the support of at least four sitting Justices.<sup>65</sup> Hence, they warrant critical examination to assess their functional utility and propriety.

### A. *The Guilt or Innocence Based Limitations*

Two distinct proposals seek to limit federal habeas as a remedy for "unjust" deprivations of liberty. First, it has been urged that the purpose of collateral review is to ensure that no *innocent* man suffers an unconstitutional loss of liberty. Accordingly, possible or likely innocence of the petitioner becomes the critical factor for habeas review. Alternatively, it has been suggested that habeas review be restricted to "those errors that are so fundamental that they infect . . . the integrity of the process by which [the conviction] was obtained."<sup>66</sup> While judicial discussion frequently commingles these proposals,<sup>67</sup> they are markedly different and are con-

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65. See *supra* note 23. Additionally, the policy and value assumptions which have motivated the proposals for change, see *supra* text accompanying notes 19-23, have been relied upon by Justice O'Connor as justification for strict forfeiture standards. See *Engle v. Isaac*, 102 S. Ct. 1558, 1571 (1982).

66. *Rose v. Lundy*, 102 S. Ct. at 1216 (Stevens, J., dissenting).

67. Justice Black, for example, proposed both that the "element of probable or possible innocence" of the petitioner should be a determinative factor in post-conviction habeas review and that "the probability or possibility that constitutional commands related to the integrity of the fact-finding process have been violated" should control. See *Kaufman v. United States*, 394 U.S. 217, 234, 241 (1969) (Black, J., dissenting). Justice Powell similarly emphasized that "[h]abeas corpus *should* provide the added assurance for a free society that



sidered separately below.

1. *Limiting federal habeas corpus consideration to the post-conviction claims of the arguably factually-innocent petitioner.* The only judicial proposal to limit post-conviction habeas jurisdiction to the claims of the arguably innocent prisoner was advanced by Justice Black in his dissenting opinion in *Kaufman v. United States*.<sup>68</sup> *Kaufman*, which for all practical purposes has been overruled by *Stone v. Powell*,<sup>69</sup> held fourth amendment exclusionary claims cognizable in section 2255 post-judgment proceedings instituted by federal prisoners.<sup>70</sup> Justice Black's reasoning, however, applies to state prisoner petitions as well.<sup>71</sup>

Principally relying on the discretion implicit in the provision of the writ, Justice Black asserted that not every conviction based in part on a denial of a federal constitutional right should be subject to habeas attack. In exercising its discretion, the habeas court should give particular consideration to the possible or probable innocence of the petitioner.<sup>72</sup>

One might dismiss this proposal as reflecting the license of a lone dissent but for the serious elaboration of it by Judge Henry Friendly. In an influential paper, Judge Friendly proposed "a requirement that, with certain exceptions, an applicant for habeas corpus must make a colorable showing of innocence [which] would enable courts of first instance to screen out rather rapidly a greater multitude of applications not deserving of their attention and devote their time to those few where injustice may have been done.

. . ."<sup>73</sup>

no innocent man suffers an unconstitutional loss of liberty," while advocating limiting the writ of habeas corpus to constitutional claims "relating to innocence or guilt." *Schneekloth v. Bustamonte*, 412 U.S. at 256-57. See also *Cover & Aleinikoff*, *supra* note 57, at 1091.

68. 394 U.S. 217 (1969).

69. 428 U.S. 465, 481 n.16 (1976).

70. 394 U.S. at 221, 231.

71. The discussion was appropriate since an important factor in the majority's decision to permit collateral review of the fourth amendment claims of federal prisoners was the fact that such claims were assumed to be cognizable under 28 U.S.C. § 2254. 394 U.S. at 221-26.

72. 394 U.S. at 234. Justice Black's opinion is also laced with references to claims which relate to guilt or innocence. See *supra* note 67. Nevertheless, Justices Harlan and Stewart, who dissented separately in *Kaufman*, understood the Black proposal to turn on "a petitioner's assertion that he was in fact innocent, or on the substantiality of such an allegation." 394 U.S. at 242. They explicitly disassociated themselves from such an assumption. *Id.*

73. Friendly, *supra* note 8, at 150. The proposed exceptions encompassed the types of claims accepted on post-conviction review prior to *Brown*. *Id.* at 151-54.

As Judge Friendly concedes, the Court should not, consistent with appropriate notions of statutory construction, seek to impose a factual-innocence-based limitation on post-conviction federal habeas jurisdiction.<sup>74</sup> There is simply no precedential or other historical predicate for restricting habeas review to claims of the apparently innocent.

Justice Black's *Kaufman* opinion underscores this lack of support for the proposal. The only precedent relied upon is the Court's 1963 procedural forfeiture decision in *Fay v. Noia*.<sup>75</sup> While that opinion contains several broad references to the propriety of habeas relief for "[t]hose few . . . persons whom society has grievously wronged and for whom belated liberation is little enough compensation," the language relates to the particularly egregious factual setting of the case.<sup>76</sup> In light of the decision's expansive construction of the habeas statute, no intention to impose a factual-innocence limitation could have been manifested.

Justice Black also relied on the authority of courts to shape the habeas remedy in accordance with equitable principles.<sup>77</sup> This doctrine provided the foundation for promulgation of judge-made rules relating to exhaustion of state remedies and procedural forfeiture. Such rules are means to accommodate federalism and comity concerns inherent in federal collateral review of final state convictions. Thus, under the exhaustion requirement, which was later codified,<sup>78</sup> the federal habeas court will defer consideration of claims not presented to the state courts to allow state judges the initial opportunity to address them. Similarly, procedural forfeiture doctrine holds that an unexcused failure to raise a federal constitutional claim in the state courts bars subsequent federal consideration unless both good "cause" and actual "prejudice" can be demonstrated.<sup>79</sup>

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74. *Id.* at 143, 155.

75. 372 U.S. 391 (1963).

76. 372 U.S. at 440-41. The petitioner in *Fay* was held in custody for many years on the basis of a state procedural default, despite the fact that he had a functionally identical constitutional defense to the voluntariness claim which had led to the freedom of his two codefendants.

77. 394 U.S. at 232 (Black, J., dissenting).

78. Compare *Ex Parte Royall*, 117 U.S. 241 (1889) with 28 U.S.C. §§ 2254(b), (c) (1966). While the statutory provision is phrased in mandatory terms, the equitable nature of exhaustion continues. See *Rose v. Lundy*, 102 S. Ct. 1198 (1982).

79. *Engel v. Isaac*, 102 S. Ct. 1558 (1982); *Wainwright v. Sykes*, 433 U.S. 72 (1977). Considerable question has been raised concerning the constitutional power of the federal

There is an obvious difference between these discretionary comity restrictions designed to protect reasonable state court procedures and the blanket preclusion of collateral review to all petitioners who cannot preliminarily establish a colorable showing of their innocence. Hence, equitable principles cannot legitimate a drastic reorientation of the writ.<sup>80</sup>

Further, there is a dubious assumption underlying the individual innocence standard: that federal courts examining a cold and often extensive record of a trial in a preliminary manner can make reliable judgments about the possibility of innocence. As habeas commentators have pointed out, full habeas review on the merits does not ultimately produce more accurate or correct determinations of discrete facts material to particular constitutional claims.<sup>81</sup> This observation is indeed persuasive, particularly in respect to the myriad of elusive facts going to the ultimate question of guilt or innocence.<sup>82</sup> Given the uncertain ability of a reviewing court to resolve this question accurately, especially as a threshold determination, the propriety and fairness of using the possibility of factual innocence as the determining factor for federal consideration of a habeas petitioner's constitutional claims is doubtful.

Equally important, the possible-innocence standard provides federal reconsideration to the wrong class of petitioners. The possibly innocent defendant is likely to be fairly and carefully treated by the state courts which have no interest in factually mistaken conviction. The dangers of result orientation or bad faith resolution of constitutional claims are greatest for defendants least able

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habeas court to consider claims which would be barred from Supreme Court review by an independent and adequate state procedural ground. See *Fay v. Noia*, 372 U.S. at 463-70 (Harlan, J., dissenting). See also Hill, *The Inadequate State Ground*, 65 COLUM. L. REV. 943 (1965). The Court, nevertheless, has continued to apply the equitable abstention doctrine enunciated in *Fay*, changing only the standard of judicial application.

80. See generally *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293, 297-98 (1943).

81. See Bator, *supra* note 4, at 446-49.

82. Professor Bator's observation was extended to collateral reexamination of state court application of law to accepted factual findings as well. *Id.* at 449. The observation is far less persuasive in this "appellate" context. When the habeas court reexamines the application of established rules of law to facts reliably found by the state courts, experience indicates that demonstrably "wrong" results may be corrected. See, e.g., *Stone v. Powell*, 428 U.S. at 471-73; *Gamble v. State of Oklahoma*, 583 F.2d 1161 (10th Cir. 1978). See also *Wright & Sofaer, supra* note 28, at 899 n.15. Indeed, a significant premise of appellate jurisdiction in general is founded on the ability of judicial review to serve such a corrective function.

to show innocence. Consider, for example, those defendants who rely on constitutional suppression claims to rebut proof of guilt. These are just the petitioners who most need detached consideration, but who are frozen out in an apparent innocence-limited system.

As observed above, habeas review may serve to provide a federal court assessment of the adequacy of state judicial consideration of a criminal defendant's constitutional claims.<sup>83</sup> Limitation of that jurisdiction predicated upon factual innocence deprives the system of its promise of providing some assurance of regularity and consistency of state court process. The focus of a federal habeas court shifts from consideration of whether the state judicial system fairly permitted full development of the relevant facts and correctly applied applicable principles of law to what is essentially a determination of the sufficiency of the reliable evidence to convict regardless of constitutional error.

Constitutional rights afforded defendants focus in part on process; they place a premium on fairness and uphold the dignity and autonomy of the accused while establishing standards of decency in investigative and prosecutorial conduct.<sup>84</sup> A habeas system limited to probable innocence diminishes these concerns. It repudiates the judgment that it is as unjust to unfairly convict and punish a "guilty" defendant as to erroneously convict the innocent in a fair process.<sup>85</sup>

The factual-innocence-based limit thus poses formidable problems of policy. It also presents serious difficulties of implementation. Thus, it is nearly impossible to articulate a workable and fair standard for determining a "colorable showing of innocence."

Judge Friendly observes that the standard must be a meaningful screen that still permits a "rather rapid" disposition of peti-

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83. See *supra* notes 51-58 and accompanying text.

84. See generally *Olmstead v. United States*, 277 U.S. 438, 469-71 (1928) (Holmes, J., dissenting); *id.* at 71-85 (Brandeis, J., dissenting). See also *infra* notes 131-43 and accompanying text.

