THINKING ABOUT HABEAS CORPUS

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Hailed as the "great writ of liberty," the writ of habeas corpus protects the American citizenry from arbitrary and wrongful governmental imprisonment. The scope of the protection provided by the writ, however, has never been finally settled during its almost 200 year existence. This is the result of a failure on the part of those analyzing its scope to recognize the complexity of the issues involved and to confront the true issues that underlie its application. In this Article, Professor Chemerinsky discusses what he considers to be the four primary considerations of habeas issues; federalism, separation of powers, the purposes of the criminal justice system, and the nature of the litigation involved. In order to promote continuing dialogue on the habeas doctrine, he provides his views on how these issues should be analyzed in the habeas context.

INTRODUCTION

BLACKSTONE REFERRED TO the writ of habeas corpus as "the most celebrated writ in the English law."[1] Mindful of its importance in English jurisprudence, the Framers of the United States Constitution explicitly provided that "The Privilege of the Writ of Habeas Corpus shall not be suspended unless when in Cases of Rebellion or Invasion the public Safety may require it."[2] Congress, in adopting the first Judiciary Act, authorized federal courts 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."[3] Although initially federal courts could only grant habeas corpus to prisoners in federal custody, after the Civil War Congress allowed state prisoners to obtain habeas corpus if they were held "in custody in violation of the

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1. 3 BLACKSTONE COMMENTARIES 129 (1791). For an excellent history of habeas corpus, see W. DUKER, A CONSTITUTIONAL HISTORY OF HABEAS CORPUS (1980). *See also* Rosenn, *The Great Writ—A Reflection of Societal Change*, 44 OHIO ST. L.J. 337 (1983). The focus of this paper is solely on habeas corpus in federal courts and on the most familiar form of the habeas writ, traditionally titled, habeas corpus *ad subjiciendum*. R. SOKOL, FEDERAL HABEAS CORPUS 35 (2d ed. 1969).

2. U.S. CONST. art. I, § 9, cl. 2.

3. Judiciary Act of 1789, ch. 20, 1 Stat. 73 (1789).

Constitution or laws of the United States."[4]

The writ of habeas corpus provides individuals with protection against arbitrary and wrongful imprisonment. It is not surprising, therefore, that habeas corpus has long been viewed as the "great writ of liberty."[5] It truly is one of the most, if not the single most, important part of the Constitution which protects individual rights.

Yet, even after almost 200 years of habeas corpus litigation in the United States, including more than 100 years under the Reconstruction statutes that made the writ available to state prisoners, there remains great disagreement over the circumstances under which habeas corpus should be available. Scarcely a year goes by without several major Supreme Court cases dealing with the scope of habeas corpus relief.[6] Perhaps the area where the Burger Court most dramatically departed from the Warren Court precedents was in the area of habeas corpus.[7] Additionally, the Reagan Adminis-

4. 28 U.S.C. § 2254 (1982).

5. W. DUKER, *supra* note 1, at 3.

6. In the 1985-86 Term, for example, the Court decided several major cases dealing with habeas corpus. *See* Vasquez v. Hillary, 106 S. Ct. 617 (1986) (district court order allowing supplementation of record does not violate rule requiring exhaustion in habeas cases; passage of time does not prevent habeas petition based on racial exclusions of grand jurors); Ford v. Wainwright, 106 S. Ct. 2595 (1986) (deficiency of state fact-finding procedure requires hearing de novo in federal court on question of defendant's possible mental disorder); Kuhlmann v. Wilson, 106 S. Ct. 2616, 2627 (1986) (concurring opinion of four Justices concluding that " 'the ends of justice' require federal courts to entertain such petitions only where the prisoner supplements his constitutional claim with a colorable showing of factual innocence."); Kimmelman v. Morrison, 106 S. Ct. 2574 (1986) (defendant may present on habeas corpus claim that because of ineffective assistance of counsel illegally obtained evidence was not challenged during state trial); Murray v. Carrier, 106 S. Ct. 2639 (1986) (defendant may not raise on habeas corpus challenge to state court conviction based on procedural errors that were not raised during the initial trial, even though the failure to object was a result of the attorney's inadvertence and not a deliberate decision); Smith v. Murray, 106 S. Ct. 2661, 2668 (1986) (failure to object to procedural errors during state court trials prevents raising of objections on habeas corpus absent a "substantial claim that the alleged error undermined the accuracy of the guilt or sentencing determination.").

7. Nichol, *Backing into the Future: The Burger Court and the Federal Forum*, 30 U. KAN. L. REV. 341, 356 (1982) ("In no other area of jurisprudence is the Court's approach more diametrically opposed to that of its predecessor.").

I recognize that separating analysis into the Warren and Burger eras is somewhat misleading. Many of the same Justices served on the Court under each of these Chief Justices. Additionally, the cases do not always neatly divide between the eras. Some of the cases expanding the role of the federal courts in protecting constitutional rights were decided before and after the Warren Court. *See, e.g.*, Brown v. Allen, 344 U.S. 443 (1953) (all constitutional claims may be relitigated on habeas); Patsy v. Board of Regents, 457 U.S. 496 (1982) (no exhaustion requirement in constitutional cases under 42 U.S.C. § 1983). Additionally, it is quite likely that the Burger Court's views of habeas corpus are likely to continue during the Rehnquist Court, at least until there are additional changes in the Court's membership.

Nonetheless, it seems appropriate to compare the Warren and Burger Courts with regard to habeas corpus. As described in detail below, *see infra* text accompanying notes 45-77,

tration has sponsored several controversial bills in Congress seeking to further limit the availability of habeas corpus.[8]

Conservatives view habeas corpus as the vehicle that guilty people use to escape convictions and sentences.[9] They emphasize the importance of finality and urge limiting the availability of habeas corpus to those who can make a colorable showing of their innocence.[10] Liberals see habeas corpus as an essential protection against individuals being held in violation of the Constitution and laws of the United States.[11] They argue that habeas corpus does not exist solely to free innocents who were wrongfully convicted; it serves to assure that no person is imprisoned because of an infringement of his or her constitutional rights.[12]

Is it possible to bridge this fundamental disagreement? If society were to start all over again with a blank slate and attempt to define the availability of habeas corpus, how should it go about doing so? In this Article, I suggest that the issues involved in deciding the scope of habeas corpus are far more complex than is usually

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there was a major difference between these two Courts in their habeas doctrines and their underlying views of habeas corpus. As such, comparison of the two Courts is revealing both in understanding the development of habeas law and as a convenient way of identifying and contrasting two very different approaches to the subject.

8. *See, e.g.*, S. 2903, 97th Cong., 2d Sess. (1982); *Hearings on S. 653 Before the Subcommittee on Courts of the Senate Comm. on the Judiciary*, 97th Cong., 1st Sess. 19 (1981) (testimony of Jonathan Rose presenting position of Reagan Administration). *See* Yackle, *The Reagan Administration's Habeas Corpus Proposals*, 68 IOWA L. REV. 609 (1983).

9. *See, e.g.*, Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142 (1970) (arguing limit of habeas corpus to cases where there is a colorable showing of innocence); Weick, *Apportionment of the Judicial Resources in Criminal Cases: Should Habeas Corpus be Eliminated?*, 21 DE PAUL L. REV. 740 (1972) (advancing proposals to restrict the availability of habeas corpus).

10. The Burger Court repeatedly emphasized that habeas corpus undermines finality and releases the guilty. *See, e.g.*, Engle v. Isaac, 456 U.S. 107, 127-28 (1982) (habeas corpus "undermines the usual principles of finality of litigation," "degrades" the trial, and "cost[s] society the ability to punish admitted offenders."); Smith v. Murray, 106 S. Ct. 2661, 2668 (1986) ("profound societal costs that attend the exercise of habeas jurisdiction" justify enforcing procedural default rules in the absence of any "substantial claim that the alleged error undermined the accuracy of the guilt or sentencing determination."). The Burger Court's habeas corpus decisions, however, cannot be understood solely as reflecting a desire to correct errors relating to actual guilt or innocence; many other values are also reflected in the Burger Court's habeas decisions. *See* Seidman, *Factual Guilt and the Burger Court: An Examination of Continuity and Change in Criminal Procedure*, 80 COLUM. L. REV. 436 (1980).

11. *See, e.g.*, Saltzburg, *Habeas Corpus: The Supreme Court and Congress*, 44 OHIO ST. L.J. 367 (1983) (habeas corpus symbolic of ideal that no person shall be convicted in violation of the fundamental law of the land.).

12. *See, e.g.*, Stone v. Powell, 428 U.S. 465, 524 (1976) (Brennan, J., dissenting) ("[P]rocedural safeguards . . . are not admonitions to be tolerated only to the extent they serve the functional purposes that ensure that the 'guilty' are punished and the 'innocent' freed.").

recognized. It is impossible to answer questions about habeas corpus without considering basic issues of federalism, separation of powers, the purposes of the criminal justice system, and the nature of litigation. In fact, it is precisely because habeas corpus implicates difficult and profound questions of American government that it is an area where consensus is unlikely, disagreements are heated, and shifts in the Supreme Court's jurisprudence are most manifest.

Thus, my purpose in this Article is to identify the issues which must be confronted, in litigation or in legislation, in determining the availability of habeas corpus. Part One briefly summarizes the history of habeas corpus and especially the shift in doctrine from the Warren Court to the Burger Court. Part Two examines the questions which must be asked and faced in defining the scope of habeas corpus relief. Finally, I conclude with some thoughts about how each of the issues should be discussed and debated. The hope is to add clarity and advance the dialogue in an area of the law long regarded as essential to the protection of individual rights and civil liberties.

I. A BRIEF HISTORY OF HABEAS CORPUS

The history of habeas corpus has been thoroughly chronicled.[13] Therefore, I only want to provide a brief summary of its evolution to facilitate examination of its underlying themes. To the extent that some believe that the scope of habeas corpus should be decided by reference to Framers' intent, it is important to at least summarize the accepted wisdom about the purposes of these provisions.[14]

A. *Background of the Habeas Doctrine*

Habeas corpus existed in the American colonies prior to the adoption of the Constitution.[15] In many colonies there were claims

13. *See generally* W. DUKER, *supra* note 1; Rosenn, *supra* note 1.

14. There are constitutional scholars who believe that the Constitution should be interpreted solely on the basis of the text and the intent of the Framers. *See generally* R. BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT (1977); Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971); Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693 (1976). Although I have criticized these theorists elsewhere, *see* E. CHEMERINSKY, INTERPRETING THE CONSTITUTION (forthcoming 1987), the debate here over the proper method of constitutional interpretation is not likely to be decisive. There simply is no discernable Framers' intent with regard to the specific questions confronting the Supreme Court in defining the scope of habeas corpus. Additionally, it is even more likely that there will be disagreements over the role of congressional intent in interpreting the habeas statutes and as to how particular provisions should be interpreted. *See infra* text accompanying notes 92-105.

15. Rosenn, *supra* note 1, at 338.

to a common law right to habeas corpus and in others there were provisions in the colonies' charters and in colonial statutes assuring the availability of the writ of habeas corpus.[16] At the Constitutional Convention, delegate Charles Pinckney proposed a provision to assure the availability of habeas corpus.[17] A compromise resulted and instead of guaranteeing habeas corpus, the Constitution instead prohibited its suspension. Recent English history taught the American colonists of the likelihood and danger of suspensions of the writ. Parliament frequently suspended the writ of habeas corpus during the seventeenth and eighteenth centuries, allowing individuals to be imprisoned without any legal protections.[18] William Duker, in his authoritative history of the writ of habeas corpus, argues that the Framers feared that Congress might suspend the states' ability to grant habeas corpus, in the same way that Parliament had suspended habeas corpus in the colonies.[19] Duker concludes that the "provision was designed to restrict Congress from suspending state habeas for federal prisoners."[20] He wrote: "The framers of the Constitution did not intend to guarantee a right to a federal writ. Under the intent of the framers any right to federal habeas would be purely statutory."[21]

Congress, in the Judiciary Act of 1789, explicitly provided for federal courts to grant habeas corpus to federal prisoners.[22]Although federal courts could not issue habeas to state prisoners, the Supreme Court upheld its ability to review the constitutionality of state criminal convictions on direct appeal.[23]

After the Civil War, Congress feared that southern states would persecute and even literally imprison former slaves.[24] Congressional investigations discovered that "despite a theoretical improvement in legal status, Negroes remained virtually unprotected by

16. Fay v. Noia, 372 U.S. 391, 405 (1963); DUKER, *supra* note 1, at 98-99; Rosenn, *supra* note 1, at 338.

17. W. DUKER, *supra* note 1, at 127.

18. Rosenn, *supra* note 1, at 338.

19. W. DUKER, *supra* note 1, at 126-56.

20. *Id.* at 131.

21. *Id.* at 155.

22. Judiciary Act of 1789, ch. 20, 1 Stat. 73, 81-82 (1789).

23. Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 291-93 (1821). The Supreme Court explicitly ruled that it did not have authority to grant habeas corpus to state prisoners under the Judiciary Act of 1789. *See Ex Parte* Dorr, 44 U.S. (3 How.) 103 (1845).

24. Oaks, *Legal History in the High Court: Habeas Corpus*, 64 MICH. L. REV. 451, 452 (1966) (purpose of statute, in part, was to free ex-slaves illegally imprisoned by states trying to avoid emancipation decrees).

