1990

Form and Function in the Administration of Justice: The Bill of Rights and Federal Habeas Corpus

Larry Yackle
Boston University School of Law

FORM AND FUNCTION IN THE ADMINISTRATION OF JUSTICE: THE BILL OF RIGHTS AND FEDERAL HABEAS CORPUS

Larry W. Yackle*

The perennial controversy regarding federal habeas corpus for state prisoners is driven by two related quarrels deep within American constitutionalism. One debate is over the respective responsibilities of the state and federal courts in the effectuation of federal rights. The other is over the form and function of federal rights themselves—whatever tribunals may be charged with their enforcement. The Report on habeas corpus for state prisoners, generated by the Justice Department's Office of Legal Policy (OLP) near the end of the Reagan presidency,[1] takes strong positions with respect to each of these controversies.[2] Initially, the Report insists that the state courts should have primary responsibility for enforcing the Bill of Rights in state criminal prosecutions and

* Professor of Law, Boston University School of Law. A.B., University of Kansas, 1968; J.D., University of Kansas School of Law, 1973; LL.M., Harvard University Law School, 1974. I would like to thank Kathryn Abrams, Jack M. Beermann, Robert G. Bone, Jane Maslow Cohen, Michael G. Collins, and Frederick M. Lawrence for valuable comments. Chris Mensah helped with research.

1. OFFICE OF LEGAL POLICY, U.S. DEP'T OF JUSTICE, TRUTH IN CRIMINAL JUSTICE SERIES, REPORT NO. 7, REPORT TO THE ATTORNEY GENERAL ON FEDERAL HABEAS CORPUS REVIEW OF STATE JUDGMENTS (1988), *reprinted in* 22 U. MICH. J.L. REF. 901 (1989) [hereinafter REPORT NO. 7, HABEAS CORPUS]. In the current administration, the OLP has been absorbed by the Office of Legislative Affairs. Inasmuch as this essay is meant to be a reaction to a report generated by the former office, I continue, of course, to refer to that office by name.

2. Professor Grano has explained that this Report, along with others in the series, states only the policy preferences of the OLP and does not necessarily reflect the official position of the Department of Justice, even during the last administration. Grano, *Introduction—The Changed and Changing World of Constitutional Criminal Procedure: The Contribution of the Department of Justice's Office of Legal Policy*, 22 U. MICH. J.L. REF. 395, 405 n.44 (1989). I am unaware of any comparable policy statement from either the Office of Legislative Affairs or the Justice Department under Mr. Bush. However, Mr. Paul L. Maloney, Deputy Assistant Attorney General, Criminal Division, recently referred repeatedly to the OLP Report in congressional testimony. Although Mr. Maloney did not cite the Report for the view that federal habeas corpus should be discarded entirely, he did rely heavily upon the Report in support of restrictions on the habeas jurisdiction. *Hearings on H.R. 4737 Before the Subcomm. on Courts, Intellectual Property, and the Admin. of Justice of the House Comm. on the Judiciary*, 101st Cong., 2d Sess. (1990) [hereinafter *Hearings on H.R. 4737*] (statement of Paul L. Mahoney).

that the lower federal courts should be banished from the field.[3] I have examined claims of this sort elsewhere and argued that postconviction habeas corpus can orchestrate the proper distribution of decision-making authority between the state and federal courts.[4]

In addition, the Report contends that any political or philosophical values served by criminal process are and should be subordinate to what the Report itself takes to be the criminal justice system's chief function: the investigation of historical truth.[5] The Report understands the search for truth to be coextensive with the determination of factual guilt or innocence and insists that the state courts render confident judgments in this sense and need no federal oversight.[6] In the Report's telling, collateral litigation of Bill of Rights claims in federal court departs needlessly from the historical office of habeas corpus, floods the federal courts with frivolous claims, and sacrifices legitimate interests in efficiency and finality to the pursuit of insubstantial and speculative values.[7] For these additional reasons, according to the Report, the federal courts' jurisdiction to hear postconviction claims should be eliminated or drastically curtailed. I mean in this essay to explain why this view, too, is unsound.

Part I critiques the Report's insistence that accurate fact finding exhausts, or nearly exhausts, the objectives of criminal justice, identifies the fundamental role of the Bill of Rights in the American political order, and situates federal habeas corpus within that framework. Part II traces the Report's historical review of the federal habeas jurisdiction and critiques the Report's too-convenient reliance on selected materials that, on examination, fail to undermine conventional understandings of the writ's development as a postconviction remedy. Part III responds to the Report's complaints regarding current habeas corpus practice and refutes contentions that the habeas jurisdiction overburdens federal dockets with stale claims. Part IV takes up recent Supreme Court decisions in the field, identifies the vision of criminal process they appear to sponsor, and contests the notion that they support the OLP's approach to habeas corpus.

---

3. *See* REPORT NO. 7, HABEAS CORPUS, *supra* note 1, at 969-70.
4. Yackle, *Explaining Habeas Corpus*, 60 N.Y.U. L. REV. 991 (1985).
5. *See* REPORT NO. 7, HABEAS CORPUS, *supra* note 1, at 915.
6. *Id.* at 955-63.
7. *Id.* at 943-51.

I. THE BILL OF RIGHTS: FORM AND FUNCTION

The series of policy statements of which the OLP Report on habeas corpus is a part declares by its very title[8] that procedural safeguards in criminal cases are and should be tools for discovering the truth about the historical events said to comprise a criminal offense. An introductory statement by former Attorney General Meese weds this "truth-seeking" purpose to the ascertainment of factual guilt or innocence. "The function of the criminal justice system," according to Mr. Meese, "might best be summed up as the protection of the innocent."[9] Both the innocent defendant wrongly suspected

---

8. The collection of Reports is entitled the "Truth in Criminal Justice Series."

9. Mr. Meese's statements introducing the original reports were not reprinted by the *University of Michigan Journal of Law Reform* in its Special Issue at the request of the OLP. The statement on habeas corpus reads as follows:

> The function of the criminal justice system might best be summed up as the protection of the innocent. In criminal prosecutions, an extensive system of rights and procedures guards against the conviction of an innocent person. Equally important, enforcement of the criminal law in all its phases—crime prevention, police investigations, criminal prosecutions and corrections—also aims at protection of the innocent. By detecting, convicting and punishing those who break our laws, we protect innocent people from the depredations of criminals.
>
> To protect the innocent effectively, the criminal justice system must be devoted to discovering the truth. The truth is the surest protection an innocent defendant can have. Uncovering the truth and presenting it fully and fairly in criminal proceedings is also of critical importance to the effort to restrain and deter those who prey on the innocent.
>
> Over the past thirty years, however, a variety of new rules have emerged that impede the discovery of reliable evidence at the investigative stages of the criminal justice process and that require the concealment of relevant facts at trial. This trend has been a cause of grave concern to many Americans, who perceive such rules as being at odds with the goals of the criminal justice system. Within the legal profession and the law enforcement community debate over these rules has been complicated by disagreements about the extent to which constitutional principles or valid policy concerns require the subordination of the search for truth to other interests.
>
> This report is a contribution to that debate. It was prepared by the Office of Legal Policy, a component of the Department of Justice which acts as a principal policy development body for the Department. At my request, the Office of Legal Policy has undertaken a series of studies on the current status of the truth-seeking function of the criminal justice system.
>
> This volume, "Federal Habeas Corpus Review of State Judgments," is the seventh in that series. It reviews the historical development of the federal habeas corpus jurisdiction; examines the contemporary operation of that jurisdiction as a means by which lower federal courts review state judgments; and discusses the constitutional and policy considerations affecting the continuation or restriction of this type of review. It also analyzes the prospects

of crime and the innocent public are protected by the identification, conviction, and punishment of the guilty:

> To protect the innocent effectively, the criminal justice system must be devoted to discovering the truth. The truth is the surest protection an innocent defendant can have. Uncovering the truth and presenting it fully and fairly in criminal proceedings is also of critical importance to the effort to restrain and deter those who prey on the innocent.[10]

Mr. Meese acknowledges that criminal procedure may also serve values beyond accurate fact finding. Yet he declares that procedural rules that subordinate the "search for truth" to "other interests" are perceived by "many Americans" to be "at odds with the goals of the criminal justice system."[11] That public perception, in turn, warrants the rigorous critical reexamination this series of reports is meant to supply.[12]

The body of the OLP Report on habeas corpus repeats and builds upon the same thesis. Quoting a 1935 Supreme Court opinion out of context, the Report observes flatly that the objective of criminal prosecutions is that "guilt shall not escape or innocence suffer."[13] The problem at present, and apparently since the mid-1950s,[14] is that we have lost sight

---

for reform in this area, considering both legislative and litigative options.

In light of the general importance of the issues raised in this report and its companion volumes, it is fitting that they be available to the public. They will generate considerable thought on topics of great national importance, and merit the attention of anyone interested in a serious examination of these issues.

Meese, *Introduction* to OFFICE OF LEGAL POLICY, U.S. DEP'T OF JUSTICE, TRUTH IN CRIMINAL JUSTICE SERIES, REPORT NO. 7, REPORT TO THE ATTORNEY GENERAL ON FEDERAL HABEAS CORPUS REVIEW OF STATE JUDGMENTS (1988).

10. *Id.*

11. *Id.*

12. *See id.*

13. REPORT NO. 7, HABEAS CORPUS, *supra* note 1, at 915 (quoting Berger v. United States, 295 U.S. 78, 88 (1935)). In *Berger*, the Court dealt with an extraordinarily abusive prosecutor whose "pronounced and persistent" misconduct at trial might well have led the jury to convict an innocent man. 295 U.S. at 84. The Court explained that the prosecutor had two duties—to "use every legitimate means to bring about a just [verdict]" and to "refrain from improper methods calculated to produce a wrongful conviction." *Id.* at 88. To be sure, the Court said that the purpose of the law was also two-fold: to convict the guilty and spare the innocent. But there was no occasion in the narrow circumstances in *Berger* to elaborate fully on the objectives of procedural safeguards. Certainly, there is no warrant whatever to read the Court to have denied the significance of other values.

14. *See* REPORT NO. 7, HABEAS CORPUS, *supra* note 1, at 903, 932-37.

of the guilt-determination function of criminal process and saddled the criminal justice system with rules that conflict with the pursuit of historical truth. In the main, the Report has in mind an assortment of doctrines, discussed in other entries in this series,[15] by which the Supreme Court has restrained overzealous police officers and prosecutors tempted to seek and use evidence, however reliable, in circumstances that threaten constitutional values apart from the determination of guilt or innocence.[16]

Moreover, by this account, we have allowed a troubling asymmetry to develop in our mechanisms for curing error at the trial level. On the one hand, erroneous acquittals are not subject to judicial revision and thus go uncorrected on appeal or collateral review. The public interest in convicting the guilty is frustrated by a rule, supplied by the jeopardy clause,[17] that insists upon holding mistaken acquittals inviolate—in the teeth of the assumed purpose of criminal justice to achieve accuracy.[18] On the other hand, disappointed defendants are allowed to seek appellate and collateral review and, in at least some instances, to upset even accurate convictions on grounds unrelated to factual innocence. As much as the OLP would like to permit prosecutors to appeal from acquittals thought to be wrong, the Constitution will not tolerate second-guessing the acquitting jury in a criminal case.[19] The only recourse, then, is to pare back the ability of

---

15. OFFICE OF LEGAL POLICY, U.S. DEP'T OF JUSTICE, TRUTH IN CRIMINAL JUSTICE SERIES, REPORT NO. 1, REPORT TO THE ATTORNEY GENERAL ON THE LAW OF PRETRIAL INTERROGATION (1986), *reprinted in* 22 U. MICH. J.L. REF. 437 (1989); OFFICE OF LEGAL POLICY, U.S. DEP'T OF JUSTICE, TRUTH IN CRIMINAL JUSTICE SERIES, REPORT NO. 2, REPORT TO THE ATTORNEY GENERAL ON THE SEARCH AND SEIZURE EXCLUSIONARY RULE (1986), *reprinted in* 22 U. MICH. J.L. REF. 573 (1989); OFFICE OF LEGAL POLICY, U.S. DEP'T OF JUSTICE, TRUTH IN CRIMINAL JUSTICE SERIES, REPORT NO. 4, REPORT TO THE ATTORNEY GENERAL OF THE ADMISSION OF CRIMINAL HISTORIES AT TRIAL (1986), *reprinted in* 22 U. MICH. J.L. REF. 707 (1989).

16. *E.g.*, Miranda v. Arizona, 384 U.S. 436 (1966) (establishing rules for the custodial interrogation of suspects); Massiah v. United States, 377 U.S. 201 (1964) (restricting contacts with suspects apart from defense counsel); Mapp v. Ohio, 367 U.S. 643 (1961) (extending the fourth amendment exclusionary rule to state criminal cases).

17. "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb." U.S. CONST. amend. V.

18. Of course, if it is posited that the only objective is accuracy and that an acquittal is erroneous, no interest on the part of an innocent accused is protected by barring judicial review.

19. The sixth report in the OLP's series makes an unabashed attempt to interpret the jeopardy clause to allow the prosecution to attack jury acquittals, but comes away convinced that the original meaning of the fifth amendment was otherwise and that

convicts to challenge judgments against them. The OLP's primary target is federal habeas corpus. Inasmuch as convicts may dispute their convictions on appeal or in postconviction proceedings in state court, further adjudication in the federal forum can only reexamine claims of innocence already rejected by the state courts or expound upon matters unrelated to guilt or innocence. Given the centrality of guilt-determination within the OLP's framework, federal habeas corpus is either redundant or simply irrelevant.

We may expect oversimplification in a prefatory note signed by a cabinet member charged to press the sitting president's political agenda. The OLP must offer something more sophisticated if its Report is to contribute seriously to public discussions of federal habeas corpus. The Report's conceptual flaws are everywhere apparent. To begin, it will not do to suggest that the guilt-determination function of criminal process is captured entirely by a search for historical "truth." The formulation of confident judgments about historical events (what was done, by whom it was done, etc.) is, of course, a critical feature of criminal proceedings, as it is of any exercise of conventional judicial authority. Yet ascribing criminal responsibility to a defendant is a much more complex enterprise. A court scarcely *discovers* guilt or innocence as a *fact*, fully contained within an authenticated account of the episode in question. As Peter Arenella has explained, criminal guilt also contemplates a "mental element," which is essential to responsibility, and recognizes the notion of justification or excuse, which defeats liability.[20] The factual record, however well established, only lays the predicate for judgments touching the defendant's culpability—her moral responsibility

---

no revisionist history can reconcile the Constitution to the OLP's desires. *See* OFFICE OF LEGAL POLICY, U.S. DEP'T OF JUSTICE, TRUTH IN CRIMINAL JUSTICE SERIES, REPORT NO. 6, REPORT TO THE ATTORNEY GENERAL ON DOUBLE JEOPARDY AND GOVERNMENT APPEALS OF ACQUITTALS (1987), *reprinted in* 22 U. MICH. J.L. REF. 831 (1989). Professor Grano advises critics to "take note" that at least in this instance, the originalist commitments of Justice Department lawyers did not produce an interpretation that comports with Mr. Meese's policy preferences. *See* Grano, *supra* note 2, at 419-20. I take the point, but I tend to think that this exception proves a contrary rule. The wonder is that the Reagan administration did not propose a constitutional amendment to rid the country of an inconvenient protection for individual liberty. *Cf.* S.J. Res. 180, 101st Cong., 1st Sess. (1989) (the Bush administration's proposed amendment to permit the punishment of flag "desecration").