85. For example, as a precondition to resolution of the merits of a habeas petition under Judge Friendly's proposal, the federal judge would be required to consider and weigh evidence which he concluded was the result of unconstitutional conduct by the state. Friendly, *supra* note 8, at 160. Indeed, if protection of the arguably innocent is the limiting factor, consideration of reliable evidence suppressed by the state court itself would seem appropriate. See Cover & Aleinikoff, *supra* note 57, at 1089.

tions. He states that:

[T]he petitioner for collateral attack must show a fair probability that, in light of all the evidence, including that alleged to have been illegally admitted [but with due regard to any unreliability of it] and evidence tenably claimed to have been wrongly excluded or to have become available only after the trial, the trier of facts would have entertained a reasonable doubt of his guilt.<sup>86</sup>

This alluringly simple formulation does not confront the complexity of the inquiry. A multitude of standards are available, but they all illustrate the difficulty of imposing a barrier which will not be excessively burdensome in application and which will also effectively screen out a large majority of present habeas petitioners.

At one extreme, an easily satisfied barrier, requiring little more than an express assertion of personal innocence, takes no time to apply, but it would not effectively alter the scope of habeas. A more rigorous standard will restrict habeas review of the merits, but only by imposing a burdensome and time-consuming threshold inquiry.<sup>87</sup> A district court would be obliged, as a preliminary matter, to carefully evaluate the entire trial record, supplemented by a consideration of challenged evidence. In addition, newly discovered evidence would be relevant, at least upon a determination of good cause for failing to proffer it at trial.

Good faith inquiry of this sort would require, in many instances, as much judicial effort and time as presently consumed by the essentially appellate process of reconsidering the merits of constitutional claims. In particular, resolution of the reliability of challenged evidence, especially in the context of a preliminary screening, would be an elusive and troublesome process.

Further, if the entry barrier is rigorous enough to effectively preclude the majority of potential petitioners, the standard approaches the newly imposed test for constitutional sufficiency of

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86. *Id.* The fact that Judge Friendly had entertained "real doubt about a defendant's guilt" in only a half-dozen cases in eleven years of judicial experience illustrates the dimensions of the envisioned factual-innocence limited system. *Id.* at n.94.

87. The Court has recognized the burdensome nature of the threshold determination as a "sound judicial policy" upon which to predicate rejection of a "clear violation" exception to the exhaustion requirement. *Duckworth v. Serrano*, 454 U.S. 1, 4 (1981)(per curiam). This policy is equally relevant to an assessment of the advisability of a proposed change in the scope of habeas review which is substantially based upon the drain on judicial resources engendered under present practice. See Friendly, *supra* note 8, at 148.

the evidence.<sup>88</sup> Constitutional sufficiency claims require the court, after a full review of the record evidence adduced at trial, to determine whether a rational trier of fact could have found proof of guilt beyond a reasonable doubt.<sup>89</sup>

If the entry barrier to federal habeas review approaches constitutional sufficiency, the threshold standard produces anomalous results. A favorable conclusion on factual innocence leads to assertion of collateral jurisdiction and concurrently justifies granting the writ on constitutional sufficiency grounds, without more. Further, constitutional insufficiency obviates resolution of other claims, since double jeopardy would bar retrial.<sup>90</sup> Thus, habeas jurisdiction becomes self-limiting, and deals exclusively with resolution of sufficiency claims, both as an entry barrier and on the merits.

The difficulties in fairly applying a rigorous factual-innocence barrier can be seen by contrasting it with the distinct doctrine of constitutional harmless error.<sup>91</sup> Unlike the unstructured preliminary inquiry into the question of personal innocence, harmless error analysis occurs only after a constitutional violation is found. The inquiry is structured and focused, the question being whether the error had an impact upon the outcome. Notwithstanding the seeming narrowness of the question, federal courts rely on rules allocating burden of proof<sup>92</sup> and establishing *per se* presumptions of prejudice<sup>93</sup> to avoid the inherent speculativeness of the inquiry. The apparent-innocence question does not have the focus of the harmless error issue, and there are no rules for avoiding

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88. *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979).

89. The issue of constitutional sufficiency is not always equal to factual innocence. See Friendly, *supra* note 8, at 160. Consideration of reliable evidence which may have been unconstitutionally admitted and of previously unavailable extra record evidence, however, would bring a sufficiency standard more closely into line with the question of factual guilt.

90. *Burks v. United States*, 437 U.S. 1 (1978). While *Burks* held that an appellate reversal for insufficiency of the evidence precluded retrial on double jeopardy grounds, a subsequent federal habeas determination of insufficiency should have the same effect.

91. As Judge Friendly has noted, a key distinction between harmless error and a factual-innocence barrier is that the former is directed, not at preventing "unjust" punishment, but at assessing the effect of the error on the resulting conviction regardless of guilt. See Friendly, *supra* note 8, at 157, n.81.

92. *Chapman v. California*, 386 U.S. 18, 24 (1967).

93. See, e.g., *Mincey v. Arizona*, 437 U.S. 385, 398 (1978); *Chapman v. California*, 386 U.S. 18, 23 (1967); *Haynes v. Washington*, 373 U.S. 503 (1963); *Malinski v. New York*, 324 U.S. 401, 410 (1945) (use of involuntary confession evidence can never be harmless error).

speculation.

2. *Limiting federal habeas corpus consideration to the class of claims which relate to the guilt-determination process.* The alternative limitation of federal habeas predicated upon the concept of an "unjust" incarceration turns on whether the constitutional claim asserted is related to the reliability of the guilt-determination process. Such a limitation has gained substantial support of late, numbering among its proponents Justices Powell, Stevens, Rehnquist, and the Chief Justice.<sup>94</sup>

Justice Powell initiated the proposal, concurring in *Schneckloth v. Bustamonte*, another fourth amendment exclusionary rule case.<sup>95</sup> Justice Powell's major premise was that the recent expansion of federal habeas jurisdiction over the post-conviction constitutional claims of state prisoners has been posited upon a revisionist historical perspective.<sup>96</sup> Upon identifying the central role of habeas as assurance that "no innocent man suffers an unconstitutional loss of liberty,"<sup>97</sup> Justice Powell proposed that: "federal collateral review of a state prisoner's Fourth Amendment claims—claims which rarely bear on innocence—should be confined solely to the question of whether the petitioner was provided a fair opportunity to raise and have adjudicated the question in the state courts."<sup>98</sup>

While this proposed modification was restricted to the fourth amendment issue presented, Justice Powell subsequently has advocated an across-the-board restriction of habeas review to claims related to reliability,<sup>99</sup> unless adequate process had been denied in the state courts.<sup>100</sup> The proposed limitation gathered further momentum in the ambiguities of *Stone v. Powell*,<sup>101</sup> where a majority of the Court held that fourth amendment exclusion claims may not

94. See *supra* note 23.

95. 412 U.S. at 250-75 (Powell, J., concurring).

96. *Id.* at 252-56, 259. Justice Powell relies, anomalously, primarily upon Professor Bator's extensive historical analysis. See *supra* note 10. Professor Bator makes the historic case for a fully unified and consistent process-limited habeas review. See *infra* notes 169-71 and accompanying text. His study offers no tangible support for Justice Powell's reliability-limited model.

97. 412 U.S. at 256-57.

98. *Id.* at 250.

99. *Rose v. Mitchell*, 443 U.S. 545, 581 (1979) (Powell, J., concurring).

100. See *infra* notes 164-200 and accompanying text (for discussion of the process-limited model of federal post-conviction review).

101. 428 U.S. 465 (1976). See also *infra* note 209.

be reviewed on habeas when an opportunity for full and fair consideration of the claim has been afforded in the state courts.<sup>102</sup>

Restricting habeas review to reliability-related claims is significantly different from limiting habeas consideration to the claims of factually innocent petitioners. Under a reliability-claims standard, the inquiry is generalized, requiring broad definition of the primary value served by a constitutional claim, as opposed to the purely individualized factual inquiry mandated by the personal innocence model.<sup>103</sup> This standard leaves room for the further elaboration of constitutional safeguards in collateral review (albeit less room than provided by *Brown*).<sup>104</sup>

Despite these differences, the reliability limitation is equally without congressional support or judicial precedent in earlier conceptions of habeas corpus, even going beyond the 1867 Act to its statutory and common law precursors.<sup>105</sup> The attempts to find legitimate support only confirm its absence.

Justice Powell, for example, finds a relationship between a reliability limit and a 1966 amendment<sup>106</sup> which adopts the judicially-created rule that a habeas court ordinarily need not consider a second habeas petition raising claims identical to those of an earlier action.<sup>107</sup> The relationship is indeed obscure and indirect. If the argument is that the reliability restriction serves finality too, the amendment remains a slender reed upon which to justify judicial imposition of the proposal. In adopting a qualified notion of *res judicata* in habeas, Congress acknowledged that conventional rules of finality are inapplicable to federal habeas proceedings.

Justice Powell, in *Stone*, also finds support in the federal comity doctrine barring equitable interference with ongoing or threatened state criminal prosecution.<sup>108</sup> *Younger v. Harris* and its

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102. 428 U.S. at 482.

103. See *supra* text accompanying notes 83-85.

104. See generally, Cover & Aleinikoff, *supra* note 57, at 1009.

105. Justice Powell has acknowledged the lack of historical underpinnings for his proposal. See *Schneekloth*, 412 U.S. at 257 (Powell, J., concurring). See also *supra* note 96.

106. 412 U.S. at 271-74 (Powell, J., concurring). See also Act of Nov. 2, 1966, Pub.L. 89-711, 80 Stat. 1104.

107. These provisions presently are contained in 28 U.S.C. § 2244(b) (1976). In addition to imposing a limited finality effect to prior denials of relief by federal habeas courts on the same claim, the amendments enacted, with minor modification, the broad collateral factfinding powers laid down by the Court in *Townsend v. Sain*, 372 U.S. 293 (1963).

108. The *Stone* majority favorably quotes from Justice Stewart's opinion in *Francis v. Henderson*, 425 U.S. 536, 541-42 (1976), which suggests that traditional notions of comity



progeny bar federal court injunctions against pending state criminal proceedings absent proof of bad faith and irreparable injury.<sup>109</sup> Hence, where a state prosecution is pending, a defendant must present his constitutional claims to the state courts for resolution.<sup>110</sup>

The *Younger* rule is an application of an ancient principle of equity that a court ordinarily will not enjoin a criminal prosecution.<sup>111</sup> Habeas review does not entail an equivalent interference with an *ongoing* state prosecution, since the exhaustion requirement generally bars interference with a state criminal trial or appeal.<sup>112</sup> Because habeas involves subsequent reconsideration of claims, the writ cannot be equated with injunctive relief during the course of state criminal proceedings.<sup>113</sup>

Justice Stevens also proposes to limit habeas to certain claims that "infect the validity of the underlying judgment itself, or the integrity of the process by which that judgment was obtained."<sup>114</sup> He finds support for judicial imposition of such a limitation in the

and federalism embodied by *Younger v. Harris*, 401 U.S. 37 (1971), justify limitation of federal habeas review of claims procedurally forfeited in the state system. See *Stone*, 428 U.S. at 478 n.11.

109. 401 U.S. 37 (1971). See also *Juidice v. Vail*, 430 U.S. 327 (1977); *Hicks v. Miranda*, 422 U.S. 332 (1975); *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975).

110. 401 U.S. at 57.

111. *Id.* at 43-44. See also *Douglas v. City of Jeannette*, 319 U.S. 157, 164 (1943); *Fenner v. Boykin*, 271 U.S. 240 (1926); *Davis & Farnum Mfg. Co. v. Los Angeles*, 189 U.S. 207 (1903).

