A Tale of Two Habeas

Barry Friedman

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A Tale of Two Habeas

Barry Friedman*

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I would like to thank Professors Jonathan I. Charney, Donald J. Hall, Thomas R. McCoy, Girardeau A. Spann, and Larry W. Yackle for their comments on earlier drafts of this article and for their generous assistance in thinking through various aspects of the problem. In addition, I would like to thank Harry Burnett, Patricia Daniel, Bob Hovious, David Melloh, Alice Welsh, and Jeff Willis for their invaluable research assistance.
INTRODUCTION

"[W]e had everything before us, we had nothing before us..."¹

Michael Marnell Smith was electrocuted in August 1986, perhaps because his lawyer mistakenly failed to raise the one claim on appeal of Smith's state murder conviction that would have entitled Smith to federal habeas relief. The Supreme Court upheld denial of the writ of habeas corpus² without ruling on the merits of Smith's constitutional claim.³ The Court held that because Smith's lawyer failed to raise the claim prop-

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¹ C. DICKENS, A TALE OF TWO CITIES 1 (London 1859).
erly in state court, thereby forfeiting Smith's right to further review under state law, the federal court could not hear the claim either. Smith v. Murray and its companion case Murray v. Carrier stand for the proposition that, absent a showing that a prisoner was denied effective assistance of counsel in violation of the sixth amendment, federal habeas petitioners must suffer the consequences of the mistakes of their lawyers.

The Smith and Carrier cases were similar in many respects. In each case, a state prisoner sought federal habeas relief on the ground that a state trial court had violated his constitutional rights. In each case, a claim of constitutional error at issue was defaulted in state court because the prisoner's lawyer failed to raise the claim in conformity with state procedural requirements. The procedural default in each case occurred in the course of appellate proceedings in state court: Smith's lawyer decided not to present to the state appellate court a claim that was meritless under state law at the time of appeal, but that a federal court subsequently found to have merit; Carrier's lawyer apparently simply forgot to include a meritorious claim in the state appellate brief. In each case, the state supreme court had ample knowledge of the claim despite the procedural default: in Smith an amicus raised the claim in a brief filed on Smith's behalf; in Carrier the claim had been a serious point of contention at trial, the constitutional error was manifest, and the claim was raised in the notice of appeal, although omitted from the appellate brief. In each case, the constitutional claim, had it been raised properly, likely would have entitled the petitioner to federal habeas relief. Relief was denied in each case, however, because of the

4. Id.
7. Smith, 477 U.S. at 537-39; Carrier, 477 U.S. at 488, 495-97 ("we discern no inequity in requiring [the client] to bear the risk of attorney error").
8. Smith, 477 U.S. at 532; Carrier, 477 U.S. at 483.
9. Smith, 477 U.S. at 529-33; Carrier, 477 U.S. at 482-85.
10. Smith, 477 U.S. at 529-33; Carrier, 477 U.S. at 482-85.
14. Carrier, 477 U.S. at 482.
15. In Smith, the defendant was tried for murder connected with a rape. 477 U.S. at 529. At the sentencing phase, the court allowed the state to introduce the testimony of a psychiatrist who examined Smith at the request of defense counsel. Id. at 530. The psychiatrist testified that Smith told him about a previous incident in which Smith tore the clothing off a student on a school
In each case, counsel was appointed, not retained.\footnote{In both \textit{Smith} and \textit{Carrier},} Under such circumstances as these, in which denial of habeas relief results in a prisoner's continued incarceration or even execution, one might expect that the Court's decision would contain a thorough discussion and sensitive weighing of the interests at stake. For example, the Court appropriately might consider why, on the facts stated above, the client should bear the consequence of an attorney's error. On this point, however, the Court simply concluded without explanation that "we discern no inequity in requiring [the client] to bear the risk of attorney error that results in a procedural default."\footnote{One likewise might expect a careful assessment of the strength of the state's interests that justified failing to order a new trial free from constitutional error. In \textit{Smith} and \textit{Carrier} the petitioners argued that whatever the strength of the state's interests in enforcement of procedural rules that result in defaults at trial, those interests are diminished substantially with regard to appellate defaults.} Rather than address this argument on

\begin{quote}
bus. \textit{Id.} The court sentenced Smith to death. \textit{Id.} Permitting the psychiatrist to testify about Smith's statements probably violated Smith's fifth amendment rights, see Estelle v. Smith, 451 U.S. \textit{Id.} 454, 468 (1981), and eighth amendment rights, see Zant v. Stephens, 462 U.S. 862, 912-13 (1983) (Marshall, J., dissenting); accord Smith v. Murray, 477 U.S. at 539, 551, 554 (Stevens, J., dissenting) (asserting that violations of Smith's rights were "clear").

Carrier was tried for rape. 477 U.S. at 482. The issue in \textit{Carrier} was whether the defendant was entitled to discover the victim's statement to the police. \textit{Id.} After examining the statement \textit{in camera} the trial court denied the discovery request on the ground that the statement contained no exculpatory evidence. \textit{Id.} Carrier's counsel included in the notice of appeal a claim that denial of access to the report violated Carrier's rights, but failed to address the issue in the appellate brief. \textit{Id.} Under Brady v. Maryland, 373 U.S. 83 (1963), the victim's statement should have been turned over to defense counsel if the evidence was material to guilt, whether or not it was exculpatory. See \textit{Id.} at 87. A rape victim's statement generally is material to the defendant's guilt, so it is highly likely that the trial judge's denial of Carrier's discovery request constituted reversible error. \textit{See Carrier,} 477 U.S. at 497 (Stevens, J., concurring) ("[t]he trial judge may have erroneously denied respondent's counsel access to statements").

\footnote{16. In both \textit{Smith} and \textit{Carrier}, the prisoners' attorneys were responsible for the default of constitutional claims. \textit{Smith,} 477 U.S. at 529-33; \textit{Carrier,} 477 U.S. at 482-85. Carrier's lawyer apparently did not even consult his client regarding claims to pursue on appeal. 477 U.S. at 481. If counsel had at least furnished Carrier with a copy of the appellate brief in his case, the absence of claims raised in the notice of appeal might have been spotted.}

\footnote{17. \textit{Smith,} 477 U.S. at 529; \textit{Carrier,} 477 U.S. at 482.}

\footnote{18. \textit{Carrier,} 477 U.S. at 488.}

\footnote{19. \textit{Smith,} 477 U.S. at 533; \textit{Carrier,} 477 U.S. at 489-90. Carrier argued, for example, that appellate defaults implicate less weighty state interests than do

\footnote{16. In both \textit{Smith} and \textit{Carrier}, the prisoners' attorneys were responsible for the default of constitutional claims. \textit{Smith,} 477 U.S. at 529-33; \textit{Carrier,} 477 U.S. at 482-85. Carrier's lawyer apparently did not even consult his client regarding claims to pursue on appeal. 477 U.S. at 481. If counsel had at least furnished Carrier with a copy of the appellate brief in his case, the absence of claims raised in the notice of appeal might have been spotted.}
the merits, however, the Court decided in conclusory fashion that the standards for excusing a procedural default "should not vary depending on the timing of [the default] or on the strength of an uncertain and difficult assessment of the relative magnitude of the benefits attributable to the state procedural rules that attach at each successive stage of the judicial process."\(^{20}\)

In addition to expecting an accurate assessment of the competing interests, which the Court failed to provide in *Smith* and *Carrier*, one also might expect the Court to explain how the holding in each case was consistent with the purpose of the writ of habeas corpus. If the petitioners' attorneys *had* raised their constitutional claims in conformity with state procedure, and the state courts had decided those claims adversely to the petitioners, the Court would have permitted the petitioners to raise the claims anew in a federal court.\(^{21}\) Because the petitioners' attorneys failed to raise their claims in state court, however, the Court barred federal habeas review.\(^{22}\) The Court should have explained what it is about the writ of habeas corpus that entitles some petitioners to both federal and state review of constitutional claims, while other petitioners receive no adjudication of their claims on the merits.

Although the Court should have addressed these issues in *Smith* and *Carrier*, it is not surprising that the Court was silent, because habeas corpus has lost its reference point. *Smith* and *Carrier* are but two of a number of recent decisions that changed, or suggested significant changes to, habeas doctrine.\(^{23}\)

\(^{20}\) *Carrier*, 477 U.S. at 491; *accord Smith*, 477 U.S. at 533.

\(^{21}\) See infra notes 66-75 and accompanying text (discussing rule that federal court may rehear claims of constitutional error heard in state court); *see also* Wainwright v. Sykes, 433 U.S. 72, 108 (1977) (Brennan, J., dissenting) (deploring harsh rule that denies access to state or federal courts because of default; in absence of default both state and federal court would hear claim).

\(^{22}\) *Smith*, 477 U.S. at 538-39; *Carrier*, 477 U.S. at 497.

\(^{23}\) *See also* Kuhlmann v. Wilson, 477 U.S. 436, 454 (1986) (plurality opinion) (asserting that "ends of justice" never justify litigation of more than one federal habeas petition unless petitioner advances a claim of actual innocence); Kimmelman v. Morrison, 477 U.S. 365, 373-82 (1986) (permitting petitioner effectively to raise fourth amendment claim in habeas despite contrary general rule of *Stone v. Powell*, 428 U.S. 465 (1976), discussed *infra* notes 146-49 and accompanying text, if claim not raised in state court because trial attorney failed to provide effective assistance of counsel); *Stone v. Powell*, 428 U.S. at 496-502 (concurring opinion) (suggesting such claims will not succeed on merits because attorney failure to raise fourth amendment claim does not create
For all their innovation, these recent habeas opinions make little attempt to discuss the writ’s purpose or relate that purpose to the cases’ holdings. The Court evidently has lost track of the purpose of the writ of habeas corpus. Without an enunciated purpose, habeas doctrine\(^\text{24}\) has lost its way.

The divorce of the writ of habeas corpus from a satisfactory rationale explaining the purpose of the writ can be traced back to the Court’s seminal decision in *Brown v. Allen*.\(^\text{25}\) In that case the Court acknowledged an expansion of the scope of the writ of habeas corpus from its traditionally narrow focus on jurisdictional errors to encompass any claim of constitutional error raised by a prisoner in state custody.\(^\text{26}\) The expansion of the scope of the writ in *Brown*, however, took place in a most peculiar fashion. Rather than explicitly discussing the expansion in the scope, and thus the nature, of the writ, the *Brown* Court simply presumed the enlarged scope of the writ.\(^\text{27}\) Because the change in habeas corpus occurred sub silentio, the Court never provided a rationale for the writ’s expansion. Since *Brown*, habeas corpus has been in search of a rationale.

For decades, the *Brown* Court’s failure to explain and justify the expanded scope of the writ has plagued habeas corpus doctrine, and confounded properly informed debate on the subject.\(^\text{28}\) Without a rationale for the original decision, further...
doctrinal development has had no guiding principle. Not surprisingly, the rules governing access to habeas review have become hopelessly confusing and confused. Moreover, the Brown Court's failure to explain the expansion of habeas has obscured debate on the proper role of federal habeas corpus review. Since Brown the increase in the scope of habeas jurisdiction has created sharp controversy among courts and commentators, and to this day, commentators observe that no single satisfactory rationale exists for the broad scope of habeas jurisdiction.

This Article sets out the rationale for the expansion of the scope of the writ that the Brown Court neglected to provide, thereby permitting an untangling of confused habeas doctrine and focusing debate on the pertinent questions concerning federal habeas review. The Article's thesis is that the Court expanded the scope of the writ of habeas corpus in Brown because

29. Even in 1960, when the rules governing habeas were far more clear than they are today, Professor Reitz wrote “[o]f all the many dark corners of the law, few are so dimly lit as is the federal habeas corpus jurisdiction.” Reitz, Postconviction Remedy, supra note 2, at 461; see also Bator, supra note 2, at 443 (describing habeas as an “often murky and technical field of law”); Hart, supra note 2, at 101, 122-25 (noting that in Sunal v. Large, 332 U.S. 174, 184 (1947), Justice Frankfurter termed habeas corpus “an untidy area of our law,” and that in Irvin v. Dowd, 359 U.S. 394 (1959), the Supreme Court compounded its untidiness); Reitz, Postconviction Remedy, supra note 2, at 468 (noting “tangled formalities” of postconviction procedures and “technical confusion” among remedies); Yackle, Book Review, supra note 2, at 394 (noting that “anyone who reads the advance sheets knows that the greater proportion of judicial time in habeas cases is spent wrestling with threshold procedural matters of extraordinary complexity”).

30. For example, the 1952 Conference of Chief Justices resolved: “orderly Federal procedure under our dual system of government should require that a final judgment of a State's highest court . . . be subject to review or reversal only by the Supreme Court of the United States.” REPORT OF THE HABEAS CORPUS COMM. OF THE CONF. OF CHIEF JUSTICES, Chicago, Illinois, August 14, 1954, in H.R. REP. No. 1293, 83rd Cong., 2d Sess. 6, 7 (1955) [hereinafter STATE JUSTICES' REPORT]; see also Bator, supra note 2, at 443, 526-28 (noting that habeas is one of the areas of “acutest controversy” in criminal law and recommending limits on availability of writ); Yackle, Book Review, supra note 2, at 377 (noting that “[e]ven the casual observer knows that post-conviction habeas has always been a controversial subject”).

31. See, e.g., Bator, supra note 2, at 502 (noting that “basic reason why the courts have had such difficulties in defining the scope of review on habeas is that the Court in Brown did not provide a principled rationalization”); Reitz, Abortive State Proceeding, supra note 2, at 1317 (stating that “there is no acceptable unifying rationalization for the present state of the law” of procedural default doctrine in habeas); Yackle, Explaining Habeas, supra note 2, at 991 (arguing controversy will continue until habeas is explained in conceptually satisfying manner); id. at 1018-19 (noting failure of “conventional wisdom” to explain habeas plausibly).
the Court recognized that it no longer could shoulder the burden on direct review of scrutinizing constitutional claims arising in state criminal proceedings. Accordingly, the federal habeas courts were to act as surrogates for the United States Supreme Court through habeas review, in effect exercising appellate jurisdiction over state criminal proceedings. In a sense, then, after *Brown* there were two writs of habeas corpus: the old common-law writ, narrow in scope and historically used to free prisoners subject to fundamentally unlawful incarceration, and a new writ, which now serves in effect as a federal appeal from every state conviction.

Identifying the *Brown* Court's rationale resolves the confusion created by the Court's failure to explain *Brown*'s implicit holding. First, acknowledging that after *Brown* habeas in effect constitutes a new appellate writ permits enormous simplification of existing habeas doctrine. The less complicated and more familiar rules governing direct review by the Supreme Court may replace all of the confusing habeas rules. Second, acknowledging the new writ and the reason the Court created it focuses debate on the Court's practical inability to provide adequate review in state criminal cases, and the concomitant need for habeas review, rather than on inadequate post-*Brown* justifications for broad habeas jurisdiction.

It is not entirely novel to argue that habeas was the *Brown* Court's solution to the inadequacy of direct review. In the decades since *Brown* several courts and commentators have alluded to this idea, but none pursued the insight. Yet this rationale, better than any other, explains current habeas doctrine and provides a touchstone for habeas jurisdiction in the years to come.

32. See infra notes 56-68 and accompanying text (describing narrow scope of original writ and its gradual evolution).

33. See, e.g., Amsterdam, *supra* note 2, at 380 (arguing that reliance on Supreme Court is unsatisfactory in view of volume of cases and inadequacy of state procedures); Bator, *supra* note 2, at 514 (noting sense of inequality created by discretionary certiorari); Reitz, *Postconviction Remedy, supra* note 2, at 467 (describing Supreme Court review as frustrated to extent state procedures are inadequate); Yackle, *Explaining Habeas, supra* note 2, at 1008 (characterizing superintendence of state supreme courts by direct review as impossible); Yackle, Book Review, *supra* note 2, at 379 (noting that Supreme Court cannot supervise scores of local courts); see also Stone v. Powell, 428 U.S. 465, 526 (1976) (Brennan, J., dissenting) ("The Court does not, because it cannot, dispute that institutional constraints totally preclude any possibility that this Court can adequately oversee whether state courts have properly applied federal law.").
The initial section of this Article addresses the general inadequacy of habeas jurisprudence. Part I(A) presents a hypothetical that graphically illustrates the doctrinal confusion surrounding habeas. Part I(B) provides an overview of the history of habeas jurisprudence, explaining how the failure of the Court to explain the expansion of habeas jurisdiction in *Brown v. Allen* left habeas without a satisfactory rationale. The initial section concludes, in part I(C), by setting out the thesis of this Article—that the *Brown* Court intended expanded habeas jurisdiction to serve as a substitute for direct Supreme Court review of state criminal cases—a thesis that, if accepted, would lead to untangling, simplification, and better understanding of habeas doctrine.

The second section examines in detail the key habeas doctrines of “scope of the writ,” “res judicata,” “procedural default,” and “exhaustion.” The section demonstrates that commonly-offered justifications for the *Brown* decision cannot account for these doctrines, which limit the reach of the *Brown* decision, and that the law governing each doctrine is confusing and internally inconsistent. This section argues, however, that when viewed from the perspective of the “appellate” rationale for *Brown* that is the thesis of this Article, these doctrines make great sense and can be applied in an enormously simplified fashion. This section also examines the “actual innocence” standard imposed by the Court’s recent habeas decisions, explaining that this standard is completely at odds with common justifications for *Brown*, but can be understood with reference to the common-law function of the writ, which existed before, and properly should survive, *Brown*. The second section concludes by articulating how the new “appellate” model for habeas would operate, demonstrating that a proper understanding of *Brown* greatly simplifies habeas corpus procedure.

The final section of the Article evaluates the merits of the appellate model, comparing it both to the model currently used by the Court and to models preferred by other commentators. This section evaluates the appellate model first as applied to claims raised and adjudicated in state courts, and then as applied to claims not raised in state proceedings (and thereby “defaulted” under the Court’s jurisprudence). The final section concludes that the appellate model set forth in this Article is the most satisfactory of all interpretations of *Brown*, and provides a sensible, coherent approach to the jurisprudence of habeas corpus. Not only does the appellate model simplify
habeas, but it strikes an appropriate balance between the need to provide a federal forum for review of federal claims and the commonly expressed concern for finality in criminal proceedings.

I. DOCTRINAL CONFUSION IN HABEAS: AN ILLUSTRATION, AN ANALYSIS, AND A PROPOSED SOLUTION

A. AN ILLUSTRATION OF DOCTRINAL CONFUSION

Assume defendants Tom, Dick, and Mary are tried individually for participation in the same crime. Differences among their cases result only from variations in the quality of their representation at trial or on appeal and the related decision to raise, or failure to raise, a claim of constitutional error committed in state court. This section will show that these differences lead to widely differing, rationally inexplicable dispositions of their habeas petitions by a federal court, despite the identical merits of their underlying constitutional claims.

Accused Tom retains the very best of criminal defense attorneys. His attorney raises every conceivable constitutional claim, but Tom is convicted nonetheless. Tom then files a federal habeas petition, seeking redetermination of any or all of the constitutional claims raised in state court. Under prevailing habeas doctrine, Tom is entitled to this broad review by the federal habeas court, and if Tom proves his case, he may obtain relief.34 If the habeas court finds constitutional error, the conviction will be reversed unless the state can bear the heavy burden of proving beyond a reasonable doubt that the error was harmless.35

34. This results from a simple application of the rule of Brown v. Allen, 344 U.S. 443 (1953). See infra notes 68-73 and accompanying text (discussing rule of Brown).
35. Under Brown, a habeas court simply evaluates the constitutional claim and grants the writ under the standards governing appellate review. Brown, 344 U.S. at 485. When an appellate court finds constitutional error underlying the conviction of a defendant, it generally will overturn the conviction unless the state can prove beyond a reasonable doubt that the error was harmless. See Chapman v. California, 386 U.S. 18, 22-24 (1967). The harmless error standard applies to most meritorious claims of constitutional error, see Rose v. Clark, 478 U.S. 570, 577-78 (1986), but not to every such claim. For example, if the error consists of the prosecution's failure to disclose evidence to the defense, the conviction will stand unless the undisclosed evidence was favorable to the defense and material to either guilt or innocence. Brady v. Maryland, 373 U.S. 83, 86-88 (1963). For a thought-provoking discussion of appellate review standards generally, and the significance of applying harmless error or an
Compare Tom’s situation with that of Dick, whose court-appointed counsel is fresh out of law school and unsure of what he is doing. Dick’s lawyer tries his best, but fails to raise in state court a number of the constitutional claims that Tom’s lawyer raised. After Dick is convicted, he seeks habeas relief, hoping to litigate the defaulted claims. Dick could face the burden of overcoming the default to obtain habeas review, under unfavorable standards developed for this purpose, but he need not worry about that burden because his attorney’s performance was so deficient that it failed even to meet sixth amendment standards for effective assistance of counsel. Rather than trying to overcome the default, Dick simply will assert a sixth amendment claim in federal habeas court. Under the guise of his claim for ineffective assistance of counsel, Dick now may raise essentially the same issues as did Tom. For Dick to obtain relief, however, the Court’s sixth amendment jurisprudence requires that he prove he suffered “actual prejudice” from his lawyer’s failure to raise the claims raised by Tom’s lawyer. Thus, even if Dick establishes the same state-court

alternative standard, in particular, see the recent article by Professors Stacy and Dayton, Rethinking Harmless Constitutional Error, 88 COLUM. L. REV. 79, 126-42, 79-91 (1987).

36. Obviously attorneys other than those “just out of law school” may render ineffective assistance, and some attorneys “just out of law school” may provide competent representation. Thus, the illustration is purely hypothetical in this respect. In reality, members of the criminal defense bar often suffer from disabilities other than inexperience, such as excessively heavy case loads, which result, in part, from relatively small fees or inadequate public funding for representation of indigents. For a discussion of the importance of providing criminal defendants with competent representation, see infra notes 431-36 and accompanying text.

37. A habeas court will not hear a claim that has been defaulted in state court absent a showing of either “cause” to excuse the default and “prejudice” resulting from it, Wainwright v. Sykes, 433 U.S. 72, 90-91 (1977), or actual innocence, Murray v. Carrier, 477 U.S. 478, 497 (1986). See infra notes 186-264 and accompanying text (discussing standard for hearing defaulted claims).

38. See Strickland v. Washington, 466 U.S. 668, 687 (1984) (establishing two-part test for evaluating claims of ineffective assistance of counsel); see also Tague, supra note 2, at 56-57 (noting that restricting access to habeas for defendants whose counsel failed to make timely claims causes defendants to transform claims into attacks on counsels’ competence). For a critique of Strickland, see infra notes 431-36 and accompanying text.

39. Dick either can press a claim for ineffective assistance of counsel under Strickland or can offer ineffective assistance as grounds for excusing a procedural default under Sykes. See infra notes 227-40 and accompanying text (discussing procedural default); notes 279-80 and accompanying text (discussing redundancy of treating sixth amendment violation as cause to excuse procedural default).

40. See Strickland, 466 U.S. at 691-96.
error that Tom established, Dick does not likewise shift to the state the burden to prove the error was harmless, but rather must himself show that but for the error he might not have been convicted.

In other words, Dick, under the rubric of a sixth amendment claim, in effect may raise any substantive claim Tom may raise by asserting that his attorney was ineffective in failing to raise that claim. But Dick is, in effect, penalized for having incompetent counsel in that he must bear the burden and prove a higher degree of materiality with regard to the error in order to have his conviction overturned.

Defendant Mary’s plight is worse yet. Mary’s lawyer is not very good, but not very bad either. Mary’s lawyer is mediocre. Unfortunately, Mary’s lawyer forgets to raise at least one of the constitutional claims raised by Tom’s lawyer in state court. The neglected claim, however, is the claim Mary now believes to be her strongest, so she raises the claim in her petition for federal habeas review. Unlike Tom, Mary is not entitled automatically to a determination on the merits of this claim, because her lawyer procedurally defaulted it by failing to raise it properly in state court. Unlike Dick, Mary cannot obtain review of the constitutional claim through a claim for ineffective assistance of counsel because her lawyer’s overall performance was not so deficient as to qualify her for relief under prevailing sixth amendment standards, despite the lawyer’s failure to raise a meritorious constitutional claim. Finally, the federal court

41. As previously noted, a standard other than “harmless error” applies to some constitutional claims. See supra note 35 (describing appellate review standards). The important point is that Dick’s burden of proving ineffective assistance of counsel does not vary according to the underlying claim, but remains at the actual prejudice level, a heavier burden to carry than the harmless error test. Cf. Stacy & Dayton, supra note 35, at 118 n.157 (noting that prejudice test requires greater impact on outcome than harmless error test).

42. See Strickland, 466 U.S. at 694; see also Tague, supra note 2, at 37 (stating habeas rules place “a dramatically higher” burden on defendant who failed to raise claim at trial); cf. United States v. Frady, 456 U.S. 152, 167-69 (1982) (holding that for defaulted claim prisoner must show "actual prejudice").


44. According to the Court in Carrier, counsel’s default of a single claim may be sufficiently serious to constitute ineffective assistance of counsel. Carrier, 477 U.S. at 496 (citing United States v. Cronic, 466 U.S. 648, 657 n.20 (1984)). The Court did not excuse the defaults in either Carrier or Smith, however, even though both defaults were serious and in Smith the petitioner faced execution. See supra note 15. Moreover, the unnecessarily complex cause-and-prejudice standard for excusing a procedural default distracts courts
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will not excuse Mary's procedural default, because Smith and Carrier hold that attorney error which does not rise to the level of ineffective assistance of counsel is not "cause" to excuse a default and permit habeas review of the defaulted claim. Absent cause, Smith and Carrier allow Mary to litigate her claim only if she can prove that she actually is innocent. In other words, those with mediocre lawyers who fail to raise constitutional claims in conformity with state rules get no federal habeas relief unless they satisfy the heretofore unheard of burden of proving their own innocence.

In sum, current habeas jurisprudence produces the following inexplicable result. Prisoners whose lawyers raise and lose constitutional claims in state court may relitigate those claims in federal court and obtain relief under a relatively low standard of materiality. Prisoners with claims defaulted by a lawyer whose performance was constitutionally deficient also may obtain review on the merits of those claims in a federal court, but despite the fact that such prisoners are not responsible for counsels' failings, a higher materiality standard applies. Prisoners with defaulted claims who cannot establish ineffective assistance of counsel, who also are not responsible for their defaults, must prove actual innocence to obtain habeas review of their constitutional claims.

The seeming unfairness of this scenario is exacerbated when the undefined constitutional claim involved in the hypothetical above is given a name. Assume, for example, Tom, Dick, and Mary are trying to raise a fourth amendment claim before the federal habeas court. It turns out that Tom cannot raise the claim after all, because in Stone v. Powell the Court held that fourth amendment claims—alone among constitutional defects in state criminal proceedings—are barred from relitigation in habeas. For the same reason, Mary cannot

from serious analysis of the constitutional sufficiency of attorney performance. See infra notes 497-98 and accompanying text. In fact, the Court has indicated it prefers not to scrutinize closely counsel's performance for fear of chilling attorneys in the performance of their duties. See infra notes 431-36 and accompanying text (discussing inadequacy of Court's ineffective assistance of counsel jurisprudence).

45. Smith, 477 U.S. at 538-39; Carrier, 477 U.S. at 497.
46. Smith, 477 U.S. at 538; Carrier, 477 U.S. at 497. There are exceptions to the procedural default rule not applicable to this hypothetical. See infra notes 274-91 and accompanying text.
48. Id. at 494; see infra notes 146-80 and accompanying text (discussing
raise the claim either. But Dick can raise the claim even though fourth amendment claims generally are not cognizable on habeas, because the rule changes if the claim was defaulted due to counsel's constitutionally deficient performance at trial.

Suppose, in contrast, the defendants are asserting that the state discriminated blatantly in selecting the grand jury: for example, the prosecutor intentionally excluded all blacks. Tom can raise the claim; indeed, under governing precedent such discrimination never can be harmless error. If he proves his claim on habeas review, Tom will obtain relief no matter what the state argues as to the materiality of the violation. Mary, however, will have her claim barred by the default holdings of Smith and Carrier, unless she can establish her actual innocence, which possibly would make relief on the grand jury claim appropriate.