20. Arenella, *Rethinking the Functions of Criminal Procedure: The Warren and Burger Courts' Competing Ideologies*, 72 GEO. L.J. 185, 197-98 (1983).

for the harms the criminal law hopes to condemn.[21]

Nor is the determination of *factual* guilt the raison d'etre of criminal process. The American system of criminal justice has always demanded a demonstration of *legal* guilt, by which is meant the adjudication of a defendant's criminal culpability by means of the process specified by law.[22] That process, in turn, reflects a range of judgments regarding the appropriate use of governmental power, the allocation of authority between and among the agents of government, and, most importantly, the received principles of liberty that structure the relations between government and the individual in this society.[23] Within the notion of legal guilt, the Bill of Rights cuts a significant figure—most of its procedural safeguards ensuring the accuracy of factual determinations, some furthering structural values and principles of individual liberty. The sixth amendment right to trial by jury enlists community representatives to appraise a defendant's culpability;[24] the fourth amendment ban on unreasonable search and seizure protects personal privacy;[25] the fifth amendment privilege against self-incrimination safeguards individual integrity.[26] To mute the significance of legal guilt and these further functions of procedural safeguards is to risk grave misunderstanding of what is at stake in the criminal process. Not even the OLP would contend (one would hope) that order should be promoted "without law."[27]

---

21. *Id.* at 198.

22. *See* H. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 166 (1968) (explaining that a defendant can be said to be legally guilty "if and only if . . . factual determinations are made in procedurally regular fashion and by authorities acting within competences duly allocated to them," and is not held guilty if "various rules designed to protect [the accused] and to safeguard the integrity of the process are not given effect").

23. *See id.*

24. *See, e.g.,* Taylor v. Louisiana, 419 U.S. 522, 530-31 (1975) (explaining that the requirement that jurors be drawn from a cross-section of the community not only ensures impartiality but maintains public confidence in the criminal process and fosters a " 'sharing in the administration of justice' " as a " 'phase of civic responsibility,' " (quoting Thiel v. Southern Pac. Co., 328 U.S. 217, 227 (1946) (Frankfurter, J., dissenting))).

25. *See, e.g.,* Katz v. United States, 389 U.S. 347, 353 (1967) (explaining that the fourth amendment protects privacy on which an individual "justifiably" relies).

26. *See, e.g.,* Fisher v. United States, 425 U.S. 391, 397 (1976) (explaining that the fifth amendment privilege protects against "physical or moral compulsion").

27. *See* Arenella, *supra* note 20, at 187 (insisting that it is trivial to note that the Warren and Burger Courts were similar in the superficial sense that both recognized functions for the criminal process "apart from promoting reliable guilt determinations"). Professor Grano is appropriately careful to acknowledge Professor Damaska's

Let us be clear about at least one thing. The Bill of Rights occupies a vital position in the ideological foundations of American government. It is scarcely accidental that most provisions found in the first eight amendments mandate procedural safeguards for criminal cases. The criminal law is the primary means by which government exercises coercive power with respect to individuals, and, accordingly, it is in criminal prosecutions that citizens require protection—if they are to have it at all. Criminal cases in which courts hammer out procedural rights are political events—recognizing, defining, and perpetuating the perilous line that marks off liberty from governmental power. It would be hyperbole to portray the conviction or acquittal of criminal defendants as subordinate to the elaboration of procedural rights in criminal cases. Yet time and again, in case after case, as our courts enforce individual rights, so do they demonstrate our commitment to limited government. American citizens and foreign observers alike regard criminal cases as the crucible in which our rights are tested and look to the treatment of those charged with crime for genuine evidence of the measure of individual freedom on these shores.[28]

The OLP Report fails to recognize all this and thus offers an incomplete account of constitutional criminal procedure. The Report then rests its negative appraisal of federal habeas corpus on a flawed foundation—rejecting habeas corpus as a significant, or even a legitimate, vehicle for confirming individual freedom.[29] In a real sense, however, the federal courts' habeas authority to vindicate federal rights plays just this critical role in the American political order.[30]

---

point that any system of criminal justice must strike a balance between the search for truth and the service of other values. Grano, *supra* note 2, at 403 (citing Damaska, *Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study*, 121 U. PA. L. REV. 506, 576 (1973)).

28. *Cf.* Allen, *Central Problems of American Criminal Justice*, 75 MICH. L. REV. 813, 814-15 (1977) (brilliantly articulating the threat that criminal law enforcement poses to individual liberty).

29. *See* REPORT NO. 7, HABEAS CORPUS, *supra* note 1, at 903.

30. Whether the judicial elaboration of liberty values is wholly successful as a means by which we pursue societal goals is debatable. Professor Seidman faults the Warren Court for unrealistic ambitions in this respect. *See* Seidman, *Factual Guilt and the Burger Court: An Examination of Continuity and Change in Criminal Procedure*, 80 COLUM. L. REV. 436 (1980). I admit to higher hopes, but the critical point is the general agreement among observers that the courts *do* contribute mightily to the establishment and maintenance of liberty—however short their efforts may fall.

II. HABEAS HISTORY

In a section devoted to the history of habeas corpus in the federal courts, the OLP Report resists both the notion that postconviction habeas corpus for state prisoners is constitutionally grounded and the view that Congress meant to create such a jurisdiction by statute.[31] According to the Report, the habeas jurisdiction we know today is wholly the creature of judicial decisions regarding both the scope of the writ and the content of the federal constitutional rights the writ may be engaged to vindicate.[32] These arguments are unexceptional, although they are hardly so commanding as the OLP apparently believes them to be. The practical trouble with them is that they are so obviously beside the point—a matter to which I will return in a moment.

The Report's attack on the idea that postconviction habeas corpus has constitutional foundation in the suspension clause[33] tramps familiar ground. The Report argues that the writ that is constitutionally protected from suspension[34] differs from the modern federal writ in that it addresses custody in the hands of federal, not state, officials and that it speaks to executive detention prior to or without trial—not to custody under the authority of a judicial judgment.[35] Curiously, the Report passes quickly over a conventional (and equally availing) interpretation of the suspension clause—namely that the clause was meant to prevent the new national legislature from following the practice of Parliament, which had routinely suspended the writ in England in order to banish disfavored dissenters to the tower without judicial remedy.[36] Nor does the Report make much of the familiar

---

31. REPORT NO. 7, HABEAS CORPUS, *supra* note 1, at 916-24.

32. *Id.* at 932-37.

33. *Id.* at 918 n.8.

34. "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." U.S. CONST. art. I, § 9, cl. 2.

35. REPORT NO. 7, HABEAS CORPUS, *supra* note 1, at 916.

36. *See* R. HURD, A TREATISE ON THE RIGHT OF PERSONAL LIBERTY AND ON THE WRIT OF HABEAS CORPUS AND THE PRACTICE CONNECTED WITH IT: WITH A VIEW OF THE LAW OF EXTRADITION OF FUGITIVES 122-27 (1858); W. CHURCH, A TREATISE ON THE WRIT OF HABEAS CORPUS 40-42 (2d ed. 1893); Oaks, *Habeas Corpus in the States—1776-1865,* 32 U. CHI. L. REV. 243, 248 (1965). The Report notes that the suspension clause appears in the Constitution among limitations on congressional power and seems vaguely to recognize the argument in the text. Yet the analogy to

argument that the suspension clause contemplates only a writ issued by the state courts and does not itself establish a habeas jurisdiction for the lower federal courts.[37] At the least, the Report does not press these arguments clearly and convincingly.

More disturbing than the Report's failure to advance its own cause as well as it might is its failure to acknowledge arguments on the other side. There *is* a plausible case to be made for a constitutional writ. The suspension clause conceivably directs "all superior courts of record, state as well as federal, to make the habeas privilege routinely available."[38] And the Court has more than once suggested that the suspension clause guarantees access to federal habeas, even in its modern form.[39] There is counterevidence in the books, of course.[40] But if the OLP genuinely wishes to contribute to discussion of the constitutional question, its Report must take issue with interpretations of the suspension clause that would make that

---

Parliament's actions is never explicitly drawn, and the Report's discussion slides quickly to the point that, in 1789, only prisoners in federal custody enjoyed access to the writ. REPORT NO. 7, HABEAS CORPUS, *supra* note 1, at 919.

37. *See* P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1513-14 (2d ed. 1973) *cited in* REPORT NO. 7, HABEAS CORPUS, *supra* note 1, at 918 n.8 (adopting the conventional view that the Constitution does not require Congress to establish lower federal courts and recalling that the federal courts did not have jurisdiction to grant the writ of habeas corpus to state prisoners until 1867).

38. Paschal, *The Constitution and Habeas Corpus,* 1970 DUKE L.J. 605, 607.

39. *See* Sanders v. United States, 373 U.S. 1, 11-12 (1963) (warning that alterations in modern habeas practice that "derogate from the traditional liberality of the writ . . . might raise serious constitutional questions" under the suspension clause); Jones v. Cunningham, 371 U.S. 236, 238 (1963) (stating that "[t]he [federal] habeas corpus statute implements the constitutional command that the writ of habeas corpus be made available"); *cf.* United States v. MacCollom, 426 U.S. 317, 322-23 (1976) (mentioning but avoiding a suspension clause claim); Scaggs v. Larsen, 396 U.S. 1206 (1969) (Douglas, J.) (relying in part on the suspension clause to order the release of a military reservist); Locks v. Commanding General, 89 S. Ct. 31, 32 (Douglas, Circuit Justice 1968) (noting that the suspension clause may empower individual Justices of the Supreme Court to issue the writ but that the question "has never been decided"); *cf.* United States v. Hayman, 342 U.S. 205 (1952) (discussing whether federal habeas corpus statutes properly implement the suspension clause); Johnson v. Eisentrager, 339 U.S. 763, 798 (1950) (Black, J., dissenting) (arguing that habeas corpus is "written into the Constitution" and that its availability "cannot . . . be constitutionally abridged by Executive or by Congress").

40. *See, e.g.,* Kuhlmann v. Wilson, 477 U.S. 436, 445 n.7 (1986) (noting that the modern postconviction writ and the writ with which the suspension clause is concerned may not be the same); Swain v. Pressley, 430 U.S. 372, 384 (1977) (Burger, C.J., concurring) (contending that the suspension clause constitutionalizes the writ only as it existed when the Constitution was adopted); Bounds v. Smith, 430 U.S. 817, 835 (Burger, C.J., dissenting) (same); *id.* at 840 (Rehnquist, J., dissenting).

clause an important factor in contemporary thinking about habeas corpus.[41]

The same must be said with respect to the Report's treatment of the Habeas Corpus Act of 1867 ("the 1867 Act").[42] Briefly stated, the Report argues that the 1867 Act's sole purpose was to provide a federal judicial remedy for emancipated Blacks in the South, who were still being held in overt slavery or under oppressive apprenticeships and servitudes substituted for slavery in the wake of the thirteenth amendment.[43] It was people of that kind, "restrained of [their] liberty" in continued slavery or peonage, who required federal judicial orders for their release.[44] The only citation for this proposition is an article by Lewis Mayers, whose work on the legislative records of the period persuaded him that Congress meant the 1867 Act as an enforcement device for the thirteenth amendment rather than as an authority in the federal courts to entertain petitions from prisoners in jail—either before or after conviction in state court.[45] Mayers' paper was published in 1965 as a response to the decision in *Fay v. Noia*,[46] in which the Supreme Court interpreted the 1867 Act to establish a statutory grant of jurisdiction to determine federal claims by prisoners in state custody.[47] Inasmuch as *Noia* is a prime target for the OLP's complaints regarding federal habeas corpus,[48] it is not surprising that Mayers' contemporaneous criticism of that decision should find its way

---

41. Certainly, it is inadequate to charge critics with "equivocation"—defined by the Report as "drawing specious inferences by using a term with a particular meaning at one point in an argument and using the same term with another meaning at a different point in the argument." REPORT NO. 7, HABEAS CORPUS, *supra* note 1, at 955 n.133. In this context, critics of the OLP's position are said to contend that modern postconviction habeas (meaning #1) cannot be restricted because the writ protected by the suspension clause (meaning #2) cannot be withdrawn. Yet it is scarcely settled that the familiar brand of postconviction habeas corpus today is qualitatively different from the writ safeguarded by the Constitution from suspension. That is the matter in issue.

42. Habeas Corpus Act of 1867, ch. 28, 14 Stat. 385.

43. REPORT NO. 7, HABEAS CORPUS, *supra* note 1, at 921-24.

44. *Id.* at 922; *see, e.g., In re* Turner, 24 F. Cas. 337 (C.C.D. Md. 1867) (No. 14, 247) (involving a former slave seeking relief from "restraint and detention" under an apprenticeship to her former master—executed by her mother only two days after the petitioner had been emancipated).

45. *See* REPORT NO. 7, HABEAS CORPUS, *supra* note 1, at 921 n.13 (citing Mayers, *The Habeas Corpus Act of 1867: The Supreme Court as Legal Historian,* 33 U. CHI. L. REV. 31 (1965)).

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

47. *Id.* at 415; Mayers, *supra* note 45, at 31.

48. *See* REPORT NO. 7, HABEAS CORPUS, *supra* note 1, at 952.

into the Justice Department's files and should figure prominently in the OLP Report.

Although Mayers deals Justice Brennan's opinion in *Noia* some solid blows, his divergent account of the 1867 Act is hardly telling. His paper suffers from the same liabilities that beset any intentionalist inquiry. At the most fundamental level, Mayers assumes that the meaning to be assigned to the 1867 Act is controlled by the intentions of those responsible for it.[49] In the poststructuralist world, this unexamined acknowledgement of authorial sovereignty over written text is disquieting, to say the least. Going on, and even laying aside the insights of modern literary theory, it is startling that Mayers seems not to recognize the significance of choosing the actors whose intentions should count in the interpretive exercise. He selects as his target the drafter of the bill in the House, presumed *but not known* to have been Representative William Lawrence of Ohio.[50] Digging ever deeper into the mire, Mayers seeks not the drafter's general purpose for the bill, but his subjective attitude—what was "present in his mind" at the time.[51] Mayers can't know that. Even if he could and did, he would have nothing. For if any historical intention is probative, it surely must be the collective intention of the majorities in the House and the Senate, whose votes made the 1867 Act the law of the land. It is foolish to think that there was any such group intention (for this or any other measure passed by Congress) and equally foolish to think that an historian could lay hands on it if it existed.

