THE THEORIES OF FEDERAL HABEAS CORPUS

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The Supreme Court faces a stability crisis in its habeas corpus jurisprudence. In the last two Terms, the Court has considered overruling several well-entrenched doctrines. The Court has reconsidered whether *Miranda* claims may be heard during federal habeas review;[1] whether error must be proven harmless beyond a reasonable doubt in order for it to be overlooked by a federal habeas court;[2] and whether federal review of "mixed" questions of law and fact should be non-deferential.[3] The results have been mixed. The Court ultimately reaffirmed that *Miranda* may be heard in federal habeas proceedings, but it overruled the applicability of the reasonable doubt standard to harmless error analysis on habeas, and it altogether dodged the question of how much deference federal habeas courts owe to state court applications of law to fact.

Part of the instability in habeas jurisprudence is attributable to the changing membership of the Court. As with criminal procedure generally, many of the Warren Court's innovations have been abolished or at least rolled back to some degree. But—at least with respect to habeas—more is involved than a shift in the political views of those who have been appointed to the Court. Several justices have had an unusual degree of difficulty sorting out their thoughts about the underlying purposes of federal habeas jurisdiction. Each of several justices has endorsed or relied upon theories that are hard to reconcile with one another. In the last habeas case of his Supreme Court tenure, Justice White lamented that "[o]ur habeas jurisprudence is taking on the appearance of a confused patchwork."[4] Justice White is right. The Court's theories of habeas point in virtually every direction.[5] No wonder even the most well-entrenched doctrines now

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1. *See* Withrow v. Williams, 113 S. Ct. 1745 (1993).
2. *See* Brecht v. Abrahamson, 113 S. Ct. 1710, *reh'g denied*, 113 S. Ct. 2951 (1993).
3. *See* Wright v. West, 112 S. Ct. 2482 (1992).
4. *Brecht*, 113 S. Ct. at 1728 (White, J., dissenting).
5. One leading habeas scholar, Professor Barry Friedman, has written that "[t]he Court evidently has lost track of the purpose of the writ of habeas corpus. Without an enunciated purpose, habeas doctrine has lost its way." Barry Friedman, *A Tale of Two Habeas*, 73 MINN. L. REV. 247, 252 (1988)

seem open to reconsideration.

The most completely developed theory of habeas is the process-only model (process), originally articulated by Professor Paul Bator.[6] It is also the stingiest theory in the sense that it would bar federal habeas relief except in a narrow range of circumstances. The process theory holds that federal habeas relief is justifiable only insofar as state courts have failed to accord the petitioner a full and fair hearing on her federal constitutional claims. Put differently, a court should not grant federal habeas relief unless there has been some monstrous abridgment in state court process. If, for example, the trial judge had permitted an angry mob demanding a conviction to dominate the trial, that would justify the intervention of a federal habeas court.[7] Or, if the judge had forced the petitioner to represent herself at trial after she had requested a lawyer, the federal habeas courts could not stand idly by. In either of these scenarios, one could not say in any meaningful sense that the state courts had afforded the petitioner a "full and fair" hearing.[8]

Procedural defects any less grave, however, do not justify federal habeas relief, according to the process theory. The mere fact that the trial court admitted illegally seized evidence does not undermine the reliability of fact-finding to the point where federal habeas relief is warranted, even if state courts themselves are required to provide a remedy. Nor, if a trial court were to admit a confession despite the absence of *Miranda* warnings, would that justify the intervention of a federal habeas court. Even if the petitioner could prove that she never committed the crime, a federal court would not be justified in granting relief unless she had been convicted by something less than a full and fair *process*. According to the process theory, the federal habeas courts cannot take it upon themselves to judge guilt or innocence. If the petitioner's case is compelling enough, the governor can always grant clemency.[9] The federal habeas courts must confine themselves to correcting fundamental deprivations of process.

A second theory, as articulated by Judge Henry Friendly, is the process-plus-innocence theory (innocence). This theory begins with the process-

(footnote omitted).

6. Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441 (1963).

7. *See, e.g.*, Moore v. Dempsey, 261 U.S. 86 (1923).

8. Neither Professor Bator nor any of the justices who have advocated his theory have ever offered a general definition of "full and fair."

9. *See* Herrera v. Collins, 113 S. Ct. 853, 866, *reh'g denied*, 113 S. Ct. 1628 (1993).

based assumption that federal habeas courts may intervene when state courts have denied a full and fair hearing. However, unlike the process theory, the innocence theory denies that it is either futile or improper for federal habeas courts to intervene on behalf of a petitioner who has made a colorable showing of innocence. As a result, the innocence theory recognizes two quite different situations in which federal intervention is justified—when the petitioner has been denied a full and fair hearing by the state courts *or* when a full and fair state court adjudication has nonetheless produced the conviction of an innocent person.

According to the innocence theory, federal habeas courts are the final guardians of procedural integrity in criminal proceedings *and* they act as a safety net to catch the few truly innocent people who have slipped through the cracks of generally adequate procedure. The innocence theory limits federal habeas to those two functions. The federal habeas courts may not intervene to correct constitutional errors unless they are so fundamental that the petitioner has been denied a full and fair hearing or unless the petitioner can show that she is probably innocent (and that the constitutional errors have caused her wrongful conviction).[10]

Both the process and innocence theories condone federal habeas relief only under narrow circumstances. At the other end of the spectrum lies the "federal forum" theory, variants of which have been embraced by Justice Brennan and Professors Barry Friedman,[11] James Liebman,[12] and Larry Yackle.[13] This theory holds that the habeas statute guarantees a federal forum for every claim of non-harmless constitutional error by a state convict. According to this theory, there exists a "clear congressional policy of affording a federal forum for the determination of the federal claims of state criminal defendants."[14] This policy flows from the "institutional setting in which state courts address Fourteenth Amendment claims."[15] Because the "overriding responsibility of the state courts to carry out state

10. Judge Friendly also advocated federal habeas review of a limited set of claims that usually relate to the accuracy of factfinding, such as denials of counsel and the assertion of facts not in the record. Henry Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142, 151-54 (1970).

11. *See generally* Friedman, *supra* note 5. Professor Friedman's theory is less inclusive than the other federal forum theories. *See infra* part II.C.

12. *See* JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE 5-24 (1988); *see also* Michael E. Tigar, *Habeas Corpus and the Penalty of Death*, 90 COLUM. L. REV. 255, 268-69 (1990) (reviewing Liebman).

13. *See* Larry Yackle, *Explaining Habeas Corpus*, 60 N.Y.U. L. REV. 991 (1985).

14. Fay v. Noia, 372 U.S. 391, 418 (1963).

15. Yackle, *supra* note 13, at 1031.

law . . . deprives them of the neutrality and dispassion demanded for contemporaneous enforcement of the Fourteenth Amendment,"[16] a federal trial court must be available to review each constitutional claim.

A fourth explanation for federal habeas review is based on the prospect of deterrence. The deterrence theory insists that federal habeas courts grant relief whenever the likelihood of deterring future state court constitutional violations outweighs the institutional and societal costs of granting relief. The deterrence theory indulges in the empirical supposition that state court judges generally wish to minimize the vulnerability of their judgments, not only to reversal on direct appeal, but also to collateral attack. The supposition runs like this: a small but significant number of state court judges has never quite accepted certain of the Warren Court's criminal procedure decisions; they consciously "underenforce" the rights recognized by such decisions; they feel confident that state appellate courts will not reverse them on these grounds; and they know that the odds of plenary review in the United States Supreme Court are infinitesimal. A much larger number of state court judges accepts and respects the Supreme Court's criminal procedure edicts, but from time to time considerations of economy and convenience tempt such judges to cut corners on enforcement. Even more commonly, these judges do not always do their best to keep track of where the Court's criminal procedure decisions are headed. According to the deterrence theory, the ready availability of federal habeas review encourages greater effort by state judges to toe the constitutional line. The deterrence theory of habeas has made sporadic and sketchy appearances in some of the Court's opinions but to date has had no scholarly champion.

This Article makes two principal arguments. First, the best interpretation of the federal habeas corpus statute would not embrace any of the above-mentioned theories to the exclusion of all others. To some degree, the Court has had trouble settling on a theory of habeas because the theories under consideration are oversimple. What makes the most sense is a hybrid approach to habeas jurisdiction. This hybrid theory would hold that federal habeas relief is justified whenever: (1) state courts have failed to accord the petitioner's constitutional claims a full and fair hearing; (2) the petitioner has made a colorable showing of innocence and that a constitutional violation may have caused the conviction; *or* (3) when the likelihood of deterring future constitutional violations outweighs the costs of relief.

16. *Id.* at 1031-32.

Federal habeas relief would be impermissible in the absence of one of these three circumstances. Adoption of this hybrid theory would move the Court toward stability in its habeas jurisprudence.

Second, the Article focuses on how the third prong of the hybrid theory—the deterrence concept—would work in practice. Although there is room for disagreement about precisely how much deterrence would result from particular grants of habeas relief and about the costs of such relief, I believe that the deterrence theory would eventually become a powerful force in favor of relatively broad federal habeas review. I believe this because the very adoption of the deterrence theory presupposes a skepticism about state court willingness and ability to vindicate constitutional rights. It also presupposes federal district court competence in correcting such errors. Given these suppositions, some of the important factors that would otherwise have to be weighed in a deterrence balancing test—such as "traditional notions of judicial federalism"—must be categorically ruled out. The likely result is expansive habeas review for most types of constitutional claims.

The Article is organized as follows. Part II surveys some of the most important habeas decisions of the last two Terms with emphasis on how they mesh with the theories of federal habeas corpus. The process, innocence, and deterrence theories all find some support in these decisions, but none can make a legitimate claim to dominance, much less exclusivity. Part III advances the normative argument against granting any of the theories exclusivity.[17] The most sensible tack would be an integrative theoretical approach to federal habeas review. Finally, Part IV illustrates how this integrative theoretical approach might shake out in practice. This Article surveys four major questions in habeas jurisprudence: (1) how much deference does a habeas court owe to state courts' findings of "mixed" questions of law and fact; (2) may *Miranda* and *Mapp* claims be litigated during federal habeas review; (3) may a federal habeas court apply new rules of criminal procedure retroactively; and (4) under what circumstances may successive federal habeas petitions be brought? Although a thorough analysis of how the hybrid theory would apply to each of these doctrinal areas cannot be accomplished in a single article, I venture to suggest that

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17. By arguing against the recognition of a single theory, I do not mean to endorse "legal pragmatism" or "practical reasoning." In particular, I do not mean to identify myself with "antifoundationalism," which I take to be a general rejection of the need to base action on principle. The hybrid theory that I offer here rests on a "foundational" premise; the theory simply is not as elegant as it would be if it embraced a single concept.

the deterrence prong of the theory would result in surprisingly expansive review for each of these areas.

II. THE THEORIES OF FEDERAL HABEAS CORPUS

A. Process

According to traditional wisdom,[18] the modern age of federal habeas corpus dawned in 1953 with the decision in *Brown v. Allen.*[19] There, the Court held that the normal law of preclusion does not apply to federal habeas proceedings. Under *Brown*, a federal habeas court generally must permit the petitioner to relitigate even issues previously accorded a full and fair adjudication in state court. In his influential separate opinion, Justice Frankfurter got straight to the heart of the matter—the fact that Congress had enacted a statute empowering the federal district courts to grant writs of habeas corpus to prisoners in state custody. "Congress could have left the enforcement of federal rights governing the administration of criminal justice in the States exclusively to the State courts," Justice Frankfurter noted. Indeed, he further noted that no federal court had jurisdiction to issue a writ of habeas corpus to a state prisoner until 1867.[20] However, in the Habeas Corpus Act of 1867, Congress broke with history and gave such jurisdiction to the federal courts.[21] Justice Frankfurter concluded that if this jurisdiction was to mean anything, the federal habeas courts could not simply accord complete deference to state court adjudications. "All that has gone before is not to be ignored as irrelevant," Justice Frankfurter stated. "But," he added, "the prior State determination of a claim under the

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18. The traditional view of *Brown* as revolutionary may be on its way out. *See, e.g.*, James Liebman, *Apocalypse Next Time?: The Anachronistic Attack on Habeas Corpus/Direct Review Parity*, 92 COLUM. L. REV. 1997, 2083 (1992) (noting that principles catalogued in *Brown* "already were long established"); Ann Woolhandler, *Demodeling Habeas*, 45 STAN. L. REV. 575, 631 & n.327 (1993).

19. 344 U.S. 443 (1953).

20. This is not quite accurate. On two previous occasions Congress granted piecemeal jurisdiction to review the legality of state custody. The Act of March 2, 1833, 4 Stat. 634 (the Force Act of 1833), gave federal courts authority to grant habeas on behalf of any prisoner detained for any act done "in pursuance of a law of the United States." The Act of Aug. 29, 1842, ch. 257, 5 Stat. 539, authorized federal courts to grant habeas in certain cases involving prisoners who are "subjects or citizens of a foreign State, and domiciled therein" and are held under federal or state law.

21. In 1868, Congress tried to repeal the Supreme Court's jurisdiction over habeas for state prisoners. Act of March 27, 1868, 15 Stat. 44. This succeeded in preventing the Court from taking the appeal in *Ex Parte* McCardle, 74 U.S. (6 Wall.) 506 (1868), but the Court later held that the repealer act did not remove the Court's certiorari power to review a lower federal court's denial of habeas. *Ex Parte* Yerger, 75 U.S. (8 Wall.) 85 (1868).

United States Constitution cannot foreclose consideration of such a claim, else the State court would have the final say which the Congress, by the Act of 1867, provided it should not have."[22]

Brown facilitated a great expansion in the role of lower federal courts reviewing state convictions. But in 1963, the late Professor Paul Bator wrote an article strongly critical of *Brown v. Allen*.[23] Professor Bator's critique proceeded along two lines—historical and functional. The historical critique, in a nutshell, was that *Brown* had created from whole cloth the notion that the proper function of federal habeas review was to provide a determination of the merits of all federal constitutional claims arising in state criminal proceedings, no matter how fully those claims had been considered by state courts.[24] Professor Bator undertook a lengthy and seemingly exhaustive survey of the history of federal habeas jurisdiction since the founding.[25] It showed that, contrary to the new orthodoxy emerging from *Brown v. Allen*, federal habeas courts relitigated claims first adjudicated by state courts only when the state courts lacked jurisdiction or when they failed to afford a full and fair process. In other words, according to Professor Bator, the license that *Brown v. Allen* granted federal habeas courts to review any federal claim was almost totally without historical warrant.

Professor Bator's functional argument proceeded along a line parallel to his historical analysis. He began with the epistemological premise that we can never really know whether a court has reached the "correct" result in any given case or with respect to any particular issue:

> Assuming that there "exists," in an ultimate sense, a "correct" decision of a question of law, we can never be assured that any particular tribunal has in the past made it: we can always continue to ask whether the right rule was applied, whether a new rule should have been fashioned. Surely, then, it is naive and confusing to think of detention as lawful only if the previous tribunal's proceedings were "correct" in this ultimate sense.[26]

In other words, there may well be such a thing as hard-edged "truth" in a metaphysical sense,[27] but no amount of litigation or relitigation can ever guarantee that we will find it.

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22. *Brown*, 344 U.S. at 500 (opinion of Frankfurter, J.).
23. Bator, *supra* note 6.
24. Bator, *supra* note 6, at 463-499.
25. Professor Bator limited his analysis to relitigation of claims first determined in state court. He expressly disclaimed any attempt to analyze the area of state procedural defaults. *Id.* at 444 & n.5.
26. *Id.* at 447.
27. *Id.* at 448 n.12.

Professor Bator conceded that continuous relitigation may stand a better chance of approximating correct results than would simply resting on the first adjudication.[28] However, he pointed to countervailing considerations—inefficiency and the postponement of finality in criminal proceedings.[29] "Why should we duplicate effort?" Professor Bator asked.[30] Not only does duplication squander economic resources, but "all of the intellectual, moral, and political resources involved in the legal system."[31] The postponement of finality in criminal adjudication exacts different costs. The knowledge that federal courts will ultimately call the shots is "subversive of a [state] judge's sense of responsibility, of the inner subjective conscientiousness which is so essential a part of the difficult and subtle art of judging well."[32] Moreover, finality plays a special role in the criminal law where we expect punishment to deter future wrongdoing:

> Surely it is essential to the educational and deterrent functions of the criminal law that we be able to say that one violating that law will swiftly and certainly become subject to punishment, just punishment. Yet this threat may be undermined if at the same time we so define the processes leading to just punishment that it can really never be finally imposed at all.[33]

Thus, according to Professor Bator, the dubious claim of greater "accuracy" in criminal adjudication hardly justifies the serious costs in terms of efficiency and finality occasioned by a general rule permitting relitigation on habeas.

Professor Bator's historical argument was considered by the Supreme Court almost immediately in *Fay v. Noia*.[34] Writing for the majority, Justice Brennan squarely rejected the notion that *Brown v. Allen* was the first time the Court had approved general relitigation of federal issues on

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28. *Id.* at 451.

29. *Id.* at 451-53. It should be noted that all federal habeas proceedings are denominated civil, even though they usually are invoked to test the legality of custody resulting from criminal prosecutions. Other uses of the writ include challenging civil confinement in an institution, a deportation order, an extradition order, or a conviction by a military court. *See* ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 15.2, at 682 (1989).

30. Bator, *supra* note 6, at 451.

31. *Id.*

32. *Id.* This rationale is greatly reminiscent of one of the arguments made in favor of *Younger* abstention. *See* CHEMERINSKY, *supra* note 29, § 13.2, at 629. For a critique of this view, *see* Michael Wells, *The Role of Comity in the Law of Federal Courts*, 60 N.C. L. REV. 59, 70 n.65 (1981).

33. Bator, *supra* note 6, at 452.

34. 372 U.S. 391 (1963). Here I use the shorthand "historical argument" to refer to the discrete and distinctive portion of Professor Bator's historical analysis—*i.e.*, that (prior to *Brown v. Allen*) relitigation in federal habeas was limited to jurisdictional defects and cases in which the petitioner did not receive a full and fair adjudication of federal rights by the state courts.

habeas.[35] But Justice Harlan's dissent clearly accepted Professor Bator's historical argument: "Prior to *Brown v. Allen*, habeas corpus would not lie for a prisoner who was in custody pursuant to a state judgment of conviction by a court of competent jurisdiction if he had been given an adequate opportunity to obtain full and fair consideration of his federal claim in the state courts."[36]

From its inception, then, the historical argument behind the process theory engendered sharp disagreement among members of the Court. Because the disagreement centers on a purely descriptive analytical task, one might have expected that the passage of time would have resolved the controversy. It has not. The players have changed, but disagreement over the accuracy of Professor Bator's historical analysis still deeply divides the Court. This was made crystal clear in *Wright v. West*,[37] decided two Terms ago.