Whether Dick, with the grossly incompe-

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49. If Mary can prove her innocence, however, the Court might excuse the default under Carrier and permit reaching the merits. See Carrier, 477 U.S. at 497 (showing of innocence will excuse default). Because Mary originally had a "full and fair" opportunity to raise the claim below, Stone apparently would nonetheless bar relief on the merits. Stone, 428 U.S. at 494. Confusion in this area results from the Court's seeming adoption of two inconsistent standards for limiting the scope of the habeas writ. See infra notes 167-69 and accompanying text.

50. See Kimmelman v. Morrison, 477 U.S. 365, 375-79 (1986) (holding that if attorney fails to raise fourth amendment claim at trial, default of claim, though barred from habeas review under Stone, may serve as basis for ineffective assistance claim); infra notes 158-66 and accompanying text (discussing this aspect of Kimmelman).


52. See id.

53. This result looks particularly absurd. After all, as with the Stone claim, if Mary can establish her innocence, why must she do anything further in order to obtain habeas relief? Nonetheless, under the habeas statute, a court cannot grant the writ unless there has been a constitutional error. See 28 U.S.C. § 2254(a) (1982) (requiring writ to be granted to a person "in custody in violation of the Constitution"); Stolz, supra note 2, at 965 n.76 (noting "something odd" about system of postconviction relief that will not entertain claim of innocence). Mary may be able to overcome default of her grand jury claim by establishing her innocence, then establish the merits of the grand jury claim, and obtain relief with no further showing regarding the materiality of this particular violation. This would follow from the Court's decision in Vasquez. 474 U.S. at 260-64. But see Francis v. Henderson, 425 U.S. 536, 542 (1976) (requiring showing of actual prejudice to excuse default of grand jury claim). As with the fourth amendment claim, this confusion results from the Court's attempt to adopt two inconsistent standards for limiting the scope of the habeas writ. See infra notes 167-69 and accompanying text.
tent lawyer, will obtain relief remains uncertain.\textsuperscript{54}

These illustrations paint a picture of habeas that is difficult to fathom. Nonetheless, current habeas jurisprudence prescribes the results depicted. The thesis of this Article is that, although the commonly-offered justifications for habeas are inadequate, many aspects of this illustration may be explained by developing an entirely different perspective on the problem of habeas jurisdiction. Habeas must be seen not as a writ removed from ordinary criminal process, but as an appeal to a federal forum available in every state criminal case. Viewed from this perspective, much of the hypothetical begins to make sense. Moreover, this perspective helps to identify the aspects of habeas jurisprudence that must be modified to yield acceptable results in the cases of Tom, Dick, and Mary. The remainder of this Article unravels habeas and then reconstructs it to make sense of the writ and of the foregoing hypothetical.

B. CURRENT HABEAS LAW: A WRIT IN SEARCH OF A RATIONALE

Although the writ of habeas corpus often is described in exalted terms,\textsuperscript{55} historically the respect accorded the Great Writ reflected more its procedural reach than its substantive scope. A judge empowered to issue the common-law writ could order the prompt release of a prisoner from custody.\textsuperscript{56} The

\textsuperscript{54} On the one hand, the Court's test for ineffective assistance of counsel incorporates a standard for materiality of counsel error (prejudice) that cannot be met by establishing that counsel failed to raise a claim of grand jury error. \textit{See} \textsuperscript{Strickland v. Washington, 466 U.S. 668, 686-87 (1984); infra} notes \textsuperscript{432-34} and accompanying text; \textit{see also} \textit{infra} notes \textsuperscript{154-57} and accompanying text (discussing how grand jury error has no impact on verdict); \textit{cf.} \textit{Kimmelman v. Morrison, 477 U.S. 365, 393-97 (1986) (Powell, J., concurring)} (suggesting failure to raise fourth amendment claim does not constitute prejudice required to sustain ineffective assistance claim on habeas, because fourth amendment claims are not related to guilt and do not render conviction unreliable). On the other hand, any showing of materiality might be excused, consistent with \textit{Vasquez}. 474 U.S. at 260-65; \textit{see supra} note 51 and accompanying text. \textit{But see} \textit{Francis, 425 U.S. at 542 (requiring showing of actual prejudice to excuse default of grand jury claim)}. As with the fourth amendment claim, confusion surrounding grand jury error results from the Court's attempt to adopt two inconsistent standards for limiting the scope of habeas. \textit{See infra} notes \textsuperscript{167-69} and accompanying text.

\textsuperscript{55} \textit{See infra} notes 56-57.

\textsuperscript{56} \textit{Oaks, supra} note 2, at 459-60 (1966). In \textit{Fay v. Noia, 372 U.S. 391 (1963)}, the Court explained that [habeas's] function has been to provide a prompt and efficacious remedy for whatever society deems to be intolerable restraints . . . . [\textit{If the imprisonment cannot be shown to conform with the fundamental}}
writ thus cut through all legal forms and went right to the heart of an unlawful incarceration. Yet the scope of the writ at common law was relatively narrow. A court could appropriately issue the writ when the body responsible for committing a prisoner to custody lacked legal power to do so. The common-law writ was limited to correcting such jurisdictional errors, and other errors deemed equally “lawless” in scope.

Although firmly rooted in its common-law history, current habeas doctrine purports to be a construction of the Act of 1867, by which Congress extended the habeas jurisdiction of the federal courts to individuals in the custody of state officials. The Reconstruction Congress passed the Act of 1867 as one part of its broad program for reforming the secessionist states. The Act provides that a federal court shall issue a writ to any person “in custody in violation of the Constitution or laws or treaties of the United States.” Despite its broad language, for some sixty years after its enactment the Act of 1867 found almost no application to convicted prisoners held in state custody. During that time, federal courts generally confined application of the writ of habeas corpus on behalf of state prisoners to its

requirements of law, the individual is entitled to his immediate release . . . . Vindication of due process is precisely its historic office . . . . [It] was early used by the great common-law courts to effect the release of persons detained by order of inferior courts.

Id. at 401-03 (footnote omitted).

57. “[H]abeas corpus cuts through all forms and goes to the very tissue of the structure. It comes in from the outside, not in subordination to the proceedings, and although every form may have been preserved opens the inquiry whether they have been more than an empty shell.” Frank v. Magnum, 237 U.S. 309, 346 (1915) (Holmes, J., dissenting); see also Fay, 372 U.S. at 411 & n.22, 421 (quoting Justice Holmes and stating that court adopted this view in Moore v. Dempsey, 281 U.S. 86, 91-92 (1923)).

58. The history of the writ of habeas corpus is a matter of sharp controversy focusing on whether, to what extent, and in which cases the Court expanded the common-law scope of the writ. In Fay, Justice Brennan described the writ’s history in a manner that suggested the writ’s scope had always been as broad as that acknowledged in Brown. See Fay, 372 U.S. at 399-415. Commentators have vigorously attacked Justice Brennan’s interpretation, casting some doubt on its accuracy. See Bator, supra note 2, at 446; Mayers, supra note 2, at 37-38 & nn.30-33, 42 & n.45. This Article’s description of habeas largely remains on firm and undisputed ground, avoiding conflicts over the writ’s history where possible.


60. See Fay, 372 U.S. at 415 (arguing Act passed to counter anticipated Southern resistance to Reconstruction measures). But see Mayers, supra note 2, at 49-52 & nn.68-77 (disputing same).

common-law scope. Thus, even under the Act of 1867, federal courts generally would not review claims of state prisoners challenging their incarceration unless they claimed that the trial courts lacked jurisdiction or had committed an error so fundamental that the habeas court found the trial court had "lost" its jurisdiction. Even the exceptional case that strayed outside this narrow stance reflected some effort, no matter how implausible, to "kiss the jurisdictional book." State prisoners rarely found a sympathetic audience in federal habeas courts.

By the time of Brown v. Allen, the Court was under pressure to expand the scope of the writ beyond its common-law dimensions. Although the Court's decisions immediately prior to Brown adhered to the jurisdiction rationale, application of this rationale increasingly stretched the concept of jurisdiction beyond recognition. Moreover, by the time of Brown, the

62. See Bator, supra note 2, at 465-72, 474-84 (describing federal courts' post-Act review of unlawful detention as limited to corrective process); Hill, The Forfeiture of Constitutional Rights in Criminal Cases, 78 COLUM. L. REV. 1050, 1053-54 (1978) (noting that federal courts stretched "lack of jurisdiction" concept considerably but did not abandon limitation until well into twentieth century); Mayers, supra note 2, at 54 n.89 (stating habeas during this period limited to claims attacking jurisdiction); Teel, Federal Habeas Corpus: Relevance of the Guilt Determination Process to Restriction of the Great Writ, 37 W.L.J. 519, 521-30 (1983) (describing federal courts' slow progress away from lack of jurisdiction as determinant of habeas availability).

63. Cf. Bator, supra note 2, at 474-83 (stating that conviction under unconstitutional statute, racial exclusion in jury selection, and ineffective assistance of counsel implicate jurisdiction and therefore warrant habeas review); see also Johnson v. Zerbst, 304 U.S. 458, 468 (1938) (holding that court with initial jurisdiction can "lose" jurisdiction if proceedings infringe defendant's constitutional rights).

64. Friendly, supra note 2, at 151; see also Bator, supra note 2, at 471 (noting Court continued to pay "lip service" to jurisdiction limitation in early period). But see Bator, supra note 2, at 464-68 (characterizing exceptions to jurisdictional cases as "limitations" on principle that error made by court of competent jurisdiction was not ground for relief under habeas).

65. 344 U.S. 433 (1953).

66. See Frank v. Mangum, 237 U.S. 309, 337 (1915) (acknowledging that interference of mob violence or disorder may strip court of jurisdiction); but see Moore v. Dempsey, 261 U.S. 86, 91 (1923) (holding habeas review proper where state procedure does not adequately protect defendant's constitutional rights). Contemporary commentators suggested that decisions such as Moore signaled an expansion of the writ of habeas corpus, but, as Judge Friendly observed, until Brown the Court scrupulously adhered to the narrow jurisdiction rationale. Friendly, supra note 2, at 151-52.

67. Early decisions stretching the jurisdiction rationale include Moore, 261 U.S. at 91 (holding federal habeas court may hear claim that threat of mob violence inhibited fair trial because state court system did not provide corrective process for federal constitutional error) and Brown v. Mississippi, 297 U.S. 278, 286-87 (1936) (holding court that fails to provide counsel to capital defendant
lower federal courts had begun to hear habeas claims that did
not challenge the jurisdiction of the committing courts. Without
doing so explicitly, the Brown Court accepted a broadened scope of the writ that included any claim of federal constitutional error arising in state criminal proceedings.

In Brown, a state prisoner sentenced to death challenged the constitutionality of the state trial proceedings. Brown raised two claims. First, he alleged racial discrimination in the selection of the grand jury. Second, he claimed that a confession admitted into evidence against him was not given voluntarily. Brown had raised these issues in state court, and had applied to the United States Supreme Court for a writ of certiorari. After the Court denied certiorari, Brown sought habeas relief.

What is significant about Brown is that the Court addressed Brown’s claims on the merits. Neither the racial discrimination nor the confession claim related to the jurisdiction of the committing court. Moreover, even if these errors arguably deprived the committing court of power to adjudicate the case, the Brown Court made no attempt to rely on such an argument. Thus, under the traditional, common-law view of the writ’s scope, neither the lower federal habeas court nor the Supreme Court should have addressed Brown’s claims.

The fact that the Brown Court did address Brown’s claims on the merits, without any attempt to fit them into the jurisdictional framework, signalled a shift in the scope of the writ. Brown has been cited frequently for the proposition that habeas lies to correct any constitutional error addressed in state-court proceedings. This represented a shift of tremen-
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doous significance, yet the Brown Court not only failed to explain the shift but failed even to acknowledge it. Nowhere did the majority opinion discuss which claims are properly cognizable in habeas. Nor did the Court discuss how the nature of the writ justified its newly broadened scope. Indeed, the Court's only nod in the direction of a holding on this point was that, in discussing the role a prior state adjudication of constitutional claims would have in a federal habeas proceeding, the Court simply asserted that "the state adjudication carries the weight that federal practice gives to the conclusion of a court of last resort of another jurisdiction on federal constitutional issues. It is not res judicata." To the extent that the Brown Court relied on the Act of

courts. It is equally fundamental that the state courts cannot . . . have the last word. This is the teaching of . . . Brown v. Allen. That decision . . . explicitly enthroned the principle that all federal constitutional questions decided in state criminal cases may be redetermined on the merits on federal habeas corpus.

Reitz, Postconviction Remedy, supra note 2, at 463 (footnotes omitted). See Bator, supra note 2, at 462 (footnote omitted) ("[In Brown] it was held that state prisoners could maintain proceedings in the federal courts to attack convictions for constitutional error after full and fair proceedings in the state courts."); Friendly, supra note 2, at 155.

73. The Brown majority came closest to acknowledging the new scope of habeas in its discussion of the defendant's right to a plenary hearing on habeas review: "A way is left open to redress violations of the Constitution . . . Moore v. Dempsey, 261 U.S. 86. Although they have the power, it is not necessary for federal courts to hold hearings . . . when satisfied that federal constitutional rights have been protected." Brown v. Allen, 344 U.S. 443, 464 (1953). The majority also referred to "the statutory development of 1867 that expanded habeas corpus." Id. at 457.

In a concurring opinion, Justice Jackson explicitly addressed modern habeas's expansion beyond the traditional inquiry into jurisdiction, expressing doubt that the language of the 1867 Act could justify this expansion. 344 U.S. at 532-34 & n.4 (Jackson, J., concurring) (attributing both expansion and resulting controversy surrounding habeas to, among other things, Court's use of fourteenth amendment to subject state courts to federal control).

In dissent, Justice Black agreed that district courts had jurisdiction and power to release state prisoners held in violation of constitutional rights, apparently regarding this as a settled question after Moore v. Dempsey. Brown, 344 U.S. at 549 (Black, J., dissenting). Black asserted that courts in habeas proceedings were to look through procedural screens to prevent forfeiture of life or liberty in defiance of the Constitution. Id. at 554.

Justice Frankfurter's dissent rejected the idea that habeas be used as a "jejune abstraction," and quoted with approval the words of Judge Learned Hand from 30 years before Brown: "'[T]he writ is available, not only to determine points of jurisdiction, stricti juris, and constitutional questions; but whenever else resort to it is necessary to prevent a complete miscarriage of justice.'" Brown, 344 U.S. at 558 (Frankfurter, J., dissenting) (emphasis added) (quoting United States ex rel. Kulick v. Kennedy, 157 F.2d 811, 813 (2d. Cir. 1946)).

75. 344 U.S. at 458 (footnote omitted).
1867, its construction finds support in the Act's plain language, but not in its history. Commentators have disagreed sharply over the correct historical interpretation of the Act of 1867 with regard to state prisoners. Some commentators maintain that Congress intended that the Act be applied just as the Brown Court applied it. These commentators contend that the Reconstruction Congress foresaw southern resistance to reform and enacted the habeas statute as a means of opposing that resistance. Thus, the Act therefore should be given the broadest interpretation, extending habeas to any claim of constitutional error. Others argue that the Act of 1867 had nothing to do with state criminal prisoners, but was directed solely at former slaves, ostensibly emancipated but nonetheless held "in custody." Under this interpretation the Act did not alter the

76. "[T]he several courts of the United States . . . shall have power to grant writs of habeas corpus in all cases where any person may be restrained of his or her liberty in violation of the constitution, or of any treaty or law of the United States. . . ." Act of February 5, 1867, ch. 28, § 1, 14 Stat. 385, 385 (current version at 28 U.S.C. §§ 2241-2255 (1982)).

77. See Reitz, Postconviction Remedy, supra note 2, at 462 (arguing that scope of habeas jurisdiction conferred by Congress extends to state prisoners imprisoned in violation of Constitution); see also Bator, supra note 2, at 474 (acknowledging argument for broad scope of habeas based on language of 1867 Act). In Fay v. Noia, 372 U.S. 391 (1963), Justice Brennan's majority opinion characterized the Act as establishing clear congressional intent to provide a federal forum for review of the federal claims of state criminal defendants. Id. at 415-19. In Justice Brennan's view, decisions limiting habeas review in any fashion established a doctrine of abstention from interfering with the states that derived from considerations of comity, not from want of power in the lower federal courts. Fay, 372 U.S. at 415-20; see also Friendly, supra note 2, at 154-55 (suggesting that true motivation for Brown decision was Court's inability to perform its historic function of correcting constitutional error through direct review of state criminal cases); Bator, supra note 2, at 474-77 (asserting that habeas traditionally functioned as protection against detention without court process, not as postconviction remedy; sparse legislative history does not furnish overwhelming evidence needed to show that Congress intended to remove habeas from its historic context and convert it into ordinary writ of error). But see generally Mayers, supra note 2, at 58 (concluding that it is "inherently implausible" that Congress intended in 1867 to make habeas into procedure for review of state convictions).

78. At least one commentator has pointed out that this argument is not entirely sound. Assuming the need for federal courts to combat southern resistance, it is difficult to identify the writ's role in that struggle, because the Supreme Court in 1867 had not yet interpreted the due process clause to incorporate selective rights from the Bill of Rights against the states. See Mayers, supra note 2, at 54. Thus, the writ, which only is granted to redress federal constitutional violations, would have had extremely limited application to prisoners in state custody.

79. See Mayers, supra note 2, at 43-48 (criticizing Supreme Court's interpretation and arguing that historical context as well as language of amend-
common-law scope of the writ. Whichever view is correct, the Brown Court's interpretation ran contrary to sixty years of experience with the Act and required some explanation.

Habeas decisions and commentary following Brown have attempted to identify the rationale for broad habeas review that the Brown Court failed to provide. Some would justify the broad scope of habeas by reference to the nature of the claims asserted: because constitutional rights are so important, extraordinary habeas review is essential to vindicate those rights. This rights-based rationale arguably can be tied to the common-law tradition on the grounds that habeas lies to correct fundamental injustices, and that any deprivation of a constitutional right is fundamental. Others explain the scope of

ment suggest habeas was to be ultimate protection of newly-emancipated slaves, rather than ordinary state prisoners, right to freedom); id. at 39-40 & n.39 (arguing that Act was directed to cases involving persons virtually enslaved through device of state laws).

80. Subsequent history indicates that the intent of the Reconstruction Congress is somewhat irrelevant to modern interpretation of the Act. Congress has amended the 1867 habeas statute a number of times. Several amendments followed Supreme Court decisions regarding the scope of the writ; indeed, Congress on occasion has amended the habeas statute to incorporate specific decisions. See Stone v. Powell, 428 U.S. 455, 528-29 (1976) (Brennan, J., dissenting) (discussing Act of Nov. 2, 1966, Pub. L. No. 89-711, § 2, 1966 U.S. CODE CONG. & ADMIN. NEWS (80 Stat.) 1105, by which Congress adopted Court's decision in Townsend v. Sain, 372 U.S. 293, 322 (1963), to establish federal courts' responsibility to conduct factfinding hearings for state prisoners in habeas proceedings). Congress's apparent ratifications of the Court's decisions render the intent of the 1867 Congress relatively unimportant. Construction of the 1867 Act thus differs from typical statutory construction which involves the determination of congressional intent followed by the application of statutory language to the specific case at hand with that congressional intent in mind. In the habeas situation, the Court has followed Congress to a far lesser extent than Congress has followed the Court. The Court consistently has felt free to change its construction of the Act. See Wainwright v. Sykes, 433 U.S. 72, 79-81 (1977) (discussing Court's willingness to alter construction of Act).

81. See, e.g., Sanders v. United States, 373 U.S. 1, 8 (1963) ("Conventional notions of finality of litigation have no place where life or liberty is at stake and infringement of constitutional rights is alleged."); Fay v. Noia, 372 U.S. 391, 416 (1963) (Act of 1867 was intended to provide additional review where vindication of rights under postwar amendments is necessary); Reitz, Abortive State Proceeding, supra note 2, at 1344, 1349-51 (arguing that purpose of habeas is vindication of federal rights). Often, concern for federal rights reflects a sense that federal rights should be vindicated in a federal forum. See Amsterdam, supra note 2, at 380 ("[i]t makes good sense to give a state criminal defendant a federal judge to try the facts underlying his federal constitutional claim"); Reitz, Abortive State Proceeding, supra note 2, at 1344, 1349; Yackle, Explaining Habeas, supra note 2, at 1022.

82. See Fay, 372 U.S. at 399-426. Justice Brennan's attempt to weave the rights-based rationale for broad habeas review into the history of the common-
habeas with reference to the liberty interest at stake: because the deprivation of liberty is so serious, only extraordinary review can protect prisoners from wrongful deprivation of liberty. Neither rationale, however, explains the current set of rules governing habeas.

The liberty-based theory is inadequate because the current writ's scope is both under- and overinclusive when measured against the liberty-based rationale. It is overinclusive because federal habeas now is used to vindicate rights that have nothing to do with the ultimate question of whether an individual ought to be deprived of liberty. For example, under the liberty-based rationale, a person claiming error in grand jury proceedings who subsequently was lawfully convicted has a weak claim that his interest in avoiding incarceration justifies collateral relief. This claim is nonetheless cognizable on habeas. The liberty-based rationale also is underinclusive because if the sole purpose of federal habeas were to relieve unjust incarcerations, habeas certainly should lie to address a claim that a state convicted an innocent person. Although the question of actual innocence plays a part in the rules that limit access to habeas review, a habeas petition claiming only that a state has incarcerated an innocent person would be dismissed for failure to state a claim upon which relief can be granted under current doctrine.

Nor can broad federal habeas jurisdiction be explained by the special importance of the rights that petitioners claim were infringed. The purpose of direct appellate review of criminal convictions is to ensure that trials are free from legal error. The rights-based habeas rationale does not explain why this

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law writ has come under sharp attack. See supra note 58 (discussing debate over history of common-law writ); see generally Oaks, supra note 2 (disputing Brennan's historical analysis and conclusions); Mayers, supra note 2 (same).

83. Sanders, 373 U.S. at 8; Fay, 372 U.S. at 402 ("[habeas writ's] root principle is that in a civilized society, government must always be accountable to the judiciary for a person's imprisonment"). But cf. Bator, supra note 2, at 441-53 (responding to, and disagreeing with, liberty-based rationale).

84. See Stacy & Dayton, supra note 35, at 99-104 (noting that grand jury claim is unrelated to propriety of conviction and proposing novel remedy for such claims).


86. See supra note 53.

87. At common law an appellate court could issue a "writ of error" to review a lower court's decision; the direct appeal now serves that purpose. See BLACK'S LAW DICTIONARY 1443-44 (5th ed. 1979); see also Friendly, supra note 2, at 151-52 (questioning why collateral attack need be available to correct errors that may be raised on direct appeal).
system of direct review is inadequate to redress constitutional violations, making habeas review necessary. Moreover, if the reason is that the rights at stake are so important that habeas must be available as a backup system to vindicate those rights not protected during direct review, the extensive rules limiting access to habeas developed since Brown are inconsistent with the rights-based explanation. As Part II demonstrates, those rules bar habeas review in many cases that present meritorious constitutional claims. Finally, it is arguable whether habeas relief actually “vindicates” rights: a new trial, excluding evidence unlawfully obtained, does not necessarily compensate the petitioner for the harm caused by the initial violation—the injury resulting from coercion of a confession contrary to the fifth amendment, for example.

Moreover, in application both the liberty-based and the rights-based rationales possess similar fundamental flaws. Under the current formulation, in determining whether to apply a limiting rule that will bar access to the habeas court, the Court applies a balancing test: explicitly or implicitly, the Court balances the prisoner's interest in liberty or in having a federal right vindicated against the state's interest in avoiding review, generally a concern for finality or comity. Balancing tests by their nature pose intractable difficulties. When the Court attempts to balance dissimilar or uncertain factors, as in the habeas context, these difficulties are exacerbated. For example, it simply is impossible to discuss usefully the balance between a prisoner's interest in litigating a defaulted fifth amendment claim and the state's interest in having its procedural rule respected and the prisoner's conviction upheld.

88. See infra Part II (discussing limiting rules).
89. See Stacy & Dayton, supra note 35, at 103.
90. See, e.g., Murray v. Carrier, 477 U.S. 478, 485-92 (1986) (weighing petitioner's interest in having claim heard against state's interest in procedural rule to determine whether attorney error constitutes cause to excuse procedural default); Kuhlmann v. Wilson, 477 U.S. 436, 452-54 (1986) (plurality opinion) (weighing prisoner's interest in release against state's interest in finality to determine whether petition should be heard).
91. For an excellent discussion of the problems associated generally with balancing tests, see Tushnet, Anti-Formalism in Recent Constitutional Theory, 83 Mich. L. Rev. 1502, 1508-09 (1985) [hereinafter Tushnet, Anti-Formalism]. For the same author's similar, though less well developed, discussion specifically addressed to habeas corpus, see Tushnet, supra note 2, at 496-502.
92. See generally Tushnet, Anti-Formalism, supra note 91, at 1509-12 (discussing problems with balancing incommensurable interests).
93. Thus, the Court has balanced the same factors at different times and arrived at different results. Compare Smith v. Murray, 477 U.S. 527, 538-39
Both sides of the balance have significant weight, but there is no measure by which to compare them.\textsuperscript{94}

Even if a balance could be struck, it would have to be struck on a case-by-case basis,\textsuperscript{95} and the current formulation leaves no room for that. Instead, habeas doctrine relies on categorical balancing, increasing the difficulties inherent in balancing dissimilar interests. For example, the Court will not assess the magnitude of a particular individual's liberty interest in a case of procedural default; whether the individual is to serve one week or fifty years is irrelevant.\textsuperscript{96} Similarly, in \textit{Smith} and \textit{Carrier} the Court declined to analyze whether particular defaults implicated more or less weighty state interests. For example, the Court refused to distinguish between defaults at trial and defaults on appeal, although trial defaults arguably are more serious because remedying a constitutional defect in that context requires replaying the entire trial.\textsuperscript{97} Rather than conducting the sensitive balancing needed to weigh dissimilar factors, the Court applies categorical rules unlikely to strike the appropriate balance in individual cases.\textsuperscript{98}

Thus, even supporters of broad federal postconviction review have failed to advance a rationale that adequately justifies

\begin{quote}
(1986) (granting no relief on merits of defaulted fifth amendment claim unless petitioner can show actual innocence) \textit{with} Fay v. Noia, 372 U.S. 391, 438 (1963) (holding defaulted fifth amendment claim cognizable unless petitioner "deliberately by-passed" state remedies). Clearly, the \textit{Smith} and \textit{Fay} Courts had very different views of the balanced interests, but the opinions viewed the interests at a level so general as to be virtually worthless. This is to be expected when the Court balances apples and oranges.

\textsuperscript{94} See Tushnet, \textit{Anti-Formalism}, supra note 91, at 1509-16 (noting arbitrary characterizations made in attempts to balance incommensurable interests).

\textsuperscript{95} Id. at 1514-16 (critiquing possibility of doing this in meaningful fashion).

\textsuperscript{96} See \textit{Smith}, 477 U.S. at 538 ("We reject the suggestion that the principles of \textit{Wainwright v. Sykes} apply differently depending on the nature of the penalty a State imposes for the violation of its criminal laws."). Even an analysis sensitive to the duration of imprisonment would not tackle the complexity of the problem, for the same penalty may affect different people differently. A few days in prison might devastate one person; another might find it burdensome, but less serious than a large fine.

\textsuperscript{97} See, \textit{e.g.}, \textit{Smith}, 477 U.S. at 533; Murray v. \textit{Carrier}, 477 U.S. 478, 492 (1986).

\textsuperscript{98} See \textit{Carrier}, 477 U.S. at 491 ("We likewise believe that the standard for cause should not vary depending on the timing of a procedural default or on the strength of an uncertain and difficult assessment of the relative magnitude of the benefits attributable to the state procedural rules that attach at each successive stage of the judicial process.").
the Brown decision. Not surprisingly, that Brown remains unexplained has worked to the advantage of those seeking to curtail broad habeas jurisdiction. Critics identify tensions caused by federal review of state criminal decisions and present those tensions as justification for cutting back the broad reach of habeas.\textsuperscript{100}

Correctly or incorrectly, its critics perceive habeas corpus review by federal courts as carrying heavy costs. First, federal court review of state decision making has created friction between state and federal courts.\textsuperscript{101} Second, habeas jurisdiction undermines the finality of criminal convictions; habeas can result in the release of a prisoner years after the conclusion of state proceedings in the case.\textsuperscript{102} Finally, critics perceive expansion of the writ as increasing the work of both federal and state courts, consuming limited judicial resources.\textsuperscript{103} All of these perceived costs may be justified, or at least required, by the special nature of the writ of habeas corpus,\textsuperscript{104} but because the Brown Court never offered an explanation of the purpose of

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\textsuperscript{99} Professor Yackle points out that the scope of the writ continues to be attacked precisely because the Court has yet to provide a satisfactory rationale: "The controversy surrounding federal habeas corpus has not abated. It will continue until the federal courts' [habeas] authority . . . is explained on some conceptually satisfying basis." Yackle, Explaining Habeas, supra note 2, at 991.