State criminal processes."[25] The Congressional Committee on Reconstruction concluded that former slaves were victims of "cruelty, oppression and murder, which the local authorities are at no pains to prevent or punish."[26] Thus, one of the most important provisions of the Reconstruction Act was to allow federal courts to grant habeas corpus to state prisoners held in violation of the Constitution and laws of the United States.[27]

Although there is disagreement about what the drafters of the Act intended on many specific questions,[28] there is consensus that the law was based on a distrust of southern states and was designed to allow federal courts to especially protect former slaves from unconstitutional confinement. The Supreme Court, shortly after the adoption of the Act, noted that "[t]he legislation is of the most comprehensive character. It brings within the *habeas corpus* jurisdiction of every court and of every judge every possible case of deprivation of liberty contrary to the National Constitution, treaties, or laws. It is impossible to widen this jurisdiction."[29] Thus, Professor Redish observes, the "legislative intent—which has been well documented by commentators and by the Court itself—was to interpose the *federal* judiciary between the individual and the state, largely because of the failure of the state courts adequately to protect the individual."[30]

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25. Rosenn, *supra* note 1, at 342 (quoting U.S. COMM'N ON CIVIL RIGHTS, LAW ENFORCEMENT: A REPORT ON EQUAL PROTECTION IN THE SOUTH 7 (1965)).

26. *Id.* (quoting JOINT COMM. ON RECONSTRUCTION, REPORT OF THE JOINT COMM. ON RECONSTRUCTION, H.R. REP. NO. 30, 39th Cong., 1st Sess. vii, xvii (1866)).

27. Act of February 5, 1867, ch. 28, 14 Stat. 385 (codified as 28 U.S.C. §§ 2241-2255 (1976)). The Act provided that the

> several courts of the United States . . . within their respective jurisdictions, in addition to the authority already conferred by law, shall have power to grant writs of habeas corpus in all cases where any person may be restrained of his or her liberty in violation of the Constitution, or of any treaty or law of the United States.

Id.

28. *See* W. DUKER, *supra* note 1, at 189-90 stating:

> The words of the statute are unambiguous: that a state, as well as a federal, prisoner may avail himself of the protection of the Act seems all too obvious. However, when one ventures beyond the text of the statute, the meaning of the Act and the intent of its framers are not easy to determine.

Id. Compare Peller, *In Defense of Federal Habeas Corpus Relitigation*, 16 HARV. C.R.-C.L. L. REV. 579, 690-91 (1982) (statutory history and language supports *Brown v. Allen's* provision of federal habeas corpus review for all constitutional claims) *with* Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 526 (1963) (rejects *Brown v. Allen's* theory because broad habeas corpus relitigation is incompatable with legality as fairness in the institutional process).

29. *Ex Parte* McCardle, 73 U.S. (6 Wall.) 318, 325-26 (1867).

30. Redish, *Abstention, Separation of Powers, and the Limits of the Judicial Function*, 94 YALE L.J. 71, 111 (1984) (emphasis in original; citations omitted).

Nonetheless, in the first years after the adoption of the Reconstruction Act, the application of habeas corpus was limited to circumstances in which the defendant alleged that the sentencing court lacked jurisdiction.[31] During the latter part of the nineteenth century, the Supreme Court progressively expanded the circumstances under which a federal court could find a lack of state court jurisdiction and grant habeas corpus to a state prisoner.[32] For example, the Court found that a state court lacked jurisdiction when there was a violation of the prohibition against double jeopardy[33] and when the statute which was the basis for the prosecution was unconstitutional.[34]

In 1915, the Supreme Court went even further and in the landmark decision of *Frank v. Magnum* held that habeas corpus is available whenever the state "supplying no corrective process, . . . deprives the accused of life, liberty, or property without due process of law."[35] However, according to *Frank*, so long as the state provided an adequate review process to hear the defendant's claims, there was no basis for habeas relief for state prisoners.[36] *Frank* was important because it was the first time the Supreme Court recognized that federal courts could grant habeas corpus to state prisoners on grounds other than that the trial court lacked jurisdiction.[37]

Although many habeas cases were decided during the first half of the twentieth century, it was not until after World War II that the scope of habeas corpus began to change dramatically. Several pressures combined to necessitate a major revision in the principles of habeas corpus. First, the application of the Bill of Rights to the states through the incorporation process greatly expanded the opportunity for state violation of constitutional liberties. Early in American history, the Supreme Court held that the Bill of Rights did not apply to state government actions.[38] Slowly at first, and then at an accelerating pace, the Supreme Court held that the term "liberty" in the due process clause of the fourteenth amendment

31. C. WHITEBREAD & C. SLOBOGIN, CRIMINAL PROCEDURE 831 (2d ed. 1986); Friendly, *supra* note 9, at 151.

32. Hart, *The Supreme Court-1958 Term, Foreward: The Time Chart of the Justices*, 73 HARV. L. REV. 84, 103-04 (1959) (discusses the "long process of expansion of the concept of lack of jurisdiction"); Rosenn, *supra* note 1, at 344.

33. *Ex Parte* Lange, 85 U.S. (18 Wall.) 163 (1873).

34. *Ex Parte* Siebold, 100 U.S. 371, 376 (1879).

35. 237 U.S. 309 (1915).

36. *Id.* at 335.

37. The Supreme Court explicitly held that lack of jurisdiction was not the only basis for habeas corpus in Waley v. Johnston, 316 U.S. 101, 104-05 (1942).

38. Barron v. Mayor of Baltimore, 32 U.S. (7 Pet.) 243 (1833).

"incorporated" provisions of the Bill of Rights.[39] Through this interpretive process the Supreme Court applied almost all of the Bill of Rights to the states, including most of the provisions dealing with criminal procedure.[40] Second, the expansion in the rights of criminal defendants also created more opportunity for claims that individuals were held in violation of the Constitution and laws of the United States.[41] In many areas, the Warren Court interpreted the Constitution to provide additional procedural protections to criminal defendants, each of which could be the basis for a habeas petition if there was an allegation of infringement.[42] Third, national attention on civil rights after World War II served as a reminder that blacks in the South were often unconstitutionally deprived of their rights and lacked adequate protection in state courts. As the Reconstruction Act proponents had intended, habeas corpus was perceived as a vehicle to uphold and advance civil rights.[43]

Finally, the growth in the size of the country and the amount of litigation meant that review by the United States Supreme Court was not sufficient to remedy all allegedly unconstitutional convictions. If there was to be federal court review of state court procedures, it would have to be undertaken primarily in the district courts through habeas corpus.[44]

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39. *See, e.g.*, Twining v. New Jersey, 211 U.S. 78 (1908) (recognizing that some of the Bill of Rights applied to the states because they are part of the conception of due process); Palko v. Connecticut, 302 U.S. 319 (1937) (articulating principle of selective incorporation of the Bill of Rights). *See also* Crosskey, *Charles Fairman, "Legislative History" and the Constitutional Limitations on State Authority*, 22 U. CHI. L. REV. 1 (1954); Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?: The Original Understanding*, 2 STAN. L. REV. 5 (1948); Henkin, *"Selective Incorporation" in the Fourteenth Amendment*, 73 YALE L.J. 74 (1963); Morrison, *Does the Fourteenth Amendment Incorporate the Bill of Rights?: the Judicial Interpretation*, 2 STAN. L. REV. 140 (1948).

40. *See, e.g.*, *In re* Oliver, 333 U.S. 257 (1948) (applying sixth amendment right to public trials to states); Mapp v. Ohio, 367 U.S. 643 (1961) (applying fourth amendment right to be free from unreasonable searches and seizures, and exclusionary rule, to states); Gideon v. Wainwright, 372 U.S. 335 (1963) (applying sixth amendment right to counsel to states); Malloy v. Hogan, 378 U.S. 1 (1964) (applying fifth amendment right to be free of compelled self-incrimination to states); Pointer v. Texas, 380 U.S. 400 (1965) (applying sixth amendment right to confront witnesses to states); Klopfer v. North Carolina, 386 U.S. 213 (1967) (applying sixth amendment right to speedy trial to states); Duncan v. Louisiana, 391 U.S. 145 (1968) (applying sixth amendment right to jury trials to states).

41. *See generally* Friendly, *supra* note 9.

42. *See, e.g.*, Miranda v. Arizona, 384 U.S. 436 (1966) (protection of right against self-incrimination requires warnings be given to criminal defendants); United States v. Wade, 388 U.S. 218 (1967) (right to counsel at lineups after initial appearance or indictment); Davis v. Mississippi, 394 U.S. 721 (1969) (detention for fingerprinting unconstitutional if detention does not comply with constraints of fourth amendment).

43. Rosenn, *supra* note 1, at 347-48.

44. Reitz, *Federal Habeas Corpus: Post Conviction Remedy for State Prisoners*, 108 U.

B. *Habeas Corpus, the Warren Court, and the Burger Court*

In comparing the habeas corpus jurisprudence of the Warren and Burger Courts, I want to focus on two issues. First, when may a state defendant present issues on habeas corpus that were not raised at the time of the trial? Second, when may a state defendant relitigate issues on habeas corpus that were raised and litigated at the time of the trial? Although these issues also arise in the context of federal prisoners, and although there are other issues where the Warren and Burger Courts have differed, these two questions are among the most frequently litigated and they are especially revealing of the underlying perspectives of each Court.[45]

1. *When May a Defendant Present Issues on Habeas Corpus That Were Not Raised at the Time of the Trial?*

In the 1963 decision of *Fay v. Noia*, the Supreme Court held that an individual convicted in state court may raise, on habeas, issues that were not presented at trial, unless it can be demonstrated that he or she chose to deliberately bypass the state procedures.[46] Justice Brennan, writing for the majority, began his analysis by observing that the Reconstruction Act gave the federal courts an expansive role in preventing unconstitutional incarceration by state governments. He observed:

> Although the Act of 1867 . . . nowhere defines habeas corpus, its expansive language and imperative tone, viewed against the backdrop of post-Civil War efforts in Congress to deal severely with the States of the former Confederacy, would seem to make inescapable the conclusion that Congress was enlarging the habeas remedy as previously understood, not only in extending its coverage to state prisoners, but also in making its procedures more efficacious.[47]

In *Fay*, three codefendants were convicted. Years later, two of them were successful in having their convictions overturned because of the manner in which their confessions were obtained. The

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PA. L. REV. 461, 473-75 (1960) (the federalizing role of habeas corpus was performed by the Supreme Court when there were less crowded dockets).

45. *See, e.g.*, United States v. Frady, 456 U.S. 152 (1982) (applying cause and prejudice to federal prisoners). Other important and controversial issues involving habeas corpus include the requirement for exhausting state remedies prior to federal court review, *see, e.g.*, Rose v. Lundy, 455 U.S. 509 (1982) (federal court should dismiss a habeas petition if it presents any unexhausted claims), and the circumstances under which federal courts can hold de novo fact-finding hearings, *see, e.g.*, Townsend v. Sain, 372 U.S. 293 (1963); Maggio v. Fulford, 462 U.S. 111 (1983); Marshall v. Lonberger, 459 U.S. 422 (1983).

46. 372 U.S. 391 (1963).

47. *Id.* at 415.

New York state courts denied Noia's motion to have his conviction overturned because his failure to appeal constituted a procedural default precluding review. The Supreme Court rejected the argument that failure to comply with state procedures bars federal court review on habeas corpus. The Court concluded that "a forfeiture of remedies does not legitimize the unconstitutional conduct by which . . . [a] conviction was procured."[48] Thus, the Court saw its role and the purpose of habeas corpus as preventing people from being detained if their conviction resulted from unconstitutional conduct. The Court said that a habeas petitioner would be foreclosed from raising an issue on the ground that it was not presented at trial only if he or she "deliberately by-passed the orderly procedure of the state courts."[49]

In sharp contrast, the Burger Court adopted a dramatically different standard. It consistently held that a habeas petition may present issues not raised at trial only if there is good cause for the omission and if the defendant was prejudiced by the failure to raise the objections. In *Davis v. United States*[50] and *Francis v. Henderson*,[51] the Supreme Court refused to allow habeas petitions challenging the composition of grand juries when no challenge was made at the time of trial. The Court held in both cases that the defendants would be allowed to present the claims only if they could demonstrate "cause" and "prejudice."

