
~~OVERDUE PROCESS~~

A Study of Federal Habeas Corpus in Capital Cases
and a Proposal for Reform

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by Kent S. Scheidegger
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Introduction

The jury files back in. They have finally decided. The family of the murder victim waits breathlessly. They have endured the horror of the murder. Then the investigation. Then months of pre-trial maneuvering. Then the guilt trial. Then came the penalty phase, where the defense paints the “good” side of a cold-blooded murderer while any attempt to humanize the departed, innocent victim brings a flood of objections.

Now the verdict is read. The aggravating factors outweigh the mitigating. The sentence is death. Now, finally, they think, justice will be done.

But they are tragically wrong. To borrow Churchill’s phrase, it is not the end, or the beginning of the end; at best, it is only the end of the beginning.

Clarence Ray Allen committed murder in 1974 and was convicted in 1977. He was sentenced to life in prison. From within prison, he ordered the murder of the witnesses to the first murder. In September 1980, his assassin shotgunned three people to death and gravely wounded a fourth.¹

Six years later, the California Supreme Court affirmed his conviction and death sentence. During the next two years, it considered and denied a state habeas corpus petition, in which a prison inmate is permitted to attack his sentence on facts outside the appellate record. The U. S. Supreme Court declined to review either proceeding.²

Yet justice has *still* not been done. On September 2, 1988, a federal district judge issued a stay of execution. *Over six years later* that stay remains in effect, and the case is still mired in the district court.

Why?

In the pages that follow, this paper will explore the myths and reality of the use of the federal writ of habeas corpus by state prisoners. The conclusions can be summarized as follows:

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1. *People v. Allen*, 42 Cal. 3d 1222, 1242-1243, 729 P. 2d 115 (1986).
 2. *Allen v. California*, 484 U. S. 872 (1987); *Allen v. California*, 487 U. S. 1264 (1988).

1. The contention that the present use of the writ, as a second appeal, is required either by the Constitution or by the heritage of the common law “Great Writ” is entirely baseless.

2. As a device for correcting fundamentally unjust verdicts, *i. e.*, convictions of innocent people, the present writ is not suited to the task. The focus of litigation is neither on innocence nor on procedures directly related to the reliability of the guilt verdict.

3. The often-cited statistic that 40% of state capital sentences are overturned on federal habeas is out of date. The overall number is around 15%, and only 8% if the oft-reversed Ninth Circuit is excluded. For guilt verdicts, the rate is only 5%.

The balance of justice and fairness would be better served by limiting federal habeas corpus to cases of actual innocence and to those cases where the state system either is inadequate to the task or has failed to correct a clear violation of a rule universally agreed to be fundamental. The fine points of close questions should be finally decided in a single review by the state supreme court, subject only to reversal by the United States Supreme Court.

All Americans, even clearly guilty murderers, are entitled to due process of law. “But justice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true.”³ Justice Cardozo’s words ring as true today as they did six decades ago.

Despite some recent gains, the balance remains far from true. Years upon years of review are far more process than is due. In capital litigation today, process is overdue.

3. *Snyder v. Massachusetts*, 291 U. S. 97, 122 (1934).

I. Defining the Question.

The first step to answering the habeas corpus riddle is to precisely define the question. This seemingly simple task is made difficult by the truckloads of red herring that are constantly dumped upon it.

The dispute is not about correcting “egregious” errors by state courts. If agreement could be reached that habeas review would be limited to such errors, suitable limiting language could be worked out. The dispute is not about resolving the actual facts of what happened, either in the commission of the offense or in the conduct of the trial. Congress adopted a rule of deference to state court fact-finding nearly three decades ago,⁴ and changes to that rule are not a major bone of contention.

The dispute is not about whether judge-made rules of recent vintage are or are not “important.” Of course they are important. But so are the rules of evidence, the rules of procedure, and the rules of substantive criminal law, and we trust all of those decisions to the ordinary appellate process.

The heart of the dispute consists of this rule: a federal district judge presented with a habeas corpus petition must reconsider from scratch (“*de novo*”) close questions of federal constitutional law, on which reasonable, competent, conscientious jurists can and do differ, even though these questions have already been fully considered and decided by state courts. In capital cases, these questions have already been decided by the state supreme court.

In all other forms of litigation, a final decision by a court of competent jurisdiction finally settles the issues between the parties. That judgment cannot be reviewed by any court which does not have appellate jurisdiction over the case. At common law, this was also true in criminal cases. This is true today, for most purposes, of the criminal judgments of the federal district courts and the local court system of the District of Columbia.⁵ The question is, why should it not be true for the judgments of state courts?

4. 28 U. S. C. § 2254(d).

5. 28 U. S. C. § 2255; D. C. Code § 23-110(g).

II. The Great Writ: History and Histrionics.

For state convicts today, the writ of habeas corpus has become a second appeal, in which they are entitled to receive, in the lower federal courts, a second review from scratch of claims already considered and rejected by the state courts. Calls to restrict this use of the writ have been around for as long as the usage itself. A quarter century ago, Judge Henry Friendly aptly described the reaction to proposals for reform: “Any murmur of dissatisfaction with this situation provokes immediate incantation of the Great Writ, with the inevitable initial capitals, often accompanied by the suggestion that the objector is the sort of person who would cheerfully desecrate the Ark of the Covenant.”⁶

Little has changed in the intervening years. The following statement is typical of the misleading appeals to history which permeate the debate:

“Habeas corpus is the basis of all our freedoms. Tinkering with it is always a dangerous proposition, and must be done very carefully—more carefully, perhaps, than amending the Constitution itself, for it is habeas corpus that gives life to all of the Constitution’s various guarantees of individual liberty. It is habeas corpus which embodies the entire notion of individual rights against the government—a tradition rooted in Magna Carta and exalted by our founding fathers.”⁷

This statement is based on a clever, misleading ambiguity. Is it intended to defend the writ of habeas corpus as it was known to the common law and the founding fathers? If so, it is completely true but also completely irrelevant, since no serious proposal before Congress suggests reducing the scope of habeas relief to anything less than it was in 1789. If the statement is intended to defend the expansion of the writ to new uses

6. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. Chi. L. Rev. 142, 142 (1970).

7. Statement of Benjamin Civiletti, et al., on behalf of the “Emergency Committee to Save Habeas Corpus” before the House Subcommittee on Civil and Constitutional Rights, February 22, 1994, p. 2 (cited below as “Emergency Committee Statement”).

unknown to the common law, then its appeal to Magna Carta and the founding fathers makes no sense. A warning against “tinkering” with the ancient writ is no argument against a proposal to partially reverse some of the modern tinkering.

A strong argument can certainly be made that history is irrelevant here, and that Congress should simply decide on the merits whether re-review of already litigated issues is necessary or desirable. However, since the opponents of reform repeatedly claim history and heritage as a justification for relitigation of completed appeals, these claims need to be refuted.

Without qualification, habeas corpus was not available at common law to review a conviction of felony, entered by a court of competent jurisdiction, by another court which did not otherwise have authority to review that judgment. The function of the writ was to set free people who had been imprisoned illegally. An application by a duly sentenced traitor or felon was therefore summarily denied, since the conviction by a proper court was, on its face, a legally sufficient ground for the jailer to keep him in jail.⁸ For this reason, the celebrated Habeas Corpus Act of 1679 explicitly excluded from its operation persons convicted of a felony.⁹ In one famous case, a contempt citation was reviewed by another court on habeas, but that decision very clearly and explicitly distinguished contempt proceedings, which were initiated, tried, and decided by a single judge, from felony cases, where the defendant had the protections of the common law, especially trial by jury.¹⁰

In this country, the writ was guaranteed against suspension in the original Constitution.¹¹ This clause, however, was well understood to refer to habeas for federal prisoners. The First Congress, consisting largely of the same people who wrote and

8. 3 W. Blackstone, Commentaries on the Law of England 132 (1st ed. 1768).

9. 31 Car. 2, ch. 2.

10. *Bushell's Case*, 124 Eng. Rep. 1006, 1009-1010 (C. P. 1670); Oaks, Legal History in the High Court—Habeas Corpus, 64 Mich. L. Rev. 451, 466-467 (1966).

11. U. S. Const., Art. I, § 9, cl. 2.

ratified the Constitution, flatly prohibited the issuance of habeas for state prisoners by federal courts, except to bring them into federal court to testify.¹² Some have contended that federal review of state convictions via habeas corpus is constitutionally required, but the unquestioned constitutionality of this section of the Judiciary Act is sufficient to refute that notion.¹³

The Constitution contained only a few constraints on state government in 1789, compared to its present scope, but it did contain some. The *Ex Post Facto* Clause of Article I, section 10, for example, is directed solely to state criminal prosecutions.¹⁴ The Bill of Attainder Clause of the same section was directed at an abuse well known to the people of that time which typically involved incarceration.¹⁵ Yet the First Congress created neither federal question jurisdiction nor federal habeas corpus to authorize the lower federal courts to enforce these limitations. Instead, the Constitution itself expressly directed state judges to enforce the supremacy of federal law.¹⁶ The assertion of one opponent of reform that since 1789 Congress has invariably provided federal habeas as a mechanism to enforce “every Federal right”¹⁷ is simply not correct.

12. Judiciary Act of 1789, § 14, 1 Stat. 81.

13. Mello & Duffy, *Suspending Justice: The Unconstitutionality of the Proposed Six-Month Time Limit on the Filing of Habeas Corpus Petitions by State Death Row Inmates*, 18 N. Y. U. Rev. L. & Soc. Change, 451, 472 (1991), effectively acknowledge that the Suspension Clause as enacted does not support their position and fall back on the last resort of antidemocratic jurisprudence, the “living Constitution.”

14. See *Calder v. Bull*, 3 U. S. 386, 390 (1798) (opinion of Chase, C. J.).

15. See Edmund Randolph, *Remarks in the Virginia Ratifying Convention* (1788), in 3 *The Founders' Constitution* 396 (P. Kurland and R. Lerner eds. 1987).

16. U. S. Const., Art. VI, cl. 2.

17. J. Curtin, *Statement to the House Subcommittee on Civil and Constitutional Rights* (1991) (cited below as “Curtin Statement”), reprinted in *Habeas Corpus Issues*, Serial No. 39, 102d Cong., 1st Sess., 445 (1992). This serial is cited below as “Habeas Corpus Issues.”

The original Judiciary Act did give the federal courts authority to issue the writ for federal prisoners, as the Constitution requires, but it did not specify the grounds on which the writ should be granted. For answers to the question on when the writ ought to be issued by a court which had the power to issue it, the Supreme Court consistently looked to the common law. The writ could be used for *pretrial* review of whether a defendant ought to be committed for trial or released on bail,¹⁸ but in the case of *Ex parte Watkins*,¹⁹ the Supreme Court made clear that once a competent court had tried the case, a court which lacked appellate jurisdiction over that case could not hear an indirect appeal on habeas corpus.²⁰ The fact that the claim was based in the Constitution made no difference to this analysis.²¹

Opponents of reform have attempted to dismiss the *Watkins* case as dealing with the peculiarities of the Supreme Court's jurisdiction rather than the general principles governing habeas corpus.²² This argument is specious. Chief Justice Marshall's opinion is cleanly divided between the jurisdiction of the court to issue the writ of habeas corpus, which was found to exist,²³ and the propriety of using the writ as a form of review of a final conviction, which was found to be improper.²⁴ The latter

18. *Ex parte Bollman*, 8 U. S. 75, 100 (1807); see also *Ex parte Burford*, 7 U. S. 448, 452 (1806) (petitioner jailed on warrant that "does not allege that he was convicted of any crime").

19. 28 U. S. 193 (1830) ("*Watkins I*") (Marshall, C. J.).

20. "An imprisonment under a judgment cannot be unlawful, unless that judgment be an absolute nullity; and it is not a nullity, if the court has general jurisdiction of the subject, although it should be erroneous." *Id.*, at 203.

21. *Ex parte Watkins*, 32 U. S. 568, 574 (1833) ("*Watkins II*") (Story, J.).

22. See, e.g., Peller, In Defense of Federal Habeas Corpus Relitigation, 16 Harv. C.R.-C.L. L. Rev. 579, 611-612 (1982).

23. 28 U. S., at 201.

24. *Id.*, at 202-203.

holding was recognized as precedent in other courts throughout the nineteenth century.²⁵

In 1833, Congress made an exception to the general rule that federal courts would not issue habeas for state prisoners, and it permitted issuance of the writ in cases where the states were interfering with federal officers.²⁶ The primary antebellum use of this exception was to suppress northern resistance to the Fugitive Slave Act and facilitate sending escaping slaves back into bondage.²⁷ Thus while the claim has been made that “[t]hroughout history [habeas corpus] has been the last bulwark against injustices born of racial prejudice and intolerance,”²⁸ the truth is that the first substantial use of federal habeas for state prisoners was for precisely the opposite purpose.

In 1867, Congress authorized federal habeas for “any person . . . restrained of his or her liberty” in violation of the Constitution.²⁹ This Act was passed primarily to enforce the recently ratified Thirteenth Amendment and other federal anti-slavery laws.³⁰ It did not alter the well-established *Watkins* rule that claims of error by a court of competent jurisdiction could not be reviewed by habeas corpus.³¹ For state prisoners wrongly convicted, another section of the same act created a remedy by writ of error to the Supreme Court.³² The operative language

25. See, e.g., *In re Callicot*, 4 F. Cas. 1075, 1076-1077 (CC EDNY 1870); *Ex parte Gibson*, 31 Cal. 620, 628 (1867).

26. Act of Mar. 2, 1833, § 7, 4 Stat. 632, 634-635.

27. See *Ex parte Jenkins*, 13 Fed. Cas. 445 (C. C. E. D. Pa. 1853); *Ex parte Sifford*, 22 Fed. Cas. 105, 106 (S. D. Ohio 1857); W. Duker, *A Constitutional History of Habeas Corpus* 188 (1980).