\textsuperscript{100} See, e.g., Bator, supra note 2, at 444-62 (pointing to high "finality" costs as grounds for limiting habeas to claims of insufficient "corrective process" in state court); Friendly, supra note 2, at 148-49 (pointing to finality and resources costs to justify limiting habeas to claims of actual innocence); see also Kuhlmann v. Wilson, 477 U.S. 436, 454-55 (1986) (plurality opinion) (noting finality costs of multiple habeas proceedings will limit availability of habeas to review a successive petition to cases raising a claim of "factual innocence"); Stone v. Powell, 428 U.S. 465, 489-96 (1976) (noting costs of overturning convictions on fourth amendment grounds and limiting opportunity to raise such claims in habeas to cases in which there was no "full and fair opportunity" to litigate claim in state court).

\textsuperscript{101} See STATE JUSTICES' REPORT, supra note 30, at 1 (recommending that only United States Supreme Court have authority to overturn state court convictions); Bator, supra note 2, at 503-04 (noting that federalism counsels against indiscriminate expansion of habeas); Brennan, supra note 2, at 439 (acknowledging he resented federal intrusion while member of New Jersey Supreme Court).

\textsuperscript{102} Bator, supra note 2, at 441-53; Friendly, supra note 2, at 146-48. A related problem resulting from granting the writ years after conviction is that the state's evidence may have disappeared, making retrial impossible. See Bator, supra note 2, at 517; Friendly, supra note 2, at 146-47.

\textsuperscript{103} See, e.g., Brown v. Allen, 344 U.S. 443, 532, 536 & n.3 (1953) (Jackson, J., concurring in the result); Bator, supra note 2, at 506; Friendly, supra note 2, at 148-49; Shapiro, supra note 2, at 321-25.

\textsuperscript{104} Cf. Bator, supra note 2, at 505 (stating that it is not unseemly for fed-
the writ consistent with its expanded scope, there is no ration-
ale with which to justify the costs of broad habeas review.

The perceived costs of habeas made it inevitable that courts
would develop rules limiting access to habeas, but a lack of un-
derstanding of the purpose of the writ has thwarted sound doc-
trinal development of those rules. Since Brown, the Court has
developed at least four sets of rules that limit the scope or
availability of the writ of habeas corpus. These rules govern
(1) the scope of the writ; (2) the extent to which prior state
or federal determinations bind a subsequent habeas court, often
referred to as principles of res judicata; (3) whether a federal
court can review an issue barred from review in state court
through procedural default; and (4) the timing of federal
court review of state convictions. As Part II explains in de-
tail, this collection of rules governing the availability of habeas
is confusing and often internally inconsistent.

In its 1985-1986 term, the Court decided four important
habeas cases. In addition to the Smith and Carrier decisions
discussed in the introduction, the Court decided Kuhlmann v.
Wilson, a plurality decision that would restructure dra-
mically the application of res judicata rules to habeas, and Kim-
melman v. Morrison, a decision concerning the availability of
habeas for raising claims of ineffective assistance of counsel.
Rather than clearing up debate over the purpose of habeas,
these decisions complicated matters. Every decision included a
suggestion, either from the majority or in a concurring or dis-
senting opinion, that in some, although not all, instances,
habeas review should lie only for petitioners claiming actual in-
ocence of the crimes for which they are incarcerated. This

eral court to reverse highest state court, but it is unseemly to do so without
"principled justification").

105. In addition to the four sets of rules this Article discusses, the concept
of "custody" and limits on the factfinding authority of federal courts also re-
strict the scope of habeas review. See Yackle, Explaining Habeas, supra note 2, at 998-1010 (discussing custody issue); infra note 416 (briefly discussing
factfinding in habeas).

106. See infra Section II(A).
107. See infra Section II(C).
108. See infra Section II(B).
109. See infra Section II(C).
U.S. 478, 497 (1986); Kuhlmann, 477 U.S. at 454 (plurality opinion); Kim-
melman, 477 U.S. at 394-98 (Powell, J., with Burger, C.J. and Rehnquist, J.,
concurring) (effectively disallowing ineffective assistance of counsel claims al-
new twist not only complicates habeas doctrine, but further confuses the rules governing availability of the writ.

Habeas doctrine, therefore, is in a state of widely acclaimed muddle. Between the broad scope of the writ acknowledged in Brown and the harsh limiting rules developed subsequent to Brown, the doctrine moves in two directions at once, satisfying no one. This confusion suggests that Brown has yet to be explained properly.

C. EXPLAINING BROWN V. ALLEN . . . AND HABEAS

The inadequacy of post-Brown rationales for broad habeas review indicates that the Brown Court had some other concern in mind when it accepted broad federal habeas review. Thus, a return to Brown is required.

The Brown Court’s motive for expanding habeas becomes apparent on close examination of the issue that divided the Brown Court most sharply. That issue was the effect a habeas court should give to the prior denial of certiorari by the United States Supreme Court. Under then-emerging practice, prisoners had to apply to the Supreme Court for a writ of certiorari in order to satisfy the requirement that state remedies be exhausted before seeking habeas relief. In Brown and its companion cases, the lower federal courts gave weight to the denial of certiorari by the Supreme Court in resolving habeas cases on the merits. In other words, one reason for denying habeas relief was that the Supreme Court previously had denied relief—presumably on the same grounds—on direct review.

The Brown Court split on the certiorari issue, the majority holding that denial of certiorari should have no effect in subsequent habeas proceedings, and the dissenters arguing that...
such denial should have some weight.\textsuperscript{118} What divided the Court was the question of the efficacy of direct Supreme Court review of criminal convictions. Both sides clearly believed it important that state review criminal convictions receive federal review.\textsuperscript{119} But the majority was unwilling to pretend that the certiorari process afforded meaningful review,\textsuperscript{120} and even the dissent was unwilling to give the certiorari process full credit.\textsuperscript{121} As Justice Jackson lamented, "some say denial means nothing, others say it means nothing much."\textsuperscript{122}

At the heart of the Brown Court's decision to expand the scope of federal habeas, therefore, was its realization that direct review alone no longer could provide adequate treatment of federal questions arising in state criminal cases. Because the Court could not perform this function, the lower federal courts would act as surrogates through the writ of habeas corpus. The Brown opinions support this rationale, without presenting it explicitly as the basis for the Court's implicit endorsement of broad habeas jurisdiction.\textsuperscript{123}

There were several reasons why, at the time of Brown, a majority of the Court came to conclude that the Court could not meaningfully review state criminal cases. Three of these reasons were particularly significant.\textsuperscript{124} First, the Court no longer heard every criminal case on direct appeal: as late as

\begin{itemize}
\item \textsuperscript{118} See id. at 491-97, 508-13.
\item \textsuperscript{120} See id. at 545-48 (Jackson, J., concurring in the result).
\item \textsuperscript{123} See id. at 485-87; id. at 510-13 (Frankfurter, J., writing for the majority); id. at 545-48 (Jackson, J., concurring in the result).
\item \textsuperscript{124} Justice Frankfurter's opinion details several lesser concerns this Article does not address, including inconsistencies in review resulting from Justices' disagreements over why certiorari should be denied, denials of certiorari
1916, the Court reviewed state criminal convictions on appeal; by the time of *Brown*, discretionary review had replaced appellate jurisdiction. Therefore, the efficacy of review depended on the Court’s willingness and ability to closely scrutinize certiorari petitions.

Second, the Court decided *Brown* at the beginning of the due process revolution. The Court increasingly was giving specific content to the fourteenth amendment’s due process clause, broadening and spelling out the scope of substantive federal rights accorded state prisoners. The consequences were twofold: the number of certiorari petitions claiming violations of substantive rights was increasing; and the Court was more solicitous of such claims. Both factors made it difficult for the Court to provide the sort of review of criminal certiorari petitions that its members evidently believed necessary.

Finally, at the time of *Brown*, most criminal certiorari petitioners were unrepresented by counsel and their petitions were often incomprehensible, making evaluation of the constitutional claims extremely difficult. The decision in *Gideon v. Wainwright*, granting counsel to most state criminal defendants, still was a decade away, and even *Gideon* and its progeny do not entitle a prisoner to counsel to seek discretionary review by the Supreme Court. Thus, the form of many of

having nothing to do with the merits of cases, and poor records shaping the issues. *Brown*, 344 U.S. at 491-94.


126. See, e.g., *Rochin v. California*, 342 U.S. 165, 173 (1952) (per curiam) (holding use of emetic by police to obtain evidence swallowed by suspect violates due process); *Johnson v. Zerbst*, 304 U.S. 458, 467-68 (1938) (stating that sixth amendment entitles criminal defendant to counsel at trial); *Mooney v. Holohan*, 294 U.S. 103, 112 (1935) (per curiam) (holding that use of perjured testimony by prosecuting authorities violates fourteenth amendment); see also *Friendly*, supra note 2, at 153-54 & n.53 (discussing Supreme Court criminal procedure decisions); Reitz, *Abortive Proceeding*, supra note 2, at 1329 (stating that Moore v. Dempsey, 261 U.S. 86 (1923)) was “point of departure” for expansion of due process rights.


130. *Id.* at 342.

the growing number of certiorari petitions hindered the Court's exercise of its supervisory role.

By the time of Brown, the Court therefore was ready to concede that direct review of state criminal convictions did not and could not constitute meaningful review.\textsuperscript{132} If there were to be any meaningful federal review, it would have to occur at another stage in the process. The question was not whether to provide more review of state criminal cases, but whether to provide any meaningful federal review.

Accordingly, the Court turned to the writ of habeas corpus to ease the pressure on direct review. Although generally described in grandiose terms, the writ had little to do with state prisoners before Brown.\textsuperscript{133} With a little revision, however, the Court drafted habeas into service to provide the federal review of state criminal cases the Court could not supply.

What the Court did, in effect, was split the old writ into two. Presumably, the writ would continue to lie when a prisoner asserted a fundamental miscarriage, such as the absence of jurisdiction in the committing court. But the writ also would serve a new purpose as a surrogate for direct review by the Supreme Court.

This explanation for the scope of the new writ is not altogether novel. Since Brown, several commentators have alluded to the theory in passing\textsuperscript{134} and at least one member of the Court has acknowledged the theory.\textsuperscript{135} No commentator, court or judge, however, has extended this theory to its logical conclusion.

Recognizing habeas as an appeal suggests that procedural rules governing habeas practice ought to resemble, or derive from, the rules governing direct Supreme Court review. Instead, the Court has developed a separate and highly complicated set of doctrines for the lower federal courts to apply in habeas cases. Yet the Court intuitively has understood that habeas is a surrogate for direct review. As the next section demonstrates in detail, the appellate rationale for the new habeas explains the trend of post-Brown habeas decisions with remarkable accuracy. While applying overcomplicated and

\textsuperscript{132} See generally Reitz, Postconviction Remedy, supra note 2, at 484-503 (surveying cases to demonstrate inadequacy of Supreme Court review). But see Brown, 344 U.S. at 485 (majority not ready to concede on this issue).

\textsuperscript{133} See supra notes 56-67 and accompanying text.

\textsuperscript{134} See supra note 33.

poorly justified rules, the Court in most cases is reaching results similar to the results of direct appeal.

II. UNRAVELING HABEAS: HOW AN APPELLATE MODEL RESOLVES PERVERSIVE DOCTRINAL CONFUSION

A. THE SCOPE OF THE WRIT

1. Current Doctrinal Confusion

_Brown v. Allen_ stands for the proposition that the writ of habeas corpus extends to any claim of constitutional error in state criminal proceedings, so long as the petitioner raised the claim in state court in conformity with state procedure.\(^{136}\) Dissatisfaction with the broad scope of the writ since _Brown_,\(^ {137}\) and with post-_Brown_ explanations for that scope, led to development of alternate theories of habeas jurisdiction that would limit its scope considerably. The Court in its habeas decisions has given two of these theories some recognition, but has adopted neither theory as a governing principle. Rather, the Court has applied these theories in piecemeal fashion, creating serious inconsistency in habeas doctrine concerning the scope of the writ.

The first theory is the "corrective process" theory, advanced most forcefully in an influential article by Professor Bator.\(^ {138}\) Bator's argument was that a prisoner should obtain access to a federal court to review a constitutional claim arising in state court proceedings only if the state itself failed to provide adequate process to correct the constitutional violation.\(^ {139}\) If, for example, the entire course of state proceedings occurred under the influence of mob violence, or the petitioner was tor-

\(^{136}\) See _supra_ note 73 and accompanying text.

\(^{137}\) See, e.g., _Bator, supra_ note 2, at 523-25 (arguing that habeas should be limited to challenges to fairness of state procedures); _Mayers, supra_ note 2, at 58 (arguing that habeas statute was not intended to expand scope of writ); see _also supra_ note 30 (noting state chief justices' resolution that only Supreme Court should review final state decisions).

\(^{138}\) _Bator, supra_ note 2, at 448, 455.

\(^{139}\) _Id_. Professor Bator views "corrective process" as process "fairly and rationally" suited to determining facts and applying law:

I have said that, presumptively, a process fairly and rationally adapted to the task of finding the facts and applying the law should not be repeated. This suggests that it is always an appropriate inquiry whether previous process was meaningful process, that is, _whether the conditions and tools were such as to assure a reasoned probability that the facts were correctly found and the law correctly applied._

_Id_. at 455 (emphasis in original).
tured to plead guilty, federal jurisdiction should lie to adjudicate the claim.  

The second theory is the "guilt-related" theory. According to this theory, the purpose of the criminal process is to assess accurately the defendant's guilt or innocence, and federal habeas should lie only to redress guilt-related claims. Under this theory a federal habeas court should not hear claims seeking exclusion of unlawfully seized evidence, for example, because such evidence is probative of guilt despite the unlawful nature of the seizure, and thus federal adjudication of the claim would not affect the accuracy of the guilt-innocence determination. On the other hand, habeas should lie to hear a claim that a conviction was obtained by the use of perjured testimony, because such a conviction rests on unreliable evidence of guilt. There are several versions of the guilt-related theory,
all in some way derived from a seminal piece on habeas corpus by Judge Friendly. Judge Friendly maintained that habeas never should be available to a petitioner who fails to advance a colorable claim of innocence.

Both of these limiting theories find some support in Stone v. Powell, which is the Court's most significant decision concerning the scope of the writ after Brown. In Stone, the Court held that habeas does not lie to hear a claim that evidence should have been excluded from state proceedings because it was seized in violation of the fourth amendment. Stone is consistent with the guilt-related theory because, as indicated above, evidence seized unlawfully is nonetheless probative of guilt. The Stone rule also is consistent with the corrective

144. See id. It is difficult to generalize regarding the Court's use of the innocence rationale, however, because the Court vacillates between two very different interpretations of this rationale. Under one interpretation, the writ of habeas corpus would lie to address almost every constitutional claim; but to get the petition heard at all, the prisoner would have to make a colorable claim of factual innocence. See, e.g., Murray v. Carrier, 477 U.S. 478, 495-96 (1986). The second interpretation of the innocence rationale does not require that petitioners make a colorable claim of innocence, but extends habeas jurisdiction only to those constitutional claims that plausibly could have affected the trial court's determination of guilt. Fourth amendment claims, for example, generally would not be cognizable on habeas under this rationale, but coerced confession claims would be. Stone v. Powell, 428 U.S. 465 (1976), discussed supra note 142 and infra notes 146-49 and accompanying text, is the best example of the Court's application of the latter rationale. See Stone, 428 U.S. at 489-90. The former definition is finding its way into more recent cases. See infra notes 410-12 and accompanying text; see generally Friendly, supra note 2, at 160 (defining colorable showing of innocence); Cover & Aleinikoff, supra note 2, at 1088-91 (discussing "categorical" and "individual" means of analyzing innocence problem).

145. No decision concerning the scope of the writ would limit habeas to the extent recommended by Judge Friendly. Judge Friendly wrote that, with few exceptions, "convictions should be subject to collateral attack only when the prisoner supplements his constitutional plea with a colorable claim of innocence." Friendly, supra note 2, at 142. Judge Friendly defined a colorable showing of innocence as follows:

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

Id. at 160. But cf. Seidman, supra note 2, at 457 n.126 (criticizing Judge Friendly's approach).

147. Id. at 494-96.
148. Justice Powell wrote in Stone that "the physical evidence sought to be excluded is typically reliable and often the most probative information bearing on the guilt or innocence of the defendant. . . . Application of the [exclusion-
process model, in that the Court created an exception permitting habeas litigation of fourth amendment claims if the state allowed no "full and fair opportunity" to litigate those claims in state court.\textsuperscript{149}

The first post-\textit{Stone} case to address the scope of the writ adhered to a guilt-related interpretation of \textit{Stone}. In \textit{Jackson v. Virginia},\textsuperscript{150} the Court held that a federal habeas court can review the sufficiency of the evidence in a state criminal case to ensure that the evidence supports a finding of guilt beyond a reasonable doubt.\textsuperscript{151} Counsel for the state in \textit{Jackson} sought to rely on \textit{Stone} to exclude such claims from the scope of the writ.\textsuperscript{152} The Court rejected this argument because Jackson's claim was guilt-related and therefore distinguishable from the fourth amendment claim in \textit{Stone}:

The constitutional issue presented in this case is far different from the kind of issue that was the subject of the Court's decision in \textit{Stone v. Powell}. The question whether a defendant has been convicted upon inadequate evidence is central to the basic question of guilt or innocence.\textsuperscript{153}

Just four days after its decision in \textit{Jackson}, however, the Court seriously undercut its evolving guilt-related rationale. In \textit{Rose v. Mitchell},\textsuperscript{154} the Court held that a federal habeas court could review a claim that the state discriminated in selecting the nonvoting foreperson of a grand jury.\textsuperscript{155} Because subsequent to indictment the petitioners in \textit{Rose} were tried before a constitutionally proper petit jury and were convicted, the grand jury claim was not guilt-related.\textsuperscript{156} Nonetheless, the Court rejected the argument that the \textit{Stone} doctrine ought to apply.\textsuperscript{157}

\begin{itemize}
\item \textsuperscript{149} \textit{Id.} at 490.
\item \textsuperscript{150} 443 U.S. 307 (1979).
\item \textsuperscript{151} \textit{Id.} at 326.
\item \textsuperscript{152} \textit{Id.} at 321.
\item \textsuperscript{153} \textit{Id.} at 323 (emphasis added) (citation omitted).
\item \textsuperscript{154} 443 U.S. 545 (1979).
\item \textsuperscript{155} \textit{Id.} at 554.
\item \textsuperscript{156} \textit{Id.} at 449-50. Most claims of grand jury error bear no relationship to the guilt or innocence of the defendant. For example, even if a grand jury hears nothing but inadmissible hearsay evidence before rendering an indictment, if the subsequent trial meets constitutional standards, guilt has been determined properly, a determination that arguably vitiates grand jury error. \textit{See, e.g.,} Costello v. United States, 350 U.S. 359, 363 (1956); \textit{see also} Cover & Aleinikoff, \textit{supra} note 2, at 1095 (predicting grand jury claims would be "subsumed under the rule of \textit{Stone}"); Stacy & Dayton, \textit{supra} note 35, at 101 (urging novel remedy for grand jury violations).
\item \textsuperscript{157} 443 U.S. at 560-64. Justice Blackmun's majority opinion distinguished
The Court dealt a further blow to coherent development of a guilt-related rationale for habeas through its recent decision in *Kimmelman v. Morrison*. 158 *Kimmelman* involved a claim that a state denied the petitioner effective assistance of trial counsel in violation of the sixth amendment. 159 On its face, such a claim is consistent with the guilt-related rationale, for a trial in which the defendant is not represented by constitutionally adequate counsel may well yield an inaccurate result. In *Kimmelman*, however, counsel’s inadequacy consisted merely of failure to object to the introduction at trial of evidence seized unlawfully from the petitioner’s apartment. 160 Given that this evidence was probative, its introduction did not lead to an inaccurate determination of guilt. *Kimmelman* therefore is further

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*Stone* as “‘not concerned with the scope of the habeas corpus statute as authority for litigating constitutional claims generally.’” *Id.* at 560 (emphasis in original) (quoting *Stone*, 428 U.S. at 495, n.37). The Court stated that a claim of discrimination in grand jury selection differs “so fundamentally” from the fourth amendment exclusionary rule that *Stone* should not be read to prevent review of such discrimination claims. *Rose*, 443 U.S. at 560-61.

The Court’s many explanations for distinguishing *Stone* are unsatisfactory, however. For example, the *Rose* opinion states that the costs of excluding evidence on fourth amendment grounds are greater than the cost of ordering retrial on grand jury grounds, because retrial after exclusion may be impossible. *Id.* at 564. If the trial court appropriately should have excluded unlawfully seized evidence on fourth amendment grounds originally, and insufficient evidence remains to convict, however, the prisoner never should have been convicted and there is no point in incurring the cost of retrial. But grand jury error might have occurred despite a subsequent legitimate conviction. In that case retrial is perfectly appropriate, and the costs cannot be avoided.

The *Rose* Court also justifies its holding on the ground that discrimination claims are more important than fourth amendment claims, *id.* at 560-61, but it is unclear what rationale the Court relies upon to support this argument. It is difficult to argue that discrimination claims are inherently more important than fourth amendment claims; historically, the right to privacy has been as fundamental as the right to be free from discrimination.

The Court’s most extraordinary argument is that states have long been bound by discrimination rules in jury selection, and so those rules should be enforced in habeas, but fourth amendment claims are of more recent vintage and deserve less vigorous enforcement. *Id.* at 561-62. Arguably, just the opposite is true. Because the states have greater experience with discrimination claims such claims require less federal supervision, while the relative inexperience of the states with fourth amendment claims necessitates greater federal supervision.

At bottom, that the Court felt the need to advance some five separate arguments in favor of its *Rose* decision suggests that none of those arguments is, in and of itself, very convincing.

159. *Id.* at 371-72.
160. *Id.* at 373-74.
evidence that the Court has not adopted the guilt-related rationale, and that Stone cannot be fully explained using that rationale.\footnote{161} The Court could have written an opinion in Kimmelman that supported the guilt-related rationale by arguing that counsel's ineffectiveness threatened the accuracy of the entire proceeding.\footnote{162} Instead, buttressing the argument that Kimmelman is inconsistent with Stone, the Kimmelman Court seemed to go out of its way to make clear that the only impact of counsel's error was admission of the probative, although unlawfully seized, evidence.\footnote{163} Kimmelman could be construed as consistent with the corrective process theory, but other decisions demonstrate that that theory also is not the Court's operative explanation for the scope of the writ. Because a defendant with inadequate counsel cannot hope to obtain fair adjudication of constitutional claims, such as the fourth amendment claim there at issue, the decision fits the corrective process rationale.\footnote{164} The difficulty with relying on a corrective process interpretation of Kimmelman is that although habeas certainly does lie any time state courts afford no corrective process,\footnote{165} under Brown v. Allen, habeas also will

\footnote{161} Justice Powell diverged from the majority on precisely this issue in Kimmelman. \textit{Id.} at 390-97 (Powell, J., concurring). Powell pointed out that failure to raise a fourth amendment claim never can constitute "prejudice" within the meaning of the test for ineffective assistance of counsel set forth in Strickland v. Washington, 466 U.S. 668, 687 (1984), because a defendant never can be "prejudiced" by admission of probative evidence. \textit{See Kimmelman} at 396-97. Whether or not Justice Powell is correct about the meaning of prejudice, it follows a fortiori that probative evidence cannot undermine a factual finding of guilt. Justice Powell's argument is that admission of illegally seized but reliable evidence cannot possibly prejudice the defendant in a constitutional sense because it does not affect the accuracy and, hence, the fairness of the verdict: "As many of our cases indicate, the admission of illegally seized but reliable evidence does not lead to an unjust or fundamentally unfair verdict. We have held repeatedly that such evidence ordinarily is excluded only for deterrence reasons that have no relation to the fairness of the defendant's trial." \textit{Id.} at 396.

\footnote{162} Counsel in Kimmelman conducted no discovery. \textit{Id.} at 369, 385. The Court could have decided Kimmelman on this basis by holding that failure to conduct any discovery constituted ineffective assistance of counsel in the case, and left Stone v. Powell intact. The Court eschewed this obvious means to avoid undercutting Stone, and addressed the claim as though the only objection to the counsel's performance was failure to raise the fourth amendment violation. \textit{Id.} at 387-91.

\footnote{163} \textit{Id.} at 382-87.

\footnote{164} \textit{See} Bator \textit{supra} note 2, at 458.

\footnote{165} \textit{See id.} at 485-86. In Frank v. Mangum, 237 U.S. 309 (1915), the Court stated that the lawfulness of detention for habeas corpus purposes may depend
lie even when state corrective process is adequate.\textsuperscript{166}

Rather than settle on one limiting theory, the Court's decisions draw on both the guilt-related and the corrective process theories, even though the theories are inconsistent not only with Brown's scope and with post-Brown explanations for that scope, but with each other.\textsuperscript{167} After Stone, for example, a federal habeas court may review a fourth amendment claim only if the petitioner had no full and fair opportunity to litigate the claim in state court.\textsuperscript{168} Under the guilt-related theory, however, whether the state provided such an opportunity should be irrelevant; all fourth amendment claims should be barred from habeas review because they do not call the prisoner's guilt into question. Conversely, a coerced-confession claim relates to guilt even if the petitioner had a full and fair opportunity to litigate the claim in state court. Thus, the guilt-related rationale for habeas would permit relitigation of such a claim even if the corrective process model would not.

Stone thus excepts fourth amendment claims from the scope of the writ without a satisfactory rationale. Subsequent cases indicate that while the Stone rule cannot be explained by a guilt-related rationale, the "full and fair opportunity" exception cannot be explained by a corrective process rationale.

Some commentators suggest that Stone best can be understood by treating it as a fourth amendment decision unrelated to the general question of the scope of the writ of habeas corpus.\textsuperscript{169} Under this view of Stone, the Court excluded fourth amendment claims from the scope of the writ without a satisfactory rationale. Subsequent cases indicate that while the Stone rule cannot be explained by a guilt-related rationale, the "full and fair opportunity" exception cannot be explained by a corrective process rationale.

\textsuperscript{166} See Brown v. Allen, 344 U.S. 443, 463-65 (1953) (stating that federal court at its discretion may redetermine federal questions arising in state criminal cases).

\textsuperscript{167} See Peller, supra note 2, at 602 (discussing "fundamentally divergent models"); Seidman, supra note 2, at 456 (stating Court "has attempted to respond with one stroke to two fundamentally inconsistent arguments").

\textsuperscript{168} Stone v. Powell, 428 U.S. 465, 494 (1976) ("we conclude that where the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial").

\textsuperscript{169} See Seidman, supra note 2, at 451-52; Tague, supra note 2, at 47; see generally O'Brien, Federal Habeas Review of Ineffective Assistance of Counsel Claims: A Conflict Between Strickland and Stone?, 53 U. CHI. L. REV. 183

\textsuperscript{166} See Brown v. Allen, 344 U.S. 443, 463-65 (1953) (stating that federal court at its discretion may redetermine federal questions arising in state criminal cases).

\textsuperscript{167} See Peller, supra note 2, at 602 (discussing "fundamentally divergent models"); Seidman, supra note 2, at 456 (stating Court "has attempted to respond with one stroke to two fundamentally inconsistent arguments").

\textsuperscript{168} Stone v. Powell, 428 U.S. 465, 494 (1976) ("we conclude that where the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial").