In *Wainwright v. Sykes*, the Supreme Court made clear that the "deliberate by-pass" standard of *Fay* was no longer controlling; rather, the defendants must show cause and prejudice before presenting a matter on habeas that was not raised at trial.[52] Justice Rehnquist, writing for the majority, emphasized the need to encourage defendants to raise all of their arguments in one proceeding.[53] He approved the *Francis* rule of "cause" and "prejudice" because it makes the state trial on the merits the " 'main event' . . . rather than a 'tryout on the road' for what will later be a determinative federal habeas hearing."[54]

After *Sykes*, the Burger Court repeatedly reaffirmed the cause and prejudice test. In *Engle v. Isaac*, a defendant used habeas

48. *Id.* at 428.
49. *Id.* at 438.
50. 411 U.S. 233 (1973).
51. 425 U.S. 536 (1976).
52. 433 U.S. 72 (1977).
53. *Id.* at 90.
54. *Id.*

corpus to challenge the constitutionality of the jury instructions used in his case.[55] In a case decided subsequent to his conviction, the Ohio Supreme Court had held that the type of instructions given violated Ohio statutory law and that its ruling applied retroactively to all cases where they had been used.[56] Nonetheless, the Supreme Court held that the issue could not be raised on habeas corpus because the defendant's attorney did not object at trial, even though at that time there was no reason to think that the instructions were unconstitutional. Justice O'Connor writing for the majority concluded:

> the futility of presenting an objection to the state courts cannot alone constitute 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. Allowing criminal defendants to deprive the state courts of this opportunity would contradict the principles supporting *Sykes*.[57]

The Court in *Engle* made clear that it took a very different view of habeas corpus than had the Warren Court. Justice O'Connor expressed great reservations about the availability of habeas corpus because it imposes "significant costs on society," including "undermin[ing] the usual principles of finality," "cost[ing] society the right to punish admitted offenders," and "frustrat[ing] both the States' sovereign power to punish offenders and their good faith attempts to punish admitted offenders."[58]

Two years later, in *Reed v. Ross*, the Supreme Court recognized that under limited circumstances, "where a constitutional claim is so novel that its legal basis is not reasonably available to counsel," a defendant may present matters on habeas that were not raised at trial.[59] The Court made clear, however, that this was a very narrow exception, not an overruling of *Engle*. As Professor Resnik notes, "[a]lthough the *Ross* plurality found a crevice in the seemingly impregnable 'cause' requirement of *Isaac*, the aperture is narrow. . . . Under *Ross*, the hurdle of 'cause' only can be surmounted in rare instances."[60]

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55. 456 U.S. 107 (1982).

56. State v. Robinson, 47 Ohio St. 2d 103, 110, 351 N.E.2d 88, 93 (1976). *See also* State v. Humphries, 51 Ohio St. 2d 95, 103, 364 N.E.2d 1354, 1359 (1977) (jury instruction held improper but defendant waived error by failing to object).

57. *Engle*, 456 U.S. at 130.

58. *Id.* at 126-27.

59. 104 S. Ct. 2901, 2910 (1984) (the decision was five to four, with four of the Justices who were in the majority in *Engle*—Justices Blackmun, Burger, O'Connor and Rehnquist—dissenting).

60. Resnik, *Tiers*, 57 So. Cal. L. Rev. 837, 904-05 (1984).

Last year, the Supreme Court strongly reaffirmed the cause and prejudice test and held that an attorney's inadvertence, not rising to the level of ineffective assistance of counsel, does not constitute cause sufficient to allow matters to be raised on habeas that were not presented at trial.[61] Justice O'Connor, again writing for the majority, concluded that "the mere fact that counsel failed to recognize the factual or legal basis for a claim, or failed to raise the claim despite recognizing it, does not constitute cause for a procedural default."[62] The Court again noted the "profound societal costs that attend the exercise of habeas jurisdiction" and concluded that there was nothing unfair about enforcing procedural default rules absent a "substantial claim that the alleged error undermined the accuracy of the guilt or sentencing determination."[63] The Warren Court, as reflected in *Fay*, saw it as essential that constitutional errors be corrected and therefore refused to allow procedural defaults to preclude habeas corpus unless there was proof that the attorney "deliberately by-passed" state procedures. In sharp contrast, the Burger Court viewed upholding the finality of convictions and encouraging presentation of all objections at trial as paramountly important and thus consistently held that procedural defaults do prevent habeas review, except in the relatively rare circumstances that there is "cause" for the default and "prejudice" from it.

2. *When May a Defendant Relitigate on Habeas Corpus Issues That Were Raised and Litigated in State Court?*

The principles of res judicata and collateral estoppel preclude a party from relitigating a matter already presented to a court and decided upon. *Brown v. Allen*, decided in 1953, created an important exception to collateral estoppel and res judicata for habeas petitions.[64] The Supreme Court, in an opinion by Justice Frankfurter, held that any constitutional claim may be raised on habeas, even though it had been raised, fully litigated and decided in state court.

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61. Smith v. Murray, 106 S. Ct. 2661 (1986).

62. *Id.* at 2667. In another case last year, the Court again noted "[a]ttorney error short of ineffective assistance of counsel does not constitute cause for a procedural default even when that default occurs on appeal rather than trial." Murray v. Carrier, 106 S. Ct. 2639, 2648 (1986).

63. *Smith*, 106 S. Ct. at 2668. In another case last Term, the Supreme Court specified the circumstances under which there is cause for a procedural default. *Murray*, 106 S. Ct. at 2639. The Court said that cause exists if the factual or legal basis for the claim was not available at the time the claim should have been made, as in *Reed v. Ross*; when state officials interfered with the attorney's ability to avoid default; or when there was ineffective assistance of counsel. *Id.* at 2646-47; C. WHITEBREAD & C. SLOBOGIN, *supra* note 31, at 836-37.

64. 344 U.S. 443 (1953).

Justice Frankfurter observed that "even the highest state courts" have failed to give adequate protection to federal constitutional rights.[65] Habeas corpus exists to remedy state court disregard or violations of defendant's rights. *Brown* thus established that "a state prisoner ought to have an opportunity for a hearing on a federal constitutional claim in a federal court."[66]

In fact, the Warren Court so valued the importance of the opportunity to relitigate constitutional issues to assure correct decisions, it held that a prisoner convicted by a federal court may also raise issues on habeas that had been presented and decided at trial.[67] The Court concluded that "the provision of federal collateral relief rests . . . fundamentally upon a recognition that adequate protection of constitutional rights . . . requires the continuing availability of a mechanism of relief."[68]

In marked contrast, the Burger Court in *Stone v. Powell* held that fourth amendment search and seizure claims may not be relitigated on habeas corpus.[69] The Court concluded that "where the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas relief on the ground that the evidence obtained in an unconstitutional search or seizure was introduced at trial."[70] The Court emphasized that exclusionary rule claims do not relate to the accuracy of the fact finding process and rejected the assertion that state judges would be less vigilant than their federal counterparts in protecting federal constitutional rights.[71] Whereas the Court in *Brown* had explicitly noted frequent state court disregard of the Constitution, Justice Powell writing for the majority in *Stone* said that we are "unwilling to assume that there now exists a lack of appropriate sensitivity to constitutional rights in the trial and appellate courts of the several states."[72]

The Supreme Court has not, however, extended *Stone* to other constitutional rights or limited the application of *Brown*. After *Stone*, the Court held that challenges to the racial composition of

65. *Id.* at 511.

66. Hart, *supra* note 32, at 106-07.

67. Kaufman v. United States, 394 U.S. 217 (1969).

68. *Id.* at 226.

69. 428 U.S. 465 (1976).

70. *Id.* at 494. *See* Halpern, *Federal Habeas Corpus and the Mapp Exclusionary Rule After* Stone v. Powell, 82 COLUM. L. REV. 1 (1982) (reviewing court interpretations of what constitutes a "full and fair" hearing after *Stone*).

71. *Stone*, 428 U.S. at 489-94.

72. *Id.* at 493 n.35.

grand juries,[73] and to jury instructions concerning the standard of proof to be applied,[74] may be relitigated on habeas although these issues had been presented and decided at trial. Last year, the Supreme Court held that *Stone* does not preclude a defendant from raising ineffective assistance of counsel on habeas corpus, even though the basis for that claim is the failure of counsel to present a fourth amendment objection to evidence.[75]

Nonetheless, the difference between *Brown* and *Stone* is remarkable. Because fourth amendment exclusionary rule claims are frequently the basis for habeas petitions, and because there is a clear difference in the rhetoric and reasoning of the two decisions, they are illustrative in understanding the evolution of the habeas corpus doctrine.

II. DEFINING THE SCOPE OF HABEAS CORPUS: THE ISSUES

On a political level, the differing approaches to habeas corpus in the Warren and Burger Courts are not surprising. The Warren Court is remembered for its concern for protecting civil rights and civil liberties, especially the rights of criminal defendants. Habeas corpus was an obvious tool to facilitate judicial review and uphold constitutional rights in the criminal justice system. In contrast, the more conservative Burger Court showed far less concern for defendant's rights and frequently eroded protections created by the Warren Court.[76] Habeas corpus not only was a less important way of achieving important objectives, but more importantly it was disfavored as it permitted guilty defendants to secure their release from prison.[77]

Although this political assessment is correct as far as it goes, it is too easy and too final an appraisal of the Courts and their approaches to habeas corpus. Reducing the disagreement to the difference between liberals and conservatives leaves no room for dialogue or reasoning to bridge that disagreement. It provides no basis for analysis of what should be the appropriate scope of habeas corpus. Additionally, it masks the fundamental issues that are

73. Rose v. Mitchell, 443 U.S. 545 (1979).

74. Jackson v. Virginia, 443 U.S. 307 (1979).

75. Kimmelman v. Morris, 106 S. Ct. 2574 (1986).

76. For a description of the difference between the jurisprudence of the Burger and Warren Courts in criminal justice cases and a partial listing of cases where the Burger Court overruled or limited Warren Court precedents, see C. WHITEBREAD & C. SLOBOGIN, *supra* note 31, at 3-9.

77. *See, e.g.*, Engle v. Isaac, 456 U.S. 107, 127 (1982) (habeas "cost[s] society the right to punish admitted offenders.").

presented in deciding when federal courts should be able to grant habeas corpus relief.

There are four major issues that must be confronted in deciding the availability of habeas corpus: federalism, separation of powers, constitutional rights and collateral review.[78] On each of these issues the Warren Court and the Burger Court took very different positions.

A. *Federalism: When Should Federal Courts Review State Court Judgments and Proceedings?*

The question of when state prisoners can obtain habeas corpus review in federal courts inescapably requires consideration of the proper relationship between the federal and state judiciaries. How much should federal courts defer to state court decisions and proceedings in criminal cases? It is impossible to answer this question without considering the relative competence of the federal and state courts in upholding federal constitutional rights. For example, in order to decide whether a state prisoner should be able to relitigate on habeas corpus a matter that was fully litigated in state court it is necessary to determine whether there is any reason not to accord finality to the state court decision.

The question of relative competence might be avoided by stipulating the relationship between federal and state courts. For example, it might be asserted that there should be a federal forum available for all constitutional rights, regardless of the state court's ability to uphold federal claims. Alternatively, it could be posited that the principle of comity requires deference to state courts and prevents a federal court from rehearing matters already litigated in a state court. Such approaches, however, are problematic. First, they are definitional arguments and are impossible to appraise, discuss, or refute, unless reasons are given for them. Second, unless the reasons focus on the relative competence and willingness of these courts to uphold federal constitutional rights, the arguments assume that institutional arrangements are ends in themselves. The appropriate relationship of courts can only be assessed relative to the goals to be achieved. Although courts exist to serve many func-

78. It is important to resist the temptation to view the habeas doctrine as reflecting any single one of these issues; instead, it should be viewed as a reflection of a complex interaction of these issues. *Cf.* Seidman, *supra* note 10, at 445 ("The search for any single model explaining every result that the Supreme Court reaches leads inevitably to oversimplification and distortion.").

tions,[79] the proper application of the Constitution and protection of constitutional rights is the most important end in constitutional cases.

Therefore, deciding the scope of habeas corpus necessitates consideration of the relative willingness and ability of state and federal courts to correctly apply the Constitution and protect the rights of criminal defendants. As such, it should not be surprising that the Warren and Burger Courts articulated very different views on the parity between these Courts in upholding constitutional liberties. In interpreting the Reconstruction Act statutes, the Warren Court expanded federal court jurisdiction by citing the history of state court disregard for federal constitutional rights.[80] The Court rejected a requirement that litigants exhaust state remedies in civil rights cases under section 1983, on the grounds that state court protection of federal constitutional rights often is unavailable.[81] The Court observed that section 1983, another key part of the Reconstruction statutes, is based on a distrust of state courts and a belief in the superiority of federal courts in protecting federal rights:

> Congress clearly conceived that it was altering the relationship between the States and the Nation with respect to the protection of federally created rights; it was concerned that state instrumentalities could not protect those rights; it realized that state officers might, in fact, be antipathetic to the vindication of those rights; and it believed that these failings extended to state courts. . . . The very purpose of § 1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights.[82]

In *Brown v. Allen*, the Court upheld the relitigation of constitutional claims on habeas corpus in federal court, even after full litigation in state court, because state courts frequently fail to adequately protect federal rights.[83] Additionally, in *Fay v. Noia*, the Warren

79. For an excellent description of the values in the litigation system, see Resnik, *supra* note 60, at 845-59.

80. For a review of the Warren Court decisions based on the assumption that state courts were not to be trusted to adequately protect federal constitutional rights, see Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105, 1118 n.48 (1977) ("The Warren Court's major forum allocation decisions appear based on . . . [the] assumption that potentially outcome-determinative distinctions exist between state and federal courts which justify a broad choice of forum for constitutional claims."). *See, e.g.*, Zwickler v. Koota, 389 U.S. 241 (1967); Dombrowski v. Pfister, 380 U.S. 479 (1965); Fay v. Noia, 372 U.S. 391 (1963); Monroe v. Pape, 365 U.S. 167 (1961).

81. *See, e.g.*, *Monroe*, 365 U.S. at 168; Patsy v. Florida Bd. of Regents, 457 U.S. 496, 496 (1982).

82. Mitchum v. Foster, 407 U.S. 225, 242 (1972).

83. 344 U.S. 443 (1953).