112. *But see Amsterdam, supra* note 64, at 882-912. Professor Amsterdam suggests that the post-conviction context of federal habeas may cause as much, or more, irritation to the state judicial system as a carefully delineated anticipatory federal jurisdiction. *Id.* at 835-36.

113. *Cf. Fair Assessment in Real Estate Ass'n, Inc. v. McNary*, 454 U.S. 100, 117-25 (1981) (Brennan, Marshall, Stevens and O'Connor, J.J., concurring) (concerns of comity and federalism cannot legitimately be used to limit congressionally mandated jurisdiction). Moreover, *Younger* abstention, as it has developed in civil rights litigation, provides some justification for a broad federal habeas remedy. The doctrine operates quite distinctly from ordinary modes of abstention which merely defer federal consideration. *Younger* effectively stands as a bar to the exercise of federal jurisdiction over most constitutional claims related to ongoing or envisioned state criminal or quasi-criminal proceedings. Claims seeking injunctive or declaratory relief are dismissed. Similarly, if the constitutional defenses are decided adversely to the defendant in the state proceedings, subsequent damage actions will be barred by application of traditional notions of *res judicata* and collateral estoppel. See, e.g., *Allen v. McCurry*, 449 U.S. 90 (1980). Thus, *Brown* has the salutary effect of ensuring that these federal claims, for which Congress has provided an independent federal forum through enactment of the Civil Rights and habeas statute, can be considered in the federal courts, at least for the class of defendants whose conviction results in some form of custody.

114. 102 S. Ct. at 1216 (Stevens, J. dissenting).

Court's construction of a companion habeas statute providing post-conviction relief for federal prisoners, which refers to "custody . . . in violation of the . . . laws of the United States," as well as the Constitution.<sup>115</sup> Despite the language, the Court has limited law violations cognizable in habeas to those that constitute "a fundamental defect which inherently results in a complete miscarriage of justice."<sup>116</sup> Justice Stevens asserts that "the reasons that persuaded the Court to limit errors of law under 28 U.S.C. § 2255 also apply to constitutional errors under 28 U.S.C. § 2254."<sup>117</sup>

The assertion is perhaps plausible, but not persuasive. First, the limited cognizability of non-constitutional error in habeas proceedings by federal prisoners has not been restricted to claims concerning reliability.<sup>118</sup> Whatever the reasons for the limitation, therefore, they do not suggest this particular restriction on constitutional claims. Moreover, the Court's limiting construction of section 2255 expressly distinguished between violations of the Constitution and the laws, with the latter being of lesser significance in habeas review.<sup>119</sup>

Justice Stevens also relies on the relatively limited scope of federal constitutional rights applicable to the states in 1948 when the habeas statute was recodified.<sup>120</sup> Since the then-accepted flexible notions of due process were concerned primarily with reliability, "a limitation of habeas corpus relief to instances of fundamental fairness is consistent with the intent of the Congress that enacted section 2254 in 1948."<sup>121</sup>

This argument falls with its premise that Congress intended to adopt and freeze the Constitution to the interpretations extant in

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115. 28 U.S.C. § 2255 (1976).

116. *See, e.g.*, *United States v. Timmreck*, 441 U.S. 780, 784 (1979); *Davis v. United States*, 417 U.S. 333, 346 (1974); *Hill v. United States*, 368 U.S. 424, 428 (1962). *Cf.* *Sunal v. Large*, 332 U.S. 174, 179-80 (1947) (conviction under selective service law upheld on collateral attack under the predecessor to § 2255 for failure to take appeal from conviction where the error asserted does not invoke any constitutional right or question the jurisdiction of the trial court).

117. 102 S. Ct. at 1219 n.18 (Stevens, J., dissenting).

118. For example, certain non-reliability-related statutory suppression claims have been considered on federal post-conviction motions. *See, e.g.*, *United States v. Consiglio*, 391 F. Supp. 564 (D. Conn. 1975).

119. *See, e.g.*, *United States v. Timmreck*, 441 U.S. at 783-84; *Davis v. United States*, 417 U.S. at 346; *Hill v. United States*, 368 U.S. at 428; *Sunal v. Large*, 332 U.S. at 179, 182.

120. *See supra* note 17.

121. 102 S. Ct. at 1219 n.18 (Stevens, J. dissenting).

1948. Precisely this premise was rejected by the Court,<sup>122</sup> under more compelling circumstances, in interpreting the grant of jurisdiction by the 1874 Civil Rights Act over alleged state deprivations of federal statutory rights.<sup>123</sup> Despite evidence that the 1874 Congress equated federal statutory claims with equal rights,<sup>124</sup> and the subsequent extraordinary expansion of diverse federal statutes, the Court rejected an equal rights limitation and held that the Civil Rights Act extends to all violations of federal law. Murky legislative history could not substitute for the clear language of the Act and support an intent to freeze then prevailing law, by category or otherwise.<sup>125</sup>

Unlike the legislative background of the Civil Rights Act, there is no evidence in the reenactment of the habeas corpus statute that Congress intended to limit habeas to the kind or scope of constitutional claims then recognized by the Court. Absent compelling indication of such intent, particularly in light of Congress' awareness that the Constitution changes over time, constitutional law in 1948 cannot establish a revision in the reach of habeas today.

In addition to these legitimacy obstacles, the reliability proposal poses serious issues of policy and problems of application. The most substantial policy objection to the proposal is well elaborated by Professor Cover, who observes that the characterization of constitutional rights required by the proposal has dangers of both oversimplification of analysis and "impoverishment of the symbolic

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122. *Maine v. Thiboutot*, 448 U.S. 1 (1980).

123. 42 U.S.C. § 1983 (1976) states:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States, or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

*Id.* (emphasis added).

124. *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 624-40 (1979) (Powell, J., concurring).

125. "Given that Congress attached no modifiers to the phrase, the statute undoubtedly embraces respondents' claim that petitioners violated [a statute unrelated to equal rights]." 448 U.S. at 4. The Court also relied on prior decisions which indicated, in dictum, that all statutory claims were cognizable. *Id.* The consistent interpretation in the Court's holdings since *Brown* similarly impedes the persuasiveness of Justice Stevens' position. See *infra* note 176.

qualities of the rights."<sup>126</sup>

As the Court's constitutional due process jurisprudence has expanded, the values implicit in due process range beyond unitary interests easily identifiable as truth-serving or non-truth-serving. Reliability, of course, reflecting the Court's concern with protecting the innocent, is a factor implicated by many rights.<sup>127</sup> For example, constitutional speedy trial claims require a showing of prejudice, which most often relates to lost ability to defeat the charges.<sup>128</sup> These claims can also serve interests apart from reliability, however.<sup>129</sup> Under the proposed reliability limit, the Court must weigh and specify the comparative importance of the various interests served by individual constitutional protections. As noted by Professor Cover, in engaging in such determination, the Court "must beware lest a dominant value becomes an exclusive one; lest a functional inquiry into a right's consequences for accuracy crystallize a functionalist reduction of a right's content."<sup>130</sup>

Furthermore, consistent and fair application of a reliability limitation to federal habeas corpus relief is problematic. Thus, while individual members of the Burger Court insist that the primary function of constitutional controls on the criminal process is to protect the innocent defendant and not impede convicting the guilty,<sup>131</sup> recent decisions reveal a marked solicitude for, and expansion of, rights not primarily related to reliability.

Even for a Court committed to accurate guilt determination, the values that non-reliability claims serve may possess an emotional and historic force which can be compelling. Thus, in *Rose v. Mitchell*,<sup>132</sup> the Court ruled on whether grand jury discrimination claims should be cognizable on federal habeas, notwithstanding conviction by an unchallenged petit jury. While the claim does not

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126. Cover & Aleinikoff, *supra* note 57, at 1091.

127. *Id.* at 1093-94.

128. *Barker v. Wingo*, 407 U.S. 514 (1972).

129. *Id.* at 537 (White, J., concurring); *Klopfer v. North Carolina*, 386 U.S. 213 (1967).

130. Cover & Aleinikoff, *supra* note 57, at 1092.

131. Compare *id.* at 1068-1102; Chase, *The Burger Court, the Individual and the Criminal Process: Directions and Misdirections*, 52 N.Y.U. L. REV. 518, 519 (1977) (the Burger Court has shown disenchantment with non-reliability-related constitutional rights of criminal defendants) with Seidman, *Factual Guilt and the Burger Court: An Examination of Continuity and Change in Criminal Procedure*, 80 COLUM. L. REV. 436 (1980) (the Burger Court may not be examined solely on the guilt/innocence model).

132. 443 U.S. 545 (1979).

ensure reliability,<sup>133</sup> only two members of the Court would eliminate it from collateral review for that reason.<sup>134</sup> Other values implicit in the constitutional guarantee of racial equality were of such deep concern to a majority of the Court that they upheld the availability of federal habeas relief to correct error. It seems unlikely that even the application of an unequivocal reliability limit would lead the Court to a different result.<sup>135</sup>

Other constitutional claims, such as double jeopardy and the right to assistance of counsel, present similar problems. The bar against retrial after jeopardy has attached occasionally serves reliability interests.<sup>136</sup> Reprosecution after a verdict of innocent obviously increases the dangers of convicting a factually innocent defendant. The guarantees against reprosecution for the same offense after prior conviction,<sup>137</sup> against reprosecution after a mistrial purposefully obtained through prosecutorial misconduct,<sup>138</sup> and against multiple punishment for the same offense<sup>139</sup> are not responsive to this concern, however. Rather, they represent important assertions about individual autonomy and the fair and proper role of the state in the criminal process, assertions that the Court would not easily or costlessly ignore in ruling on the availability of habeas relief.<sup>140</sup> Similarly, while the sixth amendment right to assistance of counsel in preparation for and during judicial proceedings may contribute to accurate verdicts,<sup>141</sup> the right has been ex-

133. See Cover & Aleinikoff, *supra* note 57, at 1094-95.

134. Only Justice Rehnquist joined Justice Powell's concurring opinion.

135. The Court, in *Rose*, was considering "the question whether such claims should be cognizable any longer on federal habeas corpus in light of *Stone v. Powell*." 443 U.S. at 559. The precise meaning of *Stone* is uncertain. See *infra* note 209. Accordingly, the Court's decision in *Rose* can only suggest problems of consistently applying a reliability/process limited habeas system of post-conviction review.

136. See, e.g., *Sanabria v. United States*, 437 U.S. 54 (1978); *Green v. United States*, 355 U.S. 184 (1957). See also Cover & Aleinikoff, *supra* note 57, at 1093.

137. See, e.g., *In re Nielson*, 131 U.S. 176 (1889).

138. E.g., *Oregon v. Kennedy*, 102 S. Ct. 2083 (1982); *United States v. Dinitz*, 424 U.S. 600 (1976).

139. *Ex parte Lange*, 85 U.S. (18 Wall.) 163, 168 (1873).