\textsuperscript{169} See Seidman, supra note 2, at 451-52; Tague, supra note 2, at 47; see generally O'Brien, Federal Habeas Review of Ineffective Assistance of Counsel Claims: A Conflict Between Strickland and Stone?, 53 U. CHI. L. REV. 183
amendment claims from habeas review simply because the value of excluding unlawfully seized evidence in deterring police misconduct is so diminished by the time of collateral review that the Constitution no longer requires its exclusion.\textsuperscript{170} Much of the \textit{Stone} opinion speaks in these terms.\textsuperscript{171} Moreover, in a footnote to the majority opinion, Justice Powell disavows any broader statement on the scope of the writ.\textsuperscript{172}

For a number of reasons, however, \textit{Stone} cannot be read simply as a fourth amendment case. First, \textit{Stone} offers no satisfactory explanation of why the fourth amendment compels consideration of the failure to exclude unlawfully seized evidence on direct review, but does not compel consideration of such failure in habeas.\textsuperscript{173} Second, although the \textit{Stone} majority disclaimed any application of its rule beyond the context of the fourth amendment, footnotes to the majority opinion explicitly set out the guilt-related rationale for habeas.\textsuperscript{174} Third, Justice Powell, who wrote the \textit{Stone} opinion, consistently has cited \textit{Stone} in subsequent decisions to support a guilt-related interpretation of habeas jurisdiction.\textsuperscript{175} Finally, although the guilt-related theory has served to bar only fourth amendment claims (1986) (demonstrating that \textit{Stone} does not bar federal habeas review of sixth amendment claim arising from counsel's failure to raise a fourth amendment claim).

\textsuperscript{170} See Seidman, supra note 2, at 595.

\textsuperscript{171} See \textit{Stone}, 428 U.S. at 482-95.

\textsuperscript{172} See \textit{id.} at 482 n.17.

\textsuperscript{173} See \textit{id.} at 506-15 (Brennan, J., dissenting); see also Cover & Aleinikoff, supra note 2, at 1076 n.195 ("it was probably the guilt/innocence perspective, rather than disdain for the exclusionary rule, that lies at the base of [\textit{Stone v. Powell}]"). Professor Seidman argues that application of the exclusionary rule is constitutionally compelled only when its deterrent application would be effective. Seidman, supra note 2, at 453. Thus, the exclusionary rule is required on direct review, but not on collateral attack, when it would not serve its deterrent or educative purposes. \textit{id.} Accepting Professor Seidman's argument, \textit{Stone} can be construed as limiting the scope of habeas with respect to the exclusionary rule and as not disturbing the rule of \textit{Brown v. Allen}.

\textsuperscript{174} See \textit{Stone}, 428 U.S. at 491 n.31 ("Resort to habeas corpus, especially for purposes other than to assure that no innocent person suffers an unconstitutional loss of liberty, results in serious intrusions on values important to our system of government.").

\textsuperscript{175} See, e.g., Kuhlmann v. Wilson, 477 U.S. 436, 446-48 (1986) (Powell, J., plurality opinion); Rose v. Mitchell, 443 U.S. 545, 579-88 (1979) (Powell, J., concurring). In his \textit{Rose} concurrence, Powell downplayed the differences between fourth amendment exclusionary rule claims and claims of discrimination in the selection of a grand jury. Neither claim, according to Justice Powell, bears on the incarceration of innocent persons. \textit{id.} at 588. As a result, to maintain consistency with \textit{Stone}, Powell suggests that grand jury discrimination claims also should not be cognizable on federal habeas review. \textit{id.} at 587-88, n.10. See also Wainwright v. Sykes, 433 U.S. 72, 87 n.11 (1977) (Rehnquist, J., majority
from habeas review, and although Rose and Kimmelman partially repudiated the theory, the Court has not banished the guilt-related theory from subsequent habeas jurisprudence. Innocence does not serve as a rationale for the general scope of the writ, but the concept of actual innocence recently has reappeared in the rules limiting access to habeas adjudication of claims that fall within that scope.176

Not only is the Court's decision in Stone unsupported by a coherent view of the scope of the writ, but its decisions on the scope of the writ yield a quite peculiar result after Kimmelman. Suppose that two codefendants are arrested for the same crime and tried separately. One defendant's lawyer raises a fourth amendment claim; the claim has merit but the state courts reject it. Under Stone, this defendant has no access to a federal habeas court to redetermine the merits of the fourth amendment claim.177 The second defendant's lawyer never objects to admission of the evidence, although the same fourth amendment claim exists. Subsequently, the second defendant brings a federal habeas petition alleging ineffective assistance of counsel based on the lawyer's failure to raise the fourth amendment objection. The habeas court reviews this claim, and in doing so necessarily touches on the merits of the fourth amendment claim.178 The effect of this review may well be exclusion of the evidence on fourth amendment grounds and a new trial. The defendant whose lawyer raised the fourth amendment claim never can have the claim heard by a federal opinion, joined by Powell, J.) (hinting that Miranda claims might fall within rubric of Stone if veracity of confession is not at issue).


177. Stone, 428 U.S. at 494.

178. Under the Court's ineffective assistance of counsel jurisprudence, a habeas court must determine both whether counsel's performance was so ineffective as to violate constitutional standards and whether prejudice resulted from counsel's ineffective performance. Strickland v. Washington, 466 U.S. 668, 687 (1984). Determining whether counsel was ineffective in failing to raise a claim necessarily includes assessing the validity of that claim. Of course, the Court could avoid such an assessment by finding that even if counsel's performance was ineffective, no prejudice could result from failing to raise a fourth amendment claim because the evidence unlawfully seized was probative of the defendant's guilt. Under this construction, guilty defendants cannot be prejudiced by ineffective counsel. Justice Powell made this argument in his Kimmelman concurrence, but the Court rejected it, further undercutting the innocence rationale. Kimmelman, 477 U.S. at 373-75.
habeas court, but the defendant whose lawyer did not raise the claim in state court obtains relief, through the vehicle of a claim for ineffective assistance of counsel.\footnote{179}

The Court has said nothing that explains why, if evidence is unlawfully seized, a defendant with an incompetent lawyer should reap the benefit of exclusion of the evidence, but a defendant with a competent lawyer should not.\footnote{180} It might be perfectly defensible to allow both of them to reap the benefit, but as Stone makes clear, this is not the law. Similarly, it might be defensible to allow neither of them to obtain relief, consistent with Stone, but as Kimmelman makes clear, this is not the law either.

Brown, Stone, Jackson, Rose, and Kimmelman present important statements by the Court on the scope of the writ of habeas corpus. Although each decision includes or exclude specific claims from the scope of the writ, the cases do not provide a governing principle coherently explaining the purpose of the writ. Instead, four separate theories now affect the scope of habeas: the rights-based theory, the liberty-based theory, the guilt-related theory, and the corrective process theory. None of the theories by itself offers a satisfactory explanation for the current scope of the writ.

2. The Scope of the Writ Explained

The appellate model provides a simple and satisfying rationale for the broad habeas jurisdiction acknowledged in Brown, succeeding where the other rationales have failed. Because any federal claim preserved in state court proceedings may be raised on direct review, any such claim should also be

\footnote{179} In his dissenting opinion in Stone, Justice White points out another incongruity resulting from the Court’s elimination of fourth amendment exclusionary rule claims from federal habeas review. Stone, 428 U.S. at 536-37. Two defendants, Smith and Jones, are tried separately for the same crime and are convicted with the same evidence. Both file petitions of certiorari with the Supreme Court, but only Jones’s petition is heard. Based on a factual finding that the arrests were made without probable cause, Jones gets relief, while Smith, whose certiorari petition was denied, does not. Id.

\footnote{180} Under current habeas doctrine there is an intermediate choice: a court could determine that the failure to object on fourth amendment grounds did not render counsel’s performance actually ineffective. If this is so, the resulting procedural default will not be excused. See Murray v. Carrier, 477 U.S. 478, 485-88 (1986). This line of argument rests upon the premise that counsel could fail to raise a valid constitutional claim, and yet render effective assistance within the meaning of the sixth amendment. See infra notes 431-36 and accompanying text (discussing inadequacy of Court’s sixth amendment jurisprudence).
subject to federal habeas review. This, more comprehensively than the rights-based or liberty-based rationales, explains why habeas review is available for almost all federal claims. It also suggests that the guilt-related and corrective process models ought to play no role in determining the writ's scope.

What the appellate model simply cannot account for is the exception to habeas jurisdiction for fourth amendment claims created by *Stone v. Powell*. To retain the *Stone* rule, consistent with the appellate model, one could argue that *Stone*’s fourth amendment “diminishing return” rationale fits direct appeal as well as it fits habeas. The fourth amendment rationale for *Stone* rests on the premise that by the time of collateral review through habeas the deterrent effect of excluding unlawfully seized evidence no longer is strong enough to justify exclusion on constitutional grounds. It simply is implausible that the Court would likewise hold that although the Constitution requires exclusion if a state court upholds a fourth amendment claim, a state court’s failure to so exclude cannot be raised on direct appeal to the Supreme Court. But *Brown* and the entire course of habeas cases establish that the Supreme Court cannot review adequately claims of error in state court proceedings.

If the appellate rationale explains habeas, state prisoners therefore should be allowed to raise fourth amendment claims in habeas petitions, because habeas is a surrogate for direct Supreme Court review. The new model therefore suggests that *Stone* simply is incorrectly decided.

Moreover, the difficulty with the *Stone* decision is compounded by the decision in *Kimmelman*. *Kimmelman*’s holding is consistent with the appellate model for habeas because it preserves an appeal through habeas for claims of sixth amendment error. *Kimmelman* combines with *Stone*, however, to create the curious result that defendants who raise fourth amendment claims in state court effectively get no federal review because of the inadequacy of direct Supreme Court review of state criminal cases, while defendants whose lawyers fail to raise those claims may well get federal review by alleging that such failure constituted ineffective assistance of counsel on habeas. Rather than supporting *Stone* on its tenuous fourth amendment rationale, the appellate model suggests that *Stone*

181. See *Stone*, 428 U.S. at 482-95.
182. See supra notes 114-35 and accompanying text.
184. See supra notes 177-79 and accompanying text.
should be overruled. The Court should acknowledge that if direct review is appropriate for any constitutional claim it is appropriate for all of them, and that the habeas courts simply are surrogates for this task.

B. PROCEDURAL DEFAULT

1. Current Doctrinal Confusion

In a companion case to Brown, Daniels v. Allen,185 the Court held that although a federal habeas court will hear constitutional claims litigated previously in state court, it will not hear claims denied review in state court due to a procedural default.186 A procedural default consists of the failure of a defendant to comply with a state's procedural rule governing the timing or manner for asserting errors in criminal proceedings.187 The rule in habeas, subject to the exceptions discussed below, is that a federal court will not hear a claim that a state court refused to hear because of a procedural default.188

The very harshness of the procedural default rule makes it controversial. In contrast to some of its counterparts, such as exhaustion or res judicata rules, which affect only timing or relitigation, the procedural default rule deprives the petitioner of any review in state or federal court. Critics maintain that such an "airtight forfeiture"189 is inappropriate when federal constitutional questions are involved.190

187. Wainwright v. Sykes, 433 U.S. 72, 82-85 (1977). See also Smith v. Murray, 477 U.S. 527, 530-31 (1986) (finding procedural default in defendant's failure to raise allegedly erroneous ruling by trial judge on appeal); Carrier, 477 U.S. at 482 (same); Kimmelman, 477 U.S. at 368-69 (finding procedural default in defendant's failure to move within 30 days of indictment to suppress evidence at trial).
188. Carrier, 477 U.S. at 485; Sykes, 433 U.S. at 87. The procedural default rule originated in a companion case to Brown. In Daniels v. Allen, decided sub nom. Brown v. Allen, 344 U.S. 443 (1952), the Court refused to address the merits of the petitioner's claims because the state supreme court had refused to entertain those claims. Id. at 483. The petitioner's lawyers had failed to comply with a state rule requiring that an appeal be timely filed, subjecting the claim to procedural default. Id. at 483. Even though Daniels's lawyers were only a day late, good reason existed for the untimely filing. Daniels's claims had merit, and the case was a capital one, the Court held the procedural default was an absolute bar to federal habeas review of the merits. Id. at 482-87.
190. See Sykes, 433 U.S. at 115 (Brennan, J., dissenting) (arguing rule is most unfair solution for tension between justice and efficiency); Reitz, Abor-
The harshness of the procedural default rule has led the Court to vacillate regarding its scope. In *Daniels v. Allen*, the Court treated the rule as a jurisdictional matter: a procedural default in state court prevented a prisoner from exhausting state remedies and so completely barred relief in federal court. Roughly ten years later, *Fay v. Noia* modified *Daniels* in holding that although a procedural default presented no jurisdictional bar, as a matter of comity the federal court in its discretion could refuse to hear a claim that a prisoner had defaulted through "deliberate bypass" of state remedies.

The Court changed direction again a little more than a decade later in *Wainwright v. Sykes*. *Sykes* held that although a procedural default posed no jurisdictional bar, comity ordinarily barred a federal habeas court from hearing a defaulted claim, except in the limited circumstances in which a prisoner could establish both "cause" for not having raised the claim properly in state court, and "actual prejudice" resulting from being barred from habeas relief. The *Sykes* opinion came complete with assurances that the new cause-and-prejudice test would not exclude the claims of a prisoner who had suffered a fundamental miscarriage of justice.

In *Murray v. Carrier* and *Smith v. Murray*, decided roughly another decade later, the Court modified *Sykes*. These cases, discussed in the introduction, held that a lawyer's mistake does not constitute "cause" to excuse a procedural default. By the time of *Carrier* and *Smith*, however, the Court

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192. Id. at 487.
194. Id. at 438.
196. Id. at 90-91.
197. *According to the Court:* The 'cause'-and-'prejudice' exception . . . will afford an adequate guarantee, we think, that the rule will not prevent a federal habeas court from adjudicating for the first time the federal constitutional claim of a defendant who in the absence of such an adjudication will be the victim of a miscarriage of justice.

198. *Id.*
no longer was confident that the *Sykes* test always would protect the victim of a fundamental miscarriage of justice. The Court therefore created another basis for habeas review of a defaulted claim, holding that a prisoner with a defaulted claim could obtain habeas relief if he was prepared to show he actually was innocent.201

a. The Problem with Procedural Default

The uncertainty of the basis for the procedural default rule presents serious doctrinal difficulty. The rule finds no support in the federal habeas statute.202 Moreover, in *Carrier* the Court finally admitted, more than a decade after *Sykes*, that the rule lacks a "perfect historical pedigree."203 Without congressional authorization or precedential support, the rule has no firm foundation.

The procedural default rule created by *Daniels v. Allen*204 could be seen as an extension of the "independent and adequate state ground" rule,205 which holds that the Supreme Court may not review directly a case presenting a federal question if the judgment rests on a state-law ground independent from the federal claim and adequate to sustain the judgment.206 The explanation for this rule is that if the Supreme Court were to review the federal ground, its decision would constitute an impermissible advisory opinion because the state-court judgment rested on an adequate state law ground. Even reversal on federal grounds would not change the judgment in the case.207 Early cases applied similar reasoning, in the habeas context, suggesting that a petitioner's failure to raise a constitutional claim in accordance with state procedural rules barred habeas relief.208

203. *Carrier*, 477 U.S. at 2650.
204. *See supra* notes 185-92 and accompanying text.
205. *Cf. Daniels v. Allen, decided sub nom. Brown v. Allen*, 344 U.S. 443, 485-87 (1953) (habeas statute authorizes issuance of writ only if prisoner is held "in custody in violation of the Constitution"; state's refusal to hear claim based on valid procedural rule bars habeas relief); *Reitz, Abortive State Proceeding, supra* note 2, at 1334 n.78 (noting that the "exact rationale of the [Daniels] Court is far from clear in the opinion" and that "the Court referred to at least four doctrinal bases for its result").
207. *See id.* at 443; *Brennan, supra* note 2, at 434-35.
208. *See supra* note 204.
The *Fay v. Noia*\(^{209}\) Court, however, divorced the concept of procedural default from the adequate and independent state ground doctrine. Writing for the majority in *Fay*, Justice Brennan asserted that the adequate and independent state ground doctrine, strictly applied, has no place in habeas jurisprudence.\(^{210}\) Because a habeas court, in theory, does not review a state-court judgment, but issues a writ acting directly on the body of the prisoner, there can be no advisory opinion problem; even if a state-court judgment rests on a default, a habeas court could order release of the prisoner if there were constitutional error.\(^{211}\)

During the thirty years since *Brown* and *Daniels*, and particularly since *Fay* divorced the rule from its original rationale, the Court has developed a variety of alternative rationales for the procedural default rule. Proponents of the rule rely on considerations of comity and federalism,\(^{212}\) sound judicial administration,\(^{213}\) and concerns about trial lawyers "sandbagging" state courts\(^{214}\) to justify the habeas courts' refusals to hear claims defaulted in state court. The difficulty is not that any of these explanations necessarily is wrong. It is that none of them is necessarily right, either.

For example, one argument in favor of the default rule is that it is necessary to foster respect for state procedural rules.\(^{215}\) If federal courts refuse to hear defaulted claims, in theory lawyers will be more likely to comply with those procedural rules.\(^{216}\) But critics offer at least three responses to this argument. First, a habeas system that ignores a state procedural default would not be invalidating the rule per se. State courts would remain free to enforce their own rules and deny


\(^{210}\) *Fay*, 372 U.S. at 440-41.

\(^{211}\) *Id.* at 430-31; Brennan, *supra* note 2, at 436.

\(^{212}\) See *Wainwright v. Sykes*, 433 U.S. 72, 88 (1977) (stating that contemporaneous objection rule deserves more respect than *Fay* accords it because it serves many interests and "it is employed by a coordinate jurisdiction within the federal system")

\(^{213}\) *See id.* (noting that contemporaneous objection rule advances finality, making trial "main event").

\(^{214}\) *See id.* (stating that rule of *Fay v. Noia* "may encourage 'sandbagging' on the part of defense lawyers, who may take their chances on a verdict of not guilty in a state trial court with the intent to raise their constitutional claims in a federal habeas court if their initial gamble does not pay off")

\(^{215}\) *See Murray v. Carrier*, 477 U.S. 478, 486-87 (1986); *Sykes*, 433 U.S. at 87-91.

\(^{216}\) *Carrier*, 477 U.S. at 486-87.
all state remedies to the defendant who fails to comply.217 Second, the strong state interest in having its rules obeyed will not be furthered by denying federal habeas corpus review when failure to obey a rule is the result of inadvertence. When failure to follow a rule is accidental rather than intentional, the procedural default rule cannot specifically deter noncompliance with procedural default rules.218 Third, the threat of losing the right to raise a claim in state courts is sufficient to encourage compliance with procedural rules. A defendant loses nothing by raising all claims in state court because a state court judgment has no res judicata effect on habeas review.219 There simply are no strong reasons not to try to win in state court before going through the time and expense of a habeas appeal.

Ultimately, arguments such as these on both sides of the procedural default question are unpersuasive.220 They involve a balancing of dissimilar factors in which it is impossible to demonstrate that one factor actually outweighs another.221 It is impossible to know, particularly without case-by-case analysis, whether the right at stake in a given default is more important than fostering respect for state procedures.222

More fundamentally, resting the procedural default rule on considerations such as the need to foster respect for procedures seems at odds with post-Brown explanations for the scope of the writ. Brown instructs a habeas court to reach the merits of a nondefaulted claim without according res judicata effect to the prior determination of that question by the state court.223 Although Brown did not provide a rationale, the rule has been justified in part on the ground that the importance of the interests or rights at stake necessitates federal intrusion.224 Under the procedural default scheme, a habeas court generally will re-
fuse nonetheless to consider a claim not fully litigated in state court. If the justification for habeas review is the importance of the rights involved or the liberty interest of the accused, however, it is hard to see why hearing a defaulted claim is not justified. Arguably just the opposite is true, for the prisoner whose claim was defaulted gets no review in any court, while a nondefaulted claim is reviewed twice.

b. The Problem with Cause and Prejudice

One might respond to the argument above by asserting that a prisoner who fails to present a claim to state court should be barred from presenting that claim to a federal court, because a petitioner who is, or whose lawyer is, responsible for the default must bear the consequences. This argument suggests that barring a defaulted claim is a punishment. Fay v. Noia took this position and would have barred from federal court only the claims of those defendants who deliberately withheld claims from state courts.

On its face, the cause-and-prejudice test presented by Wainwright v. Sykes is not inconsistent with this fault-based notion of procedural default. "Cause" seems to require only that a prisoner explain why a constitutional claim was not raised in conformity with state procedure, and "prejudice" superficially requires only that the prisoner show that injury resulted from being unable to raise the claim. Even proponents of the most liberal standards for access to habeas review might be content to bar a defaulted claim if a prisoner intentionally withheld the claim at the state level or if there was no conceivable way in which failure to fully adjudicate the claim affected the fairness of the proceedings.

The Court's opinion in Sykes, however, makes clear that notions of fault or responsibility have little to do with the cause-and-prejudice test as applied. In Sykes, the defendant

226. See Tague, supra note 2, at 47.
227. Fay v. Noia, 372 U.S. 391, 438-39 (1963). In a sense Fay is to blame for much subsequent confusion in this area. Although the Fay Court could have grounded its decision in the prisoner's "fault" in failing to follow state procedures, or at least the prisoner's responsibility for a considered choice not to follow such procedures, the Fay Court held that a federal court could abstain from hearing the claim as a matter of "comity." 372 U.S. at 418-20. The concern for comity that Fay introduced ultimately became the basis for the Sykes "cause and prejudice" formulation. See supra notes 195-97 and accompanying text.
228. 433 U.S. 72 (1977); see supra notes 195-97 and accompanying text.
was convicted of murder.\textsuperscript{229} The state's evidence included several confessions arguably obtained in violation of Sykes's \textit{Miranda} rights,\textsuperscript{230} but Sykes's trial counsel did not seek to exclude these confessions.\textsuperscript{231} Sykes sought to raise the \textit{Miranda} issue for the first time in postconviction proceedings, at which point the state opposed Sykes's claim on the ground of procedural default.\textsuperscript{232}

Consistent with a fault-based theory of procedural default, the \textit{Sykes} Court could have resolved Sykes's case either in favor of the state or in favor of Sykes. The Court could have held that although Sykes's attorney erred in failing to raise the claim, Sykes was not personally responsible for the error, and thus cause existed to excuse the default and allow Sykes to raise the claim in habeas.\textsuperscript{233} Alternatively, the Court could have held, given the other evidence against Sykes and that the confessions arguably supported his intoxication defense, that his attorney had made a sound strategic decision not to raise the \textit{Miranda} claim. A client should be bound by his attorney's reasonable strategic decisions whether or not he actually is consulted, and therefore no cause existed to excuse Sykes's default and make habeas review available.\textsuperscript{234}

Instead of approaching the question from the perspective of whether the defendant (or the defendant's lawyer) was responsible for the default, however, the \textit{Sykes} Court focused on whether permitting adjudication of the defaulted claim would show sufficient respect for the state's contemporaneous objection rule.\textsuperscript{235} According to the Court, state procedural rules such as the contemporaneous objection rule serve vital purposes that would be undermined by hearing claims not raised in compliance with such rules.\textsuperscript{236} Moreover, the Court concluded that principles of comity and federalism require federal court

\begin{itemize}
  \item \textsuperscript{229} \textit{Sykes}, 433 U.S. at 74.
  \item \textsuperscript{230} \textit{id.} at 75.
  \item \textsuperscript{231} \textit{id.}
  \item \textsuperscript{232} \textit{id.} at 74-75.
  \item \textsuperscript{233} \textit{See id.} at 74-75 (summarizing procedural history); \textit{id.} at 99-118 (Brennan, J., dissenting) (discussing rationale for attorney competence standards).
  \item \textsuperscript{234} \textit{See id.} at 90-91; \textit{see also} Murray v. Carrier, 477 U.S. 478, 488 (1986) (stating that so long as defendant is represented by counsel whose performance is not constitutionally ineffective, there is no inequity in requiring defendant to bear the penalty of an attorney error that results in procedural default).
  \item \textsuperscript{235} \textit{Sykes}, 433 U.S. at 88.
  \item \textsuperscript{236} \textit{id.}
\end{itemize}
deference to a state's application of its procedural rules.\textsuperscript{237} Thus, respect for state procedural rules, not any concept of fault or responsibility for failure to comply with those rules, underlies the cause prong of the \textit{Sykes} test.

The prejudice prong also is inconsistent with a fault-based rationale. Assuming cause exists to adjudicate a defaulted claim, prejudice is the standard by which the Court weighs the consequence of failure to adjudicate the claim. Although the Court has not precisely defined prejudice, it applies a seemingly outcome-determinative test: whether, but for the alleged error, the outcome might have been different.\textsuperscript{238} This prejudice standard punishes prisoners—even those who can show cause, thus establishing their lack of fault—for defaults. If a defendant raises a claim in state court and loses on the merits, the claim can be raised in federal habeas court. If the federal court determines that the claim has merit, it will decide whether to reverse or uphold the conviction by applying the same standard that was used on appeal, most likely the "harmless error" standard.\textsuperscript{239} If a defendant fails to raise a claim in state court, however, the defendant will be required to meet the heavier burden of showing prejudice before a habeas court even will hear the claim.\textsuperscript{240} If a petitioner has shown cause and is thus blameless for the default of a constitutional claim, it is unclear why the prisoner should face a stricter standard of materiality in order to have the conviction overturned.

Nowhere is the divorce of the concept of fault from the concept of procedural default more obvious than in the Court's recent decision in \textit{Smith v. Murray}.\textsuperscript{241} Smith claimed that the testimony of a psychiatrist who examined him on behalf of the defense should not have been used against him at the sentenc-

\textsuperscript{237} \textit{Id.} at 88-91.

\textsuperscript{238} The leading case on prejudice is United States v. Frady, 456 U.S. 152 (1982). In \textit{Frady}, the Court declined to define prejudice precisely. \textit{Id.} at 169-75. The outcome-determinative test for prejudice is consistent with other tests for prejudice in similar circumstances. See Strickland v. Washington, 466 U.S. 668, 694-96 (1984) (defining prejudice standard as defendant's burden to show reasonable likelihood of different result but for the error). Lower courts have construed the prejudice prong of the \textit{Sykes} test as requiring that the defendant prove that the error was outcome-determinative. \textit{See}, \textit{e.g.}, Cook v. Lynaugh, 821 F.2d 1072, 1075 (5th Cir. 1987); Bates v. Blackburn, 805 F.2d 569, 573, 577-78 (5th Cir. 1986) (quoting Preston v. Maggio, 705 F.2d 113, 115 (5th Cir. 1983)). \textit{But see} Williams v. Lane, 826 F.2d 654, 666 (7th Cir. 1987).

\textsuperscript{239} \textit{See supra} notes 34-35 and accompanying text.

\textsuperscript{240} \textit{See supra} note 46.

\textsuperscript{241} 477 U.S. 522 (1986).
ing phase of his death penalty trial. Smith's court-appointed lawyer objected to introduction of the evidence at trial, but failed to appeal on this ground, concluding that under applicable state law the state appellate courts would not be sympathetic. An amicus raised the claim in its brief on behalf of Smith, but the state supreme court declined to hear the claim on the ground that it would hear only claims raised by the parties. After Smith was denied relief on direct review, a federal court in another case overturned the state law. As a result, the claim omitted from Smith's appeal now clearly had merit.

Smith raised his claim in a federal habeas petition, and the state argued that the claim was barred due to procedural default. In response, Smith offered two "causes" for default. First, Smith argued that failure to raise the claim in state court should be excused because the claim clearly was barred by state law at the time of his appeal, so that Smith could not be faulted for failing to raise the claim at that time. Second, Smith argued that, even if his attorney erred in deciding not to raise the claim on appeal, Smith should not be considered at fault for his lawyer's erroneous decision.

The Court denied relief on both grounds. First, the Court found that if Smith's attorney had been constitutionally ineffective, the resulting sixth amendment violation would constitute cause, because it would be fair to require the state to bear "responsibility for the default" in that situation. Relying on Carrier, however, the Court held that attorney error that did not rise to the level of ineffective assistance of counsel could not constitute cause. Smith's lawyer had, in the Court's opinion, done a good job overall; the lawyer's failure to raise this one claim did not show ineffective assistance because the process of winnowing out better from less good claims, such as those barred by current state law, is the very essence of effec-

242. Id. at 522.
243. Id. at 530-31.
244. Id.
245. Id.
246. Id. at 534.
247. Id.
248. Id. at 535.
249. Id.
250. Id.
251. Id. at 535-36.
tive advocacy. In this situation it was not inequitable to re-
quire Smith to bear the risk of loss.