1. Wright v. West

On December 16, 1991, the Supreme Court granted certiorari to review the Fourth Circuit's judgment in *West v. Wright*.[38] The case looked like an odd choice for plenary review; it appeared the only issue was whether the evidence had been sufficient to convict the petitioner of grand larceny. But any mystery surrounding the grant of certiorari soon dissipated. Just two days later, the Court amended its order granting certiorari to request briefs on the following question:

> In determining whether to grant a petition for a writ of habeas corpus by a person in custody pursuant to a judgment of a state court, should a federal court give deference to the state court's application of law to the specific facts of the petitioner's case or should it review the state court's determination de novo?[39]

The issuance of this order knocked the habeas corpus world on its ear. Once a case has advanced beyond the trial court, it is quite unlikely that the result will ultimately turn either on an abstract question of law (*e.g.*, must custodial interrogation cease upon request?)[40] or on a simple question of historical fact (*e.g.*, did the officers, within earshot of the suspect, lament

35. *Id.* at 421-22 n.30.
36. *Id.* at 459-60 (Harlan, J., dissenting).
37. 112 S. Ct. 2482 (1992).
38. 931 F.2d 262 (4th Cir. 1991).
39. 112 S. Ct. 672 (1991).
40. *See* Miranda v. Arizona, 384 U.S. 436, 473-74 (1966).

that some innocent child might stumble onto the murder weapon and accidently hurt herself with it?).[41] Rather, the great likelihood is that the final disposition of the case will depend on the application of a settled proposition of law to a relatively settled version of what happened: if the police tried to elicit a confession by making the suspect feel guilty, even though they asked no direct questions, did they nonetheless conduct an "interrogation"?

If federal habeas courts were required to defer to the findings of state courts on all questions of this sort, the nature of federal habeas review would change drastically. Combined with the statutory requirement that federal habeas courts give great deference to state court findings regarding historical facts[42] and with the rule of *Teague v. Lane* prohibiting the application of new rules of law on collateral attack,[43] a requirement of deference with regard to law application would render federal habeas review an empty formality for virtually everyone other than victims of outright state court vendettas. The sheer magnitude of the question that the Court had propounded brought a flood of amicus briefs and press attention.

However, the reports of habeas' death proved to be exaggerated. The Court decided the case on the sufficiency of the evidence issue. The momentous question that the Court had specially propounded did not need to be reached. Whether the Court gave absolute deference or no deference to the state court finding of sufficiency, the conviction had to be upheld.[44] Thus, the great case of *Wright v. West* ultimately decided nothing about the future of habeas corpus.

What makes the case of continuing interest is the *way* in which the Court decided nothing. Before concluding that it was unnecessary to pass on the question of how much deference is owed state court findings regarding law application, Justice Thomas' opinion laid down a comprehensive theory of federal habeas review, drawing a sharp response from Justice O'Connor and a revealing response from Justice Kennedy. *Wright v. West* may have settled nothing, but it graphically illustrates the chasm with respect to the historical argument that underlies the process theory.

Justice Thomas announced the judgment of the Court in an opinion joined only by Chief Justice Rehnquist and Justice Scalia. Despite his

41. *See* Rhode Island v. Innis, 446 U.S. 291, 294-95 (1980).

42. *See* 28 U.S.C. § 2254(d) (1988).

43. *See infra* part IV.D.

44. The Court did not explain why this proposition was not evident from the petition for certiorari and opposition brief.

statement that it was unnecessary to reach the standard of review issue, Justice Thomas thoroughly recited the history of federal habeas relitigation of state court findings. Walking in Professor Bator's footsteps, he began his discussion by noting that, throughout most of the 19th Century, habeas was available to attack a conviction only on the ground that the trial court lacked jurisdiction. Toward the end of the 19th Century and in the early 20th Century, the Supreme Court began to expand the scope of what could be relitigated on federal collateral review. In *Ex Parte Siebold*,[45] the Court permitted the use of habeas to attack a conviction rendered pursuant to an unconstitutional statute. In *Ex Parte Lange*,[46] the Court allowed the habeas petitioner to challenge a sentence that was beyond the statutory authorization. In *Moore v. Dempsey*,[47] the Court invalidated a conviction resulting from a mob-dominated trial. Thus, according to Justice Thomas, as late as 1953, the rule was that a federal habeas court could relitigate matters only under exceptional circumstances.

That changed markedly with the Court's landmark decision in *Brown v. Allen*.[48] Justice Frankfurter's opinion stated that the normal rules of preclusion generally do not apply on federal habeas review. In particular, Justice Frankfurter had emphasized that neither state court determinations with respect to "pure" matters of law or matters of law application were binding on federal habeas courts.[49] According to Justice Thomas, however, *Brown* went no further than to establish that federal habeas courts have the *discretion* to consider de novo applications of law to facts performed by state courts. Moreover, Justice Thomas stated that *Brown* did not support the proposition that a federal habeas court is required to conduct a de novo review of state court law application. He insisted that it was only the Court's own sloppy dictum in *Townsend v. Sain*[50] that had attributed a mandatory de novo standard of review to *Brown v. Allen*. The Court had never corrected this error and the rule of mandatory de novo review of mixed questions of law and fact was authoritatively adopted in *Miller v. Fenton*.[51] The tone of Justice Thomas' opinion left little doubt that he, Chief Justice Rehnquist, and Justice Scalia believe the error should

45. 100 U.S. 371, 377 (1880).
46. 85 U.S. (18 Wall.) 163 (1873).
47. 261 U.S. 86, 91-92 (1923).
48. 344 U.S. 443 (1953).
49. *Id.* at 506-07.
50. 372 U.S. 293, 318 (1963).
51. 474 U.S. 104, 112 (1985).

be corrected.[52]

Justice Thomas' opinion in *Wright v. West* adopted Professor Bator's historical analysis lock, stock, and barrel.[53] As noted above, Justice Thomas began with the assertion that federal habeas review of state prisoners' convictions was originally limited to cases in which the state courts lacked jurisdiction. Although the category of "jurisdictional" defects was expanded to include the violation of a select group of other procedural norms, Justice Thomas maintained that, prior to *Brown v. Allen*, a federal habeas court would not relitigate federal claims unless the state courts had failed to afford full and fair consideration.[54] In support of this proposition, Justice Thomas cited Justice Harlan's dissent in *Fay v. Noia* and Professor Bator's article.[55]

Justice O'Connor, joined by Justices Blackmun and Stevens, concurred in the judgment only. Her opinion was a staccato burst of criticisms aimed at Justice Thomas' opinion. Foremost was her criticism of Justice Thomas' historical analysis.[56] Justice O'Connor acknowledged that, prior to *Brown v. Allen*, federal habeas petitioners could not relitigate federal claims that had received full and fair consideration by state courts. However, this was not because of any rule peculiar to habeas jurisdiction. Justice O'Connor stated that, for most of the period prior to *Brown v. Allen*, the only federal rights that a criminal defendant possessed were the explicit guarantees of

52. Justice Thomas did not formally argue for the overruling of mandatory de novo review for state court law application; he declined to decide this "far-reaching issue." Instead, he attributed the arguments for deferential review of mixed questions to the government. However, in attacking these arguments, Justice O'Connor seemed to credit Justice Thomas, and, in defending them, Justice Thomas did appear to adopt the arguments. *See Wright*, 112 S. Ct. at 2487-92 nn.3-9.

53. *See* LIEBMAN, *supra* note 12, at 2013. Justice Thomas' normative argument in favor of restricted relitigation does not appear not to have been consciously borrowed from Professor Bator's article. Nevertheless, it paralleled Professor Bator's functional argument in one important respect—efficiency. Justice Thomas pointed to several areas in which the degree of scrutiny exercised by reviewing courts differs as between direct appeals and collateral attack, including retroactivity, right to counsel, and the exclusionary rule. According to Justice Thomas, "These differences simply reflect the fact that habeas review 'entails significant costs.'" *Wright*, 112 S. Ct. at 2491 (quoting Engle v. Isaac, 456 U.S. 107, 126 (1982)). He also stated that "we have emphasized that these costs, as well as the countervailing benefits, must be taken into consideration in defining the scope of the writ." *Id.* In support of this observation, he cited, *inter alia*, Justice Powell's opinion in *Stone v. Powell*, 428 U.S. 465 (1976). *Wright*, 112 S. Ct. at 2491. In sum, there is considerable evidence that Justice Thomas subscribes to Professor Bator's "process" theory of habeas, or reasonable facsimile.

54. *Wright*, 112 S. Ct. at 2486.

55. *Id.*

56. Justice O'Connor's critique of the Thomas/Bator historical analysis is almost identical to that of Professor Gary Peller. *See* Gary Peller, *In Defense of Federal Habeas Corpus Relitigation*, 16 HARV. C.R.-C.L. L. REV. 579 (1982).

the Fourteenth Amendment—most notably, due process. Due process *itself* guaranteed a full and fair hearing by state courts but nothing more.[57] Even on direct appeal a criminal defendant could not relitigate federal claims that had been given full and fair consideration at trial because no such federal rights existed. Thus, Justice O'Connor asserted, the history of federal habeas does not support the proposition that, prior to *Brown v. Allen*, federal habeas courts were specially disabled from relitigating state court determinations made pursuant to full and fair process.[58]

2. Brecht v. Abrahamson

In the landmark case of *Chapman v. California*,[59] the Court held that not every violation of a criminal defendant's constitutional rights gives rise to a remedy. If the constitutional error was "harmless beyond a reasonable doubt,"[60] an appellate court normally will not reverse the conviction. Subsequently, the Court distinguished "structural defects in the constitution of the trial mechanism,"[61] which by definition cannot be "harmless," from mere "trial error," which can be denominated harmless. Thus, any mere trial error that is harmless beyond a reasonable doubt does not constitute grounds for reversal on direct appeal.

Until last Term, the Court had never squarely considered whether the reasonable doubt standard of *Chapman* applies to proceedings under section 2254.[62] In other words, when the state claims in a federal habeas proceeding that a trial error was harmless, must it prove harmlessness beyond a reasonable doubt as it is required to do on direct appeal? In *Brecht v. Abrahamson*, the Court held that the government need not prove harmlessness beyond a reasonable doubt during federal habeas review.[63] Rather, the relevant question is whether the error had a "substantial and injurious effect or influence in determining the jury's verdict."[64] The

57. Here, Justice O'Connor cited Ponzi v. Fessenden, 258 U.S. 254, 260 (1922).

58. Justices White, Kennedy, and Souter declined to enter the historical debate.

59. 386 U.S. 18 (1967).

60. *Id.* at 24.

61. Arizona v. Fulminante, 111 S. Ct. 1246, 1265 (1991).

62. In several previous cases, the Court had assumed that *Chapman* applied to habeas proceedings. *See, e.g.*, Yates v. Evatt, 111 S. Ct. 1884 (1991); Rose v. Clark, 478 U.S. 570 (1986); Milton v. Wainwright, 407 U.S. 371 (1972); Anderson v. Nelson, 390 U.S. 523 (1968) (per curiam).

63. Brecht v. Abrahamson, 113 S. Ct. 1710, 1713, *reh'g denied*, 113 S. Ct. 2951 (1993).

64. *Id.* at 1714 (quoting Kotteakos v. United States, 328 U.S. 750, 776 (1946)). *Kotteakos*, in turn, derived the test from the statute that governs nonconstitutional harmless error in federal prosecutions. *See* 28 U.S.C. § 2111 (1988) (replacing 28 U.S.C. § 391, which was in force at the time of *Kotteakos*).

opinions in *Brecht* offer valuable clues to the various justices' thinking about the underlying purposes of federal habeas.

Todd Brecht's story is probably destined to become a television docudrama. Brecht had been serving time in a Georgia prison for felony theft. His sister, Molly Hartman, thought she and her husband could help Todd by assuming temporary custody of him and bringing him back to live with them in Alma, Wisconsin. But Molly's husband, Roger, didn't get along with Todd. For one thing, Roger was the local district attorney and did not look favorably upon Todd's criminal history. Roger also disapproved of heavy drinking (Todd was an alcoholic) and homosexuality (Todd was gay). The Hartmans told Todd that he could live with them as long as he did not drink or engage in homosexual activity under their roof.

About a week later, while Roger and Molly were out, Todd broke into the liquor cabinet and started drinking heavily. He then found a rifle upstairs and started shooting cans in the backyard. When Roger got home from work, Todd shot him in the back and fled in Molly's car. Roger tried to get help on the downstairs phone, but Todd had taken the upstairs extension off the hook. Roger then crawled all the way to a neighbor's house, begging for help. Aid was summoned, but it was too late; Roger died.

Meanwhile, Todd had ran Molly's car into a ditch. A police officer stopped to offer assistance, but Todd told him Molly was on her way to help. After that close call, Todd hitched a ride to Winona, Minnesota, where he was stopped by police. First he tried to conceal his identity, but eventually he admitted who he was, and the police arrested him. Told that he was being held for the murder of Roger Hartman, he said "it was a big mistake" and he wanted to talk with someone who would understand him. The authorities returned him to Wisconsin, where he was arraigned and given the *Miranda* warnings.

At trial, he claimed that the killing had been an accident. Todd claimed that when Roger came home, he had rushed to replace the gun in the bedroom, but he tripped and the gun went off. The prosecution asked whether Todd had told anybody before trial that it was an accident. After his lawyer's objection was overruled, Todd testified he had not told anyone. In its closing argument, the prosecution made several references to the fact that the trial was the first time that Todd had ever claimed it was an accident. The jury convicted Todd, and he was sentenced to life imprisonment.

The trial court committed a so-called "*Doyle* error" when it permitted the prosecution to mention the fact that the defendant had never before

advanced his claim of accident.[65] To the degree that the defendant's silence included the period after he received his *Miranda* warnings, the prosecution was prohibited from arguing that silence. Was the error harmless nonetheless? The Wisconsin Supreme Court found it harmless beyond a reasonable doubt, but on habeas, the federal district court concluded that the error was not harmless beyond a reasonable doubt. The Supreme Court granted certiorari to resolve a conflict among the circuits on whether the reasonable doubt standard applies to the determination of whether *Doyle* errors are harmless.[66]

Chief Justice Rehnquist, speaking for Justices Stevens, Scalia, Kennedy, and Thomas, began his analysis by noting that section 2254 is silent on the standard for determining what constitutes harmless error.[67] To fill that gap, the Court needed to look to "the considerations underlying our habeas jurisprudence, and then determine whether [the *Kotteakos* rule] would advance or inhibit these considerations . . . ."[68] The Court described the purpose of federal habeas review as follows:

> [T]he writ of habeas corpus has historically been regarded as an extraordinary remedy, "a bulwark against convictions that violate 'fundamental fairness. . . .'" "The Court uniformly has been guided by the proposition that the writ should be available to afford relief to those 'persons whom society has grievously wronged in light of modern concepts of justice. . . .'" Habeas corpus "is designed to guard against extreme malfunctions in the state criminal justice systems."[69]

These statements are all consistent with the process model of habeas. The emphasis on "fundamental fairness" parallels Professor Bator's notion of "full and fair" adjudication. The notion of "extreme malfunctions in the state criminal justice systems" sounds very much like extreme defects in state court criminal process. Yet, these statements are also consistent with the innocence theory of habeas. What wrong could be more "grievous" than the conviction of an innocent person? What manifestation of "extreme malfunction" could be clearer than wrongful conviction? It is not possible to conclude from the Court's opinion in *Brecht* alone whether the five

65. *See* Doyle v. Ohio, 426 U.S. 610 (1976).

66. The Seventh Circuit panel in Brecht v. Abrahamson, 944 F.2d 1363 (7th Cir. 1991), held that the *Kotteakos* standard of "substantial and injurious effect" applied to *Doyle* errors. The Eighth Circuit had previously held that the reasonable doubt standard applied to *Doyle* errors. *See* Bass v. Nix, 909 F.2d 297 (8th Cir. 1990).

67. *Brecht*, 113 S. Ct. at 1718.

68. *Id.* at 1719.

69. *Id.* (citations omitted).

justices in the majority subscribe to the process theory or to the innocence theory.

Whether operating on the process or innocence theory, the *Brecht* Court found its description of the underlying purpose of habeas to support different legal standards on collateral and direct review of convictions. The Court noted that collateral relief imposes significant additional social costs, such as: "the expenditure of additional time and resources for all the parties involved, the 'erosion of memory' and 'dispersion of witnesses' which accompany the passage of time and make obtaining convictions on retrial more difficult, and the frustration of 'society's interest in the prompt administration of justice.'"[70] The Court also mentioned that federal habeas relief cuts against federalism: Federal intrusions into state criminal trials frustrate both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights.[71] Because the true purpose of habeas is to remedy only the most extreme constitutional violations, and because federal habeas relief entails such grave institutional costs, it is appropriate to limit federal habeas to remedy errors that had substantial and injurious effect on the jury's verdict.

Note the scope of the Court's holding. By the majority's own characterization, the Court granted certiorari in *Brecht* to determine "whether the *Chapman* harmless-error standard applies on collateral review of *Doyle* violations."[72] However, the Court did not limit its holding to *Doyle* claims: "[W]e hold that the *Kotteakos* harmless-error standard applies in determining whether habeas relief must be granted because of constitutional error of the trial type."[73] Thus, *Chapman* no longer applies in federal habeas proceedings.

3. Withrow v. Williams

Last Term, the Court granted certiorari in *Withrow v. Williams*[74] to decide whether *Miranda* claims should generally be cognizable during federal habeas review. By a 5-4 margin, the Court held that they should

70. *Id.* at 1721 (quoting United States v. Mechanik, 475 U.S. 66, 72 (1986)).

71. *Id.* at 1720 (quoting Engle v. Isaac, 456 U.S. 107, 128 (1982)).

72. *Id.* at 1713.

73. Brecht v. Abrahamson, 113 S. Ct. 1710, 1722, *reh'g denied*, 113 S. Ct. 2951 (1993). In a footnote, the Court held open the possibility that a "deliberate and especially egregious" trial error, or one involving prosecutorial misconduct, might justify relief even if it did not substantially influence the jury's verdict. *Id.* at n.9.

74. 113 S. Ct. 1745 (1993).

be cognizable.[75] Justice Scalia, joined by Justice Thomas, wrote a dissenting opinion arguing that the federal habeas courts should exercise their equitable discretion not to entertain *Miranda* claims absent extraordinary circumstances. The opinion sheds further light on the position of Justices Scalia and Thomas. As with the majority opinion in *Brecht*, the *Withrow* opinion does not establish conclusively that they fully embrace the process theory articulated by Professor Bator.

Justice Scalia began by acknowledging the comprehensive scope of jurisdiction granted by the federal habeas statute.[76] But the mere fact that jurisdiction has been conferred does not mean it must be exercised in all cases.[77] Justice Scalia noted that the habeas statute provides only that writs of habeas corpus "*may* be granted," not that they *shall* be granted.[78] Federal habeas courts must not grant relief for just any constitutional violation; they must exercise their "equitable discretion" to separate deserving petitions from undeserving ones.[79] A petition ordinarily will be undeserving of relief if the petitioner received a full and fair adjudication of her federal constitutional claims in state court. Justice Scalia concluded: "Prior opportunity to litigate an issue should be an important equitable consideration in any habeas case, and should ordinarily preclude the court from reaching the merits of a claim, unless it goes to the fairness of the trial process or to the accuracy of the ultimate result."[80] The inclusion of the phrase "accuracy of the ultimate result" suggests that Justices Scalia and Thomas embrace the innocence theory of habeas.

One of Justice Scalia's opinions from earlier in the Term, however, contradicts the inference that he and Justice Thomas agree with the innocence theory. In *Herrera v. Collins*, the petitioner claimed that newly-

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75. For analysis of the Court's holding in *Withrow*, see *infra* notes 111-16 and accompanying text.

76. The federal habeas statute states in pertinent part: "Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions." 28 U.S.C. § 2241(a) (1988).
The statute also provides:

> The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

28 U.S.C. § 2254(a) (1988).

77. *But see* Martin H. Redish, *Abstention, Separation of Powers and the Limits of the Judicial Function*, 94 YALE L.J. 71 (1984) (questioning propriety of declining to exercise jurisdiction in context of abstention doctrines).

