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HABEAS AFTER THE REVOLUTION

The past few years have seen a series of Supreme Court decisions dramatically altering the law of federal habeas corpus. Some of these decisions have significantly restricted access to habeas; others have declined to impose similar restrictions. No obvious pattern appears. The Court is fractured, and no one seems able to predict what will happen next.

Our purpose in writing this article is not to analyze or attack particular habeas decisions. Rather, our goal is to suggest that the current state of confusion over habeas law involves more than the problem of how to decide particular cases or resolve particular issues. We believe that the present confusion exists primarily because the Court, along with most commentators, is not even thinking about habeas in the proper way. Both habeas law and habeas literature have failed to internalize the fact that habeas is a part of

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1 Teague v Lane, 489 US 288 (1989); Penny v Lynaugh, 492 US 302 (1989); Butler v McKellar, 494 US 407 (1990); Stringer v Black, 112 S Ct 1130 (1992); Keeny v Tamayo-Reyes, 112 S Ct 1715 (1992); Wright v West, 112 S Ct 2482 (1992); Herrera v Collins, 113 S Ct 853 (1993); Brecht v Abrahamson, 113 S Ct 1710 (1993); Withrow v Williams, 113 S Ct 1745 (1993).

2 Others have already done so. See, for example, Barry Friedman, Habeas and Hubris, 45 Vand L Rev 797 (1992) (analyzing and attacking Teague v Lane); James S. Liebman, Apocalypse Next Time?: The Anachronistic Attack on Habeas Corpus/Direct Review Parity, 92 Colum L Rev 1997 (1992) (analyzing opinions of Justice O'Connor and Justice Thomas, and attacking position taken by Justice Thomas, in Wright v West); Robert Weisberg, A Great Writ While It Lasted, 81 J Crim L & Criminol 9 (1990) (analyzing and attacking Teague v Lane).

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the criminal justice system. This inattention to habeas's substantive legal context has prevented the development of a coherent intellectual framework for modern habeas law.

To put it differently, we think the current habeas confusion stems from a miscategorization. Habeas has long been viewed as a particular species of the genus of federal court remedies for violations of federal constitutional rights. Habeas issues have thus been seen as "of a kind" with issues that arise in Section 1983 litigation, the immunity of state governments and officials, Younger v Harris abstention, and the Eleventh Amendment. Specifically, the prevailing approach to habeas has focused the Court's attention on two competing ideologies that Professor Richard Fallon has aptly labeled "Federalism" and "Nationalism." Federalists argue for greater state autonomy and less federal intervention; the Framing of the Constitution provides the historical anchor for this ideology. Nationalists, on the other hand, claim that federal interests require federal enforcement and that state courts cannot be fully relied upon to protect federal rights; the Reconstruction Era following the Civil War is the historical impetus behind the Nationalist view. Much of the law of federal courts today—whether in habeas, Section 1983, immunity doctrine, or the Eleventh Amendment—is the product of the struggle between these competing ideologies.

That struggle, we believe, no longer provides a satisfactory framework for the habeas debate. A third historical event is more important to defining the proper scope of modern habeas law than either the Framing or Reconstruction: the Criminal Procedure Revolution of the 1960s and 1970s.

As far as the law of criminal procedure is concerned, the Revolution changed everything. Before the Revolution, the federal constitutional law that was relevant to state criminal cases (based primarily, though not exclusively, on the Due Process Clause of the Fourteenth Amendment) operated as a background limitation on the power of the states. Although it was federal law, and thus "supreme," the Due Process Clause left substantial room for the development and day-to-day operation of state criminal procedure.

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4 Id at 1164–1224 (detailing influence of Federalist and Nationalist ideologies on development of several doctrinal areas within the law of federal courts).
Habeas corpus doctrine. In other words, before the Revolution, federal constitutional law affected the handling of state criminal cases in much the same way that it affected other common kinds of state action, such as the regulation of property rights or the administration of public schools and universities.