140. Indeed, in reviewing a Fifth Circuit decision which had rejected an extension of *Stone* to double jeopardy claims, *Greene v. Massey*, 546 F.2d 51, 53 n.6 (5th Cir. 1977), the Supreme Court did not even address the question, despite the fact that the respondent renewed the contention. See *Greene v. Massey*, 437 U.S. 19 (1978); *United States ex rel Sanders v. Rowe*, 460 F. Supp. 1128, 1143 (N.D. Ill. 1978).

141. See, e.g., *Powell v. Alabama*, 287 U.S. 45, 69 (1932). See also *infra* notes 226-27 and accompanying text.

tended to situations in which counsel will almost certainly impede such value.<sup>142</sup> Thus far, the Court has exhibited no inclination to exclude such claims from habeas review.<sup>143</sup>

The difficulty of consistent and coherent application of a reliability limit may be seen in the Court's standards for resolving whether newly enunciated constitutional rights should be retroactively applied.<sup>144</sup> The Court's retroactivity decisions are said to provide a basis for classifying claims under a reliability limit.<sup>145</sup> Notwithstanding that reliability is the purported touchstone for retroactivity,<sup>146</sup> the Court has acted on other compelling values in providing retroactive application of double jeopardy claims,<sup>147</sup> cruel and unusual punishment invocations,<sup>148</sup> and challenges under expansive criteria removed from the reliability of involuntary confessions.<sup>149</sup> Conversely, in denying retroactive effect to such reliability-implicating rights as the requirement of counsel at preliminary hearings<sup>150</sup> and the ban against comment on the failure of an accused to testify,<sup>151</sup> the Court has relied on an unilluminating standard that masks other unstated values and concerns.

Moreover, the proposed limitation frequently would impose results which diverge from consistent historical development of the

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142. See, e.g., *Brewer v. Williams*, 430 U.S. 387 (1977); *Massiah v. United States*, 377 U.S. 201 (1964). See also *infra* note 228.

143. See, e.g., *United States v. Henry*, 447 U.S. 264 (1980); *Brewer v. Williams*, 430 U.S. 387 (1977).

144. See, e.g., *Linkletter v. Walker*, 381 U.S. 618 (1965).

145. See *Rose v. Lundy*, 102 S. Ct. at 1216 n.8 (Stevens, J., dissenting); *Mishkin, supra* note 8. But see *Schwartz, supra* note 37 (Supreme Court's retroactivity decisions do not provide an acceptable basis for classifying claims under a reliability limit).

146. *Adams v. Illinois*, 405 U.S. 278, 280-81 (1972); *Desist v. United States*, 394 U.S. 244, 249-50 (1969).

147. *Robinson v. Neil*, 409 U.S. 505 (1973). The Court's analysis conforms to Professor Cover's prediction that a unified reliability-limited system of post-conviction review would include non-reliability-related claims which prevent a criminal trial from taking place at all. See *infra* note 155 and accompanying text.

148. The Court's decisions concerning the constitutionality of death penalty statutes have, of course, been accorded retroactive effect. See, e.g., *Moore v. Illinois*, 408 U.S. 786 (1972).

149. See generally *Schwartz, supra* note 37, at 725-27.

150. *Adams v. Illinois*, 405 U.S. 278 (1972). Reliability-related functions of counsel at a preliminary hearing include creating a record for subsequent impeachment and discovering the particulars of the case against the accused. *Id.* at 281-82. See also *Coleman v. Alabama*, 399 U.S. 1, 9 (1970).

151. *Tehan v. United States ex rel Shott*, 382 U.S. 406 (1966). See also *Schwartz, supra* note 37, at 727-30.

writ. For example, even when habeas was limited to "jurisdictional" error,<sup>152</sup> claims of unauthorized sentence<sup>153</sup> and re prosecution after conviction<sup>154</sup> were considered appropriate for reconsideration. In light of this historic claim, elimination of such double jeopardy claims from habeas review would be anomalous, notwithstanding the marginal reliability interests they serve.

Professor Cover observes that these difficulties of consistent application necessarily would result in expansion of a reliability limit to include claims that "constitute a constitutional right to be free from conviction despite guilt" as well as those rights "granted special protection due to [their] fundamental nature."<sup>155</sup> This expansion would provide flexibility so as to allow the Court to respond to diverse and compelling historic and policy considerations. But, it is questionable whether the Court's ranking of personal constitutional rights for purposes of defining the scope of federal protection on the basis of a criterion as subjective as an assessment of "fundamental" importance would result in predictable or coherent jurisprudence.<sup>156</sup> The availability of the writ would appear, at least, to be governed by the shifting *ad hoc* predilections of individual Justices.

Moreover, it is not clear that a reliability limitation would either stem the tide of post-conviction claims or substantially lessen the demands placed on the federal judiciary. Initially, every claim would have to be characterized as falling within or outside of the reliability barrier to entry. Once the claims have been categorized, the limitation would induce petitioners to recast their claims to qualify for review on the merits. Many arguably non-reliability claims can be so reformulated. Assuming that *Miranda* violations were excluded from habeas, for instance,<sup>157</sup> due process voluntariness allegations easily could be substituted. The reformulated sub-

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152. See *supra* notes 13-18 and accompanying text.

153. *Ex parte Lange*, 85 U.S. (18 Wall.) 163 (1873).

154. *In re Nielsen*, 131 U.S. 176 (1889).

155. Cover & Aleinikoff, *supra* note 57, at 1094.

156. Such a system would resemble the flexible "jurisdiction" model of post-conviction review which developed prior to *Brown*. See *supra* note 13. Justice Frankfurter, in 1947, described the flexible jurisdiction model as "dubious and confused," requiring "much more systematic consideration than it has thus far received." See *Sunal v. Large*, 332 U.S. at 184 (Frankfurter, J., dissenting).

157. 384 U.S. 436 (1966). *Miranda* was held to be non-retroactive because it was founded on factors which implicated not just reliability, but other concerns as well. *Johnson v. New Jersey*, 384 U.S. 719 (1966). But see *infra* note 232.

stitute claim is more burdensome to resolve because it entails a particularized, detailed sifting of multiple factors in each case, instead of the application of more general *per se* rules.<sup>158</sup> Indeed, prophylactic rules such as the *Miranda* rulings were intended in part to obviate troublesome inquiries into the totality of the circumstances.<sup>159</sup>

Additionally, the preoccupation with reliability in the proposed restriction likely would cause reorientation of substantive doctrine as well, since habeas represents the primary forum for federal definition and elaboration of the constitutional rights of state defendants.<sup>160</sup> For example, coerced confession claims would continue to be cognizable in habeas, no doubt, given the possible effect of coercion on reliability.<sup>161</sup> But the law of voluntariness as formulated and applied during the last three decades rests on values of autonomy and acceptable police conduct along with reliability.<sup>162</sup> The focus on reliability in habeas entry may well reorient the coercion inquiry away from these non-instrumental factors. Dignity and fairness interests soon could be discounted or disregarded.<sup>163</sup> If so, this would narrow the scope of protection in direct criminal proceedings as well as habeas, for federal defendants as well as state. These ramifications should be of concern to those who believe that constitutional values extend beyond securing reliable outcomes.

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158. Another example would be transposition of *Wade* counsel claims to due process challenges of suggestive, unreliable identification confrontations under *Neil v. Biggers*, 409 U.S. 188, 198-200 (1972). See generally *Jackson v. Virginia*, 443 U.S. 307 (1979) (permitting the federal habeas court to reconsider constitutional sufficiency of the evidence—a reliability-related claim which requires particularized factual consideration by the habeas court).

159. See *infra* text accompanying notes 201-34 for a discussion of an alternative analytical approach to the reliability limit which has been proposed to limit the collateral cognizability of these prophylactic rules.

160. See generally *Cover & Aleinikoff*, *supra* note 57, at 1087-88.

161. See generally *Schwartz*, *supra* note 37 at 725-27; *Kaufman v. United States*, 394 U.S. at 237 (Black, J., dissenting); *Johnson v. New Jersey*, 384 U.S. 719 (1966).

162. Compare *Brown v. Mississippi*, 297 U.S. 278 (1936) (confession found to be involuntary and unreliable when the result of whippings continuing until an acceptable confession) with *Davis v. North Carolina*, 384 U.S. 737, 739 (1966); *Payne v. Arkansas*, 356 U.S. 560, 567-68 (1958); *Lynumn v. Illinois*, 372 U.S. 528, 537 (1963); *Haynes v. Washington*, 373 U.S. 503, 518-20 (1963); *Jackson v. Denno*, 378 U.S. 368, 386 (1964); *Rogers v. Richmond*, 365 U.S. 534, 540-41 (1961); *Spano v. New York*, 360 U.S. 315 (1959) (in passing on the voluntariness of a confession, the federal court may not consider the guilt or innocence of the accused or the reliability of the statement itself).

163. Another possibility would be application of a harmless error standard to claims of involuntary confession. See *supra* note 93 and accompanying text.



## B. *The Full and Fair "Process" Limitation*

A secondary judicial proposal would limit the scope of federal post-conviction habeas corpus jurisdiction to claims predicated upon denials of "process" by the state judicial system. Under this standard, "fair and adequate process" would preclude the collateral relitigation of any and all constitutional claims in habeas.

The process limitation was first offered by Justice Jackson, concurring in the denial of relief in *Brown v. Allen*.<sup>164</sup> Justice Jackson noted that, by construing the Habeas Corpus Act of 1867 as authority for federal judges to entertain attacks on the constitutionality of state court criminal judgments, habeas jurisdiction would grow commensurately with each expansion of the interpretation of the fourteenth amendment.<sup>165</sup> To avoid this expansion, Justice Jackson proposed:

[N]o lower Federal court should entertain a [habeas corpus] petition except on the following conditions: (1) that the petition raises a jurisdictional question involving federal law on which the state law allowed no access to its courts, either by habeas corpus or appeal from the convictions . . . or (2) that the petition shows that although the law allows a remedy he was actually improperly obstructed from making a record upon which the question could be presented. . . ."<sup>166</sup>

The concept next appears as the exception to Justice Powell's proposal to limit post-conviction habeas corpus practice to claims which relate to the reliability of the factfinding process. Thus, under the *Schnecko* concurrence and the *Stone* holding, fourth amendment claims are barred from collateral reconsideration unless the petitioner was denied an opportunity for full and fair litigation of his claim in the state courts.<sup>167</sup> Under Justice Powell's unified proposal, this process limitation defines cognizability of other primarily non-reliability-related claims. No current judicial proposal fully embraces the process limit so as to subject all constitutional claims to the fairness-adequacy test.

164. 344 U.S. at 532-48.

165. *Id.* at 533-34.

166. *Id.* at 545. While no precise definition of a "jurisdictional question" was offered, a serious omission in light of the historic flexibility with which the concept has been treated in its post-conviction habeas corpus context, Justice Jackson did indicate that he would require, by way of pleading, that "habeas corpus will be deemed to lie only for defects not disclosed on the record, going to the power, legal competence or jurisdiction of the committing state court." *Id.* at 547.