78. 113 S. Ct. 1745, 1766 (Scalia, J., dissenting).

79. *Id.*

80. *Id.* at 1768.

discovered evidence showed he was actually innocent of the murder for which he had been convicted and sentenced to die. The Court affirmed the denial of habeas relief, assuming *arguendo* that innocence by itself is a sufficient ground for habeas relief.[81] Justice Scalia's concurring opinion, joined by Justice Thomas, expressed hope that the assumption would not become law:

> A number of Courts of Appeals have hitherto held, largely in reliance on our unelaborated statement in *Townsend v. Sain*, that newly discovered evidence relevant only to a state prisoner's guilt or innocence is not a basis for federal habeas corpus relief. I do not understand it to be the import of today's decision that those holdings are to be replaced with a strange regime that assumes permanently, though only "*arguendo*," that a constitutional right exists, and expends substantial judicial resources on that assumption. The Court's [opinion] does nothing but support our statement in *Townsend*, and strengthen the validity of the holdings based upon it.[82]

This statement represents an unambiguous rejection of Judge Friendly's innocence model. The defining characteristic of the innocence theory is the belief that innocence, standing alone, is sufficient to justify the grant of federal habeas relief.[83] In the above-quoted passage, Justices Scalia and Thomas reject that notion, even in a capital case.

B. Innocence

In a highly lauded article, the late Judge Henry Friendly proposed a

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81. The Court stated:

> We may assume, for the sake of argument in deciding this case, that in a capital case a truly persuasive demonstration of "actual innocence" made after trial would render the execution of a defendant unconstitutional, and warrant federal habeas relief if there were no state avenue open to process such a claim. But because of the very disruptive effect that entertaining claims of actual innocence would have on the need for finality in capital cases, and the enormous burden that having to retry cases based on often stale evidence would place on the States, the threshold showing for such an assumed right would necessarily be extraordinarily high. The showing made by petitioner in this case falls far short of any such threshold.

Herrera v. Collins, 113 S. Ct. 853, 869, *reh'g denied*, 113 S. Ct. 1628 (1993).

82. *Id.* at 875 (Scalia, J., concurring).

83. Though not entirely free of ambiguity, Judge Friendly's proposal appears to have contemplated the availability of relief even in the absence of a constitutional violation:

> I would also allow an exception to the concept of finality where a convicted defendant makes a colorable showing that an error, whether 'constitutional' or not, may be producing the continued punishment of an innocent man.

Henry Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142, 160 (1970) (footnote omitted). I will put aside the question of how a federal court could obtain jurisdiction no federal question is presented.

theory that would place innocence at the apex of the habeas value structure.[84] The proposal was that, with four exceptions, an applicant for federal habeas corpus would be required to make a "colorable showing of innocence" before relief could be granted.[85] The four proposed exceptions are as follows: (1) cases in which the trial court lacked jurisdiction; (2) cases in which the claimed constitutional violation could not be discerned from the trial record; (3) cases in which the defendant had been denied the opportunity to assert a constitutional defense at trial; and (4) cases in which the defendant sought the benefit of a retroactive rule of criminal procedure developed after the conviction became final.[86]

In addition to cases in which the trial court truly lacked jurisdiction over the person or subject matter, the first exception would include cases in which the petitioner had been denied a constitutional right to trial counsel[87] or cases in which the state effectively prevented trial counsel from doing her job, such as forcing her to trial without adequate opportunity for preparation.[88] The second group would have consisted of cases in which the petitioner claimed that the guilty plea was coerced,[89] or that the prosecution put on perjured evidence,[90] or that the petitioner was incompetent to stand trial.[91] The paradigm case falling under the third exception would be *Jackson v. Denno*,[92] in which the Court permitted federal habeas review for convictions obtained when the voluntariness of a confession had been submitted to the jury without a threshold determination by the court. The fourth exception, of course, would have permitted federal habeas review in the very cases currently screened off from federal habeas cognizance by *Teague v. Lane*.[93]

For the most part, Justice O'Connor has embraced Judge Friendly's

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84. Friendly, *supra* note 83. Judge Friendly was, along with Justice Frankfurter, perhaps the greatest federal courts scholar ever to sit on the federal bench. This may explain why two of the three dedications by the editors of PAUL M. BATOR ET AL., HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM xix (1988) are to Judge Friendly and Justice Frankfurter.

85. Friendly, *supra* note 83, at 150.

86. *Id.* at 151-54.

87. *See* Johnson v. Zerbst, 304 U.S. 458 (1938).

88. *See* Powell v. Alabama, 287 U.S. 45 (1932).

89. *See* Waley v. Johnston, 316 U.S. 101 (1942).

90. *See* Miller v. Pate, 386 U.S. 1 (1967).

91. *See* Pate v. Robinson, 383 U.S. 375 (1966).

92. 378 U.S. 368 (1961).

93. 489 U.S. 288 (1989).

theory.[94] In her *Brecht v. Abrahamson* dissent, she wrote: "If there is a unifying theme to this Court's habeas jurisprudence, it is that the ultimate equity on the prisoner's side—the possibility that an error may have caused the conviction of an actually innocent person—is sufficient by itself to permit plenary review of the prisoner's federal claim."[95] The same day, in her separate opinion in *Withrow v. Williams*, she stated: "Most telling of all, this Court continuously has recognized that the ultimate equity on the prisoner's side—a sufficient showing of actual innocence—is normally sufficient, standing alone, to outweigh other concerns and justify adjudication of the prisoner's constitutional claim."[96] Clearly, Justice O'Connor does not believe that any such error must rise to the level of a fundamental defect in process as long as it caused the conviction of an innocent person.

C. Federal Forum

The federal forum theory needs little elaboration. The argument is simply that the habeas statute normally guarantees a federal forum for the assertion of all non-waived federal constitutional claims. At one time, the Supreme Court might have fulfilled this mandate, but the reality of caseload pressures has long since made plenary Supreme Court review the exception rather than the rule for criminal defendants. Today, only federal district court exercise of jurisdiction under section 2241 can satisfy the dictates of the federal forum theory.

The principal articulation of the federal forum theory came in *Fay v. Noia*.[97] Noia was convicted of felony-murder in New York. His co-defendants filed timely appeals, but Noia did not. Eventually, Noia's co-defendants succeeded in having their convictions overturned on the ground that their confessions had been coerced. The state stipulated that Noia's confession had also been coerced, but it argued that Noia's failure to

94. Justice O'Connor obviously disagrees with Judge Friendly's fourth exception regarding retroactivity. Justice O'Connor authored the plurality opinion in Teague v. Lane, 489 U.S. 288 (1989), which prohibited the application of new rules of criminal procedure during federal collateral review. This does not, however, make Justice O'Connor any less of an adherent to the innocence theory of habeas. Indeed, it was Judge Friendly who went beyond either process or innocence concerns in this fourth exception. This exception can only be attributed to some variant of the "federal forum" theory. Thus, I do not take this exception into account when determining which justices embrace Judge Friendly's theory.

95. Brecht v. Abrahamson, 113 S. Ct. 1710, 1729 (O'Connor, J., dissenting), *reh'g denied*, 113 S. Ct. 2951 (1993).

96. *Withrow*, 113 S. Ct. 1745, 1757 (1993) (O'Connor, J., concurring in part and dissenting in part).

97. 372 U.S. 391 (1963).

perfect a timely appeal barred his assertion of the coercion argument during federal habeas proceedings. The Supreme Court held that the argument was not precluded because Noia had not deliberately bypassed his appeal.[98]

In setting forth the "deliberate bypass" standard for review of claims defaulted in state court, Justice Brennan's opinion for the Court trumpeted the federal forum theory of habeas. Justice Brennan asserted that there existed a "clear congressional policy of affording a federal forum for the determination of the federal claims of state criminal defendants."[99] He also stated that "Congress in 1867 sought to provide a federal forum for state prisoners having constitutional defenses by extending the habeas corpus powers of the federal courts to their constitutional maximum."[100] A state criminal judgment resting on constitutional error is not void for all purposes, Justice Brennan conceded, "[b]ut conventional notions of finality in criminal litigation cannot be permitted to defeat the manifest federal policy that federal constitutional rights of personal liberty shall not be denied without the fullest opportunity for plenary federal judicial review."[101] Justice Brennan echoed these convictions in subsequent cases.[102]

Professor Larry Yackle has found that the federal forum theory provides the most satisfying explanation for the availability of federal collateral review, particularly viewed in the general framework of federal jurisdiction.[103] He starts with the "concededly controversial . . . [yet] powerful" proposition that every litigant with a federal claim has a right to litigate

98. In fact, Noia *had* deliberately bypassed his appeal. Noia was convicted in 1942 and sentenced to life imprisonment. Apparently it did not occur to his lawyer at the time that one of the grounds for appeal was that the confession was coerced. If he had appealed on some other basis and won a new trial, he might have been convicted anew and sentenced to death. *Id.* at 471 (Harlen, J., dissenting). After Noia's co-defendants had their convictions set aside on the ground that their confessions were coerced, it became rational for Noia to want a new trial. Without the confession, he apparently did not think he could be convicted again.

99. *Id.* at 417.

100. *Id.* at 426.

101. *Id.* at 424.

102. In *Stone v. Powell*, Justice Brennan stated that *Stone* and its companion case did not present the question whether illegally seized evidence should have been excluded at trial. "Rather, they involve the question of the availability of a *federal forum* for vindicating those federally guaranteed rights." 428 U.S. 465, 502-03 (Brennan, J., dissenting). In Reed v. Ross, 468 U.S. 1 (1984), Justice Brennan's opinion for the Court asserted that by enacting section 2254, Congress had "expressed [an] interest in providing a federal forum for the vindication of the constitutional rights of state prisoners." *Id.* at 10.

103. Yackle, *supra* note 13.

that claim in a federal forum other than the Supreme Court.[104] Even if one disagrees with the breadth of that statement, one must find "irresistible" the narrower proposition that every *state criminal defendant* has a right to litigate federal claims in a federal forum other than the Supreme Court.[105]

The reason for this right is that state courts have a sort of conflict-of-interest problem enforcing federal rights against state officials. According to Professor Yackle, "The overriding responsibility of the state courts to carry out state law thus deprives them of the neutrality and dispassion demanded for contemporaneous enforcement of the fourteenth amendment."[106] Professor Yackle asserts that "[i]t is because they are charged with other potentially conflicting duties that state courts' determinations of federal claims raised in defense cannot be accepted as final."[107] Professor Yackle notes that the federal forum theory, pushed to its logical extreme, would require that every state criminal defendant wishing to assert a federal claim be permitted to remove to federal court. He stops short of this conclusion, however, on the ground that leaving the primary adjudication of criminal justice in the hands of state courts promotes a decentralization of power essential to individual liberty.[108]

A variation on the federal forum theory is the "appellate" model of habeas advocated by Professor Barry Friedman.[109] Professor Friedman argues that federal habeas jurisdiction should be viewed as an additional tier of appellate review, rather than as collateral attack. He asserts that erasing the distinction between direct and collateral attack would greatly simplify federal habeas doctrine. Just as federal appellate courts review all issues properly raised in federal trial courts, federal habeas courts should review all issues properly raised by criminal defendants in the state courts. Professor Friedman argues that the Court should recognize no exceptions for the exclusionary rule or any other type of constitutional claim and that it should be irrelevant whether the petitioner is capable of showing that she is "actually innocent." Review of issues adjudicated in the state courts should be all-encompassing. On the other hand, a federal appellate court normally will not review issues not raised below; thus, a federal habeas court should not review claims on which the petitioner defaulted in state

104. *Id.* at 1019-31.
105. *Id.* at 1031.
106. *Id.* at 1031-32.
107. *Id.*
108. *Id.* at 1033-40.
109. *See* Friedman, *supra* note 5.

court.[110] Professor Friedman's theory, then, would lead to somewhat less federal habeas review than the federal forum theories advanced by Justice Brennan or Professor Yackle.

D. Deterrence

No scholar has offered a full articulation of what I have termed the "deterrence" theory of habeas. Some members of the Court nonetheless may be headed in that direction. The deterrence rationale finds support from the Court's opinion in *Withrow v. Williams*. By a 5-4 vote, the Court declined to adopt a rule excluding *Miranda* claims from federal habeas review. Justice Souter's opinion[111] was narrow, eschewing any sweeping statements about the underlying purposes of habeas. Despite that, it seems likely that the majority's unarticulated assumption about the underlying purpose of habeas involves deterrence of state court constitutional violations.

In *Withrow*, the state argued for an extension of *Stone v. Powell*[112] to claims under *Miranda v. Arizona*.[113] In *Stone*, the Court had held that an exclusionary rule claim under *Mapp v. Ohio*[114] normally may not be adjudicated during federal habeas review, provided the claim received a full and fair hearing by the state courts. Justice Souter carefully distinguished the nature of *Miranda* rights from the nature of *Mapp* rights. *Miranda* protects a defendant's Fifth Amendment privilege against self-incrimination, which is a fundamental trial right. *Mapp* does not protect any such fundamental trial right. Moreover, the *Miranda* rule can be expected to make the criminal justice system's ascertainment of guilt or innocence more accurate in the long haul. Justice Souter stated: "[A] system of criminal law enforcement which comes to depend on the 'confession' will, in the long run, be less reliable and more subject to abuses than a system relying on independent investigation."[115] Moreover, banishing *Miranda* claims from habeas proceedings would not appreciably lighten the load of the district courts. Nothing would prevent petitioners from simply converting their *Miranda* claims into claims that their confessions were involuntary,

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110. Professor Friedman would make an exception for ineffective assistance claims. *Id.* at 325-29.

111. Justice Souter wrote for the Court, joined by Justices White, Blackmun, Stevens, and Kennedy.

112. 428 U.S. 465 (1976).

113. 384 U.S. 436 (1966).

114. 367 U.S. 643 (1961).

115. *Withrow*, 113 S. Ct. at 1753 (quoting Michigan v. Tucker, 417 U.S. 433, 448 n.23 (1974), quoting Escobedo v. Illinois, 378 U.S. 478, 488-89 (1964)).

and therefore, that their convictions violated due process. Thus, the extension of *Stone* to *Miranda* claims was inappropriate.

Finally, and most tellingly, Justice Souter acknowledged the argument that permitting *Miranda* claims on federal habeas creates too much friction between federal and state courts. His response is worth recounting:

> One might argue that tension results between the two judicial systems whenever a federal habeas court overturns a state conviction on finding that the state court let in a voluntary confession obtained by the police without the *Miranda* safeguards. And one would have to concede that this has occurred in the past, and doubtless will occur again. It is not reasonable, however, to expect such occurrences to be frequent enough to amount to a substantial cost of reviewing *Miranda* claims on habeas or to raise federal-state tensions to an appreciable degree. We must remember in this regard that *Miranda* came down some 27 years ago. In that time, law enforcement has grown in constitutional as well as technological sophistication, and there is little reason to believe that the police today are unable, or even generally unwilling, to satisfy *Miranda*'s requirements. *And if, finally, one should question the need for federal collateral review of requirements that merit such respect, the answer simply is that the respect is sustained in no small part by the existence of such review.*[116]

It is difficult to attribute this last sentence to anything other than a view that federal habeas relief deters law enforcement officials from violating *Miranda*. Indeed, the statement goes beyond the usual deterrence notion that only those with a predilection toward breaking the law need to be deterred. Justice Souter explicitly acknowledged that law enforcement officials may have accepted the legitimacy of *Miranda*. Yet he firmly insisted that the continued availability of federal habeas relief for *Miranda* claims would help maintain law enforcement officials' acceptance of that legitimacy. This is a strong version of deterrence theory, where habeas relief is viewed not only as a threat to "bad" actors, but also as a retaining wall meant to prevent backsliding.

Brecht v. Abrahamson, decided the same day, confirms that Justices White, Blackmun, and Souter view deterrence as a major role of federal habeas jurisdiction. Characterizing the majority's holding as a virtual elimination of the *Chapman* reasonable doubt standard from federal habeas proceedings, Justice White stated:

> I believe this result to be at odds with the role Congress has ascribed to habeas review which is, at least in part, to deter both prosecutors and courts

116. *Id.* at 1754-55 (citations omitted) (emphasis added).

> from disregarding their constitutional responsibilities. "[T]he threat of habeas serves as a necessary additional incentive for trial proceedings in a manner consistent with established constitutional standards."[117]

Justices Blackmun and Souter joined Justice White's dissent. All three were in the *Withrow* majority.

The deterrence theory also finds support in Justice O'Connor's plurality opinion in *Teague v. Lane*.[118] Justice O'Connor wrote for the plurality, joined by Chief Justice Rehnquist and Justices Scalia and Kennedy. The plurality quoted the same basic language from Justice Harlan's opinion in *Desist v. United States*:[119] "[T]he threat of habeas serves as a necessary additional incentive for trial and appellate courts throughout the land to conduct their proceedings in a manner consistent with established constitutional standards."[120] The plurality then stated, "We agree with Justice Harlan's description of the function of habeas corpus."[121] One prominent commentator concluded that, above all, *Teague* was animated by the deterrence theory.[122] According to Professor Hoffman, the plurality found a general rule of non-retroactivity appropriate because it was consistent with the theory that the purpose of federal habeas is to ensure that state judges "toe the constitutional mark."[123] Professor Hoffman heralded *Teague* as the dawn of a new era in federal habeas corpus, marked by the emergence and ascendancy of the deterrence theory.[124]

Though Professor Hoffman's reading of the *Teague* decision is perfectly reasonable, hindsight now reveals that the deterrence argument was little more than a makeweight. In her *Withrow* dissent, the author of the *Teague* plurality, Justice O'Connor, explicitly rejected the deterrence rationale for habeas relief:

> [T]o the extent exclusion of voluntary but unwarned confessions serves a deterrent function, "the awarding of habeas relief years after conviction will often strike like lightning, and it is absurd to think that this added possibility

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117. Brecht v. Abrahamson, 113 S. Ct. 1710, 1727 (White, J., dissenting) (quoting Desist v. United States, 394 U.S. 244, 262-63 (1969) (Harlan, J., dissenting)), *reh'g denied*, 113 S. Ct. 2951 (1993).

118. 489 U.S. 288 (1989).

119. 394 U.S. 244, 262-63 (1969) (Harlan, J., dissenting).

120. *Teague*, 489 U.S. at 306.

121. *Id.* at 308.

122. Joseph L. Hoffman, *The Supreme Court's New Vision of Federal Habeas Corpus for State Prisoners*, 1989 SUP. CT. REV. 165, 175-78 (1989).

123. *Id.* (quoting Mackey v. United States, 401 U.S. 667, 687 (1971) (Harlan, J., dissenting and concurring in the judgment)).

124. I do not mean to imply that Professor Hoffman approves of the deterrence theory, but merely that he saw *Teague* as the standard-bearer for advancing the deterrence theory of habeas.

> . . . will have any appreciable effect on police training or behavior. [. . .]" Judge Friendly made precisely the same point [in his 1970 article articulating the innocence theory]: "The deterrent value of permitting collateral attack," he explained, 'goes beyond the point of diminishing returns.'[125]

Chief Justice Rehnquist, another member of the *Teague* plurality, joined Justice O'Connor's repudiation of the deterrence theory of habeas.