28. Emergency Committee Statement, *supra* note 7, at 2.

29. Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385.

30. Mayer, *The Habeas Corpus Act of 1867: The Supreme Court as Legal Historian*, 33 U. Chi. L. Rev. 31, 33-35 (1965).

31. *Ex parte Royall*, 117 U. S. 241, 248 (1886); Duker, *supra* note 27, at 243.

32. 14 Stat., at 386-387.

of the habeas corpus act remains substantially the same to the present day.³³ Congress has never abrogated the *Watkins* rule. That change was made by the courts.

In a 1963 law review article, Professor Paul Bator of Harvard traced the expansion of habeas corpus from a limited review of jurisdiction at the turn of the century to a general review of all constitutional issues by the 1940's.³⁴ At least as late as 1944, however, re-review of questions already litigated in state court was the exception and not the rule.³⁵ That rule was changed without any real explanation in the 1953 case of *Brown v. Allen*.³⁶ Since then, with limited exceptions, the federal courts have reconsidered all federal constitutional questions, without regard to the fact that the highest court of the state may have already given full and fair consideration to that question and reached a decision well within the mainstream of American jurisprudence.

De novo review of completed litigation is a drastic measure. In a case of racial discrimination from the South in 1953, it is not difficult to see why it was considered necessary. Drastic measures, however, should be limited in duration to the circumstances that made them necessary. Gasoline rationing, for

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33. 28 U. S. C. § 2241(c)(3). The other subdivisions are also codifications of the historical acts. Subdivisions (1), for federal prisoners, and (5), to bring witnesses in to testify, are from the original Judiciary Act of 1789. Subdivision (2), to protect persons carrying out federal policy, is from the 1833 Act, and subdivision (4), to prevent state interference with foreign policy, is from the 1840 Act.
34. Bator, *Finality in the Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 Harv. L. Rev. 441, 482-484, 495-496 (1963). Bator's article was criticized in an article by a then-recent law school graduate, but that article is flawed by glaring errors of elementary constitutional law. See Peller, *supra* note 22, at 615, n. 194 (unaware that Bill of Rights was fully applicable to territories). Duker's rendition of the history, *supra* note 27, at 241-257, is substantially consistent with Bator's.
35. *Ex parte Hawk*, 321 U. S. 114, 118 (1944); see also *Schechtman v. Foster*, 172 F. 2d 339, 341 (CA2 1949) (Hand, J.).
36. 344 U. S. 443; cf. Mayer, *supra* note 30, 33 U. Chi. L. Rev., at 56, n. 98.

example, is a drastic measure which was necessary during periods of extreme shortage, but no one would even consider instituting or continuing rationing today. Past necessity says nothing about present necessity. The continuation today of a drastic measure from the days when overt resistance civil rights was commonplace is a curious phenomenon, to say the least. Has nothing changed since 1953?

If duplication of litigation is to be justified, it must be justified on contemporary considerations of policy. The history and heritage of the Great Writ provide no support for it.³⁷

III. Purposes of Collateral Review.

There have been a number of proposals to restrict the availability of collateral review and some vehement assertions that we should leave it untouched. Each proposal for change and each opposition to change is based on assumptions about the purposes of habeas corpus.

A. Forcing courts to toe the mark.

The traditional view of the principal purpose of habeas corpus as a collateral attack was summarized by Justice Harlan in *Mackey v. United States*³⁸: “The primary justification given by the Court for extending the scope of habeas to all alleged constitutional errors is that it provides a quasi-appellate review function, forcing trial and appellate courts . . . to toe the constitutional mark.”

As applied to federal habeas for state convicts, this notion rests on the idea that state court judges will reverse convictions they would otherwise affirm simply to avoid having them set aside later on federal habeas corpus. There are a number of problems with this idea. First, it assumes state judges lack integrity, a point discussed further below. Second, a mark

37. See Oaks, *supra* note 10, 64 Mich. L. Rev., at 472; Bator, *supra* note 34, 76 Harv. L. Rev., at 501; Mayer, *supra* note 30, 33 U. Chi. L. Rev., at 58.

38. 401 U. S. 667, 687 (1971) (concurring and dissenting).

cannot be “toed” unless it is visible. There is no dispute in state courts today that the Constitution must be obeyed or that the precedents of the United States Supreme Court must be followed.³⁹ The problem lies in figuring out what these precedents actually require in a given case. While the Bill of Rights itself consists of only a few, relatively simple rules, the vast, complex body of caselaw that has been grafted onto it⁴⁰ necessarily produces honest, good-faith disagreements over what the law requires.

In state courts today, it would be an extremely rare occurrence for a court to simply refuse to follow a clear precedent. Congress could rely on the Supreme Court’s certiorari jurisdiction to deal with such cases, or it could, with carefully limited wording, authorize federal habeas relief when the state courts are wrong beyond question. Assuming for the sake of argument that there is a continuing need to insure that some state courts “toe the mark,” *de novo* review of every borderline question of law is an intrusion far beyond the need.

B. Correcting fundamentally unjust incarcerations.

The oldest and most important purpose of habeas corpus is to set free those prisoners who have done nothing illegal. The celebrated *Bushell’s Case*,⁴¹ for example, freed a juror held in contempt for bringing in the “wrong” verdict. The concept of jurisdiction was first expanded beyond its usual meaning to cover cases where the defendant had been convicted of violating an unconstitutional statute and was therefore actually innocent of any crime.⁴² The early habeas cases on procedural claims

39. Cf. *Estes v. Texas*, 381 U. S. 532, 556 (1965) (Warren, C. J., concurring) (state court judge declared trial was being conducted under Texas Constitution and not United States Constitution).

40. See Friendly, note 6, 38 U. Chi. L. Rev., at 156.

41. 124 Eng. Rep. 1006 (1670).

42. See *Ex parte Siebold*, 100 U. S. 371, 376-377 (1880).

involved circumstances raising grave doubt whether the defendants were actually guilty.⁴³

Opponents of reform like to emphasize the role of habeas corpus in saving the innocent from imprisonment or execution,⁴⁴ but the reality is that habeas is a very poor fit to that function. Until fairly recently, the actual guilt or innocence of the petitioner was virtually irrelevant to habeas corpus cases,⁴⁵ and even today it serves only as a “safety valve” to open the door to procedural claims which are otherwise defaulted.⁴⁶

If the question is who committed the act (as opposed to mental defenses), the reality is that relatively few criminal cases and only a tiny handful of capital cases involve substantial questions of innocence. In a study by the Criminal Justice Legal Foundation of 100 capital habeas cases from the Eleventh Circuit, only one case involved a significant claim of mistaken identity.⁴⁷ The Supreme Court recently confirmed that independent research shows that cases of federal habeas petitioners who can make a showing of actual innocence by *any* standard are very rare.⁴⁸ The few cases of innocent people being sentenced

43. See, e.g., *Moore v. Dempsey*, 261 U. S. 86, 91 (1923) (mob-dominated trial).

44. Emergency Committee Statement, *supra* note 7, at 2.

45. See *Townsend v. Sain*, 372 U. S. 293, 317 (1963) (Warren, C. J.) (new evidence of innocence alone is not a ground for federal habeas relief).

46. *Harris v. Reed*, 489 U. S. 255, 271 (1989) (O'Connor, J., concurring). In *Herrera v. Collins*, 122 L. Ed. 2d 203, 227, 113 S. Ct. 853, 859 (1993), the Supreme Court indicated that a sufficiently compelling case of innocence might be a ground, by itself, for habeas relief in a capital case. That question has not arisen to be squarely answered for the simple reason that the state courts and clemency authorities have granted relief when innocence was clearly shown. See *infra* note 49 and accompanying text.

47. K. Scheidegger, *Rethinking Habeas Corpus* 38-39 (1989) reprinted in *Habeas Corpus Issues*, at 253-254.

48. *Schlup v. Delo*, No. 93-7901 (U. S., Jan. 23, 1995) slip op., at 23, n. 36.

to death have generally been resolved in state proceedings, not on federal habeas corpus.

In the case of *Schlup v. Delo*, Centurion Ministries filed an *amicus* brief along with five former death row inmates who had since been freed. Yet far from showing a compelling need for federal habeas for the wrongly convicted, the stories of these five men show exactly the opposite. Four of the five had obtained their relief through direct appeal, state collateral review, executive clemency, or some combination of these remedies.⁴⁹

Only one case, that of Joseph Brown, was resolved on federal habeas corpus.⁵⁰ After the grant of federal habeas relief, the prosecution decided that it would not be able to retry this then 13-year-old case.⁵¹ That hardly constitutes a finding that Brown was actually innocent, for practicing attorneys are well aware that stale cases are harder to try than fresh cases, and this is especially so for a party that must surmount the formidable barrier of proof beyond a reasonable doubt. As Justice O'Connor has noted, "Retrial becomes very difficult, and sometimes impossible, when many years have passed since the original trial. Witnesses and evidence become difficult to relocate; memories fade."⁵²

The Arizona case of Mitchell Blazak illustrates the point. Blazak was convicted of two counts of first-degree murder in 1974. Nineteen years later, in a splintered decision, the Ninth Circuit upheld a grant of habeas corpus. In preparing the case for retrial, however, the prosecution discovered that critical

49. See *Adams v. Texas*, 448 U. S. 38 (1980); *Ex parte Adams*, 768 S. W. 2d 281, 293-294 (Tex. Crim. App. 1989); *Bloodsworth v. State*, 512 A. 2d 1056 (Md. 1986); *Bloodsworth v. State*, 543 A. 2d 382, 384 (Md. App. 1988); J. Valentine, Jailed for Murder, Freed by DNA, *The Washington Post*, June 29, 1993, p. A1, col. 1; *Ex parte Brandley*, 781 S. W. 2d 886 (Tex. Crim. App. 1989); *McMillan v. State*, 616 So. 2d 933, 949 (Ala. Crim. App. 1993).

50. *Brown v. Wainwright*, 785 F. 2d 1457, 1458 (CA11 1986).

51. Carolyn Snurkowski, Director, Criminal Appeals, Office of Florida Attorney General, personal communication (Jan. 17, 1995).

52. S. O'Connor, Local Control of Crime (1991), in *Habeas Corpus Issues*, *supra* note 17, at 197.

evidence had been lost, possibly by the federal habeas court itself. They had to settle for a no-contest plea to second-degree murder, and Blazak was released six months later. Far from preventing a miscarriage of justice, federal habeas corpus has put a double murderer back on the street.⁵³

Opponents of reform assume that a different result on retrial means that an injustice has been prevented.⁵⁴ That assumption is unjustified. The kinds of marginal errors that typically result in disputed questions of law today are rarely more harmful to the search for truth than is the passage of time.

Before leaving the area of actual innocence, it is important to correct a misstatement previously laid before Congress by the “Emergency Committee to Save Habeas Corpus”:

“In the *Coleman v. Thompson* case in 1991, a death row inmate with strong new evidence of actual innocence—evidence so powerful and disturbing that Time magazine featured it as a cover story—was denied an opportunity to even have his new evidence *heard* in federal court, because his lawyer had unwittingly missed a filing deadline by three days. . . . Mr. Coleman was executed.

“Such rulings devalue the protections of the Bill of Rights. No person should pay with his life for the neglect or ignorance of his lawyer.”⁵⁵

There is no need to mince words here. This is a patent falsehood, as even the most cursory review of the *Coleman* case would have revealed.⁵⁶

53. Letter from R. Ford, Arizona Assistant Attorney General, to CJLF, January 10, 1995, copy attached as Appendix B.

54. Curtin Statement, *supra* note 17, Habeas Corpus Issues, at 471.

55. Emergency Committee Statement, *supra* note 7, at 3-4.

56. I do not accuse the distinguished gentlemen whose names appear on the Statement of deliberately lying to Congress. The Statement appears to have been ghost-written, and they are probably among the deceived rather than the deceivers. The former Attorneys General have, however, been negligent in lending their names to a statement blasting a Supreme Court opinion which they obviously have not read.

Coleman's case went to the Supreme Court twice on federal habeas corpus. In the 1991 case, to which the statement refers, the high court expressly acknowledged its prior holding that a strong showing of actual innocence would exempt the prisoner from the procedural default rule, but noted that Coleman had not made such a claim in the proceeding then before it.⁵⁷

The claim of actual innocence came later. The "Emergency Committee's" statement that the evidence was not heard in federal court is false. Coleman filed a second habeas petition seeking to invoke the "actual innocence" exception. Federal District Judge Glen M. Williams *did* consider this evidence and wrote an extensive, published opinion reviewing that evidence.⁵⁸ Judge Williams concluded that Coleman had not even made a "colorable showing" of actual innocence.⁵⁹ He found particularly compelling the result of a DNA PCR test ordered by the state court at Coleman's request and done by the expert chosen by Coleman's lawyers. That test "significantly bolster[ed] the jury's finding of guilt."⁶⁰ The Court of Appeals affirmed, and the Supreme Court denied a stay of execution, premised squarely on the district judge's finding that Coleman did not even have a colorable claim of innocence, much less a "powerful" one as the "Emergency Committee" claims.⁶¹

While it is true that Time magazine featured the case as a cover story, that choice says more about Time than it does about Coleman. While extensively reviewing the evidence claimed by Coleman to "prove" his innocence, Time simply omitted any mention of the inconvenient DNA evidence.⁶²

57. *Coleman v. Thompson*, 501 U. S. 722, 750, 757 (1991); see also Brief for Petitioner in No. 89-7662, pp. 7-8 (claiming only "cause" exception and "deliberate bypass" rule).

58. *Coleman v. Thompson*, 798 F. Supp. 1209 (D. C. W. D. Va. 1992).