During the 1960s and 1970s, however, the role of federal constitutional law in state criminal cases was completely transformed. Through incorporation of most of the specific criminal procedure guarantees contained in the Fourth, Fifth, and Sixth Amendments, the Court rendered state criminal procedure doctrine in such areas as search and seizure, interrogation, the right to counsel, jury selection, and double jeopardy essentially meaningless. Since the Revolution, the only criminal procedure law that matters on most issues—from the point of view of both state and federal courts—is federal criminal procedure law. Federal criminal procedure law has become in effect a detailed, national Code of Criminal Procedure that almost totally supersedes state law.

This transformation has not gone unnoticed by habeas courts and the academics who study them. But its implications have not been fully recognized. When criminal procedure issues appear in habeas cases and commentaries, they usually appear as an afterthought—as though all constitutional rights, and all constitutional litigation, are the same. But the constitutional rights of criminal defendants differ from other federal rights, both in their relationship to state law and in the ways they are enforced. And criminal litigation is not like other forms of constitutional litigation. These differences ought to matter to any sensible vision of habeas corpus.5

After the Revolution, it no longer makes sense to think about habeas primarily in terms of the ideological struggle between Federalism and Nationalism. The historical tension between state and

5 Throughout this article, we discuss federal habeas corpus review of state criminal convictions. There is a parallel system of federal collateral review for federal criminal cases. That system, based for the most part on 28 USC § 2255, differs in some important ways from the law governing federal habeas for state prisoners. Perhaps the most important difference is in the treatment of claims previously adjudicated on direct appeal; unlike habeas courts reviewing state convictions, federal courts operating under Section 2255 generally may not reexamine previously litigated and rejected claims. See Davis v United States, 417 US 333, 342 (1974); James S. Liebman, Federal Habeas Corpus Practice and Procedure, § 36.7(e), at 569–70 (Michie Co 1988). We do not discuss this parallel system of federal collateral review for federal criminal cases, mainly because courts and commentators have focused much more heavily on federal habeas for state prisoners.
federal law, which still exists in most areas of federal constitutional law today, has been almost completely eliminated in the criminal procedure context. Because there is no longer a significant body of state criminal procedure law to conflict with the federal criminal procedure rights that are enforced through habeas, modern habeas issues should be resolved in light of the values and concerns that are relevant to criminal procedure, not those of federal courts law. We therefore propose a change in the terms of the habeas debate—a change that refocuses attention and energy on the task of identifying the most effective role for habeas to play within the criminal justice system.

Our approach is fairly simple. We believe that habeas law should serve the basic goals of the criminal justice system: ensuring just outcomes for defendants, deterring unconstitutional behavior by government actors, and preserving needed opportunities for federal lawmaking. Yet these goals need not be addressed by a set of uni-

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6 On August 6, 1993, Joseph Biden introduced S. 1441, the Habeas Corpus Reform Act of 1993, in the U.S. Senate. Similar habeas reform legislation was also introduced in the U.S. House of Representatives. These reform initiatives would have made several important changes in the statute governing federal habeas corpus for state prisoners, 28 USC §§ 2241 et seq. Included among these changes would have been (1) the institution of a filing deadline for habeas petitions; (2) the codification of a general rule of non-retroactive application of new rules to habeas cases, along the lines of the Court's decision in *Teague v Lane*, 489 US 288 (1989); (3) a provision mandating de novo review on all matters of established federal law, including the application of law to facts, by habeas courts; (4) limitations on successive habeas petitions; (5) recognition of a right to habeas relief, even on a successive habeas petition, if a capital defendant could present sufficient new evidence of innocence or ineligibility for the death penalty; and (6) various provisions mandating the appointment of certifiably qualified counsel to represent capital defendants during all state court proceedings and on certiorari to the Court.

In late 1993, these proposed habeas reforms were dropped from the packages of federal crime legislation that eventually passed the House and Senate, respectively, and were sent to a conference committee. As this article went to press, therefore, no habeas reform legislation seemed likely to emerge from Congress during 1994.