The deterrence theory was also expressly rejected in *Brecht v. Abrahamson.* Brecht had argued that the reasonable doubt standard for harmless error was necessary on collateral review to deter state courts from "relaxing their . . . guard" when reviewing constitutional claims and to deter prosecutors from committing error in the first place.[126] Chief Justice Rehnquist's majority opinion, joined by Justices Stevens, Scalia, Kennedy, and Thomas, responded to the deterrence argument with disdain for the petitioner's view of state functionaries:

> Absent affirmative evidence that state-court judges are ignoring their oath, we discount petitioner's argument that courts will respond to our ruling by violating their Article VI duty to uphold the Constitution. Federalism, comity, and the constitutional obligation of state and federal courts all counsel against any presumption that a decision of this Court will 'deter' lower federal or state courts from fully performing their sworn duty.[127]

Toting up the scores, it seems clear that (notwithstanding the plurality opinion in *Teague*) Chief Justice Rehnquist and Justices O'Connor, Scalia, and Thomas reject the deterrence theory. Of those four, Justice O'Connor embraces the innocence theory. Justices Scalia and Thomas advocate the process theory, and it is not clear which of the two theories Chief Justice Rehnquist advocates. Justices White, Blackmun, and Souter believe that deterrence makes up at least a large part of the underlying rationale for federal habeas jurisdiction.

Justices Stevens and Kennedy have been the wild cards. Both were in the *Withrow* majority, which explicitly backed the deterrence theory. Both were in the *Brecht* majority, which explicitly rejected it. As noted above, Justice Kennedy was in the *Teague* plurality; however, none of the other three members of that plurality now seem as if they were serious about the discussion of deterrence theory. Justice Stevens's *Teague* opinion endorsed Justice Harlan's proposal to differentiate the treatment of retroactivity

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125. *Withrow*, 113 S. Ct. at 1760 (O'Connor, J., dissenting) (quoting Friendly, *supra* note 83, at 163).

126. Brecht v. Abrahamson, 113 S. Ct. 1710, 1721, *reh'g denied*, 113 S. Ct. 2951 (1993).

127. *Id.* (citation omitted).

between direct and collateral attack—a proposal based in large part on the deterrence theory of habeas—but perhaps Justice Stevens thought the approach justifiable on a different rationale.

III. AN INTEGRATIVE THEORETICAL APPROACH TO FEDERAL HABEAS

The theories of habeas are logically severable. It is possible to advocate exclusivity on behalf of any of the theories of habeas (except the federal forum theory, which is all-encompassing). The process theory is, by hypothesis, exclusive of any rationale other than process. Judge Friendly's version of the innocence theory happens to recognize both process and innocence as legitimate justifications for the grant of habeas relief. However, one could just as well imagine a narrower variant of the theory rejecting anything other than innocence as a valid rationale. Finally, a theory that recognized only deterrence as a valid ground for habeas relief would be perfectly coherent.

However, the three justices who advocate deterrence as a rationale for federal habeas do not view deterrence as an exclusive purpose. In his *Brecht v. Abrahamson* dissent, Justice White was careful to say that deterrence of state court constitutional error is a legitimate rationale for federal habeas—"at least in part."[128] He did not say what other rationale(s) might be valid. Justice Blackmun, joined by Justice Souter in his *Herrera v. Collins* dissent, made it clear that he views factual innocence as a sufficient ground for federal habeas relief, even in the absence of any constitutional violation at trial: "[E]ven a prisoner who appears to have had a *constitutionally perfect* trial, 'retains a powerful and legitimate interest in obtaining his release from custody if he is innocent of the charge for which he was incarcerated.'"[129] In this Part, I argue that, from the standpoint of statutory interpretation, Justices White, Blackmun, and Souter occupy the most tenable position.

A. Text

The textual highpoints of the habeas statute are sections 2241 and 2254(a). Section 2241(a) states, in pertinent part: "Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions." As

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128. *Id.* at 1727 (White, J., dissenting).

129. Herrera v. Collins, 113 S. Ct. 853, 880 (Blackmun, J., dissenting), *reh'g denied,* 113 S. Ct. 1628 (1993).

Justice Scalia pointed out in his *Withrow v. Williams* dissent, this provision uses the permissive "may" in granting habeas jurisdiction. This locution strongly suggests that judges have discretion not to grant relief even when they have power to do so. The language gives no clue as to what factors are to be weighed in exercising such discretion. However, it is clear that if this discretion is to be channelled, it must be recognized. This poses a serious problem for the federal forum theories, all of which posit entitlement to a hearing in federal court on most or all constitutional issues.[130]

There is, perhaps, a way out of this textual inconvenience for the federal forum advocate. The word "may" implies discretion, but it does not specify how much. What makes Justice Scalia think that the judge has discretion to deny a meritorious petition altogether as opposed to merely conditioning the withholding of relief upon the state's promise to grant the petitioner a new trial? In other words, the federal forum theorists might argue that "may" gives judges the option to order a new trial instead of outright release, but that it contemplates no further options. This interpretation strikes me as somewhat unnatural. It would have been entirely too easy for the drafters to have specified that judges may grant a writ of habeas corpus or a new trial. Moreover, enumeration of the judge's options would have been in keeping with the general tendency toward lists in jurisdictional statutes. Thus, the use of the permissive in section 2241(a) causes federal forum theories considerable embarrassment.

The truth is, the text of the habeas statute tells us relatively little about the underlying purpose of federal habeas relief. Habeas is nowhere defined and there is no preamble. The use of the permissive is inconsistent with federal forum theories, but no other portion of the text rules out the remaining theories.

B. *Legislative History*

The legislative history of what is now section 2241 also sheds little light on the underlying purpose of federal habeas corpus. The Act of February 5, 1867 granted federal courts power to issue writs of habeas corpus in "all cases where any person may be restrained of his or her liberty in violation of the constitution, or of any treaty or law of the United States . . . ."[131]

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130. Assuming, of course, one subscribes to legislative primacy in working out the scope of federal jurisdiction. Not all do. *See, e.g.*, Barry Friedman, *A Different Dialogue: The Supreme Court, Congress and Federal Jurisdiction*, 85 NW. U. L. REV. 1 (1990) (advocating dialogue in which the Court would have broad role in determining scope of federal jurisdiction).

131. Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 386.

Professor Amsterdam has exhaustively researched the enactment of this legislation.[132] In December 1865, just following the conclusion of the Civil War, Representative Shellabarger introduced the following resolution to the House:

> *Resolved*, That the Committee on the Judiciary be directed to inquire and report to this House, as soon as practicable, by bill or otherwise, what legislation is necessary to enable the courts of the United States to enforce the freedom of the wives and children of soldiers of the United States under the joint resolution of Congress of March 3, 1865, and also to enforce the liberty of all persons under the operation of the constitutional amendment abolishing slavery.[133]

In fact, no such "joint resolution . . . of March 3, 1865," was in existence. Professor Amsterdam persuasively argues that Representative Shellabarger meant to refer to an Act of March 3, 1863, chapter 81, which immunized Union officers from liability for acts or omissions under color of federal law and which authorized such officers to remove any action against them to federal court.[134] The House immediately agreed to the resolution.

About four months later, during debate concerning the amendment of the removal procedures of the March 3, 1863, legislation, Representative Shellabarger described an incident that would later figure prominently in the debate on the habeas corpus bill:

> In Grant County, I believe, in the State of Kentucky, a provost marshal of the United States ordered certain citizens to take to the jail of that county two persons who were arrested and held as notorious guerrillas. While executing this order the persons in charge of these guerrillas, in order to prevent their attempted escape, were obliged to fire at them; and by that volley one of the guerrillas was killed and the other wounded. The persons who took part in that transaction have been indicted by the grand jury of the county for murder in the first degree; and one or two of them, in order to avoid trial and the conviction which they regarded as inevitable in that county, have been compelled to escape from the State.[135]

Representative Shellabarger presented this to the House as "one of a very

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132. Anthony G. 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 (1965). An equally exhaustive survey of the legislative history appears in Lewis Mayers, *The Habeas Corpus Act of 1867: The Supreme Court as Legal Historian*, 33 U. CHI. L. REV. 31 (1965). For a critique of Mayers' historiography, *see* Larry Yackle, *Form and Function in the Administration of Justice: The Bill of Rights and Federal Habeas Corpus*, 23 U. MICH. J.L. REF. 685, 695-702 (1990).

133. CONG. GLOBE, 39th Cong., 1st Sess. 87 (1865).

134. Amsterdam, *supra* note 132, at 820.

135. CONG. GLOBE, 39th Cong., 1st Sess. 1426 (1866).

large class of similar cases."[136]

In the summer of 1866, the House Judiciary Committee reported out a bill responding to the concerns articulated by Representative Shellabarger in December 1865 and March 1866. The bill reported out by the Judiciary Committee eventually became the Act of February 5, 1867, which was the predecessor to the current habeas corpus statute. On July 25, 1866, in advocating the bill as reported out by the Judiciary Committee, Representative Lawrence stated:

> On the 19th of December last, my colleague [Representative Shellabarger] introduced a resolution instructing the Judiciary Committee to inquire and report to the House as soon as practicable, by bill or otherwise, what legislation is necessary to enable the courts of the United States to enforce the freedom of the wife and children of soldiers of the United States, and also to enforce the liberty of all persons. Judge Ballard, of the district court of Kentucky, decided that there was no act of Congress giving courts of the United States jurisdiction to enforce the rights and liberties of such persons. In pursuance of that resolution of my colleague this bill has been introduced, the effect of which is to enlarge the privilege of the writ of *hobeas* [sic] *corpus*, and make the jurisdiction of the courts and judges of the United States coextensive with all the powers that can be conferred upon them. It is a bill of the largest liberty, and does not interfere with persons in military custody, or restrain the writ of *habeas corpus* at all. I am satisfied there will not be a solitary objection to this bill if it is understood by the House.[137]

Without further debate, the House passed the bill. In the Senate, the chairman of the Judiciary Committee, Senator Trumbull, was asked about the bill's exclusion of military prisoners from its scope. He responded:

> . . .[T]he *habeas corpus* act of 1789, to which this bill is an amendment, confines the jurisdiction of the United States courts in issuing writs of *habeas corpus* to persons who are held under United States laws. Now, a person might be held under a State law in violation of the Constitution and laws of the United States, and he ought to have in such a case the benefit of the writ, and we agree that he ought to have recourse to United States courts to show that he was illegally imprisoned in violation of the Constitution or laws of the United States.[138]

This was the sum total of Senate debate on the habeas corpus bill. The Senate passed it with a procedural amendment in which the House

136. *Id.*
137. *Id.*
138. CONG. GLOBE, 39th Cong., 1st Sess. 4229 (1866).

concurred without debate.[139]

Of the preceding floor discussion, one phrase stands out. Representative Lawrence said the legislation makes federal jurisdiction "coextensive with all the powers that can be conferred upon them" and that "[i]t is a bill of the largest liberty." In *Fay v. Noia*,[140] Justice Brennan seized upon this language as evidence in support of a federal forum theory of habeas. Justice Brennan found that the Act extended the habeas power of the federal courts "evidently to what was conceived to be its constitutional limit" and manifested a "clear congressional policy of affording a federal forum for the determination of the federal claims of state criminal defendants."[141] The problem with this argument is that it ignores the text of the statute. Section 2241 states that writs of habeas corpus "may" be granted by federal judges within their jurisdictions. Thus, while it is true that the federal habeas jurisdiction is all-encompassing, it does not follow ineluctably that federal judges are required to exercise that jurisdiction in such a manner as to afford every federal constitutional claim a hearing in a federal forum.

Federal forum advocates might respond that the word "may" did not appear in the original text of the 1867 Act; instead, the statute merely stated that federal courts "shall have power to grant writs of habeas corpus in all cases where any person may be restrained of his or her liberty in violation of the constitution, or of any treaty or law of the United States."[142] The current locution—"Writs of habeas corpus may be granted"—did not replace the original phrasing until the 1948 amendment. Therefore, federal forum theorists might argue, the mandatory exercise of federal habeas jurisdiction with respect to all constitutional claims is correct as a matter of the subjective original intention of the Framers, even if it does not comport entirely with the present statutory text.

There are two replies to this argument. First, even the original phrasing of the 1867 Act implies discretion. The statute does not say that the federal courts "shall grant writs of habeas corpus," as one would expect if Congress were operating on a federal forum theory. The statute merely states that federal courts shall have power to grant writs of habeas corpus which implies that federal courts have power not to grant them as well. Second, the original intent of the 1948 Congress must be held to supersede

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139. Amsterdam, *supra* note 132, at 823 & n.126.

140. 372 U.S. 391 (1963).

141. *Id.* at 417-18.

142. Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 386.

that of the 1867 Congress, wherever the two are irreconcilable. Thus, the admittedly grand language of Representative Lawrence during the House debate on the 1867 Act does not support any theory that posits a general entitlement to a federal forum for constitutional claims.

Nor is there anything else of much use in the floor debates. The leading scholar on legal aspects of the Reconstruction period has commented that: "[c]ongressional intent in passing the Habeas Corpus Act of 1867 is unusually murky, even for a piece of Reconstruction legislation."[143] The stingiest of original intent analysis might focus on the animating force for the 1867 Act, namely, the pattern of vengeful harassment by local Southern law enforcement officials against ex-Union soldiers and their families and against federal functionaries carrying out the policies of Reconstruction. One could argue that federal judges ought to limit the exercise of their habeas jurisdiction to protect these discrete groups. This, of course, would eliminate present-day litigation under section 2254, as all ex-Union soldiers have long since died and Reconstruction has long since ended.

Alternatively, the original intent analysis could be made slightly more abstract, resulting in a conclusion that habeas should be granted only when state courts and law enforcement officials in a discrete region of the country are demonstrably hostile to certain defendants in the same way that Southern justice systems were consistently biased against freedmen and federal officials. This too would probably eliminate litigation under section 2254 because it would be virtually impossible to prove that state courts in any particular area are hostile to an ascertainable subset of defendants.[144]

Even laying to one side the practical consequences of these two interpretations based on relatively narrow views of original intent, neither is tenable from the standpoint of the statutory text. The original statute extended the availability of habeas to "all persons" in custody in violation of the Constitution, laws, or treaties of the United States.[145] Although the

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143. William M. Wiecek, *The Great Writ and Reconstruction: The Habeas Corpus Act of 1867*, 36 J. S. HIST. 530, 539 (1970).

144. At least the Court is unlikely to admit that such disparate treatment has been proved. *See, e.g.*, McCleskey v. Kemp, 481 U.S. 279 (1987).

145. In arguing for the interpretation that would limit habeas to freedmen, Professor Mayers offered this possible explanation for why Congress nonetheless used such broad phrasing:

> The newly constituted legislatures of those [Southern] states . . . were striving to impose a new bondage on the freedman by contract labor statutes carrying criminal penalties for breach of contract and by broadly phrased vagrancy and apprenticeship laws. Quite possibly it was thought that one seeking relief through habeas corpus from detention under such vagrancy or contract labor statutes would find the broader phrase, 'restrained of his liberty in violation of the constitution,' more serviceable than the narrower 'held in slavery or involuntary servitude.'

phrase "all persons" no longer appears in the statute, the current wording conveys an equally broad scope. Section 2241(c) sets forth five sets of circumstances under which federal habeas will properly lie:

> (1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or
>
> (2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or
>
> (3) He is in custody in violation of the Constitution or laws or treaties of the United States; or
>
> (4) He, being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or sanction of any foreign state, or under color thereof, the validity and effect of which depend upon the law of nations; or
>
> (5) It is necessary to bring him into court to testify or for trial.

We can ignore (1) because it refers to prisoners in federal custody. We can ignore (4) because it refers to foreign nationals held in American custody, and we can ignore (5) because it has nothing to do with those in custody at all. This leaves (2), which clearly corresponds to Congress' concern about state and local harassment of federal functionaries carrying out Reconstruction. It also leaves (3), which does not refer only to freedmen or to any discrete group of defendants unable to receive a fair hearing before a state court. Instead, (3) deliberately extends federal habeas to those whose custody violates federal law.

Probably Congress had foremost in mind the Thirteenth Amendment and the Civil Rights Act of 1866.[146] However, in enacting the habeas corpus bill in February 1867, Congress did not limit the coverage of paragraph (3) to the Thirteenth Amendment and the Civil Rights Act of 1866 or even to federal laws guaranteeing "equal civil rights."[147] Congress obviously knew how to limit federal jurisdiction to civil rights cases or situations in

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Mayers, *supra* note 132, at 43-44. This, however, utterly fails to explain why Congress did not simply use the phrase "any *freedman* restrained of his liberty in violation of the Constitution." The chasm between the narrow category of "freedmen" and the all-encompassing category of "persons" remains too huge to ignore.

146. Act of April 9, 1866, ch. 31, § 1, 14 Stat. 27. The Civil Rights Act of 1866 defined all persons born in the United States (except Indians) as national citizens and spelled out rights which they were to enjoy equally without regard to race—making contracts, bringing lawsuits, and enjoying "full and equal benefit of all laws and proceedings for the security of person and property."

147. *Cf.* 28 U.S.C. § 1443(1) (1988) (allowing removal to federal court if defendant is unable to enforce "any law providing for the equal civil rights of citizens of the United States").

which defendants faced hostile state forums. The original civil rights removal provision, which was part of the Civil Rights Act of 1866, embodied both restrictions. It restricted the right of removal to those "persons who are denied or cannot enforce in the courts or judicial tribunals of the State or locality where they may be any of the rights secured to them by the first section of this act." However, in the habeas corpus statute, Congress deliberately used the general terms "Constitution" and "laws"—two things obviously capable of growth.[148] Further, Congress did not include in the habeas statute any requirement that petitioners demonstrate their inability to enforce rights in state courts. Thus, narrow original intent interpretations of the habeas statute fail.

C. *Historical Context*

My conclusion that the legislative history tells us little about the underlying purpose of the habeas statute does not mean that I reject the legislature's original intent as a legitimate basis for statutory interpretation. Original intent, to the degree it can be ascertained, is an important factor in extracting meaning from a statute. In the case of the Habeas Corpus Act of 1867, the recorded legislative history is simply too meager to be of much help. The same is not true, however, of the political circumstances surrounding the enactment of the statute. One of the primary criticisms of both the deterrence and federal forum theories of habeas is that they run counter to traditional notions of judicial federalism. But the ruling Republicans' deep distrust of state courts in the enforcement of civil rights and civil liberties rebuts that criticism.

The Thirty-Ninth Congress, elected in the midst of war in 1864, did not first assemble until December 1865. In both houses, Republicans outnumbered Democrats more than three to one. The two most significant groups of Republicans were Radicals and Moderates. The Radicals, such as Charles Sumner, Ben Wade, and Henry Wilson in the Senate, and

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148. Professor Wiecek agrees that Congress intended considerable elasticity in the scope of the statute's coverage:

> Perhaps all that can be concluded about the intent of Congress in passing the Habeas Corpus Act of 1867 is that, in attempting to secure the narrow objective of protecting certain southern Negroes, Congress enacted a statute of comprehensive terminology, being vaguely aware of the possibilities inherent in the act and willing to see how it would be nurtured and matured in the courts. Even this conservative conclusion indicates the extent to which Congress was ready to expand the powers of the federal courts, since it would be the courts that would, in effect, prescribe the limits of their own jurisdiction.

Wiecek, *supra* note 143, at 540-41.