167. See *supra* notes 98 & 102 and accompanying text.

Professor Paul M. Bator's influential article "Finality in Criminal Law and Federal Habeas Corpus" is the seminal elaboration of the reasons behind a process limit.<sup>168</sup> Professor Bator concludes from exhaustive study of federal habeas from 1789 to *Brown* that, with marginal exceptions, the scope of the writ was limited in post-conviction proceedings to narrow issues of jurisdiction.<sup>169</sup> This severe limit had been relaxed in later decisions, originating with *Frank v. Mangum*,<sup>170</sup> to include the examination of whether the state had afforded the petitioner access to a fair and meaningful process in which to raise his constitutional claims.

Professor Bator ultimately concludes that the expansions of *Brown v. Allen* and its progeny were both inconsistent with the historic scope of habeas and incompatible with a sound criminal justice system administered in a federal setting. He advocates a return to the pre-*Brown* model he sets forth.<sup>171</sup>

Professor Bator's careful historical analysis provides a legitimating argument for judicial imposition of a process-limited system which is lacking for the guilt-innocence models.<sup>172</sup> But the lynchpins of the argument, the early mob-domination cases of *Frank v. Mangum* and *Moore v. Dempsey*,<sup>173</sup> are too ambiguous and controversial to provide strong support. The cases have engendered voluminous judicial<sup>174</sup> and scholarly<sup>175</sup> disagreement over

168. Bator, *supra* note 4.

169. *Id.* at 463-99.

170. 237 U.S. 309 (1915).

171. Bator, *supra* note 4, at 525.

172. See *supra* notes 73-80 & 105-25 and accompanying text.

173. 261 U.S. 86 (1923).

174. Compare, e.g., *Sumner v. Matta*, 449 U.S. 539, 544 (1981); *Wainwright v. Sykes*, 433 U.S. 72, 79 (1977); *Stone v. Powell*, 428 U.S. at 476 n.9; *Preiser v. Rodriguez*, 411 U.S. 475, 485 (1973); *Peyton v. Rowe*, 391 U.S. 54, 58 (1968); *Fay v. Noia*, 372 U.S. at 433-34, 439; *Brown v. Allen*, 344 U.S. at 464; *id.* at 533 n.4 (Jackson, J., concurring); *Sunal v. Large*, 332 U.S. at 174, 186 (Frankfurter, J., dissenting); *id.* at 188 (Rutledge, J., dissenting); *Johnson v. Zerbst*, 304 U.S. 458, 468 (1938); *Moore*, 261 U.S. at 92 (McReynolds, J., dissenting) (suggesting that *Frank* and/or *Moore* permit habeas reconsideration of the merits of a state prisoner's constitutional claims) *with Schneekloth v. Bustamonte*, 412 U.S. at 255-56 (Powell, J., concurring); *Fay v. Noia*, 372 U.S. at 456-58 (Harlan, J., dissenting); *Ex parte Hawk*, 321 U.S. at 118; *Waley v. Johnson*, 316 U.S. 101, 102 (1942); *Mooney v. Holohan*, 294 U.S. 103, 113 (1935) (suggesting that *Frank* and *Moore* only require habeas consideration of the adequacy of state procedure).

175. Compare Comment, *Developments in the Law: Federal Habeas Corpus*, 83 HARV. L. REV. 1038, 1050-54 (1970); Hart, *supra* note 51, at 105; and Reitz, *Federal Habeas Corpus: Impact of an Abortive State Proceeding*, 74 HARV. L. REV. 1315, 1328-29 (1961) *with* Bator, *supra* note 4, at 483-93; Friendly, *supra* note 8, at 151.

whether they rest on limited "corrective process" considerations or entail an actual reconsideration of the merits of the alleged due process violations.

Moreover, in light of the Court's consistent and visible adherence to *Brown* since 1953,<sup>176</sup> a judicially-imposed process limitation would be unseemly, notwithstanding earlier history. As the Court has stated, "long standing acceptance by the courts, coupled with Congress' failure to reject [the judicial] interpretation" of a statute results in a legislative ratification which may preclude subsequent judicial modification.<sup>177</sup> Unquestionably, Congress has had the perceived costs of the *Brown* standard critically and emphatically called to its attention.<sup>178</sup> During the past thirty years, efforts in Congress to impose a process limitation have failed on at least five separate occasions.<sup>179</sup> In light of such persistent rejection, judicial revision is, or appears to be, impermissible lawmaking.

In the face of the critics' weighty policy objections to *Brown*, technical doctrines of statutory construction may seem unduly sterile and formalistic. But strongly-held value judgments concerning the wisdom and costs of present habeas practice do not relieve the Court of responsible adherence to separation of powers constraints. Uncertainty as to the actual effects of present practice further confirm the propriety of legislative, not judicial, revision.<sup>180</sup>

The principal advocates of less habeas review also strongly endorse judicial restraint and Congress' authority to define the juris-

176. Other than the ambiguous decision in *Stone v. Powell*, the Court has consistently reaffirmed the interpretation posited by *Brown*. See *infra* note 209 (for a discussion of the conflicting interpretations of *Stone*).

177. *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 733 (1975).

178. See, e.g., *Hearings on H.R. 6742, H.R. 4958, H.R. 3216, H.R. 2269 Before Subcomm. No. 3 of the House Comm. on the Judiciary*, 86th Cong., 1st Sess. 4-7, 25-26 (1959); Letter from Attorney General Richard G. Kleindeinst to Rep. Emmanuel Celler, Chairman, House Committee on the Judiciary, reprinted in 119 CONG. REC. 2222 (1973); *Hearings on S. 895 Before the Subcomm. on Constitutional Rights of the Senate Judiciary Comm.*, 92d Cong., 1st Sess. (1971) (statement of then Assistant Attorney General William Rehnquist).

179. See, e.g., S. 567, 93d Cong., 1st Sess., 119 CONG. REC. 2221 (1973) (combining a process and reliability limit); S. 917, 90th Cong., 2d Sess., 114 CONG. REC. 11, 189 (1968); H.R. 3216, 86th Cong., 1st Sess., 105 CONG. REC. 1060 (1959); H.R. 8361, 85th Cong., 2d Sess., 104 CONG. REC. 4674 (1958); H.R. 5649, 84th Cong., 2d Sess., 102 CONG. REC. 1060 (1959). See also H.R. 134, 97th Cong., 1st Sess. (1981). The Reagan administration's current legislative proposal to amend the habeas corpus statute and effectively eliminate post-conviction review once again seeks to impose a process-limited system of review. See *Criminal Justice Reform Act of 1982*, S. 2903, 97th Cong., 2d Sess. § 305(d) (1982).

180. See *supra* notes 19-52 and accompanying text.

diction of the federal courts.<sup>181</sup> They cannot have it both ways, emphasizing conservative principles of statutory construction and the paramount power of Congress when confronted with judicial expansion of federal jurisdiction, and stressing personal notions of policy in seeking judicial curtailments of habeas jurisdiction. That is expediency, not law.

The process limit also poses formidable problems of implementation and policy. The premises underlying the threshold barrier of fair process are straightforward: no finite system of review can guarantee error-free determinations of law and fact; adequate corrective process provides an acceptable probability of reliable determination and also promotes salutary finality of judgment.<sup>182</sup> These premises, however, reveal a conceptual flaw in the proposed model of adequate process as a threshold barrier to federal habeas post-conviction jurisdiction.

Acceptance of adequate procedure as the appropriate focus of federal habeas review limits the role of the habeas court to identifying procedural flaws in a state's judicial administration. Absent a procedural deficiency, states are as competent as federal courts to resolve constitutional issues. Accordingly, there is no need for federal court resolution of the merits of constitutional claims. Upon finding a procedural lapse, remand for state court resolution of the federal claim is the appropriate disposition.

Proponents of the process system decline to accept the logical dictates of these premises, however. Instead, they uncritically assume that the result of a finding of inadequate state process will be federal court resolution of the underlying claim. In support of no remand, they argue the "political wisdom" of not forcing the states "to undertake positive rectification" and find that *Frank* and *Moore* require consideration of the merits of the claim.<sup>183</sup>

These reasons do not bear scrutiny and a more plausible one is not far to seek. A habeas system really limited by a process stan-

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181 See, e.g., *Cannon v. Univ. of Chicago*, 441 U.S. 677, 730-49 (1979) (Powell, J., dissenting); *Adlinger v. Howard*, 427 U.S. 1 (1976) (Rehnquist, J., writing for the Court). See also Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693, 705-06 (1976).

182. Bator, *supra* note 4, at 446-53.

183. *Id.* at 460, 491-93. There is language in Justice Powell's concurring opinion in *Schneekloth* which suggests that he intended that the federal habeas court never consider the merits of fourth amendment claims. See 412 U.S. at 250 (Powell, J., concurring). However, as ultimately resolved by the Court in *Stone*, adequate process is only an entry barrier to federal collateral consideration of the claim. 428 U.S. at 482, 494 n.37.

dard would afford state courts exclusive and final power over all manner of constitutional claims (save only for infrequent direct Supreme Court review). The writ would be limited to merely ensuring employment of adequate procedures for federal claims in state courts. Even if the process adherents would accept that curious outcome,<sup>184</sup> it would be difficult to attribute it to Congress.<sup>185</sup> Nonetheless, the internal inconsistency remains. If the "wrong" consists of the state's failure to provide adequate process, substituting a federal court for a state court to resolve the merits is not the appropriate or responsive remedy, particularly since the foundation of the process standard is comity and state judicial responsibility.<sup>186</sup>

There is a further hidden anomaly in the process barrier to habeas review. The yardstick for determining the adequacy of state process under this habeas threshold standard would not likely be procedural due process of law<sup>187</sup>—presumably because such a stan-

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184. Professor Bator alone makes the case for a consistent and fully unified process-limited system of habeas review applicable to all constitutional claims. While fairly acknowledging the importance of the question, he appears to accept the resultant effective elimination of a federal role in the resolution of constitutional claims in the state criminal process as both appropriate and beneficial. Compare Bator, *supra* note 4, at 445-46, 510 with *id.* at 449, 451-53, 462, 509. It is certainly not clear that Justice Powell and the other recent judicial proponents of a partially process-limited system are willing to do as much. Their limitation of the concept to a class of disfavored claims with federal relitigation required upon a finding of unfair process strongly suggests the contrary.

185. See *supra* note 179 and accompanying text. The concept of federal responsibility for the federal defenses of state prisoners was certainly familiar to the reconstruction Congress. Only seven years after it passed the 1867 Habeas Corpus Act, federal reconsideration of all properly preserved federal questions arising in state convictions was mandated through writ of error to the Supreme Court. See *supra* notes 32-33 and accompanying text.

186. *Brown* has engendered significant unhappiness in the state judiciary with federal oversight of the constitutional claims of state prisoners. See *supra* note 20. Accordingly, Professor Bator's suggestion that habeas consideration of the merits of those claims which were denied fair process in the state courts would be more palatable than remand is open to question. See *supra* note 183 and accompanying text. See also Bator, *supra* note 4, at 523.