Mayers contends that the bill originated in the House in response to an earlier resolution calling for legislation to effectuate the thirteenth amendment.[52] Yet he concedes that

---

49. Mayers, *supra* note 45, at 36.

50. *See* Mayers, *supra* note 45, at 35-36; *see also* REPORT NO. 7, HABEAS CORPUS, *supra* note 1, at 922. Often, Professor Mayers refers to "intent" without specifying the person or persons of whom he is speaking. But I count at least six explicit statements in the paper indicating that Mayers' focus is on the drafter of the bill. On one occasion, he refers as well to what the "proponents" of the bill "had in mind," Mayers, *supra* note 45, at 54, but it is unclear whether he means the small group of individual members who were apparently pushing the measure along or the majorities that voted for it in the end. Once, Mayers mentions "congressional intent." *Id.* at 42.

51. *See* Mayers, *supra* note 45, at 38.

52. Mayers cites a House resolution, dated December 19, 1865, which directed the Committee on the Judiciary to propose legislation "to enforce the liberty of all persons under the operation of the constitutional amendment abolishing slavery." Mayers, *supra* note 45, at 34 (quoting CONG. GLOBE, 39th Cong., 1st Sess. 87 (1865)). He

when the bill was offered, first in the House and then in the Senate, the managers described it quite differently. Representative Lawrence referred to the prior resolution, but he went on to say that the bill would enable the federal courts to "enforce the liberty of all persons" and that it would extend to the federal courts a habeas corpus jurisdiction "coextensive with all the powers that can be conferred upon them."[53] Lawrence also characterized the bill as "of the largest liberty," a label fairly suggesting an expansive jurisdiction.[54]

---

notes that a bill prescribing habeas corpus relief for persons " 'held in slavery or involuntary servitude *otherwise than for crime whereof they are convicted*' " was introduced in the committee a few weeks later. *Id.* (quoting a handwritten document in the National Archives) (emphasis added by this author). That bill failed to clear committee, but later a "new measure" was prepared and reported out in conjunction with what Mayers thinks was an "unrelated measure" regarding the Supreme Court's jurisdiction to review state court judgments on writ of error—the enactment that spawned the controversy in Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590 (1875). According to Mayers, this second habeas corpus bill (lightly amended) became the Habeas Corpus Act of 1867. Mayers, *supra* note 45, at 34-35. Because Representative Lawrence mentioned the December 19 resolution in his presentation of the bill to the House, Mayers infers that Lawrence intended it to reach only persons suffering some form of servitude left over from chattel slavery. *Id.* at 36-37 (quoting CONG. GLOBE, 39th Cong., 1st Sess. 4151 (1866)).

53. Mayers, *supra* note 45, at 36-37 (quoting CONG. GLOBE, 39th Cong., 1st Sess. 4151 (1866)). Mayers insists that when Lawrence referred to the liberty of "all persons" rather than "persons under the operation of the constitutional amendment abolishing slavery," which had been the language of the December 19 resolution, *see supra* note 52, he merely neglected an intended qualification in the "stress of debate." Mayers, *supra* note 45, at 36 n.28. Mayers notes that Lawrence later told the House that a district judge in Kentucky had held that the federal courts lacked jurisdiction to enforce the rights of "such" persons, and takes that as an indication that Lawrence had a particular category of "persons" in mind—recently freed slaves. *Id.* at 36-37. The point is fair. A speaker who means genuinely to refer to "all" people may be unlikely in the next breath seemingly to reduce the field to "such" persons. Yet in the "stress of debate" a speaker may get a lot of things muddled, and it is anything but clear that Lawrence misspoke when he referred to "all persons" rather than when he injected "such" persons into his speech. Mayers' interpretation may be accurate, but it is also convenient for his argument. The speech was ambiguous. What counts, or would seem to count, is the interpretation that the majority that voted for the bill placed upon it—if, indeed, even that is probative of the meaning to be given a Reconstruction era statute today.

54. CONG. GLOBE, 39th Cong., 1st. Sess. 4151 (1866). Justice Brennan quotes the "largest liberty" line in Fay v. Noia, 372 U.S. 391, 417 (1963). Mayers objects that the quotation is out of context. The rest of the sentence concerns persons in military custody, and Mayers insists that severing the tie to military prisoners obscures the speaker's meaning. Mayers, *supra* note 45, at 38. Section 2 of the bill specifically exempted military prisoners from its scope, Habeas Corpus Act of 1867, ch. 28, 14 Stat. 385., for the reason (according to Mayers) that some military prisoners in 1866 were not entitled to habeas corpus pursuant to the Judiciary Act of 1789 because of the wartime suspension of the writ, and because the drafter had no intention of revoking that suspension by the enactment of this bill. Mayers, *supra* note 45, at 38. When, however, the suspension was lifted in due course, military prisoners would

In the Senate, Senator Lyman Trumbull described the bill precisely in the manner in which it has been interpreted by the modern Court: as the relaxation of the chief limitation on federal habeas corpus fixed by the Judiciary Act of 1789—the restriction of the writ to prisoners held in federal custody.[55] Upon enactment, Trumbull told the Senate, the measure would empower the federal courts to entertain petitions from prisoners in state custody as well, provided they complained of detention in violation of federal law.[56] Both houses ultimately adopted the bill without illuminating debate. In these circumstances, one might conclude that if any intention is to be identified and given significance in the interpretation of the 1867 Act, it is the intention the majorities in the two bodies might reasonably have taken from the face of the bill and from the representations made by Lawrence and Trumbull: that the bill would establish a federal habeas corpus jurisdiction for

---

again have access to the writ—by dint of the 1789 Act. *Id.* In his speech on the floor, then, Lawrence meant to assure the House that the exemption for military prisoners in the bill under discussion would not restrict the availability of the writ to military prisoners once the suspension now affecting them was ended. *Id.* Once again, Mayers' explanation for Lawrence's language is plausible, but one has to ask whether it overwhelms alternative accounts.

55. Mayers, *supra* note 45, at 38-39 (quoting CONG. GLOBE, 39th Cong., 1st Sess. 4229 (1866)); *see also* REPORT NO. 7, HABEAS CORPUS, *supra* note 1, at 922-24; Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 81.

56. Mayers, *supra* note 45, at 38-39 (quoting CONG. GLOBE, 39th Cong., 1st Sess. 4229 (1866)). Mayers protests that Trumbull was simply "ignoran[t] of the purpose of the House bill." *Id.* at 39. Trumbull knew nothing about the bill prior to presenting it on the floor and, in fact, only advanced the bill as a favor to an unnamed member of the House who had asked him to handle the matter, and who apparently had assured him it was noncontroversial. In Mayers' telling, Trumbull "[p]resumably" drew the objective of the bill from its language and offered that understanding to the Senate. *Id.* To Mayers, the episode demonstrates that the intention behind the bill was *not* what Trumbull told the Senate it was. Yet it seems the better inference is just the opposite. However confused Trumbull may have been regarding the understanding of the bill by its drafter or, for that matter, by the House of Representatives, his explanation to the Senate is far more important. If this is the way he himself understood the bill (from its language, not its history), and the way he presented the bill, and if the bill was enacted with little or no further discussion (another point Mayers thinks supports *his* point of view), then one may fairly infer that at least some members voting "aye" may have meant to embrace Trumbull's account. And isn't the intention of the majority of the Senate—the body that (with the House) made the bill law—the critical matter (within the intentionalist framework)? In this vein, I am not sure I see the point of Mayers' note that Senator Trumbull *later* voiced an explanation for the habeas corpus bill more in keeping with the intention Mayers ascribes to the drafter in the House. *Id.* at 39 & n.39 (quoting CONG. GLOBE, 40th Cong., 2d Sess. 2096 (1868)). Of far greater value are Mayers' notes that two senators made brief remarks indicating that they might well have thought the bill applied to prisoners in general. *Id.* at 40 & n.40.

state prisoners complaining of custody in violation of federal law.[57]

Mayers fares better when he shifts away from the supposed subjective intentions of the drafter and probes contextual implications. He contends, for example, that the "negligent draftsmanship" of the bill, the "indifference" shown to it by the Senate, and the absence of serious debate before passage suggest that Congress did not understand that it was creating a new and sweeping federal jurisdiction to inquire into the validity of state prisoners' detention.[58] The bar demonstrated no such understanding at the time;[59] no one appears expressly to have associated the 1867 Act with contemporaneous Reconstruction legislation or, indeed, with the fourteenth amendment itself;[60] and most importantly, a plenary jurisdiction to adjudicate federal claims by state prisoners would have been largely fruitless in a time when the content of due process was minimal and incorporation theory was questionable.[61] Inferences from silence offer a plausible, and more objective, basis for the proposition that the 1867 Act was generally thought, at the time of enactment, to be a narrowly focused measure in aid of emancipation.

Still, even persuasive evidence of historical intent is helpful in resolving legal issues only if one initially accepts the notion that positive law can and should be interpreted according to what can be gleaned from incomplete historical documents that themselves must be interpreted. The search for legislative purpose is vexing enough with respect to recently enacted statutes. Mayers' exercise demonstrates the practical impossibility of intentionalism as an interpretive strategy for materials from the Reconstruction period. Historical inquiries of this kind are creative, not descriptive. Meaning cannot be drawn from the 1867 Act; rather, meaning must be assigned to that Act—meaning forged not only from the language of the statute and its murky historical record, but from reasoned judgment about concrete legal problems that face the nation today. Even if we could do the impossible and identify with confidence what the Congress intended for habeas corpus jurisdic-

57. Mayers contends that the bill's failure expressly to refer to "prisoners" refutes this conclusion. Mayers, *supra* note 45, at 40-41 & n.41.

58. *Id.* at 40-41 & n.40.

59. *Id.* at 42-43.

60. *Id.* at 48-53.

61. *Id.* at 54-55.

tion in 1867, we would scarcely let that discovery dominate current decisions about the appropriate sphere of the federal courts.

Of course, we don't, and we haven't. The OLP Report grudgingly recounts a long line of Supreme Court precedents, culminating in the acknowledgement of postconviction habeas corpus as a routine mechanism for the federal adjudication of federal claims.[62] Notwithstanding the bits and pieces of historical evidence on which Mayers relies, as early as 1886 the Court held that the federal courts in 1867 were granted jurisdiction in "language as broad as could well be employed."[63] On a case-by-case basis over the years since, the Court has groomed the writ for its modern role.[64] Today, and for good reason, the 1867 Act is understood as an amendment to the habeas corpus provisions of the Judiciary Act of 1789 ("the 1789 Act")—extending the federal courts' habeas jurisdiction to prisoners in state custody, either before or after conviction.[65]

The OLP Report laments all this, pausing in particular to fault the decision in *Brown v. Allen*,[66] which confirmed state prisoners' access to the federal courts to attack state criminal judgments collaterally. Importantly, *Brown* was decided in 1953, and the scoundrel of the piece (by the OLP's own account) was not Earl Warren or even Justice Brennan, but Felix Frankfurter. For my part, Justice Frankfurter's concurring opinion in *Brown* was his grandest hour. In any case, the fundamental proposition in *Brown* is now well settled.[67]

---

62. REPORT NO. 7, HABEAS CORPUS, *supra* note 1, at 924-37.

63. *Ex parte* Royall, 117 U.S. 241, 247 (1886).

64. The Report's principal source is Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners,* 76 HARV. L. REV. 441 (1963), which offers a reading of the cases repudiated by the Court's decision in *Fay v. Noia*, handed down in the same year. REPORT NO. 7, HABEAS CORPUS, *supra* note 1, at 924 n.25. The Report does not refer to well-known academic criticisms of Bator's work. *E.g.,* Peller, *In Defense of Federal Habeas Corpus Relitigation,* 16 HARV. C.R.-C.L. L. REV. 579 (1982). Again, good scholarship demands attention to competing points of view. *E.g.*, Friedman, *A Tale of Two Habeas,* 73 MINN. L. REV. 247, 264-73 (1988) (offering a revisionist appraisal of Brown v. Allen 344 U.S. 443 (1953), but not before addressing other positions recorded in the literature).

65. *See, e.g.,* Lehman v. Lycoming County Children's Serv., 458 U.S. 502, 509 n.9 (1982) (stating that "[j]urisdiction to challenge both state and federal judgments is conferred by § 2241"—the basic jurisdictional statute derived from the 1789 Act).

66. 344 U.S. 443 (1953).

67. For all the rhetoric in Stone v. Powell, 428 U.S. 465 (1976), the Court insisted in that case that its decision largely to abandon the enforcement of the fourth amendment exclusionary rule in habeas corpus was not to be taken as a limitation on the

Even if the force of consistent precedent is insufficient, there is the undeniable point that the legislative branch has (at least) acquiesced in a general postconviction habeas jurisdiction. Not only has Congress repeatedly rejected proposals to overrule *Brown*,[68] it has also adopted legislation that plainly accepts the very role for postconviction habeas contemplated in the cases. Mayers himself recognizes that the 1948 revision of the Judicial Code,[69] which included what is now 28 U.S.C. § 2254, seems clearly to have ratified the Court's understand-

---

federal courts' jurisdiction to determine exclusionary rule claims. *Id.* at 494-95 & n.37. In most cases, the practical result of *Stone* may approach the result that would follow from restricting jurisdiction. *See* O'Berry v. Wainwright, 546 F.2d 1204, 1211-12 (5th Cir. 1977). Yet the availability of habeas review within the narrow exception allowed by the *Stone* opinion cannot be overlooked. *See, e.g.,* Bailey v. Duckworth, 699 F.2d 424 (7th Cir. 1983) (concluding that an exclusionary rule claim could be heard in federal court because the state courts had not accorded the petitioner an opportunity for full and fair adjudication of that claim); Halpern, *Federal Habeas Corpus and the* Mapp *Exclusionary Rule After* Stone v. Powell, 82 COLUM. L. REV. 1 (1982) (discussing the exception allowed by *Stone*). Even the current Court's extraordinarily rigid rules for cutting off claims for procedural default in state court begin with the assumption that *Brown* is good law. *E.g.,* Wainwright v. Sykes, 433 U.S. 72, 87 (1977) (stating that the "rule of *Brown v. Allen* is in no way changed by our holding today"); *see also, e.g.,* Smith v. Murray, 477 U.S. 527, 533 (1986) (reaffirming that the "federal courts at all times retain the power to look beyond state procedural forfeitures").

I wrote the first draft of this commentary just after Teague v. Lane, 489 U.S. 288 (1989), in which, speaking for a plurality, Justice O'Connor warned federal habeas corpus petitioners that they would henceforth be entitled to press for or rely upon a "new rule" of constitutional law only in narrow circumstances. *Id.* at 310. While I was preparing a second draft, Justice O'Connor invoked the *Teague* approach to the "retroactivity" problem in Penry v. Lynaugh, 109 S. Ct. 2934 (1989)—this time for a majority and in a capital case. While the editors were examining my second draft, the Court handed down two more decisions elaborating on *Teague:* Butler v. McKellar, 110 S. Ct. 1212 (1990), and Saffle v. Parks, 110 S. Ct. 1257 (1990). Read literally, *Butler* defines a "new rule" as a legal proposition, the correctness of which was open to argument among reasonable minds at the time the habeas petitioner's sentence became final. *Butler*, 110 S. Ct. at 1216. This is not the place to explicate *Teague* and its progeny or, certainly, to explore the implications of the notion that constitutional law can sensibly be understood as a series of lurching leaps from unquestionable propositions to "new rules." This essay is meant to be a retrospective examination of what I consider to be the OLP's misguided ideas about federal habeas corpus. I should not wish now to transform it into a speculative look into the future. I leave for another day an attempt to situate *Teague* in an intelligible account of the federal habeas jurisdiction. Let me only say that any move to unseat *Brown*, in effect, by means of a new approach to "retroactivity" would be bizarre.