Thaddeus Stevens, George W. Julian, and James M. Ashley in the House, were ideologues. Philosophically, their driving force was "the utopian vision of a nation whose citizens enjoyed equality of civil and political rights, secured by a powerful and beneficent national state."[149] Their belief in national enforcement of equal rights brought with it a non-traditional view of judicial federalism. They carried the conviction that "federalism and state rights must not obstruct a sweeping national effort to define and protect the rights of citizens."[150] Representative Stevens summed it up for the Radicals when he told the House that "'We are making a nation,' . . . and obsolete 'technical scruples' must not be allowed to stand in the way."[151]

Moderate Republicans shared some of the Radicals' distaste for legal niceties that might obstruct Reconstruction. They did not, however, favor a universal and permanent repudiation of traditional notions of federalism and state sovereignty.[152] Ideally, Moderates would have preferred to preserve an antebellum arrangement whereby states exercised primary control over most areas of social and economic concern through the police power and whereby national power was limited to matters of interstitial concern. The difference between Radicals and Moderates could be seen in the example of a May 1866 debate concerning the protection of Americans from cholera. Senator Sumner, the Radical leader, insisted that the federal government was best equipped to handle the problem. Moderates responded that public health matters fell "within the police power of the States exclusively."[153]

Outside the ambit of Reconstruction, then, Radicals and Moderates had a basic disagreement about the balance of national and state power. Radicals often saw national power as the engine that would drive social improvement. Moderates feared the undue centralization of power. Where Reconstruction measures were concerned, however, Moderates faced a

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149. ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877 230 (1988). The Radicals of 1867 would hardly be considered radical today. They believed in formal civil equality—such as equal rights before the criminal law and equal rights to contract and sue. They also believed in extending suffrage to freedmen. They did not believe in state enforcement of social equality. As Radical leader Tad Stevens stated, "Negro equality . . . does not mean that a negro shall sit on the same seat or eat at the same table with a white man. That is a matter of taste which every man must decide for himself." CONG. GLOBE, 39th Cong., 2d Sess. 252 (1866).

150. FONER, *supra* note 149, at 231-32.

151. *Id.* at 232.

152. *Id.* at 242.

153. *Id.*

dilemma. Like the Radicals, they were committed to guaranteeing certain civil rights, such as the rights to make and enforce contracts and the right to formal equality before the criminal law. Moderate Republicans knew full well that such civil rights could not be guaranteed through enforcement by state courts. Freedmen, their sympathizers, and federal functionaries were routinely harassed or otherwise discriminated against by sheriffs, judges, and juries, often under color of facially neutral laws.[154] If equal civil rights were to be protected, it would have to be in federal courts where judges and jurors were required to take the "Ironclad Oath" swearing past loyalty to the Union. Where it came to guaranteeing civil rights, then, Moderates knew their preference for preserving the traditional balance of federal and state judicial power simply could not be honored.

This concession to political reality was amply reflected in the Civil Rights Act of 1866 (the Act).[155] In addition to conferring substantive civil rights, the Act authorized aggressive federal enforcement. It gave federal district attorneys, federal marshals, and Freedmen's Bureau officials the power to bring suit against violators of the civil rights set forth in the Act. It granted the federal courts jurisdiction to hear such cases, and it authorized federal criminal penalties against anyone who violated civil rights under color of state law. And Congress consciously declined to limit the reach of the Act to the South or to the protection of freedmen. Many of the discriminatory laws invalidated by the Act were in Northern states.[156]

Radicals and Moderates alike were aware that the Civil Rights Act embodied a "profound change in federal-state relations and reflected how ideas once considered Radical had been adopted by the party's mainstream."[157] Because the enforcement provisions clearly manifested the proposition that the federal government possessed authority to protect citizens' rights, the Act "represented a striking departure in American jurisprudence."[158]

All parties, then, were aware that Reconstruction legislation providing for the enforcement of civil rights and civil liberties marked a sharp departure

154. *Id.* at 245.

155. Act of April 9, 1866, ch. 31, § 1, 14 Stat. 27.

156. FONER, *supra* note 149, at 244.

157. *Id.* at 244.

158. *Id.* at 245. Senator Lot Morrill stated: "I admit that this species of legislation is absolutely revolutionary. But are we not in the midst of a revolution?" ROBERT J. KACZOROWSKI, THE POLITICS OF JUDICIAL INTERPRETATION: THE FEDERAL COURTS, DEPARTMENT OF JUSTICE AND CIVIL RIGHTS, 1866-1876 1-4 (1985).

from previous understandings about judicial federalism. For the Radicals, it was a product of ideology; for the Moderates, it was a concession to reality. In either case, Congress' conscious decision to break with the traditional balance of federal-state power in the civil rights and civil liberties area goes a great distance toward answering critics of the deterrence and federal forum theories. Recall that in his opinion for the Court in *Brecht v. Abrahamson*, Chief Justice Rehnquist aimed exactly that criticism at the deterrence rationale:

> "Federal intrusions into state criminal trials frustrate both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights. [. . .]" Absent affirmative evidence that state-court judges are ignoring their oath, we discount petitioner's argument that courts will respond to our ruling by violating their Article IV duty to uphold the Constitution. Federalism, comity, and the constitutional obligations of state and federal courts all counsel against any presumption that a decision of this Court will 'deter' lower federal or state courts from fully performing their sworn duty.[159]

Here Chief Justice Rehnquist is arguing that the Court must have a high degree of confidence in the inclination and ability of state courts to vindicate federal constitutional rights. In his view, the Court is required to maintain such confidence in state courts because a traditional conception of judicial federalism calls for it. But Congress is entitled to depart from this tradition if it so chooses. In *Fitzpatrick v. Bitzer*,[160] then-Justice Rehnquist's opinion for a unanimous Court, recognized congressional power pursuant to the Reconstruction Amendments to change the balance of federal-state relations. In *Fitzpatrick*, the Court upheld congressional abrogation of the Eleventh Amendment in the context of an amendment to Title VII. The legislation was enacted pursuant to Section 5 of the Fourteenth Amendment, which, according to Justice Rehnquist, represented a "shift in the federal-state balance [that] has been carried forward by more recent decisions of this Court."[161] This shift had been countenanced by several of the Court's decisions, sanctioning "intrusions by Congress, acting under the Civil War Amendments, into the judicial, executive, and legislative spheres of autonomy previously preserved to the States."[162]

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159. Brecht v. Abrahamson, 113 S. Ct. 1710, 1721, *reh'g denied*, 113 S. Ct. 2951 (1993) (citations omitted).

160. 427 U.S. 445 (1976).

161. *Id.* at 455.

162. *Id.*

"[W]e think that the Eleventh Amendment, and the principle of state sovereignty which it embodies, are necessarily limited by the enforcement provisions of § 5 of the Fourteenth Amendment,"[163] the Court concluded. In determining the permissible reach of Title VII, the *Fitzpatrick* Court considered itself bound by Congress' departure from that traditional federal-state balance when enacting the amendment. By the same token, in determining the reach of the habeas statute, the Court ought to consider itself bound if the Thirty-Ninth Congress intended to depart from that balance. The Court should not lightly infer intent to depart from traditional notions of judicial federalism.[164] But, judging from the historical context in which the Habeas Corpus Act of 1867 was enacted, the intent seems clear. To deny that the Reconstruction Congress intended to depart from the traditional, antebellum conception of judicial federalism—at least in the context of enforcing civil rights and civil liberties—would require turning a blind eye to overwhelming evidence.

Those who argue against the deterrence and federal forum theories on judicial federalism grounds might concede that the Thirty-Ninth Congress intended to suspend the usual understandings about federal-state power, but only temporarily. They might argue that, as the decades went by, sectionalism would fade; state justice systems would no longer be dominated by bias and prejudice; and the need for federal habeas review of state convictions would wither away. As the need for such review waned, the traditional notion of state court prerogative over criminal matters would militate against the exercise of federal habeas jurisdiction. In other words, the argument runs, Congress intended a "sunset" of the habeas statute, and the federal courts should honor that intention.

But Congress knew how to sunset Reconstruction institutions. In March 1865, Congress created the Freedmen's Bureau, whose function was to "distribute clothing, food, and fuel to destitute freedmen and oversee 'all subjects' relating to their condition in the South."[165] This last vague phrase gave the Bureau unprecedented responsibilities and powers, but Congress nonetheless saw it as a temporary expedient. The enabling legislation limited the Bureau's life span to one year and gave it no direct appropriation. Senator Sumner, the Radical leader, argued in favor of making the Bureau a permanent Cabinet department, but his proposal was

163. *Id.* at 456.

164. *Cf.* Atascadero State Hosp. v. Scanlon, 473 U.S. 234 (1985) (requiring clear statement of congressional intent to abrogate Eleventh Amendment immunity).

165. FONER, *supra* note 149, at 69.

turned away. The next year, as part of the Civil Rights Act of 1866, Congress extended the Bureau's life, gave it some direct money, and authorized Bureau agents to exercise jurisdiction over cases involving black persons and to *punish* state officials who denied black persons equal civil rights. Obviously, giving the Bureau authority to mete out punishments over state officials represented a total departure from traditional notions of state sovereignty and judicial federalism, but even moderate Republicans could support it on the representation that the Bureau was not a permanent institution. If Congress had wanted the habeas statute phased out with the decline of sectionalism and prejudice in Southern justice systems, it could have given the statute a ten- or fifteen-year term. However, Congress did not set a time limit. Similarly, Congress set no time limit on the Civil Rights Act of 1866, which was also aimed at sectionalism and prejudice that Congress hoped would wane as time passed.

D. *Statutory Structure*

I believe the most availing mode of analysis with respect to the habeas statute is its structure and relationship to the civil rights removal statute. Before explaining why I think this analysis is persuasive, I will explain the nature of what I refer to as "structural" analysis. By this I mean a mode of interpretation that deduces an underlying rationale of a constitutional or statutory provision at a high level of abstraction, based on that provision's relationship to other provisions. Chief Justice Marshall's defense of judicial review, for example, is a product of structural and relational analysis. Nothing in Article III explicitly empowers the Court to strike down a legislative enactment. But if the Court is to exercise the "Judicial Power" (the power to decide cases) and if the basic nature of a constitution is that it trumps ordinary legislative enactments, then the Court must have the power to decline the enforcement of an unconstitutional statute. The principle of judicial review is thus a logical inference from the relationship of Article III and the meta-principle of constitutional supremacy. Structural and relational analysis can be employed just as profitably in statutory interpretation as it can in the service of constitutional interpretation.

Congress enacted the first major civil rights act on April 9, 1866. Section 3 of the statute, *inter alia*, authorized federal trial courts to entertain certain actions removed from state court:

> Sec. 3. *And be it further enacted*, That the district courts of the United States, within their respective districts, shall have, exclusively of the courts of the several States, cognizance of all crimes and offenses committed against the provisions of this act, and also, concurrently with the circuit courts of the

> United States, of all causes, civil and criminal, affecting persons who are denied or cannot enforce in the courts or judicial tribunals of the State or locality where they may be any of the rights secured to them by the first section of this act . . . .[166]

This section gave the district and circuit courts removal jurisdiction in civil and criminal cases in which state courts would not vindicate rights created by section 1 of the Civil Rights Act. It is significant that section 3 of the Act did not authorize removal generally in cases where defendants were unable to enforce rights secured to them by "the Constitution and laws of the United States." The latter locution, of course, was the phrase used in the Habeas Corpus Act of 1867 and is far more inclusive and open-ended than the phrase used in the removal provision.

Why did the Thirty-Ninth Congress limit the removal provision to cases involving rights under the Civil Rights Act? Unfortunately, as Professor Amsterdam found, "The pertinent congressional materials do not illuminate the intended scope of this removal provision."[167] During the relevant period (1866 and 1867), the only real difference between rights protected by section 1 of the Civil Rights Act and rights protected by the "Constitution and laws of the United States" was the Thirteenth Amendment. In other words, the only then-extant federal civil rights stemmed from the Thirteenth Amendment and the Civil Rights Act. There were no other federal constitutional or statutory provisions protecting civil rights or civil liberties against the states. This fact makes it tempting to gloss over the difference in phrasing between the removal provision and the habeas corpus statute. However, to minimize the difference in phrasing would be to misread the chronology of the Thirty-Ninth Congress. Even before a stunned and angry Republican Congress overrode President Johnson's veto of the Civil Rights Bill in April 1866, Republicans were looking to freeze broad protections for civil rights and civil liberties into the Constitution.

By the time the Habeas Corpus Act was enacted in February 1867, the Fourteenth Amendment had already been set in stone. All that remained was to secure the formal ratification of the Amendment by state conventions. After the congressional elections of 1866, ratification was virtually a foregone conclusion. The election was widely seen as a referendum on the Fourteenth Amendment. The electorate voiced its approval of the Amendment by confirming Republicans' overwhelming supermajority in Congress. Ratification was assured by the fact that Northern states

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166. Act of April 9, 1866, ch. 31, § 3, 14 Stat. 27.

167. Amsterdam, *supra* note 132, at 811 & nn.78-79.

overwhelmingly approved of the Amendment, and Southern states would be forced to ratify if they wanted to regain representation in Congress. In other words, by February 1867, Congress knew that the phrase "Constitution and laws of the United States" would include the Fourteenth Amendment as well as the Thirteenth Amendment and the Civil Rights Act of 1866.

What is the significance of the difference between the somewhat narrow scope of removal and the very broad scope of habeas corpus? It is the difference between a statute that guarantees a federal forum (removal) and a statute largely premised on latent federal presence (habeas corpus). The phenomenon of overburdened federal trial courts is not new. In 1866 and 1867, Congress was aware that the federal trial courts—the circuit courts in particular—already had more work than they could expeditiously handle.[168] As is true today, federal judicial resources were scarce and had to be rationed. If an all-encompassing jurisdiction were authorized, then it had to be exercised in a partial manner. If the jurisdiction were tightly restricted, it could be exercised to its fullest extent. That was, and is, the reality of allocating scarce judicial resources.

The "tightly restricted jurisdiction" just described was, of course, the removal provision of the Civil Rights Act of 1866, now section 1443 of Title 28 of the United States Code. Through the so-called *Rives-Powers* doctrine,[169] the Supreme Court interpreted this jurisdictional grant narrowly indeed. The *Rives-Powers* doctrine holds that removal under section 1443 is impermissible unless the defendant shows that some state constitution or statute discriminates on its face. To say the least, this restrictive interpretation has caused the civil rights removal jurisdiction to drain exceedingly few resources from the federal judicial system. One need not agree with the Court's miserly construction of the civil rights removal statute to see that it is an example of a relatively narrow jurisdiction meant to be exercised to its fullest.

Given its view of state justice systems circa 1867, Congress probably would have preferred in the abstract to guarantee a federal forum for every claim of federal civil rights by state criminal defendants. However, scarcity

168. The industrialization and territorial expansion of the United States in the period 1789-1865 caused acute caseload difficulties for the federal circuit courts (which were trial courts at the time). The problems were especially serious for the western states and territories. The story is recounted in FELIX FRANKFURTER & JAMES M. LANDIS, THE BUSINESS OF THE SUPREME COURT: A STUDY IN THE FEDERAL JUDICIAL SYSTEM 4-56 (1928).

169. *See* Virginia v. Rives, 100 U.S. 313 (1880); Kentucky v. Powers, 201 U.S. 1 (1906).

of federal judicial resources made that unrealistic. The best that could be done was to identify a core of federal rights requiring the most aggressive protection and to guarantee a federal forum for their vindication. This was accomplished through the removal provision. Other federally-created rights would, for the most part, have to be vindicated by state courts. Though state courts could not ordinarily be trusted to vindicate such rights, they might perform more faithfully if they sensed a federal presence constantly hovering over them. This latent federal presence could be provided by a broad—yet only partially exercised—habeas jurisdiction.

The statutory scheme simply does not make sense if both the civil rights removal statute and the habeas statute are construed to guarantee a federal forum for every claim within their respective ambits. The jurisdictional scope of the removal statute includes all claims arising out of section 1 of the Civil Rights Act of 1866. The jurisdictional scope of the habeas statute includes all claims arising out of federal law. The group of claims arising out of section 1 of the Civil Rights Act comprises a fully included subset of all federal claims. Therefore, if both statutes are interpreted to guarantee a federal forum, the habeas statute rendered the civil rights removal statute largely redundant. We should be uncomfortable with such a conclusion.

There are a couple of potential rebuttal arguments. One is that the statutes are not redundant because removal provides a *pre*-state judgment federal forum, whereas habeas provides only a *post*-state judgment federal forum. In other words, once one adds the dimension of time, the statutes do not really overlap. This rebuttal argument loses most of its steam when one considers that: (1) the original civil rights removal statute permitted post-judgment removal as well as pre-judgment removal[170]; and (2) the original habeas corpus statute did not require exhaustion, therefore permitting a person in state custody to petition for federal habeas corpus even prior to trial.[171] Adding the dimension of time does not save these statutes from redundancy if they are both viewed as guaranteeing a federal forum for every claim within their respective jurisdictions.

A second rebuttal is the versatile "so what?" argument. So what if the habeas statute rendered the civil rights removal statute largely redundant? Congress is entitled to change its mind and it does not always dedicate as

170. This assumes that something less than full preclusive effect would be accorded to the state judgment in a properly removed case.

171. The exhaustion doctrine was introduced to habeas law in *Ex Parte Royall*, 117 U.S. 241 (1886). Congress partially codified the doctrine into 28 U.S.C. § 2254 in 1948. For an account of the legislative history, see Brown v. Allen, 344 U.S. 443, 447 (1953).

much attention to the niceties of statutory housekeeping as academics might desire. For example, when Congress repealed the amount in controversy requirement for general federal question jurisdiction in 1988, it rendered the jurisdictional implementation for section 1983 totally redundant.[172] The answer to this argument is that it is implausible in this particular instance. It is one thing for the 1988 Congress to rethink the proper scope of general federal question jurisdiction, first enacted in 1875. It is quite another thing to say that the Thirty-Ninth Congress changed its mind about the best way to enforce federal civil rights less than one year after enacting the Civil Rights Act. Historically, there is nothing in particular that might have prompted such a change in thinking. On the contrary, the removal statute (part and parcel of the Civil Rights Act of 1866) and the habeas corpus statute (part and parcel of the Reconstruction Act of 1867) appear to have been part of a unitary legislative program.

One nagging question remains: Why have I not offered a "first principles" theory of habeas corpus? I have given what I believe is the best interpretation of the existing statute, but I have not questioned its desirability. Should there be any provision at all for lower federal court review of state convictions?[173] I deliberately have avoided this question because it is impossible to answer without first knowing whether federal courts adjudicate constitutional criminal procedure claims any differently from state courts. This is an empirical question for which we currently have no reliable answer and for which we may never have a reliable answer. Some observers are sure that federal courts are generally more sophisticated, better staffed, and predisposed to the protection of constitutional rights. Other observers are sure that, in this day and age, no difference exists between the behavior of federal and state judges. In the world of federal courts scholarship, this is known as the "parity" debate. Only one thing is known for sure: the disagreement has been baked so hard that anything resembling consensus on this is, for the foreseeable future, out of the question.[174] Rather than develop a theory doomed to

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172. *Compare* 28 U.S.C. § 1331 (1988) *with* 28 U.S.C. § 1343(3) (1988).

173. As a formal matter, section 2255 does not authorize review of the underlying conviction. It authorizes an inquiry into the legality of the detention *simpliciter*. *See Fay*, 372 U.S. at 430. This distinction has proved of little practical significance.

174. Professor Chemerinsky has valiantly argued for an end to this debate, *see* Erwin Chemerinsky, *Ending the Parity Debate*, 71 B.U. L. REV. 593 (1991), but the volume and persistence of literature suggests otherwise. For a sample of the literature, *compare* Bert Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977) (stating federal courts are better equipped to adjudicate claims of federal right); Martin H. Redish, *Judicial Parity, Litigant Choice, and Democratic Theory: A Comment on*

rejection by roughly half its audience, I have limited myself to the premise that section 2254 is here to stay.