Although this article discusses primarily the Supreme Court's current view of the proper role of habeas, and explains why we think that view should change to reflect the dramatic impact of the Criminal Procedure Revolution, the article could just as easily be aimed at Congress in its consideration of the most appropriate role for habeas in the future. Whoever is making the relevant decisions about the nature and scope of habeas, we believe, should take into account the uniquely dominant role of federal criminal procedure law in the modern handling of state criminal cases. We think that Congress, like the Court, should try to identify and implement the most appropriate role for habeas within the criminal justice system, rather than engage in an outmoded debate about federalism, comity, the right to a federal forum, and the parity of state and federal courts. And it seems obvious to us that the proposed legislation, especially in its adoption of a de novo habeas standard of review, would represent a continuation of the same misguided approach to habeas that we criticize in the article.
tary, "one size fits all" habeas rules. We propose two "tracks" of habeas relief—one focused on the protection of innocents, the other focused on deterrence. On the first track, petitioners who can demonstrate a reasonable probability of innocence would receive de novo review of their federal claims, free of the restrictions currently imposed by the habeas doctrines of procedural default and retroactivity. On the second track, petitioners who cannot make a sufficient showing of innocence would have their federal claims (whether legal, factual, or mixed, and including those Fourth Amendment claims now barred in habeas under Stone v Powell) reviewed solely to determine if the state court acted reasonably in denying them; such deferential review is all that is needed for habeas to fulfill its deterrence role. By providing two separate roads to habeas relief, we can dispense with much of the complexity surrounding such doctrines as procedural default, the rule of Stone v Powell, and retroactivity. And this can be done without eliminating the ability of federal courts to make federal law where needed.

In Part I, we discuss the prevailing federal courts approach to habeas and explain why we believe that approach to be obsolete. In Part II, we develop the structure, and identify the basic values and concerns, of a habeas jurisprudence grounded in the criminal justice system. In Part III, we sketch some of the likely doctrinal implications of our proposed approach. Finally, in Part IV, we address the special context of death penalty cases, and suggest how our approach to habeas might produce a completely separate set of habeas doctrines applicable solely to capital cases.

I. HABEAS AND THE IDEOLOGIES OF FEDERAL COURTS LAW

The statutory writ of federal habeas corpus for state prisoners can be categorized as one example of the general class of federal court remedies that have been created or recognized for the purpose of redressing violations of federal constitutional rights. This traditional classification of habeas has shaped the views of generations of lawyers, judges, and academics. For instance, although today a few criminal procedure casebooks include a smattering of habeas cases, for more than fifty years (dating back to well before Hart and Wechsler) habeas has appeared in law school curricula in fed-
eral courts courses, if it has appeared at all.\textsuperscript{7} The traditional mindset has thus tended to see habeas issues as similar to other federal courts issues such as the scope of Section 1983, the availability of injunctions against state judicial proceedings, and the meaning of the Eleventh Amendment.\textsuperscript{8}

The categorization of habeas as a member of the class of federal remedies for constitutional violations by state and local officials is not wrong; on the contrary, it is both correct and important. But it is also misleading, for habeas is part of another system as well—the criminal justice system. And the criminal justice system is quite different, substantively and procedurally, from the other settings in which federal constitutional law is enforced against state and local actors.

A. HABEAS AND THE FEDERAL COURTS DEBATE

The federal courts approach to habeas, like the federal courts approach to other federal remedies, has emerged from the tension between Federalism and Nationalism. Federalists tend to think of the Constitution as a document that preserves the balance between federal and state authority by carefully limiting federal power. In the judicial arena, Federalists view state and federal courts as equally competent and equally dedicated to the enforcement of federal rights—in other words, they believe in the “parity” of state and federal courts. For these reasons, when federal and state juris-