68. The Report recalls these failed attempts in order. REPORT NO. 7, HABEAS CORPUS, *supra* note 1, at 942-45 (citing, *e.g.*, H.R. 5649, 84th Cong., 1st Sess. (1955); S. 2216, 97th Cong., 2d Sess. (1982)).

69. Act of June 25, 1948, Ch. 646, 62 Stat. 967 (codified as amended as United States Code, Title 28).

ing of the 1867 Act.[70] That legislation was before the Court in *Brown*, of course, and even more recent enactments, particularly the establishment of the federal rules for habeas practice in 1977,[71] close the books on the question whether current law makes the federal forum available to state prisoners.

At the end of the day, the OLP gets nowhere in its attempt to portray modern habeas corpus as a colossal mistake, the product of bad history and worse, judicial manipulation. The framework now in place is the framework we have knowingly established for ourselves through both legislative and judicial means. If the OLP hopes to move American society in a new direction, this Report on habeas corpus must press on to straightforward arguments from policy. The Report does shift to policy analysis, but stumbles clumsily in that unfamiliar territory.[72]

---

70. Mayers, *supra* note 45, at 32 & n.7.

71. Rules on Habeas Corpus, Pub. L. 94-426, 90 Stat. 1334 (1976) (codified as amended at 28 U.S.C. § 2254, Rules 1-11 (1988)).

72. As I reflect on the Justice Department's enthusiastic embrace of Mayers' account of the 1867 Act and Professor Bator's critique of relevant Supreme Court precedents, I am torn between two ostensible explanations. The one is obvious enough. Despite the introduction by Mr. Meese, perhaps the Report is not meant to be a contribution to serious debate, but a brief in support of a chosen result—the abolition of postconviction habeas corpus in the federal courts. That would account not only for the selection of authorities on which the Report relies, but for the bad scholarship the Report exhibits. Contra Mr. Meese, Professor Grano understands that this and other Reports were prepared primarily to guide the Attorney General and *not* to enlighten the public. Grano thus acknowledges the brief-like advocacy in some Reports, although he insists that "the Reports generally present a careful and complete legal analysis. . . ." Grano, *supra* note 2, at 411 n.76. As my text makes clear, I think the habeas corpus Report misses that mark. Indeed, it is sloppy work like this, embraced too quickly by respected academics like Grano, that gives "conservative" treatments of constitutional law a bad name. *Cf. id.* at 398 n.12 (complaining that many academics in the field employ "inflated rhetoric" in criticizing Chief Justice Rehnquist's opinions).

The other explanation is even less charitable. The Report's infatuation with Mayers' historical study may reflect a belief, not to say a faith, that law (or at least the best kind of law) is the product of some event or events long ago and now must simply be discovered as a matter of fact and accepted without further argument. Overstated, the notion is that law is or ought to be comparatively objective, not subject to current seasoning to taste. This is the spirit of originalism in constitutional analysis, with which the Office of Legal Policy under Mr. Meese was apparently much taken. *See, e.g.*, OFFICE OF LEGAL POLICY, U.S. DEP'T OF JUSTICE, GUIDELINES ON CONSTITUTIONAL LITIGATION (1988). A similar yearning for objectivity may color the Report's insistence that criminal justice is primarily concerned with the discovery of historical "truth." Suffice it to say that the pursuit of objectivity in this sense is a fool's errand. The responsibility for law of any kind is ours, ours in the here and now. We make and remake our law on a daily basis and cannot ascribe

III. THE PRACTICAL SIDE OF FEDERAL HABEAS

The OLP Report treats several practical problems said to attend habeas corpus litigation within the current scheme.[73] I will focus on three administrative charges the Report puts forward. The Report states, first, that habeas corpus petitions from state prisoners overload federal dockets;[74] second, that prisoners fail to pursue federal relief as soon as they are able;[75] and, third, that claims in federal habeas proceedings are so rarely meritorious that the maintenance of the federal courts' jurisdiction to entertain petitions from state prisoners fails a rudimentary cost-benefit analysis.[76] None of these charges is sustained by the evidence.

The first argument, that the federal habeas corpus jurisdiction opens the floodgates to waves of petitions that engulf the federal courts, is flawed in several respects. To begin, the statement of the argument reflects an anterior judgment about the relative value of habeas litigation. We may take as given that *some* body of cases will consume the federal courts' scarce resources. Any concern that a particular category of cases is heavily represented must depend upon a judgment that cases

---

responsibility to wiser heads who thought great thoughts a century or more ago. This is not to say that law cannot be objective in any sense, but only to insist that objectivity must flow from reasoned, current analysis of concrete problems and the values and policies at stake in those problems.

73. The Report also takes up a range of policy considerations. Needless to say, I am satisfied, contra the Report, that the values protected by federal habeas corpus more than justify its existence. Taking the considerations identified by the Report in turn, I am persuaded, as the OLP is not, that we *should* approach the modern postconviction writ with the reverence associated with habeas at common law; that the accumulated import of habeas law to date *does* indicate that litigants with federal claims are entitled to at least one fair opportunity to litigate those claims in a federal forum; that the federal courts often *do* provide a more sympathetic forum for federal claims; that the federal district and circuit courts *do* and *should* serve as surrogates for the Supreme Court; that federal articulation of federal rights *is* of great value; that federal habeas corpus *is* needed to correct injustices visited upon prisoners in state court; that prisoners *do* profit psychologically from the availability of the federal courts for the treatment of their claims; that the institutional position of the federal courts *does* permit them to adjudicate federal claims independently; and that federal habeas corpus *does* generate a valuable dialogue between the federal and state courts. *See* L. YACKLE, POSTCONVICTION REMEDIES, 71-150 (1981) (collecting illustrations). *Contra* REPORT NO. 7, HABEAS CORPUS, *supra* note 1, at 953-66.

74. REPORT NO. 7, HABEAS CORPUS, *supra* note 1, at 945-49.

75. *Id.* at 949-51.

76. *Id.* at 948-49.

of that kind are less entitled to the time and effort they demand than are other cases competing for space on the docket. The floodgates argument is therefore circular and cannot answer the question before the house: whether habeas corpus petitions *should* command significant judicial attention.[77]

Moreover, the floodgates argument is wrong on the facts. Years ago, when the federal habeas jurisdiction flowered in the wake of *Brown v. Allen*,[78] there was perhaps some currency to Justice Jackson's fear that habeas petitioners would "inundate" the lower federal courts and "swell" the Supreme Court's own case load.[79] Even at that time, however, the portion of federal civil dockets given over to habeas actions by state prisoners was very small; Judith Resnik recalls that *all* prisoner filings averaged 2% of the federal docket over the fifteen-year period, 1944-59.[80] To be sure, there was reason to think that the habeas filing rate might increase and, in fact, it did increase for a time. The OLP Report notes the raw numbers of cases from the late 1970s (when the Warren Court's decisions still set the tone) down to the mid-to-late 1980s (by which time the current Court's decisions were presumably having some effect). Habeas filings rose from 7,033 in 1978 to 9,542 in 1987—an increase of 2,509, or 36%, over the decade.[81] Yet the raw numbers tell very little of the story. In the same period, 1978-87, the number of potential habeas petitioners increased from a minimum of 267,155[82] to 517,733[83]—an increase of 250,578, or 94%. Thus the rate of

---

77. *Cf.* Resnik, *Tiers*, 57 S. CAL. L. REV. 837, 951-56 (1984) (treating as normative the question whether habeas petitions should consume scarce federal resources).

78. 344 U.S. 443 (1953).

79. The OLP recalls Jackson's notation that 541 petitions had been filed in the year preceding *Brown*. REPORT NO. 7, HABEAS CORPUS, *supra* note 1, at 945 (citing Brown v. Allen, 344 U.S. at 536 n.8 (Jackson, J., concurring in result)).

80. Resnik, *supra* note 77, at 940 (relying on data in ANNUAL REPORTS OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, in REPORTS OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES (1945-60)).

81. REPORT NO. 7, HABEAS CORPUS, *supra* note 1, at 947.

82. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PRISONERS IN STATE AND FEDERAL INSTITUTIONS ON DECEMBER 31, 1978, at 12, Table 1 (1980). This figure and the next figure for the state prisoner population in 1987 include all prisoners sentenced to more than one year of incarceration under the jurisdiction of state correctional authorities.

83. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, NATIONAL DATA BOOK AND GUIDE TO SOURCES, STATISTICAL ABSTRACT OF THE UNITED STATES 183 (table 318) (109th ed. 1989).

habeas corpus filings (the percentage of potential applicants who actually sought habeas relief) dramatically *declined* during the period in question—from 2.54% in 1978 to 1.84% in 1987.[84] The OLP Report leaves the impression of a current glut of habeas petitions that worsens by the year. That impression is misleading at best.

The contention that state prisoners frequently delay their applications for federal habeas corpus relief is equally unsound. Initially, the notion that prisoners sit on their rights is counterintuitive. Citizens suffering what they consider to be invalid incarceration can be expected to put their claims to the federal courts as quickly as they reasonably can. The sooner they litigate, the sooner they may win relief. The record now thought to be favorable may become cold. Documents may be lost; witnesses may become unavailable. Moreover, prisoners who believe themselves wronged have a psychological incentive to press their grievances promptly. The OLP Report insists, by contrast, that prisoners may deliberately postpone litigation until the record has grown stale and the state is prejudiced either in responding to constitutional claims or in reprosecuting after the federal courts grant relief.[85] This is an old tactic in the war on habeas corpus: depict petitioners as sophisticated strategists who abuse the judicial system's tolerance for illegitimate ends. The picture is wholly fictitious. Prison inmates are not the manipulators the OLP makes them out to be; typically they are undereducated young men[86] from the streets with neither the will nor the means to outwit the prosecutors and judges before whom they appear. If prisoners seem to delay beyond the earliest moment when they might file, it is undoubtedly because they lack professional counsel and thus are unable to identify claims, prepare them for litigation, and approach the courts as soon as would potential litigants not in custody.

---

84. These figures greatly underestimate the number of potential habeas corpus applicants. For not only prison inmates, but jail prisoners, as well as parolees and probationers, are eligible to seek federal habeas review. If I were to collect data regarding changes in the populations in these further categories, I dare say each would show significant increases—demonstrating the point in the text all the more forcefully. Moreover, both the number of federal district judges and the size of their nonhabeas dockets increased dramatically over the same period, such that more judges are now available to hear habeas corpus petitions. *See* Annual Report of the Director of the Administrative Office of the United States Courts 7 (table 3) (1987).

85. *See* REPORT NO. 7, HABEAS CORPUS, *supra* note 1, at 951.

86. *See* BUREAU OF THE CENSUS, *supra* note 83, at 183 (table 319).

The OLP Report singles out death penalty cases for special attention in connection with delays in habeas corpus practice,[87] and in this the Report finds itself in prestigious company. At an American Bar Association meeting last year, Chief Justice Rehnquist said that the usual incentives for prompt litigation do not operate in capital cases: A prisoner on death row "does not need to prevail on the merits in order to accomplish his purpose; he wins temporary victories by postponing a final adjudication."[88] This account of the incentive structure in capital cases evidently prompted the Chief Justice to appoint an ad hoc committee on habeas corpus in capital cases, chaired by former Justice Powell, whose recommendations have caused such a flurry in the Congress.[89]

---

87. REPORT NO. 7, HABEAS CORPUS, *supra* note 1, at 950-51.

88. W. Rehnquist, Remarks at the American Bar Association Mid-Year Meeting (Feb. 6, 1989) (on file with the *University of Michigan Journal of Law Reform*). The Chief Justice has repeated this view more recently, distinguishing cleanly between noncapital and capital cases:

> [S]omeone who is convicted and sentenced to prison for a term of years in state court, and wishes to challenge that conviction and sentence in a federal habeas proceeding, has every incentive to move promptly to make that challenge. . . . This is true even though there is no statute of limitations for bringing the federal habeas proceeding.
>
> But the incentives are quite the other way with a capital defendant. All federal review of his sentence must obviously take place *before* the sentence is carried out; consequently, the capital defendant frequently finds it in his interest to do nothing until a death warrant is actually issued by the state.

W. Rehnquist, Remarks of the Chief Justice at the American Law Institute Annual Meeting 4-5 (May 15, 1990) (on file with the *University of Michigan Journal of Law Reform); accord Hearings on H.R. 4737, supra* note 2 (statement of former Justice Lewis F. Powell Jr.).

89. AD HOC COMMITTEE ON FEDERAL HABEAS CORPUS IN CAPITAL CASES, COMMITTEE REPORT (1989), *reprinted in* 135 Cong. Rec. S13,481 (daily ed. Oct., 16, 1989). The Chief Justice appointed the committee in June, 1988. Thereafter, the 100th Congress wrote a reference to the committee into the Anti-Drug Abuse Act of 1988, enacted late in the 1988 session. Pub. L. No. 100-690, 102 Stat. 4181, 4467. The Act instructed the chairman of the Senate Committee on the Judiciary, Senator Biden, to introduce a habeas corpus reform bill within 15 legislative days following receipt of the committee report from the Chief Justice. *Id.* The committee worked on its project for just over a year, then submitted a report to the Judicial Conference of the United States in September 1989. The Conference tabled the matter until its next meeting. *See* Letter from Chief Justice William H. Rehnquist to Hon. Joseph R. Biden, Jr., Chairman, Senate Judiciary Committee (Sept. 22, 1989), *reprinted in* 135 CONG. REC. S13,481 (daily ed. Oct. 16, 1989). The Chief Justice nevertheless sent the preliminary report to Senator Biden immediately, explaining that he interpreted the Anti-Drug Abuse Act to contemplate submission of the report—with or without action by the Judicial Conference. W. Rehnquist, Statement of the Chief Justice (Oct. 5, 1989) (on file with the *University of Michigan Journal of Law Reform*). Fourteen members of the Conference joined in a letter to L. Ralph Mecham, Secretary to the Judicial Conference, asking Mr. Mecham to approach the chairs of the judiciary committees

The same sentiment appears to be behind similar proposals for change offered by the ABA's Criminal Justice Section.[90] Accordingly, it may be appropriate to spend a moment on death penalty cases.

The notion that capital petitioners are content to languish on death row, to engage in dilatory tactics, and generally to abuse avenues for frivolous litigation in order to postpone the inevitable is not supported by any reliable data.[91] Death sentences scarcely eliminate the incentive structure facing prisoners. Men and women under sentence of death may feel psychological pressures to press their grievances most acutely.