In this Part, I have proposed a theory of habeas that incorporates notions of process, innocence, and cost-effective deterrence. There are a number of ways that this hybrid theory could potentially be applied to habeas practice, but I believe one particular scenario is the most likely and defensible. In the final Part of this Article, I will both describe and argue for that scenario.

IV. THE SURPRISING REACH OF A DETERRENCE RATIONALE

The task is to fashion a workable set of doctrines around the general theory that I have proposed. We start with Justice Scalia's description of federal habeas practice: "Habeas jurisdiction is tempered by the restraints that accompany the exercise of equitable discretion."[175] I adopt the phrase "equitable discretion" advisedly; I do not mean to endorse any of the federalism baggage that the Court loaded onto the phrase in *Younger v. Harris*.[176] What Justice Scalia meant, I believe, was simply that a federal habeas court has relatively broad discretion to grant or withhold relief within its jurisdiction, and that this discretion should be informed by factors traditionally considered upon prayer for extraordinary relief. I propose that three factors be considered sufficient for the grant of habeas relief. First, the fact that a constitutional violation may have caused an innocent person to be convicted should be sufficient to support the grant of habeas relief. Second, a shocking departure from accepted norms of adjudication, such as allowing a mob to dominate a trial, should be another sufficient ground. Finally, and most significantly from a practical perspective, the fact that granting this type of relief generally would be likely to deter constitutional violations in the future without undue depletion of federal judicial resources ought to be considered a sufficient ground.

Equitable discretion reposes in each district judge and appropriate

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Federal Jurisdiction and Constitutional Rights, 36 UCLA L. REV. 329 (1988) (same); *with* Paul Bator, *The State Courts and Federal Constitutional Litigation*, 22 WM. & MARY L. REV. 605 (1981) (stating that state courts are equally capable of and inclined toward vindicating federal constitutional rights); Michael Solimine & James L. Walker, *Constitutional Litigation in Federal and State Courts: An Empirical Analysis of Judicial Parity*, 10 HASTINGS CONST. L.Q. 213, 214-15 (1983) (same).

175. *Withrow*, 113 S. Ct. at 1766 (Scalia, J., dissenting).

176. 401 U.S. 37 (1971). For a spellbinding account and critique of how the Court transformed equitable discretion into a doctrine of judicial federalism, see Owen M. Fiss, *Dombrowski*, 86 YALE L.J. 1103 (1977).

deference should be accorded to exercises of this discretion. At the same time, however, some generalizations can be taken as presumptively correct. For example, the Supreme Court ought to be able to draw some generalizations about the likelihood that granting habeas relief in particular types of cases will deter future state court constitutional violations.[177] Furthermore, the Court should be able to make some generally-applicable observations about how much in judicial resources a particular type of review would occasion. Therefore, with respect to some types of habeas cases, a presumption in favor of or against the exercise of equitable discretion should exist.

The Supreme Court should consider the same factors mentioned above when fashioning procedural rules for habeas jurisdiction. Here I use the term procedural rules broadly, including, for example, rules governing the standards of review on federal habeas. If a procedural rule enhances the odds that innocent prisoners will be exonerated, and if it does not cause undue depletion of judicial resources, it should be favored over rules that do not enhance such odds. Likewise, if a proposed procedural rule is more likely to deter state courts from future constitutional violations, and if it does not cause undue depletion of resources, it should be favored over its rivals. With this preface, I will now examine individual areas of habeas jurisprudence to see how the hybrid theory would apply.

A. Standard of Review for Mixed Questions of Law and Fact

In *Miller v. Fenton*,[178] the Court held that federal habeas courts should review state court findings on mixed questions of law and fact under a de novo standard. In *Wright v. West*,[179] after specially requesting briefing on whether the Court should reexamine this standard, the Court ultimately found it unnecessary to address the question. Justice Thomas' opinion in *Wright v. West*, joined by Chief Justice Rehnquist and Justice Scalia, hinted strongly that those three justices will eventually vote to overrule *Miller v. Fenton* and to substitute in its place a more deferential standard of review. Justice O'Connor's opinion in *Wright v. West* made it clear that she and Justices Blackmun and Stevens favor retention of the de novo standard.

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177. On this, I would advocate adoption of the Court's concept of procedures that form part of the scheme of "ordered liberty," see Palko v. Connecticut, 302 U.S. 319, 325 (1937), or the formulation that replaced it, see Duncan v. Louisiana, 391 U.S. 145, 148-49 (1968) (stating that procedure must be "fundamental to the American scheme of justice").

178. 474 U.S. 104 (1985).

179. 112 S. Ct. 2482 (1992).

Justice Kennedy's opinion strongly suggests that he also favors retention of the de novo standard. Justices White and Souter intimated no position on the matter.

In applying the hybrid theory of habeas articulated earlier in this Article, the first question is whether greater or lesser deference to state court findings on mixed questions would increase the chances that factually innocent prisoners will be granted relief. Although this—like most of the questions asked by the hybrid theory—is an empirical question, it seems likely that a less deferential standard of review will enhance the chances of exonerating innocent prisoners whenever the question at hand is related to accuracy of fact-finding. One obvious example would be whether a confession was coerced. The Court has previously decided that the finder of fact is better off without any confession at all than with a coerced confession. The more rigorous federal court scrutiny, the more likely federal courts will overturn state court determinations that confessions were not coerced. The more determinations of non-coercion that are overturned, the more likely that factually innocent prisoners will be released. Of course, it also increases the odds that factually guilty prisoners will be granted relief. This fact poses a serious challenge to the conventional American wisdom that it is better to free several guilty defendants than to convict a single innocent person. Accepting the conventional wisdom as a point of departure, it seems clear that the less deferential standard is preferable.

This leaves us with the often difficult problem of determining which mixed questions bear on fact-finding accuracy. Most do; constitutionally-mandated procedures that are not aimed at safeguarding against mistakes in the determination of guilt are exceptional and, for the most part, notable. Laying *Miranda* and *Mapp* claims aside for the moment, only a few constitutional claims even arguably fit into the description of "unrelated to accuracy of fact-finding." These claims include the following: the prosecution violated the Equal Protection Clause in the exercise of preemptories; the grand jury was improperly composed; the prosecution argued the defendant's post-*Miranda* silence at trial; and the defendant was placed in double jeopardy. There are other such claims, but not many. Even the privilege against compelled self-incrimination, which arguably is animated by a philosophical commitment to individual autonomy and individual dignity, probably reduces the risk of inaccuracy in coerced confessions.

Thus, based on the innocence prong of the hybrid theory alone, we are driven to the conclusion that review of the great majority of mixed

questions ought to be non-deferential because they are related to accuracy in the determination of factual guilt. What of the few mixed questions unrelated to accuracy in guilt determination? Is review of such questions to be highly deferential? Not necessarily, because non-deferential review of those questions might still deter state court judges from violating underlying constitutional rights. Consider, for example, permitting the prosecution to argue post-*Miranda* silence in its closing. If it becomes well-known among state judges that federal habeas courts will grant relief because of such violations and that they will exercise *independent, non-deferential judgment* as to whether a particular prosecutorial comment alluded to post-*Miranda* silence, then there is good reason to believe that they will be more inclined to uphold contemporaneous defense objections to such comments. Upholding such objections entails virtually no disruption to the flow of trial, yet helps insulate the resulting conviction, if any.

A word should be said about the role of abstraction in deterrence analysis. The proper question is not whether a single grant of habeas relief would deter state judges. Normally, single cases do not carry sufficient notoriety to make a discernable institutional difference. Rather, the proper question is whether the grant of relief in this *type* of case is likely to have some deterrent value against future constitutional violations. If the answer is yes, then the deterrence prong of the hybrid theory is satisfied regarding that type of case.

The principal objection to deterrence analysis of any kind is that "We don't know whether it works, and we never will know for sure." For the sake of argument I will concede this, but nothing flows from it. In the absence of hard empirical data, we must ask whether we have enough confidence in our hunches to act upon them. One never knows if the weather forecast is accurate until it is too late; thus, if the forecast is for rain, it makes sense to take one's umbrella along. We have enough confidence in the weather forecaster's hunch to justify the added bother of the umbrella. The question, then, is how much confidence do we have in the hunch that the grant of federal habeas relief exerts general or specific deterrence effect against future state court constitutional violations?

There are at least two major variables. One is the type of issue involved. State judges might be influenced by the availability of federal habeas relief with respect to certain constitutional violations—say, violations that can easily be avoided and from which there is little to gain—but beyond influence with respect to other violations. A second variable is the type of state court judge. Some do their best to stay abreast of and to abide by the Supreme Court's criminal procedure decisions, whether or not they seem

right. Deterrence is irrelevant with respect to these judges. At the other extreme, a few judges are incorrigible; they remorselessly enforce their own idiosyncratic views of criminal procedure. They are angered when federal courts grant habeas relief to defendants convicted in their courts, but it has no effect on their behavior.

The remainder of judges—whether because of caseload congestion, a lack of sympathy for expansive views of defendants' rights or even just lack of awareness about the latest criminal procedure developments—sometimes cut procedural corners. The violations are usually subtle and in borderline situations. It is this group of judges that can be encouraged to improve their performance. The grant of relief by federal district courts may cause state trial judges to realize for the first time that other trial judges view particular Supreme Court edicts as requiring more than they had previously thought. In that regard, it may be less accurate to say that federal relief "deters" constitutional violations than it would be to say that such relief spurs state judges to do a fully professional job with the federal claims. In any event, there is good reason to speculate that "deterrence" can be effective in these circles.

This brings us to the matter of costs. Deterrence normally requires the expenditure of scarce judicial resources. The expected benefit of deterrence must be weighed against this depletion of resources. Standard of review jurisprudence, however, is one rare area in which additional deterrence is costless. It is a common misconception that deferential review requires less time or attention than non-deferential review. In either case, the reviewing court is required to undertake a careful survey of the record as a whole.[180] The only difference between deferential review and non-deferential review is the threshold for reversal.

Where deferential review is the standard, the reviewing court must be strongly convinced that the question at issue ought to have been answered differently. Where review is non-deferential, the reviewing court should reverse even when it only leans toward the opposite conclusion. Juries provide a good analogy. No one would dream of suggesting that a criminal jury can spend less time deliberating or pay less attention during the trial than a civil jury simply because the burden of persuasion is much steeper in a criminal case. The jurors in either type of case must undertake the

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180. I mean this as a normative, not descriptive, assertion. Some appellate judges may well "cheat" by spending less time on cases where the standard of review is highly deferential. The relevant comparison, however, is the properly-conducted deferential review versus the properly-conducted de novo review.

same diligent and conscientious review of the evidence. The only difference is that they measure the strength of their conclusions against different scales.

In light of the costliness of increased deterrence through a less deferential standard of review, the standard of review for all mixed questions should be de novo.

B. Cognizability of Miranda *and* Mapp *Claims*

If *Miranda* and *Mapp* claims are to be cognizable on habeas review, it will probably have to be on a deterrence rationale, for neither of these procedural rules appreciably enhances the likelihood that factually innocent prisoners will be granted habeas relief. *Miranda* sets forth a "prophylactic" rule, simply meaning that it requires the exclusion of some voluntary confessions in the hope of drastically reducing the incidence of coerced confessions. If the warnings are not given, any subsequent confession is inadmissible at trial, even if it bears all the indicia of a perfectly voluntary statement. The idea, of course, is that the prospect of completely losing a suspect's statements will persuade law enforcement officials to give the warnings faithfully. This, in turn, is supposed to produce either silence or an intelligent waiver.

As noted above, coerced confessions are less likely to be reliable than voluntary ones, and so the rule excluding coerced confessions helps ferret out innocent defendants. However, the rule excluding coerced confessions and the rule excluding all confessions when warnings have not been given are different rules. The first rule, if properly administered, banishes only coerced confessions from trial. The second rule operates to exclude both coerced *and* voluntary confessions, on the theory that the total number of coerced confessions will be lower than under a regime in which only the first rule exists. Thus, the *Miranda* doctrine is only tenuously related to accuracy in the determination of guilt.

The exclusionary rule is also unrelated to accuracy in the determination of guilt. The fact that physical evidence has been illegally seized does not diminish its evidentiary reliability. It is true that the "fruit of the poisonous tree" doctrine extends the exclusionary rule to evidence secondarily derived from illegal seizures, including inculpatory statements made by the suspect following seizure.[181] The fact that physical evidence was illegally seized,

181. The "fruit of the poisonous tree" doctrine originated in Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920).

however, does not alter the reliability of such voluntary inculpatory statements. Presumably, if the evidence had been seized legally, the suspect would have made the same statements.

It seems clear that the purpose of both *Miranda* and *Mapp* is not to help win acquittals of innocent defendants, but to deter state law enforcement officials from coercing confessions and from illegally seizing physical evidence. Of course, if *Miranda* and *Mapp* are to have their desired impact, the sanctions must be enforced; state courts must faithfully exclude statements given in the absence of proper warnings, illegally seized physical evidence, and inculpatory statements that are the product of the illegal seizure of physical evidence. So state courts become the instruments of deterrence against state law enforcement officers. They police the police.

Should we police the police's police? If so, it must come in the form of federal habeas corpus, for the United States Supreme Court cannot possibly review enough cases to provide an effective deterrent. However, there has been major disagreement among the members of the Court on the question whether federal habeas courts can or ought to deter state courts in the context of *Miranda* and *Mapp*. The result has been to uphold the cognizability of *Miranda* claims on habeas, but to deny the cognizability of *Mapp* claims. This differential treatment is untenable.

The Court in *Stone v. Powell*[182] articulated three reasons why *Mapp* claims should not be relitigated on federal habeas, at least where they have been given a full and fair hearing in state court. First, the exclusionary rule exacts high societal costs. It diverts attention from the "ultimate question of guilt or innocence." It also causes the release of some guilty defendants, which in turn "generat[es] disrespect for the law and administration of justice." Whatever one may think about the merits of these criticisms, they do not address anything unique to habeas. They are criticisms of the exclusionary rule in general.[183] The exclusionary rule exacts these same costs at trial and on direct appeal, yet the *Stone v. Powell* Court explicitly upheld the rule in these contexts. Clearly, then, the argument about "societal costs" was a makeweight in *Stone*; the real reason for the decision must have been because of a perceived lower level of benefits on habeas, or because of some other cost present during habeas but not during trial or

182. 428 U.S. 465 (1976).

183. Indeed, the first criticism applies more to trial than appeal or collateral attack. The question of guilt or innocence is, of course, the proper focus of trial. The proper focus of appeal and collateral attack, however, is legal error.

direct appeal.

Those were in fact the other two rationales articulated by the Court in *Stone*. The Court asserted that the deterrence gained from applying the exclusionary rule to federal habeas is substantially less than the deterrence gained from applying it at trial and on direct appeal:

> To be sure, each case in which such claim is considered may add marginally to an awareness of the values protected by the Fourth Amendment. There is no reason to believe, however, that the overall educative effect of the exclusionary rule would be appreciably diminished if search-and-seizure claims could not be raised in federal habeas corpus review of state convictions. Nor is there reason to assume that any specific disincentive already created by the risk of exclusion of evidence at trial or the reversal of convictions on direct review would be enhanced if there were the further risk that a conviction obtained in state court and affirmed on direct review might be overturned in collateral proceedings often occurring years after the incarceration of the defendant. The view that the deterrence of Fourth Amendment violations would be furthered rests on the dubious assumption that law enforcement authorities would fear that federal habeas review might reveal flaws in a search or seizure that went undetected at trial and on appeal.[184]

In this passage, the Court expresses skepticism about whether application of the exclusionary rule adds any deterrence to what is achieved by application of the rule at trial and on direct appeal. According to the Court, because habeas relief usually comes years after trial the threat is too attenuated to be effective. Moreover, if a law enforcement officer would be deterred from an illegal seizure by the threat of habeas, then she certainly will be deterred by the threat of evidentiary exclusion at trial and on appeal.

The *Stone* Court's skepticism is unwarranted. The Court either ignored or improperly rejected two major rebuttals. First, the fact that habeas relief normally takes years cuts both ways. It is plausible, as the Court asserted, that some law enforcement officers who will be deterred by the relatively immediate sanction of evidentiary exclusion at trial will not be deterred by the distant prospect of habeas relief. However, it is also plausible that the draconian nature of habeas relief counterbalances its untimeliness. Law enforcement officers are well aware that if a new trial is granted on habeas, it may be considerably more difficult to win a second conviction. Key prosecution witnesses may have disappeared or died; memories grow

184. *Stone*, 428 U.S. at 493 (footnote omitted).

dimmer. Indeed, the increased difficulty of gaining a second conviction is frequently used as an argument against liberal exercise of the habeas jurisdiction. It is quite likely that law enforcement officers would prefer an immediate reversal, when inculpatory evidence is still fresh, to a later reversal, when a guilty defendant might walk. This is particularly true in a case in which there is probably sufficient evidence to gain conviction even without the illegal seizure of any further evidence. Thus, the delayed nature of habeas relief does not necessarily diminish its deterrence value, and might even increase it.

The main flaw of the Court's reasoning in *Stone* was its dogmatic and improper refusal to honor the very essence of the federal habeas statute—namely, the assumption that federal and state courts differ in the way that they protect civil rights and civil liberties. This was Justice Powell's third argument against permitting exclusionary rule claims during federal habeas proceedings. The Court asserted that the deterrence value of the exclusionary rule on habeas was too slight to outweigh the costs. It was "dubious," according to the Court, that state law enforcement officers would think a federal court will find flaws where state courts did not. With all respect, this is not for the Court to decide. In enacting this statute in the first place, the Thirty-Ninth Congress essentially made a legislative finding of fact that state courts are less trustworthy in the vindication of civil rights and civil liberties than federal courts. This legislative fact-finding is not open to second-guessing by the Court.[185] Taking this legislative fact as true, there is every reason to believe that state law enforcement officers fear federal review more than state review. State law enforcement officers might expect a wink and a nod from the local trial judge, but they might not know what to expect from an unfamiliar federal district judge.

To summarize, there is good reason to think that the application of the exclusionary rule during federal habeas proceedings provides some deterrence of state law enforcement officers with respect to illegal seizures, and some deterrence of state courts with respect to admitting into evidence the products of such illegal seizures. Use of the exclusionary rule always

185. It might be objected that the Thirty-Ninth Congress could not have foreseen the exclusionary rule, or the application of the Fourth Amendment against the states. If Congress could have foreseen these doctrinal developments, it might not have been so sanguine about upsetting the traditional state-federal balance. But "changed circumstances" arguments do not work nearly as well in the realm of statutory interpretation as they do in constitutional interpretation because it is relatively easy to amend a statute if it becomes outdated.

contemplates the release of some guilty defendants, but this is just as much of a problem at trial and during direct appeal as it is on collateral review. It is also true that the delay inherent in habeas relief makes it more difficult to gain second convictions, but this cost is counterbalanced by the additional deterrence effect. Finally, a unique cost of federal habeas—damage to traditional notions of judicial federalism—is beyond the Court's control. In enacting the statute, Congress suspended this antebellum conception of federal-state balance. The Court would usurp congressional authority were it to reconceptualize that balance in this context.