Court refused to give effect to most state court procedural defaults, emphasizing historical reasons for distrusting states to protect federal rights.[84]

In contrast, the Burger Court frequently has proclaimed that state courts are equal to federal courts in protecting federal rights, making federal relitigation unnecessary.[85] In *Stone v. Powell*, the Court remarked that there is "no intrinsic reason why the fact that a man is a federal judge should make him more competent, or conscientious, or learned with respect to [constitutional claims] than his neighbor in the state courthouse."[86] The Court explicitly said that it was unwilling to assume that state courts were insensitive to or incapable of adequately protecting federal rights.[87]

Similarly, in the academic literature much of the disagreement over the scope of habeas corpus is based on differing views of the relative competence of federal and state courts. Some commentators, such as Professor Paul Bator, argue that states are to be trusted in upholding federal constitutional rights, making relitigation in federal courts on habeas petitions unnecessary.[88] Other writers, such as Professors Burt Neuborne and Gary Peller, expressly challenge the assumption of parity and argue that historical experience and structural differences between federal and state courts demonstrate the need for federal courts to enforce constitutional rights.[89]

In short, deciding when state prisoners are entitled to habeas corpus relief from federal courts requires consideration of federalism issues and especially an analysis of the relative abilities of the state and federal courts in constitutional analysis.

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84. *Fay*, 372 U.S. at 416, 421-22.

85. *See, e.g.*, Sumner v. Mata, 449 U.S. 539, 549 (1981):

> State judges as well as federal judges swear allegiance to the Constitution of the United States, and there is no reason to think that because of their frequent differences of opinion as to how that document should be interpreted, all are not doing their mortal best to discharge their oath of office.

Id.; Atascadero State Hosp. v. Scanlon, 105 S. Ct. 3142, 3146 n.2 (1985), *reh'g denied*, 106 S. Ct. 18 (1985) ("It denigrates the judges who serve on state courts to suggest that they will not enforce the supreme law of the land."). *See also* cases reviewed in Neuborne, *supra* note 79, 1118 at n.48.

86. *Stone*, 428 U.S. at 493 n.35.

87. *Id.*

88. *See generally* Bator, *The State Courts and Federal Constitutional Litigation*, 22 WM. & MARY L. REV. 605 (1981); Bator, *supra* note 28.

89. *See* Peller, *supra* note 28, at 665-69; Neuborne, *supra* note 80.

B. *Separation of Powers: Is It for Congress to Decide the Scope of Habeas Corpus and, If So, What Was Congressional Intent in Adopting the Habeas Corpus Statutes?*

Habeas corpus has both constitutional and statutory origins. The Constitution prohibits Congress from suspending the writ of habeas corpus, and statutes empower the federal courts to release federal and state prisoners held in violation of the Constitution and laws of the United States. There is little indication of the Framers intent regarding the scope of review in habeas corpus cases.[90] In fact, there is strong evidence that the Framers did not intend to create a right to habeas corpus, let alone to define that right; rather, they intended to prevent Congress from suspending the writ and thereby prevent state courts from releasing individuals who were wrongfully imprisoned.[91] Furthermore, whatever intent that can be discerned is of little use in deciding when state prisoners can relitigate claims in federal court on habeas or present objections not raised in state courts. As explained earlier, it was not until after the Civil War that Congress extended habeas corpus to state prisoners.

Therefore, there is a strong argument that the scope of habeas corpus is a statutory question, to be decided by the courts in accord with traditional principles of statutory construction. There are additional reasons for concluding that Congress should decide the availability of federal court habeas corpus relief. First, the Supreme Court has held that Congress has broad authority to determine the jurisdiction of the lower federal courts.[92] Because Congress has discretion under the Constitution as to whether to create lower federal courts, it also has discretion to determine their jurisdiction.[93] Accordingly, Congress should decide the lower federal court jurisdic-

90. *See* W. DUKER, *supra* note 1, at 135-36.

91. *See supra* text accompanying notes 20-21.

92. *See, e.g.*, Sheldon v. Sill, 49 U.S. (8 How.) 441, 448-49 (1850); Lauf v. E.G. Shinner & Co., 303 U.S. 323, 327 (1938). There is a rich academic literature on the subject of Congressional control over lower federal court jurisdiction. *See, e.g.*, Bator, *Congressional Power Over the Jurisdiction of the Federal Courts*, 27 VILL. L. REV. 1030 (1982); Eisenberg, *Congressional Authority to Restrict Lower Federal Court Jurisdiction*, 83 YALE L.J. 498 (1974); Gunther, *Congressional Power to Curtail Federal Jurisdiction: An Opinionated Guide to the On-Going Debate*, 36 STAN. L. REV. 895 (1984); Sager, *Foreward: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17 (1981).

93. *See, e.g., Sheldon*, 49 U.S. (8 How.) at 441; *Lauf*, 303 U.S. at 327; Palmore v. United States, 411 U.S. 389, 400-01 (1973).

tion in habeas cases.[94]

Second, because the issue of federal court review of state court judgments and proceedings is a question of federalism, Congress is the appropriate institution to determine the scope of habeas corpus. Professor Herbert Weschler, in one of his famous articles, argued that the national political process best determines the proper relationship between the federal and state governments: "[T]o the extent that federalist values have real significance they must give rise to local sensitivity to central intervention; to the extent that such a local sensitivity exists, it cannot fail to find reflection in Congress."[95] The national political process in the United States—and especially the role of the states in the composition and selection of the central government—is intrinsically well adapted to retarding or restraining new intrusions by the center on the domain of the states.[96] The Supreme Court, in *Garcia v. San Antonio Metropolitan Transit Authority*, recently relied on Wechsler's theory to justify complete judicial deference to Congress in matters of federalism arising under the Commerce Clause.[97] Likewise, it can be argued that Congress—with its "reflection" of "local sensitivity"—should be accorded complete deference in its allocation of power between federal and state courts in habeas corpus.

The difficulty with this theory is that Congress could then eliminate all habeas corpus in federal courts or abolish habeas for certain classes of cases, such as certain types of crimes or particular types of constitutional challenges. If Congress were to eliminate the federal writ of habeas corpus, entirely or partially, is that not a suspension of habeas corpus in violation of Article I of the Constitution? Evidently, Congress acts unconstitutionally when it legislates with the purpose and effect of preventing the vindication of constitutional rights.[98]

The response to this concern is that such restrictions of federal court jurisdiction to issue habeas corpus are not unconstitutional so

94. For an excellent argument criticizing the Court for not following congressional jurisdictional statutes in other areas, see Redish, *supra* note 30.

95. Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 547 (1954). *See also* J. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS (1980) (arguing for judicial deference to Congress in matters of federalism).

96. Wechsler, *supra* note 95, at 547.

97. 469 U.S. 528 (1985).

98. *Cf.* Battaglia v. General Motors Corp., 169 F.2d 254 (2d Cir. 1948), *cert. denied*, 335 U.S. 887 (1948) (unconstitutional for Congress to eliminate access to all courts).

long as state courts remain available to protect federal rights.[99] Yet, this raises concerns as to whether state courts are to be trusted to adequately protect federal rights on habeas corpus and, if not, whether it unconstitutionally violates separation of powers for Congress to prevent the judiciary from protecting federal constitutional rights. Arguably, the core role of the federal courts in the scheme of separation of powers is to assure the protection of federal rights, and Congress acts unconstitutionally when it restricts habeas jurisdiction to undermine constitutional liberties.[100]

If it is conceded that Congress should define the scope of habeas corpus, at least absent attempts to eliminate habeas jurisdiction, the question then becomes what did Congress intend in creating the habeas statutes? There is substantial disagreement among commentators and Justices as to congressional intent. For example, conservatives such as Professor Bator argue that the Reconstruction Act, which authorizes habeas for state prisoners, had limited objectives. Professor Bator contends that the drafters of the Act thought that the issues raised on habeas would be limited to challenges to the jurisdiction of the tribunal.[101] Bator argues that "it would . . . require rather overwhelming evidence to show that it was the purpose of the legislature to tear habeas corpus entirely out of . . . its historical meaning and . . . convert it into an ordinary writ of error with respect to all federal questions."[102] Several Supreme Court Justices have expressed similar limited views of Congress' intent.[103]

In contrast, other commentators and Justices see a much broader congressional purpose underlying the Reconstruction Act. They argue that Congress greatly distrusted state courts and therefore allowed state prisoners access to federal courts to assure protection of constitutional rights.[104] As Professor Amsterdam observes, the "[t]hirty-ninth Congress thoroughly distrusted the

99. *See, e.g.*, Swain v. Pressley, 430 U.S. 372, 382-83 (1977) (Constitution requires only that some court be available to hear habeas petitions).

100. *See, e.g.*, Paschal, *The Constitution and Habeas Corpus*, 1970 DUKE L.J. 605, 607 (Constitution of its own force vests jurisdiction in federal courts to issue habeas corpus). *Cf.* United States v. Klein, 80 U.S. (13 Wall.) 128, 147 (1872) (declaring a restriction of Supreme Court jurisdiction unconstitutional, as a violation of separation of powers).

101. Bator, *supra* note 28, at 466. *See also* Oaks, *supra* note 24, at 452.

102. Bator, *supra* note 28, at 475.

103. *See, e.g.*, Schneckloth v. Bustamonte, 412 U.S. 218, 255 (1973) (Powell, J., concurring); *Brown*, 344 U.S. at 533 (Jackson, J., concurring).

104. *See, e.g.*, Seidman, *supra* note 10, at 462 n.155 ("the Reconstruction Congress, suspicious of state attempts to subvert federal rights, intended to provide a forum in the lower federal courts for their vindication."); Tushnet, *Judicial Revision of the Habeas Corpus Statutes: A Note on* Schneckloth v. Bustamonte, 1975 WIS. L. REV. 484, 487-91.

State courts and expected nothing from them but resistance and harassment."[105] Accordingly, it is argued that it was not intended that federal courts hearing habeas petitions would defer to state courts.

After carefully reviewing the legislative history and the early case law, Professor Gary Peller disagrees with Professor Bator and argues that Congress, in enacting the Reconstruction Act, meant to allow state prisoners to relitigate their habeas claims in federal court.[106] Likewise, the Supreme Court, in cases such as *Fay v. Noia*, took a broad view of the habeas statutes as empowering the federal courts to remedy state court deprivations of constitutional rights.[107]

Thus, a second issue to be confronted in defining the scope of habeas corpus is to what extent must the Court follow Congressional intention in determining the availability of habeas corpus and what did Congress intend in adopting the existing habeas statutes.

C. *What is the Purpose of Constitutional Rights in the Criminal Justice System?*

Should habeas corpus be limited to providing relief for prisoners who demonstrate a reasonable probability that they are actually innocent and were wrongfully convicted, or should habeas be available to all defendants who can demonstrate that their conviction likely resulted from a violation of their constitutional rights, regardless of whether they are factually guilty or innocent? This issue, perhaps more than any other, divides commentators and explains the disagreement between the Warren and Burger Courts.[108]

Answering these questions about the scope of habeas corpus requires consideration of the purpose of the underlying rights that habeas exists to protect. If constitutional rights are primarily designed to protect innocent individuals and assure that only those who actually committed a crime will be convicted, then it makes sense to limit habeas to those who are arguably innocent.[109] By

105. 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, 818 (1965).

106. Peller, *supra* note 28, at 619-21.

107. *Fay*, 372 U.S. at 422, 424.

108. For an excellent discussion of the role this factor has played in the Burger Court decisions, see Seidman, *supra* note 10. I agree with Professor Seidman that the Burger Court cannot be understood as solely focusing on factual guilt although it certainly is a major factor in many of its decisions.

109. *See, e.g.*, Manson v. Brathwaite, 432 U.S. 98, 111-12 (1977); *Stone*, 428 U.S. at 489-92, 496 (Burger, C.J., concurring); United States v. Janis, 428 U.S. 433, 448-49 (1976);

contrast, if constitutional rights serve other purposes besides protecting the innocent—goals such as controlling police behavior and protecting individual privacy and dignity—then habeas corpus should be available regardless of guilt or innocence.

The Burger Court's criminal procedure decisions were animated by a deep conviction that the overriding goal of the criminal justice system is to punish the guilty and exonerate the innocent.[110] Professor Seidman notes that "[f]actual guilt or innocence has been a preoccupation of the Burger Court, at least rhetorically."[111] Similarly, Professors Whitebread and Slobogin observe:

> The first theme is the 'Burger Court's' belief that the ultimate mission of the criminal justice system is to convict the guilty and let the innocent go free. The Warren Court tried to encourage respect for individual rights in the aggregate. In so doing, it often required the release of a factually guilty defendant in order to ensure an appropriate process. . . . [The Burger Court's] decisions suggest that the rights enumerated in the Constitution are not all entitled to the same degree of judicial protection, but instead should be valued according to their impact on the adequacy of the guilt determining process.[112]

Some constitutional rights, most notably the fourth amendment's protection against unreasonable search and seizure, cannot be understood in terms of protecting innocent defendants.[113] However, if the primary goal of the criminal justice system is punishing the guilty, it is sensible to limit habeas corpus to defendants who have a claim of factual innocence. A plurality of the Burger Court, consisting of Justices Powell, Blackmun, Burger and Rehnquist, stated that the "central reason for habeas corpus [was to afford] a means . . . of redressing an *unjust* incarceration."[114]

Thus, in *Stone* the Burger Court held that fourth amendment exclusionary rule claims may not be relitigated in habeas corpus. The Court reasoned that because fourth amendment claims do not

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United States v. Peltier, 422 U.S. 521, 535-36 (1975); Williams v. Florida, 399 U.S. 78, 82 (1970).