59. *Id.*, at 1217.

60. *Id.*, at 1213-1214, 1217.

61. 966 F. 2d 1441 (CA4 1992) (Table); 119 L. Ed. 2d 1, 112 S. Ct. 1845 (1992).

62. Smolowe, Must This Man Die?, Time 40 (May 18, 1992).

In short, Coleman was not executed because of his lawyer's error. Coleman was executed because he raped and murdered Wanda Fay McCoy.

The bottom line on innocence is that *de novo* habeas corpus relitigation of *all* federal constitutional questions is a meat-axe approach to a problem that requires a scalpel. If actual innocence is the problem, an answer crafted specifically for that problem can and should be devised.

C. Giving every defendant a federal forum.

One reason often asserted against limitation of habeas corpus is the contention that every defendant should have the opportunity to litigate his federal questions in a federal forum.⁶³ This position is founded on a deep distrust of state courts. It asserts, in essence, that state courts are incompetent to adjudicate federal questions.

Our judicial system has not historically been structured that way. It has been understood from the very beginning that state courts could pass on federal questions.⁶⁴ Indeed, the Constitution itself expressly directs them to do so.⁶⁵ If a state court decides a question of civil rights law in the course of deciding a civil case, for example, that decision is binding on the parties and cannot be relitigated in federal court.⁶⁶ The desire for a federal forum, by itself, is similarly insufficient to justify collateral attack on final judgments in criminal cases. A federal forum may be necessary where state remedies are grossly inadequate, as they may have been decades ago.⁶⁷ The contention that federal court resolution of every federal constitutional issue

63. See, e.g., Reitz, *Federal Habeas Corpus: Postconviction Remedy for State Prisoners*, 108 U. Pa. L. Rev. 461, 464 (1960).

64. *The Federalist* No. 82 (A. Hamilton).

65. U. S. Const., Art. VI, cl. 2.

66. *Allen v. McCurry*, 449 U. S. 90, 103-104 (1980) (state decision is res judicata in § 1983 suit); Reitz, *Federal Habeas Corpus: Impact of an Abortive State Proceeding*, 74 Harv. L. Rev. 1315, 1330 (1961).

67. See Reitz, *supra* note 63, 108 U. Pa. L. Rev., at 464.

in every criminal case in every state is essential today, however, is unsupportable.⁶⁸

1. Elected judges.

The need for a federal forum is sometimes premised on the fact that most state judges do not have life tenure. Congress has already rejected that argument. As part of “home rule” for the District of Columbia, Congress established a local court system without life tenure.⁶⁹ This court system has the authority to finally adjudicate federal constitutional questions, subject only to review on certiorari by the United States Supreme Court; habeas review in the federal district court is prohibited, unless the local remedy proves “inadequate or ineffective.”⁷⁰ This limitation is constitutional.⁷¹

In the state judiciaries, a few have life tenure, some have retention by a means other than election, a plurality have “retention elections,” in which the justice stands for a yes/no vote without a named opponent on the ballot, some have nonpartisan elections, with a named opponent but no party label, and some have partisan elections. Of the 50 states, the number with each type breaks down as follows:⁷²

Life tenure	3
Non-elective retention	9
Retention election	19
Nonpartisan election	12
Partisan election	7

68. See *infra* pp. 18-21.

69. D. C. Code § 11-1502.

70. D. C. Code § 23-110 (g).

71. *Swain v. Pressley*, 430 U. S. 372, 381 (1977).

72. U. S. Bureau of Justice Statistics, *Sourcebook of Criminal Justice Statistics 1993*, p. 82 (1994). Tennessee has been reassigned from the “partisan” group to the “retention” group due to a change made after the Sourcebook’s data were collected. See Tenn. Code Ann. § 17-4-115(b).

Only 19 states require appellate justices to face named opponents on the ballot. Nineteen others have a system which requires an enormous groundswell to unseat a sitting justice. In California, for example, such a movement has only succeeded once in 60 years, after a court majority personally opposed to the death penalty had repeatedly abused its power, applying “a standard of review so strict . . . that it virtually guarantee[d] that the law [would] not be enforced.”⁷³ The impact of elections on the state appellate judiciary is vastly overestimated.

The essence of the “federal forum” argument is a picture of justices who face reelection as abandoning the Constitution and fleeing in terror from a horde of club-wielding, Neanderthal voters. Justice Brennan’s dissent in *Butler v. McKellar*⁷⁴ is typical of the bottomless disdain for state judges that underlies this argument:

“Because state courts need not *fear* federal habeas review so long as they avoid clearly unreasonable constructions of existing doctrine, they will have *no incentive* to reflect carefully about existing legal principles and thereby to develop novel and more sophisticated understandings of constitutional guarantees.”⁷⁵

State judges have exactly the same incentives as federal judges: respect for the Constitution, fidelity to their oaths of office,⁷⁶ and dedication to the rule of law and to the rights of people. If Justice Brennan’s view of state judges were correct, there would never be any cases of state courts expanding protections for defendants on independent state grounds, nor would there be any cases of state courts overestimating the extent of federal protections and being reversed by the U. S. Supreme Court. Yet both types of cases occur regularly, even in the much-maligned South. Here are just a few of many examples:

73. P. Johnson, *The Court on Trial* 10 (1985).

74. 494 U. S. 407 (1990).

75. *Id.*, at 430, n. 12 (emphasis added).

76. See U. S. Const., Art VI, cl. 3 (all state judges swear to support Constitution).

- In *California v. Ramos*,⁷⁷ the Supreme Court held that a state may constitutionally inform the jury of the governor's commutation powers, reversing a state court decision in favor of the defendant. In *State v. Jones*,⁷⁸ the Louisiana Supreme Court declined to follow *Ramos* and struck down a similar state statute on state constitutional grounds, although there was no relevant difference in the language of the state constitution.
- In *State v. Middlebrooks*,⁷⁹ the Tennessee Supreme Court held that the circumstance of killing in the course of a felony could not be both a part of the definition of murder and an aggravating circumstance making the case eligible for capital punishment. That position had previously been accepted by only one federal circuit, which had already reversed itself and rejected that position before the *Middlebrooks* decision.⁸⁰ When the U. S. Supreme Court granted certiorari in *Middlebrooks* and seemed poised to reverse, the Tennessee Supreme Court declared that its decision rested on independent state grounds.⁸¹
- In *Arizona v. Youngblood*,⁸² the U. S. Supreme Court held that accidental destruction of evidence of no clear exculpatory value does not violate the Due Process Clause. The Alabama Court of Appeals declined to follow *Youngblood* and reversed a conviction.

77. 463 U. S. 992, 1013-1014 (1983).

78. 639 So. 2d 1144, 1152-1153 (La. 1994).

79. 840 S. W. 2d 317 (Tenn. 1992), cert. dismissed 126 L. Ed. 2d 555, 114 S. Ct. 651 (1993).

80. *Collins v. Lockhart*, 754 F. 2d 258 (CA8 1985), overruled in *Perry v. Lockhart*, 871 F. 2d 1384, 1393 (CA8 1989).

81. *State v. Howell*, 868 S. W. 2d 238, 259, n. 7 (1993).

82. 488 U. S. 51, 57-58 (1988).

tion on state constitutional grounds in *Gurley v. State*.⁸³

- In *Kastigar v. United States*,⁸⁴ the U. S. Supreme Court held that a witness who claims the privilege against self-incrimination may be compelled to testify with a grant of “use” immunity. In *State v. Thrift*,⁸⁵ the South Carolina Supreme Court declined to follow *Kastigar*, and required complete “transactional” immunity.

In each of these cases, there was no significant possibility that a decision against the defendant would have been overturned on habeas corpus. If the view of state courts typified by Justice Brennan’s *Butler* dissent were correct, all of them would have been decided the other way. That view, therefore, is fatally flawed.

2. The forty percent figure.

An argument commonly made to justify *de novo* federal review of state capital cases is based on the now-outdated statistic that 40% of habeas petitions had resulted in some grant of relief.⁸⁶ There is less to this statistic than meets the eye.

If one flips a coin twice, the second flip will “reverse” the first flip 50% of the time. Deciding capital cases in the 1970’s and 1980’s was not quite a coin toss, but it was a very uncertain process, due to the ever-changing state of the law:

- Texas, until fairly recently, had a system for sentencing capital murderers by asking the jury three statutory questions and basing the sentence on their answers. Is that system constitutional? The Supreme Court upheld it in 1976,⁸⁷ struck it down for a seem-

83. 639 So. 2d 557 (Ala. Crim. App. 1993).

84. 406 U. S. 441 (1972).

85. 440 S. E. 2d 341, 350-351 (S. C. 1993).

86. Emergency Committee Statement, *supra* note 7, at 3.

87. *Jurek v. Texas*, 428 U. S. 262.

ingly broad class of cases in 1989,⁸⁸ and then sharply narrowed its disapproval in 1993.⁸⁹

- Florida originally enacted a sentencing system in which the jury was given a list of mitigating factors without a “catchall” instruction to include other factors not on the list. The Supreme Court approved this system in *Proffitt v. Florida*,⁹⁰ and then struck it down in *Hitchcock v. Dugger*.⁹¹
- After implying that mandatory sentencing was required in *Furman v. Georgia*⁹² and then striking it down in *Woodson v. North Carolina*,⁹³ the Supreme Court expressly noted a possible exception for murders committed by life prisoners, who are otherwise effectively immune from criminal punishment.⁹⁴ The Court took another ten years to finally answer the dangling question in the negative.⁹⁵

Thus, when state court judges fail to anticipate the next hairpin turn in the Supreme Court’s “annually improvised” jurisprudence of capital sentencing,⁹⁶ it is not from a lack of diligence or integrity, but merely from a lack of clairvoyance.

88. *Penry v. Lynaugh*, 492 U. S. 302.

89. *Johnson v. Texas*, 125 L. Ed. 2d 290, 113 S. Ct. 2658.

90. 428 U. S. 242 (1976).

91. 481 U. S. 393 (1987); *Hitchcock* itself was a unanimous opinion, but its result was dictated by earlier decisions which had effectively overruled *Proffitt* by misrepresenting the earlier opinion. See *Lockett v. Ohio*, 438 U. S. 586, 623-624 (1978) (White, J., dissenting in part).

92. 408 U. S. 238 (1972).

93. 428 U. S. 280 (1976).

94. *Roberts v. Louisiana*, 431 U. S. 633, 637, n. 5 (1977); *Lockett v. Ohio*, 438 U. S. 586, 604, n. 11 (1978) (plurality).

95. *Sumner v. Shuman*, 483 U. S. 66 (1987).

96. *Morgan v. Illinois*, 119 L. Ed. 2d 492, 517, 112 S. Ct. 2222, 2242 (1992) (Scalia, J., dissenting).

Decisions made from an honest, thorough examination of the Supreme Court's precedents at any point in time very often turned out to be "wrong" years later. Where that "error" ran in the defendant's favor, it stood uncorrected.⁹⁷ Where it ran against the defendant, it added to the 40% statistic. The judgment was overturned even though the state courts diligently obeyed every rule in effect at the time of the decision.

It stands to reason that if rapid change in the law was the primary reason for the high grant rate, then a settling of the law would dramatically lower the grant rate. That is, in fact, exactly what has happened. Appendix A describes earlier studies of the grant rate and a new study of cases decided in a recent 15-month period. The rate has dropped dramatically over time. Habeas relief is granted as to the guilt determination in only 5% of cases, the same as noncapital cases, and only 15% overall. Outside the often-reversed Ninth Circuit, moreover, the overall grant rate is only 8%, and the guilt phase grant rate is only 4%.

The 40% figure, which has been the cornerstone of the anti-reform argument to date, is no longer valid.

D. Guaranteeing procedural perfection.

A fourth possible purpose of collateral review is to guarantee that no one is punished without a perfect trial. "But [the Supreme] Court never has defined the scope of the writ simply by reference to a perceived need to assure that an individual accused of crime is afforded a trial free of constitutional error."⁹⁸

97. For example, California's death penalty law plainly authorizes capital punishment for the triggerman in felony murder cases without an express jury finding of intent to kill. Yet the California Supreme Court read such a finding requirement into the statute in *Carlos v. Superior Court*, 35 Cal. 3d 131, 672 P. 2d 862 (1983), on the false premise it was constitutionally required, and overruled that holding upon finding there was no such requirement. *People v. Anderson*, 43 Cal. 3d 1104, 1139-1141, 742 P. 2d 1306, 1326-1327 (1987). In the interim, 13 cases were reversed for the wholly fictitious "*Carlos* error."

98. *Kuhlmann v. Wilson*, 477 U. S. 436, 447 (1986) (plurality).

The “perfect trial” view obviously cannot be accepted in its extreme form, for otherwise every case would be infinitely relitigable. If convictions are ever to be final, we must at some point accept the proposition that some claims will no longer be considered. The unanimous decision of the Supreme Court in *United States v. Timmreck*⁹⁹ establishes this principle unequivocally. In that case, a federal prisoner sought collateral review for what he claimed was an error in applying the Federal Rules of Criminal Procedure. The Court held that, regardless of the merits of his claim, it would not be considered on collateral review. Claims based on rules and statutes will only be so considered when they are fundamental to a fair trial.¹⁰⁰ The question, then, is not *whether* to accept the possibility of imperfection, but only *where* to draw the line.

Prior to the 1940’s, the line was drawn between claims going to the jurisdiction of the convicting court, which could be asserted on habeas corpus, and those going only to the correctness of the judgment, which could not. The Supreme Court had made quite clear in numerous opinions that the constitutional nature of the claim made no difference.¹⁰¹ The scope of what was considered “jurisdictional” expanded in the early part of this century, until the Court dropped the pretense and, without explanation, began routinely applying the writ to all constitutional claims.¹⁰²

Looking at the claims involved in those early cases, we can see that they all involved fundamental claims, in the sense that the violations in question are of the type which are highly likely to result in the conviction of innocent people. The cases

99. 441 U. S. 780 (1979).