C. Procedural Defaults

Every state court system imposes deadlines and other procedural requirements on the assertion of objections by criminal defendants. No system of criminal justice could function without such deadlines. Typically criminal defendants must challenge the composition of a jury pool within a certain number of days following indictment; they must move for a new trial within a certain number of days following the rendering of the verdict; and, most commonly, they must object to the admission of evidence before examination of the witness resumes. These are just three examples of a virtually endless number of deadlines for objections. The penalty for failing to meet such deadlines is usually that the defendant is considered to have waived the objection. Thus, even though the objection may have been meritorious and changed the entire course of the proceedings had it been asserted in a timely manner, it no longer can be asserted at any time during the remainder of direct review up the state court ladder, or in state postconviction review.

If a default precludes a criminal defendant from asserting the objection in state appellate or habeas proceedings, does it preclude the assertion of the objection during federal habeas review? The Warren Court said no, unless the defendant had made a conscious decision to forego the objection during the original proceedings. In the landmark case of *Fay v. Noia*,[186] the petitioner alleged that his confession had been taken against his will, and therefore that he should be granted a new trial. The state courts had held that he was precluded from attacking the admission of the confession because he had failed to appeal the trial court's decision. Justice Brennan's opinion for the Court held that a habeas petitioner is foreclosed from raising a defaulted issue only if he "deliberately bypassed the orderly

186. 372 U.S. 391 (1963).

procedure of the state courts."[187] Justice Brennan's conclusion assumed that most defaults result from inadvertence and neglect on the part of trial counsel, rather than from strategic decisions to forego objections.

The Burger Court made it far more difficult for a petitioner to raise a defaulted constitutional challenge during federal habeas review. In *Wainwright v. Sykes*,[188] the petitioner had challenged his conviction on the ground that his confession was improperly admitted into evidence. The state courts rejected this argument without reaching its merits because he had failed to raise the point at trial as state law required. Rather than holding that a federal habeas court could entertain the defaulted claim as long as the petitioner had not made a strategic decision to waive it, the Court held that the defaulted claim could not be considered unless the petitioner could demonstrate "cause and prejudice."[189] Writing for the Court, Justice Rehnquist stated that the main reason for adopting this stricter standard was to encourage state criminal defendants to raise all their objections at trial. Whereas the Court's empirical supposition in *Fay v. Noia* was that most procedural defaults result from inadvertence and neglect, the supposition underlying *Wainwright v. Sykes* was that most procedural defaults result from strategic maneuver. Justice Rehnquist stated that the standard of *Fay v. Noia* "may encourage 'sandbagging' on the part of defense lawyers, who may take their chances on a verdict of not guilty in a state trial court with the intent to raise their constitutional claims in a federal habeas court if their initial gamble does not pay off."[190] *Wainwright* all but formally overruled *Fay v. Noia*.[191]

The Court's opinion in *Wainwright* itself did not attempt to define cause and prejudice. In subsequent decisions, however, the Court made it clear that courts are to construe both terms narrowly. In *Murray v. Carrier*,[192] the Court offered a list of circumstances that qualify as "cause" for a procedural default within the meaning of *Wainwright*.[193] The first circumstance that will excuse a default for purposes of federal habeas

187. *Id.* at 438.

188. 433 U.S. 72 (1977).

189. The "cause and prejudice" standard was introduced in Davis v. United States, 411 U.S. 233 (1973), and Francis v. Henderson, 425 U.S. 536 (1976), in which the Court refused to allow habeas petitions challenging the composition of grand juries when no challenge was made at the time of trial. *See* CHEMERINSKY, *supra* note 29, § 15.5.1 at 704.

190. *Wainwright*, 433 U.S. at 89.

191. The formal overruling came in Coleman v. Thompson, 111 S. Ct. 2546 (1991).

192. 477 U.S. 478 (1986).

193. The Court insisted that the list was non-exhaustive. *Id.* at 488.

review is the existence of some factual or legal basis for a claim that was not reasonably available to counsel at trial. For example, in *Reed v. Ross*,[194] the petitioner asserted a challenge to the constitutionality of a jury instruction on the burden of proof for self-defense. The challenge was predicated on the Supreme Court's ruling that the prosecution is required to prove every essential element of a crime beyond a reasonable doubt. This ruling was handed down the year following the petitioner's trial.[195] A narrow majority of the Supreme Court held that this was a sufficient excuse for the procedural default and that the petitioner could now object to the jury instruction for the first time during federal habeas review.

However, this way of demonstrating cause is considerably narrower than a simple reading of *Reed v. Ross* would suggest. Two years earlier, in *Engle v. Isaac*,[196] the petitioner attempted to challenge the constitutionality of jury instructions. To support his challenge, he cited a state supreme court decision rendered after his trial, which had expressly been given retroactive effect in the state system. The petitioner conceded that he had not objected to the jury instructions at the time of trial, but noted (as in *Reed v. Ross*) that he could not possibly have anticipated the state supreme court's ruling. The United States Supreme Court held that the petitioner was barred from raising the objection for the first time on federal habeas review. Speaking for the majority, Justice O'Connor stated that the "futility of presenting an objection to the state courts cannot alone constitute cause for failure to object at trial . . . . Even a state court that has previously rejected a constitutional argument may decide, upon reflection, that the contention is valid."[197]

It is difficult to reconcile *Engle* and *Reed*.[198] Four of the justices who were in the *Engle* majority dissented in *Reed*. Probably the only significant distinction was that defense counsel in *Reed* failed to anticipate a major decision from the United States Supreme Court (excusable), whereas the lawyer in *Engle* failed to anticipate a major decision from the state supreme court (inexcusable). Justice Brennan's opinion in *Reed* stated that a petitioner may raise a defaulted claim during federal habeas review if she relies on a United States Supreme Court decision explicitly overruling precedent; or overturning "a longstanding and widespread practice to which

194. 468 U.S. 1 (1984).
195. *See In re* Winship, 397 U.S. 358 (1970).
196. 456 U.S. 107 (1982).
197. *Id.* at 130.
198. *See* Barry Friedman, *Tale of Two Habeas*, 73 MINN. L. REV. 247, 300-01 & n.287 (1988).

the Court has not spoken"; or disapproving a "practice this Court arguably has sanctioned in prior cases."[199] Furthermore, Justice Brennan implied that state supreme court decisions are easier to anticipate than United States Supreme Court decisions because, in the field of criminal procedure, the former can, to some degree, be expected to follow logically from the latter.[200]

The second method of demonstrating cause is by showing some form of prosecutorial or other state official misconduct making it impracticable for the petitioner to assert the objection. *Amadeo v. Zant* is a rare case where this standard was met.[201] There, the defendant had been convicted of murder and sentenced to death. While his state appeal was pending, pretrial discovery in a civil voting rights lawsuit turned up a handwritten memorandum of the prosecutor's office to the jury commissioners, listing figures for the number of blacks and women to be placed on master jury lists. The apparent purpose of the memo was to advise the commissioners how best to hold down the number of blacks and women on juries without giving rise to a prima facie case of discrimination. The Supreme Court held that this wilful misconduct constituted cause for the failure to object to the jury composition during trial. The basis for the claim was "'reasonably unknown'" to the defense lawyer as the result of the misconduct.[202] Clearly, very few petitioners will be able to bring themselves within the definition of this second type of "cause."

The third way to show cause within the meaning of *Wainwright* is to demonstrate that the default was the result of ineffective assistance of counsel. Under *Strickland v. Washington*,[203] a defendant may establish ineffective assistance only by "showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable."[204] To satisfy the *Strickland* standard, the petitioner must also show a reasonable probability that she would not have been convicted had

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199. *Reed*, 468 U.S. at 17.

200. The *Reed* form of "cause" is not only limited by *Engle*, but by the Court's decision in Teague v. Lane, 489 U.S. 288 (1989). *Teague* prohibits federal habeas courts from applying rules that were handed down after a petitioner's conviction became final on direct appeal. Thus, in order for a petitioner's defaulted claim to be cognizable on federal habeas, it must be based on a decision handed down after trial; but in order for the claim to avoid the bar of *Teague*, it must have been handed down before the conviction became final on appeal, which usually means as of the moment that the state supreme court denies review.

201. 486 U.S. 214 (1988).

202. *Id.* at 222 (quoting *Reed*, 433 U.S. at 14 and *Murray*, 477 U.S. at 488).

203. 466 U.S. 668 (1984).

204. *Id.*

it not been for the ineffective assistance. However, this second prong of the *Strickland* test adds nothing to the "prejudice" requirement already present in *Wainwright*.[205]

The Court has articulated one notable exception to *Wainwright*'s requirement of cause and prejudice for defaulted claims.[206] In a trio of 1986 decisions,[207] the Court held that a federal district court may entertain a defaulted claim even without a showing of cause and prejudice if the petitioner could make a "colorable claim of factual innocence."[208] This is known as the "fundamental miscarriage of justice" exception to the cause and prejudice rule. The Court has described the standard for determining actual innocence as follows:

> The prisoner 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 the facts would have entertained a reasonable doubt of his guilt.[209]

In other words, the test is whether the petitioner has made a "substantial claim that the alleged error undermined the accuracy of the guilt or

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205. *See* United States v. Frady, 456 U.S. 152 (1982). *Frady* is a section 2255 case, but applies equally to section 2254 petitions. *See* CHEMERINSKY, *supra* note 29, § 15.5.1, at 711-12.

206. It is unclear whether there exists a second exception to the cause and prejudice requirement. Presumably, a petitioner may raise a defaulted claim on federal habeas if the state procedural rule is not "adequate" to support the conviction within the meaning of the "independent and adequate state grounds" doctrine. To take an extreme example, if a party forfeits a claim in state court based on an unconstitutional procedural rule, the United States Supreme Court will not permit the default to bar the Court's consideration of the claim. The state ground of decision is said to be "inadequate" to support the judgment, and the federal court may reach the federal claim. *See* Staub v. City of Baxley, 355 U.S. 313 (1958). Clearly, a prisoner who had defaulted a federal claim based on an unconstitutional state procedure could raise the claim on habeas. This could hardly be described as an "exception" to the cause and prejudice requirement, however, because virtually any procedural rule found to be inadequate will also give rise to "cause" for the default. *See* HART & WECHSLER, *supra* note 84, at 1550-51.

207. Kuhlmann v. Wilson, 477 U.S. 436 (1986); Murray v. Carrier, 477 U.S. 478 (1986); Smith v. Murray, 477 U.S. 527 (1986). *Kuhlmann* recognized the "miscarriage of justice" doctrine as an exception to the general prohibition against successive federal petitions. In *Carrier* the Court held the exception applicable to the general prohibition against raising defaulted claims on habeas. *Smith* raised, but did not resolve, the issue of how the miscarriage of justice exception might apply to death sentences. The Court resolved the issue last Term in Sawyer v. Whitley, 112 S. Ct. 2514 (1992). There, the Court held that one is "actually innocent of the death penalty" if he shows by clear and convincing evidence that, but for a constitutional error, no reasonable juror would have found him eligible for the death penalty under applicable state law.

208. *Kuhlmann*, 477 U.S. at 454.

209. *Id.* at 455 n.17 (quoting Friendly, *supra* note 84, at 160).

sentencing determination."[210] Because the definition of "cause" and the fundamental miscarriage of justice exceptions are so narrow, *Wainwright v. Sykes* and its progeny have significantly reduced the number of defaulted claims that may be entertained by a federal habeas court.

The hybrid theory of habeas calls for a modest broadening of the review of defaulted claims. It starts by accepting "cause" as a sufficient justification for excusing a default. At least two of the circumstances that the Court considers to be "cause"—gross prosecutorial misconduct and ineffective assistance of counsel—give rise to a shocking abridgment of process if the default is not excused. Further, because expecting a defendant to anticipate a *state* supreme court ruling is just as fundamentally unfair as expecting her to anticipate a United States Supreme Court ruling, the rule of *Engle v. Isaac* should give way to the rule of *Reed v. Ross*.[211]

Furthermore, because the hybrid theory embraces the idea that one of the purposes of federal habeas review is to release innocent prisoners done in by constitutional error, it would retain the "fundamental miscarriage of justice" doctrine. A procedural default should be excused if the petitioner shows that she is probably innocent and that the underlying constitutional violation probably contributed to the wrongful conviction. In this context, probably means "by a preponderance of the evidence."[212] Suppose, for example, that the petitioner wants to assert a *Doyle* claim on habeas. The petitioner insists that the prosecution improperly commented on her post-*Miranda* silence during its closing argument. However, trial counsel failed to object, and all state appellate courts on direct and collateral attack refused to reach the issue on its merits because of the default. If the petitioner demonstrates to the court by a preponderance of the evidence that she is actually innocent of the crime, and that the prosecution's comments helped influence the jury or judge to reach a guilty verdict, then the habeas court should reach the *Doyle* claim on its merits.

This is where current doctrine ends. Cause and prejudice or a showing of probable factual innocence will excuse a default, but nothing else. The hybrid theory of habeas would excuse defaults under one additional circumstance: when granting relief to correct a particularly egregious constitutional violation might deter state courts or state law enforcement

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210. Smith v. Murray, 477 U.S. 527, 539 (1986).

211. Admittedly, this will matter only when the new rule is one "without which the likelihood of an accurate conviction is seriously diminished." *Teague*, 489 U.S. at 290.

212. Presumably this is what the Court means by "fair probability," *Kuhlmann*, 477 U.S. at 455 n.17, though we cannot know with certainty.

officers from similar violations in the future. This formulation is designedly open-ended in the hope that district courts will have the flexibility to reach any type of underlying police or state judicial behavior that should not escape public rebuke. The Court's current definition of "cause" is too narrow to encompass this situation. The root concept of "cause" focuses exclusively on individual desert—does the petitioner deserve to be excused from the default, or was it her fault that her lawyer failed to assert the objection in a timely fashion? Even the presence of serious prosecutorial misconduct does not necessarily excuse a default.

Under *Amadeo v. Zant*,[213] the petitioner must demonstrate that the misconduct deprived the defense of the information necessary to assert the objection, or in some other way prevented the defense from objecting. This inquiry focuses entirely on the defendant's fault. In contrast, the deterrence inquiry ignores the question of individual desert. It is irrelevant that the petitioner may have been negligent or even reckless in failing to assert the objection at trial. If the underlying constitutional violation is sufficiently profound, the habeas court ought to reach the merits of the defaulted claim and publicly set the record straight.[214] The individual petitioner is given a "windfall" in the same way that a defendant invoking the exclusionary rule is given a windfall. She is the unintended beneficiary of a remedy aimed at institutional betterment. Of course, because the habeas statute only reaches "custody" that has resulted from constitutional violations, the petitioner must always show that the constitutional violation may have contributed to her conviction before the habeas court may reach the merits of the claim.

To illustrate, we need do no more than posit a slight change in the facts of *Amadeo v. Zant*. Recall that the prosecution had conspired with the jury commissioners to hold down the number of blacks on the master rolls from which prospective jurors were drawn. Now further suppose that the defense stumbles onto the "smoking gun" memorandum detailing this practice. Then, due to a simple misunderstanding about whether an extension had been granted, trial counsel misses the deadline for asserting challenges to the composition of the jury venire. The defendant is convicted by an all-white jury, and there is considerable doubt whether he could have been convicted by a jury composed of blacks and whites.

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213. 486 U.S. 214 (1988).

214. *Cf.* Rose v. Lundy, 455 U.S. 509, 544 (1982) (Stevens, J., dissenting) ("errors that are so fundamental that they infect the validity of the underlying judgment itself, or the integrity of the process by which that judgment was obtained").

Current doctrine would not excuse the default because the defendant is charged with his lawyer's negligence. One cannot reasonably say that the prosecutorial misconduct prevented the defense from asserting its objection. Nor is it at all clear that defense counsel's neglect would amount to ineffective assistance under the stringent standard of *Strickland v. Washington* and its progeny. Under the hybrid theory, however, it is irrelevant that the defense was negligent in failing to object in a timely manner. The constitutional violation is intolerable and everyone must know it. Prosecutors and jury commissioners across the nation must be deterred from thinking that the federal courts will ever look away from violations of this magnitude.

Excuse of procedural defaults on this deterrence rationale would not be limited to race cases. Other types of constitutional violations could be sufficiently egregious: brutality or trickery in obtaining a confession; trickery in obtaining positive identification from an eyewitness; railroading a defendant into a guilty plea; or railroading a jury into a guilty verdict by giving an overpowering *Allen* charge. The plain fact is that defense counsel makes a timely objection to these types of violations in an overwhelming number of instances; thus, they never reach the default stage. But when they do, habeas courts must review the merits of these claims and grant relief to deter similar violations in the future.

A quick word should be said about the "deliberate bypass" of an objection. On the institutional rationale of deterring future violations, why should federal habeas courts refrain from excusing even defaults that resulted from strategic decisions at trial? Why should it matter that the defendant deliberately waived an objection if the underlying violation is so egregious that state courts and law enforcement personnel should be deterred from similar behavior in the future? The answer is that defendants would then have insufficient incentive to assert their objections at trial. The "sandbagging" concern voiced by the Court in *Wainwright v. Sykes*—in my opinion, greatly exaggerated—would become serious if some constitutional objections became non-waivable for purposes of collateral attack.

D. Application of New Rules

A problem endemic to the common-law method of adjudication is whether and to what degree newly developed rules should be given

retroactive application.[215] In the criminal procedure area, the Warren Court dealt with the problem on an ad hoc basis. In *Linkletter v. Walker*,[216] the Court set forth a three-part test to determine whether a new rule would be given retroactive effect: (1) was the purpose of the new rule furthered by retroactive application; (2) how much reliance was placed on the old rule; and (3) would retroactive application have a positive effect on the administration of justice? This flexible test may have permitted the Court to hand down controversial new rules of criminal procedure without attracting the extra criticism that would surely follow the wholesale reversal of convictions. In *Linkletter*, the Court held that *Mapp v. Ohio* would be applied only to trials held after the decision was handed down. And in *Johnson v. New Jersey*,[217] the Court held that *Miranda v. Arizona*[218] would be applied only to trials held after the decision was announced. Yet in other areas, the Court found that new rules should be applied not only on direct review but also on collateral review.[219]

The Rehnquist Court drastically changed the rule regarding retroactivity. In *Teague v. Lane*,[220] the petitioner claimed that his Sixth Amendment rights were violated because his petit jury did not reflect a fair cross section of the community. His argument was based on a logical extension of *Taylor v. Louisiana*,[221] in which the Court held that the Sixth Amendment requires a jury venire to be drawn from a fair cross section of the community. The Court could first have considered the cross section argument on its merits, proceeding to the question of retroactivity for both the petitioner and others only if the argument was upheld. The Court had often done this in the past. However, Justice O'Connor's plurality opinion rejected that approach, insisting that retroactivity be dealt with as a threshold issue.[222]

Thus, the Court turned to the question whether a new rule extending the

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215. Of course, retroactivity can be a problem with statutes as well. However, the problem is more complex with regard to common law. Legislatures often specify the degree to which new statutes should be applied retroactively. Moreover, there is seldom any problem determining what constitutes a "new" statute, whereas it is often difficult to determine how great a change in judge-made law constitutes a "new" rule.

216. 381 U.S. 618 (1965).

217. 384 U.S. 719 (1966).

218. 384 U.S. 436 (1966).

219. *See Desist*, 394 U.S. at 256-57 (Harlan, J., dissenting) (citing examples).

220. 489 U.S. 288 (1989).

221. 419 U.S. 522 (1975).