110. Seidman, *supra* note 10, at 436-37. For an excellent exposition of the position that habeas review should be limited to protecting arguably innocent defendants, see Friendly, *supra* note 9.

111. Seidman, *supra* note 10, at 445 n.47. *See also* Seidman, *The Trial and Execution of Bruno Richard Hauptmann: Still Another Case That "Will Not Die"*, 66 GEO. L.J. 1, 46 (1977) (noting "preoccupation with the issue of factual guilt or innocence.").

112. C. WHITEBREAD & C. SLOBOGIN, *supra* note 31, at 3-4.

113. In *Stone v. Powell*, the Supreme Court explicitly noted that fourth amendment exclusionary rule claims do not relate to the integrity of the fact finding process. 428 U.S. 468, 503-06, 515-16 (1976).

114. Schneckloth v. Bustamonte, 412 U.S. 218, 257-58 (emphasis in original).

relate to the integrity of the fact finding process, they do not justify disrupting the finality of the conviction and the other costs attendant to habeas review.[115] The Court's conclusion was based on the belief that "exclusionary rule claims are disfavored because they frustrate the true aim of the criminal process: conviction of the guilty and acquittal of the innocent. Reversal of a conviction for a fourth amendment violation was therefore an inappropriate exercise of habeas corpus jurisdiction."[116] Likewise, in greatly restricting the ability of defendants to present matters on habeas that were not raised at trial, the Court has emphasized the function of habeas as protecting wrongfully convicted prisoners. For example, the Court narrowly defined what constitutes sufficient "cause" for not making a contemporaneous objection so as to allow the matter to be raised on habeas,[117] but held that "in an extraordinary case, where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas corpus court may grant the writ even in the absence of a showing of cause for the procedural default."[118] The result is that those who are arguably innocent can present their constitutional claims, but few other defendants will be allowed to argue matters on habeas that were not raised at trial, even if the default was a result of the attorney's error.[119]

Also, in defining "prejudice" the Supreme Court seems to require some showing that the defendant is arguably innocent and was wrongfully convicted because of the procedural default at trial.[120] The Court has explicitly held that "we . . . reject the suggestion that there is anything 'fundamentally' unfair about enforcing procedural default rules in cases devoid of any substantial claim that the alleged error undermined the accuracy of the guilt or sentencing determination."[121]

The Warren Court, by contrast, saw much broader goals for

115. *Stone*, 428 U.S. at 490-95. *See* Cover & Alienikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 YALE L.J. 1035, 1086 (1977) ("*Stone v. Powell* viewed the central function of habeas corpus as protection of *innocent* defendants from unconstitutional denials of their liberty.").

116. Cover & Alienikoff, *supra* note 115, at 1076.

117. *See supra* text accompanying notes 60-63 (cases defining "cause").

118. Murray v. Carrier, 106 S. Ct. 2639, 2650 (1986).

119. Unless the attorney's error amounts to ineffective assistance of counsel, it is not "cause" justifying its presentation on habeas corpus. *See id.* at 2648 ("Attorney error short of ineffective assistance of counsel does not constitute cause for a procedural default.").

120. *See* United States v. Frady, 456 U.S. 152, 171 (1982); Yackle, *supra* note 8, at 646 n.170 (*Frady* standard equates prejudice with innocence).

121. Smith v. Murray, 106 S. Ct. 2661, 2668 (1986).

constitutional rights and habeas corpus. Although the primary purpose of individual liberties is to prevent the conviction of innocent persons, rights also are enforced as a way of deterring unlawful police practices and of protecting individual privacy and dignity from government infringement.[122] Justice Brennan stated this view forcefully in his dissent in *Stone*: "[P]rocedural safeguards . . . are not admonitions to be tolerated only to the extent they serve functional purposes that ensure that the 'guilty' are punished and the 'innocent' freed."[123]

Under this view, habeas corpus exists to assure that no person is in custody because of a conviction obtained in violation of the Constitution of the United States. In *Brown v. Allen*, the Court allowed relitigation of all constitutional claims, regardless of whether they relate to guilt or innocence.[124] Similarly, in *Fay v. Noia*, the Warren Court allowed all defendants, without regard to their actual guilt or innocence, to raise objections despite procedural defaults at trial (unless it was shown that they deliberately by-passed state procedures).[125] This perspective views "habeas corpus as symbolic of a commitment to constitutional values and to the ideal that no person shall be convicted in violation of the fundamental law of the land."[126]

It should be noted that there is an intermediate position between a view that habeas corpus should be limited to protecting those with a claim of innocence and a view that all constitutional claims should be allowed on habeas review. Justice Stevens, for example, consistently has argued that habeas should be available when a defendant raises a claim of "fundamental unfairness."[127] This approach, of course, begs a definition of what constitutes "fundamental unfairness."

Therefore, deciding the scope of habeas corpus necessitates analysis of the purpose of criminal procedure rights and of the entire criminal justice system. Are individual liberties and habeas corpus solely to protect the innocent from wrongful conviction or are there other important objectives to be upheld?

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122. *See* C. WHITEBREAD & C. SLOBOGIN, *supra* note 31, at 1-5 (describing Warren Court's views of the criminal justice system).

123. Stone v. Powell, 428 U.S. 465, 524 (1976).

124. 344 U.S. 443 (1953).

125. 372 U.S. 391 (1963).

126. Saltzburg, *supra* note 11, at 367.

127. *See, e.g.*, Smith v. Murray, 106 S. Ct. 2661, 2669-77 (Stevens, J., concurring); Murray v. Carrier, 106 S. Ct. 2639, 2650-60 (Stevens, J., concurring).

D. *The Role of Collateral Review: and the Tension Between Finality and Revisions*

Finally, in order to define the scope of habeas corpus it is necessary to confront the basic tension between wanting to end criminal cases and preserve finality, and wanting to allow the opportunity for revisions to correct mistakes.[128] Habeas corpus occurs after all appeals have been exhausted.[129] Those arguing for limits on the scope of habeas review contend that except under compelling circumstances, such as when the habeas petitioner has a colorable claim of innocence or has been denied a fair opportunity to present his or her claims in state court, additional resources should not be expended on further review of a case that has already been litigated and decided.[130] In sharp contrast, advocates of broader habeas review argue that "jurisdictional redundancy" serves important values, especially in offering additional opportunities to correct mistakes.[131]

Arguments about the relative merits of finality and revisions cannot be separated from the issues analyzed previously. The more state courts are trusted and the less concern there is for constitutional violations unrelated to guilt or innocence, the less the need for upsetting finality. Conversely, the greater the distrust of state courts' willingness or ability to protect constitutional rights and the greater the desire to protect all constitutional rights, the more there is a need to provide an additional chance for revision.

The Burger Court repeatedly emphasized the costs of habeas corpus for the criminal justice system.[132] The loss of finality imposes economic costs in terms of expenditure of additional judicial resources. Professor Bator argues that the "automatic collateral relitigation model exacts severe costs. It is profligate with resources at a time of increasing scarcity."[133] The Burger Court's decisions have frequently expressed the concern that if procedural defaults

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128. For a superb discussion of the values of procedural systems involved in deciding the manner of review of a court's decisions, see Resnik, *supra* note 60, at 845-59.

129. *See, e.g.*, Rose v. Lundy, 455 U.S. 509, 522 (1982) (habeas petitions will be dismissed unless all appeals on all claims presented within them have been exhausted).

130. Professor Paul Bator has been one of the most ardent advocates of this position. *See* Bator, *supra* note 28, at 451-52; Bator, *supra* note 88, at 610-11.

131. *See generally* Cover, *The Uses of Jurisdictional Redundancy: Interest, Ideology and Innovation*, 22 WM. & MARY L. REV. 639 (1981); Cover & Alienikoff, *supra* note 115, at 1042.

132. *See, e.g.*, Engle v. Isaac, 456 U.S. 107, 126 (1982) ("[T]he Great Writ entails significant costs."); *Smith*, 106 S. Ct. at 2668 (In view of the "profound societal costs that attend the exercise of habeas jurisdiction, such exercise 'carries a serious burden of justification.' " (citation omitted)).

133. Bator, *supra* note 88, at 614.

are not enforced, defense counsel will have an incentive to "sandbag" some of their claims for habeas corpus.[134] The result would be a waste of judicial resources as litigation would be divided into many phases.[135]

Additionally, it is argued that disrupting finality undermines the purposes of the criminal justice system. For example, one claim is that if convictions are overturned on habeas, there is less predictability and certainty of punishment, and therefore less deterrence of future crimes.[136] Likewise, some argue that rehabilitation of prisoners is frustrated by the availability of habeas review because it prevents them from facing and dealing with the reality of their crime and punishment.[137]

Perhaps most persuasively, it is argued that a large number of nonmeritorious habeas petitions causes a judicial predisposition towards dismissal, making it more difficult for deserving individuals to gain needed relief.[138] In *Brown v. Allen*, Justice Jackson explained: "It must prejudice the occasional meritorious application to be buried in a flood of worthless ones. He who must search a haystack for a needle is unlikely to end up with the attitude that the needle is worth the search."[139]

In contrast, the Warren Court and defenders of broader habeas review have emphasized the importance of collateral review as a method of error correction. As Professor Resnik explains:

> The perception that humans are fallible suggests that decisions rendered by the first person to rule on a dispute may be in error. The hope is that later, the same person or another person with a different vantage point, may be able to find and rectify errors. Under certain circumstances, finality bows to error correction.[140]

Professor Cover argues that "jurisdictional redundancy" serves many functions including error correction, providing greater assur-

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134. *See, e.g.*, Wainwright v. Sykes, 433 U.S. 72, 89 (1977); United States v. Frady, 456 U.S. 152, 164 (1982); *Engle*, 456 U.S. at 130-34.

135. *Cf.* McKeever v. Israel, 689 F.2d 1315, 1325 (7th Cir. 1982) (Posner, J., dissenting) (expressing dislike for "multiphasic" criminal proceedings).

136. *See, e.g.*, Burger, *Annual Report to the American Bar Association by the Chief Justice of the United States*, 67 A.B.A. J. 290, 292 (1981); *Stone*, 428 U.S. at 489-90.

137. *See, e.g.*, Bator, *supra* note 88, at 614.

138. Friendly, *supra* note 9, at 149.

139. Brown v. Allen, 344 U.S. 443, 537 (1953) (Jackson, J., concurring).

140. Resnik, *supra* note 60, at 855. *See also* Cover, *supra* note 131, at 653:

> It is therefore in order to ask whether redundancy in the design of the adjudicatory system furthers the desired end of reducing error defined simplistically as deviation of outcomes from those that would be predicated upon an accurate and truthful account of the event. The answer to this question is an unqualified 'yes'.

ances of legitimacy of decisions to litigants,[141] preventing one ideology from imposing its will in a pluralistic society,[142] and encouraging innovation through a dialogue between differing court systems and perspectives.[143] Thus, the expenditure of resources in review of habeas petitions is completely justified.

Additionally, defenders of habeas refute the arguments advanced by its critics. For instance, it is argued that defense attorneys have little incentive to sandbag arguments for habeas corpus; their most rational strategic behavior is to present the strongest arguments at trial and hope to win there.[144] Moreover, it is argued that the effects of habeas corpus on the criminal justice system are totally speculative assertions. The chance of a habeas reversal is sufficiently low that it is unlikely that it effects the deterrence of crime. Moreover, rehabilitation is now seldom considered a likely effect of the criminal justice and penal systems. Finally, it is denied that meritorious habeas cases are lost simply because of the large number of petitions. It is argued that habeas cases are a relatively small portion of the federal courts' docket and there is not a substantially greater danger of frivolous claims in habeas cases than elsewhere.[145]

Thus, there is a dispute over the benefits and costs of revisions through habeas corpus. Some see relatively little gained and great cost; others find substantial benefits and therefore acceptable costs. Ultimately, a determination of the proper scope of habeas must confront this tension between the desire for finality and the benefits of revisions.

I have identified four issues in deciding the availability of habeas relief and in comparing the Warren and Burger Courts: federalism, separation of powers, the function of criminal rights, and the desirability of collateral relief. Although I have primarily examined these issues independently, it is important to note their interrelationship. For instance, if it is decided that it is for Congress to define the scope of habeas corpus, then the proper approach to each of the other issues is to identify Congress' intent in adopting the habeas statutes.

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141. Cover, *supra* note 131, at 661.

142. *Id.* at 667-69.

143. *Id.* at 673.

144. *See, e.g.*, Resnik, *supra* note 60, at 897 (the sandbagging argument "assumes a fantastically risk-prone pool of defendants and attorneys."). *See infra* text accompanying notes 222-24.

145. Resnik, *supra* note 60, at 951-52 (habeas cases account for five percent of the federal docket and "frivolous claims exist in all parts of the docket.").