100. *Id.*, at 783-784; see also *Reed v. Farley*, 129 L. Ed. 2d 277, 288, 114 S. Ct. 2291, 2297 (1994).

101. *Ex parte Watkins*, 32 U. S. 568, 573-574 (1833) (Story, J.); *Matter of Moran*, 203 U. S. 96, 105 (1906) (Holmes, J.); *Goto v. Lane*, 265 U. S. 393, 402 (1924) (“If the questions presented involved the application of constitutional principles, that alone did not alter the rule”).

102. See *Walker v. Johnson*, 312 U. S. 275 (1941) (no mention of jurisdiction).

involve mob domination of trials,¹⁰³ denial of counsel to indigent defendants,¹⁰⁴ and racial discrimination in the selection of juries.¹⁰⁵ Because very few federal constitutional protections applied to state trials at that time,¹⁰⁶ it was generally true that all federal constitutional issues in a state criminal case were fundamental issues, with a strong connection to the accurate determination of the guilt or innocence of the accused.

All that changed in the 1960's and 1970's. The Supreme Court created nonfundamental constitutional rules of criminal procedure at a rapid clip. The opening salvo was the exclusionary rule of *Mapp v. Ohio*,¹⁰⁷ which created a rule which actually served to inhibit the search for truth, rather than enhance it. The barrage continued with *Miranda v. Arizona*,¹⁰⁸ which took an FBI practice of giving warnings and made it a constitutional mandate, and *Griffin v. California*,¹⁰⁹ which forbade any mention of the obvious fact that the defendant had not testified. The Supreme Court admitted that the states' prior practice of following different rules had not resulted in convictions of the innocent when it made the new rules nonretroactive.¹¹⁰

The greatest expansion of all, though, came in the capital sentencing cases. In *Gregg v. Georgia*¹¹¹ and the cases which followed, the Supreme Court read into the Eighth Amendment a detailed code of sentencing procedure which has no bearing

103. *Moore v. Dempsey*, 261 U. S. 86, 87-90 (1923).

104. *Johnson v. Zerbst*, 304 U. S. 458, 462-463 (1938).

105. *Brown v. Allen*, 344 U. S. 443, 467 (1953).

106. See *Palko v. Connecticut*, 302 U. S. 319, 322-324 (1937), overruled in *Benton v. Maryland*, 395 U. S. 784, 794 (1969).

107. 367 U. S. 643 (1961).

108. 384 U. S. 436 (1966).

109. 380 U. S. 609, 615 (1965).

110. *Linkletter v. Walker*, 381 U. S. 618, 619-620 (1965) (*Mapp*); *Johnson v. New Jersey*, 384 U. S. 719, 721 (1966) (*Miranda*); *Tehan v. United States*, 382 U. S. 406, 419 (1966) (*Griffin*).

111. 428 U. S. 153 (1976).

whatsoever on the question of guilt or innocence of the offense. While the early cases in this series dealt with the global question of whether the state sentencing system as a whole imposed the sentence of death in a rational way, rather than an arbitrary, capricious way,¹¹² the later cases have undertaken a detailed examination of the procedure in the sentencing of individual murderers.¹¹³

The reason given for such extensive federal intrusion into state procedure is that “death is different.”¹¹⁴ The fallacy here is exposed by comparing two hypothetical prisoners. The first has been sentenced to life in prison for a crime he may not have committed. The second has been sentenced to death for a crime he certainly committed and which is punishable by death, but for which the death penalty may arguably not be “appropriate.” Which case carries the potential for greater injustice?

All but the most extreme opponents of capital punishment would have to agree that imprisoning an innocent man for life is a greater injustice than executing *any* person who is actually guilty of willful, deliberate, premeditated murder. Yet the “death is different” brigade would have us devote *more* resources to relitigating the penalty phase of capital cases than we devote to reexamining the guilt phase of noncapital cases. The American Bar Association, for example, has contended that any claim that a given procedure “lessens the integrity of sentencing determinations,” apparently to *any* degree, should qualify for an exception to the usual limits on habeas corpus.¹¹⁵

Once a person has been found guilty beyond a reasonable doubt, the choice of sentence within the allowable range of sentences for the offense is necessarily a “judgment call.” Reasonable people will always differ as to what sentence is appropriate. In one survey, 11% of the American people

112. See, e.g., *id.*, at 196-206 (lead opinion).

113. See, e.g., *Sochor v. Florida*, 119 L. Ed. 2d 326, 112 S. Ct. 2114 (1992).

114. See, e.g., *Gregg, supra*, 428 U. S., at 188 (lead opinion).

115. Brief for American Bar Association as *Amicus Curiae* in *Sawyer v. Smith*, No. 89-5809 (U. S.) p. 10.

opposed capital punishment in all murder cases, while 29% favored it in all murder cases.¹¹⁶ Sentence choice within the allowable range can therefore *never* result in a miscarriage of justice of the magnitude of the lengthy imprisonment of an innocent person.

The various rules created by the Supreme Court may very well be good rules as matters of policy. It does not follow, however, that an error on the fringes of one of these rules is such a grave injustice that borderline questions must be reconsidered from scratch by four or more different courts.¹¹⁷ Questions arising from the Supreme Court's constitutional decisions are not automatically more important than those arising from rules or statutes. The admissibility of a defendant's prior criminal record, for example, may be so important that the defense lawyer's entire strategy is based upon it,¹¹⁸ yet this question is almost entirely one of statutory law, with little, if any, constitutional basis.¹¹⁹

In short, the assumption that constitutional issues are necessarily more important than statutory issues is false. If trial, appeal, and state habeas are sufficient to reduce the chance of error on these other issues to a level we consider acceptable, there is no apparent reason why these same remedies are necessarily inadequate to resolve federal constitutional questions.

116. U. S. Bureau of Justice Statistics, *Sourcebook of Criminal Statistics—1988*, p. 230 (1989). This is a 1986 poll. Regrettably, more recent polls have failed to offer respondents the option of favoring the death penalty in some cases but not others, instead asking for an all-or-nothing response. See U. S. Bureau of Justice Statistics, *Sourcebook of Criminal Statistics—1993*, p. 200 (1994). Even so, the stability of support for the death penalty in the intervening years means that the numbers cited in the text are still largely correct.

117. At present the state trial court, state appellate court, federal district court, and federal court of appeals all review questions of federal law *de novo*, with no deference to the decision of the prior court. There may be additional reviews beyond that.

118. E. Imwinkelried, *Uncharged Misconduct Evidence* § 1.02, p. 1-4 (1994).

119. See *Estelle v. McGuire*, 116 L. Ed. 2d 385, 396, 112 S. Ct. 475, 480 (1991).

E. Illegitimate functions of habeas review.

The reasons most often stated publicly for *de novo* review on habeas corpus are not necessarily the most important reasons from the defense perspective. The defense gains other benefits from federal habeas corpus which are patently illegitimate.

1. Delay.

So long as habeas litigation continues, the execution of the capital sentence must be stayed. Each day's delay is an incremental victory for the opponents of capital punishment and an incremental loss in the deterrent, retributive, and incapacitative value of capital punishment. Relitigation of issues already fully and fairly litigated once add greatly to the delay.

The Powell Committee found that federal habeas corpus made up 40% of the total delay from sentence to execution in a sample of 50 cases.¹²⁰ This figure, however, is derived from cases completed to execution and thus undersamples the most extremely prolonged cases, most of which had not been completed. An example of the latter is the case of Jimmie Wayne Jeffers from Arizona.

Jeffers murdered Penelope Cheney in May 1976.¹²¹ Fourteen years later, after exhaustive review in both the state and federal courts, the United States Supreme Court resolved the principal issue against Jeffers. That was four and a half years ago as of this writing, and the sentence has still not been carried out. The Ninth Circuit has taken all of that time to resolve, against Jeffers, the issues that it had not deemed important enough to resolve in its first opinion.¹²² Mere decision of the remaining questions of law after remand has taken longer than the *entire* review process from judgment to execution ought to

120. L. Powell et al., Report of the Ad Hoc Committee on Federal Habeas Corpus in Capital Cases 8 (1989).

121. *Lewis v. Jeffers*, 497 U. S. 764, 766 (1990).

122. See *Jeffers v. Ricketts*, 832 F. 2d 476 (CA9 1987); *Jeffers v. Lewis*, 38 F. 3d 411 (CA9 1994) (on remand).

take. And all this has happened in a case where there is no doubt whatever who committed the murder. This is intolerable.

2. Expense.

A common argument against capital punishment is that it simply costs too much. Habeas corpus is an important component of this cost. Every murder case in which the prosecution seeks the maximum penalty, and hence has nothing to plea bargain with, requires a trial and an appeal. The marginal cost of having capital punishment, therefore, consists to a large extent of the penalty phase and the additional review procedures. Capital habeas cases are fought longer and harder than noncapital cases, driving up the cost of capital punishment. Thus some opponents of capital punishment argue that the cost of *de novo* review on federal habeas is a strong reason to abolish capital punishment.¹²³ Since the people will not stand for that, this becomes a strong reason to abolish *de novo* review on federal habeas.

3. "Heads I win; tails we take it over."

Finally, there is the judge-shopping effect. As noted earlier, state courts often accept claims that would be rejected in federal court. Conversely, federal courts sometimes accept claims already rejected in state court. The defendant can effectively "appeal" a state ruling to federal court, but the prosecution cannot. The result is to heavily bias the decision in favor of the defense.

Suppose, for example, there is a question of whether a fully voluntary confession was taken in complete accordance with the *Miranda* rule, the question is close enough that half of all judges would affirm and half would reverse, and the state and federal courts in question are both middle-of-the-road ideologically. The defendant has a 50-50 chance of winning in state court. If he does, and the U. S. Supreme Court denies certiorari, that is the end of the case. On the other hand, if he loses in state court he has another 50-50 chance of winning in federal

123. See, e.g., Blakely, *The Cost of Killing Criminals*, 18 No. Ky. L. Rev. 61, 72-76 (1990).

court. Thus, the defendant has a 75% chance of reversal on a claim that should be only 50-50.

The criminal justice system is intentionally biased in favor of the defendant on the question of guilt. For centuries, the Anglo-American system of law has adhered to the principle that it is better for ten guilty men to go free than for one innocent to suffer,¹²⁴ and both the burden of proof and the double jeopardy rule reflect that intentional bias. But is there any reason to bias the system on the resolution of judicially created rules of recent vintage, far removed from the original meaning of the Bill of Rights, in cases where there is no genuine doubt as to the identity of the murderer? For these questions, a wrong decision for the defendant is every bit as unjust as a wrong decision for the people, if not more so. The people and the defendant ought to stand on equal ground.

IV. Court-Created Limitations on Collateral Review.

The purpose of this paper is to explore possible limitations on habeas review by Congress. A discussion of the limitations already created by the Supreme Court is useful both as the legal background against which a statute may be enacted and to illuminate where Congress ought to follow the Court and where it ought to depart from the case law.

A. Pre-Teague limitations.

Each of the limitations on habeas corpus that the Supreme Court has adopted has accommodated the enforcement and correction of injustice purposes and rejected the federal forum and perfection rationales.

In *Stone v. Powell*,¹²⁵ the Supreme Court removed from habeas corpus claims based on the exclusionary rule of the Fourth Amendment. *Stone* recognizes that the exclusionary rule

124. 4 W. Blackstone, *Commentaries on the Law of England* 352 (1st ed. 1769).

125. 428 U. S. 465 (1976).

has no relevance to actual innocence and hence habeas review of such claims does not further the injustice correction purpose.¹²⁶ *Stone* emphatically rejects the contention that a federal forum is required merely because a federal constitutional question is to be litigated.¹²⁷ It accepts the possibility of imperfection at trial. The requirement is full and fair litigation, not absolute correctness.¹²⁸ The enforcement purpose is not explicitly discussed, but presumably a state court decision which defies outright a controlling Supreme Court precedent would not constitute full and fair litigation.¹²⁹

In *Wainwright v. Sykes*,¹³⁰ the Supreme Court clarified that habeas corpus relief would not be granted when the defendant failed to timely raise his claim as required by the procedural rules of the state, unless he had good cause for the failure and made a showing of prejudice. This rule implicitly recognizes that when the trial judge's failure to rule on a question is due to defendant's own failure to raise it, there is no need for the enforcement function.¹³¹ In addition, the Court carved out an additional exception for habeas petitioners who are actually innocent in *Murray v. Carrier*,¹³² thus recognizing the importance of the correction of injustice. Under *Sykes*, imperfections not objected to are usually tolerated, and they are generally not litigated on the merits in any forum, state or federal.

The procedural default doctrine serves as one method of separating fundamental from nonfundamental claims. Failure to object at trial to a fundamentally unfair procedure will not insulate that error from habeas review, since such a failure is

126. *Id.*, at 490-491, nn. 30, 31.

127. *Id.*, at 493-494, n. 35.

128. *Id.*, at 494-495.

129. See *Gamble v. Oklahoma*, 583 F. 2d 1161, 1165 (CA10 1978).

130. 433 U. S. 72 (1977).

131. See *id.*, at 91.

132. 477 U. S. 478, 496 (1986).

necessarily ineffective assistance.¹³³ Conversely, the defects in trial to which a competent lawyer does not object are necessarily less than fundamental.