---

in the Senate and the House to request that no action be taken on the committee report until the judges could be heard in hearings. *See* Letter to the Honorable L. Ralph Mecham, Secretary, Judicial Conference of the United States, regarding the Report of the Ad Hoc Committee on Habeas Corpus in Capital Cases (Oct. 4, 1989) (on file with the *University of Michigan Journal of Law Reform*); *see also* Greenhouse, *Judges Challenge Rehnquist Action on Death Penalty,* N.Y. Times, Oct. 6, 1989, at A1, col. 3. Senator Biden asked Chief Justice Rehnquist whether, in these circumstances, the Chief Justice meant by early submission of the report to invoke the 15-day time limit specified in the Act. The Chief Justice declined to change his position. *See* Greenhouse, *Rehnquist Renews Request to Senate,* N.Y. Times, Oct. 13, 1989, at A21, col. 1. Senator Biden then found himself obliged to review the committee report quickly and to present a bill. On October 16, 1989, Senator Biden introduced a habeas corpus reform bill patterned after, but differing from, the Powell committee report. S. 1757, 101st Cong., 1st Sess., 135 CONG. REC. S13,474 (daily ed. Oct. 16, 1989). Later the same day, Senator Thurmond introduced a bill tracking the Powell committee report precisely. S. 1760, 101st Cong., 1st Sess., 135 CONG. REC. S13,480 (daily ed. Oct. 16, 1989). At a meeting on March 14, 1990, the Judicial Conference approved some aspects of the Powell committee's plan, but rejected two key elements. Where the committee would give death penalty states the option of appointing counsel for petitioners in state collateral proceedings and would leave it to the states to establish performance standards for the lawyers appointed, the full Conference recommends that all death penalty states should be required to provide counsel to indigents at all stages of state court proceedings and that the attorneys so appointed should be subject to "one mandatory national standard." Resolution of the Judicial Conference of the United States regarding the Powell Ad Hoc Committee on Habeas Corpus Involving Capital Cases 1-2 (March 14, 1990) (on file with the *University of Michigan Journal of Law Reform*). In addition, the Conference recommends that a successive petition from the same prisoner should be entertained if the claim rests on facts that, if proved, "would undermine the court's confidence" not only in the petitioner's factual guilt, but in the appropriateness of the death sentence. *Id.* at 3. At the meeting, other proposals to mitigate the harshness of the Powell committee plan were disapproved by narrow margins. In two instances, the Chief Justice himself cast negative votes to produce ties and thus to defeat amendments that would have made federal habeas more accessible to capital petitioners. *See* Greenhouse, *Vote is a Rebuff for Chief Justice,* N.Y. Times, March 15, 1990, at A16, col. 1.

90. AMERICAN BAR ASS'N, TOWARD A MORE JUST AND EFFECTIVE SYSTEM OF REVIEW IN STATE DEATH PENALTY CASES (1990).

91. *See Hearing on S. 238 Before the Senate Comm. on the Judiciary*, 99th Cong., 1st Sess. 106 (1985) (statement of Phylis Skloot Bamberger on behalf of the American Bar Association).

They can be expected to act immediately in order to vindicate themselves, in their own eyes and in the eyes of family and friends, and, of course, to relieve themselves of the prospect of execution. It is most unlikely that capital prisoners choose to remain on death row with the threat of death hanging over them rather than risk litigation that may conclude their claims unsuccessfully. The mental torment such a scenario contemplates would be staggering.

The only significant distinction between capital habeas cases and others is that death row petitioners are more likely to have counsel, albeit only in the eleventh hour.[92] The stakes being what they are, lawyers who enter death cases are warranted in taking the time necessary for careful legal work.[93] Habeas corpus litigation can be complicated in any instance; in death penalty cases, it is extraordinarily complex and time-consuming.[94] Initially, a lawyer newly appointed to represent a client on death row must clear her own schedule in order to devote maximum effort to the new case. This is often difficult. Good lawyers are by definition busy lawyers. They may need considerable time to dispose of other responsibilities for which they have a professional duty of zealous advocacy. The attorney must also locate, visit, and interview

---

92. The OLP Report cites former Attorney General Smith for the view that death row prisoners deliberately delay federal petitions until execution is imminent. REPORT NO. 7, HABEAS CORPUS, *supra* note 1, at 951; *accord* Bell v. Lynaugh, 858 F.2d 978, 985-86 (5th Cir. 1988) (Jones, J., concurring). The more likely explanation for feverish litigation on the eve of executions is that it is then, and often only then, that prisoners obtain counsel. Legal talent for prisoners sentenced to death is spread thin in the United States. *See Hearings on H.R. 4737, supra* note 2 (statement of former Justice Lewis F. Powell, Jr.) ("I agree with those who say that the fairness of capital litigation would be enhanced by the provision of better counsel at the early stages of capital litigation, especially at trial. . . . Our Committee tried to assess the situation realistically, and to give the States an incentive to provide counsel in one area where it is not required at all—at the postconviction stage.") Specialists typically channel their efforts through a sort of triage, which gives highest priority to clients in immediate danger. The federal government has only recently begun providing all indigent death row prisoners with counsel in *federal* habeas corpus proceedings. *See* Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181, 4393-94 (codified at 21 U.S.C. § 848(g)(4) (1988)).

93. In complex civil litigation (antitrust litigation, for example), teams of sophisticated attorneys spend a great deal of time preparing their cases before putting anything before a court. Death penalty litigation demands and deserves similar treatment. *Cf.* Mercer v. Armontrout, 864 F.2d 1429, 1433 (8th Cir. 1988) (estimating that on average a competent lawyer would have to devote a quarter of her annual billable hours to a single postconviction attack on a death sentence).

94. *See generally* Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U. L. REV. 299 (1983); Mello, *Facing Death Alone: The Post-Conviction Attorney Crisis on Death Row*, 37 AM. U.L. REV. 513 (1988).

the prisoner—spending the time and effort necessary both to win the client's confidence and to obtain information essential to the case. Many death row prisoners are poorly educated and inarticulate;[95] some are mentally retarded.[96] It is no small matter, then, to deal with the client both sympathetically and effectively. Visits to death row typically mean extensive travel, compliance with a host of prison rules and regulations, and other inefficiencies. Days and weeks may be spent simply arranging access to the prisoner.

Time is also required to obtain the record of the case. In some cases, an attorney appointed for the postconviction stages may be able to obtain the trial and appellate records in a few weeks. In a great many instances, however, the attorney needs much more time to obtain a full complement of materials, including transcripts of testimony and similarly lengthy documents. To fill in particulars, counsel must also contact police officers, prosecutors, and other attorneys who represented the prisoner in the past. In light of what counsel learns in these ways, he must investigate the factual history of the case—tracing down the full range of matters going both to constitutional claims touching the prisoner's criminal conviction and to the legitimacy of the death sentence.[97] Witnesses must be found, interviewed, and prepared for court appearances. In many cases, professional investigators must be employed and superintended.

Not only the factual record, but the relevant law in the case must be thoroughly researched. The attorney must become familiar with local criminal law, criminal procedural rules, and, most importantly, the extraordinary intricacies of death penalty jurisprudence. The complexities of state postconviction practice and federal habeas corpus must also be conquered. As anyone familiar with these matters will attest, a death penalty case makes enormous demands upon the lawyer assigned to represent the prisoner, forcing her into what may be entirely new and difficult legal materials. Finally, the lawyer must marshal the results of these investi-

---

95. *Cf.* BUREAU OF THE CENSUS, *supra* note 83, at 83 (table 319) (indicating that more than 50% of state prison inmates have fewer than 12 years of education).

96. *See, e.g.*, Penry v. Lynaugh, 109 S. Ct. 2934, 2938-39 (1989) (overturning the death sentence of a mentally retarded prisoner).

97. Not the least of these investigations is the exploration of the prisoner's psychiatric record. *See* Ford v. Wainwright, 477 U.S. 399 (1986) (holding that the eighth amendment prohibits the execution of an insane prisoner).

gations and prepare legal documents for presentation to the federal courts—a petition, a legal memorandum, and any other supporting documents that may be appropriate.[98] In the end, then, we should be pleasantly surprised that habeas corpus litigation in death penalty cases is launched as early as it is.

Nor do the data support the proposition that habeas petitions are routinely delayed. The OLP Report presumes to speak to the current situation, but relies solely on Paul Robinson's study, published in 1979.[99] Robinson reported that "[o]n the average" the prisoners under examination filed habeas actions in federal court "just over two years" after conviction and that the "most common interval from conviction to filing" was a year and a half.[100] The OLP Report fails to mention these average figures and prefers, instead, a subsequent analysis of Robinson's raw data by students at Rutgers-Camden, which notes that forty percent of the petitions studied were filed more than five years after conviction and that a third were filed more than ten years later.[101] From this, the OLP Report derives a "finding" that "there are frequently enormous delays between the conclusion of the normal adjudicatory process in the state courts and the filing of a habeas corpus petition."[102] Neither Professor Robinson nor his students at Rutgers made such a claim. Indeed, the Rutgers students came to the conclusion that "lengthy delay . . . rarely occurs."[103] The OLP Report alone insists otherwise, notwithstanding that *during* the period between conviction and the filing of a federal petition, the typical prisoner in the Robinson study was called upon to exhaust state remedies[104] as well as prepare for federal litigation in the manner

98. For an overview of the necessary qualifications and responsibilities of attorneys appointed to death penalty cases, see AMERICAN BAR ASS'N, GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF COUNSEL IN DEATH PENALTY CASES 3-28 (1990).

99. REPORT NO. 7, HABEAS CORPUS, *supra* note 1, at 947 n.105 (citing P. ROBINSON, AN EMPIRICAL STUDY OF FEDERAL HABEAS CORPUS REVIEW OF STATE COURT JUDGMENTS (Federal Justice Research Program 1979)).

100. P. ROBINSON, *supra* note 99, at 9.

101. REPORT NO. 7, HABEAS CORPUS, *supra* note 1, at 950 & n.114 (citing Allen, Schachtman & Wilson, *Federal Habeas Corpus and its Reform: An Empirical Analysis,* 13 RUTGERS L.J. 675, 703-04 (1982)).

102. REPORT NO. 7, HABEAS CORPUS, *supra* note 1, at 949-50.

103. Allen, Schachtman & Wilson, *supra* note 101, at 703. The OLP Report labels this conclusion "idiosyncratic." REPORT NO. 7, HABEAS CORPUS, *supra* note 1, at 950 n.114.

104. *See* REPORT NO. 7, HABEAS CORPUS, *supra* note 1, at 948.

I have just described.[105]

The OLP Report purports to describe "enormous delays" not in the cases Robinson studied a decade ago, but in cases litigated today.[106] Yet much has changed over the past decade. Acting on a proposal offered by the Judicial Conference in 1976, the Congress promulgated special rules for habeas corpus cases, which became effective on February 1, 1977.[107] Rule 9(a) of the Habeas Corpus Rules provides:

> A petition may be dismissed if it appears that the state of which the respondent is an officer has been prejudiced in its ability to respond to the petition by delay in its filing unless the petitioner shows that it is based on grounds of which he could not have had knowledge by the exercise of reasonable diligence before the circumstances prejudicial to the state occurred.[108]

Rule 9(a) is not a rigid statute of limitations, but incorporates the doctrine of *laches* for habeas corpus cases. The rule encourages prisoners to file as soon as they can and authorizes the federal courts to dismiss tardy claims when the prisoner might have applied earlier and the delay actually results in prejudice to the state. This is reasonable in the circumstances of federal habeas corpus, providing an incentive to prisoners while allowing necessary flexibility. The courts, in turn, have

---

105. The OLP Report acknowledges that the exhaustion of state appellate and collateral remedies may require "up to a few years," but contends that the average time demanded for exhaustion (2.8 years in the Robinson study) cannot account for the further delays noted in some instances. *Id.* at 950 n.114. Robinson's figures for the average time between conviction and federal filing and the average time for exhaustion appear to conflict because a large proportion of the prisoners in the study (37.1%) failed to satisfy the exhaustion doctrine. P. ROBINSON, *supra* note 99, at 13.

The OLP Report simply compares the time taken for habeas filings with the time allowed in ordinary criminal cases for notices of appeal and motions for new trial. REPORT NO. 7, HABEAS CORPUS, *supra* note 1, at 950. Those are incommensurate analogies. Habeas corpus is not necessarily, or even ordinarily, anything like appellate review of state court judgments. *But see* Friedman, *supra* note 64 (elaborating an appellate model for federal habeas but scarcely proposing that petitions could be filed within a period suited to ordinary appellate review). The better reference would be to statutes of limitation for constitutional tort litigation—allowing a minimum of two years in most states. *See, e.g.*, CAL. CIV. PROC. CODE § 338 (West 1982) (three years); VA. CODE ANN. § 8.01-243 (1984) (two years).

106. *See* REPORT NO. 7, HABEAS CORPUS, *supra* note 1, at 949-51.

107. Rules on Habeas Corpus, Pub. L. 94-426, 90 Stat. 1334 (1976) (codified as amended at 28 U.S.C. § 2254, Rules 1-11 (1988)).

108. 28 U.S.C. § 2254, Rule 9(a) (1988).

developed an effective framework for evaluating claims of undue delay and prejudice to the state—providing adequate protection against prisoners who drag their feet needlessly.[109]

Almost all the cases Professor Robinson examined were filed before Rule 9(a) became effective. There is no question about this; Robinson was explicit that he and his staff chose petitions filed in several districts over a two-year period, fiscal years 1976-77 (between July 1, 1975 and June 30, 1977).[110] Accordingly, Rule 9(a) was operable only for the last five of the twenty-four months covered by the project. The data gathered in the Robinson study are thus wholly inadequate for a legitimate assessment of current arrangements—after Rule 9(a) has been in place for a dozen years. The OLP is silent on this point. More recent data indicate that tardy habeas corpus petitions present no serious continuing problem—perhaps because of Rule 9(a), perhaps for other reasons. A study undertaken by the Institute of Judicial Administration at New York University shows that in 77% of the habeas corpus actions filed in the United States District Court for the Southern District of New York during the calendar years 1979-81, the petitioners had been convicted in those very years or within the previous three-year period, 1976-78.[111]

The OLP's contention that most habeas petitions are frivolous and thus are unworthy of judicial attention[112] is similarly short on hard support. The success rate among

---

109. *See* L. YACKLE, POSTCONVICTION REMEDIES § 114 (Supp. 1990) (collecting illustrative cases).

110. P. ROBINSON, *supra* note 99, at 44 & app. 1 at 4. Professor Robinson also studied cases pending in the United States Court of Appeals for the Seventh Circuit during the same period. *Id.* at 5 n.6. The petitions in those cases had, of course, been filed at the district level prior to the effective date of Rule 9(a).