\textsuperscript{8} The point is seen most clearly in older Federal Courts books, which did not have a separate unit on habeas corpus, but included the subject in a unit covering a variety of federalism issues. For example, McCormick and Chadbourn placed habeas in a unit titled “Conflicts between State and National Judicial Systems”; the unit also covered sovereign immunity, injunctions of state court proceedings, injunctions of state taxes, and the use of three-judge panels for constitutional challenges to state legislation. McCormick and Chadbourn, \textit{Federal Courts}, at 298–413 (cited in note 7).
diction overlaps, Federalists tend to favor comity and deference to decisions made by state courts.\(^9\)

Nationalism stresses national supremacy, federal interests, and federal enforcement of federal constitutional rights, at the expense of state sovereignty. Nationalists tend to think of the Constitution as a document built around the Fourteenth Amendment—as a charter that, first and foremost, protects individual rights against state infringement. And they believe only federal court enforcement of those rights can provide the necessary protection. From a Nationalist point of view, the federal courts are more trustworthy adjudicators of claims involving possible violations of federal rights; even the lower federal courts are generally superior to state courts in their ability to ensure the supremacy of federal constitutional law. For these reasons, Nationalists emphasize the importance of federal judicial review of federal constitutional claims, and discount the values of comity and deference to state court decisions.\(^10\)

Of course, few cases have been decided solely on the basis of one or the other of these ideologies, and few judges consistently adopt either polar position. Rather, as Professor Fallon suggests, Federalism and Nationalism tend to serve either as rhetorical structures or as ideal models of the way the world should work.\(^11\) Nevertheless, these two ideologies have done much to shape the law of federal courts. Disputed issues in a wide variety of areas have been analyzed and debated in terms of the values and considerations that are central to Federalism and Nationalism: comity, state sovereignty, the importance of federal enforcement of federal rights, and the relative competence and dedication of state and federal courts in enforcing those federal rights.

The pattern holds true for habeas doctrine as for other areas of federal courts law. In Coleman v Thompson, a recent Court decision about the scope of procedural default doctrine in habeas cases, Justice O’Connor began her majority opinion as follows:

> This is a case about federalism. It concerns the respect that federal courts owe the States and the States’ procedural rules


\(^10\) Id at 1158–64.

\(^11\) Id at 1145–50.
when reviewing the claims of state prisoners in federal habeas corpus.\textsuperscript{12}

The opinion predictably proceeded to defer to the relevant state court decision dismissing the defendant's state habeas appeal.\textsuperscript{13} Justice Blackmun's dissent in \textit{Coleman} responded in kind:

\begin{quote}
The majority proceeds as if the sovereign interests of the States and the Federal Government were co-equal. Ours, however, is a federal republic, conceived on the principle of a supreme federal power . . . . The ratification of the Fourteenth Amendment by the citizens of the several States expanded federal powers even further, with a corresponding diminution of state sovereignty . . . . \textsuperscript{14}
\end{quote}

Justice Blackmun went on to argue that federal courts must serve "as guardians of the people's federal rights,"\textsuperscript{15} and so concluded that the dismissal of the defendant's state court appeal should not preclude federal court review of the merits of the defendant's federal claims.\textsuperscript{16}

\textit{Coleman} is a prime example of a common phenomenon. For the past four decades, Court opinions in habeas cases have resembled a tug-of-war between Nationalism and Federalism. In the 1950s

\textsuperscript{12} \textit{Coleman} v \textit{Thompson}, 111 S Ct 2546, 2552 (1991).

\textsuperscript{13} Id at 2561-66. In \textit{Coleman}, there were two potential obstacles to this deference: the state court order dismissing Coleman's state habeas appeal had not specified the grounds for the dismissal, and Coleman's lawyer in state habeas proceedings had incompetently failed to file his appeal on time. Most of Justice O'Connor's opinion was devoted to establishing that the dismissal was apparently based on an adequate and independent state ground (the petitioner had filed his appeal one day late), and that the state court did not need so to specify in order for the default to "count" in federal habeas proceedings. Id at 2553-61. With respect to the attorney incompetence issue, Justice O'Connor fairly quickly concluded that absent a right to \textit{any} counsel on state habeas—earlier decisions made clear there is no such right—there can be no claim of ineffective assistance of counsel in such proceedings. Id at 2566-68.