Second, the fact that state law barred Smith’s claim at the
time of his appeal did not excuse his failure to raise the claim.
According to a branch of the rules governing cause, if a claim
was sufficiently “novel” at the time it was defaulted the default
may be excused. Novelty did not excuse Smith’s failure to
raise his claim, however. Although state law did bar the claim,
challenges to the state law had been “percolating” in the lower
state and federal courts. Moreover, that an amicus thought
enough of the claim to raise it demonstrated that the “tools”
were available to fashion the argument. Thus, the claim was
not so novel as to warrant excusing the default.

Whatever the value of the Smith opinion as an intellectual
exercise, its application of the Carrier standard for cause and
prejudice is entirely removed from any sensible discussion of
whether a federal court should hear Smith’s claim. If any
party could be considered responsible for the default, it is the
state, which adhered to an unconstitutional rule. Yet, the
Court held not only that the state could choose not to hear
Smith’s claim, but that application of the Sykes test compelled
the federal court to do the same. Rather than focusing on
fault, the Smith opinion dwelt on the need to respect state pro-
cedures. The majority commenced with a discussion of Vir-
ginia’s procedural rule and ended with the observation that
Smith had not “carried his burden of showing cause for non-
compliance with Virginia’s rules of procedure.” Although
Smith demonstrated he was not responsible for failure to com-
ply, and although the state arguably was responsible, the proce-
dural rule served to deny Smith relief.

Once “fault” is divorced from procedural default, the con-
cept of “default” becomes inconsistent with any post-Brown ex-
planation of the scope of the writ of habeas corpus. The

254. Id.
255. Id.
257. Smith, 477 U.S. at 536.
258. Id.; see infra note 283 and accompanying text.
260. See id. (applying the Carrier standard).
261. Id. at 533-39.
262. See id.
263. Id. at 533.
264. Id. at 537.
constitutional right at stake in Smith—the right to counsel—is an important one. Moreover, life, not merely liberty, was at stake. Smith was executed just weeks after the Court's decision. Neither the strength of the right asserted nor the life or liberty interest at stake can explain the broad scope of habeas if a defendant, blameless for default of a valid constitutional claim, can be executed under the circumstances described in Smith.

2. Procedural Default Explained

The most significant benefit of the appellate model is that treating habeas as an appeal explains the procedural default principle, yet eliminates completely the need for special rules governing procedural default in habeas. Under this model, habeas courts would not hear defaulted claims unless they could be reviewed directly by the Supreme Court. Application of the appellate model effects little change in results, but makes the governing rules clearer and easier to apply.

The first rule of Supreme Court appellate jurisdiction is that the Court may review any claim of federal error that actually was adjudicated below. Therefore, if the parties litigated a constitutional issue in state criminal proceedings, the federal habeas court should reach the issue. This rule is completely consistent with current habeas practice, excepting the decision in Stone v. Powell.

The second rule of Supreme Court appellate practice is that, in general, the Court will not hear a claim that was not raised and adjudicated below and thus preserved on appeal. Accordingly, if a petitioner did not raise a claim of constitutional error below, and the highest state court did not or would not hear the claim because of a procedural default, a federal habeas court should not hear the claim.

An exception to this rule is that the Supreme Court will review a claim of error, even if the highest state court treats the claim as defaulted, if the state is manipulating its procedural rules to avoid federal review. In such a case, the state procedural rule is not an "adequate and independent" ground

266. See supra notes 180-81 and accompanying text.
268. See id.; see also Henry v. Mississippi, 379 U.S. 443, 446-49 (1965) (stating that federal court may hear claim procedurally defaulted in state court unless state has legitimate interest in requiring compliance).
to bar federal relief. The reason for this exception is that if the Court refused to hear defaulted claims under any circumstances, state courts could thwart review of a federal question simply by refusing to hear a claim and treating it as defaulted. Further, in Henry v. Mississippi the Court held that it would not honor a default if the state's procedural rule served no legitimate purpose. The rule in habeas therefore ought to be that although federal habeas courts generally will not hear a claim not heard below, if the state court refused to hear the claim because of some hostility to, or interference with, the federal claim, the habeas court can proceed.

The appellate model abandons the cause-and-prejudice test in favor of the test of Henry v. Mississippi and the "adequate state procedural ground" cases. Although the Court continues to maintain that it has not fully defined "cause" for a habeas court to excuse a procedural default, after Smith and Carrier cause exists in only three situations, two of which are meaningless under close scrutiny, and a third that is completely consistent with direct review cases concerning state procedural grounds. First, constitutionally ineffective assistance of counsel constitutes cause. Second, the "novelty" of a defaulted claim—that the claim was not asserted because it had not achieved widespread acceptance by the courts—may establish

271. Id. at 447. In Henry, a state prisoner sought direct review of a claim of constitutional error that state courts refused to hear due to procedural default. Id. at 444-45. The Court explained that in general it would not review defaulted federal claims, because convictions in such cases rest on adequate and independent state grounds. Id. at 446-47; see supra notes 204-11 and accompanying text. The Court recognized the difference between procedural grounds and substantive grounds, 379 U.S. at 446-47, however, and held that only those procedural grounds that served legitimate state interests were "adequate and independent" enough to foreclose federal review. Id. The only evident purpose of a procedural rule not justified by such interests would be to thwart federal court review of a federal question. Id. The Henry Court also suggested that habeas review would be broader than review on direct appeal, id., but this aspect of Henry has not stood the test of time. Compare Fay v. Noia, 372 U.S. 391, 429-32 (1963) (defining lenient requirements for federal habeas jurisdiction) with Wainwright v. Sykes, 433 U.S. 72, 89-90 (1977) (criticizing Fay rule permitting prisoners to raise issues in habeas court not raised in state court).
273. See supra notes 268-71 and accompanying text.
cause. Third, a showing of "state interference"—that some action by state officials prevented timely assertion of legal error—may establish cause.

Defining ineffective assistance of counsel as a form of cause is simply redundant. The determination of whether a defendant was denied effective assistance of counsel in violation of the sixth amendment subsumes cause-and-prejudice analysis. Under *Strickland v. Washington*, the test for assessing counsel's performance by sixth amendment standards asks both whether the attorney justifiably failed to assert a meritorious constitutional claim ("cause") and whether the defendant was prejudiced by the failure to raise the claim ("prejudice"). Moreover, ineffective assistance of counsel constitutes a legal claim separate from the defaulted claim; if established, this separate claim entitles the petitioner to relief. Therefore, the same proof used to excuse a default based on counsel's performance, making habeas review of the defaulted claim available, also establishes a substantive constitutional violation. Thus, this ground for cause to excuse default of another constitutional claim simply is unnecessary.

Defining novelty as a form of cause also is meaningless. Novelty is a question of the extent to which a defaulted claim rested on law accepted at the time of default. If the claim

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276. *Id.* at 489; see also *Reed v. Ross*, 468 U.S. 1, 14 (1984) (holding that counsel's failure to raise novel issue may establish cause); *Engle v. Isaac*, 456 U.S. 107, 131 (1982) (stating, in dicta, that novelty of constitutional claim may establish cause for failure to object).

277. *Carrier*, 477 U.S. at 488-89. This past term, in *Amadeo v. Zant*, 108 S. Ct. 1771 (1988), the Court for the first time decided a case in which state interference provided the grounds to excuse the default of a federal claim. *Id.* at 1780. The petitioner in *Amadeo* had failed to raise a claim of grand jury discrimination in state trial proceedings, but raised the claim in federal habeas court. *Id.* at 1774. Relying on evidence adduced in an unrelated civil case concerning grand jury discrimination, the district court excused the state court default. *Id.* at 1775. That evidence showed that state officials had conspired to hold black and female participation in grand and traverse juries at levels just below those necessary to establish a prima facie case of racial discrimination under *Swain v. Alabama*, 308 U.S. 202 (1955). The Court upheld the district court's decision in a unanimous opinion. *Id.* at 1780. The only remarkable aspect of *Amadeo* was that the en banc court of appeals had split on the issue of whether such conduct constituted "state interference." *Id.* at 1776.


279. *Id.*; see *Carrier*, 477 U.S. at 488-89.

280. See *Strickland*, 466 U.S. at 687-96 (outlining standards for ineffective assistance of counsel claims).

was unknown and unaccepted, it was "novel," and its novelty establishes cause to excuse failure to raise the claim.\textsuperscript{282} If the claim was known or available, that is, if "tools" existed to fashion the claim, it is not novel and does not establish cause for having not raised the claim.\textsuperscript{283}

The problem with novelty as cause is that it establishes an incoherent rule when combined with the principles of retroactive application of constitutional rules. Although retroactivity law has been in great flux lately, under the emerging trend a constitutional rule always will apply retroactively to cases on direct appeal at the time of the Supreme Court decision establishing the new rule, but can rarely, if ever, apply retroactively on collateral attack.\textsuperscript{284}

This being so, if a habeas petitioner could establish that a defaulted claim was sufficiently novel to establish cause to excuse the default, retroactivity rules would bar relief on the merits. The essence of a novelty claim, as defined strictly by the Smith Court,\textsuperscript{285} is that a new rule has emerged subsequent to the petitioner's default. New rules rarely are retroactive on collateral review. Thus, novelty as cause is a Catch-22\textsuperscript{286} that excuses failure to raise a claim in state court only in situations where the federal habeas court will be unable to adjudicate the merits of the claim.\textsuperscript{287}

All that is left of the Court's list of causes to excuse a procedural default then, is state interference. The Court has said that some action on the part of state officials that prevented a prisoner from raising a constitutional claim will establish cause

\begin{thebibliography}{9}
\bibitem{} Engle, 456 U.S. at 130-31.
\bibitem{} Id. at 109, 130-34.
\bibitem{} See Yates v. Aiken, 108 S. Ct. 534, 535-38 (1988) (intimating that "new constitutional rules" may not apply retroactively to cases pending on collateral attack); Griffith v. Kentucky, 107 S. Ct. 708, 716 (1987) (stating that new rule for conduct of criminal prosecutions should be applied to all cases not yet final or on direct review).
\bibitem{} My colleague Sue Kay suggests the appropriate phrase is Catch-22\textsuperscript{54}.
\bibitem{} Reed v. Ross, 468 U.S. 1 (1984), is the Court's only decision applying the novelty exception to excuse a default, \textit{id.} at 16-20, and thus appears to be the appropriate test for the assertion in the text. If the constitutional claim asserted by petitioner Ross was sufficiently novel to excuse his default, Ross should not have been able to rely on its retroactive application to obtain relief on the merits. A careful reading of \textit{Ross} discloses that the Court failed to reach this issue, however, only because "[t]he State . . . has not challenged the retroactive application of [the new rule] in this case." \textit{Id.} at 20 (Powell, J., concurring). \textit{Ross} thus hints at the Catch-22 that makes novelty meaningless as a cause, but the Court sidestepped the question.
\end{thebibliography}
to excuse the resulting default.\textsuperscript{288} For example, a prosecutor might hide evidence that would establish a constitutional claim until it was too late to raise the claim in timely fashion. Another example might be a state court's application of a procedural rule in a bizarre manner that caused a default in one case although no default would result in other cases.\textsuperscript{289}

It is misleading, however, to refer to state interference as a cause to excuse a procedural default. A criminal defendant's failure to raise a claim due to some state conduct or misconduct is hardly a default by the prisoner. The Court's description of this situation as a default simply emphasizes the divorce of default from the concept of fault. More precisely, state interference does not constitute default by the petitioner, but a state's failure to permit a defendant to adjudicate a federal question.

Viewed from either the perspective of default or that of state interference, the appellate model easily accommodates the situation under the adequate state procedural rule rationale of direct review. It long has been the rule that a state procedural ground will not be deemed adequate to sustain a judgment, and so bar review of a federal question, if the state courts applied the procedural rule in a peculiar fashion to thwart review of a federal question or if state officials interfered with rule compliance.\textsuperscript{290} Indeed, even when the Court deemed procedural default an absolute bar to habeas review under the adequate and independent state ground doctrine, it recognized an exception for this situation.\textsuperscript{291}

In sum, default rules applied by the Supreme Court on direct review reach precisely the same result as the more complicated habeas corpus default rules. Adoption of the appellate model, therefore, eliminates the confusing cause-and-prejudice inquiry without changing results in actual cases.

\textsuperscript{288} Murray v. Carrier, 477 U.S. 478, 488-89 (1986).
\textsuperscript{289} For an extensive collection of cases in which state law or the actions of state agents caused defendants to fail to raise claims in accordance with state procedural rules, see Amsterdam, supra note 2, at 385 n.34.
\textsuperscript{290} See Henry v. Mississippi, 379 U.S. 443, 448-49 (1965); Brennan, supra note 2, at 430; supra notes 285-73 and accompanying text.
C. RES JUDICATA AND EXHAUSTION

1. Current Doctrinal Confusion


*Brown* established that a federal habeas court is free to re-litigate constitutional issues previously litigated in state proceedings. A related issue is whether a federal habeas court is bound by another federal habeas court's prior adjudication. If a state prisoner presents a claim in one habeas petition and a federal court denies relief on the merits, may the prisoner raise the claim in a successive petition?

The common-law rule was that the principles of res judicata found no application in habeas. A prisoner seeking release could go from judge to judge with his habeas application, and no court was bound by any other court's prior determination. Although the reasoning is somewhat formalistic, the common-law rule made sense in light of the traditional scope of the writ, which was limited to attacking the jurisdiction of the committing court. Thus:

if the petition discloses facts that amount to a loss of jurisdiction in the trial court, jurisdiction could not be restored by any decision above. It is of the historical essence of habeas corpus that it lies to test proceedings so fundamentally lawless that imprisonment pursuant to them is not merely erroneous, but is void. Hence the familiar principle that res judicata is inapplicable in habeas proceedings.

As the scope of habeas expanded, the Court continued to...
apply the common-law rule. In Brown, which addressed the question of whether federal courts could relitigate claims adjudicated in state courts, the Court held: "[On habeas] the state adjudication carries the weight that federal practice gives to the conclusion of a court of last resort of another jurisdiction on federal constitutional issues. It is not res judicata."299

In Sanders v. United States,300 the Court addressed the specific question of successive federal petitions, holding, consistent with Brown, that res judicata principles would not bar litigation of successive habeas petitions in federal court.301 Perhaps realizing that the expanded scope of the writ strained the traditional explanation for why res judicata did not apply, the Sanders Court set out a modern rationale for the old rule. According to the Court, and consistent with commonly offered post-Brown explanations for the scope of the writ, res judicata does not apply in habeas because the government must be accountable for deprivations of liberty and because such important interests are at stake when a petitioner asserts a violation of constitutional rights.302

Although the Sanders Court held that habeas courts should not apply principles of res judicata, the Court did not go so far as to require that a federal habeas court adjudicate repeated petitions. Rather, if the petition presented a ground already adjudicated by a previous habeas court, the second court could refrain from readjudicating the claim unless the "ends of justice" required otherwise.303 According to the Sanders Court,

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300. 373 U.S. 1 (1962).
301. Id. at 14-15.
302. Id. at 8. The Sanders Court explained: "Conventional notions of finality of litigation have no place where life or liberty is at stake and infringement of constitutional rights is alleged. If 'government . . . [is] always [to] be accountable to the judiciary for a man's imprisonment,' access to the courts on habeas must not be thus impeded." Id. (citation omitted) (quoting Fay v. Noia, 372 U.S. 391, 402 (1962)).
303. Id. at 12. In Kuhlmann v. Wilson, 477 U.S. 436 (1986), the state argued that 1966 amendments to the habeas corpus statutes (particularly 28 U.S.C. § 2244(b) (1982)) that make no reference to "ends of justice" relieved a court of the duty to consider the "ends of justice" before dismissing a successive petition. Id. at 451. According to the state, once a habeas court had reviewed a claim on the merits, a subsequent court should dismiss any subsequent petition not alleging facts absent from the prior petition, regardless of the "ends of justice." Id. The Court agreed that Congress intended that federal courts give a prior petition's denial on the merits some preclusive effect, recognizing Congress's desire for more finality in habeas corpus proceedings. Id. The language granting district courts the power to refuse to hear successive petitions is permissive, however. ("A subsequent application . . . need not be entertained." 28
evaluating the "ends of justice" was an inquiry that could not be finely particularized and would rest in the sound discretion of the habeas court. Sanders made clear, however, that retitigation frequently would be permitted.

The difficulty with Sanders, the keystone of all modern habeas res judicata rules, is that it too hastily concludes that traditional notions of finality have "no place" in habeas. Such notions of finality, embodied in res judicata and collateral estoppel rules, always have left room for courts to reconsider a judgment in the face of a grievous wrong. Absent such a wrong, however, finality must play some role in criminal law. Indeed, some respected commentators' sharpest attacks on the entire expansion of habeas rests on the notion that the Court too easily has abandoned principles of finality. These commentators argue forcefully that principles of finality are at least as important in criminal law as in civil law.

U.S.C. § 2244(b) (1982). A district court therefore still can entertain successive petitions in certain instances. Kuhlmann, 477 U.S. at 451. Because the statute does not identify the instances in which courts should entertain successive petitions, the Court in Kuhlman relied on the Sanders "ends of justice" language. See id.

See supra note 293.Sanders construed “ends of justice” to require habeas courts to hear petitions advancing potentially meritorious claims). The Sanders Court, also addressing the question of “abuse of the writ,” see supra note 293, reached a conclusion somewhat parallel to its holding with regard to successive petitions: a petitioner who failed to raise an issue in a first petition could raise the issue in a second petition. 373 U.S. at 17. Relying on principles of equity, however, a habeas court could refuse to treat the question raised in the second petition if it had been deliberately withheld from the first petition. Id. at 18.

The Supreme Court has warned:
Because res judicata may govern grounds and defenses not previously litigated, however, it blockades unexplored paths that may lead to truth. For the sake of repose, res judicata shields the fraud and the cheat as well as the honest person. It therefore is to be invoked only after careful inquiry.


According to Professor Amsterdam, supra note 2, no reason exists not to adhere to finality principles within a single judicial system. Id. at 381 n.19. The question in habeas, therefore, is the extent to which the interest in providing a federal forum for federal claims justifies review of state criminal convictions. Cf. id. at 383-84 (setting out finality concerns); Friendly, supra note 2, at 149-50 (that "'conventional notions of finality' should not have as much place in criminal as in civil litigation [does not mean] that they should have none") (citation omitted) (emphasis in original).

See e.g., Bator, supra note 2, at 443-44; Friendly, supra note 2, at 149-50.
Apparently aware of this weakness in the Sanders rule, a plurality of the Court recently backed away from Sanders in the case of Kuhlmann v. Wilson, taking the position that greater finality with regard to successive federal petitions is necessary. Kuhlmann involved a prisoner's challenge to the use against him at trial of evidence obtained by a jailhouse informant on the ground that the state obtained the evidence in violation of the rule in Massiah v. United States, which generally prohibits post-indictment questioning of criminal suspects by government informants. The prisoner's conviction was upheld on direct review; he then filed a federal habeas petition raising the Massiah claim and was denied relief. Subsequently, the Supreme Court decided United States v. Henry, which elaborated on the Massiah rule in the jailhouse context and involved facts very similar to those in Wilson's case. Wilson again petitioned the federal courts for relief.

312. Id. at 450 (stating that "[t]he legislative history demonstrates that Congress intended the 1966 amendments . . . to introduce 'a greater degree of finality of judgments in habeas corpus proceedings' ") (quoting S. REP. No. 1797, 89th Cong., 2d Sess. 2 (1966)). A plurality has suggested the same approach to the question of abuse of the writ. Rose v. Lundy, 455 U.S. 509, 520-21 (1982) (strongly suggesting that dropping a claim from a habeas petition, only to raise it in a subsequent petition, would constitute "abuse of the writ," barring habeas review of the claim). In light of Kuhlmann, it is open to question whether the Rose plurality would permit review of such a claim if the petitioner argued that he or she were actually innocent. See infra notes 371-74 and accompanying text.
314. Id. at 206. In Massiah, federal agents had listened to petitioner's incriminating statements through use of a transmitter placed in petitioner's automobile while he was free on bail pending trial for narcotics violations. Id. at 202-03. Petitioner made the statements to a former confederate who had agreed to cooperate with the agents. Id. The Court held that the state's acquisition of such statements in the absence of petitioner's attorney deprived him of his sixth amendment right to counsel and that the statements could not be used against him at trial. Id. at 206-07. The Court later applied Massiah in United States v. Henry, 447 U.S. 264, 270 (1980). See infra note 317 and accompanying text.
317. Id. at 265-69. In Henry, government agents paid an informant who shared a cell block with the respondent to furnish information obtained from conversations with the respondent. Id. at 266. The agents told the informants not to question the respondent or initiate conversations regarding the charges against him. Id. The Court held that the government's actions violated respondent's sixth amendment right to counsel by placing him in a situation likely to induce incriminating statements in the absence of counsel. Id. at 274. The Court found that the informant "deliberately elicited" the incriminating information within the meaning of Massiah. Id. at 274-75.
Ultimately, the Court denied relief on the ground that even under *Henry*, Wilson's claim did not succeed on the merits.\(^3\)\(^1\)\(^9\) A plurality of the Court would have gone a step further, however, and barred relitigation of the successive petition.\(^3\)\(^2\)\(^0\)

The *Kuhlmann* plurality reached its decision by relying on a perverse application of the “ends of justice” inquiry set out in *Sanders*.\(^3\)\(^2\)\(^1\) Arguing that the broad discretion accorded habeas courts by *Sanders* was inappropriate,\(^3\)\(^2\)\(^2\) the plurality took the position that the ends of justice require relitigation of a claim in a successive federal habeas court only when the petitioner advances a colorable claim of innocence.\(^3\)\(^2\)\(^3\) In this variant of the guilt-related rationale for habeas, only those petitioners who maintain their factual innocence can obtain a hearing on a successive petition. The *Kuhlmann* plurality reached this position by balancing the interest of the petitioner in relitigation against the interest of the state in avoiding relitigation.\(^3\)\(^2\)\(^4\) According to the plurality, the only legitimate interest of a successive petitioner is to avoid incarceration if he or she is not guilty.\(^3\)\(^2\)\(^5\) Otherwise the state’s interest in finality is paramount.\(^3\)\(^2\)\(^6\)

The *Kuhlmann* plurality opinion presents at least three significant difficulties. First, *Kuhlmann* completely eviscerates

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\(^3\)\(^1\)8. *Kuhlmann*, 477 U.S. at 442-43. Wilson filed a motion in state trial court to vacate his conviction, but the motion was denied on two grounds. The judge held that *Henry* was distinguishable from Wilson’s case, and that state precedent precluded giving *Henry* retroactive effect. *Id.* Denied leave to appeal, Wilson thereafter returned to federal habeas court. *Id.*

\(^3\)\(^2\)9. *Kuhlmann*, 477 U.S. at 456. The *Kuhlmann* Court distinguished Wilson’s case from *Henry* because in Wilson’s case the informant made no effort to stimulate conversations about the crime with which the defendant was charged. *Id.* at 459-61. The question whether such conduct violates the sixth amendment was left open in *Henry*, but the Court in *Kuhlmann* decided that the state does not violate the sixth amendment by positioning a passive informant in a jail cell. *Id.* at 459; *see also id.* at 461 (Burger, C.J., concurring) (“[T]here is a vast difference between placing an ‘ear’ in the suspect’s cell and placing a voice in the cell to encourage conversation for the ‘ear’ to record.”).

\(^3\)\(^2\)\(^0\) Id. at 444-55.

\(^3\)\(^2\)\(^1\) See supra note 303 and accompanying text.

\(^3\)\(^2\)\(^2\) The *Kuhlmann* plurality argued that habeas courts used the broad discretion accorded them by *Sanders* in a whimsical and capricious manner, 477 U.S. at 451, but offered no evidence that this was the case. If a danger of abuse of discretion in fact exists, the proper course would be to define or narrow that discretion rather than eliminating it completely, absent some other competing interest.

\(^3\)\(^2\)\(^3\) Id. at 454.

\(^3\)\(^2\)\(^4\) Id. at 452-54.

\(^3\)\(^2\)\(^5\) Id. at 452.

\(^3\)\(^2\)\(^6\) Id. at 452-53.
Sanders, which it purports to construe. Sanders fashioned a liberal test that committed the decision to allow relitigation to the discretion of the court. Kuhlmann forecloses that discretion, replacing the broad ends of justice inquiry with the narrow innocence test.

Second, the Kuhlmann plurality ignored important interests in applying its balancing test. In the thirty-odd years since Brown, the Court has identified several interests at stake in habeas proceedings other than an innocent petitioner's interest in obtaining relief. For example, one theory of Brown asserts that habeas exists to vindicate federal rights, whether or not a petitioner is innocent. Yet the Kuhlmann plurality simply ignored the rights-based rationale for habeas in its weighing of competing considerations.

Most important, however, the reasoning of the Kuhlmann plurality is squarely at odds with the rule of Brown v. Allen. The Kuhlmann reasoning concerning successive petitions would be applicable to a first federal habeas petition. If a prisoner's only legitimate interest is in avoiding incarceration if he is innocent, that should be as true on an initial federal habeas petition as on a successive one. Brown contains no such limitation of habeas to cases of asserted innocence, and the Court's repudiation of Stone v. Powell's guilt-related rationale in later decisions suggests this limitation will not be the rule.

Under the governing framework, therefore, decisions regarding successive habeas petitions cannot be reconciled with decisions governing the scope of the writ. Respected commentators favor one approach or the other. Some commentators argue that principles of finality are extremely important in the criminal area and that both initial state and federal determinations should have res judicata effect. Other commentators,

327. Sanders v. United States, 373 U.S. 1, 18-19 (1962); see also text accompanying note 304 (discussing “ends of justice” test).
328. For example, the Court alludes to the importance of vindicating federal rights through habeas and engendering respect for the criminal justice system by not convicting defendants in unfair trials. Although this Article argues that these other considerations do not necessarily justify broad habeas jurisdiction, the Court has in fact relied on the arguments in its habeas decisions, something the Kuhlmann plurality simply ignored.
329. See supra notes 81-82 and accompanying text.
331. See supra notes 146-49 and accompanying text.
332. See Bator, supra note 2, at 453-62 (arguing that relitigation should not be available absent lack of corrective process in state court); Friendly, supra...
relying on one or more of the various rationales offered to explain Brown, argue that habeas is extraordinary and that res judicata should not apply in either situation. A plurality of the Court has taken an intermediate, and apparently inconsistent, position with regard to the res judicata impact of prior state and federal adjudication of constitutional claims. Prior state adjudication deserves no res judicata effect, but prior federal adjudication bars relitigation absent a showing of innocence.

Although the Court’s res judicata decisions cannot be squared with any one theory of habeas jurisdiction offered to date, the appellate model provides a coherent explanation. Because the exhaustion and res judicata doctrines are intimately related under the appellate model, a single explanation of both follows the discussion of current confusion concerning the exhaustion doctrine.

b. Exhaustion: When Is Review Appropriate?

From the standpoint of the prisoner, the exhaustion doctrine is ostensibly the least objectionable of the four doctrines limiting access to habeas review, because it purports to affect only the timing of federal review, not whether the prisoner can obtain federal review. Under the exhaustion doctrine, a federal court may reject a habeas petition even though it has jurisdiction over the petitioner’s claim, on the ground that presentation of that claim to a federal court is premature. The habeas statute itself requires that a federal court dismiss any claims for which the prisoner has not exhausted state remedies. The prisoner must present the claim in orderly fashion to the highest state court that will hear the claim, but need

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333. See Brennan, supra note 2, at 425 & n.4; cf. Yackle, Book Review, supra note 2, at 376 (noting that judiciary treasures respect for constitutional safeguards and “resists the notion that it is ever ‘too late’ to worry about the violation of constitutional rights”).
336. See Ex parte Hawk, 321 U.S. 114, 117 (1944) (per curiam) (federal court will not review a state prisoner’s habeas petition until all state remedies have been exhausted); see also Wade v. Mayo, 334 U.S. 672, 677 (1948) (approving district court’s award of habeas relief to state prisoner who had first been denied relief by highest state court).
337. 28 U.S.C. § 2254(b) (1966); see also Rose v. Lundy, 455 U.S. 509, 520 (1982) (plurality opinion) (holding habeas court must dismiss petition containing both exhausted and nonexhausted claims).
present the claim only once, even if repeated channels of review are available. Moreover, the prisoner need not make a futile attempt to exhaust state remedies. According to the Court, the exhaustion doctrine serves comity interests, preventing disruption of state court proceedings. Moreover, it allows state courts, also charged with protection of federal rights, an opportunity to address and correct constitutional violations before a prisoner resorts to federal review. By requiring initial review in state court, the exhaustion doctrine "serves to minimize friction between our federal and state systems of justice."