111. The study was conducted under the auspices of the Institute of Judicial Administration with financial support from the State Justice Institute (SJI). The views expressed are not to be ascribed to SJI. Tina Rubenstein was project director; Richard Faust was data analyst; I served as principal investigator. The statistics reported in the text are included in the project's preliminary report: R. Faust, T. Rubenstein & L. Yackle, The Great Writ in Action: Empirical Light on the Federal Habeas Corpus Debate 78 (draft ed. Oct. 30, 1990) (unpublished manuscript) (copy on file with the author) [hereinafter THE GREAT WRIT IN ACTION]. Returns regarding the time between the conclusion of state court proceedings and the filing of habeas corpus petitions were incomplete, permitting no extrapolations in which we could have confidence. However, inasmuch as the prisoners in this study were required to exhaust state remedies after state court conviction, it is fair to say on the basis of data touching conviction dates alone that habeas petitioners in the Southern District of New York did not sit on their rights.

112. REPORT NO. 7, HABEAS CORPUS, *supra* note 1, at 951.

habeas corpus petitioners *does* appear low in the abstract. Professor Robinson reported that only 3.2% of the petitions he and his staff examined resulted in "any relief."[113] There is evidence, moreover, that a few ostensibly sympathetic district judges may have accounted for more than their proportionate share of successful habeas actions in the Robinson study.[114] Prisoners were awarded relief in 4% of the 1979-81 cases examined by the Institute of Judicial Administration.[115]

In the circumstances, however, one would scarcely expect anything else. By hypothesis, given the exhaustion doctrine, habeas corpus applicants have previously presented their federal claims to the state courts. If the state courts are doing a respectable job of enforcing the Constitution, and certainly if their reliability in this respect equals that of the federal courts as the OLP Report maintains,[116] one would anticipate that prisoners turned away without relief in the state courts may also suffer dismissal in federal habeas. Indeed, if the success rate were substantially higher than it is, the case for federal habeas corpus as a corrective mechanism for state court error would be overwhelming. As it is, the modest numbers of successful habeas corpus petitioners shed little light on the need for federal collateral review. The OLP insists that the low success rate indicates that the state courts are fully effective.[117] Yet one can respond with equal force that if the state courts are acting responsibly, it is *because* they know that the federal habeas corpus courts are available to consider federal claims later.[118] To test the contribution made by federal habeas corpus, we would have to observe the state courts operating without the federal district courts

---

113. P. ROBINSON, *supra* note 99, at 4(c).

114. REPORT NO. 7, HABEAS CORPUS, *supra* note 1, at 948 & n.110 (noting that three judges were involved in 29.9% of the cases in which relief was awarded and that twelve judges accounted for over two-thirds of those cases).

115. THE GREAT WRIT IN ACTION, *supra* note 111, at 81. Death row petitioners break the pattern with a success rate estimated at between one-third and one-half of all cases. *Cf.* Barefoot v. Estelle, 463 U.S. 880, 915 (1983) (Marshall, J. dissenting) (reporting that the federal courts of appeals granted relief to "approximately 70%" of death row prisoners whose appeals from denials of habeas corpus relief were reviewed on the merits between 1976 and mid-1983) (citing Brief for NAACP Legal Defense and Education Fund, Inc., as *Amicus Curiae* at 1e-6e).

116. REPORT NO. 7, HABEAS CORPUS, *supra* note 1, at 957-59.

117. *See id.* at 948.

118. Judge Lay has been making this point for years. *E.g.*, Lay, *The Constitution, the Supreme Court, and Mr. Meese: Habeas Corpus and the Doctrine of Original Intent*, 1986 DET. C.L. REV. 983, 990.

waiting in the wings. Of course, we have already run that experiment in this country. The results were not pretty.[119]

The OLP Report's complaints that the federal habeas corpus jurisdiction draws a flood of tardy, frivolous claims into the federal forum do not withstand scrutiny. Viewed realistically, and in light of reasonable inferences from the little solid data available, the federal courts' authority to entertain habeas petitions from state prisoners makes only modest claims on federal judicial resources, tolerates no dilatory tactics, and results in the award of relief to a predictably small number of petitioners. Most important, habeas corpus makes possible the federal elaboration of federal claims that otherwise might be neglected.

IV. RECENT CASES

The OLP Report implies that recent Supreme Court decisions endorse fragmentary, if not sweeping, restrictions on federal habeas corpus for state prisoners.[120] This claim *is* justified. The decisions noted by the OLP make the point,[121] and there are others.[122] Indeed, the rare occasions on which the Court has seemingly enlarged the availability of the writ stand out as surprising exceptions to the general trend in the opposite direction.[123] Petitioners before the Court should

---

119. *Cf., e.g.,* Mapp v. Ohio, 367 U.S. 643 (1961); Rochin v. California, 342 U.S. 165 (1952).

120. REPORT NO. 7, HABEAS CORPUS, *supra* note 1, at 952-53.

121. *Id.* at 952-53. The Report lists McMann v. Richardson, 397 U.S. 759 (1970) (limiting the claims that prisoners who pleaded guilty in state proceedings can raise in federal court) and Tollett v. Henderson, 411 U.S. 258 (1973) (same); Wainwright v. Sykes, 433 U.S. 72 (1977) (tightening the rules regarding procedural default in state court); Stone v. Powell, 428 U.S. 465 (1976) (largely excluding fourth amendment exclusionary rule claims from federal habeas corpus); and Sumner v. Mata, 449 U.S. 539 (1981) (requiring greater deference to state court fact finding).

122. *E.g.,* Woodard v. Hutchins, 464 U.S. 377 (1984) (apparently approving the dismissal of a successive petition because of the prisoner's failure to explain why new claims had not been offered earlier); Barefoot v. Estelle, 463 U.S. 880 (1983) (approving expedited habeas adjudication in death penalty cases); Rose v. Lundy, 455 U.S. 509 (1982) (tightening the exhaustion doctrine as a prerequisite to federal habeas). Of course, the *Teague* line of cases might be cited here, but I promised not to talk about that. *See supra* note 67.

123. I count as (arguable) exceptions Harris v. Reed, 489 U.S. 255 (1989) (applying to collateral proceedings in habeas corpus the "plain statement" rule previously established for direct review and making it clear that procedural

count themselves lucky if the Justices bypass the opportunity their cases may present to close the federal courts' doors ever tighter against habeas petitions.[124] Moreover, the rhetoric of recent majority opinions has been consistently critical.[125]

Yet the Court's decisions reflect no clearly articulated acceptance of the OLP Report's position that procedural safeguards in criminal justice serve only the search for historical truth and that federal habeas corpus is therefore redundant, irrelevant, and (accordingly) dispensable. There is, to be sure, a good deal of talk in the cases about accuracy in the criminal process.[126] Moreover, the factual guilt or innocence of the defendant in the dock bulks large in the Court's treatment of procedural safeguards—both constitutional rights and mechanisms for the protection of those rights like federal habeas corpus.[127] In this vein, the Court tends, in turn, to merge the reliability of the outcome in criminal cases with the normative matter of procedural fairness. Still, the Court often approves procedures that plainly generate results that are inaccurate by any sensible definition of the term.[128] And, most important with respect to habeas corpus, the Court routinely invokes procedural rules that evade the treatment of claims that may bear on guilt.[129] In this section, I want first to propose an account of procedural safeguards that better fits the cases, and then to explain why simplistic appeals to historical truth or factual guilt fail to capture what the

---

defaults that would not cut off direct review in the Supreme Court will not preclude federal habeas corpus either) and Vasquez v. Hillery, 474 U.S. 254 (1986) (arguably loosening the exhaustion doctrine with respect to factual allegations—albeit in narrow circumstances).

124. Only a few recent cases have affirmed the breadth of the writ. *See, e.g.*, Maleng v. Cook, 109 S. Ct. 1923 (1989) (noting that a petitioner may attack a sentence under which he is currently in custody on the ground that it was enhanced because of an earlier conviction, the sentence for which has been served); Kimmelman v. Morrison, 477 U.S. 365 (1986) (permitting a prisoner to claim ineffective assistance of counsel with respect to a lawyer's failure to raise a fourth amendment exclusionary rule objection); Strickland v. Washington, 466 U.S. 668, 684 (1984) (reaffirming that despite the exhaustion doctrine, a petitioner's failure to exhaust all state remedies does not deprive the federal courts of jurisdiction of habeas claims); Rose v. Mitchell, 443 U.S. 545 (1979) (declining to extend *Stone v. Powell* to a case in which the prisoner alleged race discrimination in the selection of a grand jury foreperson).

125. *See, e.g.*, Engle v. Isaac, 456 U.S. 107, 126 (1982) (marshalling the "costs" of postconviction habeas corpus).

126. *See, e.g.*, Teague v. Lane, 489 U.S. 288, 312-13 (1989).

127. *See, e.g.*, Kuhlmann v. Wilson, 477 U.S. 436, 447 (1986).

128. *See, e.g.*, North Carolina v. Alford, 400 U.S. 25 (1970); *see also infra* note 134.

129. *See, e.g.*, Smith v. Murray, 477 U.S. 527 (1986); *Alford*, 400 U.S. 25.

Justices are about.

Upon examination, the Supreme Court's decisions of late appear to regard the criminal process not as a means of achieving accuracy in criminal judgments, but rather as a rough mechanism for disposing of society's disputes with a class of citizens who threaten stability—whatever the objective "truth" of the charges against them. By this account, federal procedural safeguards neither advance the pursuit of historical/factual truth nor serve other values at risk in criminal prosecutions. Rather, the Bill of Rights is an arsenal of weapons available to the defense in criminal cases, weapons that may be used or not at the discretion of counsel in the course of adversarial relations with the prosecution. Consistent with this "dispositional" account, the courts can and often do settle criminal cases without determining historical truth with any genuine confidence, without respecting procedural rights calculated to produce accurate decisions, and, certainly, without insisting upon respect for procedural safeguards as political statements of individual liberty. The dispositional account of criminal justice is inadequate as a coherent model against which to appraise existing law and practice or by which to judge the character and consistency of argument. It is instead a collage of value-laden, intensely ideological notions about the way the world works or ought to work. This, at any rate, is the picture that emerges from a close reading of the Court's opinions—as opposed to the OLP's image of a truth-seeking, guilt-focused body of case law.

The OLP looks to the plea negotiation cases decided in the early 1970s[130] for evidence of the Court's concern for historical truth and factual guilt or innocence.[131] Thus, the Report argues that constitutional claims do not (in the main) survive pleas of guilty because once factual guilt has been established by plea, procedural safeguards meant to ensure accurate decision making at trial are no longer pertinent.[132] If the

---

130. *E.g.*, McMann v. Richardson, 397 U.S. 759 (1970); *see also* Brady v. United States, 397 U.S. 742 (1970); Parker v. North Carolina, 397 U.S. 790 (1970).

131. REPORT NO. 7, HABEAS CORPUS, *supra* note 1, at 952.

132. *Id.* The notorious footnote in Menna v. New York, 423 U.S. 61 (1975), does, indeed, seem to say as much:

> [A] counseled plea of guilty is an admission of factual guilt so reliable that, where voluntary and intelligent, it *quite validly* removes the issue of factual guilt from the case. . . . A guilty plea . . . simply renders irrelevant those constitutional violations not logically inconsistent with the valid establishment of factual guilt and which do not stand in the way of conviction, if factual guilt

plea cases are examined carefully, however, they plainly stand for something quite different. They are excellent illustrations of an overriding concern for early (and thus cheap) dispositions in criminal cases, dispositions that often fail to match a defendant's culpability with an appropriate conviction.

Fairly read, the plea bargain cases contemplate that at the outset of criminal proceedings, defendants are presented with an all-important choice. Defendants can put the state to its proof, in which case they will have the benefit of all the procedural safeguards established by the Constitution and, in addition, the prospect of appellate and collateral review of any asserted errors in the proceedings. Alternatively, defendants may choose self-conviction by way of a plea of guilty, in which case they will have the benefits of any plea bargain that can be worked with the prosecution, but will surrender the procedural safeguards that would have attended a trial *and* the availability of further review of any alleged failure to respect those constitutional rights. Defendants who plead guilty are left, accordingly, with only the claims that can be raised against the voluntariness of their pleas—including attacks on the competency of defense counsel.

Within this scheme, the legislature's specification of criminal offenses and attendant punishments is rarely consulted. Prosecutors have little time and resources to devote to individual cases and are thus prepared to accept inaccuracy (the conviction of defendants for crimes different from the offenses their behavior warrants) in exchange for the convenience of conviction by plea. Defendants, for their part, are willing to forego procedural rights in exchange for the benefits of negotiation, typically reduced punishment.[133] Defendants

---

is validly established.

Id. at 62 n.2.

This language, it must be said, has caused no end of difficulty in the reviews. Both Saltzburg and Westen contend that the footnote contains an error: the Court must have meant to say "consistent" rather than "inconsistent." Saltzburg, *Pleas of Guilty and the Loss of Constitutional Rights: The Current Price of Pleading Guilty*, 76 MICH. L. REV. 1265, 1278 n.69 (1978); Westen, *Away from Waiver: A Rationale for the Forfeiture of Constitutional Rights in Criminal Procedure*, 75 MICH. L. REV. 1214, 1223 n.21 (1977). I once agreed, *see* L. YACKLE, *supra* note 73, at 406 n.81 (1981), but on rereading I am no longer so sure. The double negative is hard to decipher. In the end, however, I understand the Court to be explaining here that procedural safeguards having as their function the enhancement of accurate fact finding are no longer needed once a criminal defendant has freely chosen to convict herself by plea.

133. In some instances, it may be fair to say that defendants *waive* procedural rights that would otherwise be theirs. *E.g.*, Boykin v. Alabama, 395 U.S. 238 (1969)

are convicted, to be sure, but they are not (necessarily) convicted of the offenses of which they are guilty—the offenses to which a serious estimate of historical truth and a genuine ascertainment of culpability would lead. Rather, they are convicted of offenses on which the two sides converge through hard bargaining.[134] The parties reach agreement by contract, against the background of law provided by prosecutors' ability to press more serious charges or for more severe penalties and defendants' entitlement to put the state to its proof. Moreover, even after matters have been settled in this way, convicts may upset the agreement on grounds unrelated to factual guilt.[135] In sum, the criminal justice system simply disposes of criminal charges apart from any reliable determination of historical truth and even with an occasional nod in the direction of values entirely distinct from factual guilt.

The Court's practical elimination of fourth amendment exclusionary rule claims from federal habeas corpus provides similarly superficial evidence that the Justices regard criminal process as a search for truth and factual guilt. There is, to be sure, much rhetoric in this direction in *Stone v. Powell*,[136]

(explaining that a guilty plea amounts to a waiver of the right to trial by jury). Routinely, however, it is more accurate merely to say that defendants *forego* claims they might otherwise assert. For whether they are aware of such claims or not (knowledge being essential to waiver), defendants surrender them when they voluntarily and intelligently choose the course of plea negotiation. Tollett v. Henderson, 411 U.S. 258, 266-67 (1973).