Throughout her analysis for the Court on both issues, Justice O'Connor treated habeas review of state criminal cases as something akin to a diplomatic faux pas: an affront to another sovereign, of the sort that ought to be avoided unless absolutely necessary.

\textsuperscript{14} Id at 2570 (Blackmun dissenting).

\textsuperscript{15} Id, quoting \textit{Mitchum v Foster}, 407 US 225, 242 (1972).

\textsuperscript{16} That is, Justice Blackmun concluded that absent a plain statement to the contrary, the Court should assume that the state court order rested on federal law, and hence lacked any adequate and independent state ground. Id at 2571-76. And he further argued that ineffective assistance of counsel should constitute "cause" for a procedural default even if the default occurred in state habeas proceedings. Id at 2576-78.
and 1960s, in cases like *Brown v Allen*\(^\text{17}\) and *Fay v Noia*,\(^\text{18}\) Nationalism prevailed; more recently, as in *Coleman*, the Federalists have won most of the battles.\(^\text{19}\) But the relevant values—federalism, comity, the importance of enforcing federal rights in federal courts, and the relative dedication and competence of federal and state courts—have remained unchanged.

Scholars have responded accordingly. The late Paul Bator's famous article, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*,\(^\text{20}\) virtually defined the Federalist approach to habeas, emphasizing deference to state courts and the equal ability of state and federal judges to apply federal law. Well-known articles by Burt Neuborne\(^\text{21}\) and Gary Peller\(^\text{22}\) responded from a Nationalist orientation: Neuborne's article took issue with the assumption of parity among state and federal judges, while Peller emphasized habeas's place in the Nationalist tradition dating back to Reconstruction. More recently, as the Court's habeas decisions have become more Federalist, academics have tended to move in the opposite direction, as evidenced by the largely Nationalist writings of Larry Yackle,\(^\text{23}\) Barry Friedman,\(^\text{24}\) James Liebman,\(^\text{25}\) and Ann Woolhandler.\(^\text{26}\)

Some habeas commentary has not fit this pattern. Judge

\(^{17}\) 344 US 443 (1953). *Brown* held that any federal constitutional claim could entitle a habeas petitioner to relief, notwithstanding that the constitutional claim was decided adversely to the petitioner by a state court that had jurisdiction over the case. The practical effect of *Brown* was to open up habeas to all possible constitutional claims, not merely those that might cast some shadow on the state court's jurisdiction.

\(^{18}\) 372 US 391 (1963). *Fay* held that procedurally defaulted claims could be raised on federal habeas as long as the default was not "deliberate" (which, in the nature of things, it rarely is).

\(^{19}\) For the leading examples, see *Stone v Powell*, 428 US 465 (1976); *Wainwright v Sykes*, 433 US 72 (1977); *Teague v Lane*, 489 US 288 (1989); *Brecht v Abrahamson*, 113 S Ct 1710 (1993).

\(^{20}\) 76 Harv L Rev 441 (1963).


Friendly's article *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments* focused on the relationship of habeas to the guilt-innocence determination. And many of Justice Harlan's opinions in habeas cases exhibited a special concern with how habeas could serve to deter misinterpretations of federal law by state courts. These two jurists, along with some others, sought to analyze habeas as a part of criminal procedure. But their approach has been the exception. Most habeas opinions and articles have remained anchored in the Federalism-Nationalism debate.

Two particular types of habeas argument that have become increasingly popular in recent years are really disguised versions of that debate. The first is the argument from Congressional intent. Because federal habeas for state prisoners is based on a federal statute, this argument goes, the crucial question in deciding a disputed habeas issue ought to be: What does Congress think about the issue? Or, at least, what did Congress think when it last amended the statute in relevant ways?