It should not be assumed that Justices or scholars analyze each of these issues separately in deciding their views about habeas corpus. It is quite possible that some of these issues are raised for rhetorical reasons and really are just masks for other concerns. For example, conservatives, believing that habeas allows for the release of guilty defendants, may construct federalism arguments or appeals to efficiency not because of genuine concern for the values of federalism or efficiency, but rather as a way of achieving their goal of restricting habeas corpus and keeping defendants in jail. Liberals, desiring to assure the protection of all constitutional rights, may use a separation of powers argument not because of a belief in the need for deference to Congress, but rather because it may support more expansive habeas jurisdiction. Nonetheless, thinking about the scope and availability of habeas corpus necessitates consideration of these four issues.

III. THINKING ABOUT THE ISSUES: CONSIDERATIONS IN THE DEBATE OVER THE PROPER SCOPE OF HABEAS CORPUS REVIEW

Decisions regarding habeas corpus turn on the most basic and most difficult questions in American society: how should power be allocated between the federal and state governments?; what is the appropriate division of powers between Congress and the federal judiciary in constitutional cases?; what is the purpose of constitutional rights in the criminal justice system?; how should society balance the tension between wanting an end to litigation and desiring the opportunity for error correction? It is not surprising, therefore, that even after 200 years of habeas corpus litigation there is still disagreement as to even the most basic doctrinal questions. In fact, because decisions about habeas implicate deep, underlying value questions, it is quite likely that there never will be consensus as to the proper scope of habeas. As the Court's membership changes, and new Justices come on the bench with differing views on these underlying issues, the habeas doctrines will also change. In light of the scope and complexity of the underlying issues, I do not purport to present a theory of habeas corpus. Rather, I merely wish to suggest several considerations that should be taken into account as each of the issues previously elaborated on are discussed and debated.

A. *Federalism: When Should Federal Courts Review State Court Judgments and Proceedings?*

When analyzing federalism, it is important to clearly focus on the proper issue. Frequently, critics of expansive habeas review argue that habeas is undesirable from a federalism perspective because it creates tension between federal and state courts. Last term, for example, the Supreme Court declared: "Federal habeas review creates friction between our state and federal courts, as state judges—however able and thorough—know that their judgments may be set aside by a single federal judge, years after it was entered and affirmed on direct appeal."[146] Commentators likewise invoke "friction" as a basis for opposing habeas review. Professor Bator commented that habeas "creates a peculiarly abrasive and intrusive relationship between the federal courts and the state courts, since it subordinates the entire hierarchy of state tribunals to a single federal judge."[147] In fact, concern over avoiding friction with state judiciaries has been frequently mentioned by the Burger Court in defining a number of federal court principles.[148]

Yet, avoiding friction with state judiciaries deserves little weight in defining the appropriate scope of habeas review. Although the label "friction" is frequently invoked there is rarely any explanation of what that friction is and or how it manifests itself. Apparently, state judges are insulted by the fact that federal courts review their decisions on habeas and are angry when their rulings are overturned.[149]

First, it must be recognized that the very existence of federal courts, and of most federal jurisdiction, is based on a distrust of state courts. Diversity jurisdiction, for instance, exists because of a fear that state courts will be parochial and protect their own citizens at the expense of out-of-staters.[150] Removal jurisdiction, espe-

146. Kuhlman v. Wilson, 106 S. Ct. 2616, 2627 n.16 (1986). *See also* Isaac v. Engle, 456 U.S. 107, 128 (1981).

147. Bator, *supra* note 88, at 614; *cf.* Yackle, *Explaining Habeas Corpus*, 60 N.Y.U. L. REV. 991 (1985) (summarizing objection to habeas corpus on grounds that it offends state judges).

148. *See, e.g.*, Younger v. Harris, 401 U.S. 37, 41 (1971) (federal courts may not enjoin pending state court proceedings); Rizzo v. Goode, 423 U.S. 362, 377-80 (1976) (dismissal of challenge to police department practices, in part, on federalism grounds); Fair Assessment in Real Estate Ass'n v. McNary, 454 U.S. 100, 109-10 (1981) (federal courts should not enjoin state tax collection procedures).

149. For example, Justice O'Connor, in *Engle v. Isaac*, wrote that habeas review undermines the "morale" of state judges. *Engle*, 456 U.S. at 128 n.33.

150. *See* J. FRIEDENTHAL, M. KANE & A. MILLER, CIVIL PROCEDURE 24-25 (1985) (discussing rationale underlying diversity jurisdiction).

cially in the civil rights context, reflects a distrust of state courts.[151] If state courts were identical to federal courts in their willingness to uphold federal rights, federal courts would be unnecessary (at least absent a theory that litigants with federal claims should have access to a federal court—a position clearly rejected by those who oppose broad habeas jurisdiction).[152] Thus, what additional insult to state courts does habeas corpus create in light of all of the "insult" that is inherent in the existence of federal courts and federal jurisdiction?

Second, the assumption behind the friction argument is that state court judges carefully follow the progress of their cases in federal court and hence are upset when their decisions are reversed. Yet, I have seen no evidence for this assertion and, given the case load of state court judges, it is unlikely that they have the time to keep track of the ultimate disposition of most of their cases. In fact, if it is assumed that state judges do follow federal habeas petitions, then an argument could be made that habeas *decreases* friction between federal and state judges. In the vast majority of cases, federal courts deny habeas petitions. One study found that habeas petitions were granted in only 3.2% of all cases and only 1.8% resulted in release of the petitioner.[153] Commentators agree that less than 5% of all habeas petitions are granted.[154] Therefore, because federal courts affirm state judges in over 95 percent of habeas petitions, habeas review should serve as positive reinforcement for state courts and not as a source of friction.[155]

Third, it should be noted that the Burger Court's habeas doctrines risk even greater insult to state court judges. In *Stone v. Powell*, the Court held that state court defendants may only present fourth amendment claims on habeas if they lacked a "full and fair" opportunity to present their objection in state court.[156] As Profes-

151. The Civil Rights Removal Statute provides for removal by a person "who is denied or cannot enforce [his or her equal rights] in the courts of such state." 28 U.S.C. § 1443(1) (1982). This statute was expressly motivated by distrust of state courts. *See* W. WIECEK, THE RECONSTRUCTION OF FEDERAL JUDICIAL POWER—1863-1875, at 333, 338 (1969).

152. *See* Allen v. McCurry, 449 U.S. 90, 103 (1980) (explicitly rejecting assertion that "every person asserting a federal right is entitled to one unencumbered opportunity to litigate that right in federal court.").

153. BUREAU OF JUSTICE STATISTICS, SPECIAL REPORT: FEDERAL REVIEW OF STATE HABEAS CORPUS 5 (1984), quoted in Resnik, *supra* note 60, at 952 n.523.

154. Resnik, *supra* note 60, at 952 n.523.

155. The argument in response would have to be that it is the existence of habeas review, rather than the results, which creates friction. But it is hard to imagine why a process which occurs years after the state court trial, is largely invisible to the state court judge, and usually upholds the state court decision, would be so offensive.

156. *Stone*, 428 U.S. at 494.

sor Resnik notes: "[I]n some sense, the state courts are at greater risk under *Stone v. Powell* because it authorizes a broad inquiry into the soundness of their procedures. The alternative question, of whether a case was correctly decided, seems less intrusive."[157]

Finally, and most importantly, what are the consequences of friction between federal and state courts? The claim might be that the friction will cause state judges to provide less protection for federal rights.[158] If state judges do follow any habeas proceedings on their decided cases and dislike being reversed, they would be careful to protect constitutional rights to minimize the chances of being overruled.[159]

Even if federal courts create friction by reversing state court decisions, correcting errors and protecting a wrongfully incarcerated individual is more important than maintaining harmony between levels of government. Federal court enforcement of constitutional rights, such as in desegregation and reapportionment, frequently causes friction between federal and state governments. Yet such tensions are accepted as a cost of constitutional governance.

In considering the proper relationship between state and federal courts in criminal cases, the issue is not friction, but rather, whether state courts can be trusted to adequately protect constitutional rights. As previously explained, determining the scope of habeas jurisdiction for state prisoners inescapably requires a comparison of the competence and vigilance of the two court systems in constitutional cases.[160] Differing perspectives on whether there is parity between federal and state courts explains much of the difference between the Warren and Burger Courts as well as conservative and liberal commentators.[161]

There are several excellent articles citing reasons for the lack of parity between federal and state courts and explaining the need for a federal forum to protect constitutional rights.[162] Detailed re-

157. Resnik, *supra* note 60, at 886 n.157.

158. *Cf.* Bator, *supra* note 88, at 626 (habeas corpus as disincentive to good decisionmaking in state courts).

159. Cover & Alienikoff, *supra* note 115, at 1046 ("If state courts knew that errors would be corrected by a federal court requiring a retrial, they might be more solicitous toward [federal] claims brought before them.").

160. *See supra* text accompanying notes 78-80.

161. *See supra* text accompanying notes 80-90.

162. *See, e.g.*, Neuborne, *supra* note 80, at 1105-06:

> The assumption of parity is, at best, a dangerous myth, fostering federal forum allocation decisions which channel constitutional adjudication under the illusion that state courts will vindicate federally secured constitutional rights as forcefully as would lower federal courts. At worst, it provides a pretext for funneling federal

sponses argue that state courts are to be trusted in applying constitutional criminal procedure protections.[163] My objective is to offer several observations about the dispute, not resolve it.

It must be recognized that the question of parity is an empirical issue: what is the difference between federal and state courts in deciding constitutional issues, and which court system is "better" in resolving such claims? Yet, for methodological reasons it is unlikely that there ever will be empirical data to resolve the question.[164] There would need to be some measure for comparing the courts, and criteria for defining a superior court for protecting constitutional rights. Unless federal and state courts are presented with identical cases, it is difficult to assess whether differences in outcomes reflect variance in the forum, the issues, or the types of cases.[165] Additionally, in a country with fifty state court systems, it is likely that some state courts are superior to federal courts in protecting federal rights, and in some states they are inferior to the federal judiciary. The courts will probably vary depending on the particular issue; a state court might be superior in upholding federal rights in some areas and inferior in others. However, an aggregate study concluding that there is or is not parity would still not reveal all of the instances of disparity between the court systems.

Commentators arguing that there is no parity attempt to avoid the empirical question by pointing to historical evidence of state court hostility towards federal rights.[166] Although there still would need to be some measure of comparing the historical practices of state courts and federal courts, more importantly, there would need

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constitutional decision-making into state courts precisely because they are less likely to be receptive to vigorous enforcement of federal constitutional doctrine.

Id.; *See also* Peller, *supra* note 28, at 666-68.

163. *See, e.g.*, Bator, *supra* note 28, at 451-52; Bator, *supra* note 88, at 610-11; Solimine & Walker, *Constitutional Litigation in Federal and State Courts: An Empirical Analysis of Judicial Parity*, 10 HASTINGS CONST. L.Q. 213, 214 (1983) (state courts are no more hostile than federal courts to the protection of federal rights).

164. *See* Neuborne, *supra* note 80, at 1116 n.46 ("No comparative study of the relative performance of state and federal courts in the enforcement of constitutional rights appears to exist."). *But see supra* note 163 and *infra* note 165.

165. For example, Solimine and Walker examine federal and state courts in constitutional cases and conclude that there is no difference in the performance of the two court systems. Solimine & Walker, *supra* note 163, at 214-15. Yet, this conclusion ignores methodological problems of self-selection. Litigants chose the state courts over the federal courts and those were the cases where they perceived the greatest chance of a favorable state court decision.

166. Neuborne, *supra* note 80, at 1111-15. *See also* Beatty, *State Court Evasion of United States Supreme Court Mandates During the Last Decade of the Warren Court*, 6 VAL. U.L. REV. 260 (1972); Schneider, *State Court Evasions of United States Supreme Court Mandates*, 7 VAL. U.L. REV. 191 (1973); Amsterdam, *supra* note 105, at 802.

to be evidence that the disparity continues. Especially with the large number of conservative judges appointed by the Reagan administration, it cannot be assumed that the federal judiciary necessarily will be more aggressive than state courts in protecting constitutional rights in the future.

Another way in which commentators attempt to avoid the empirical question of parity is to focus on the structural differences between federal and state courts. The argument raised is that because federal judges are insulated from direct electoral accountability (they have life tenure and their salaries cannot be decreased), they are more disposed to apply and uphold the Constitution.[167] Even though state court bias against constitutional rights cannot be empirically proven, there is a "reasoned institutional justification" for believing that there is prejudice.[168] Professor Yackle, for example, argues:

> The need for federal habeas has not subsided. State judges, who must stand periodic election . . . cannot be as zealous in the protection of constitutional rights as life-tenured federal judges. . . . State judges act at their peril when they subordinate societal interests in convicting the guilty to the defendant's interests in procedural safeguards.[169]

Although this argument is frequently made,[170] the problem is that there is no way to persuade those who disagree and believe that these institutional differences do not affect decisionmaking and that state courts are as effective as federal courts in protecting constitutional rights. It is all a matter of opinion; either one believes the insulation of federal judges makes them more likely to uphold individual liberties or one believes that there is no real difference between the court systems. Absent empirical evidence there is little basis for dialogue or persuasion.

There are, however, several ways in which the dispute over parity might be resolved in the absence of empirical studies. For example, it might be argued that there is no reason for the Supreme Court to evaluate the comparative competence of federal and state courts; that the question of parity is one for Congress to resolve. The notion is that since it is for Congress to determine the jurisdiction of the lower federal courts,[171] and to decide questions of feder-

167. Peller, *supra* note 28, at 682; Neuborne, *supra* note 80, at 1122-29.

168. Peller, *supra* note 28, at 681.

169. Yackle, *supra* note 8, at 616.

170. *See, e.g.*, Cover & Alienikoff, *supra* note 115, at 1050-51; Neuborne, *supra* note 80, at 1105; Amsterdam, *supra* note 105, at 802.