B. Partially adopted proposals.

Three proposed limitations on federal habeas are worth mentioning for the light they shed on the broader problem. Professor Bator's extensive article, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*,¹³⁴ is devoted primarily to demonstrating that relitigation *de novo* on federal habeas is unjustified. He concludes with a recommendation that federal habeas courts consider actual guilt or innocence as an important, if not determinative, factor in deciding whether habeas relief ought to be granted.¹³⁵

Judge Henry Friendly spoke more directly to the same point. He proposed that "with certain exceptions, an applicant for habeas corpus must make a colorable showing of innocence . . ." before habeas relief could be granted.¹³⁶

Neither proposal has been adopted for the first federal review. For successive petitions, however, Judge Friendly's view was endorsed by a four-Justice plurality of the Supreme Court in *Kuhlmann v. Wilson*,¹³⁷ with Justice Stevens indicating that guilt or innocence should be considered in the judge's discretion,¹³⁸ along the lines of Professor Bator's proposal. *Kuhlmann* has since been superseded by *McCleskey v. Zant*, discussed below.

The partial acceptance and partial rejection of these innocence-driven proposals indicate that innocence is relevant but that there was thought to be a continuing need for the enforce-

133. See *ibid.*

134. 76 Harv. L. Rev. 441 (1963).

135. *Id.*, at 528.

136. Friendly, *supra* note 6, 38 U. Chi. L. Rev., at 150.

137. 477 U. S. 436, 454 (1986).

138. *Id.*, at 476-477.

ment function as well. A mechanism is needed to correct state court disobedience of controlling precedent, even in the case of clearly guilty defendants. It is most unlikely, however, that such disobedience would go uncorrected on the first federal petition.

A different but equally substantial reform was proposed by Justice Stevens in his dissent in *Rose v. Lundy*.¹³⁹ Justice Stevens divided constitutional claims into four categories: meritless claims, harmless errors, reversible but nonfundamental errors, and fundamental errors.¹⁴⁰ The last category is described primarily by examples.¹⁴¹ The third category includes all claims under rules which had been held nonretroactive.¹⁴² These claims, said Justice Stevens, should not be grounds for habeas relief *at all*.

Like the Friendly and Bator proposals, this one is aimed at preserving habeas for the innocent, but in a less direct manner. It excludes by category those claims of error which are unlikely to result in the conviction of an innocent person, rather than by examining guilt or innocence in the individual case.

The separation of constitutional claims into the categories suggested by Justice Stevens would reject the implicit holding of *Brown v. Allen* that constitutional claims are fundamentally different as a category from other claims. Instead, constitutional claims would be subject to inquiry as to whether the claimed violation is fundamental, similar to the inquiry presently made for nonconstitutional claims.¹⁴³ Those not meeting the test would not be grounds for collateral relief.

139. 455 U. S. 509 (1982).

140. *Id.*, at 543.

141. *Id.*, at 544, nn. 9-11.

142. *Id.*, at 543, n. 8.

143. See *Reed v. Farley*, 129 L. Ed. 2d 227, 288, 114 S. Ct. 2291, 2297 (1994).

C. Teague and Butler.

In this broader context, *Teague* can be seen as part of a larger effort to preserve the enforcement and injustice-correcting functions of habeas corpus while applying some limits to the relitigation of the reasonable decisions of the appellate courts.

Teague v. Lane,¹⁴⁴ is the culmination of the Supreme Court's long and difficult struggle with the question of how far back a new decision should reach in undoing the work of judges, lawyers, and juries who had duly obeyed the rules in effect at the time. Whenever a rule is not applied retroactively, the contention is made that the Court has sanctioned a constitutionally flawed conviction or denied someone his constitutional rights.¹⁴⁵ That would be true if one subscribed to the Blackstonian belief that the Court merely discovers pre-existing law and does not make new law.¹⁴⁶ However attractive the Blackstone approach may be in theory, though, it loses any connection with reality when applied to requirements as far removed from the text and history of the Constitution as the *Miranda* warnings, the exclusionary rule, or the detailed code of capital sentencing procedure which has been promulgated under the name of the Eighth Amendment.

Teague is premised squarely on the dual purpose of habeas corpus review: enforcement of Supreme Court precedents and correction of grave injustices. The *Teague* rule, as further explicated in *Butler v. McKellar*¹⁴⁷ and *Saffle v. Parks*,¹⁴⁸ excludes from habeas review a class of claims where the enforcement value is zero: claims based on rules announced after the date of the state decision. The corollary that new rules cannot be created on habeas corpus inhibits the lower federal

144. 489 U. S. 288 (1989). Although a plurality opinion, the rule of *Teague* was quickly accepted by a majority in *Penry v. Lynaugh*, 492 U. S. 302, 313 (1989).

145. See, e.g., *Johnson v. New Jersey*, 384 U. S. 719, 736 (1966) (Black, J., dissenting).

146. See 1 W. Blackstone, Commentaries 69-70 (1765).

147. 494 U. S. 407 (1990).

148. 494 U. S. 484 (1990).

courts from doing indirectly what they have no authority to do directly: effectively imposing their own precedents on state courts which have no legal obligation to follow them.

The two exceptions to the *Teague* rule bring back into habeas two categories of cases where the injustice-correcting function is paramount: cases of people punished for constitutionally protected conduct and people convicted under fundamentally unfair procedures raising grave doubt as to the reliability of the determination of guilt.¹⁴⁹ As applied to the retroactivity question, the latter category is largely theoretical at this point in constitutional history; the fundamental rules have all been made.¹⁵⁰

D. *McCleskey v. Zant*.

Whatever argument there may be for an enforcement function on the first round of federal habeas corpus vanishes on the second round. State courts are not going to alter their decisions based on the possibility of their judgments being affirmed on the first round but set aside on the second.

Under the rule of *McCleskey v. Zant*,¹⁵¹ a second round of federal review is precluded unless the defendant shows either “cause and prejudice” or actual innocence. The purpose of the actual innocence exception is clear. It serves the injustice-correcting function of habeas corpus. The cause and prejudice test, which is borrowed from the law of procedural default, is somewhat more opaque.

149. 489 U. S., at 311-313.

150. See *id.*, at 313. The Supreme Court has never mentioned a case newer than *Gideon v. Wainwright* as an example of such a fundamental rule. See *Saffle*, 494 U. S., at 495. Some courts of appeals, chafing under a rule that reduces their power, have purported to find rules qualifying for this exception, see, e.g., *Sanders v. Sullivan*, 900 F. 2d 601, 606-607 (CA2 1990); *Williams v. Dixon*, 961 F. 2d 448, 454-456 (CA4 1992), but the correctness of these opinions is highly doubtful in light of the high court's strong language in *Saffle*.

151. 499 U. S. 467 (1991).

At one time, a defendant could show “cause” for not having raised the claim earlier by showing that the Supreme Court had unexpectedly created a new rule that his lawyer could not have anticipated.¹⁵² The *Teague* rule has virtually abolished this variant of cause. Any rule that new is necessarily nonretroactive, unless it fits within two very rare, narrow exceptions.¹⁵³

The principal form of “cause” today is discovery of new facts that could not have been discovered earlier with reasonable diligence. This exception serves an enforcement function, particularly where agents of the state failed to disclose facts known to them, or even actively suppressed them.¹⁵⁴ The *McCleskey* test thus indirectly reserves a second round of habeas review for the two classes of cases presenting the most compelling need: actual innocence and government misconduct.

E. The roads not taken.

Some proposals for limiting habeas corpus have not been accepted by the Supreme Court. The reasons for the Court’s refusals shed some light on the path of legislative change.

In *Rose v. Mitchell*,¹⁵⁵ the Supreme Court rejected the proposition that racial discrimination in the selection of grand juries should not be considered on habeas corpus when the defendant has been convicted by a properly selected trial jury, and the grand jury claim has been fully considered by the state courts. The Court noted that trial *courts* themselves typically select the grand jury, and thus their objectivity in adjudicating a claim of their own wrongdoing is less than complete.¹⁵⁶ The other basis for the decision was that racial discrimination claims

152. *Reed v. Ross*, 468 U. S. 1, 16 (1984).

153. *Selvage v. Collins*, 975 F. 2d 131, 136 (CA5 1992); *Gacy v. Welborn*, 994 F. 2d 305, 310-311 (CA7 1993).

154. See *Amadeo v. Zant*, 486 U. S. 214, 224 (1988) (procedural default case).

155. 443 U. S. 545 (1979).

156. *Id.*, at 561-563.

have always had a special place in the law, for very good reason.¹⁵⁷

In *Wright v. West*,¹⁵⁸ the Court discussed, but did not decide, whether the *Teague/Butler* rule of deference to reasonable state-court resolution of questions of law ought to be extended to mixed questions of law and fact.¹⁵⁹ The opposition to the execution was premised squarely on precedent and the perceived intent of Congress. Justice O'Connor relied heavily on what the Court had said in the past and on Congress' failure to pass proposals to change the rule.¹⁶⁰ Similarly, Justice Kennedy relied on what he perceived to be a "settled principle."¹⁶¹

The *West* case is also interesting as a stunning counterexample to the notion that federal courts are inherently superior to state courts in applying federal constitutional law. All nine Justices easily concluded that the state courts were right on the merits, and the federal Court of Appeals was clearly and obviously wrong.¹⁶²

Finally, there is *Withrow v. Williams*,¹⁶³ in which a bare majority of the Court declined to exclude fully litigated *Miranda* claims from *de novo* habeas review. The most important reason for this holding was the majority's belief that the excluded *Miranda* claims would just come back into the habeas court as involuntariness claims, thus producing little benefit to a

157. *Id.*, at 554-556.

158. 120 L. Ed. 2d 225, 112 S. Ct. 2482 (1992).

159. *Id.*, at 239-240, 112 S. Ct., at 2491-2492 (lead opinion).

160. *Id.*, at 247-248, 112 S. Ct., at 2497-2498 (opinion concurring in the judgment).

161. *Id.*, at 250, 112 S. Ct., at 2500 (opinion concurring in the judgment).

162. 120 L. Ed. 2d, at 240-241 (Thomas, J.), 242 (White, J.), 242 (O'Connor, J.), 250 (Kennedy, J.), 250 (Souter, J.), 112 S. Ct., at 2492, 2493, 2493, 2500, 2500.

163. 123 L. Ed. 2d 407, 113 S. Ct. 1745 (1993).

system where *de novo* review is the rule and not the exception.¹⁶⁴

Of the three cases, only *Mitchell* is based primarily on reasons that Congress need consider. The rule that precedents interpreting statutes have special weight in the courts is premised squarely on the belief that Congress can and will act when it disagrees with those precedents.¹⁶⁵ Congress has never, from day one, specified the grounds for use of habeas corpus as a collateral attack, and it is high time it did. The cost-benefit analysis of *Withrow v. Williams* is based on an assumption which will no longer be valid if Congress does abrogate the rule of *Brown v. Allen*.

V. A Habeas Corpus Act for the Twenty-first Century.

With this background, we are in a position to consider what factors Congress should consider in deciding the scope of the habeas corpus writ in the next century. The common law tradition of the Great Writ should be respected as to the common law scope of that writ, but no proposal impairing that scope is on the table.

The Supreme Court's reluctance to overturn precedents construing statutes should not inhibit Congress from modifying those statutes, since that reluctance is premised squarely on the belief that Congress can and will modify the statutes when necessary. Thus the cases where the Supreme Court has declined to change habeas due to precedent provide no reason for Congress to decline to make the same change.

The function of the writ as a safeguard against fundamentally unjust judgments should be strengthened, not weakened. As applied to capital murder cases, that means that the writ should continue to be available to those defendants who did not kill the victim and were not parties to the murder. However,

164. *Id.*, at 420, 113 S. Ct., at 1754.

165. See *Patterson v. McLean Credit Union*, 491 U. S. 164, 172-173 (1989).

where the defendant is, in fact, guilty of an offense punishable by death, execution is not a fundamental injustice.

The enforcement function needs to be reconsidered in light of the dramatic changes in state courts since 1953 and the vast expansion of the scope of “constitutional” rules in that time. The very low rate at which habeas petitions are granted outside the Ninth Circuit demonstrates that state courts are conscientiously applying Supreme Court precedents. The enormous expansion of constitutional doctrine in the 1960’s and 1970’s means that the old assumption that a constitutional claim is necessarily a claim of a fundamentally unfair procedure is no longer valid. Collateral attack is an extraordinary remedy; it should be limited to extraordinary claims.

The notions that every federal claim should be litigated in a federal forum and that perfection in procedure must be guaranteed should be rejected by Congress, just as they have been rejected by the Supreme Court.

The policy choice that Congress must make involves the risks of two kinds of error and the cost to society of the review process. If the state court judgment is accepted as final, we risk the chance that the state court has erred against the defendant. If we permit the federal courts to review that judgment *de novo*, we risk the chance that the federal court will err against the people. Further, we incur a great cost to society in both resources and the delay of justice. Since the opponents of reform are fond of citing Magna Carta,¹⁶⁶ it would be well at this point to remember Article 40: “To none will we sell, to none deny *or delay*, right or justice.” The federal government has grievously breached this sacred covenant with the families of murder victims.