Arguments from Congressional intent, however, face an enormous obstacle: the habeas statute simply does not speak to any of the key issues in habeas law. The statute does not define habeas's substantive scope, nor does it dictate a particular rule of procedural default, harmless error, or retroactivity. Consistent with

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In *Desist*, Justice Harlan expressed the view that habeas serves both to protect innocent defendants and to deter state courts from violating federal constitutional standards. 394 US at 262–63. But after a majority of the Court held that the Fourth Amendment's exclusionary rule applied in habeas cases, Harlan concluded that the protection of innocence must no longer be a principal purpose of habeas. Thus, in *Mackey*, Harlan wrote that the "primary justification" of habeas is to provide an incentive for state courts to "toe the constitutional mark." 401 US at 687.

29 The statute provides that habeas courts "shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 USC § 2254(a). This language suggests not that all federal claims must be considered, but that no non-federal claims may be considered. In addition, the statute directs habeas courts to decide petitions "as law and justice require." 28 USC § 2243. The combination of these provisions seems to leave substantive scope wholly undefined.

30 Thus, the Court has dramatically changed its positions with respect to both procedural default and habeas retroactivity, even in the absence of major changes in the statutory language. Compare *Fay v Noia*, 372 US 391 (1963) (no procedural default bar to habeas relief absent "deliberate bypass"), with *Wainwright v Sykes*, 433 US 72 (1977) (procedural default bar to habeas relief unless petitioner can show "cause" and "prejudice"); compare
the statute, the habeas remedy could be—and has been—broad and fundamental, narrow and unimportant, or somewhere in between. Nor is there much evidence of what the 1867 Congress, or any of the Congresses that have amended the statute, thought about such issues. The ironic result is that arguments from Congressional intent almost invariably rest not on statutory language or legislative history, but on the parsing of Supreme Court opinions that supposedly formed the relevant backdrop to Congressional action.  
And the Court opinions themselves focus heavily on (surprise!) comity, federalism, the importance of a federal forum for federal rights, and the relative trustworthiness of state courts—in other words, the standard litany of Federalist and Nationalist concerns.

The second argument, a cousin of the first, is the appeal to habeas history. This argument assumes that Congressional intent is unknowable; it looks instead to the broad traditions of habeas law since 1867. The hope is that, by examining habeas history, one can identify a consistent ideological perspective, at least with respect to a particular habeas issue, that can be attributed to Congress, the Court, or both. This ideological perspective can then, in turn, be used to decide the disputed case. The opinions of Justice Thomas and Justice O'Connor in *Wright v West* are typical: Justice Thomas argued that the broad sweep of habeas history revealed a general Federalist pattern of deference to state court adjudications.


See, for example, *Keene v Tamayo-Reyes*, 112 S Ct 1715, 1721, 1725–27 (1992) (O'Connor dissenting) ("[T]he fact that Section 2254(d)(3) uses language identical to the language we used in *Townsend* [*v Sain*, 372 US 293 (1963)], strongly suggests that Congress presumed the continued existence of *Townsend*"; *Wainwright v Sykes*, 433 US 72, 99, 106 n 7 (1977) (Brennan dissenting) ("Congress' grant of post-trial access to the federal courts was reaffirmed by its modification of 28 USC Section 2254 following our decisions in *Fay* [*v Noia*, 372 US 391 (1963)], and *Townsend* [*v Sain*, 372 US 293 (1963)]; *Liebman*, 92 Colum L Rev at 2087–88 (cited in note 2) (concluding, based on analysis of both majority and dissenting Court opinions, that Congress's 1966 amendment to habeas statute "did not quite codify prior law" but instead "responded directly" to *Sanders v United States*, 373 US 1 (1963), and *Townsend* [*v Sain*, 372 US 293 (1963), and thereby "restored prior law against some of the controversial changes the Court made").

*112 S Ct 2482, 2484* (Thomas's plurality opinion); id at 2493 (O'Connor concurring in the judgment).
that had never been squarely rejected by the Court; while Justice O'Connor argued that habeas history, at least with respect to applications of federal law to the facts of particular state criminal cases, showed a strong Nationalist preference.