Exhaustion is at best a nuisance and a wasted effort, and at worst offends comity interests rather than advancing them. A nonexhausted claim is one that the prisoner has failed to present to a state court for determination. By the time the prisoner presents a federal habeas court with an issue that the state has not heard, however, it is likely to be not only nonexhausted, but procedurally defaulted. If so, the federal court will refuse to hear the claim and bounce it back to state court as defaulted. A federal court, however, is capable of determining whether a claim is subject to procedural default under state law and proceeding accordingly, without forcing the

338. See Brown, 344 U.S. at 448 n.3 ("We do not believe Congress intended to require repetitious applications to state courts.").
340. See Granberry v. Greer, 107 S. Ct. 1671, 1675 (1987); Rose, 455 U.S. at 515; Ex parte Royall, 117 U.S. 241, 251 (1886); cf. Ex parte Hawk, 321 U.S. at 117-18 (stating federal courts should not interfere with states' administration of justice except in cases of peculiar urgency).
342. Id.
343. In theory, the exhaustion doctrine is discretionary; the habeas court has the power to hear nonexhausted claims, but abstains from doing so to promote comity interests. See, e.g., Fay, 372 U.S. at 438-39; Royall, 117 U.S. at 251. The Court speaks of the doctrine as virtually mandating exhaustion, however, referring to the doctrine as the exhaustion "requirement." See Rose v. Lundy, 455 U.S. 509, 518 (1982). Yet the Court considers itself free to disregard the doctrine at will. See infra notes 358-61 and accompanying text.
345. See Rose, 455 U.S. at 525 (Blackmun, J., concurring) (arguing complete exhaustion rule is destructive of comity because state courts are forced to consider frivolous claims before federal court may entertain serious, exhausted grounds for relief).
346. See 28 U.S.C. § 2254(b) (1982) (stating that applicant has not exhausted remedies if he has right to raise question in state court).
347. Procedural default occurs when a defendant fails to comply with a state's procedures for raising a claim of error in the proceedings against him. See supra notes 186-201 and accompanying text.
petitioner to waste the effort of a round trip to state court and back. 348

Even if the state courts reached the merits on remand, it is anything but clear that comity is served by requiring exhaustion. After a state court hears and rejects the merits of a constitutional claim, a federal habeas court will review the same merits and independently determine whether the state court was correct and whether state actors violated the Constitution,349 because Brown v. Allen holds that a state court decision is not res judicata on habeas review.350 Remand to state court for exhaustion is thus, in the words of Professor Bator, a "meaningless gesture," as likely to offend as to aid comity.351

A possible response is that state court review is not meaningless because, although state court determinations on questions of law are not res judicata, federal habeas courts accord state court determinations of fact a presumption of correctness—indeed, the federal habeas statute requires that federal courts give some respect to state court factual determinations.352 This argument merely emphasizes the incoherence of

348. That, after all, is the premise of Erie. See Erie R.R. v. Tompkins, 304 U.S. 64, 78 (1938) (holding federal courts must apply state law in diversity cases); see also Insurance Corp. v. Compagnie des Bauxites, 456 U.S. 694, 711 (1982) (stating that federal district courts do not possess a warrant to create jurisdictional law of their own but must apply state law); Schering Corp. v. Home Ins. Co., 544 F. Supp. 613, 618-19 (1982) (stating that where no state court determination exists, federal courts must apply what they find to be state law).

349. See Yackle, Exhaustion Doctrine, supra note 2, at 423 ("A doctrine that puts the state courts to meaningless litigation can claim precious little basis in the notion of comity. Orderly state procedures are not so much disrupted as abused, the state courts' participation in the enforcement of federal law not so much frustrated as coerced.").

350. Brown v. Allen, 344 U.S. 443, 458 (1953) (noting that state adjudication carries same weight as determination of highest court of another jurisdiction, but is not res judicata); see supra notes 71-74 and accompanying text; see also Jackson v. Cupp, 693 F.2d 867, 869 (9th Cir. 1982) (stating that state court determination on merits may be desirable because it may make federal review unnecessary, but does not bind federal courts).

351. Bator, supra note 2, at 483 (also stating "it would make little sense to encourage the use of state remedial processes through a requirement of exhaustion only in order to ignore these processes on collateral attack"); see also Rose v. Lundy, 455 U.S. 509, 525 (1982) (plurality opinion) (Blackmun, J., concurring) ("Remitting a habeas petitioner to state court to exhaust a patently frivolous claim ... hardly demonstrates respect for state courts.").

the exhaustion doctrine, for as Professor Bator observed, no good explanation exists for why state factfinding should deserve great respect on habeas while state law determinations receive little or none. 353

A second, more frequently offered defense of the exhaustion doctrine is that the requirement encourages full review of constitutional claims in state courts, thereby fostering greater competence among the state courts in handling federal constitutional claims. 354 The state courts have been addressing fed-

(N.D.N.Y. 1981) (noting that state courts' factual determinations are presumptively correct). The statute sets forth exceptions to the general presumption, that permit federal courts to review and determine facts when state factfinding is either inadequate to allow review of the federal claim or clearly erroneous. See 28 U.S.C. § 2254(d) (1982); Sumner, 449 U.S. at 550. The exceptions are quite broad, but the Court has adamantly required that the rule be followed when no exception applies. See, e.g., Marshall v. Lonberger, 459 U.S. 422, 432 (1982) (criticizing Sixth Circuit for redetermining facts based on court's mere disagreement rather than lack of "fair support" for state findings); Sumner v. Mata, 455 U.S. 591, 598 (1982) (vacating court of appeals' judgment second time for failure to defer to state court factfindings as called for by § 2254(d)); Sumner, 449 U.S. at 547-52, 591, 598 (noting habeas court should provide reasoning tying generalities of statutory exceptions to particular facts of case).

Although factfinding might seem inappropriate for a habeas court acting as a surrogate for the Supreme Court in reviewing cases, this is not so. On direct review the Court may remand for proper factfinding. See Bator, supra note 2, at 515; Hill, The Inadequate State Ground, 65 COLUM. L. REV. 943, 953 (1965). And, the Supreme Court even has made its own factual determinations on direct review contrary to those of the state courts. See H. HART & H. WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 665 (2d ed. 1973). Sitting at nisi prius, then, the habeas court simply operates with an efficiency not readily available to the Supreme Court, finding its own facts rather than remanding when the record is inadequate and also when the habeas court suspects the state court will not do an adequate job. See Bator, supra note 2, at 492 (noting habeas has "added convenience" over Supreme Court review because federal trial court can conduct hearing into adequacy of state corrective processes). The factfinding ability of habeas courts therefore provides additional support for allowing habeas courts to serve as surrogates for the Supreme Court, and need not be seen as an inconsistency in the new model. But see Stolz, supra note 2, at 965-66 (arguing that intermediate federal appellate court should serve "appellate" function of habeas, and that factfinding by habeas courts is not important given current practice of providing lawyers to criminal defendants and keeping written records).

353. See Bator, supra note 2, at 502 ("[I]f meaningful process serves as an adequate guarantee of the probability of the correctness of factfindings, we are entitled to some explanation why it does not satisfy us with respect to legal conclusions.").

354. In Rose, a plurality of the Court noted that the exhaustion requirement will encourage state prisoners to seek full relief first from the state courts, giving those courts the first opportunity to review all claims of
eral constitutional issues for a long time, however, and it is condescending at best to suggest that with more practice they might improve their ability to recognize and respect federal rights. Such a paternalistic attitude toward state courts can hardly promote comity interests: the Court foists constitutional claims on state courts so those courts will get some practice while the federal courts remain free to overrule state court determinations on questions of law.

The Court itself appears uncomfortable with the exhaustion doctrine, having eroded the doctrine by holding that it is not "jurisdictional" and by overlooking the exhaustion requirement when it seems bothersome. Moreover, the Court is drifting toward the rule that a state may waive the exhaustion requirement. Permission waiver seems at first blush to make sense: if it is comity that requires exhaustion, the state

455 U.S. at 518-19.

Cf. Stone v. Powell, 428 U.S. 465, 493-94 n.35 (1976) (discussing familiarity of state judges with search and seizure cases and denying that state judges are any less adept than federal judges). Interestingly, Justice Harlan attacked, as destructive of federalism, precisely this kind of argument—that practice will improve state court adherence to federal rules—when the argument appeared in Justice Brennan's majority opinion in Henry v. Mississippi, 379 U.S. 443 (1965). Henry, 379 U.S. at 464-65 (Harlan, J., dissenting). In Henry, the Court (per Justice Brennan) established a scheme for direct review designed to encourage state courts to develop their own collateral review procedures and expertise at deciding constitutional claims. See id. at 453.

See Rose, 455 U.S. at 525 (1981) (Blackmun, J., concurring) (noting that exhaustion requirement "appears more destructive than solicitous of federal-state comity"); see also Roberts v. LaVallee, 389 U.S. 40, 43 (1967) (questioning why state court would want to burden itself with narrow issue predetermined by established federal principles).

See Rose, 455 U.S. at 519 (citing Braden v. 30th Judicial Circuit Court, 410 U.S. 484, 490 (1973)) (stating that state courts may become increasingly familiar with and hospitable toward federal constitutional issues as number of prisoners exhausting remedies increases).


See Granberry v. Greer, 481 U.S. 129, 167 (1987) (holding appellate court not required to dismiss for nonexhaustion based on state's failure to raise issue below); see also Thompson v. Wainwright, 714 F.2d 1495, 1501 (11th Cir. 1983) (holding that Florida common law allows attorney general to waive exhaustion); Felder v. Estelle, 693 F.2d 549, 554-55 (5th Cir. 1982) (Higginbotham, J., concurring) (arguing state decision that immediate review of habeas petition by federal court best serves its sovereign interests cannot be overturned in name of comity); Comment, State Waiver and Forfeiture of the Exhaustion Requirement in Habeas Corpus Actions, 50 U. Chi. L. Rev. 354, 356
should be able to waive the requirement. Waiver does not square, however, with the Court's own explanation for exhaustion: the need for state courts to gain necessary experience with federal claims.361

If the exhaustion requirement were merely a rule of timing, these objections would carry less force. The recent decision in Rose v. Lundy,362 however, suggests that a plurality of the Court intends to convert this rule of timing into one of forfeiture. Rose addressed the problem of how a federal court should treat a "mixed bag" habeas petition, that is, that contains both exhausted and nonexhausted claims.363

To understand the significance of the Rose Court's decision, it is important to consider the possible ways the Court could have decided the case. The Court could have permitted the lower federal court to hear the entire petition, both exhausted and nonexhausted claims, but this would have undermined the exhaustion requirement.364 Alternatively, the Court could have

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361. See supra note 354 and accompanying text.
363. Id. at 510.
364. Id. at 518-22. Justice O'Connor, writing for the Court, reasoned that the policies behind exhaustion, in general, "protect[ing] the state court's role in the enforcement of federal law and prevent[ing] disruption of state judicial proceedings," could best be accomplished by requiring exhaustion of all claims. Id. at 518.
given district courts discretion to dismiss the petition entirely, or dismiss only the nonexhausted claims while proceeding to hear the exhausted claims. Instead, the Court held that a habeas court must dismiss in its entirety "mixed bag" petition.\textsuperscript{365} The prisoner could then choose whether to return to state court to exhaust the nonexhausted claims, or to drop them and proceed in federal court with only the exhausted claims.\textsuperscript{366}

Little practical difference would separate these latter two positions, but for the view of a plurality of the Court regarding the prisoner's choice. Initially, it appears irrelevant whether a prisoner withdraws entirely a petition containing nonexhausted claims or proceeds to litigate the exhausted claims in the habeas court and returns later with the other claims, if necessary, after having presented those claims to the highest state court. In either event, the purposes of the exhaustion rule would be satisfied.\textsuperscript{367}

The \textit{Rose} plurality suggested, however, that if the prisoner opted to present the exhausted claims in a first habeas petition and save the nonexhausted claims for a later effort, a federal court might deem the later petition an abuse of the writ,\textsuperscript{368} and therefore bar adjudication of the remaining claims. This is significant because the standard governing abuse of the writ is similar to the standard governing successive petitions set forth in \textit{Sanders v. United States}.\textsuperscript{369} Just as the \textit{Kuhlmann} plurality would limit review of successive petitions to cases in which the

\begin{footnotesize}
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\item \textsuperscript{365} \textit{Id.} at 522.
\item \textsuperscript{366} \textit{Id.} at 520.
\item \textsuperscript{367} Concurring in \textit{Rose}, Justice Blackmun suggested that allowing the petitioner to drop nonexhausted claims leads to the same result as letting the district court dismiss the nonexhausted claims, the Court of Appeals's approach. In either case, the district court will proceed to review only the exhausted claims. \textit{See id.} at 530.
\item \textsuperscript{368} \textit{Id.} at 520-21. Justice O'Connor cautioned that "[b]y [deleting the nonexhausted claims] the prisoner would risk forfeiting consideration of his nonexhausted claims in federal court," because failure to assert these grounds could be considered an "abuse of the writ." \textit{Id.}
\item \textsuperscript{369} In explaining abuse of the writ, Justice O'Connor in \textit{Rose} quoted from \textit{Sanders}: [I]f a prisoner deliberately withholds one of two grounds for federal collateral relief at the time of filing his first application, in the hope of being granted two hearings rather than one or for some other such reason, he may be deemed to have waived his right to a hearing on a second application presenting the withheld ground. . . . Nothing in the traditions of habeas corpus requires the federal courts to tolerate needless piecemeal litigation, or to entertain collateral proceedings whose only purpose is to vex, harass, or delay.
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prisoner could show actual innocence, the Rose plurality suggested that taking a second bite at habeas would constitute abuse of the writ per se and thus would be grounds to deny relief. In other words, a prisoner who proceeds forthwith with potentially meritorious exhausted claims runs the risk of waiving for all time the right to raise nonexhausted claims in federal court.

The plurality positions in Rose and Kuhlmann are somewhat congruous. The Rose plurality's standard for abuse of the writ could, in time, be mitigated by an actual innocence exception, making the plurality's proposed standard governing successive petitions parallel with the plurality's abuse of the writ standard. In addition, because most nonexhausted claims are defaulted claims, they are barred not only by the doctrine of exhaustion but by that of procedural default. In any event the rules for successive petitions and abuse of the writ suggested by the Kuhlmann and Rose pluralities offer a new view of the writ of habeas corpus: without a showing of actual innocence, each state prisoner gets one shot, and one shot only, at the writ of habeas corpus.

The Kuhlmann and Rose pluralities' views of habeas are at odds, however, with the commonly offered justifications for Brown. These explanations, although offered with regard to the scope of the writ, adhere to the common-law procedural functioning of the writ: Explanations of broad habeas that focus on the right or interest at stake characterize the writ as a device to "cut through all forms" and go to the heart of the matter of custody. Under these theories, if a prisoner can show a violation of constitutional right and unlawful incarceration, it should not matter whether the prisoner raises the claim in a first petition or a later one. In fact, if the articulated justifications for Brown are sound, the proper course might be to hear exhausted claims immediately rather than delay adjudication to await "total" exhaustion.

Thus, as with res judicata, the exhaustion doctrine cannot

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Id. at 521 (quoting Sanders v. United States, 373 U.S. 1, 18 (1963)); see supra notes 300-02 and accompanying text.
371. See Rose, 455 U.S. at 521.
372. See supra notes 186-201 and accompanying text.
373. See supra notes 81-83 and accompanying text.
be squared with commonly offered justifications for Brown. The appellate model, however, explains both doctrines quite well.

2. Res Judicata and Exhaustion Explained

The appellate model for habeas offers a simple rule for application of res judicata principles. If habeas is treated as a form of appeal, there would be no question of whether res judicata would bar federal courts from reconsidering state court decisions. The federal habeas court would be part of the appellate chain and res judicata would not apply until review was complete. On the other hand, once a federal habeas court examined an issue, further review by another habeas court would be precluded. Thus, federal habeas courts should not give res judicata effect to state court proceedings, but should be bound by previous federal review.

Likewise, treating modern habeas as an appeal simplifies the exhaustion doctrine by eliminating the need for special rules to implement it. Exhaustion for habeas purposes is subsumed by ordinary appellate rules. Claims that were raised and treated at each level of state proceedings below can be adjudicated. Claims that were not raised in state court cannot be adjudicated.375

Current law strays from this simplicity in two respects. First, rules governing adjudication of successive habeas petitions fail to accord full res judicata effect to federal habeas courts’ decisions.376 Second, rules governing preclusion of habeas claims due to abuse of the writ fail to accord res judicata effect to a federal court’s determination of a prisoner’s first habeas petition when a second petition raises issues not raised in the previous petition.377

Under the appellate model, the appropriate question is whether a given habeas petition represents an appeal from a state court decision. When a habeas petition follows state court proceedings, the petitioner may appeal everything raised in those proceedings. Thus, res judicata ought not to bar bringing such claims to federal court, and the rule in Brown is correct.

When the prisoner files a successive petition concerning the same claims, however, that petition is not an appeal from

375. See supra notes 265-67 and accompanying text.
anything. The matter has been appealed once, and the appeal rejected. Thus, under the appellate model a federal habeas court should not hear a successive petition, unless the previous federal habeas court remanded the case to state court and the state court heard the merits. In such a case the federal court appropriately could hear the case anew, just as on direct review. Without further state proceedings, however, repeated federal review is inconsistent with the appellate model.

Treating habeas as an appeal has similar consequences for the rules governing abuse of the writ. In filing a first habeas petition, a state prisoner may address any claims heard in state court. If the petitioner fails to raise any such claims, however, they are forfeited, just as they would be if dropped from any state appeal. A habeas petition seeking to raise a claim omitted from an earlier petition would be an appeal from no proceeding, and thus would be inconsistent with the appellate model.

Without using these terms, a plurality of the Court has intuitively reached this result. The plurality opinions in *Kuhlmann* and *Rose*, which discuss respectively the successive petition and abuse of the writ situations, are consistent with the new habeas model. The *Kuhlmann* and *Rose* plurality positions regarding successive petitions and abuse of the writ therefore should be adopted.

On the other hand, the majority holding of *Rose*, which requires dismissing mixed petitions of exhausted and nonexhausted claims, should be overruled. Under an operative model that treats habeas as a surrogate direct appeal, the habeas court should treat nonexhausted claims in a “mixed bag” petition as state law treated them, refusing to hear any claim defaulted in state court, but entertaining the rare

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378. The rule of Henry v. Mississippi, 379 U.S. 443, 446-49 (1965), also would apply here to bar manipulation of state rules to thwart federal review. *See supra* notes 268-73 and accompanying text.

379. *See Kuhlmann*, 477 U.S. at 451-55 (plurality opinion); *Rose*, 455 U.S. at 520-22 (plurality opinion). Moreover, treating habeas as an appeal explains why the Court has declined to rule that a prisoner must exhaust every possible state remedy. The current rule is that a prisoner need bring a claim to the highest state court only once. Brown v. Allen, 344 U.S. 443, 449 n.3 (1953). Even if state collateral remedies are available, they need not be exhausted. *See Roberts v. LaVallee*, 389 U.S. 40, 42-43 (1967) (per curiam). Once courts treat habeas as appellate review of federal questions decided by the state’s highest courts in criminal cases, rather than as a collateral remedy available at the end of the road, habeas policy will comport with current practice.


nonexhausted claim that is not defaulted. Rose's requirement of total exhaustion ought to play no part in habeas jurisdiction, and should be overruled.

D. THE ROLE OF INNOCENCE

The discussion has not yet addressed one aspect of recent habeas jurisprudence for which the appellate model does not easily account, however: the actual innocence test. Although rejected as a basis for the scope of the writ, this test found new life in the Court's recent decisions limiting availability of the writ. Actual innocence may also have a role to play alongside the appellate model.

1. Current Doctrinal Confusion

In the series of cases beginning with Stone v. Powell and culminating recently in Kimmelman v. Morrison, the Court rejected innocence as a limitation on the scope of the writ. It is impossible to write off Stone as an anomalous result with significance only in the fourth amendment area, however, because the innocence concept recently has reemerged in both majority and plurality decisions developing other limiting rules, such as those governing procedural default and successive petitions. Giving significance to innocence in determining which petitioners should have access to habeas review, however, raises serious questions about the role of federal courts and is inconsistent with articulated reasons for the broad scope of the writ acknowledged by the Court in Brown.

A comparison of innocence as a standard for granting relief to its more traditional harmless error counterpart reveals difficulties with the innocence test and, to a lesser degree, with Wainwright v. Sykes's prejudice test for granting review of a claim defaulted for cause. Under the harmless error standard, if the state, defending a conviction, can show that an error was harmless beyond a reasonable doubt—that is, that the result would have been the same had there been no error—the conviction stands despite the error. Harmless error theoreti-

382. See supra notes 141-63 and accompanying text.
383. See supra notes 146-80 and accompanying text.
385. See supra note 176 and accompanying text.
386. See supra notes 195-96 and accompanying text.
387. See supra notes 34-35 and accompanying text.
cally permits a reviewing court to excuse only the most trivial and insignificant errors. Under the harmless error standard the state has the burden of proof.\(^388\)

Asking a reviewing court to apply an outcome-determinative test such as prejudice, or innocence, differs fundamentally from the harmless error test, and presents at least three conceptual difficulties. First, the prejudice and innocence approaches implicitly establish a hierarchy of constitutional rights, according some rights greater importance than others.\(^389\) When innocence or prejudice is the issue, the focus of the habeas court shifts from whether a prisoner's constitutional rights were violated to whether the prisoner's trial reached an accurate result. But if accuracy is the issue, then some constitutional rights, such as the right to a jury that reflects a cross-section of the community, take a back seat to rights that help assure accuracy in criminal trials, such as the fifth amendment right to be free of state coercion to confess to a crime. This ranking of constitutional rights finds no basis in the habeas statute or the Constitution itself.\(^390\)

Second, the inquiry by a habeas court as to innocence or prejudice is profoundly at odds with any concept of habeas since its inception.\(^391\) One of the best supported and least controverted principles of habeas is that it is not to serve as a retrial of the prisoner.\(^392\) Yet, a new trial, with a shifted burden of proof, is precisely what *Smith v. Murray*, *Murray v. Carrier*, and *Wainwright v. Sykes* require: a sustainable claim of innocence proven to the habeas court sitting at nisi prius.\(^393\) Indeed,}

\(^388\) *Id.*


\(^390\) *Stone*, 428 U.S. at 514-15 (Brennan, J., dissenting); *Stacy & Dayton*, *supra* note 35, at 90. The federal statute granting habeas corpus jurisdiction to district courts does not distinguish between rights based on the various constitutional amendments; it merely provides for federal jurisdiction to hear petitions brought by persons held "in violation of the Constitution." *See* 28 U.S.C. § 2254(a) (1982).

\(^391\) See *supra* notes 81-83, 167 and accompanying text. But see *supra* notes 141-45 and accompanying text (discussing Judge Friendly's theory that habeas should be available only where prisoners advance colorable claims of innocence).

\(^392\) See *Reitz, Abortive State Proceeding*, *supra* note 2, at 1355 (stating that "no one would challenge the conclusion that the federal writ cannot be used to retry the merits of every federal criminal prosecution").

\(^393\) See *Smith v. Murray*, 477 U.S. 527, 537-39 (1986); *Murray v. Carrier*, 477 U.S. 478, 497 (1986); *Wainwright v. Sykes*, 433 U.S. 72, 90-91 (1977); *supra* note 238. *Sykes* held that procedurally defaulted constitutional claims could be heard by habeas courts only if defendants could show both "cause" and "preju-
this requirement is all the more remarkable because it represents the first time federal courts have placed the burden of proving innocence on the prisoner.\textsuperscript{394} Finally, and most important, if innocence were the appropriate basis for habeas relief, there is no reason why the innocence test should not apply to all habeas claims, as Judge Friendly suggested, rather than being limited to procedurally defaulted claims and successive petitions.\textsuperscript{395} Judge Friendly expressly denied giving any weight to procedural default, successive petitions, and the like.\textsuperscript{396} He argued that the innocence inquiry should \textit{always} be pertinent in habeas cases, particularly when state courts have reached the merits of the petitioner's constitutional claims.\textsuperscript{397} Adopting Judge Friendly's premises, therefore, innocence should always be a prerequisite for habeas relief, a view of the scope of the writ completely contrary to that adopted in \textit{Brown}.

The idea of innocence simply is at odds with the explanations generally offered to support \textit{Brown}'s expansion of the writ's scope. Those explanations invariably rely, at least in part, on the sanctity of the constitutional rights at stake and the need to ensure that conviction did not occur in derogation of constitutional mandates.\textsuperscript{398} Innocence never has played a part in these rationales for habeas. If the innocence inquiry were to play a part, it is unclear why it does not apply to habeas review generally, as Judge Friendly suggested, not as an exception.\textsuperscript{433}

Note that the federal appellate courts are less competent than the district courts to resolve the inquiry demanded by \textit{Smith}, \textit{Carrier}, and \textit{Sykes}. A district court accustomed to conducting trials sitting at nisi prius in a habeas case at least has the tools to redetermine guilt if necessary according to the Court's directives. \textit{Cf.} Stacy & Dayton, supra note 35, at 92-93 (arguing that appellate courts lack critical information because trial record does not contain evidence and legal arguments defense attorney could have made). Yet the cases increasingly reflect a tendency for the federal appellate courts to resolve questions of actual innocence or prejudice, a task to which they are ill-suited. \textit{Id.} at 93-94.

\textsuperscript{394} Normally, of course, it is the prosecution's responsibility to prove "guilt beyond a reasonable doubt." \textit{In re Winship}, 397 U.S. 358, 364 (1970).

\textsuperscript{395} \textit{See} Friendly, supra note 2, at 142.

\textsuperscript{396} \textit{Id.} at 146.

\textsuperscript{397} \textit{Id.} at 157, 160.

\textsuperscript{398} \textit{See} supra notes 81-82 and accompanying text.
tion to the limiting doctrines of procedural default, successive petition, and abuse of the writ. Despite the inconsistency of innocence with the commonly offered post-Brown justifications for the broad scope of the writ, however, the appellate model can make way for the idea of innocence.

2. Innocence Explained: Old Habeas

The previous subsections have addressed a new writ of habeas corpus—the essentially appellate writ that evolved from Brown v. Allen. But this Article does not argue that the appellate habeas acknowledged in Brown displaced the common-law writ of habeas corpus. Rather, Brown fashioned a new habeas to address the inadequacy of direct review. Brown left the old habeas untouched, and the innocence inquiry can be explained as a vital part of the old writ.

For present purposes, the old, common-law writ of habeas corpus had two significant aspects, its scope and the process that accompanied it. As a matter of process, the common-law writ cut through all forms to go right to the heart of a contested incarceration without unnecessary procedural wrangling. As a matter of scope, the common-law writ was reserved for the most fundamental errors. At the time the writ developed, long before the growth of procedural due process protections, this scope primarily encompassed jurisdictional errors. It simply was intolerable for a person to be detained by a body without jurisdiction to order the detention: such detention was "lawless."

The expansion of procedural protections that occurred during subsequent years largely has subsumed the scope of the common-law writ: the Constitution now requires elaborate protections for the criminal defendant. This expansion presents a choice with regard to the scope of the old writ.

The common-law writ, existing side-by-side with the appel-

399. See supra notes 56-57 and accompanying text.
400. See supra notes 58-64 and accompanying text; cf. Reitz, Abortive State Proceeding, supra note 2, at 134 (arguing that habeas statute expanded availability of common-law procedural remedy to all substantive rights secured by fourteenth amendment).
401. See Bator, supra note 2, at 474-83.
402. See id. at 466 & n.51; Oaks, supra note 2, at 459-60; supra notes 58-64 and accompanying text.
403. See infra note 451 and accompanying text.
late writ, could encompass all procedural due process errors. Consistent with the procedural aspect of the common-law writ, however, that would mean most of the rules limiting access to habeas should be stripped away, so that a state prisoner claiming a due process violation could get an immediate hearing before a federal court in every instance. If this were the case, the new writ, and direct review, would be meaningless, along with concepts of default, abuse of the writ, and successive petitions.