The present imbalance of risks and costs is dramatically illustrated by the case of Bernard Hamilton. Sixteen years ago, Hamilton brutally murdered and dismembered Eleanore Buchanan, the young mother of two infant sons. Her head and hands have never been found. After his arrest he boasted to the police

166. See *supra* note 7 and accompanying text.

that the charge would not stick, because they could not identify the body. They could and did.¹⁶⁷

Hamilton was convicted of murder in the first degree. *None* of the 15 jurists who examined this exhaustively litigated case found any ground for overturning the guilt verdict.¹⁶⁸

It is settled that California's system for sentencing in capital cases provides the structure necessary to avoid the unfettered discretion and resulting arbitrariness of the pre-*Furman* statutes. The Supreme Court has upheld it several times.¹⁶⁹ In the *Ramos* case, the high court specifically upheld the practice of informing the jury of the governor's power to commute life-without-parole sentences. In *Hamilton*, the state and federal courts simply disagreed over a modification to the basic *Ramos* instruction, a modification to which Hamilton's attorney agreed.¹⁷⁰

Given that Hamilton is guilty and was properly convicted of a horrible, callous murder, *given* that he was sentenced under a constitutional system, *given* that his claims have been fairly reviewed by a court that rendered a decision well within the bounds in which reasonable judges can differ, what is the compelling reason for *de novo* review on habeas in this case? He had a marginal claim on the far fringes of Eighth Amendment case law. Is the risk of error against him on such a claim really a greater evil than the risk of an error in his favor? It seems to me that when we are this far removed from questions of guilt and from the core meaning of the original Bill of Rights, the risk of error in favor of the murderer is at least equal in magnitude, if not greater.

167. *People v. Hamilton*, 41 Cal. 3d 408, 416, 710 P. 2d 981, 985 (1985).

168. See *id.*; *People v. Hamilton*, 45 Cal. 3d 351, 753 P. 2d 1109 (1988); *Hamilton v. Vasquez*, 17 F. 3d 1149 (CA9 1994).

169. *Pulley v. Harris*, 465 U. S. 37, 54 (1984); *California v. Ramos*, 463 U. S. 992, 1011 (1983); *California v. Brown*, 479 U. S. 538, 543 (1987); *Boyd v. California*, 494 U. S. 370, 386 (1990).

170. 17 F. 3d, at 1161.

I firmly believe that the Ninth Circuit did err in this case, and egregiously so. Eleanore Buchanan's sons, orphaned in infancy, are close to adulthood now. The case has dragged on through their entire childhood and adolescence, and justice has still not been done. Congress must act to save the Great Writ being misused as an instrument of injustice, instead of an instrument of justice. The time to act is now.

With these thoughts in mind, CJLF proposes the following statute:

§ 1. Section 2254 of Title 28, United States Code is amended to delete subdivisions (b) and (c), renumber subdivisions (d), (e), and (f) as (b), (c), and (d), respectively, and to add the following subdivisions:

(e) Except as provided in subdivision (g), an application for a writ of habeas corpus under this section shall not be entertained unless it appears that the remedies provided by the State are inadequate or ineffective to test the legality of the detention.

(f) State remedies are not inadequate or ineffective, within the meaning of subdivision (e), merely because the federal court or judge disagrees with the state court's determination of a question of federal law, so long as the state court's decision was within the range in which reasonable jurists could differ as of the date of that decision, based on the precedents binding on the state court. Precedents of federal courts other than the Supreme Court are not binding on state courts.

(g) Notwithstanding subdivision (e), the following grounds for a writ of habeas corpus may be reconsidered *de novo* on the first federal habeas petition, after exhaustion of state remedies, even if not timely raised in state court:

(1) Failure to appoint counsel for an indigent felony defendant who has not, at any time in the proceedings, waived counsel.

(2) Domination of the trial by a mob.

(3) Introduction at trial of a confession of the defendant extracted from him through brutality or threats of brutality by agents of the state.

(4) Use at trial of testimony on a material fact in actual dispute which was known to the prosecuting attorney to be perjured.

(5) Intentional, systematic exclusion from the grand jury or the trial jury venire of members of the defendant's race.

Comment: Section 2254 is the core section for the use of habeas corpus to collaterally attack a state conviction. Existing subdivisions (b) and (c) set forth the rules of exhaustion. These doctrines will be replaced by a more comprehensive rule, and hence will not be needed.

New subdivision (e) is the heart of the proposed reform. It simply adopts for state courts the same rule adopted by Congress for the local court system of the District of Columbia a quarter century ago.¹⁷¹ This rule is constitutional.¹⁷² Subdivision (f) precludes any doubt that simple disagreement with the state court's decision is not a good enough reason for a mere coordinate court, without appellate authority over the court rendering the decision, to set aside its judgment. Only the Supreme Court has authority to set precedents binding on state court, and only that court has authority to reverse for mere disagreement on how to apply those precedents.

Subdivision (g) adopts Justice Stevens' suggestion from *Rose v. Lundy*¹⁷³ and authorizes habeas review for the fundamental claims regardless of state procedural default. These are largely the same claims that were reviewable on habeas in 1953. Mob-dominated trials rarely, if ever, happen in modern society, but retaining habeas for this claim will at least answer the perennial complaint that the ghost of Leo Frank haunts our deliberations.¹⁷⁴

Knowing use of perjured testimony and coercion of confessions still come up occasionally in modern cases, although

171. D. C. Code § 23-110(g).

172. *Swain v. Pressley*, 430 U. S. 372 (1977).

173. 455 U. S. 509, 544 (1982) (dissent).

174. See, e.g., Curtin Statement, *supra* note 17, in *Habeas Corpus Issues*, at 463-464.

they are generally remedied in state proceedings.¹⁷⁵ Even so, these claims have a strong connection with actual innocence, and abolition of the procedural default doctrine for them will thus strengthen habeas as a bulwark against conviction of the innocent.

Review *de novo* should be discretionary with the district judge for the reasons recognized by the Supreme Court over 70 years ago, and hence the word “may” rather than “shall” is used in subdivision (g).¹⁷⁶

§ 2. Section 2254.1 is added to Title 28, United States Code:

(a) State remedies are inadequate within the meaning of section 2254 unless there is some procedure in state courts at which defendants can present evidence of federal constitutional violations not apparent from the appellate record and, if this proceeding is held in a trial court, unless defendants are entitled to a review of the trial court’s decision in an appellate court.

(b) In capital cases in which the prisoner is indigent and does not waive counsel, any of the following shall constitute inadequacy of state remedies:

(1) Appointment of counsel for trial or appeal with less than two years experience handling criminal trials or appeals, respectively;

(2) Failure of the state to appoint counsel for the proceeding described in subdivision (a) of this section;

(3) Appointment of counsel for the proceeding described in subdivision (a) who has not previously handled such a proceeding in a felony case, unless the attorney has access to consultation by persons with experience in such proceedings;

(4) Appointment of counsel for the proceedings described in subdivision (a) who also represented the petitioner at trial or on appeal, provided that the same attorney may repre-

175. See, e.g., *Ex parte Adams*, 768 S. W. 2d 281, 293 (Tex. Crim. App. 1989) (“Thin Blue Line” case).

176. *Salinger v. Loisel*, 265 U. S. 224, 231-232 (1924); see also *Ex parte Cuddy*, 40 F. 62, 65-66 (CC SD Cal. 1889) (Field, Circuit Justice).

sent the petitioner in this proceeding and the appeal if they are held concurrently; or

(5) The prisoner has new evidence of actual innocence meeting the criterion of Rule 9(b)(1) of the Rules Governing Section 2254 Cases in the United States District Courts, and the state has no effective mechanism, judicial or executive, for the determination of the facts of such claims and for granting of relief if the facts are established.

(c) Notwithstanding subdivisions (b)(1), (b)(3), and (b)(4) of this section, state remedies shall not be considered inadequate or ineffective by reason of appointment of counsel not meeting the requirements of those subdivisions if either (1) the defendant or petitioner specifically requested appointment of that attorney with knowledge of the circumstances that would otherwise disqualify that attorney; (2) the state court finds that the attorney appointed has other experience or training equivalent to the requirements of subdivision (b); or (3) the state court finds that there is a shortage of qualified attorneys.

Comment: Subdivision (a) requires that there be a state habeas proceeding or its equivalent and an appeal from denial of state habeas by a trial court.

Subdivision (b) implements a requirement that the states improve their appointment of counsel above the constitutional minimum to qualify for the benefits of limitation of habeas corpus. Trial and appellate counsel must be experienced criminal lawyers, although the extremely restrictive requirements advocated by the American Bar Association are not implemented. The supply of qualified attorneys must be large enough to meet the demand and provide some competition for the business. The ABA's further suggestion that civil attorneys cannot handle habeas corpus should be rejected. The ABA's Postconviction Death Penalty Representation Project has emphatically stated exactly the opposite.¹⁷⁷

177. ABA Postconviction Death Penalty Representation Project, Advertisement, 14 Human Rights 29 (Winter 1987); see also Mikva & Godbold, You Don't Have to Be a Bleeding Heart, 14 Human Rights 22, 24 (Winter 1987) (noting excellent work by lawyers without habeas experience); Quade, From Wall Street to Death Row, 14 Human

Subdivision (c), clause (1) prevents the defendant from manipulating the system by demanding a lawyer who does not meet the standard and then claiming that as error.¹⁷⁸ Clause (3) prevents the defense bar from manipulating the system by going on strike.¹⁷⁹

§ 3. Rule 8 of the Rules Governing Section 2254 Cases in the United States District Courts is amended to add subdivision (d), to read:

(d) A capital habeas case in which a stay of execution has been granted shall have priority over all other cases, criminal and civil. Absent extraordinary circumstances, all cases shall be decided by the district court within six months of the filing of the habeas petition and by the court of appeals within six months of the issuance of the certificate of probable cause. Writs of mandamus shall be liberally granted when necessary to enforce this rule.

Comment: Enforcement of the law against murder is the single most important function of state government. Interference with that function by a federal court is a major intrusion and should be limited to the shortest time which is absolutely necessary. Regrettably, some federal courts habitually delay these cases.¹⁸⁰ With habeas corpus limited to fundamental violations of long-established rules, there will be little need for long, complex litigation. In most cases, a determination that state remedies are effective and no fundamental violations are seriously in question can be made in a matter of days.

Rights 18, 62 (Winter 1987) (interview with Ronald Tabak).

178. For an example of manipulation of a related variety see *People v. Clark*, 3 Cal. 4th 41, 174, 833 P. 2d 561, 638 (1992) (Mosk, J., dissenting because the trial judge initially granted self-representation); *ibid.* (Kennard, J., dissenting because the trial judge subsequently revoked self-representation).

179. See *FTC v. Superior Court Trial Lawyers Assn.*, 493 U. S. 411 (1990).

180. See *In re Blodgett*, 116 L. Ed. 2d 669, 112 S. Ct. 674 (1992); Petition for Certiorari in *Lewis v. United States District Court*, O. T. 1993, No. 93-406.

§ 4. Rule 9 of the Rules Governing Section 2254 Cases in the United States District Courts is amended to delete subdivision (b) and add a new subdivision (b), to read:

(b) A second or subsequent application for a writ of habeas corpus under this section shall not be entertained unless (1) there exists new evidence which, when taken together with all other available evidence, admissible or not, establishes by a preponderance of the evidence that no reasonable juror would have found the defendant guilty of the offense, or (2) evidence establishing one of the claims listed in section 2254, subdivision (g) was concealed by agents of the state. The determination under clause (1) of this subdivision shall be made without regard to any claim based on mental disease or defect or on voluntary intoxication, regardless of whether that claim is made as an affirmative defense or to negate an element of the crime.

Comment: For most claims, this section replaces the present cause and prejudice or innocence standard of *McCleskey v. Zant*¹⁸¹ with innocence alone. The present cause and prejudice exception to the abuse-of-the-writ doctrine was developed under a regime where plenary habeas review was the norm rather than the exception. Since review is to be the exception, even on the first round, a second round should be reserved for the case of fundamental injustice: conviction of an innocent person. For the fundamental claims, a second petition may be considered if the supporting evidence was suppressed on the first round.¹⁸² The last sentence eliminates mental defenses from the actual innocence inquiry. Because of the propensity of the psychiatric profession to testify to the most ludicrous statements,¹⁸³ permitting mental defenses here would turn a rare claim into a common one.

181. 499 U. S. 467 (1991).

182. See *Amadeo v. Zant*, 486 U. S. 214 (1988).

183. Morse, Undiminished Confusion in Diminished Capacity, 75 J. Crim. L. & Criminology 1, 36 (1984).

§ 5. Section 2251 of Title 28, United States Code is amended to read:¹⁸⁴

(a) A court, justice or judge of the United States before whom a habeas corpus proceeding is pending, may, before final judgment or after final judgment of discharge, or pending appeal, stay any proceeding against the person detained in any State court or by or under the authority of any State for any matter involved in the habeas corpus proceeding. On appeal, an individual judge may issue a stay only when the full panel cannot consider the application in time, and then only for a maximum of three days, with no renewal or extension.

(b) After the granting of such a stay, any such proceeding in any State court or by or under the authority of any State shall be void. If no stay is granted, any such proceeding shall be as valid as if no habeas corpus proceeding were pending.

(c) A proceeding is pending, within the meaning of subdivision (a), only after an application or petition has been filed.

(d) In a state capital case, if a state schedules an execution less than 60 days following the final decision of the state appeal or the final denial of relief in the first proceeding in which evidence outside the appellate record can be considered, whichever is later, then the district court, upon application of the prisoner, may stay the execution for a maximum of 60 days and appoint counsel for the purpose of preparing a habeas petition. Finality, for this purpose, includes only state review and not certiorari to the United States Supreme Court. The stay issued under this subdivision shall not be renewed or extended.

(e) A stay of execution shall not be granted under subdivision (a) of this section in a capital case unless the petitioner has demonstrated a substantial probability that the criteria for entertaining a petition can be met. A stay shall not be granted without notice to respondent and an opportunity to be heard, unless compliance with this requirement is impossible. A motion by respondent to lift the stay shall be heard within 30 days and decided within 60 days of the motion.