171. *See supra* text accompanying notes 92-93.

alism,[172] the Supreme Court should allow Congress to resolve the parity issue. The relevant inquiry would be, in enacting the habeas statutes, what were Congress' views as to the willingness of state courts to protect federal rights?

Phrased in this way, there is a clear answer. There appears to be no disagreement that Congress was motivated to allow state prisoners access to federal courts precisely because they greatly distrusted state courts.[173] As the Supreme Court recently observed, "there can be no doubt that in enacting § 2254, Congress sought to interpose the federal courts between the states and the people, as guardians of the people's federal rights—to protect the people from unconstitutional action."[174] Accordingly, if the Court is to follow congressional views as to parity, the Court should interpret habeas statutes based on the assumption that state courts are to be distrusted. If subsequent developments render this premise outdated, then it would be for Congress to change its directive by modifying the underlying statute.

This approach to the parity question has its obvious attractions because it makes unnecessary any Supreme Court confrontation with the empirical question of whether state courts are inferior to federal courts in protecting federal rights. Even so, the question of parity might not be permanently put to rest. If Congress chose to greatly restrict federal jurisdiction, such as by completely eliminating habeas cases, the court would need to decide whether such legislation was constitutional. This determination would depend, in part, on the likely effect of the statute, which would in turn entail some assessment of the forseeable conduct of state courts and the question of parity.

An alternative way to avoid the parity question would be to argue that litigants presenting constitutional claims should have the opportunity to litigate in the forum of their choice. Society should strive for the maximum protection of constitutional rights and litigants are in the best position to decide what court will best protect their rights. Therefore, a defendant with a constitutional claim should be able to choose whether to present the issue to a federal or a state court.[175] In state criminal cases where the defendant has no choice of forum, the defendant should be allowed to later litigate constitutional claims in federal court if he or she wishes to do so.

172. *See supra* text accompanying notes 95-97.

173. *See, e.g.*, Amsterdam, *supra* note 102, at 840; Neuborne, *supra* note 80, at 1111.

174. Reed v. Ross, 468 U.S. 1, 10 (1984).

175. For an elaboration of such a proposal, see Yackle, *supra* note 147.

Such an approach advances the value of litigant autonomy and because the defendant chooses the forum it is likely to enhance the legitimacy of the court's decision.[176]

Professor Bator challenges this position by arguing: "Why should it be the plaintiff's choice which is decisive? What about the preference of the defendant? . . . The argument simply assumes that the forum the plaintiff is likely to choose is also the preferable forum from some neutral constitutional perspective."[177] The response is that in criminal cases where the parties are an individual with a constitutional claim and the government as prosecutor, the individual should choose the forum which would provide the maximum chance for upholding constitutional rights. The issue, then, in appraising this approach to the parity question is whether it is desirable to maximize protection of constitutional rights. For example, the Burger Court in *Stone v. Powell* prevented relitigation on habeas of fourth amendment exclusionary rule claims precisely because it did not want to maximize federal court reversals on that basis.[178] In application, this would cause the parity question to turn on the third issue discussed above; what is the function of constitutional rights in the criminal justice system? Should the Court maximize the protection of all rights or only those that relate to guilt or innocence?

Additionally, absent a mechanism whereby state defendants could remove their cases to federal court if they have a constitutional claim, it must be admitted that a litigant autonomy model would permit all prisoners raising constitutional issues access to the federal courts. Any state court defendant who lost would simply assert that he or she preferred a federal forum to adjudicate the constitutional claims and thereby gain access to the federal judiciary on habeas corpus.

A final way to avoid the parity question would be to argue that "jurisdictional redundancy" between federal courts is desirable, regardless of which court is better or worse.[179] The argument is that it is desirable to have another court, with a potentially different institutional perspective, review the case. As discussed above, Professor Cover argues that jurisdictional redundancy serves the purposes of error correction, preventing one ideology from dominating deci-

176. For a discussion of the value of litigant autonomy in the court system, see Resnik, *supra* note 60, at 845-47.

177. Bator, *supra* note 88, at 608 n.11.

178. *Stone*, 428 U.S. at 482-90.

179. Cover, *supra* note 131, at 649-73.

sionmaking, and innovation.[180] This argument inevitably collapses into the fourth issue: how are these benefits to revisions balanced against the costs of disrupting finality? Additional judicial procedures always have benefits and might correct mistakes, but the question is whether they are worth the costs. The greater the difference between the forums— the less there is parity—the more benefits there are to redundancy. But even if parity is assumed, there still are independent benefits to allowing relitigation on habeas corpus.

The question of parity is central to defining federal jurisdiction in a wide variety of areas.[181] A thorough discussion and exploration in the context of habeas corpus would potentially provide great benefits in defining the proper role for the federal courts. At the very least, the discussion can advance beyond the point where there are two sides asserting positions; one that federal courts are superior, and the other that state courts are equal to federal courts in their ability and willingness to protect constitutional rights.

B. *Separation of Powers: Is it for Congress to Decide the Scope of Habeas Corpus and, If So, What Was Congressional Intent in Adopting the Habeas Corpus Statutes?*

Earlier, I reviewed the arguments as to why it is for Congress to define the availability of habeas corpus for state prisoners: Congress has the power to determine the jurisdiction of the lower federal courts and Congress can decide the proper allocation of power between the federal and state governments.[182] Additionally, I considered the objection, that carried to its extreme, this position would seemingly authorize Congress to eliminate habeas corpus in the federal courts, unconstitutionally suspending the writ of habeas corpus.[183]

The current habeas statutes are the basis for federal court relief for state prisoners and there is no claim that they are unconstitutional. In addressing their meaning, there is a strong case to be made that all issues concerning the scope of habeas review are to be decided as statutory questions in accord with traditional principles of construction. The problem is that neither the text of the provisions nor the legislative history deal with the particular issues facing

180. *See supra* text accompanying notes 140-45.
181. *See* Neuborne, *supra* note 80, at 1105.
182. *See supra* text accompanying notes 92-97.
183. *See supra* text accompanying notes 98-100.

the Supreme Court: when may a state court defendant relitigate matters in federal court that have been decided in state court, and when may a matter be raised on habeas that was not presented at trial?

Nonetheless, commentators have attempted to support their positions with legislative history. After examining the earlier cases and the contemporaneous understanding of habeas corpus at the time the Reconstruction Act was adopted, Professor Paul Bator concluded that the statute was not meant to permit relitigation of habeas claims.[184] He argued that the drafters only intended to allow habeas relief when the sentencing court lacked jurisdiction.[185] Professor Gary Peller, by contrast, reviewed each of the cases discussed by Professor Bator and the legislative history surrounding the adoption of the Habeas Act of 1867, and concluded that Congress did intend to allow relitigation of constitutional claims on habeas corpus.[186]

I have nothing to add to these competing views of the legislative history, but wish to suggest a few additional considerations for interpreting the habeas statutes. First, the real question is, how should the statute be adopted given uncertainty as to intent? It would seem that the best approach is to follow the literal language of the statute and place the burden of proof on the shoulders of those who argue that the statute should have less reach than its apparent intended meaning.

Section 2254 expressly allows a federal court to grant habeas corpus to individuals who claim that their custody is "in violation of the Constitution or laws or treaties of the United States."[187] The text of the statute is thus a broad authorization for federal courts to grant relief to individuals who demonstrate that they were convicted due to a constitutional violation. The statute does not limit petitions to claims that were presented at trial, nor does it preclude relitigation of matters that were decided in state court. Congress certainly could have included such limitations in the statute or could amend the statute to create such requirements.[188] Therefore, in deciding between competing interpretations of legislative history, the burden of proof must be on the side of those who advocate limit-

184. Bator, *supra* note 28, at 466-77.

185. *Id.* at 466.

186. Peller, *supra* note 28, at 610-19.

187. 28 U.S.C. § 2254(a) (1982).

188. The statute does contain a requirement that prisoners exhaust their state remedies before presenting habeas claims. 28 U.S.C. § 2254(b) (1982).

ing the authority granted by the literal language of the statute. Unless a compelling case can be made that there was congressional intent to the contrary, federal courts should be able to provide relief to all prisoners who claim that they are held in violation of the Constitution or laws of the United States.

Second, if there is doubt as to Congress' intent as to specific interpretive questions, uncertainty should be resolved by reference to the clearer general objectives of the law. Although there is disagreement over particular issues, there seems to be universal agreement that Congress, in enacting the Reconstruction Act, feared state court disregard of constitutional rights.[189] As such, the statute should be interpreted in accord with this general Congressional intent —habeas corpus as protection of constitutional rights in light of strong distrust of state courts—until Congress chooses to amend the statute and give the Court other directions.

Finally, in resolving the disagreement over the meaning of the statute, consideration must be given to the meaning of Congress' failure to revise the statute. Actually, Congress did revise the habeas statute in 1966 in response to Supreme Court interpretation. In *Townsend v. Sain*, the Supreme Court held that the federal courts, in hearing habeas petitions, have broad authority to relitigate facts pertaining to constitutional claims.[190] Congress then amended section 2254(d) to specify the circumstances under which federal courts may retry factual issues.[191]

An argument can be made that Congress' failure to amend the habeas statute after *Brown v. Allen*[192] and *Fay v. Noia*[193] demonstrated implicit congressional acquiescence to these decisions and hence it was wrong for the Court to limit or reverse them in the absence of congressional action. However, does this mean that Congress' failure to revise the statute after decisions such as *Stone v. Powell*[194] and *Wainwright v. Sykes*[195] is also acquiescence to them and the Court may not revise them until Congress acts? Moreover, the Court, at times, does change its interpretation of statutes

189. *See, e.g.*, Amsterdam, *supra* note 105, at 818, 828-42; Peller, *supra* note 28, at 619; Saltzburg, *supra* note 11, at 373-76.

190. 372 U.S. 293, 310-12 (1963). *See also* Wright & Sofaer, *Federal Habeas Corpus for State Prisoners: The Allocation of Fact-Finding Responsibility*, 75 YALE L.J. 895, 958-79 (1966).

191. 28 U.S.C. § 2254(d) (1982).

192. 344 U.S. 443 (1953).

193. 372 U.S. 391 (1963).

194. 428 U.S. 465 (1976).

195. 433 U.S. 72 (1977).

notwithstanding the nonintervention of Congress.[196] Nonetheless, if habeas jurisdiction is viewed as a statutory question, the issue which must be confronted is how to treat congressional silence in light of varying judicial interpretations.

C. *What is the Purpose of Constitutional Rights in the Criminal Justice System?*

In an influential article, Judge Henry Friendly argued that habeas only should be available when there is a "colorable showing of innocence."[197] As discussed earlier, this view not only underlies the Burger Court's approach to habeas corpus, but also its general orientation to criminal procedure issues.[198] Diametrically opposed to this position are those Supreme Court Justices and commentators who believe that habeas corpus should exist to remedy all constitutional violations; that constitutional rights exist to serve functions beyond protection of the innocent.[199] Again, I am not going to attempt to resolve this fundamental disagreement, but rather, I want to suggest several factors that should be taken into consideration when confronting this issue.

First, those who argue that habeas corpus should be limited to those who make a colorable showing of innocence must demonstrate that it is possible to determine what habeas petitions to hear on the basis of the pleadings. Simply put, what must a defendant allege in order to offer a sufficient showing of possible innocence to justify habeas corpus review under this approach?[200] If the petition itself must demonstrate possible innocence, even an innocent individual may not be able to allege sufficient facts to persuade the court to hear a habeas petition. The record of the state proceedings may not contain the information needed to establish a claim that the defendant is innocent. In fact, it was because of perceived inadequacies in state fact finding processes and in the records of state

196. *See, e.g.*, Monell v. Department of Social Servs., 436 U.S. 658 (1978), *rev'd in part* Monroe v. Pape, 365 U.S. 167 (1961) (municipal liability under 42 U.S.C. § 1983).

197. Friendly, *supra* note 9, at 160.

198. *See supra* text accompanying notes 108-27.

199. *Id.*

200. Hill, *The Forfeiture of Constitutional Rights in Criminal Cases*, 78 COLUM. L. REV. 1050, 1076-77 n.158 (1978) (suggesting that such a requirement would be inappropriate in situations where the prisoner lacked a fair opportunity to present his constitutional claim. Furthermore, even in situations where there *was* a fair opportunity given to the prisoner, the author suggests that the "colorable claim" requirement might be inappropriate, because constitutional claims can be made which do not bear on the actual guilt or innocence of the prisoner).

proceedings that the Supreme Court decided to take advantage of the powers granted by congressional creation of habeas corpus review.[201] Professor Meador explains that the Court was explicitly aware of "the inadequacy of many state records" and therefore provided a "federal forum in which the evidentiary record concerning the alleged violation could be fully developed."[202]

If a defendant could obtain habeas review merely by including a statement that he or she is really innocent, every defendant would do so and the intended limitation of habeas jurisdiction would fail.[203] On the other hand, if the courts were to require a showing of arguable innocence in order to have a habeas petition heard, defendants might find access to the federal courts blocked because of deficiencies in the trial record. In fact, the constitutional objection might relate specifically to the exclusion of evidence offered by the defendant to established his or her innocence. In other words, to demonstrate innocence a defendant would need to have a hearing to elicit and produce the necessary evidence. But in order to get the hearing, the defendant would first need to establish innocence. By requiring a showing of likely innocence in order to present a habeas petition, a catch 22 is created, in that a defendant would need to persuade the court of the likely outcome on the merits in order to invoke the court's jurisdiction.