187. Justice Powell failed to provide any meaningful guidance concerning the appropriate measure of the adequacy of state process, either in his *Schneckloth* concurrence or in the majority opinion in *Stone*, and, consequently, lower court application has been confused. See generally Halpern, *Federal Habeas Corpus and the Mapp Exclusionary Rule after Stone v. Powell*, 82 COLUM. L. REV. 1, 14-34 (1982). Professor Bator posits several varying standards as appropriate. Some of these suggest the rigors of procedural due process, e.g., "if a state fails to give the defendant any opportunity at all to test federal defenses relevant to his case" or "if the state furnishes process, but it is claimed to be meaningless process." Bator, *supra* note 4, at 456-57. Some of the other standards, however, suggest something less, e.g., "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

dard is too rigorous a barrier to habeas review or because its use would cause the rapid proliferation of constitutional rules governing state procedures. Such an expansion of procedural due process would be applicable to resolution of state law as well as constitutional claims. That, of course, would not effectuate the rationales of restraint and comity that the process model seeks to serve. Moreover, employing procedural due process as the measure of adequacy limits habeas to that claim alone and this again effectively renders state courts the exclusive arbiters of all other constitutional issues in criminal proceedings.

Accordingly, the threshold of adequate process contemplates non-constitutional federal common law as the yardstick of full and fair opportunity. Aside from the oddity of using federal common law as the preliminary means of deciding whether one is held in violation of the Constitution, the formulation of such common law rules presents formidable difficulties. In passing on adequacy, federal judges enter a vast domain of uncharted territory. There are no easy precedents, received lines of authority, or analogous areas of judge-made law from which to draw.<sup>188</sup> Federal judges, further, must confront a vast array of adequacy questions, since they may arise at any stage of the entire criminal process, pre-trial, trial, appeal, and state collateral review. Uniform rules, even over time, are unlikely because the procedures employed in the fifty states are diverse and particular, and therefore pose discrete questions of full and fair opportunity. In short, the occasions for deciding adequacy are extraordinarily numerous and distinct; the feasibility of providing prospective guidance to the state courts is exceedingly limited.

The problems of implementing a threshold process barrier to federal habeas review are further complicated in that constitutional claims may impose varying demands for full and fair opportunity in the state courts. Consider, for example, post-*Gideon* claims alleging denial of counsel where the constitutional adequacy of waiver is the substantive issue.<sup>189</sup> Presumably, it is possible to

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omitted) or "whether the totality of previous proceedings furnished the defendant with a full and fair opportunity to litigate his case." *Id.* at 455, 462.

188. The only analogue suggested is the rather convoluted doctrine of independent and adequate state procedural ground. See *infra* note 195 and accompanying text.

189. *Gideon v. Wainwright*, 372 U.S. 335 (1963). See also *Johnson v. Zerbst*, 304 U.S. 458 (1937).

waive counsel without assistance of counsel,<sup>190</sup> but what procedures are adequate for an effective waiver? In this situation, the threshold inquiry and the merits are inseparable. The issue extends to the adequacy of state corrective process where counsel is present, since the factual findings on waiver will have been made without counsel. The adequacy of appellate consideration of the lower court's conclusion under these circumstances is also open to question.<sup>191</sup>

Separation of the merits from the threshold process determination may prove to be illusory in many other cases as well. In considering the threshold determination, the federal court must, of course, consider the underlying state court record reflecting resolution of the constitutional claim. That record conveys an indication of whether the claim was correctly decided. It is impossible to believe that a federal judge would be unaffected by his initial, albeit unexplored, impressions; they likely would influence his determination of whether process was adequate, especially where the process question is without clear precedent and is one whose resolution permits reconsideration of the underlying claim.<sup>192</sup>

Indeed, for some constitutional claims of paramount importance, adequacy of process is likely to require the most careful consideration and a seemingly correct resolution in the state courts. Consider, for example, capital cases in which substantial reliability-related claims are in issue. Pressure to continue federal oversight of the merits of such claims, even under a process-limited system, would be immense.<sup>193</sup> Similar insistence on correct resolution likely would define the boundaries of adequate state process for other claims which implicate particularly intensive national concern, such as racial discrimination in state criminal justice systems.<sup>194</sup> The ranking of federal constitutional claims that would be

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190. See, e.g., *Faretta v. California*, 422 U.S. 806 (1975); *Von Moltke v. Gillies*, 332 U.S. 708, 722-25 (1948); *Adams v. United States ex rel McCann*, 317 U.S. 269, 281-86 (1942) (Douglas J., dissenting). See also Bator, *supra* note 4, at 458.

191. Professor Bator has recognized the process difficulties inherent in these "double level" claims. *Id.* at 457-59, 459 nn.28 & 30. See also *infra* note 199.

192. See *supra* text accompanying note 183.

193. Under present practice, federal post-conviction habeas courts are particularly sensitive to comprehensive and careful review of death penalty cases. See *supra* note 29.

194. Indeed, the Court has recently refused to extend the limitations imposed on federal habeas review of fourth amendment claims by *Stone v. Powell* to claims of naked grand jury discrimination. See *supra* notes 101-02 and accompanying text; *Rose v. Mitchell*, 443 U.S. 545 (1979). It is unlikely that a different result would have been reached, even in the

implicit in such process determinations may or may not be objectionable. But it would certainly deprive a process standard of any semblance of uniformity or predictability.

These problems of application and predictability are not only substantial, but also strikingly similar to those encountered by the federal courts in assessing the "adequacy" of asserted state court procedural default as an independent and adequate state ground.<sup>195</sup> The myriad of problems revealed in that experience, including largely incoherent doctrine, should give pause before adoption of a system which presents substantially identical problems of clear and consistent application.

Professor Bator, relying principally upon *Frank v. Mangum*, posits a standard which apparently avoids most of these difficulties of application. In *Frank*, mob disorder alleged to have influenced judge and jury was rejected as grounds for a new trial by the state trial judge. The Georgia Supreme Court on reviewing the record, agreed with the trial judge and affirmed.<sup>196</sup> Under Professor Bator's reading of the case, habeas relief was denied, not because the federal court was convinced that the trial was fair and adequate, but because neutral corrective process which provided a fair opportunity for rectification was afforded in the Georgia Supreme Court.<sup>197</sup>

Under such an approach, the opportunity for correction in an appeal is paramount. Appellate review becomes a full and fair opportunity without more.<sup>198</sup> This certainly simplifies determination

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context of an unequivocal process-limited habeas system. See *supra* note 135.

195. See generally Hill, *supra* note 79. The adequacy of state procedural rules often turns on such diverse factors as the identity of the constitutional right which was at issue, the federal court's views as to the merits of that claim, and the severity of the sanction imposed. See, e.g., *Reece v. Georgia*, 350 U.S. 85, 89-90 (1955); *Williams v. Georgia*, 349 U.S. 375, 383 (1955); *Brown*, 344 U.S. at 552-54 (Black, J., dissenting); *id.* at 556-60 (Frankfurter, J., dissenting); *Patterson v. Alabama*, 294 U.S. 600, 606-07 (1935).

196. 237 U.S. at 332-33; see *Frank v. State*, 141 Ga. 243, 80 S.E. 1016 (1914).

197. Bator, *supra* note 4, at 483-87.

198. The precise role that opportunity for appellate correction plays in Professor Bator's proposal is not without question. Thus, he indicates that "if the conditions under which a question was litigated were not fairly and rationally adapted for the reaching of a correct solution of any issue of fact or law, there would seem to be no reason of principle to immunize the solution reached; that issue should be redetermined." *Id.* at 455 (emphasis added). He qualifies this proposition, however, with the assumption "that the question at issue—that is, the meaningfulness of the state's trial process—was not itself made the subject of a meaningful inquiry by the state courts." *Id.* at 457. Thus "corrective process" becomes, with limited exception, the only fair process required to validate the asserted defi-



of adequacy by focusing exclusively on the possibility that error will be corrected on appeal.<sup>199</sup> But it is plainly unacceptable as a means of determining whether there has been a full and fair opportunity for resolution of constitutional claims in the state courts. It amounts to accepting affirmance by a state appellate court without regard to the substantive and procedural rules of decision applied on appeal. Denial of an effective opportunity to demonstrate that a confession is coerced, or that a jury is selected by race, is quite alright so long as the appeals court approves the process employed. In such a system, federal judges are effectively limited to rubber-stamping state appellate opinions.<sup>200</sup> The unacceptability of such

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ciencies at prior levels of adjudication. See Friendly *supra* note 8, at 152 n.45. See *supra* note 191 and *infra* note 199 (for a discussion of two exceptions to the hegemony of appellate review in such a limited system of "corrective process").

199. *Frank*, even read as a "corrective process" decision, see *supra* notes 174-75, illustrates the limits of such a standard. The neutrality and objectivity of the jury and the trial court itself were attacked with allegations of mob domination and bias. The trial court rejected these claims after considering the evidence and denied a motion for a new trial. The Supreme Court of Georgia affirmed the conviction, rendering an exhaustive, detailed and lengthy formal opinion. See *Frank v. State*, 141 Ga. 243, 80 S.E. 1016 (1914). However, the adequacy of this "corrective process" as to the issue of mob domination is open to serious question. The Georgia Supreme Court affirmed the trial court's resolution of the pertinent allegations solely on the basis of the presence in the record of review of conflicting evidence which could support the denial of relief. *Id.* at 280, 282, 80 S.E. at 1032, 1033.

Appellate review of trial court findings of fact is always a difficult matter at best. Necessarily, limitations of paper review are reflected in standards of consideration which vest substantial reliance in the integrity and consistency of trial court resolution. When the very fairness and neutrality of the trial court's fundamental process is challenged, the exercise of this appellate oversight is particularly difficult. The findings of the challenged tribunal, and the affidavits and testimony of witnesses and jurors upon which they are based, must be suspect for the very reason that the integrity of the process has been challenged.

When viewed in this context, cogent support may be found for Justice Holmes' position in *Frank and Moore*, that, in cases where the relevant facts are indistinguishable from the merits of the legal claim, 237 U.S. at 347, and the integrity of the trial court has been challenged, the federal habeas court must conduct a factfinding hearing in order to ensure that reliable and fair factual determinations were made, *id.*; 261 U.S. at 92, unless some unchallenged state collateral factfinding procedure was employed. See *Bator*, *supra* note 4, at 457 n.28.

200. The problems of a rigorous "corrective process" system of habeas review are compounded by the prevailing practice of many appellate courts of affirming criminal convictions without opinion or in short memorandum orders which do not address all claims of error. See *supra* note 54 and accompanying text. By what means would the adequacy of such corrective process be tested? A generalized rule that process is inadequate under such circumstances would be at odds with the premises of the proposed system. It is also unlikely that a requirement that the federal habeas court consider the merits of the claims in order to test the adequacy of the unrationalized state appellate process would be acceptable, either in terms of theory or application, as an efficient threshold test. Rather it is most likely

formalism in determining when a prisoner is held in violation of the Constitution needs no further elaboration.

A unified process-limited federal habeas corpus system, regardless of the precise contours of the threshold barrier, presents serious difficulties of fair and consistent application. The functions of federal collateral review would be materially recast and the federal judiciary's role in defining the content of the constitutional criminal process would be substantially eliminated. While the judicial proposals mitigate these objections by limiting application of the process barrier to a class of disfavored constitutional claims, concerns of propriety and efficacy remain.