134. The obvious illustration is North Carolina v. Alford, 400 U.S. 25 (1970), in which the Court approved the acceptance of a guilty plea notwithstanding the defendant's continued claim of innocence. In *Alford*, of course, there was strong evidence of guilt, and that evidence was spread on the record to establish a factual predicate for the plea. *Id.* at 37-38. It is arguable, accordingly, that the Court only recognized that defendants might be content to confess guilt even as they insist upon innocence for some extraneous purpose (anticipated civil actions against them in the future, for example) and that circumstances of that kind should not make it impossible to determine guilt by plea. For my part, the lesson to be taken from *Alford*, however, is that criminal cases can and should be settled as quickly and inexpensively as possible and that stubborn arguments over historical truth and factual guilt or innocence should not get in the way.

135. This is undoubtedly true, although the pool of claims that defeat a plea settlement is neither deep nor clear. *See, e.g.*, Menna v. New York, 423 U.S. 61, 62 (1975) (allowing a prisoner to raise a double jeopardy claim despite his plea of guilty); Blackledge v. Perry, 417 U.S. 21, 30 (1974) (treating a due process claim in the same way on the ground that it went to the very authority of the state to hale the defendant into court to answer charges).

136. 428 U.S. 465, 494 (1976) (foreclosing fourth amendment exclusionary claims in federal habeas if the state courts provide an opportunity for "full and fair" adjudication).

and the opinion in that case surely did appear to be concerned primarily with whether *innocent* defendants might be convicted.[137] Yet the Court tied that concern to the forum allocation question in *Stone*—whether the federal courts should enforce the exclusionary rule as readily as the state courts.[138] In dissent, Justice Brennan charged the Court with limiting habeas corpus to "guilt-related" claims.[139] The majority, however, stopped well short of that and, indeed, preserved the federal courts' authority to treat even fourth amendment claims in cases in which the state courts fail to accord prisoners an opportunity for full and fair adjudication.[140] Later cases have rejected bald arguments that habeas should be closed to claims insufficiently related to factual guilt.[141]

In *Kimmelman v. Morrisson*,[142] moreover, Justice Brennan neatly cabined *Stone* as yet another (restrictive) decision limiting the fourth amendment exclusionary rule to instances in which the deterrent impact of a refusal to admit evidence promises to be significant. The general thrust of the *Kimmelman* decision is inconsistent with the notion that this Court sees the criminal process as a search for truth. *Kimmelman* rejects the truth-finding argument out of hand, confirms that procedural safeguards are available to the guilty as well as the innocent, and spotlights the role of defense

---

137. *Id.* at 491 n.31.

138. "Resort to habeas corpus, especially for purposes other than to assure that no innocent person suffers an unconstitutional loss of liberty, results in serious intrusions on values important to our system of government." *Id.* In writing for the full Court in *Stone*, Justice Powell was far more circumspect with respect to the guilt-determination function of criminal justice than he might have been if writing for himself. His previous separate opinion in Schneckloth v. Bustamonte, 412 U.S. 218, 250 (1973) (Powell, J., concurring), was far more strident, insisting that exclusionary rule claims should not be heard in habeas because they "rarely bear on innocence." *Id.*

139. *Stone,* 428 U.S. at 515-16 (Brennan, J., dissenting).

140. *Id.* at 494 n.37.

141. *See, e.g.,* Rose v. Mitchell, 443 U.S. 545 (1979) (refusing to extend *Stone* to race discrimination claims); Jackson v. Virginia, 443 U.S. 307 (1979) (declining to extend *Stone* to cases in which the petitioner alleges that guilt was not proved beyond a reasonable doubt). Justice Powell himself showed restraint in a sixth amendment exclusionary rule case. *See* Brewer v. Williams, 430 U.S. 387, 413-14 (1977) (Powell, J., concurring). *But see* Castaneda v. Partida, 430 U.S. 482, 508 n.1 (Powell, J., dissenting) (contending that a "strong case" could be made for extending *Stone* to grand jury discrimination claims). The threadbare contention that *Miranda* claims should be *Stoned* has not won majority support. *See* Duckworth v. Eagan, 109 S. Ct. 2875, 2281-85 (1989) (O'Connor, J., concurring).

142. 477 U.S. 365 (1986).

counsel within a system that depends upon adversarial conflict for the resolution of cases.[143] I scarcely mean to commend the Court's work in *Stone* or even *Kimmelman*, which repeats much of *Stone's* critique of the exclusionary rule even as it pushes other rhetoric into the background.[144] Nor, certainly, do I ignore the plain fact that everything depends these days upon the names of the Justices sitting on a case. It does seem fair to say, however, that *Stone* and its progeny resist the OLP's explanations for criminal process and, by contrast, fit the dispositional account rather well.

Finally,[145] there is the vexing question of the effect the federal courts should give to petitioners' procedural defaults in state court. To situate the Court's recent work in this sphere next to the OLP's view of criminal process, it is necessary to review the problems presented by procedural default, problems that are pervasive in the American judicial system generally. To begin, it seems reasonable to propose that legal claims should be addressed at the time and in the manner best suited for efficient adjudication and that procedural rules calling for seasonable consideration are therefore appropriate. If, for example, the defendant in a criminal prosecution raises any claims he may have to the introduction of evidence at the time the evidence is offered, the trial court can take testimony while memories are relatively fresh and perhaps can deal with the matter before the defendant is compromised. The early identification of claims thus fosters efficient decision making with respect to the claims themselves and protects the integrity of the guilt-determination process at the same time.

There is no costless means of ensuring that claims are raised and treated in a timely manner. As a first cut at the problem, one might propose to do nothing and thus simply to hope that defendants raise claims early. In many, perhaps most instances, defendants have powerful incentives to cooperate. The immediate objective is to succeed, or at least to avoid

---

143. *Id.* at 379-80.

144. *Id.* at 375.

145. I lay aside the OLP's enthusiastic citations to the Court's cases on fact finding in federal habeas corpus. REPORT NO. 7, HABEAS CORPUS, *supra* note 1, at 953 (citing Sumner v. Mata, 449 U.S. 539 (1981)). Whether the federal courts should routinely defer to fact finding in state court has nothing to do with the supposed "truth-seeking" function of procedural safeguards and belongs, instead, to the distribution of labor between the state and federal courts. *Cf. supra* note 77 and accompanying text.

heavy losses, at the trial level. Objections to the proceedings, if sustained, typically offer advantages to the defense on that score. Accordingly, rational litigants usually can be expected to press any claims of which they are aware at a time when those claims offer the most promise of protecting against conviction—when, for example, the trial judge may be able to avoid or cure potential error before a case goes to the jury.

The trouble with the laissez faire approach is plain enough. In all too many instances, incentives inherent in the criminal process will not generate timely claims. The principal reason is the sad state of the criminal defense bar in the United States. Underpaid, overworked, and ill-prepared lawyers offer services that fail even minimal professional standards.[146] Thus, claims will *not* be raised seasonably—because of ignorance, oversight, neglect, insufficient time and resources, or incompetence. Typically, neither the lawyers who represent criminal defendants nor defendants themselves function as rational, interest-maximizing actors who can and will respond reasonably to incentives for timely litigation.[147] In the comparatively rare cases in which incentives to raise claims can work, moreover, there may be counterweight incentives that tug in the other direction. Lawyers are duty bound to withhold claims they deem to be frivolous,[148] and some known contentions will not be presented for that reason—whether or not counsel's judgment is sound. Even within the realm of plausible claims, capable attorneys rank contentions for strategic purposes. It is rarely prudent to offer courts a laundry list of claims, mixing weak contentions with strong. Good lawyers know that better claims tend to suffer from the company they keep and therefore may deliberately withhold weak claims in an attempt to focus attention in a more promising direction. In the end, then, the incentive structure on which we might pin our hopes for timely litigation either breaks down in the face of reality or falters in the rare cases in which it might actually influence counsel behavior.

In this vein, it is necessary to mention one other matter—the persistent argument that defense counsel may "sandbag" the state courts. I say it is necessary to discuss

---

146. *See generally* McConville & Mirsky, *Criminal Defense of the Poor in New York City*, 15 N.Y.U. REV. L. & SOC. CHANGE 581 (1986).

147. *See generally* Berger, *The Supreme Court and Defense Counsel: Old Roads, New Paths—A Dead End?*, 86 COLUM. L. REV. 9 (1986).

148. *Cf.* FED. R. CIV. P. 11.

sandbagging not because there is any substance to the argument, but because the picture the argument creates plays an important role in current habeas corpus doctrine.[149] The sandbagging argument runs this way. In some instances, defense counsel may be aware of a nonfrivolous claim in time to raise it but nevertheless may deliberately withhold the claim in order to "save" it for litigation later. The easiest illustration is, again, a jury trial in which defense counsel is aware of an objection to evidence offered by the prosecution. A timely objection will give the trial judge an opportunity to pass on the defense claim immediately, avoiding error if the claim is sustained and building a record for appeal if the claim is rejected. If counsel anticipates that the client may escape conviction notwithstanding the admission of the offending evidence, so the argument goes, she may sit silent. If the defendant is acquitted, the presence of error will make no difference. If the defendant is convicted, the error strategically built into the record by procedural default can be raised on appeal or in collateral proceedings.[150]

The vision this argument conjures up is wholly unrealistic. Again, most lawyers representing criminal clients are unaware of claims that should be raised at trial and are scarcely in a position to sandbag the state courts deliberately. In cases in which counsel is aware of claims, the primary incentive structure should prompt counsel to act immediately in hopes of excluding evidence and avoiding conviction. If claims are strong enough to figure in counsel's plans for appeal or collateral review, they presumably are strong enough to escape omission for frivolity or weakness. To contend that counsel may knowingly withhold potentially meritorious objections at trial is to argue that counsel may reasonably choose an increased risk of conviction in order to hold out claims on which to attack an unfavorable judgment later. This is not the way trial lawyers think. Rather, they mean, first, to avoid conviction and, second, to build a complete record for appeal or collateral review should things go awry. It would be nonsense for defense attorneys to hold potentially meritorious claims in reserve at trial, when the underlying facts and attendant arguments can be spread on the record and when

149. *See infra* text accompanying notes 162-64.

150. *Cf.* Meltzer, *State Court Forfeitures of Federal Rights*, 99 HARV. L. REV. 1128, 1196-97 (1986) (offering other illustrations).

the claims can either prevent the client's conviction or lay the groundwork for appeal, in order to call them into service later—when the claims will suffer from inadequate development in the record and, even at that, can be useful only to attack a conviction already in place.[151] Only in special circumstances, when other evidence is so damning that conviction is inevitable, would competent counsel entertain such a strategy.[152] And in circumstances of that kind, the potential gain would be illusory. If claims held in reserve were successful later and the conviction were upset, the client would presumably be reconvicted on the basis of the same (untainted) evidence. Indeed, for that very reason, any error found after conviction might well be considered harmless.[153]

In the end, however, and notwithstanding the self-evident weaknesses in the sandbagging argument, the fact remains that many claims will not be raised in a timely fashion even though raising them would serve the client's interests. Usually because of ignorance, negligence, or worse, and occasionally because of reasonable tactical choices by knowledgeable counsel, claims will not be presented at the most appropriate time and place and, instead, will be identified and offered later—on appeal or in collateral proceedings. At that point, of course, the practical problems are exacerbated. Not only has the opportunity for litigation at trial now been lost, but in most cases it will be necessary to undertake fact-finding proceedings in order to develop the evidence. In some instances, it will be appropriate to remand to the trial court for further work. If claims are found to be

---

151. *See* Resnik, *supra* note 77, at 896-97 (noting that the sandbagging argument posits a "fantastically risk-prone pool of defendants and attorneys"); *accord* Berger, *supra* note 147, at 26 n.98; Meltzer, *supra* note 150, at 1199.

152. The truth is, many trial lawyers do not expect to represent clients beyond trial and, thus, hardly wish to compromise their own work for the benefit of other advocates in a different time and place. *See* Committee on Civil Rights, *Pending Legislation to Amend the Federal Habeas Corpus Statutes*, 35 REC. A.B. CITY N.Y. 124, 135 (1980) (noting that court-appointed trial counsel "rarely stay on" to represent clients in federal habeas corpus proceedings).

153. *See* Harrington v. California, 395 U.S. 250 (1969) (turning the harmlessness of error on the weight of other evidence). Of course, it is possible that counsel's strategy could embrace these possibilities. If conviction is inevitable on the basis of other evidence, if a currently withheld claim could be constructed from a barren record, if the harmless error doctrine could be avoided, and if retrial would be troublesome or particularly expensive for the prosecution—then counsel might be in a position to negotiate a better settlement for the client by plea. Cases in which such scheming is plausible must be extremely rare and scarcely the stuff from which routine doctrine is or should be fashioned.

meritorious and nonharmless, convictions must be set aside. And proceedings against the accused must begin anew. Small wonder that the states resist a scheme that values legal claims so highly that monumental state interests must be sacrificed in order to treat them. State officials can be expected to resist any arrangement that invites tardy claims and all the practical problems that attend them. Late claims, if heard, threaten the state's fundamental ability to obtain and preserve criminal convictions.

Unfortunately, concerns for adjudicative efficiency in criminal cases have generated a system that tips the balance dramatically in the other direction—a system that routinely surrenders potentially meritorious claims to procedural convenience. The engine that drives this machine is the familiar contemporaneous objection rule, which not only encourages but *requires* defendants to raise objections to their treatment "contemporaneously" and which forecloses any future opportunity to present claims not raised in season.[154] By this means, the states avoid treating claims that would demand that the trial record be reopened. On direct review by way of certiorari, moreover, the Supreme Court is without jurisdiction to overturn state judgments resting on adequate and independent state procedural grounds.[155] Thus, defendants who commit procedural default with respect to potentially meritorious federal constitutional claims can be convicted and punished in violation of the Bill of Rights and nevertheless be turned away both by the state appellate courts and by the Supreme Court itself.[156] The rigidity of the resulting system is tempered on occasion. Most states permit their appellate courts to overlook default when the merits must be reached to correct "plain error" or to avoid a "miscarriage of justice."[157] And the Supreme Court may slice through state procedural grounds it finds to be *in*adequate or insufficiently independent to foreclose consideration of underlying federal claims.[158] Still, procedural efficiency

154. *E.g.*, FED. R. EVID. 103(a) (1).

155. Michigan v. Long, 463 U.S. 1032 (1983); Fox Film Corp. v. Muller, 296 U.S. 207 (1935).

156. *See generally* Brilmayer, *State Forfeiture Rules and Federal Review of State Criminal Convictions*, 49 U. CHI. L. REV. 741 (1982).

157. *See, e.g.*, Marrone v. State, 653 P.2d 672, 675-76 (Alaska Ct. App. 1982); People v. Turner, 128 Ill. 2d 540, 555, 539 N.E.2d 1196, 1202 (1989); Commonwealth v. Lawson, 519 Pa. 504, 513, 549 A.2d 107, 112 (1988).

158. *See supra* note 123 and accompanying text.

usually prevails in head-to-head competition with federal rights—within the framework of direct review.