Additionally, creating substantial pleading requirements poses a special problem in the context of habeas cases because of the large number of petitions that are filed pro se.[204] It is quite possible that even an actually innocent pro se defendant would not draft the pleadings with sufficient persuasiveness to convince the reviewing court that there was a high enough probability of innocence to justify hearing the habeas petition.

Second, those who argue that criminal procedure protections should be limited to protecting the innocent must explain the existence of numerous constitutional provisions that seem unrelated to

201. Meador, *Straightening Out Federal Review of State Criminal Cases*, 44 OHIO ST. L.J. 272, 274 (1983) ("Not surprisingly, the state criminal process was not always attuned to a full development of such facts; nor were state judges always oriented to making the sort of detailed factual findings that would permit meaningful Supreme Court review on direct appeal.").

202. *Id.*

203. Shapiro, *Federal Habeas Corpus: A Study in Massachusetts*, 87 HARV. L. REV. 321, 371 (1973) (prisoners would allege innocence as a matter of course, so judicial scrutiny would still be required).

204. Resnik, *supra* note 60, at 950 (most habeas petitions are filed pro se and often leave out important information).

guilt or innocence. For example, as the Supreme Court itself noted in *Stone*, the fourth amendment's prohibition against unreasonable search and seizure does not pertain to the accuracy of the evidence obtained.[205] Instead, it seems oriented to protecting individual privacy from unwarranted governmental intrusion.[206] To the extent that the fifth amendment's protection against self-incrimination is more than an assurance of voluntariness, it, too, serves values other than protecting innocent defendants. Other provisions, such as a right to a speedy trial, protection against unreasonable bail, and the prohibition against cruel and unusual punishments, also seem to serve values other than accurate determination of guilt or innocence. Considering all of these provisions, it appears unrealistic to limit habeas corpus protection to those who can make an arguable claim of innocence.

Those who advocate limiting habeas corpus might argue that while these constitutional rights are important, they are adequately protected via the appeals process. Habeas corpus exists for truly important cases: those rare instances in which an arguably innocent person is incarcerated.[207] The problem with this view is that there is no apparent authority for it in any of the statutory provisions or their history. As Professor Seidman noted: "There is no evidence at all to suggest that the Framers meant [habeas corpus] availability to turn on the defendant's guilt or innocence."[208] Because federal habeas corpus jurisdiction is largely a statutory question and the statute does not limit habeas corpus to those defendants who demonstrate their arguable innocence, it would be inappropriate for the Court to independently add such a jurisdictional limitation.[209]

Thus, even without confronting the basic question of whether criminal procedure protections should exist solely to protect the innocent, several questions must be addressed by those who want to restrict the availability of habeas corpus to defendants with a colorable claim of innocence.

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205. Stone v. Powell, 428 U.S. 428, 482-89 (1976).

206. *Id. See, e.g.*, Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 353 (1974) ("The Bill of Rights in general and the fourth amendment in particular are profoundly anti-government documents.").

207. This seems the core of Judge Friendly's position. Friendly, *supra* note 9, at 142-43.

208. Seidman, *supra* note 10, at 457 n.126.

209. *See generally* Redish, *supra* note 30 (criticizing judicial limitations on congressional grants of jurisdiction).

D. *The Role of Collateral Review and The Tension Between Finality and Revisions*

As discussed earlier, habeas corpus presents a tension between the desire for finality, an end to the proceedings, and a desire to provide the chance for revisions, especially to correct errors.[210] In thinking about this conflict, it is essential to remember that what is being sought is a balance between these two objectives. There obviously must be finality at some point; a time when the defendant has had sufficient opportunities for review and the chances of finding an error are too remote to justify further expenditure of resources.[211] Yet, there must also be opportunities for revision and error correction. Criminal punishments, incarceration and even death, are so severe that mistakes "whether defined as convictions of innocents or convictions based on substantial constitutional violations" are intolerable.[212]

Therefore, it simply will not suffice to argue for restricting habeas corpus by pointing to the fact that it disrupts finality.[213] The question must be whether the benefits of possible revision outweigh the costs of sacrificing finality.

Again, my intent is not to suggest the proper balance, but rather to try and clarify what it is that is being balanced. First, it is important to brush aside several misleading arguments that frequently are part of the balancing analysis. For example, the Court and commentators continue to say that habeas is undesirable because it undermines the deterrent function of the criminal law.[214] Yet, no evidence for this assertion is ever offered. So few prisoners have had their convictions overturned on habeas that it is incredibly unlikely that habeas can be accused of decreasing the certainty of punishment. Professor Resnik's careful review of the statistics concerning

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210. *See supra* text accompanying notes 128-45.

211. *See* Resnik, *supra* note 60, at 854-55 ("Practically, both the system and the litigants must be able to turn attention and energies elsewhere. Psychologically, there is a need for repose. Politically, there is a belief that state intervention in individuals' lives should generally come to an end.").

212. Even the most ardent advocates for limiting habeas corpus recognize that finality must at times give way to error correction. *See, e.g.*, Bator, *supra* note 28, at 446-48; Friendly, *supra* note 9, at 149-50.

213. The Supreme Court has emphasized that one of the major costs of habeas corpus is that "it undermines the usual principles of finality of litigation." Engle v. Isaac, 456 U.S. 107, 127 (1982).

214. Kuhlmann v. Wilson, 106 S. Ct. 2616 (1986); Friendly, *supra* note 9, at 146. "It is essential to the educational and deterrent functions of the criminal law that we be able to say that one violating the law will swiftly and certainly become subject to punishment." *Id.* (quoting Bator, *supra* note 28, at 452). *See also* Bator, *supra* note 88, at 614.

habeas petitions revealed that 2.68% of prisoners file habeas petitions and that less than five percent of these have their habeas petitions granted.[215] One study suggests that less than two percent of habeas petitioners are actually released from custody as a result of federal court review.[216]

Deterrence is a function of the certainty and the severity of the punishment imposed.[217] The certainty of punishment includes the likelihood of being apprehended, the chance of being convicted, and the probability of a sentence being imposed. The fact that one in a thousand prisoners succeeds in gaining a reversal of a conviction on habeas hardly seems likely to have any effect on the deterrence of crime.

Likewise, it is wrong to oppose habeas on the grounds that it prevents effective rehabilitation of prisoners. Although this argument is frequently made,[218] it assumes that prisons do have a rehabilitative effect and that the possibility of collateral relief undermines that result. Yet, if there is anything in the criminal justice system about which there is widespread consensus, it is that prisons do not rehabilitate.[219] Furthermore, the relationship between rehabilitation and the remote chances of release on habeas seems very tenuous.

Finally, and most importantly, concerns about attorney's sandbagging arguments have been given far too much weight in decisions and discussions concerning the scope of habeas review. The Supreme Court repeatedly has emphasized the need to enforce procedural defaults and uphold finalilty so as to prevent the sandbagging of arguments for later presentation on habeas corpus.[220] First, concern for sandbagging does not justify enforcing procedural defaults that are the result of attorney inadvertence[221] or an attorney's

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215. Resnik, *supra* note 60, at 952 n.523, 955.

216. *Id.* at 952 n.523 (citing to BUREAU OF JUSTICE STATISTICS, SPECIAL REPORT: FEDERAL REVIEW OF STATE HABEAS CORPUS 5 (1984)).

217. *See* A. DERSHOWITZ, FAIR AND CERTAIN PUNISHMENT 3 (1976); N. MORRIS & G. HAWKINS, THE HONEST POLITICIAN'S GUIDE TO CRIME CONTROL 255-61 (1970); F. ZIMRING, PERSPECTIVES ON DETERRENCE 1-2 (1971).

218. *Kuhlmann*, 106 S. Ct. at 2626; Bator, *supra* note 88.

219. *See, e.g.*, AMERICAN FRIENDS SERVICE COMMITTEE, STRUGGLE FOR JUSTICE: A REPORT ON CRIME AND PUNISHMENT IN AMERICA 34-47 (1971) (explaining reasons why rehabilitation should not be a goal of the criminal justice system).

220. *See, e.g.*, Wainwright v. Sykes, 433 U.S. 72, 89 (1977); United States v. Fady, 456 U.S. 152, 160-61 (1982); Engle v. Isaac, 456 U.S. 107, 127 (1982).

221. *See, e.g.*, Murray v. Carrier, 106 S. Ct. 2639, 2648 (1986) ("Attorney error short of ineffective assistance of counsel does not constitute cause for a procedural default."); Smith v. Murray, 106 S. Ct. 2661, 2667 (1986) (fact that counsel did not recognize the factual or legal

failure to anticipate future court decisions creating rights that were not in existence at the time of trial.[222] Second, it is difficult to see what an attorney may gain by sandbagging. If the objection is presented at trial, there is a chance that the court will rule in the defendant's favor and that this ruling will aid in gaining an acquittal. If the court rules against the defendant, the objection is preserved and can be raised on appeal and later on habeas. If the objection is sandbagged for habeas, the defendant is giving up its use at trial and on appeal, for no apparent gain. In fact, under the *Fay v. Noia* standard,[223] the objection could not even be presented on habeas corpus if it could be shown that the defendant deliberately bypassed review in state proceedings. Furthermore, given the low rate of success on habeas, it is hard to imagine attorneys strategically choosing to wait and take the chance at a possible later reversal.[224] Third, a blanket rule enforcing virtually all procedural defaults assumes that they are more likely to result from deliberate sandbagging rather than from attorney error. Yet, the reality of criminal representation, especially by often over-worked public defenders, is quite the contrary.

Thus, concern for finality should not be on account of increasing deterrence or rehabilitation, or decreasing the likelihood of sandbagging. When these arguments are brushed aside, it becomes clear that the real basis for the concern over finality—besides preventing the release of guilty individuals as discussed above—is a desire to conserve judicial resources.[225] The question becomes whether habeas petitions are worth their costs. In order to answer this question, it is essential to carefully calculate the exact costs. After a thorough review of the docket of the federal courts, Professor Resnik estimates that approximately five percent of the federal courts' civil docket is comprised of habeas petitions.[226] Professor Resnik points out that such cases might actually occupy a greater

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basis for a claim, or failed to raise the claim even though recognizing it, is not cause for a procedural default).

222. *See, e.g., Engle*, 456 U.S. at 107.

223. *Fay*, 372 U.S. at 438.

224. Resnik, *supra* note 60, at 897 (the sandbagging "argument assumes a fantastically risk-prone pool of defendants and attorneys. Given that the success rate at trial and on appeal, while low, is greater than the success rate on habeas corpus, the odds are against being able to sandbag in a first procedure and emerge victorious in a second.").

225. Friendly, *supra* note 9 (habeas as a drain on judicial resources); Bator, *supra* note 88, at 624.

226. Resnik, *supra* note 60, at 950. Approximately ten percent of the docket consists of cases filed by prisoners where civil rights claims and habeas petitions are combined. *Id.* at 953.

percentage of judicial time because of the fact that so many of the litigants appear pro se and of the minimal likelihood of settlement.[227]

Are these costs in judicial time justified by the benefits of collateral review? This is the central question in deciding the proper balance between the desires for finality and revisions. To a large extent, the answer may be derived from information gained in analyzing the other three issues. For example, the greater the distrust in state courts, the more reason to believe that federal courts will correct errors on habeas corpus.[228] The more substantial the perceived differences between federal and state courts—the less there is a belief in parity—the more important it is to have the opportunity for federal court review.

It can be argued that it is for Congress, and not the Supreme Court, to decide what level of expenditures are justified on habeas corpus. In addition to the arguments already presented as to why Congress should determine the jurisdiction of the federal courts in habeas cases, a strong argument can be made that it is for the legislature, with control over taxing and spending, to make resource allocation decisions. Congress could decide if the relative infrequency of habeas petitions makes them unworthy of the costs; or whether the enormous importance of releasing wrongfully incarcerated individuals justifies the expenditures on federal court review.[229] Furthermore, the extent to which revisions are desirable depends, in part, on one's view of the role of constitutional rights in the criminal justice system. At a minimum, society should spend additional resources for those with a colorable claim of innocence. But those who believe that habeas should extend to all constitutional claims further argue that virtually nothing is more deserving of resources than assuring that no person is incarcerated as a result of a constitutional violation. My central point is, however, that the balancing should be done openly and explicitly, and that care should be taken to be sure that irrelevant considerations are excluded.

IV. CONCLUSION

Although there are dozens of Supreme Court decisions and law review articles examining habeas corpus, the controversy over the proper scope of habeas review shows no signs of abating. In fact,

227. *Id.* at 950.

228. Cover, *supra* note 131, at 667-69.

229. Resnik, *supra* note 60, at 956.

there is no doubt that if there is a quad-centennial celebration of the Constitution in 200 more years, there will still be dispute over the appropriate role of habeas in the American criminal justice system. The limited purpose of this Article is to clarify the agenda for debate and offer some suggestions as to how the dialogue should proceed.