*C. Limiting the Scope of Federal Post-Conviction Habeas Corpus Jurisdiction by Permitting Discretionary Exclusion of Claims Predicated Upon Prophylactic Rules*

The remaining current proposal to restrict habeas posits judicial discretion to exclude constitutional claims founded on "prophylactic rules" where a utilitarian calculus indicates that the incremental enforcement benefits from habeas review are outweighed by the incremental costs of such review.<sup>201</sup> This economic assessment focuses on the particular social objective of the prophylactic rules under examination. Thus, while the proposal incorporates elements of both the reliability and state process barriers to habeas review, the proposal is considerably narrower.<sup>202</sup>

*Stone v. Powell*, the decision that places fourth amendment exclusionary claims outside the purview of federal habeas corpus where there has been an adequate opportunity for resolution in the state courts, is illustrative.<sup>203</sup> The Court in *Stone* observed that the exclusionary rule is not a "personal constitutional right" but rather "a judicially created means of effectuating [fourth amendment] rights,"<sup>204</sup> therefore, it permits flexibility in implementation.<sup>205</sup>

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that a nearly irrebuttable presumption of adequacy would be the rule, effectively precluding collateral consideration of even these claims.

201. See Halpern, *supra* note 187, at 36-41; Seidman, *supra* note 128, at 450-59. See also Schulhofer, *Confessions and the Court*, 79 MICH. L. REV. 865, 888-91 (1981).

202. See *infra* notes 231-33 and accompanying text.

203. 428 U.S. 465 (1976). See also *supra* notes 101-02 and accompanying text.

204. 428 U.S. at 486.

205. *Id.* at 487-89. In reaching its conclusion in favor of flexible application, the Court relied on prior decisions which permitted use of illegally seized evidence in grand jury proceedings, *United States v. Calandra*, 414 U.S. 338 (1974), and to impeach the testimony of a

Finding deterrence of police misconduct to be the only purpose of the exclusionary rule,<sup>206</sup> the Court concluded that the additional deterrence provided by habeas review is not worth the heavy costs exacted by post-conviction application.<sup>207</sup> Under this reading of *Stone*, when sub-constitutional prophylactic rules are invoked in federal habeas,<sup>208</sup> the court determines availability of review by assessing the instrumental benefits and costs of such review.<sup>209</sup>

Although narrower than the other proposals, this habeas restriction poses similar legitimacy and implementation problems. In particular, its nexus with the underlying statute and habeas his-

defendant, *Walder v. United States*, 347 U.S. 62 (1954). The imposition of standing limits on assertion of the defense was also noted. See *Brown v. United States*, 411 U.S. 223 (1973). See generally Halpern, *supra* note 187, at 6-8.

206. 428 U.S. at 484-85.

207. *Id.* at 489-95.

208. Reference to "subconstitutional prophylactic rules," in this Article includes judicially created remedies such as the exclusionary rule.

209. The precise meaning of *Stone* has provoked significant academic disagreement. Some commentators (see Cover & Aleinikoff, *supra* note 57, at 1086-87; Tushnet, *Constitutional and Statutory Analyses in the Law of Federal Jurisdiction*, 25 UCLA L. Rev. 1301, 1316-18 (1978)) have seen it as adopting the uniform reliability and process barrier advocated by Justice Powell (see *supra* note 99 and accompanying text). Others, seeking to take the Court at its word, have advanced a prophylactic rule interpretation. See *supra* note 201.

The Court's post-*Stone* habeas decisions have certainly not resolved the choice between these alternative understandings, or otherwise clarified its scope and implications for habeas. The Court declined the opportunity in *Rose v. Mitchell*, 443 U.S. 545 (1979), the decision upholding habeas review of grand jury discrimination claims. That decision was based on several material distinctions between claims of fourth amendment exclusion and grand jury discrimination. One "fundamental difference" identified was that fourth amendment exclusion claims are not "personal constitutional rights" but rather judicially-created remedies, while grand jury claims are a direct violation of the equal protection clause. *Id.* at 561. Another difference noted was that the state judiciary is implicated in grand jury selection, casting doubt on the possibility for full and fair consideration of the discrimination challenge. *Id.* The former difference suggests the narrow view of *Stone*, while the latter should only be relevant in a process/reliability context.

A similar unwillingness to identify the underlying doctrinal basis of *Stone* may be found in the dissenting opinion of Chief Justice Burger in *Brewer v. Williams*, 430 U.S. 387, 415 (1977). As did the majority opinion in *Rose v. Mitchell*, the Chief Justice offered alternative rationales for his position, the first of which is consistent with one view of *Stone* and the second of which is consistent with another.

First, characterizing the issue presented as a *Miranda* claim, the Chief Justice asserted that habeas corpus suppression after *Stone* was no longer automatic. Rather, a balancing process considering the costs and benefits to be accrued by collateral enforcement of the remedy is required. Alternatively, considering the claim from the context of the sixth amendment right to counsel, the Chief Justice asserted that since the police interrogation at issue had no adverse impact on the fundamental goal of safeguarding the fairness of the trial and the integrity of the factfinding process, he would have precluded habeas review. 430 U.S. at 415-29.

tory is tenuous at best.<sup>210</sup>

This discussion must begin with an exploration of prophylactic rules and of the Court's authority to establish them. Professor Monaghan's ambitious explanation characterizes such rules as a species of federal common law indirectly derived from the constitutional guarantees provided by the Bill of Rights.<sup>211</sup> Viewing such rules as judge-made federal law permits us to perceive a link between the prophylactic rule exclusion from habeas and a line of decisions limiting the writ.

Recall that, although the habeas statute for federal prisoners extends to claims of custody in violation of "the laws of the United States," only alleged violations of fundamental laws are cognizable.<sup>212</sup> The statute for state prisoners contains the same phrase and therefore is susceptible to the same limiting construction.<sup>213</sup> Violations of prophylactic rules are violations of the "laws of the United States"—constitutional common law. The section 2255 decisions would allow the Court to restrict collateral cognizability, within the dictates of the statute, to violations of "fundamental" prophylactic rules and to exclude the others.

But there is a basic difference between the section 2255 decisions and the prophylactic rule restriction, and this difference viti-

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210. None of the proponents of the prophylactic rule interpretation, including the Court's decision in *Stone* itself, has ever attempted to provide a creditable statutory underpinning for the limitation. See *supra* note 201 (for the primary academic proponents of a prophylactic rule interpretation).

211. See Monaghan, *The Supreme Court, 1974 Term Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1 (1975). Cf. Schrock & Welsh, *Up From Calandra: The Exclusionary Rule as a Constitutional Requirement*, 59 MINN. L. REV. 251 (1974) (the exclusionary rule is considered to be based on either the fourth amendment or the due process exclusionary right).

212. 28 U.S.C. § 2255 (1976). See also *supra* notes 115-17.

213. Little consideration has been given to the scope of jurisdiction provided to consider asserted violations of federal law, because of the very limited applicability of federal statutory law to state criminal prosecutions. See *United States ex rel. Esola v. Grooms*, 520 F.2d 830, 834-35 (3d Cir. 1975). The provisions of the Federal Wiretapping Statute, Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-20 (1976) do give an accused non-constitutional procedural rights in state criminal proceedings. Despite the relationship of the statutory wiretap suppression claim and the fourth amendment exclusionary rule, the wiretap claim has been found cognizable in federal habeas proceedings as a federal law claim. See, e.g., *Cruz v. Alexander*, 477 F. Supp. 516 (E.D.N.Y. 1979); *Losinno v. Henderson*, 420 F. Supp. 380 (S.D.N.Y. 1976) (Weinfeld, D.J.). *Cruz* and *Losinno* both applied the section 2255 limitation. Additionally, the Court, in *Davis* strongly suggested that its holding applied to state prisoner petitions as well as those filed by federal inmates. 417 U.S. at 344.

ates the latter's precedential foundation. The "fundamental laws" limitation on 2255 review refers to significant personal rights,<sup>214</sup> not costs and benefits under a utilitarian calculus. In contrast, the prophylactic rule exclusion inferrable from *Stone* is plainly and exclusively an economic cost-benefit analysis. This standard breaks the nexus between the prophylactic rule proposal and the construction of section 2255. Further, nothing else in the way of precedent or habeas history lends support or credence to determining availability by an assessment of social benefits and costs.<sup>215</sup>

Classification difficulties under a prophylactic rule limitation are formidable as well. The most significant problem is to develop objective, nondefinitional criteria for differentiation between rules derived from interpretation of primary constitutional rights and those appropriately classified as constitutional common law.

This inquiry begins with the fourth amendment exclusionary rule and two others: the custodial interrogation procedures established in *Miranda v. Arizona*<sup>216</sup> and the post-indictment right to counsel at line-up identifications established in *Wade v. United States*.<sup>217</sup> The Court itself has characterized all of these as prophylactic rules and has indicated that alternative safeguards may be substituted for them.<sup>218</sup>

*Miranda* and *Wade* principles apparently share a common objective: they seek to deter, through warnings and counsel, possibly illegal conduct that otherwise would be hard to detect and prove in court, such as subtle forms of coercion in interrogation and of sug-

214. See, e.g., *Hill v. United States*, 368 U.S. 424, 428 (1962).

215. This utilitarian cost-benefit analysis, which is the keystone of the prophylactic rule interpretation of *Stone*, is troublesome for reasons beyond the lack of statutory justification. The Court's analysis reveals that this purportedly neutral test for collateral application of prophylactic rules remains inherently subjective. In endeavoring to reject or credit the various values which the prophylactic rule in question is intended to serve, the Court predetermines the result of its balancing. Thus, once it had resolved that the only legitimate function of fourth amendment exclusion was deterrence of the police, and the values of judicial integrity and generalized systemic respect for the law were rejected, the result of *Stone* had been ordained. See 428 U.S. at 484-86. See also Cover & Aleinikoff, *supra* note 57, at 1092.

216. 384 U.S. 436 (1966).

217. 388 U.S. 218 (1967). See also *United States v. Ash*, 413 U.S. 300 (1973); *Kirby v. Illinois*, 406 U.S. 682 (1972).

218. See, e.g., *Brown v. Illinois*, 422 U.S. 590, 600-01 (1975); *Michigan v. Tucker*, 417 U.S. 433, 443-44, 446 (1974); *United States v. Wade*, 388 U.S. 218, 239 (1967); *Miranda v. Arizona*, 384 U.S. 436, 467 (1966). The commentators have likewise identified *Miranda* and *Wade* claims as archetypal prophylactic rules. See, e.g., Halpern, *supra* note 187, at 39-41; Monaghan, *supra* note 211, at 20-23; Schulhofer, *supra* note 197, at 888-91.

gestion in line-up identifications.<sup>219</sup> On this view, prophylactic rules are those fashioned to deter low-visibility conduct that may violate primary and personal constitutional rights. The problem with this criteria for identifying prophylactic rules is that it includes too much. Many first-order constitutional rules are designed to prevent low-visibility illegal conduct. The first amendment is replete with them.<sup>220</sup> Accordingly, the deterrent criteria fail to effectively isolate prophylactic rules. Professor Monaghan offers a different definition: "[T]he distinction between true constitutional rules and constitutional common law lies in the clarity with which the former is perceived to be related to the core policies underlying the constitutional provision."<sup>221</sup> One need not belabor the obvious problem with this definition: it is both uncertain and indeterminate in relying on "core policies" and the clarity of the relationship between such policies and the rule in question.<sup>222</sup> Is prevention of subtle coercion in interrogation, for example, clearly related to the core policy against use of involuntary confessions?