184. For clarity, the entire section is printed here with added language in italics.

(f) *No court of the United States shall make any rule expanding the powers to grant stays beyond those provided by this section or making the grant of any stay or the issuance of any certificate of probable cause automatic.*

Comment: The limitation on one-judge stays is to prevent an abuse which has occurred more than once in the Ninth Circuit.¹⁸⁵

Subdivisions (c) and (d) deal with the problem addressed in *McFarland v. Collins*.¹⁸⁶ Subdivision (c) restores “pending” to its common-sense meaning, while subdivision (d) provides an additional stay power to deal with the practical problem presented in *McFarland* in the unusual circumstance where the state courts have set an execution with undue haste. This provision requires diligence on the part of the prisoner, which includes preparing the federal habeas petition while the Supreme Court certiorari petition is still pending. This will take six months to a year off the time line, but, because certiorari is only granted in a handful of cases, it will rarely result in a waste of effort.

Subdivision (e) codifies the statement in *McFarland* that the granting of a stay requires judgment and is not automatic¹⁸⁷ and requires minimal due process for the people.¹⁸⁸ Subdivision (f) clarifies that where Congress has required case-by-case judgment, a circuit cannot remove that requirement by local rule,

185. See Lungren & Krotoski, Public Policy Lessons from the Robert Alton Harris Case, 40 UCLA L. Rev. 295, 304-305, n. 24 (1992); *Brewer v. Lewis*, 989 F. 2d 1021, 1032 (CA9 1993) (dissenting judge granting stay after 2-1 denial by panel), vacated *sub nom. Lewis v. Brewer*, 122 L. Ed. 2d 778, 113 S. Ct. 1406 (1993).

186. 129 L. Ed. 2d 666, 114 S. Ct. 2568 (1994).

187. *Id.*, 129 L. Ed. 2d, at 676, 114 S. Ct., at 2573.

188. See Lungren & Krotoski, *supra* note 185, at 304-305, n. 24 (stay issued *ex parte*, when Attorney General could have immediately informed judge of solid reasons for denial); cf. *Mullane v. Central Hanover Tr. Co.*, 339 U. S. 306, 314 (1950) (notice and opportunity to be heard as minimal requirements of due process).

nor can a court by rule grant itself additional powers, abrogating Ninth Circuit rules to the contrary.¹⁸⁹

§ 6. Subdivision (q)(4)(B) of Section 848 of Title 21, United States Code is amended to delete the word “any” and insert in its place “the first”.

Comment: The amended section provides counsel and investigators for death row inmates. That expenditure should continue for the first petition, although the great reduction in cognizable claims should reduce it substantially. The people of the United States should not, however, finance the blizzards of last-minute, often frivolous motions that now typically accompany an execution.

§ 7. This act is fully retroactive to all cases pending on the date of its enactment.

189. See, *e.g.*, Circuit Rules for the Ninth Circuit, rule 22-3(c) (automatic stay and certificate of probable cause).

APPENDIX A

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CAPITAL HABEAS CORPUS IN 1993-94

A. Prior Studies of Habeas Grant Rates.

In 1989, the Criminal Justice Legal Foundation (CJLF) did a study of a sample of 100 capital habeas corpus cases from the Eleventh Circuit.¹ That study showed that approximately 40% of the Court of Appeals' final judgments resulted in relief being granted to the habeas petitioner. The 40% figure was consistent with a study done by a defense-oriented researcher surveying a broader data base.²

While the raw figure of 40% was consistent between our study and the opposition, the interpretations assigned to that figure were markedly different. Persons who favor relitigating every federal constitutional question on federal habeas corpus interpreted the figure as a sign of systemic deficiencies in the state courts, indicating that they could not be trusted to protect federal constitutional rights.³ CJLF's detailed analysis of the individual cases, however, indicated that the state courts had invariably reached a reasonable decision on the claims presented to them as of the time of their decision. When relief was granted in the federal courts, it was generally because the law had changed, because the claim was never properly presented to the state courts, or because the courts simply disagreed in a vast and

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1. K. Scheidegger, *Rethinking Habeas Corpus* 28-42 (1989) (cited below as "CJLF 1989 study"), reprinted in *Habeas Corpus Issues: Hearings before the House Subcommittee on Civil and Constitutional Rights*, Serial No. 39, 102d Cong., 1st Sess., at 212, 243-257 (1991). This collection of papers and testimony is cited below as "Habeas Corpus Issues." More precisely, our earlier figure was 39.4%.
 2. J. Liebman, Memorandum to Senator Biden, July 15, 1991 (cited below as "Liebman Memorandum"), in *Habeas Corpus Issues*, *supra* note 1, at 503, 506.
 3. See, e.g., D. Bruck, Statement, in *Habeas Corpus Issues*, *supra* note 1, at 391-392.

confusing area of law where competent, conscientious jurists frequently disagree.⁴

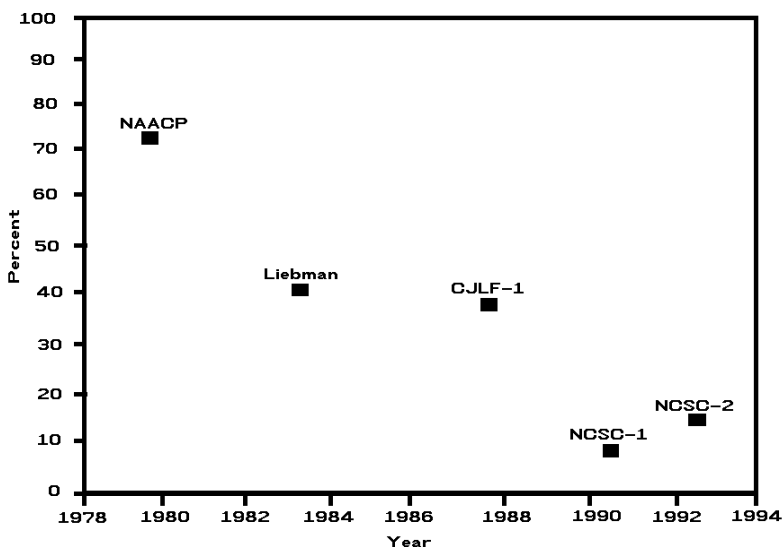
In late 1994, the National Center for State Courts (NCSC) and the State Justice Institute published a new study of habeas corpus cases. That study, based on more recent data, concluded that the success rate for capital habeas petitioners was “vastly overstated.”⁵

Looking at the dates and success rates reported in the various studies, it appears likely that, rather than being overstated, the 40% figure is simply outdated. Each study that is done, with one exception, shows a lower rate than earlier studies. In a brief filed in 1983, the NAACP Legal Defense and Education Fund stated that the rate was 73%.⁶ In 1989, CJLF found a 40% rate as did a 1976-91 study by Professor James Liebman, both noted above.

The National Center for State Courts examined data for two years. The 1990 data showed one grant of relief in twelve cases,⁷ but the resulting 8.5% rate can be dismissed as based on an inadequate sample size. The 1992 data showed 7 grants of relief in 45 final judgments, or 15%.⁸ Combining the two would yield 8 grants in 57 cases, or 14%. The NAACP, CJLF, Liebman, 1990 NCSC, and 1992 NCSC data are graphed in Figure 1, with each study assigned a date of the midpoint of its period.

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4. CJLF 1989 Study, *supra* note 1, at 34-38, Habeas Corpus Issues, at 249-253.
 5. V. Flango, Habeas Corpus in State and Federal Courts 88 (1994).
 6. Brief for NAACP Legal Defense and Education Fund, Inc. as *Amicus Curiae*, Appx. E, at 1b, in *Barefoot v. Estelle*, 463 U. S. 880 (1983).
 7. Flango, *supra* note 5, at 88.
 8. *Ibid.*

Grant Rate for Capital Habeas Petitions



This remarkable drop in the grant rate over time warranted further investigation. CJLF decided to do another study similar to our 1989 study to see if the results really do vary over time. Stated another way, is the success rate really a declining function of time, as Figure 1 would seem to indicate, or do the different figures result from differences in the studies, with the apparent time dependence being merely coincidental?

B. Method of the Present Study.

The cases for this study were selected in largely the same way as the previous study, with a computer search for cases containing words typically used in a capital habeas case.⁹ The dates of the cases ranged from mid-July of 1993 through

9. Because of advances in technology and monetary constraints, this study used a CD-ROM and Folio Views software, while the previous study used Westlaw. The computer search used was "sentence* death habeas/2254." This kind of search may miss an occasional case, but the omissions will be random with respect to the variables measured and hence not affect the validity of the result.

September of 1994.¹⁰ Cases were removed from the study if they were “false positives” from the computer search or if they were not the Court of Appeals’ final judgment on the case. That is, interlocutory appeals and orders merely enforcing previous judgments were not counted. This method of counting was developed independently by advocates on both sides in earlier studies and hence should not be a point of controversy.¹¹ The cases are listed in Table 2.

Unpublished cases were available from the Fourth and Eighth Circuits; the database was limited to published cases from the rest of the circuits. However, all of the Eighth Circuit capital habeas cases were published. The Fourth Circuit had three unpublished opinions, all of them denials of relief. An earlier study found little difference in grant rates between published appellate opinions and all verified cases.¹²

The cases were counted as granting or denying relief as to the guilt determination. A grant on guilt is necessarily a grant of relief from the death penalty. Cases denying relief on guilt were further classified as granting or denying relief as to penalty. Thus there are three possible outcomes: denial of relief, grant as to penalty only, or grant as to both guilt and penalty.

Upon tallying the result by circuit, it quickly became apparent that the Ninth Circuit was radically different from the others. The results are therefore presented in Table 1 for the overall count, the count for circuits other than the Ninth, and the count for the Ninth alone.

-
10. These are the dates for which the particular CD-ROM used had all published opinions of all circuits. Hyperlaw, Federal Appeals on Disc, Oct. 1994.
 11. Letter from J. Liebman to Chairman Edwards & Mr. Hyde, July 18, 1991, pp. 3-4 (cited below as “Liebman Letter”), reprinted in Habeas Corpus Issues, *supra* note 1, at 599-600.
 12. Liebman Memorandum, *supra* note 2, in Habeas Corpus Issues, at 503-506, 517.

C. *Results.*

**Table 1. Grant Rates in Capital Habeas Cases
July 1993 to September 1994**

	Total	Ninth Circuit	Other Circuits
Cases	60	10	50
Denials	51 (85%)	5 (50%)	46 (92%)
Grants	9 (15%)	5 (50%)	4 (8%)
Penalty Only	6 (10%)	4 (40%)	2 (4%)
Guilt & Pen.	3 (5%)	1 (10%)	2 (4%)

The overall count confirms NCSC's result that the grant rate has dropped dramatically from the earlier studies. The overall rate for any relief, guilt or penalty, is 15%. That figure is slightly over one-fifth of the NAACP's 1976-83 figure and a little over a third of Liebman's 1976-91 figure and CJLF's 1986-89 figure.

D. *Discussion.*

1. Overall rate.

Three hypotheses suggest themselves. The first, consistent with CJLF's earlier study of the reasons for the earlier high grant rate, is that the earlier rate was the result of turmoil in the law, especially the law of capital sentencing procedure. That law has settled out in recent years. Most of the major questions were settled by 1987.¹³ The only major decision plowing new ground for defendants since then was the 1989 decision in *Penry*

13. See generally Scheidegger, *Capital Punishment in 1987: The Puzzle Nears Completion*, 15 *West. St. L. Rev.* 95 (1987).

v. *Lynaugh*,¹⁴ and that decision was interpreted very narrowly a few years later.¹⁵

Similarly, in the guilt phase of trials we seem to have reached a quiescent period in which the Supreme Court has stopped disapproving standard jury instructions which have been long accepted and widely used.¹⁶ CJLF's previous study had found that one such decision accounted for a major portion of guilt-phase reversals in a state that had used a traditional, but since disapproved, instruction.¹⁷ If turmoil was the cause of the high grant rate, then reduced turmoil naturally reduces the grant rate.

A second possibility, based on the hypothesis that the earlier, high grant rate was caused by dismal state courts and counsel, would be that the state courts and counsel have improved dramatically in just a few short years. Such dramatic improvement in so short a time seems highly unlikely, but even if it were the explanation, it would still remove the argument that state courts cannot be trusted.

A third possibility would be that the Supreme Court's new limitations on habeas relief are responsible for the dramatic decline in grant rates. Since this possibility is likely to be the one endorsed by the opponents of reform, it bears close examination.

The first major limitation is the procedural default rule of *Wainwright v. Sykes*.¹⁸ This rule has been in place since the

14. 492 U. S. 302.

15. See *Graham v. Collins*, 122 L. Ed. 2d 260, 274, 113 S. Ct. 892, 901 (1993); *Johnson v. Texas*, 125 L. Ed. 2d 290, 304-305, 113 S. Ct. 2658, 2668 (1993); *Motley v. Collins*, 3 F. 3d 781, 788 (CA5 1993) (*Penry* worded broadly but interpreted narrowly).

16. Compare *Victor v. Nebraska*, 127 L. Ed. 2d 583, 114 S. Ct. 1239 (1994) (upholding traditional definition of reasonable doubt) with *Reed v. Ross*, 468 U. S. 1, 17-19 (1984) (holding that burden of proof decision was a "clear break with the past").

17. 1989 CJLF Study, *supra* note 1, at 33-34, Habeas Corpus Issues, at 248-249.

18. 433 U. S. 72, 90-91 (1977).

second year of the modern capital punishment era, and the major questions as to its application were settled in 1986.¹⁹ With no significant changes in this rule between 1986 and the present, it cannot explain a sharp drop in grant rates during that period. Similarly, the exclusion of fully litigated Fourth Amendment claims from habeas corpus has been in effect throughout the modern capital punishment era,²⁰ and cannot explain changes within those years.

Another major limitation is the strong bar against second and subsequent petitions by prisoners who have already had one full federal review.²¹ Denial of successive petitions on this ground cannot explain the drop in the grant rate, because successive petitions were not a substantial portion of the earlier, high grant rate. CJLF's earlier study found not a single case of relief being granted on a successive petition.²² The entire 40% was made up of first petitions.