If petitioners later seek relief from state custody by way of federal habeas corpus, the conceptual arrangements are quite different. Habeas corpus in the lower federal courts is not an appellate mechanism for testing state court judgments for error.[159] Habeas petitions initiate entirely new and independent legal actions, civil in nature, that more closely resemble civil rights lawsuits for damages or injunctive relief than further stages of criminal prosecutions begun in state court.[160] Indeed, habeas litigation awaits the conclusion of state proceedings only because values associated with federalism recommend placing responsibility for the criminal law with the states; because the federal claims cognizable in habeas typically arise out of local criminal investigations, trials, and appeals; and because earlier federal involvement might frustrate orderly state processes. Properly understood, federal habeas corpus has no concern for state procedural interests after the state courts have finished with petitioners and thus might reasonably ignore procedural default in state court, irrespective of the effect default may have been given in the state courts themselves or in the Supreme Court on direct review.

The theoretical status of the federal courts' habeas corpus jurisdiction to one side, the practical significance of habeas as a means of testing criminal judgments collaterally suggests, naturally enough, that here, too, some account should be taken of the procedural default problem. The same range of concerns and options again presents itself: the federal courts must strike some balance between federal rights and procedural efficiency. In the 1960s, the Warren Court gave state procedural interests priority within the context of direct review, but fashioned a different rule for habeas corpus—a different rule reflecting its own, different compromises between competing values. Initially, the state courts were allowed to cut off claims because of default, and on direct review the Court let state judgments rest on procedural default grounds—subject to exceptions marked off by the adequate state ground doctrine.[161] In federal habeas corpus, by contrast, the re-

159. This is where I part company with (well-meaning) revisionists. *E.g.*, Friedman, *supra* note 64 (reading the cases to contemplate an appellate model).

160. *See* Browder v. Director, Dep't of Corrections, 434 U.S. 257, 265 n.9 (1978).

161. If Justice Brennan meant to suggest otherwise in Henry v. Mississippi, 379

verse was true. Despite default in state court, claims were routinely reached on the merits—subject to an exception for petitioners whose default in state court constituted a "deliberate by-passing" of state procedures.[162] This, of course, was the regime of *Fay v. Noia*. Justice Brennan's opinion for the Court in *Noia* insisted that the forfeiture of appellate remedies was sufficient to protect state procedural interests and that the availability of federal habeas, despite default, was essential to preserve *some* adjudicative opportunity for federal claims.[163]

The interesting question regarding the Warren Court's position in *Noia* is the Court's reason or reasons for allowing any exceptions at all to the general habeas corpus rule that procedural default should not foreclose federal adjudication on the merits. The conventional explanation for the deliberate bypass rule is that the rule reflects an attempt to retain the writ's historical links with equity. Thus the bypass exception only precluded manipulative petitioners who approached the federal courts without "clean hands."[164] By defining bypass as waiver, moreover, the Court ensured that few petitioners would actually be denied the federal forum. That result, in turn, was wholly consistent with the Court's larger intention that habeas should generally be open for adjudication on the merits and should not be frustrated by forfeiture rules designed to protect state procedural interests.

There is a better explanation. The waiver standard adopted in *Noia* may have been grounded in the same value judgment that explains the acceptance of waivers in other contexts. The fundamental notion is personal autonomy. Although individuals may have rights, substantive and procedural, at their disposal, they have no corresponding duty to insist upon those rights and may, if they wish, decline to assert them. If the waiver of rights were not respected, the individual's integrity as a free and responsible citizen would be impugned. The

---

U.S. 443, 448 (1965), he was unsuccessful. *See id.* at 457 (Harlan, J., dissenting).

162. Fay v. Noia, 372 U.S. 391, 439 (1963); *see generally* Yackle, Book Review, 17 CRIM. L. BULL. 479 (1981). Said another way, the Court instructed the lower federal courts to disregard state procedural rulings and reach the merits even if relevant state judgments could stand (constitutionally) on procedural grounds and even if the Supreme Court itself was barred. To demonstrate deliberate bypass, the state was required to show that petitioners intentionally relinquished or abandoned a " 'known right or privilege.' " *Noia*, 372 U.S. at 439.

163. *Noia*, 372 U.S. at 398-99, 429-30.

164. *See id.* at 438-39.

basis for accepting waivers, then, is deference to individual choice in a liberal society. At the same time, the public interest in orderly proceedings regarding rights justifies limits on the individual's freedom to change positions at will. And if litigants freely and voluntarily choose to forego claims (or opportunities to litigate claims), they can be held to those choices for the protection of state reliance interests. In *Noia*, Justice Brennan may have intended to say something unexceptional: litigants cannot change their minds willy-nilly as judicial processes progress, upsetting those processes on a whim, and habeas petitioners who behave in that fashion can be barred from the federal forum, irrespective of the merits of the claims they wish (belatedly) to present.

A third possibility may be mentioned, but quickly discarded. It is possible, but most unlikely, that the bypass rule was meant to encourage compliance with the contemporaneous objection rule in state court by foreclosing collateral review in habeas corpus in addition to direct review in state court and in the Supreme Court. This instrumental explanation has no serious footing. If lawyers representing criminal defendants do not respond to powerful affirmative incentives to press claims in a timely manner, and they don't,[165] it scarcely seems likely that they would respond to additional, negative incentives provided by further penalties. Carrots usually work better than sticks. As an instrument for channeling human behavior, the bypass rule was both underinclusive (failing to speak at all to cases in which default was unintentional) and overinclusive (reaching all deliberate choices to withhold claims—even legitimate decisions to separate weak claims from strong).[166] If the bypass rule were meant to influence

---

165. *See supra* text accompanying notes 147-50.

166. This last presents a close question. One might plausibly contend that counsel's legitimate attempts to present a client's strongest claims in the best possible light should nonetheless have the effect of cutting off claims withheld for their apparent weakness. *See* Jones v. Barnes, 463 U.S. 745, 751-52 (1983) (describing a lawyer's efforts to winnow out weak claims on appeal as the hallmark of professional advocacy); *see also* Smith v. Murray, 477 U.S. 527, 535-36, (1986) (relying on *Jones* in a procedural default context). *But see Jones*, 463 U.S. at 775 (Blackmun, J., concurring) (insisting that claims omitted by lawyers on this basis should not be foreclosed in later habeas corpus proceedings instituted by different counsel or by the prisoner *pro se*). Thus, legitimate, tactical defaults could be treated in the same manner as manipulative attempts to deprive the state courts of an opportunity to pass on claims in favor of a later federal forum. Such a rule would be controversial, however. At the very least it would seem to invite lawyers to pile up objections of dubious substance, depriving clients and courts alike of the value of

counsel's strategy, it presumably would have been aimed at tactical decisions to circumvent the state courts while holding open litigation in the federal forum—i.e., sandbagging. There is no evidence that Justice Brennan gave that business serious attention and much reason to assume he discounted sandbagging entirely.[167]

The personal waiver standard in *Noia* came under attack in subsequent years, and soon after the Court's membership changed during the Nixon administration, the bypass rule was discarded in most instances.[168] In its place, the newly constituted Court introduced an entirely different scheme, pursuant to which procedural dismissals have become the rule in federal habeas corpus, just as they are on direct review—subject to exceptions for cases in which petitioners demonstrate "cause" for their default and "prejudice" from constitutional violations that went uncorrected in state court because of procedural default.[169] The leading case is *Wainwright v. Sykes*,[170] in which then-Justice Rehnquist wrote for the Court. The OLP Report cites *Sykes* as yet another illustration of the current Court's resistance to federal habeas corpus as a general postconviction remedy.[171] Again, there is little doubt that recent cases *do* indicate retrenchment. I only want to contend that although *Sykes* and other cases in the same line reflect dissatisfaction with the Warren Court's treatment of the procedural default problem, they do not necessarily endorse the OLP's preoccupation with historical truth.

On its face, the Rehnquist opinion in *Sykes* reviews the Court's previous treatment of procedural default down to and since *Noia* and then embraces a different rule, the cause-and-prejudice rule, for future application.[172] There is much

---

careful advocacy. In this vein, it should be noted that professionals now urge their colleagues to raise even the most unlikely claims in brief (thus avoiding any later claim of default), but to focus the reviewing court's attention on more promising contentions in oral argument. Telephone conversation with George Kendall, Counsel, NAACP Legal Defense Fund (May 1, 1990). At any rate, I find it difficult to believe that the Warren Court meant to ignore the subtleties within the realm of deliberate defaults and simply to punish all such defaults in the same way.

167. *See supra* text accompanying notes 162-64.

168. It remains an open question whether the bypass rule might still govern cases in which the default is a failure to seek appellate review. *See, e.g.*, Murray v. Carrier, 477 U.S. 478, 490 (1986) (noting but passing over the issue).

169. *See generally* L. YACKLE, *supra* note 73, at 297-356.

170. 433 U.S. 72 (1977).

171. REPORT NO. 7, HABEAS CORPUS, *supra* note 1, at 952.

172. *Sykes*, 433 U.S. at 87.

attention to the state interests served by the contemporaneous objection rule and much concern lest the availability of federal habeas corpus, despite default, somehow undercut state attempts to maintain orderly procedures for addressing federal claims.[173] The most disturbing feature of *Sykes* is the Court's willingness to credit the sandbagging argument, at least in form, as a partial explanation for a forfeiture sanction in federal, as well as state, court.[174] That line of analysis being fatuous,[175] one comes away from *Sykes* with the firm impression that the Court means to be even tougher than its language would indicate. The true explanation for cutting off claims raised "too late" is the mere fact of default, rather than any deliberate litigational behavior sought to be discouraged. The Court frankly prefers to disregard potentially meritorious constitutional claims if, in order to treat them on the merits, it would be necessary to reopen the record. When claims are not raised in season, they are simply sacrificed to the assumed greater good of adjudicative efficiency.

This regime is not grounded in a search for historical accuracy. When, in fact, the petitioner in *Engle v. Isaac*[176] argued that the cause-and-prejudice rule should not apply to claims touching factual guilt, the Court dismissed the idea out of hand.[177] Claims are foreclosed, whatever bearing they may have on guilt or innocence, simply in order that state judgments not be disturbed. In this there is hostility to postconviction habeas corpus, to be sure, but a general, overarching hostility reflecting many themes, principal among them concern for the finality of state judgments, rather than a focused insistence that the adjudication of criminal cases begin and end with the ascertainment of factual guilt.

The OLP Report fails to mention one aspect of current procedural default doctrine that does attach significance to petitioners' factual guilt. On the whole, the Court has insisted that the cause-and-prejudice rule, for all its rigidity, will not generate bad results. The Justices are apparently confident that "victims of a fundamental miscarriage of justice will meet

173. *Id.* at 89-90.
174. *Id.* at 89.
175. *See supra* text accompanying notes 149-53.
176. 456 U.S. 107 (1982).
177. *Id.* at 129.

the cause-and-prejudice standard."[178] Nevertheless, the Court allowed in *Murray v. Carrier*[179] that mistakes of that order might still occur. Accordingly, in an "extraordinary case, where a constitutional violation has probably resulted in the conviction of one who is actually innocent," the district courts may reach the merits of a petitioner's claim "even in the absence of . . . cause."[180] Special dispensation from the *Sykes* rule for cases in which factual innocence is in doubt does suggest a focus on guilt determination as a goal of criminal process. Similar references in other habeas contexts underscore the point.[181] Where the Court intends to take its new-found interest in petitioners' possible innocence is far from clear. In *Smith v. Murray*,[182] a slim majority expressed concern only for factual, not legal, innocence and thus refused to consider a claim that the jury that sentenced a petitioner to death had heard inadmissible evidence that might have determined the decision to impose capital punishment.[183] That result scarcely indicates that the door cracked open in *Carrier* is likely to swing wide in the days to come. Certainly the full Court is yet some distance from revising procedural default doctrine to make factual guilt the "only value" served by the criminal process.[184]

The dominant picture that emerges from these recent cases on default is, instead, the dispositional account of criminal justice. Listen to Justice O'Connor in the sixth amendment case *Strickland v. Washington*:

> The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.
>
> . . . .
>
> . . . [T]he purpose of the effective assistance guarantee

---

178. *Id.* at 135.

179. 477 U.S. 478 (1986).

180. *Id.* at 496.

181. *See, e.g.*, Kuhlmann v. Wilson, 477 U.S. 436, 454 (1986) (indicating that a successive petition may be entertained to serve the " 'ends of justice' " in a case in which a habeas applicant "supplements his constitutional claim with a colorable showing of factual innocence").

182. 477 U.S. 527 (1986).

183. *Id.* at 537-38.

184. *Id.* at 544 (Stevens, J., dissenting) (joined on this point by Marshall and Blackmun, JJ.) (resisting any such sentiments in the majority opinion).

> . . . is not to improve the quality of legal representation, although that is a goal of considerable importance to the legal system. The purpose is simply to ensure that criminal defendants receive a fair trial.[185]

And in the procedural default case *Engle v. Isaac*:

> We do not suggest that every astute counsel would have relied upon *Winship* to assert the unconstitutionality of a rule saddling criminal defendants with the burden of proving an affirmative defense. Every trial presents a myriad of possible claims. Counsel might have overlooked or chosen to omit respondents' due process argument while pursuing other avenues of defense. We have long recognized, however, that the Constitution guarantees criminal defendants only a fair trial and a competent attorney. It does not insure that defense counsel will recognize and raise every conceivable constitutional claim.[186]

The vision suggested by this language is one in which the criminal process is meant neither to determine historical truth and factual guilt or innocence on the one hand, nor to safeguard constitutional values on the other, but to establish an adversarial framework within which professional advocates on each side can dispose of charges. Within this scheme, anything may be compromised—the search for truth, the ascription of criminal culpability, and, indeed, the vindication of the Bill of Rights. The picture is not a pleasant one; on reflection it may be more disquieting even than the OLP's approach to criminal process. Certainly, the dispositional account depends on assumptions about defense counsel services that rarely hold true in American courts. In those assumptions there is not only hostility to plenary federal adjudication of federal claims; there is cynicism. My purpose here, however, is neither to develop fully a positive thesis regarding the Court's recent work, nor to offer a normative critique. I merely mean to distinguish the OLP Report's account of criminal procedure from current law in order to clarify the prescriptive program the Report offers.

---

185. Strickland v. Washington, 466 U.S. 668, 686-89 (1984).
186. Engle v. Isaac, 456 U.S. 107, 133-134 (1982).

V. CONCLUSION

I have tried in this space to offer some thoughts on the place of federal procedural safeguards in criminal process and on the role of federal habeas corpus as a mechanism for enforcing the Bill of Rights—not in isolated instances but routinely. My text has been the Report on federal habeas prepared by the Office of Legal Policy during the Reagan administration. I have criticized the Report for overvaluing the pursuit of historical truth and the determination of factual guilt in this context; for providing a misleading description of federal habeas corpus jurisdiction, past and present; and for linking its assault on the writ to Supreme Court precedents that cannot be fully explained by reference to the Report's perspective on the criminal justice system.