The alternative is to acknowledge that orderly appellate procedure—including the new habeas—is sufficient to address due process concerns, and to ask whether there nonetheless exist other errors so fundamental that the old writ—which cuts through all forms—still should address them. When the question is posed in this way, the conviction of a person who is actually innocent nicely fits the bill of “fundamental error.” Although the concept of “actual innocence” has not explicitly played a part in federal post-conviction jurisprudence until recently, it is obvious that an enlightened system of justice should not tolerate continued incarceration of one who is demonstrably innocent. By treating a claim of actual innocence as equally as fundamental as a claim that a prisoner is committed to custody by a court without power to do so, federal courts could review such claims under the extraordinary procedure of the old writ of habeas corpus.

Making actual innocence the focus of the old writ is consistent with the Court’s emerging habeas doctrine, particularly with the quartet of cases—Smith v. Murray, Murray v. Carrier, Kimmelman v. Morrison, and Kuhlmann v. Wilson—recently decided by the Court. Under this emerging doctrine, actual innocence arguably comes into play in three possible situations: defaulted claims, successive petitions, and abuse of the writ. Stated differently, although the right to the new writ might be barred by procedural formality, if

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404. See Hart, supra note 2, at 106 (arguing that Brown stands for just this rule).  
409. See supra notes 110-12 and accompanying text.  
410. See Carrier, 477 U.S. at 497.  
411. See Kuhlmann, 477 U.S. at 454 (plurality opinion).  
412. See supra notes 371-72 and accompanying text.
there is a claim of actual innocence the federal habeas court will look beyond the formality and examine the legitimacy of detention. Defining the scope of the old writ as actual innocence, therefore, is consistent both with the procedural reach of that writ, and with the Court's recent decisions.

E. THE NEW HABEAS AS AN APPEAL

Once the new habeas is separated from its traditional twin and seen primarily as a surrogate for Supreme Court review, habeas can be seen for what it is: an appellate remedy. The new habeas provides an appeal from every state criminal case, permitting federal courts to review state courts' resolution of federal questions. In Brown v. Allen the Supreme Court recognized it no longer could serve this function. The habeas courts therefore would serve as surrogates for the Supreme Court.

Having put all the pieces in place, it is possible to redescribe habeas practice as an appeal. A prisoner is tried and convicted in state court, and then appeals the conviction through the state appellate courts to the highest state court. The prisoner has preserved some federal constitutional claims, but has failed to preserve others. The prisoner then files a petition seeking federal habeas relief.

The federal court will reach the merits of any claims raised in and adjudicated by the state courts. The federal habeas court also will hear claims raised in state courts but not reviewed, if the habeas court determines that the state court's failure to hear the claim serves no purpose but to thwart re-

413. See supra notes 114-33 and accompanying text (discussing Brown).
414. See supra Part I(C) (setting out appellate model of habeas).
415. The prisoner also may file a petition for certiorari. Although such a petition once was a prerequisite for habeas relief, Darr v. Burford, 339 U.S. 200, 214-17 (1950), Fay v. Noia eliminated this requirement. 372 U.S. 391, 435-38 (1963). Denial of certiorari carries no weight in later habeas proceedings. Brown v. Allen, 344 U.S. 443, 489-97 (1953). If the Court were to adopt the appellate model for habeas, it appropriately could direct all state prisoners to habeas, with no possibility of Supreme Court review until after habeas proceedings ended. See Tushnet, supra note 2, at 494 (seeking habeas corpus without petitioning for Supreme Court review is "sensible allocation of federal judicial resources"). Such a rule would diverge little from actual current practice. Cf. Meador, supra note 2, at 289 (noting Court generally denies certiorari to state prisoners, who then seek federal habeas).
416. Habeas courts would possess the same limited authority to make factual—as well as legal—findings that they do now. See supra note 352 and accompanying text.
view of a federal constitutional question. As a general rule, however, the habeas court will simply refuse to hear any claim defaulted in state proceedings.

That is not the end of the story, for two other situations might arise in state court. The situation of lesser significance, because it is unlikely to occur often, is that a state court in collateral proceedings might reach a federal issue that was defaulted in the original state proceedings. If it does, the federal habeas court, again in an appellate capacity, will hear that claim after review by state courts.

More important, there is one claim state courts generally do not consider defaulted if not raised in the original proceeding, and which most states permit to be raised on collateral attack: a claim of ineffective assistance of counsel. The reason for this deviation from the general rule of default is that most prisoners are represented by the same counsel all the way through original proceedings. Because few attorneys will attack their own competence, a prisoner has no opportunity to raise this claim until after original counsel has withdrawn, usually at the termination of original proceedings.

Once the state courts do hear an ineffective assistance claim on state collateral attack, a federal habeas court may also hear the claim. This rule has special significance, for one issue that arises frequently in ineffective assistance cases is whether counsel was incompetent in failing properly to preserve another federal constitutional claim. In other words, procedur-

417. See supra notes 268-71 and accompanying text.
418. See supra note 267 and accompanying text.
419. See Caldwell v. Mississippi, 472 U.S. 320, 326-28 (1985) (stating that if state will hear claim subsequent to default federal court also will reach merits); see also Ulster County Court v. Allen, 442 U.S. 140, 152-54 (1979) (upholding district court’s issuance of writ of habeas corpus on grounds that state court’s rejection of constitutional claim was not based on procedural default).
420. See, e.g., Collins v. State, 271 Ark. 825, 832, 611 S.W.2d 182, 188 (1981) (holding ineffective assistance of counsel may be raised on collateral attack if there was no prior opportunity to raise); Stewart v. State, 420 So. 2d 862, 864 n.4 (Fla. 1982) (stating that “[g]enerally, ineffective assistance of counsel is a collateral matter which should be addressed through a motion for postconviction relief”); State v. Merchant, 10 Md. App. 545, 550, 271 A.2d 752, 755 (Md. Ct. Spec. App. 1970) (holding prisoner not precluded from raising ineffective assistance of counsel claim in post-conviction proceeding simply because issue was not raised at trial or on appeal); see also Tague, supra note 2, at 59-60 (explaining why ineffective assistance of counsel claim cannot be waived and how defaulted claims become ineffective assistance of counsel claims).
421. See Tague, supra note 2, at 59-60.
422. Id. at 59-62.
ally defaulted claims become, in effect, a challenge to the effective assistance of counsel. \(^{423}\)

By focusing on ineffective assistance of counsel claims in default situations, the new model would encourage evolution of attorney performance standards, a process the Court has been all too reluctant to promote. \(^{424}\) In \textit{Strickland v. Washington}, \(^{425}\) which first established a test to govern ineffective assistance claims, the Court stated a hope that courts would not be drawn into analyzing lawyer performance, for fear that this would chill effective advocacy. \(^{426}\) Indeed, the \textit{Strickland} test itself offers only the most vague guidance as to what constitutes effective assistance of counsel. \(^{427}\) In \textit{Murray v. Carrier}, the Court

\(^{423}\) \textit{Id.}; see Cover & Aleinikoff, supra note 2, at 1080 (discussing relationship of ineffective assistance of counsel claims and procedural default); Shapiro, supra note 2, at 349 (noting that petitioner will allege ineffective assistance of counsel to escape procedural default).

\(^{424}\) See Cover & Aleinikoff, supra note 2, at 1080, 1083; Tague, supra note 2, at 61-62 & n.297. Perhaps the Court has avoided close scrutiny of attorney performance, not for fear of chilling attorney performance (as the Court suggested in \textit{Strickland v. Washington}, 466 U.S. 668, 688-90 (1984)), but because it may reveal that all too often attorney performance is lacking. See Cover & Aleinikoff, supra note 2, at 1080-85. Concern is widespread that indigent criminal defendants receive inadequate representation as a class, largely because limited resources are available for their representation. See \textit{id.} at 1081 (citing studies on inadequacy of representation for indigents); Bazelon, \textit{The Realities of Gideon and Argersinger}, 64 Geo. L.J. 811, 812-16 (1976) (same); 22 Judges' J. 21 (1983); see also A. Partridge & G. Bermant, \textit{The Quality of Advocacy in the Federal Courts: A Report to the Committee of the Judicial Conference of the United States to Consider Standards for Admission to Practice in the Federal Courts} 35 (1978) (noting "as a serious problem" that surveys consistently rank performance of appointed criminal counsel higher than that of most other counsel); cf. Burger, \textit{Some Further Reflections on the Problem of Adequacy of Trial Counsel}, 49 Fordham L. Rev. 1, 19 (1980) (noting general inadequacies of trial lawyers); see generally Alschuler, \textit{The Defense Attorney's Role in Plea Bargaining}, 84 Yale L.J. 1179 (1975) (presenting incisive study of reasons for inadequate performance of defense counsel, including dishonesty, heavy caseload, and inadequate resources). If this is the case, resources must be found to overcome the problem. The Court evidently does not care to be the harbinger of this news.

Characterizing an attorney's performance as "ineffective assistance of counsel" all too easily can be equated with calling the attorney incompetent. Although this Article is not the place for detailed discussion of the subject, perhaps to the extent that inadequate performance reflects shortage of resources rather than lack of competence, "ineffective assistance of counsel" needs a name change to divert attention from a particular attorney and focus on whether the defendant received a fair trial.


\(^{426}\) \textit{Id.} at 689-91 ("[j]udicial scrutiny of counsel's performance must be highly deferential" to give counsel latitude and discourage proliferation of ineffectiveness claims).

\(^{427}\) The \textit{Strickland} test requires that a court determine both whether
repeated its concern about chilling attorney performance, indicating that this type of analysis should be rejected unless a prisoner establishes that the attorney incompetence was egregious enough to satisfy the high standard for an ineffective assistance claim.\textsuperscript{428} According to the Court, one reason that attorney error short of constitutional ineffectiveness cannot constitute “cause” to excuse a habeas petitioner’s procedural default is that it would be too difficult to identify when such error has occurred.\textsuperscript{429}

That a question is difficult, however, is not a ground to avoid trying to answer it. The question of attorney error, in the context of a default of a constitutional claim due to counsel’s failure to raise an issue, is one that demands an answer.\textsuperscript{430} The new model would force the Court to focus on this question; the old model permits the Court to avoid it.

The appellate model suggests other necessary changes in the Court’s sixth amendment jurisprudence. An analysis of attorney performance within the context of a habeas appeal suggests that the \textit{Strickland} Court established an inadequate standard for assessing the impact of attorney error. Effective assistance of counsel is a constitutional right like any other; indeed, if the Court’s statements on the subject are accepted, the Court properly regards effective counsel as one of the defendant’s most important rights.\textsuperscript{431} \textit{Strickland} dictates that a court counsel’s performance was “actually ineffective” and whether the defendant was “prejudiced” by the performance. \textit{Id.} at 693. The Court declined to provide a “checklist” for defense counsel, but insisted that a court must “indulge a strong presumption” of counsel’s adequacy, noting that “there are countless ways to provide effective assistance in any given case.” \textit{Id.} at 688-89. This strong presumption of competence contradicts prevailing opinion concerning the adequacy of trial counsel, see supra note 424, including statements made in speeches by former Chief Justice Burger. \textit{See} Burger, \textit{supra} note 424, at 19.

The \textit{Strickland} test has been criticized severely, partly because it fails to provide standards for adequate attorney performance. Dissenting in \textit{Strickland}, Justice Marshall cited extensively the works of others who have developed guidelines to assess performance of criminal defense counsel. \textit{Strickland}, 466 U.S. at 707-10.

\textsuperscript{428} Murray v. Carrier, 477 U.S. 478, 488 (1986).

\textsuperscript{429} \textit{See id.} (“Does counsel act out of ‘ignorance,’ for example, by failing to raise a claim for tactical reasons after mistakenly assessing its strength on the basis of an incomplete acquaintance with the relevant precedent?”).

\textsuperscript{430} \textit{But cf.} Cover & Aleinikoff, \textit{supra} note 2, at 1080-84 (discussing difficulty of close analysis of ineffective assistance of counsel claims).

\textsuperscript{431} \textit{See}, e.g., \textit{Strickland}, 466 U.S. at 684-85 (stating that “right to counsel exists . . . in order to protect the fundamental right to a fair trial”); Argersinger v. Hamlin, 407 U.S. 25, 31 (1972); Gideon v. Wainwright, 372 U.S. 335, 344 (1963).
evaluating a claim of ineffective assistance of counsel ask two questions: whether the attorney erred so seriously as to deprive a defendant of "counsel," and whether this error "prejudiced" the defense, that is, whether the outcome would likely have been different absent the error.\textsuperscript{432} This approach is inconsistent with the manner in which courts of appeal treat most claims of constitutional error. Ordinarily, if the appellant shows a constitutional error, which is the first step of the \textit{Strickland} test, the burden shifts to the state to prove the error harmless.\textsuperscript{433} If the right to counsel is among the criminal defendant's most important rights, it is unclear why a petitioner who succeeds in proving the merits of a claim that the state violated this right must also carry the heavy burden of proving prejudice. The proper test should require only a showing of actual error consisting of constitutionally defective representation by counsel, after which the burden should shift to the state to prove that the error was harmless, as it does in other cases of constitutional error.\textsuperscript{434}

Finally, the Court arguably has incorrectly determined when the sixth amendment requires that a state provide counsel to an indigent defendant. A defendant must be afforded counsel at trial and on appeals as of right.\textsuperscript{435} There is no right to counsel, however, for discretionary appeals, applications to the Court for a writ of certiorari, state postconviction relief, or federal habeas proceedings.\textsuperscript{436} Under the appellate model for habeas, this scheme is insufficient in two respects. First, if federal habeas review is in effect part of direct appeal, and if it is

\textsuperscript{432} \textit{Strickland}, 466 U.S. at 687, 691-92.


\textsuperscript{434} \textit{But see} Gabriel, \textit{supra} note 433, at 1281-86 (arguing denial of effective assistance never can be harmless error).

\textsuperscript{435} \textit{See Argersinger}, 407 U.S. at 36 (holding indigent defendant has right to counsel if imprisonment is possibility); Douglas v. California, 372 U.S. 353, 357 (1963) (same on appeal as of right); \textit{Gideon}, 372 U.S. at 342 (same at felony trial).

to be meaningful, counsel should be provided for federal habeas. Second, state postconviction and federal habeas proceedings may be the first and only time to raise a most important claim, that trial counsel was ineffective. It therefore seems particularly important to accord a right to counsel at this stage.

In sum, the appellate model properly places new emphasis on the sixth amendment claims of prisoners with defaulted claims. If a claim is defaulted due to counsel’s error, the appropriate question is whether the error was sufficiently serious to offend sixth amendment standards for effective representation. Because defaulted claims will clearly and unequivocally be barred in habeas, except when brought under the umbrella of a sixth amendment claim, the Court will be forced to treat seriously, and expound upon, the obligations of criminal defense counsel.

III. THE MERITS OF THE NEW HABEAS

The model of a new habeas—in which the habeas court is a surrogate for Supreme Court review, and in which procedural rules governing access to habeas mirror those governing access to Supreme Court review—describes the emerging trend of Court decisions with some accuracy. This Article does not present the new model in the terms the Court uses, or even in terms the Court necessarily would accept. Indeed, the habeas cases and literature are replete with assertions that habeas should not serve as an appeal, although there are hints to the contrary as well. The new model, however, provides an operative principle that explains the trend of habeas decisions more completely than any description offered by the Court.

437. See, e.g., Sunal v. Large, 332 U.S. 174, 178 (1947); cf. Hart, supra note 2, at 118 (stating that Brown stands for the principle that “habeas corpus now can be made ‘to do service for an appeal,’” despite “time-worn shibboleth” to contrary (emphasis in original)); Mayers, supra note 2, at 56 (noting that idea that “habeas could not be used as a substitute for appeal was, until recently, hornbook learning”).


439. Concededly, the model does not perfectly explain the Court’s cases. Stone does not fit the model, nor does Rose v. Lundy, 455 U.S. 509 (1981). See supra notes 181 and 365 and accompanying text. The pluralities in Kuhlmann v. Wilson, 477 U.S. 436 (1986), see supra note 311 and accompanying text, and Rose, see supra note 312 and accompanying text, are consistent with the new model but do not represent the positions of a majority of the Court. The new model nonetheless explains habeas practice more thoroughly and consistently than any theory offered by the Court.
The new model has as an obvious advantage over the Court's traditional approach to habeas in that it streamlines habeas procedure. As noted at the outset, the rules governing habeas corpus have become so complex that experts suggest more time is spent in litigation over procedural rules than in litigating the merits of constitutional claims.\textsuperscript{440} Once the appellate model is in place, however, the rules become remarkably straightforward and easy to apply. The new model greatly simplifies a habeas court's threshold step of separating those claims it will hear on the merits from those it will not.

Streamlined procedure alone does not justify adoption of the new model, but the model's simplicity provides another advantage by focusing the debate over habeas review. Under existing habeas jurisprudence debate about the scope and nature of habeas review arises in every case. Each Supreme Court habeas decision contains the inevitable balancing of individual interests against state and systemic interests, causing the result and its justification to shift with current thinking and the current membership of the Court.\textsuperscript{441}

Rather than requiring an assessment of the propriety of habeas review on a case-by-case basis, adoption of the new model resolves this balance at the outset. Having made the critical decision to adopt the new model, questions regarding the scope of habeas review are resolved simply by applying appellate rules. Under the new model, federal habeas is an appeal and lies to review every claim of constitutional error adjudicated in state criminal cases. Claims \textit{not} raised and preserved below will be barred from federal habeas review. Application of the new model thus raises two clear questions that really should be asked about the current scope of federal habeas corpus: (1) whether appeal to a federal forum should be

\textsuperscript{440} See, e.g., Yackle, Book Review, supra note 2, at 394-96.

\textsuperscript{441} Compare Fay v. Noia, 372 U.S. 391, 423-26 (1963) (holding that state interest in orderly administration of justice permits denial of habeas review of defaulted claim if petitioner has deliberately bypassed state remedy, although "conventional notions of finality" ordinarily have no place when personal liberty is at stake) \textit{and} Sanders v. United States, 373 U.S. 1, 8-19 (1963) (holding liberty interest at stake justifies hearing successive petitions on same claim if "ends of justice" will be served thereby) \textit{with} Wainwright v. Sykes, 433 U.S. 72, 90-92 (1977) (holding that state interest in procedural rules justifies denial of habeas review of defaulted claim unless petitioner can show both "cause" and "prejudice") \textit{and} Kuhlmann, 477 U.S. at 451 (plurality opinion) (balancing state's important interest in finality against petitioner's interest in adjudication and concluding that "ends of justice" require hearing successive petitions only when petitioner advances a colorable claim of innocence).
available in every state criminal case; and (2) the extent to which prisoners should suffer the consequences of defaults caused by their attorneys. These questions are addressed in turn.

A. HABEAS AS AN APPEAL

No matter what model one applies, Brown v. Allen permitted a great expansion of federal review of state criminal convictions. The new model recognizes this review for what it is: a surrogate for the direct review that the Supreme Court could no longer meaningfully provide for every criminal case. The question remains whether such review should exist.

A useful, though perhaps obvious, first question is whether the Court ought to review state criminal cases directly. Most answer this question in the affirmative, considering the matter settled long ago by Murdock v. City of Memphis and Martin v. Hunter's Lessee. Direct Supreme Court review serves the twin goals of assuring the supremacy and the uniformity of federal law, and no obvious reason exists for making federal review less available in criminal cases than in other cases arising in state courts.

The next question, then, is whether direct review ought properly to occur in the lower federal courts, sitting as habeas courts. This question is more difficult. Habeas review by lower federal courts arouses passions not raised by direct Supreme Court review. Because the Supreme Court has delegated its functions to the lower federal courts only in criminal cases, one must ask what distinguishes criminal cases from other cases arising in the state courts.

Three possible justifications exist for assuring fuller review of criminal cases by shifting responsibility away from an overburdened Supreme Court. First, the federal rights at stake in criminal cases may be particularly important. Second, the

442. See supra notes 73-74 and accompanying text.
443. 87 U.S. (20 Wall.) 590 (1875). Murdock held that the Supreme Court's jurisdiction over state court judgments extended to federal questions raised in and decided by the highest state court. Id. at 635-37.
444. 14 U.S. (1 Wheat.) 304 (1816). Martin held that the Supreme Court has authority to review judgments of state courts. Id. at 351-52.
446. See STATE JUSTICES' REPORT, supra note 30, at 7 ("a final judgment of a State's highest court [should] be subject to review or reversal only by the Supreme Court of the United States").
liberty interest at stake in criminal cases may be particularly important. These two arguments parallel the old model’s justifications for broad habeas review and are unpersuasive.\textsuperscript{447} If liberty or rights are the operative values in habeas cases, the Court’s decisions do a poor job of honoring them, as previous sections have explained.\textsuperscript{448} Moreover, it is not apparent why, for example, a criminal suspect’s right to confront adverse witnesses necessarily is more important than a citizen’s right to be free from an unlawful taking by the state so as to justify an additional tier of review for cases involving the former. Further, a jail sentence of only a few days cannot necessarily be described as raising greater concerns than a civil judgment that would bankrupt a defendant. Yet a criminal suspect sentenced to prison gets federal habeas review while a holder of federal rights adjudicated by the state in civil proceedings must settle for a chance at Supreme Court review.

A third justification focuses not on the individual interest at stake but on structural concerns peculiar to criminal cases. This justification requires a brief return to the Court’s decision in Brown v. Allen. Brown did not rest on the premise that criminal defendants should get more review than civil litigants, but rather on the belief that habeas would provide the only meaningful review.\textsuperscript{449} The proper inquiry therefore is whether the Brown Court’s central premise was correct.

The Brown decision itself provides some justification for the argument that the only meaningful review of criminal cases must be habeas review. The Justices writing in Brown, primarily but not exclusively Justice Frankfurter, identified a number of structural inadequacies peculiar to direct Supreme Court review in criminal cases. The Court was expanding the rights of criminal suspects and further expansion would require additional Court scrutiny of criminal cases. In fact, the number of criminal cases reaching the Court was increasing, along with particularly inadequate records and petitions often drafted by pro se petitioners. Thus, the Brown Court rightly worried about its ability to provide adequate review of state prisoners’ claims.\textsuperscript{450}

Events since Brown strengthen the case for maintaining

\textsuperscript{447} See supra notes 81-83 and accompanying text (discussing rights-based and liberty-based rationales for habeas).
\textsuperscript{448} See supra notes 84-99 and accompanying text.
\textsuperscript{449} See supra notes 114-32 (discussing this interpretation of Brown).
\textsuperscript{450} Id.
habeas review. The Court decided Brown at the beginning of the due process revolution, before the Court had incorporated the process rights contained in the Bill of Rights against the states through the due process clause of the fourteenth amendment. Now, states are bound by the provisions of the Bill of Rights, and federal standards provide a minimum requirement for state compliance.\footnote{451} Incorporation increases the number of cases requiring federal review if state and federal standards of criminal procedure are to remain the same.\footnote{452}

Moreover, although the Brown Court did not suggest this, one significant difference between constitutional claims arising in criminal cases and those adjudicated by state courts in non-criminal cases is that in criminal cases the state is both a party and an adjudicator. When a state court adjudicates the constitutional claims of a criminal defendant it therefore faces an inherent conflict of interest. The state has a strong interest in respecting its citizens' constitutional rights, but also has a

\footnote{451} See Brennan, supra note 2, at 424; see generally G. GUNTHER, CONSTITUTIONAL LAW 422-40 (11th ed. 1985) (discussing cases and providing commentary on process of incorporating federal rights).

\footnote{452} See Fay v. Noia, 372 U.S. 391, 410 (1963) (noting that incorporation has increased number of cases in which habeas is appropriate). This Article assumes that, because of the crowded and limited Supreme Court docket, the lower federal courts can assure the uniformity or supremacy of federal rights better than could the Supreme Court and that these courts are more sensitive to federal rights than are state courts. Much of the Court's expansion of federal jurisdiction during the 1960s and 1970s rested on the assumption that federal courts are more familiar with and sensitive to federal rights than are state courts. See, e.g., Fay, 372 U.S. at 424 (discussing federal policy that constitutional rights shall not be denied without federal review); Monroe v. Pape, 365 U.S. 167, 181-83 (1961) (holding federal remedy under 28 U.S.C. § 1983 supplements any remedy available under state law, on grounds that § 1983 was enacted because of concern about state hostility to federal civil rights). Sentiment on this issue seems to have changed, at least among some members of the Supreme Court. See, e.g., Trainor v. Hernandez, 431 U.S. 434, 446 (1977) (requiring that federal court stay its hand when pending state litigation raises federal claim, partly because parallel proceeding in federal court creates "negative reflection on the State's ability to adjudicate federal claims"); Stone v. Powell, 428 U.S. 465, 493-94, n.35 (1976) (claiming that state courts now are sensitive to federal rights).

On the question of parity between state and federal courts, see generally Bator, supra note 2, at 504-14; Neuborne, supra note 2, at 1115 (discussing factors resulting in litigators' preference for federal forum). Further, uniformity seems more likely to flow from federal district court decisions subject to review by only 12 courts of appeals than from decisions by 50 state supreme courts that must await the review of the United States Supreme Court. At any rate, if Brown implied that the Court cannot adequately review state criminal convictions directly, and if there is to be adequate federal review of federal claims, habeas seems to be the solution.
strong interest in convicting and sentencing criminal defendants, particularly guilty ones. Thus, criminal cases present a particularly strong need for meaningful federal review.

Arguments remain, however, against this special treatment for criminal cases. That the protection provided by direct Supreme Court review is less meaningful in criminal cases than in civil cases does not imply that review in civil cases is meaningful. Even members of the Supreme Court have complained that, given the size of the Court's current docket, it cannot adequately assure uniformity where appropriate, let alone vindicate all federal rights arising in noncriminal cases. This is a better argument for providing additional review of some sort in those other cases, however, than for limiting review in criminal cases.

A more common objection to habeas review focuses on a host of systemic costs that detractors perceive to result from lower federal court review of state criminal cases. These costs

453. See Yackle, Explaining Habeas, supra note 2, at 1031-32; cf. Schaefer, supra note 2, at 13 (stating "[j]udges are trained to look at criminal cases in terms of guilt or innocence").

The state faces a similar conflict in fifth amendment takings cases and noncriminal enforcement matters, though passions generally run higher in the criminal arena. The federal government faces the same conflict when it prosecutes, but federal judges are at least insulated by life tenure. See U.S. Const. art. III, § 1. Moreover, federal habeas is available for federal prisoners under 28 U.S.C. § 2255 (1982). Cf. Bator, supra note 2, at 510-12 (acknowledging value of independent federal judge, but arguing federal system rests on assumption that state courts are responsible for and sensitive to federal claims).

454. Even Professor Bator acknowledges that in some criminal cases, such as fifth amendment "confession" cases, Supreme Court review functions not only to secure the uniformity and supremacy of federal law but to scrutinize state procedures carefully. See Bator, supra note 2, at 516-17 (acknowledging legitimacy of habeas if Supreme Court believes this careful review is appropriate). But see Yackle, Explaining Habeas, supra note 2, at 1022 n.137 (arguing Supreme Court is not an ordinary court of error).

455. See Bator, supra note 2, at 518-19.


457. Some commentators have called for an intermediate court of appeals to ease Supreme Court docket pressure. See, e.g., Yackle, Explaining Habeas, supra note 2, at 1022 n.137 (collecting commentary on proposals). Others have proposed such a court as an alternative to habeas. See Friendly, supra note 2, at 166; Stolz, supra note 2, at 965-66. See generally Haynsworth, Improving the Handling of Criminal Cases in the Federal Appellate System, 59 Cornell L. Rev. 597 (1974); Haynsworth, A New Court to Improve the Administration of Justice, 59 A.B.A. J. 841 (1973).
include the perceived affront to comity and federalism, increased workloads for federal district courts, and undermined finality interests. Defining habeas with reference to the new model helps to eliminate, or at least change perceptions of, these costs.