222. *Teague*, 489 U.S. at 300 (citing Paul Mishkin, *Foreword: The High Court, the Great Writ, and the Due Process of Time and Law*, 79 HARV. L. REV. 56, 64 (1965)).

cross section requirement to petit juries would be applied retroactively, and if so, to what degree. In the past, the Court would have turned to the three-part test of *Linkletter* to answer these questions. But the *Teague* plurality was ready to establish a more principled approach. The Court turned to the regime suggested by Justice Harlan in his separate opinion in *Mackey v. United States.*[223] New rules of criminal procedure should always be applied retroactively to cases then pending on direct review, but never to cases reviewed collaterally.[224] A rule is considered "new" if it was not in existence at the time the petitioner exhausted her direct appeals.[225] Because Teague was requesting the application of the would-be new rule on collateral review, there was no need to decide whether his cross section argument was correct. He could not benefit from it in any event. To proceed under such circumstances, Justice O'Connor concluded, would be to render a prohibited advisory opinion.[226]

In *Mackey*, Justice Harlan had articulated two exceptions to his covering rule. First, a new rule would be applied retroactively on collateral review if it struck down the power of a state to criminalize a certain type of primary conduct.[227] Second, a new rule would be applied on habeas if it required observance of procedures "implicit in the concept of ordered liberty."[228] The *Teague* plurality adopted the first exception, but altered the second. Rather than mandate the retroactive application of new procedures that are a part of the scheme of "ordered liberty," the Court limited the second exception to new constitutional rules "without which the likelihood of an accurate conviction is seriously diminished."[229]

Although the plurality's limitation of the second exception was inconsistent with Justice Harlan's proposal in *Mackey*, it was consistent with a previous proposal that Justice Harlan had made in *Desist v. United States.*[230] His dissenting opinion in *Desist* was Justice Harlan's first

223. 401 U.S. 667, 675 (1971) (opinion of Harlan, J.).

224. The Court had already adopted the first half of Justice Harlan's proposal in Griffith v. Kentucky, 479 U.S. 314 (1987).

225. *See* Penry v. Lynaugh, 109 S. Ct. 2934, 2944 (1989).

226. Here the plurality fell prey to a common mistake about what constitutes an advisory opinion outside the authority of Article III. *See* Evan T. Lee, *Deconstitutionalizing Justiciability: The Example of Mootness*, 105 HARV. L. REV. 603, 643-51 (1992).

227. This would not be a new rule of criminal procedure at all, but a new rule of constitutional law regarding the substantive criminal law.

228. *Mackey*, 401 U.S. at 693 (opinion of Harlan, J.) (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937)).

229. *Teague*, 489 U.S. at 290.

230. 394 U.S. 244, 256 (1969) (Harlan, J., dissenting).

attempt to articulate the non-retroactivity rule that the *Teague* Court eventually adopted. In *Desist*, Justice Harlan defined the second exception as including only those "'new' constitutional rules which significantly improve the pre-existing factfinding procedures" at trial.[231] His rationale was that one of the two principal functions of habeas was "to assure that no man has been incarcerated under a procedure which creates an impermissibly large risk that the innocent will be convicted."[232] In other words, because one of the purposes of habeas is to act as a safety net for innocent defendants, the second exception ought to be limited to procedures that will help ferret innocent people out of the criminal justice system.

However, Justice Harlan changed his mind between *Desist* and *Mackey*. He gave three reasons for his switch to the more inclusive formulation of all procedures that are a part of the scheme of "ordered liberty." First, the Court's habeas decisions during the intervening period convinced him that "it is not a principal purpose of the writ to inquire whether a criminal convict did in fact commit the deed alleged." Second, he doubted whether new criminal procedure rules actually improved the accuracy of factfinding. Finally, he found "inherently intractable the purported distinction between those new rules that are designed to improve the factfinding process and those designed principally to further other values."[233]

The *Teague* plurality preferred Justice Harlan's earlier thinking. Though the Warren Court might have discounted factual innocence as a value to be protected by federal habeas review, the Burger and Rehnquist Courts had since rehabilitated it. Justice O'Connor asserted that this emphasis on innocence as a focal point for habeas review was well-reasoned. The classic historical grounds for the issuance of federal habeas revolved around threats to the accuracy of factfinding: if a trial had been dominated by mob violence; if a prosecutor had knowingly made use of perjured testimony; or if a conviction had been based on a confession extracted through torture. Justice O'Connor's opinion commented that it was unlikely many new procedures essential to factual accuracy would emerge in the future—which is to say, she expected that the second exception would be narrow indeed.

If providing a safety net for factually innocent defendants was the animating force behind the second exception to the *Teague* non-retroactivity rule, the rationale for the general rule itself was that the purpose of federal

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231. *Id.* at 262.
232. *Id.*
233. *Mackey*, 401 U.S. at 695.

habeas review is to deter state courts from violating the constitutional rights of criminal defendants. As Justice Harlan stated when he first proposed the non-retroactivity rule:

> [T]he threat of habeas serves as a necessary incentive for trial and appellate judges throughout the land to conduct their proceedings in a manner consistent with established constitutional principles. In order to perform this deterrence function, the habeas court need only apply the constitutional standards that prevailed at the time the original proceedings took place.[234]

In other words, the application of new rules during federal habeas review cannot possibly deter state courts from violating constitutional rights because no state court can anticipate what the Supreme Court will later rule.

The opinion in *Teague* created a number of questions. One was whether the anti-retroactivity rule applied to capital cases. The Court took only four months to determine that it does.[235] Another question was just how broadly the Court would define what constitutes a "new" rule for retroactivity purposes. The *Teague* plurality stated that "a case announces a new rule if the result was not dictated by precedent existing at the time the defendant's conviction became final."[236] Any doubt about the breadth of this definition was removed by *Butler v. McKellar*.[237] There, the question was whether *Arizona v. Roberson*[238] announced a new rule for habeas retroactivity purposes. *Roberson* held that police must stop questioning if a suspect requests counsel even if the request is made in the course of a separate investigation. Previous to *Roberson*, the Court had already held that police must cease questioning if a suspect requests counsel in the *same* investigation.[239] The *Roberson* Court viewed the case before it as being controlled by the earlier case. However, the Court in *Butler v. McKellar* did not find this determinative: "[T]he fact that a court says that its decision . . . is 'controlled' by a prior decision is not conclusive . . . . [T]he outcome in *Roberson* was susceptible to debate among reasonable minds . . . ."[240] Or, as the *Butler* dissenters put it,

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234. *Id.* at 262-63.
235. *See* Penry v. Lynaugh, 109 S. Ct. 2934 (1989).
236. *Teague*, 489 U.S. at 301.
237. 110 S. Ct. 1212 (1990).
238. 486 U.S. 675 (1988).
239. *See* Edwards v. Arizona, 451 U.S. 477 (1981).
240. *Butler*, 110 S. Ct. at 1217-18.

Teague means that "a state prisoner can secure habeas relief only by showing that the state court's rejection of the constitutional challenge was *so* clearly invalid under then-prevailing legal standards that the decision could not be defended by any reasonable jurist."[241] The Court has since reiterated this broad definition of "new rule" in several decisions.[242]

The hybrid theory of habeas accepts the basic covering rule of *Teague* as correct, but finds flaw with the exceptions and *Butler v. McKellar*'s definition of what constitutes a "new rule." To understand why the basic rule of *Teague* is correct, suppose a petitioner *concedes* that her argument would require the creation of a wholly new rule of criminal procedure. She cannot seriously contend that state court judges should have "followed" a rule that did not exist at the time of trial or direct appeal. Reviewing the petitioner's claim on the merits and granting relief based on that claim could not possibly serve any useful deterrent effect; state court judges cannot be deterred from failing to apply rules that do not yet exist.

If this hypothetical petitioner's claim is to receive federal habeas review, then it cannot be on a deterrence rationale. But, under the hybrid theory of habeas, review and subsequent relief might still be proper on an innocence or process rationale. Hence the need for exceptions to the covering rule—a fact that Justice O'Connor and the *Teague* plurality realized. The plurality recognized exceptions for cases in which the new rule prohibited the states from criminalizing certain types of behavior; and for cases in which the new rule would substantially increase the accuracy of factfinding. These exceptions are correct, as far as they go. The second exception clearly reflects an innocence rationale. If the new rule would increase accuracy in factfinding, it would increase the likelihood that innocent defendants would be ferreted out of the system. The first exception may be based on notions of equal protection or substantive due process.

But the plurality turned its back on Justice Harlan's "ordered liberty" exception. It viewed the choice as between the "accuracy of factfinding" exception that Justice Harlan had originally advocated in *Desist* or the "ordered liberty" exception that he eventually embraced in *Mackey*. The plurality chose the former. But why not both? Why couldn't the plurality have embraced a third exception—one for new rules that are an integral part of a scheme of ordered liberty? Such an exception would have been

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241. *Id.* at 1219.

242. *See* Graham v. Collins, 113 S. Ct. 892, *reh'g denied*, 113 S. Ct. 1406 (1993); Saffle v. Parks, 110 S. Ct. 1257 (1990); Sawyer v. Smith, 110 S. Ct. 2822 (1990).

justified by the process rationale subsumed within the hybrid theory of habeas. In other words, refusal to adopt a rule essential to ordered liberty must be considered a shocking deviation from accepted norms of adjudication. Pursuant to the hybrid theory, federal habeas courts are justified in granting relief to secure adherence to such a new rule.

Far more important than the failure to recognize an "ordered liberty" exception, however, is the Court's overly broad definition of "new rule." As noted above, *Butler v. McKellar* effectively defined a rule as new if *any* reasonable jurist could have thought that it was not preordained by previous case law. This is not the same thing as saying that a proffered rule will be considered "new" whenever the hypothetical "reasonable" state judge would have found it novel, gauged by the existing precedents of the time. It is saying that a rule will be considered new unless *no* reasonable jurist could have thought it otherwise. Just as the proper standard for a directed verdict is not merely that a reasonable juror would find for the defendant, but that no reasonable juror could find otherwise, the standard under *Butler v. McKellar* is that a rule will be considered new unless no reasonable jurist could have thought it novel at the time.

The *Butler* standard leaves too narrow an opening for habeas review. It dramatically underestimates the deterrence potential of federal habeas jurisdiction. As noted above, state judges cannot be deterred from failing to apply rules whose existence they cannot possibly foresee. When the Supreme Court hands down a decision that represents a "clear break with the past,"[243] only the most prescient will have forecast it. But for the most part, the availability of federal habeas review can encourage state judges to think carefully about the logical trend of Supreme Court decisions in the criminal procedure area. Some decisions are utterly unsurprising, even if not every "reasonable" jurist in the state courts would find them preordained by previous decisions. The *Butler* standard is a bonehead standard—it holds all state judges to the same level of analytical acumen as the very bottom tier of judges. Those state judges with the weakest analytical powers may be "reasonable" in thinking that a new Supreme Court decision was not preordained by precedents, but ought that excuse other state judges from meeting a standard they easily could have met?

Of course, I do not advocate tying the standard to the individual abilities of state judges. The standard should be a unitary one. But it should be set considerably higher than where *Butler* puts it. Rather than defining a

243. *Desist*, 394 U.S. at 277 (Fortas, J., dissenting).

"reasonable, good-faith jurist" to mean the bottom rung of state judges, it should denote the median state judge. If the median state judge, acting diligently and in a forward-looking manner, would have thought the defendant's argument beyond the logical compass of established precedents, then the rule should be considered new. If the median state judge would have found the proffered rule fairly predictable based on established case law, it should not be considered new. State judges should be encouraged to ride alongside the Supreme Court; the *Butler* standard allows them to trail behind at snail's pace. Justice Fortas expressed the idea best:

> The full realization of our great charter of liberty, set forth in our Constitution, cannot be achieved by this Court alone. History does not embrace the years needed for us to hold, millimeter by millimeter, that such and such a penetration of individual rights is an infringement of the Constitution's guarantees. The vitality of our Constitution depends upon conceptual faithfulness and not merely decisional obedience. Certainly, this Court should not encourage police or other courts to disregard the plain purport of our decisions and to adopt a let's-wait-until-it's-decided approach.[244]

E. Successive Petitions and Abuse of the Writ

The Habeas Corpus Act of 1867 did not prohibit repeated petitions.[245] In 1948, however, Congress amended the statute to provide that a federal judge is not required to entertain a petition when the legality of the detention "has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus and the petition presents no new ground not theretofore presented and determined, and the judge or court is satisfied that the ends of justice will not be served by such inquiry."[246] Then, in 1977, the rules governing section 2254 cases in the United States District Courts took effect. These rules supplemented established statutory and case law regarding habeas procedure. Rule 9(b) states:

> [a] second or successive petition may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the petitioner to assert those grounds in a prior

244. Desist v. United States, 394 U.S. 244, 277 (1969) (Fortas, J., dissenting).

245. My summary of the successive petitions doctrine is taken from CHEMERINSKY, *supra* note 29, § 15.4.3 (1988).

246. 28 U.S.C. § 2244(a) (1988).

petition constituted an abuse of the writ.[247]

Despite the fact that both section 2244(a) and Rule 9(b) imply considerable district court discretion to entertain a successive petition, the Supreme Court has gone in a different direction. In *McCleskey v. Zant*,[248] the Court held that a district court may entertain a successive petition only if the petitioner has demonstrated "cause and prejudice" or if she has made a colorable showing of innocence. Judged by the hybrid theory of habeas, *McCleskey* is too confining. Like the law of procedural defaults under *Wainwright v. Sykes*[249] and *Murray v. Carrier*,[250] *McCleskey* focuses exclusively on the notion of individual desert. If the petitioner can demonstrate adequate "cause"—that is, a sufficiently compelling excuse for having to bring a repetitive petition—the district court may entertain it. Or if the petitioner is actually innocent of the crime, she deserves as many petitions as necessary to secure her release. But *McCleskey* recognizes no institutional justification for reviewing successive petitions. Even if granting relief based on a successive petition would deter future constitutional violations because of the seriousness or notoriety of the violation, *McCleskey* makes no provision for review.

The hybrid theory would treat successive petitions in the same way it would treat procedural defaults. A district court should have discretion to review a repetitive petition when cause and prejudice or the probability of actual innocence is demonstrated. However, the discretion of a district court should not end there. The district court ought to have discretion to entertain such a petition if the underlying violation is so egregious or visible that granting relief in that type of situation would deter like violations in the future. The depletion of judicial resources would be minor, for two reasons. First, such an egregious constitutional violation will rarely go unredressed through a first round of federal habeas review. Second, under the usual local rules of federal district courts, the same federal judge who reviewed the first petition will review the successive petition. Unless there was a serious misunderstanding between petitioner and court with respect to the content and nature of the claims asserted in the first petition, the district judge will summarily deny the later petition. Such additional summary review for egregious error would not consume

247. 28 U.S.C. § 2254, Rule 9(b) (1988) (Rules Governing Section 2254 Cases in the United States District Courts).

248. 111 S. Ct. 1454 (1991).

249. 433 U.S. 72 (1977).

250. 477 U.S. 478 (1986).

significantly more time than the review presently required under *McCleskey v. Zant*, which entails scrutiny of a successive petition to ascertain the presence of "cause and prejudice" or a colorable showing of actual innocence.

IV. Conclusion

In this Article, I have advanced a hybrid theory of federal habeas corpus that may make everybody unhappy. Those who believe passionately that the be-all and end-all of the Great Writ is individual liberty and dignity may sneer at a theory that places such a high value on an institutional imperative—the fostering of a more professional ethic among state courts in vindicating constitutional rights—rather than focusing exclusively on individual desert. Those who believe in the process or innocence theories may complain that the hybrid theory moves in exactly the wrong direction—the *broadening* of federal habeas review in several important respects. In the present atmosphere of habeas debate, driven to frenzied heights by the ultimate stakes of capital punishment, the hybrid theory may be dismissed as an idea that gets it all wrong. It fails to hit the highest notes in the liberal anthem of individual dignity. At the same time, it fails to constrict habeas review when so many Americans are fed up with crime and the seeming endlessness of the criminal process.

But if the hybrid theory is politically naive, it is at least intellectually honest. The deterrence theory is the best interpretation of the text, history, and structure of the present federal habeas statute and ought to be augmented by notions of process and innocence. The text poses a serious problem for theories that would guarantee a federal forum for constitutional claims. The political history and statutory structure of section 2254 strongly support the notion that deterrence of constitutional violations by state courts and state law enforcement officials is the principal purpose of federal habeas corpus.

The restrictive versions of the process and innocence theories of habeas—so popular among the present members of the Court—find virtually no support from the text, history, or structure of the statute. The only support for the process theory comes from precedent, and even that support is far from clear. Thus, the exclusive versions of the process and innocence theories, which would bar habeas relief except when the petitioner has been deprived of a full and fair hearing or when she is factually innocent, are incorrect. Instead of insisting on an exclusive theory, the Court should adopt a hybrid theory of habeas. A hybrid theory

would sanction habeas relief when the petitioner has been denied a full and fair hearing in state court, when she has made a colorable showing of factual innocence, or when review would tend to deter similar constitutional violations in the future without causing an undue depletion of federal judicial resources.

A faithful application of this hybrid theory would generally lead to broader federal habeas review than at present. It would call for continued adherence to *Miller v. Fenton*—that is, de novo review of state court findings on "mixed" questions of law and fact.[251] It supports the holding and reasoning of *Withrow v. Williams*—that is, *Miranda* claims should be cognizable on federal habeas—and it calls for the overruling of *Stone v. Powell*, which indicates that exclusionary rule claims should generally be cognizable during federal habeas review.[252]

The hybrid theory also calls for a modest but significant broadening of the review of procedurally defaulted claims. The hybrid theory would excuse defaults when the petitioner can show "cause and prejudice," as is currently the case under *Wainwright v. Sykes*. Additionally, it would excuse defaults when the petitioner can make a showing of probable factual innocence, as is currently the case under *Murray v. Carrier*. However, the hybrid theory would excuse a defaulted claim under one additional circumstance: when granting relief to correct a particularly egregious constitutional violation might deter state courts or state law enforcement officers from similar violations in the future.[253]

The hybrid theory also supports continued adherence to the core doctrine of *Teague v. Lane*, prohibiting the application or announcement of new criminal procedure rules during federal habeas review. However, the hybrid theory calls for the acceptance of Justice Harlan's "ordered liberty" exception to *Teague*. More importantly, it rejects *Butler v. McKellar* and calls for a drastic narrowing of the definition of what constitutes a "new" rule of criminal procedure. Finally, the hybrid theory would treat successive federal habeas petitions in the same way it would treat claims that were procedurally defaulted in state court. A district court would have the discretion to entertain a successive petition if the underlying violation is so egregious or visible that granting relief in that type of situation would deter like violations in the future.

The hybrid theory is not grand theory. It does not spring from first

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251. *See supra* text accompanying notes 177-79.
252. *See supra* text accompanying notes 180-82.
253. *See supra* text accompanying notes 185-213.

principles of American political philosophy. If Congress was trying to decide whether to enact a statute for the first time extending federal habeas review to prisoners in state custody, it would do well to look elsewhere. The hybrid theory—in particular, the deterrence prong of the theory—derives from the unique political history of the Habeas Corpus Act of 1867 and its statutory juxtaposition to the civil rights removal provisions enacted at the same time. The theory has little to say about whether or in what manner Congress should amend the statute. There are signs that Congress may attempt some habeas reform in the near future. If Congress drastically alters the meaning of the entire statute, we will all be back to square one and the hybrid theory will be relegated to an historical footnote. But if reform is piecemeal, which is extremely likely, the hybrid theory will continue to offer the best and most legitimate articulation of the meaning of federal habeas corpus.