This leaves what is perhaps the most controversial of the recent limitations: the nonretroactivity doctrine of *Teague v. Lane*.²³ The *Teague* case held, in essence, that if the state courts entering and affirming the conviction obeyed the constitutional rules in effect at that time, the conviction would not be rendered void by new rules created afterward. An important corollary to this principle is that new rules cannot be created on habeas corpus.²⁴

19. *Murray v. Carrier*, 477 U. S. 478 (1986); *Smith v. Murray*, 477 U. S. 527 (1986).

20. *Stone v. Powell*, 428 U. S. 465 (1976).

21. *McCleskey v. Zant*, 499 U. S. 467 (1991).

22. 1989 CJLF Study, *supra* note 1, at 38, Habeas Corpus Issues, at 253.

23. 489 U. S. 288 (1989).

24. *Id.*, at 316.

The *Teague* rule was invoked in 10 of the 51 cases in our sample in which relief was denied.²⁵ None of these cases invoked *Teague* to deny a claim which would have been clearly meritorious without that rule. Six of the ten were Texas cases involving the *Penry-Graham-Johnson* problem, and in all six the facts of the case resembled *Johnson* more than *Penry*.²⁶ The Fifth Circuit could have rejected the claims under either *Graham*, a *Teague* case, or *Johnson*, a direct review case, and chose the simpler of the two.

In the other four cases, the habeas petitioners were similarly trying to “push the envelope,” making claims that ranged from dubious to frivolous even as of the date of the Court of Appeals’ decision.²⁷ Thus, *Teague* has only been invoked in this sample to reject claims on the far fringe of the law that would likely have been rejected even without *Teague*. While one or two of these claims might have been granted by a defense-leaning court, the rejection of these marginal claims cannot explain the dramatic drop in the grant rate.

25. *Callins v. Collins*, 998 F. 2d 269, 275-276 (CA5 1993); *Russell v. Collins*, 998 F. 3d 1287, 1291-1292 (CA5 1993); *Webb v. Collins*, 2 F. 3d 93, 95 (CA5 1993); *Smith v. Dixon*, 14 F. 3d 957, 981, n. 15 (CA4 1994); *Williams v. Collins*, 16 F. 3d 626, 635 (CA5 1994); *Motley v. Collins*, 18 F. 3d 1223, 1234-1235 (CA5 1994); *Clark v. Collins*, 19 F. 3d 959, 963 (CA5 1994); *Lackey v. Scott*, 28 F. 3d 486, 489-490 (CA5 1994); *Jacobs v. Scott*, 31 F. 3d 1319, 1326 (CA5 1994); *Murray v. Delo*, 34 F. 3d 1367, 1381-1382 (CA8 1994).

26. *Callins*, *Russell*, *Williams*, *Motley*, *Clark*, and *Lackey*.

27. *Webb* (asked instruction on consequences of jury's failure to agree); *Smith* (claim that telling jury their decision was a “recommendation” was unconstitutional, rejected on the merits by the same court in *Gaskins v. McKellar*, 916 F. 2d 941, 953 (CA4 1990)); *Jacobs* (claim that prosecution theories in separate trial of co-defendant, inconsistent as to identity of triggerman but not as to Jacobs' guilt of murder, requires reversal); *Murray* (attack on “reasonable doubt” definition, more like the one upheld in *Victor* than the one struck down in *Cage*).

2. Guilt reversal rate.

As small as the overall grant rate is, grants of relief as to the guilt determination are smaller still. Only three cases overturned the state courts' verdict that the habeas petitioner was, in fact, guilty of the highest degree of murder defined in the law of the state.²⁸ This is a rate of only 5%, the same as the rate for noncapital habeas cases.²⁹

One of the three cases, *Burden*, was a case accepted for review twice by the U. S. Supreme Court.³⁰ The Supreme Court can review a case after an adequate state habeas proceeding as well as it can after a federal habeas proceeding, so cases requiring Supreme Court intervention do not support an argument for duplicating adequate state proceedings in federal court.

3. Circuit differences.

The other remarkable feature of these data is the striking difference between the Ninth Circuit and the others. The Ninth Circuit granted relief in half the cases, compared to only 8% in the other circuits collectively. The Ninth Circuit's rate was double that of the next highest circuit, the Eleventh. If the Eleventh Circuit's *Burden* case is excluded for the reasons noted above,³¹ the next highest rate would be the Eighth Circuit's 14%, less than a third of the Ninth Circuit rate.

There are two possible reasons for this dramatically different grant rate in the Ninth Circuit. Either the state courts in the states of the Far West are doing an exceptionally poor job relative to the other states with large numbers of capital cases, or the Ninth Circuit is granting relief in cases where other circuits would not.

28. *Blazak v. Ricketts*, 1 F. 3d 891, 900 (CA9 1993); *Agan v. Singletary*, 12 F. 3d 1012, 1018-1019 (CA11 1994); *Burden v. Zant*, 24 F. 3d 1298, 1306-1307 (CA11 1994).

29. Liebman Memorandum, *supra* note 2, in *Habeas Corpus Issues*, at 506.

30. 498 U. S. 433 (1991); 126 L. Ed. 2d 611, 114 S. Ct. 654 (1994).

31. See *supra* note 30 and accompanying text.

The first possibility is difficult to swallow. Death penalty opponents for years lauded the California Appellate Project as a model for other states to emulate.³² When the majority of the American Bar Association's Habeas Corpus Task Force issued its heavily defense-oriented recommendations, the "keystone" of the entire proposal was to require all the states to do largely what California had already been doing with regard to appointment and compensation of counsel.³³ The ABA Criminal Justice Section's sharpest criticisms were invariably directed at the South, not the West.³⁴ Thus, it seems extremely unlikely that the higher grant rate is the result of state courts in the Far West being of vastly lower quality than those of other regions of the country.

The other potential source of the problem is the Ninth Circuit itself. Is the high grant rate attributable to wrong or dubious decisions by that court?

In the previous CJLF study, I undertook to examine cases individually to see if either the state court or the federal court was simply making a wrong decision. This resulted in criticism of the study as "subjective" rather than "objective."³⁵ I believe the earlier methodology was valid and the "subjectivity" criticism overblown, but in the interest of keeping the debate focussed on habeas corpus rather than methodology, for this study I will adopt the approach of the opposition and simply count case results. To determine whether the exceptionally high grant rate in the Ninth Circuit is due to poor judging by state courts or by the Ninth Circuit, this study will simply count cases.

32. See Why Death Row Needs Lawyers, 14 Human Rights 26, 27 (Winter 1987).

33. American Bar Association, Report of Task Force on Habeas Corpus 7-22 (1989); cf. *id.*, at A-3, A-19 to A-22 (minority report of Lucas, C. J.).

34. American Bar Association, Criminal Justice Section, Report and Recommendations (on Habeas Corpus) 12, n. 13, 16, n. 28, 20-21, n. 43 (1989).

35. Liebman Letter, *supra* note 11, Habeas Corpus Issues, at 601.

The rate at which the Ninth Circuit is reversed by the Supreme Court in both civil and criminal law has been noted for many years.³⁶ In the October 1993 term, for example, the Ninth Circuit was reversed, at least in part, in 12 cases and fully affirmed in only 2, for a reversal rate of 85%, far worse than any other circuit. That rate is also high in death penalty cases.

A computer search of Supreme Court opinions similar to the one described earlier turned up 25 capital cases from the Ninth Circuit or the states which comprise it, in which the high court decided the case on the merits. These cases include decisions on the merits of whether a last-minute stay was proper. The cases are listed in Table 3 at the end of this part.

There were a total of nine cases in which the Supreme Court granted certiorari to resolve a conflict between the Ninth Circuit and state courts. Eight of these were review of Ninth Circuit opinions,³⁷ and one was directly from a state court decision.³⁸ The *Walton* case involved four issues, so there were a total of thirteen issues in the nine cases. On thirteen issues, the Ninth Circuit was determined to be wrong on twelve, a stunning reversal rate of 92%.

If we broaden the scope to look at all 25 cases, we see that the state courts were reversed on six,³⁹ affirmed on nine,⁴⁰ and largely affirmed on one.⁴¹ Excluding the latter in the interest

36. See, e.g., Mayer, *Engine, Engine Number 9*, 5 Cal. Lawyer 38 (Feb. 1985); Stoll & Goldfein, *The Supreme Court and the Ninth Circuit*, 208 N. Y. L. J. 3, col. 1 (Oct. 20, 1992) (antitrust).

37. *Harris, Shuman, Adamson, Baal, Jeffers, Creech, and Moran*.

38. *Walton*.

39. *Ramos, Brown, Lankford, Riggins, Stansbury, and Powell*.

40. *Rumsey, Poland, Boyde, Walton, Fulminante, Schad, Medina, Sandoval (Victor), and Tuillaepa*.

41. In *Tison*, the judgment was vacated and remanded for further findings, but the prosecution prevailed on the main bone of contention in both state court and the Supreme Court, that a major accomplice in a felony murder case could be sentenced to death without finding an intent to kill.

of being conservative, that is a 40% reversal rate. The Ninth Circuit was affirmed in only one case, *Shuman*, but was reversed in eight,⁴² for an 88.9% reversal rate, more than double the rate of the state courts.

The sample is, of course, strongly affected by the Supreme Court's decision to review the case or not. A case is more likely to be reviewed if several justices believe it is wrongly decided, and thus discretionary review results in a higher reversal rate than mandatory review. Nonetheless, the Court's grants of certiorari are not limited to cases it believes are wrongly decided, as the state courts' 60% affirmance rate amply demonstrates. Nor does a denial of certiorari connote any approval whatsoever of the result in a case.⁴³ Thus, if eight out of nine of the Ninth Circuit cases in which certiorari was granted were wrongly decided, it stands to reason that a substantial number of the cases in which certiorari was denied reached wrong and unjust results.

The Ninth Circuit cases are also distinguished from the decisions of the other circuits by disagreement within the court. The four cases from other circuits granting relief are all unanimous panel decisions.⁴⁴ Two of the Ninth Circuit cases, *Wade* and *Hamilton*, are 2-1 reversals of a district court's denial of relief.

Of the four federal judges to review each of these cases, half of them believed the state court was correct. In a third case, *Blazak*, the Ninth Circuit panel split three ways, with one judge believing the state court was correct, one believing the appeals court had no jurisdiction, and only one believing the state court was wrong. These cases hardly make compelling arguments that state courts are disregarding federal rights.

In short, the anomalously high grant rate of the Ninth Circuit makes a stronger argument against *de novo* review than for it.

E. Conclusions.

42. *Harris I, Baal, Jeffers, Richmond, Creech, Moran, and Harris II (Gomez)*.

43. *Teague v. Lane*, 489 U. S. 288, 296 (1989).

44. *Starr and Hill* in the Eighth Circuit, and *Agan and Burden* in the Eleventh.

1. This study confirms the conclusion of the National Center for State Courts study that the present rate of grants of relief in capital habeas cases is dramatically lower than the rate reported in prior studies. Reversal of the determination of guilt is only 5%, comparable to the rate in noncapital cases. Total grants of relief are only 15%, compared to earlier rates of 40% or more.

2. The rate at which any relief is granted remains high only in the Ninth Circuit, where the rate is anomalously high. The lack of any systemic deficiencies in state courts of this region, relative to other regions, the high rate of reversal of the Ninth Circuit by the Supreme Court, and the dissention within the Ninth Circuit all run counter to the notion that this high rate is the result of inadequacies of state remedies.

3. Excluding the Ninth Circuit, relief is granted in only 8% of habeas cases. The dramatic drop in recent years is not the result of changes in the law regarding procedural defaults or abuse of the writ, and it is only minimally related to changes in the law of retroactivity. The hypothesis most consistent with the data is that the high grant rates of prior years were primarily the result of uncertainty and rapid changes in the law, and that the rates have dropped as the law has clarified and stabilized.

4. The assertion that high grant rates indicate a systemic disregard for federal rights by state courts is no longer valid, if it ever was.

APPENDIX B

Kent Scheidegger
January 10, 1995
Page Two

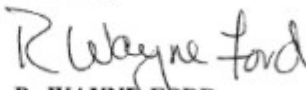
Arizona sought appellate review in the Ninth Circuit Court of Appeals, but was denied relief by an evenly divided three-judge panel. *Blazak v. Ricketts*, 1 F.3d 891 (9th Cir. 1993). On December 29, 1993, that court denied Petitioners' petition for rehearing and suggestion for rehearing *en banc*. Arizona's petition for certiorari was denied, leaving intact the one-one-one opinion of the 9th Circuit that affirmed the district court's findings.

Arizona sought to retry Blazak within the designated time period but soon discovered that crucial evidence—last seen during the habeas corpus evidentiary hearing in 1988—was now missing. Without the evidence, the State would have to rely exclusively on transcripts of the 1974 trial, or worse, be unable to withstand a directed verdict of acquittal. Either way, the prospects of another successful conviction on 20 year-old evidence looked dim.

Consequently, the parties negotiated a plea agreement whereby Blazak would plead no contest to two counts of second degree murder, which carried a maximum sentence of 10 years each. The sentences were stacked, resulting in 20 years imprisonment. Because of his presentence credit of over 19 years, Blazak was returned to prison for less than 6 months and released. Justice served?

I hope that this information will assist you in your quest.

Sincerely,



R. WAYNE FORD
Assistant Attorney General
Criminal Appeals Section

RWF:eag

OVERDUE PROCESS

Kent S. Scheidegger is the Legal Director of the Criminal Justice Legal Foundation. His articles on criminal and constitutional law have been published in law reviews and national legal publications. Legal arguments authored by Mr. Scheidegger have been cited and incorporated in several precedent-setting United States Supreme Court decisions.

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