The uncertainty in this definitional process is particularly acute in respect to constitutional rules extending well-established primary rights into new areas or circumstances. Consider, for example, the right to counsel in pre-trial stages, as in *Massiah v. United States*, where the Court excluded inculpatory statements obtained surreptitiously by the state, after the commencement of legal proceedings, through use of a confidential informant without the presence of counsel.<sup>223</sup> Similarly, in *Brewer v. Williams*, the Court excluded statements obtained by police through post-indictment interrogation of the accused in the absence of counsel.<sup>224</sup>

Does the right to counsel provided in these decisions rest directly on a core policy or a remotely related prophylactic rule?<sup>225</sup>

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219. See 384 U.S. at 448, 466; 388 U.S. at 230-32, 235.

220. See Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67 (1960) (an old, but thorough discussion of first amendment rules designed to deter low-visibility conduct).

221. Monaghan, *supra* note 211, at 33.

222. Indeed, such a test bears similarity to the largely discredited flexible notions of due process and ordered liberty analysis that so complicated the Court's interpretations of the fourteenth amendment prior to its acceptance of the doctrine of selective incorporation. The core-policy analysis is open to the same wild swings in result engendered by the substantive due process approach.

223. 377 U.S. 201 (1964). See also *United States v. Henry*, 447 U.S. 264 (1980).

224. 430 U.S. 387 (1977).

225. Admittedly, the Court predicated its analysis in these decisions upon traditional

Effective assistance to the legally uneducated layman in preparing and presenting a defense within the specialized maze of the criminal process is a core policy of the right to counsel.<sup>226</sup> A subsidiary value, necessarily implicit, is to offset the advantages of the professional public prosecutor and thus to ensure the best informed resolution of guilt.<sup>227</sup> The reader may decide whether the *Massiah* principle is clearly related to these core policies.<sup>228</sup> The standard permits one to choose, but hardly compels a choice. The Court apparently acknowledges *Massiah* as sufficiently related to core policies in its post-*Stone* reaffirmation of such claims in federal habeas.<sup>229</sup> All that may be said with assurance is that the uncertainty surrounding the question graphically illustrates the problems in the application of a prophylactic rule exclusion.<sup>230</sup> It also casts further doubt on such an interpretation of *Stone*.

In addition, the effectiveness of a prophylactic rule exclusion as a limit to the scope of present habeas review beyond the fourth amendment is doubtful. Once the Court has surmounted the difficulties of characterization, most prophylactic rules will pass the cost-benefit barrier and continue to be cognizable in habeas. Consider the *Miranda* rule, for example, which is similar in its deterrent objective to the exclusionary rule.<sup>231</sup> Despite the similarity, a

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sixth amendment critical stage analysis and, unlike in *Miranda*, eschewed any mention of prophylaxis. See, e.g., *Henry*, 447 U.S. at 269-70; *Brewer*, 430 U.S. at 398-99; *Massiah*, 377 U.S. at 206. Should the application of a jurisdictional limit turn upon such a circular or definitional gambit? Once we venture beyond such factors, however, resolution of the source of the right is problematic.

226. See, e.g., *Henry*, 447 U.S. at 290-96 (Rehnquist, J., dissenting); *Brewer*, 430 U.S. at 425 (Burger, C.J., dissenting); *Gideon*, 372 U.S. at 343-44; *Powell*, 287 U.S. at 259, 68-69.

227. See, e.g., *Scott v. Illinois*, 440 U.S. 367, 377 (1979) (Brennan, J., dissenting); *Johnson v. Zerbst*, 304 U.S. 458, 462-63 (1938).

228. It certainly can be questioned whether the use of incriminating evidence obtained from an accused voluntarily after indictment without the presence of counsel readily implicates the need for professional assistance to guarantee a defendant's substantive or procedural rights. Nor does such interrogation of the accused seem to impede factual investigation and preparation of a defense by counsel. Indeed, it has been suggested that the most compelling justification mandating suppression of such evidence is that it deters inappropriate government deception and prevents "police interference with the relationship between a suspect and his counsel once formal proceedings have been initiated." 447 U.S. at 276 (Powell, J., concurring). See also 430 U.S. at 415 (Stevens, J., concurring).

229. E.g., *United States v. Henry*, 447 U.S. 264 (1981); cf. *Brewer v. Williams*, 430 U.S. 387 (1977).

230. See *supra* note 228.

231. Additionally, unlike the primary rights they protect, violations of both the *Mapp* and *Miranda* rules have been subjected to a balancing test. The public interest which would

cost-benefit assessment supports continued recognition in habeas.<sup>232</sup>

Since *Miranda* is intended to protect against involuntary custodial statements, thus implicating reliability concerns, the costs of collateral review are appreciably less than fourth amendment exclusionary rule application. The latter unquestionably impedes reliable factfinding. In addition, the comparative ease of judicial resolution of a *Miranda* claim, instead of a voluntariness claim, reveals significant benefits from recognition in habeas.<sup>233</sup> The exclusionary rule is not a replacement for a more cumbersome substitute.

These considerations, and the Court's refusal or inability to satisfactorily explain or apply *Stone*, suggest that the controversy concerning the significance of the decision to the future of federal habeas review is a tempest in an academic teapot. In the last analysis, *Stone* may be best understood as an *ad hoc* decision bot-tomed on general hostility to the fourth amendment exclusionary rule.<sup>234</sup> As such, it does not support or portend a limit on habeas jurisdiction, either directly through a reliability and process restriction, or derivatively under a prophylactic rule analysis.

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be harmed if the rules were to be given effect in a particular situation has been compared with the incremental deterrence to conduct against which the rules are directed, and the rules have been ignored if the resultant harm exceeded the deterrence value. Compare *Michigan v. Tucker*, 417 U.S. 433, 443-52 (1974), *United States v. Calandra*, 414 U.S. 338, 347-55 (1974), *Harris v. New York*, 401 U.S. 222 (1971) (the fourth amendment exclusionary rule and *Miranda* relate to deterrent effect on police and do not totally proscribe the collateral use of illegally seized evidence) with *New Jersey v. Portash*, 440 U.S. 450, 459 (1979); *Mincey v. Arizona*, 437 U.S. 385, 398 (1978) (violation of a fundamental constitutional right prevents any use of the resulting evidence).

232. Despite a strident call to extend *Stone* to *Miranda* claims, see 430 U.S. at 415-29 (Burger, C.J., dissenting), the Court has not even addressed the question. Circuit courts which have considered the question have generally rejected any such extension. See, e.g., *White v. Finkbeiner*, 687 F.2d 885 (7th Cir. 1982) (refusing to extend *Stone* under a prophylactic rule analysis); *Patterson v. Warden, San Louis Obispo*, 624 F.2d 69 (9th Cir. 1980) (per curiam); *Wilson v. Henderson*, 584 F.2d 1185, 1189 (2d Cir. 1978), cert. denied, 442 U.S. 945 (1979); *Smith v. Wainwright*, 581 F.2d 1149, 1151 (5th Cir. 1978); *United States ex rel Henne v. Fike*, 563 F.2d 809, 812 (7th Cir. 1977) (per curiam), cert. denied, 449 U.S. 860 (1980).

233. 384 U.S. at 466.

234. See generally Boyte, *Federal Habeas Corpus After Stone v. Powell: A Remedy Only For the Arguably Innocent?*, 11 U. RICH. L. REV. 291, 311-15 (1977); Soloff, *Litigation and Relitigation: The Uncertain Status of Federal Habeas Corpus for State Prisoners*, 6 HOFSTRA L. REV. 297, 307-09 (1978).



## CONCLUSION

Recently Supreme Court Justices have added their powerful voices to the perennial criticism in Congress of broad habeas coverage. This, the proliferation of proposals, and the intensity of renewed attacks on broad coverage foretell imminent change. This Article has identified and elaborated on the reasons why adoption of any of the current proposals for modifying habeas is unwarranted and unwise.

The Justices advocating change have not provided persuasive justification for ignoring the force of a long-settled statutory interpretation that Congress has implicitly accepted on several occasions. Moreover, the particular proposals the Justices urge have little, if any, credible support in the historical understandings of the writ or prior practices. Accordingly, the constraints of acceptable judicial law-making should not yield to transient perceptions of better judicial or social policy.

Necessity may be the mother of invention, but the need for substantial revision of habeas rests on a porous foundation. Empirical evidence establishing the posited costs of current practice is sorely lacking; figures on the volume of petitions and their disposition indicate that the burdens of habeas are far less onerous than commonly supposed.

Equally important, the current proposals are not likely to work an improvement. The feasibility and application problems they present impose systemic costs that may well exceed the uncertain burdens of broad habeas review. On the other hand, the benefits associated with these proposals are nearly certain to be fewer than those associated with broad habeas review. Predictable and coherent law will be the initial victim of the attempt to implement the particular limits in the various proposals.

To be sure, equally little is known about the actual costs and benefits of current practice. It is that lack of empirical knowledge, and its apparent availability at tolerable costs, that cautions against immediate legislative change. The prime task for Congress is to separate rhetoric from reality by obtaining a reliable assessment of the benefits and burdens of current practice based on data and information rather than assertion.<sup>235</sup> Such information may

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235. The question of the appropriate scope of federal habeas review of final state court convictions has assumed proportions unrelated to its true dimensions. *Brown* has been at-

support legislative change, but the changes so indicated may well differ from the Justices' proposals. Because the writ of habeas corpus is a "fundamental guarantee of liberty" in Anglo-American law and culture,<sup>236</sup> deliberate and careful inquiry should precede redefinitions of the scope and reach of this ancient remedy.

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tacked in the press by popular commentators as an abuse which substantially impedes an effective criminal justice system. *See, e.g.,* Schlafly, *Misuse of Habeas Corpus in Courts is Criminal*, Buffalo Evening News, May 6, 1982, at B-3 col. 1; Kilpatrick, *Time to Call Cons' Great Writ Game*, Buffalo Courier Express, 1982. Proposals to sharply curtail present habeas practice have been the cornerstone of recent legislative attempts to address the national problems of prevention, detection, and punishment of crime. *See* Radio Address to the Nation on Crime and Criminal Justice Reform, President Ronald Reagan (Sept. 11, 1982); S. 2903, 97th Cong., 2d Sess. (1982). Limiting *Brown* may or may not be prudent and wise, but it is most unlikely that even the elimination of federal collateral review would materially affect crime prevention and punishment. *See supra* text accompanying notes 24-50. If such a policy motivates change, a decision to limit the scope of habeas will be reached on the basis of concerns not implicated by actual habeas practice. Moreover, political energies and popular attention are being misdirected; away from such vital concerns as increased funding and assistance for enforcement and detection, and the creation of additional judicial and correctional resources.

236. *Rose v. Lundy*, 102 S. Ct. at 1218 (Stevens, J., dissenting).