Federalism and comity concerns derive generally from the awkward prospect of a "lower" federal court, particularly a district court, reviewing the work of a state's highest court. Comity concerns the respect that judges in coordinate judicial systems accord each other's work and the need to avoid one court system's interference in the work of another.\textsuperscript{488} State judges maintain that they, like their federal counterparts, are charged with adjudicating constitutional claims, and therefore perceive readjudication of those rights by a federal court as an insult.\textsuperscript{489} Federalism concerns the notion that state and federal court systems each are a part of a separate and independent sovereign.\textsuperscript{460} It arguably is demeaning to allow the lower courts of one sovereign to supervise the work of another sovereign's highest courts.\textsuperscript{461}

Viewing the lower federal courts as surrogates for the Supreme Court could alter the perception of these comity and federalism costs. Although Supreme Court review of state decisions imposes some of these same costs, the costs of Supreme Court review to comity and federalism generally are accepted as part of our constitutional system. Under the new model, habeas courts serve not merely as "lower" federal courts, but as surrogates doing the overburdened Supreme Court's work. In a sense then, habeas review can be equated with Supreme Court review, and the comity and federalism costs can be seen as no

\textsuperscript{458} In \textit{Fay v. Noia}, for example, Justice Brennan relied on considerations of comity—the relations between coordinate judicial systems—in holding that federal review must await orderly completion of state court proceedings. 372 U.S. 391, 416-20 (1963); see also \textit{Trainor v. Hernandez}, 431 U.S. 434, 443 (1977) (discussing interests of comity and federalism); \textit{Younger v. Harris}, 401 U.S. 37, 45 (1971) (stating federal courts should not interfere with state proceedings unless protections are inadequate).


\textsuperscript{460} See Bator, supra note 2, at 443.

\textsuperscript{461} See Bator, supra note 2, at 505-06; supra note 30 and accompanying text (discussing widespread criticism of habeas).

These definitions are intended only as convenient working definitions. The terms "comity" and "federalism" often are used interchangeably; it is important to address the values that both terms represent.
different from those associated with direct Supreme Court review.

An inevitable response is that whether acting as surrogates or not, the habeas courts still are inferior courts reviewing state court work. The answer to this concern rests in the realization that district courts sitting as habeas courts do not completely substitute for Supreme Court review, nor will they often be the only court to grant relief when they decide to do so. First, although federal review may be a nuisance to states, it is of less concern when the federal courts deny relief to habeas petitioners than when relief is granted. In most habeas cases the state need only file a response, probably one requiring less work than if the Supreme Court were reviewing a claim on direct review. Second, to the extent habeas courts do grant relief, it is misleading to focus on the federal district courts as acting alone to overturn state court judgments. The state retains access to the circuit courts as of right whenever a district court grants the writ and orders a prisoner released. Thus, to the extent that a “lower” federal court awards relief, its action is supplemented by a panel of federal appellate judges.

The new model also provides a more satisfactory manner of viewing the costs of an increased federal court workload. Critics perceive habeas as giving rise to a “flood” of prisoner petitions and adding extra work to an already crowded docket, work that is a particular nuisance because so few habeas peti-

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462. Cf. Shapiro, supra note 2, at 332 (noting most habeas petitions in Massachusetts study disposed of in rather short period of time); id. at 337 (noting habeas hearings tend to be short); id. at 338 (discussing several judges' summary disposal techniques).


464. I had hoped to show that in cases where the court of appeals grants the writ or upholds the grant of the writ, the state was likely to get review by the Supreme Court. This appears unsupported. See Reitz, Postconviction Remedy, supra note 2, at 502-03 (stating that Supreme Court denied all certiorari applications by state in cases in study where certiorari sought by state). If Supreme Court review was more readily available, then it would be possible to argue that the lower federal courts, consistent with the theory of Brown v. Allen, served merely as a “sorting mechanism” for Supreme Court review.

465. See Brown v. Allen, 344 U.S. 443, 537 (1953) (Jackson, J., concurring) (“He who must search a haystack for a needle is likely to end up with the attitude that the needle is not worth the search.”); Friendly, supra note 2, at 143-44 (quantifying increase in habeas petitions); Shapiro, supra note 2, at 321-22 (same).
Habeas petitions have merit. Under the appellate model, these petitions effectively fulfill the right to petition the Supreme Court for review. Habeas petitions are not, then, "new" work at all, but the work diverted from the Supreme Court's crowded docket. Indeed, a sensible change would be to require state prisoners to pursue habeas relief before filing for Supreme Court review, rather than petitioning the Supreme Court both before and after habeas review.

Finally, and most important, the new model for habeas helps resolve concerns about the finality of criminal proceedings. The concern for finality is that under any system of justice, review of a judgment must eventually reach an end. If our system of justice is to retain legitimacy, a point must exist at which, by general agreement, the system has done the best job realistically possible of deciding who shall and who shall not be incarcerated. This concern is the most frequent basis for criticism of federal habeas review. Under existing habeas jurisprudence, although results are inconsistent, the rhetoric is of unending review. Under the new model, habeas does not pretend to offer unlimited review. Unless a case falls within

466. See Shapiro, supra note 2, at 339 (stating that 96% of petitioners are unsuccessful).

467. See supra note 415 (discussing petition procedure). The Court has noted that denial of certiorari carries no weight in subsequent habeas proceedings, so the petitioner may file a habeas petition raising the same issues without prejudice. See Carmichael v. Alabama, 434 U.S. 879, 879 (1977) (statement of Brennan and Marshall, JJ., dissenting from denial of certiorari) (noting denial will not prejudice filing of habeas petition); Jurek v. Estelle, 430 U.S. 951, 951 (1977) (denying certiorari petition "[w]ithout intimating any views on the merits of . . . petitioner's pending application for a writ of habeas corpus"); see also Reitz, Postconviction Remedy, supra note 2, at 503-07 (discussing "puzzling" Supreme Court practice of dismissing certiorari petitions "without prejudice" to habeas petitions). Perhaps the higher success rate of habeas petitions or the comparative ease of filing a habeas petition leads to more habeas than certiorari petitions, but this merely indicates that habeas provides a more meaningful appeal than does direct appeal.

468. Cf. supra note 102 and accompanying text (linking habeas and lack of finality in criminal procedure). One particularly unpersuasive finality argument, however, asserts that the availability of collateral attack through habeas thwarts efforts to rehabilitate criminals. See, e.g., Kuhlmann v. Wilson, 477 U.S. 436, 452-53 (1986) (plurality opinion) (arguing that people "contemplating criminal activity" are less likely to be deterred if they believe repeated collateral attack is available); Bator, supra note 2, at 452 (stating that finality is essential to deterrence); Friendly, supra note 2, at 146 (arguing that "unbounded" collateral attacks interfere with rehabilitation). To support this rather remarkable sociological observation would require more evidence than conjecture by lawyers, judges, or law professors.

469. See Fay v. Noia, 372 U.S. 391, 402 (1963) (stating that "government must always be accountable to the judiciary for a man's imprisonment") (em-
the scope of the old common-law writ, each prisoner may obtain habeas review only once. Thus, petitioners receive meaningful, final, federal review.

On balance, the need for meaningful federal review of federal questions arising in criminal cases adequately justifies the new appellate writ of habeas corpus. In an ideal system, the Supreme Court could itself handle the load of state prisoners’ appeals, but by the Court’s own admission it cannot.

The question remains, however, whether habeas under the appellate model provides too little federal review. After all, the new model arises from the concern that what the Court actually is doing is not consistent with loftier explanations for the writ, such as the rights-based or liberty-based theories. Before accepting the appellate model as a new theory to explain existing doctrine, it is appropriate to ask whether there should not be increased access to habeas, in keeping with traditional rhetoric concerning the post-Brown writ.

Some would argue in favor of easing doctrinal restrictions to broaden habeas review. Constitutional safeguards rightly are viewed with great respect, and it is difficult to argue against affording more procedure to ensure their enforcement. Nonetheless, sound reasons exist to adopt the appellate model and to resist the temptation to create more review.

Once the amount of available review expands past the boundaries of the appellate model, distinguishing cases in which review is appropriate from those in which it is not becomes difficult. As the Court wound its way from Brown to the current state of habeas doctrine, it intuitively attempted to address this problem. The Court’s solution, still evident in its most recent decisions, was to roughly balance competing interests: systemic or state interests against individual interests. In so doing, the Court faced the difficulty that meaningfully weighing these interests is nearly impossible. Thus, the Court subjected the availability of habeas to sudden shifts, reflecting the shifting composition of the Court.

One response might be that no line need be drawn, that habeas should lie to review any claim in which constitutional

phasis added). But see Kuhlmann, 477 U.S. at 444 (condemning liberal “successive petition” practice).

470. See supra notes 294-98 and accompanying text.
471. See supra notes 79-89 and accompanying text.
472. See, e.g., Brennan, supra note 2, at 455.
473. See supra note 441.
474. Id.
rights or liberty are at stake, without regard to defaults and the like. Although this argument has humanitarian appeal, and even perhaps furnishes a noteworthy ideal, its vision of habeas is unworkable. Error-free trials do not exist.\textsuperscript{475} Insisting that criminal trials be, in essence, replayed until they are error-free would create unending federal habeas review.

The perception that habeas is available too liberally has led to serious public and scholarly dissent concerning the scope of the writ. Habeas since \textit{Brown} has been under consistent attack by state judges, state officials, commentators, and legislators,\textsuperscript{476} and some of their criticism is easy to understand. Habeas, as inadequately explained by old models, does not always convincingly justify its perceived costs.

Dissatisfaction with a poorly justified, broad habeas has resulted in a weakening of the protections habeas provides. Since \textit{Fay v. Noia}, shifts in habeas doctrine have made the writ increasingly less available.\textsuperscript{477} Unless habeas review can be explained satisfactorily, this trend will continue.

The best hope for an enduring, meaningful habeas review lies in a theory that grounds the Court's decisions in a sound rationale. Current theory does not do this and the Court therefore engages in a balancing act that cannot be proven correct or incorrect in particular cases. Unsurprisingly, recent balancing by the Court has consistently provided an excuse to limit the availability of habeas. The current doctrinal framework provides no theoretical basis for curbing this erosion. The new model, however, provides a firm doctrinal basis for habeas review and clearly states when that review is appropriate.

Moreover, review under the new model is neither so scanty as to displease proponents of habeas nor so broad as to raise the

\textsuperscript{475} See \textit{Bator}, \textit{ supra} note 2, at 445-53 (discussing fallibility of tribunals). It is useful to recall that Justice Jackson's famous comment on the Supreme Court's infallibility is found in his \textit{Brown v. Allen} concurrence: "We are not final because we are infallible, but we are infallible only because we are final." 344 U.S. 443, 540 (1953).

\textsuperscript{476} See \textit{supra} notes 100-04 and accompanying text.

ire of the writ’s detractors. The new model simply assures a federal forum for every constitutional claim adjudicated in state court. Thus, prisoners are not subject to the changing willingness of state courts to respect federal rights, but are assured federal review. On the other hand, the new model adequately respects finality by providing it after meaningful federal review. Because the Supreme Court cannot provide adequate federal review, such review will occur—but occur only once—in the lower courts. Thus as a pragmatic compromise, the new habeas has much to commend it.

B. PROCEDURAL DEFAULT AND THE QUESTION OF ATTORNEY ERROR

The foregoing discussion analyzes the advantages of the appellate model for state prisoners’ constitutional claims raised and adjudicated in state court. What remains for consideration is the question of claims procedurally defaulted in state court.

Under both the old and new models, claims not raised in state court generally cannot be litigated in federal court. The new model differs from present habeas doctrine in that under current doctrine any number of demonstrated “causes” purportedly will excuse the default. Under the new model habeas courts will not excuse a default; but if the default was due to the constitutionally ineffective assistance of counsel, the sixth amendment will provide an independent basis for according the petitioner relief.

The new model is better than present doctrine because it focuses attention on the two questions a federal court properly should consider in examining an apparently defaulted claim: whether the claim in fact was defaulted, and, if so, whether the default resulted from the petitioner’s attorney’s failure to provide effective assistance according to sixth amendment standards. If a default occurred but was not the result of ineffective assistance of counsel, no basis for federal review ex-

478. Federal review of federal rights is the key concern of many who favor broad habeas jurisdiction. See Reitz, Postconviction Remedy, supra note 2, at 464 (arguing collateral review is “only avenue” for many prisoners’ habeas claims); Yackle, Explaining Habeas, supra note 2, at 1049 (stating that “fundamental purpose of habeas ... is to assure access to the federal forum for state criminal defendants raising federal claims”). But see Tague, supra note 2, at 67 (arguing that most important purpose of postconviction review is to have some court review constitutional challenges).

479. See supra notes 214-77 and accompanying text.

480. See supra notes 420-23 and accompanying text.
ists. The focus of habeas review is on adjudicating claims of federal right. A default constitutes a waiver of a right; if the petitioner received effective assistance of counsel and waived any other federal claims, no rights remain for federal courts to review.\footnote{481}{This statement is intended to “beg the question.” That failure to assert a right at a proper time can result in waiver, see Johnson v. Zerbst, 304 U.S. 458, 464 (1938), leaves open the question of whether reasons exist to excuse such a waiver, cf. Reed v. Ross, 468 U.S. 1, 3, 13-14 (1984) (surveying reasons why counsel might fail to raise constitutional claim). Quoting Williston, Judge Friendly appears actually to understate the problem of waiver in the habeas context: “Waiver has been well said to be a ‘troublesome term in the law.’” Friendly, supra note 2, at 159 (quoting 5 S. WILLISTON, CONTRACTS § 678, at 237 (3d ed. 1961)). Although courts apply the “knowing and intelligent” standard to waiver of some rights, see, e.g., Zerbst, 304 U.S. at 464-69 (right to counsel), other rights may be waived without knowledge, see, e.g., Schneckloth v. Bustamonte, 412 U.S. 218, 237-40 (1973) (individual can “consent” to search, and thereby waive fourth amendment right to refuse consent, without knowing of right). Judge Friendly argues that procedural default through failure to object to trial error does not raise “waiver” questions “since the state has not deprived [the defendant] of anything to which he is constitutionally entitled.” Friendly, supra note 2, at 160. Again, talk of waiver is in a sense unhelpful: the question for habeas should be whether, and under what circumstances, the client will be bound by counsel’s decisions. See infra notes 482-85 and accompanying text; see generally Reitz, Abortive State Proceeding, supra note 2, at 1332-38 (discussing different concepts of waiver).}

The new model seems harsh in that habeas courts will not excuse a default unless the petitioner can show ineffective assistance of counsel. An understandable response is to ask why a petitioner—particularly one with appointed counsel—must suffer loss of a federal claim if counsel failed properly to raise the claim. Generally, a waiver of a constitutional right must be “knowing and intelligent” to be binding.\footnote{482}{See Zerbst, 304 U.S. at 464 (applying intelligent waiver standard to relinquishment of right to counsel). But see Estelle v. Williams, 425 U.S. 501, 504-12 (1976) (holding defendant’s failure to object to being tried in prison clothing constituted waiver of right to be tried in civilian clothing because prisoner “should have known” to object).}

Waivers by trial counsel cannot be considered “knowing and intelligent” waivers by the defendant,\footnote{483}{See Wainwright v. Sykes, 433 U.S. 72, 115-16 (1977) (Brennan, J., dissenting) (decriying system that allows attorney carelessness or ignorance to cause forfeiture of constitutional claims); cf. Tague, supra note 2, at 67 (advocating “review by some court” of constitutional issues arising in criminal trials).} so the defendant’s resulting loss of an opportunity to assert a federal claim requires explanation.

The primary justification for imputing waivers by counsel to defendants is some reasonable concern for finality. A skilled lawyer reviewing a transcript after any trial undoubtedly can
identify unadjudicated constitutional claims. Sometimes trial counsel’s decision not to adjudicate a claim seems unwise in retrospect. Other times trial counsel failed to perceive an adjudicable claim. If a competent attorney who provides effective assistance of counsel cannot effectively waive a claim on behalf of a defendant, criminal trials will have little or no finality. Attorneys necessarily make decisions for defendants, and the criminal justice system must either accept those decisions or not.\(^{484}\) If not, however, many trials will have two go-arounds or more.\(^{485}\)

The approach suggested in this Article, although seemingly harsh, if adopted in its entirety likely will be more respectful of petitioners’ rights than existing habeas jurisprudence. Although the Court now purports to consider a broad range of “causes” to excuse default of a federal claim, acceptable causes actually are few.\(^{486}\) The promising breadth of the cause doc-

\(^{484}\) See Meador, supra note 2, at 288 (stating that “realities of our representational system may lead courts, more often than not, to hold counsel’s actions binding on the defendant”).

\(^{485}\) See generally Bator, supra note 2, at 445-53 (arguing that if goal is error-free trial, no conviction ever will be final). Much of this discussion was inspired by a telephone conversation with Professor Thomas Stacy, whom I thank for his contribution. Professor Stacy argued persuasively that it is unfair to penalize defendants for attorneys’ mistakes, and that one should not be overly concerned about finality and unending constitutional attacks on state conviction. If this Article overstates the danger of unending attack on convictions, however, it is not because of an unwillingness of prisoners to raise claims, but because uncounseled prisoners who do not recognize valid claims also cannot raise them. Arguments about whether finality really is necessary should not be premised on a relative degree of finality that exists because habeas petitioners are uncounseled. Habeas petitioners, in their one “appeal” to a federal court, should have counsel. See supra notes 435-36 and accompanying text. Moreover although this Article argues that courts should hold clients to their lawyers’ decisions, courts also should scrutinize the performance of trial counsel far more closely than they do under current standards. Habeas courts have been far too willing to defer to trial counsel decisions that result in default of a constitutional claim. See Amsterdam, supra note 2, at 391 n.60(a) (denouncing court’s illiberal standard for ineffective assistance claims on grounds that right to counsel is “an independently significant element of fair and fair-seeming procedure, and should be enforced as such”); see also Cover & Aleinikoff, supra note 2, at 1075 (citing Estelle v. Williams, 425 U.S. 501 (1976), as example of case in which attorney and client should not be treated as “one moral unit”).

\(^{486}\) The Court now accepts novelty, state interference, and ineffective assistance of counsel as cause. Only the latter two are meaningful, and the new model incorporates them. See supra notes 274-91 and accompanying text. Although the Court holds out promise that other causes may exist, this promise is contentless and serves only to distract from the critical questions. See infra notes 497-98 and accompanying text.
trine, however, distracts the Court from analyzing those few excuses it accepts in a rigorous manner that might be more respectful of petitioners' rights.

Smith v. Murray\textsuperscript{487} presents perhaps the most glaring example of this weakness in the Court's default cases. The Smith Court barred the petitioner's constitutional claim on the ground of default.\textsuperscript{488} The Court was too distracted by the cause issue, however, to analyze adequately whether a default actually had occurred, and if so, whether counsel's conduct in causing the default constituted ineffective assistance of counsel.

A brief summary of key aspects of Smith is necessary. According to the Court, Smith's lawyer did not raise on appeal the claim that psychiatric testimony elicited by the defense was unconstitutionally used against Smith at sentencing because the claim lacked merit under existing state law.\textsuperscript{489} The Court ruled that this decision did not constitute ineffective assistance of counsel because winnowing out meritless claims is the essence of effective advocacy.\textsuperscript{490} The Court also refused to excuse this "default" on the ground of novelty because an amicus thought enough of the claim to raise it in a brief to the state court of appeals, despite state law.\textsuperscript{491} After the state court upheld Smith's conviction, a federal court in another case declared the state rule at issue unconstitutional.\textsuperscript{492}

It seems unfair to characterize what occurred in Smith as a default. According to the Court, effective lawyers do not waste appellate bullets on worthless targets.\textsuperscript{493} Because the claim under state law lacked merit, Smith's attorney did exactly what the Court would have him do: he "winnowed out" the claim.\textsuperscript{494} Despite its support for the strategic decision of Smith's lawyer, the Court denied Smith relief because failure to raise the claim was a "default."

If a default indeed occurred, the state—not Smith or even his lawyer—was responsible. Smith's lawyer did not raise the claim because it was meritless under state precedent, a precedent found unconstitutional shortly thereafter.\textsuperscript{495} Further, an

\begin{itemize}
\item \textsuperscript{487} 477 U.S. 527 (1986).
\item \textsuperscript{488} Id. at 532-33.
\item \textsuperscript{489} Id. at 531-32.
\item \textsuperscript{490} Id. at 536.
\item \textsuperscript{491} Id. at 536-37.
\item \textsuperscript{492} Id. at 534-35.
\item \textsuperscript{493} Id. at 536 (quoting Jones v. Barnes, 463 U.S. 745, 751-52 (1983)).
\item \textsuperscript{494} Id.
\item \textsuperscript{495} Id.
\end{itemize}
amicus in Smith’s case drew the state supreme court’s attention to the unconstitutionality of this precedent, but that court refused to address the issue because a party had not raised it.\textsuperscript{496} The United States Supreme Court’s very reason for refusing to excuse the default was that the claim was evident to an amicus, and subsequently, to a federal court. If the claim was not “novel,” and if Smith’s lawyer acted properly in not raising the claim, however, the “default” occurred only because the state supreme court adhered to an evidently unconstitutional state precedent even after the matter was brought to its attention.

The unfairness in the Court’s application of the cause-and-prejudice test arises in part from the Court’s belief that its flexibility allows the Court to avoid a miscarriage of justice. This assumption makes the Court too ready to find that a default has occurred any time a claim was not raised at each level below and the state court says the claim was defaulted.\textsuperscript{497} The Court’s vague promise that numerous causes exist, some of which have not yet been enunciated,\textsuperscript{498} creates the false image of a safety net, directing the Court to focus on whether to excuse the default rather than on whether a default actually occurred. This approach conflicts with \textit{Henry v. Mississippi}.\textsuperscript{499} What \textit{Henry} and the Court’s other “adequate state procedural ground” cases acknowledge, although the \textit{Sykes} progeny do not,\textsuperscript{500} is that sometimes failure to raise a claim is the state’s fault, not the petitioner’s, and thus cannot fairly be viewed as the petitioner’s “default.”\textsuperscript{501} To term Smith’s lawyer’s failure

\textsuperscript{496} Id.
\textsuperscript{497} Cf. \textit{Hart}, supra note 2, at 118 (accepting fact that “reasonable consequences” must follow failure to comply with reasonable state procedural rules does not mean that “every last technicality of state law must be sacrosanct”).
\textsuperscript{498} Cf. \textit{Murray v. Carrier}, 477 U.S. 478, 485-86 (1986) (reviewing cases in which cause is imprecisely defined).
\textsuperscript{499} \textit{Henry} acknowledged that despite an apparent procedural default, a federal court may reach a “defaulted” federal claim if the state’s insistence on compliance with its procedural rule serves no legitimate state interest. 379 U.S. at 447; see also \textit{NAACP v. Alabama ex rel. Flowers}, 377 U.S. 288, 308-10 (1964) (holding that over-rigid or novel application of procedural rule will not bar federal relief); \textit{NAACP v. Alabama ex rel. Patterson}, 357 U.S. 449, 462-66 (1957) (holding that application of novel state rule does not bar federal relief); Amsterdam, \textit{supra} note 2, at 385 n.34 (enumerating costs of state rule or state agent’s preventing timely assertion of constitutional claim in state court proceeding). In \textit{Smith}, however, the state appellate court actually knew of the constitutional claim and declined to address it; in these circumstances, it is hard to imagine what state interest is furthered by denying Smith relief. \textit{See Smith}, 477 U.S. at 540 (Stevens, J., dissenting) (characterizing defendant’s pro-
to raise the claim as Smith’s “default,” for which Smith must forfeit an opportunity to avoid execution, glorifies form rather than substance, in direct contravention of the adequate state procedural ground cases.

Another weakness in the Court’s cause-and-prejudice analysis is exemplified by its evaluation of whether Smith’s lawyer rendered ineffective assistance in causing whatever “default” did occur. The Court’s single comment on counsel’s performance was that effective attorneys behave as Smith’s lawyer did in winnowing out less hopeful from better claims. The Court failed to focus on Smith’s lawyer’s decision to raise some thirteen claims on appeal—surely a remarkable number to survive effective “winnowing”—while failing to raise the one claim that later proved to be meritorious, a claim not “novel” because another participant in the case raised the identical issue. Even granting that “winnowing” is the hallmark of effective advocacy, it is questionable whether such winnowing occurred in Smith’s case. The issue of attorney performance received no serious consideration in Smith, however.

The supposed flexibility of the cause-and-prejudice test had again distracted the Court, this time from careful analysis of Smith’s claim that he was denied effective assistance of counsel. The cause-and-prejudice test focuses not on whether the state violated a petitioner’s rights, but on whether petitioners can concoct acceptable excuses for failing to raise claims in state court. The Court, seemingly open to new grounds for cause, manages to avoid careful consideration of the one it already accepts, ineffective assistance of counsel. Current habeas jurisprudence thus camouflages the problem of ineffective assistance of counsel.

The cause-and-prejudice test therefore distracts courts from appropriate analysis of the important questions in cases of “default.” This distraction might be fair to petitioners if a procedural default as “exceedingly minor” error); cf. Brennan, supra note 2, at 430-31 (making similar argument regarding Daniels v. Allen, decided sub nom. Brown v. Allen, 344 U.S. 443 (1953)). In time the Court’s decision in Smith may come to be viewed with the same sense of universal opprobrium accorded the Court’s decision in Daniels v. Allen.

502. See supra note 493 and accompanying text.

503. The Court acknowledged that Smith’s lawyer raised 13 claims, but then applauded his decision to “winnow out” the meritorious one. Smith, 477 U.S. at 536. Most appellate lawyers suggest limiting an appeal to no more than two or three claims. See e.g., Godbold, Twenty Pages and Twenty Minutes—Effective Advocacy on Appeal, 30 Sw. L.J. 801, 809 (1976) (advising advocate to select issue likely to be dispositive).
broad number of causes actually would satisfy the Court; in reality, however, the number of foreseeably acceptable causes is quite limited. Indeed, "cause" under present practice does not excuse a default in any situation in which the new model would not.\textsuperscript{504}

The crucial issues in a default case are whether a default occurred, and whether counsel's performance was effective. The new model will focus sharp attention on these questions. This focus may lead the Court to develop standards for effective attorney performance, something it has refused to do in the past.\textsuperscript{505}

EPILOGUE: AN ILLUSTRATION OF DOCTRINAL CONFUSION—CONCLUDING THOUGHTS

Part I concluded with an illustration that demonstrated the doctrinal incoherence of the old model.\textsuperscript{506} Tom, Dick, and Mary were tried separately for the same offense; each had an identical constitutional claim, but received very different treatment due to rules governing ineffective assistance of counsel and habeas review. The varying results in the three cases could not be reconciled with rhetoric concerning the purpose of habeas corpus.

The new model justifies some of these results, however. Treating habeas as an appeal explains why claims resolved in state court can be raised in federal court.\textsuperscript{507} Those not so raised cannot be addressed in federal court.\textsuperscript{508} If the petitioner can show a sixth amendment violation, however, this claim will provide an independent ground for relief.\textsuperscript{509} Thus, petitioners with "mediocre" lawyers who default claims but whose performance nonetheless meets sixth amendment standards do not receive habeas review. The petitioner represented by ineffective counsel can obtain review without reference to the cause-and-prejudice test.

Although the new model explains some inconsistency in the illustration, it cannot justify other results, such as the harsher treatment accorded the petitioner with a valid sixth amendment claim. Instead, the new model highlights remain-

\textsuperscript{504} See supra notes 274-91, 479-80 and accompanying text.
\textsuperscript{505} See supra notes 426-29 and accompanying text.
\textsuperscript{506} See supra Part I(A).
\textsuperscript{507} See supra note 416 and accompanying text.
\textsuperscript{508} See supra note 418 and accompanying text.
\textsuperscript{509} See supra notes 420-21 and accompanying text.
ing areas of necessary doctrinal change. Stone v. Powell should be overruled, permitting review of fourth amendment claims.\textsuperscript{510} The second prong of the Strickland v. Washington test should be modified to parallel standards for appellate review of other substantive claims.\textsuperscript{511} The positions of the Kuhlmann v. Wilson and Rose v. Lundy pluralities should be adopted with regard to successive petitions and abuse of the writ.\textsuperscript{512} Habeas petitioners should receive the right to counsel, particularly to aid them in bringing ineffective assistance of counsel claims.\textsuperscript{513} Finally, the Court should develop standards for what constitutes adequate representation and what does not.\textsuperscript{514} Habeas as an appeal will then strike an appropriate balance between vindication of federal rights and finality of criminal proceedings.

\textsuperscript{510} See supra notes 181-84 and accompanying text.
\textsuperscript{511} See supra notes 432-34 and accompanying text.
\textsuperscript{512} See supra note 380 and accompanying text.
\textsuperscript{513} See supra notes 435-36 and accompanying text.
\textsuperscript{514} See supra note 505 and accompanying text.