Habeas history arguments face a fundamental problem, too: they omit a key part of the history. For most of the habeas history to which Justices Thomas and O'Connor referred in Wright v West, federal criminal procedure doctrine was almost nonexistent. Whether habeas review was "broad" or "restrictive" made very little practical difference, because there were so few colorable grounds for constitutional claims. Indeed, as a general matter, it can fairly be said that habeas's most persistent tradition has been its near-irrelevance—a tradition that was overturned (and dramatically so) only during the past thirty years. In light of this crucial difference between pre- and post-1960s federal criminal procedure, it seems pointless to try to draw elaborate lessons about the proper resolution of modern habeas disputes from forty- and seventy-year-old habeas cases (as the opinions in Wright v West purported to do).

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33 Id at 2486-91 (Thomas's plurality opinion).
34 Id at 2493-97 (O'Connor concurring in the judgment).

An unusually long and comprehensive example of this kind of argument appears in a recent article by Professor James Liebman attacking the apparent suggestion by Justice Thomas in Wright v West that a "reasonableness" standard of review might properly apply to mixed issues of law and fact on habeas. See Liebman, 92 Colum L Rev at 2041-94 (cited in note 2) (contending that, ever since 1867, habeas has been consistently defined as a virtual mirror image of the Supreme Court's appellate jurisdiction—and that a "reasonableness" habeas standard of review for mixed issues would be inconsistent with the direct-appeal analogy).

35 This is at least true of the portion of criminal procedure law that applied to the states. For example, the Supreme Court's first involuntary confession case is in 1936, Brown v Mississippi, 297 US 278 (1936), and for the succeeding thirty years confessions law consisted of little more than an admonition to police not to be too brutal or offensive. So too, the Court applied search-and-seizure restrictions to the states only in 1949, Wolf v Colorado, 338 US 25 (1949), and for the following twelve years those restrictions consisted solely of the "shock the conscience" test. See Rochin v California, 342 US 165 (1952) (holding that pumping defendant's stomach to obtain evidence violated due process); Irvine v California, 347 US 128 (1954) (holding that repeated illegal entries into the defendant's home did not). There was no constitutional right to counsel until the 1930s, and even then it was designed to be exceptional. Compare Powell v Alabama, 287 US 45 (1932) (counsel required in capital cases) with Betts v Brady, 316 US 455 (1942) (for non-capital cases, counsel required only given some showing of special need). Plus, prior to the 1960s (and in some instances later), there were essentially no constitutional rules applicable to jury selection, discovery, self-incrimination (apart from police questioning), double jeopardy and mistrials, ineffective assistance, or burdens of persuasion.

36 See 112 S Ct at 2487-88 (Thomas's plurality opinion), discussing Brown v Allen, 344 US 443 (1953); id at 2494 (O'Connor concurring in the judgment), discussing Moore v Dempsey, 261 US 86 (1923), and Frank v Mangum, 237 US 309 (1915).
Upon closer examination, the arguments from Congressional intent and from habeas history both serve merely to translate the claim, "This is what I believe about federalism, comity, federal enforcement of federal rights, and parity," into either, "This is what Congress believes about federalism, comity, federal enforcement of federal rights, and parity," or, "This is what we've all believed for a long time about federalism, comity, federal enforcement of federal rights, and parity." The difficulty with such arguments is that they are not based on the proper set of values. Federalism and Nationalism simply do not provide a satisfactory framework for the modern habeas debate.

B. THE CRIMINAL PROCEDURE REVOLUTION AND THE DISPLACEMENT OF STATE LAW

To see why Federalism and Nationalism should no longer frame the habeas debate, one must think about how dramatically criminal procedure has changed over the past thirty years. Before the 1960s, the states were relatively free to go about their business, making and applying state criminal procedure law (or simply acting according to the discretionary judgments and practices of state or local officials), so long as they did not run afoul of the broad limitations of the Due Process and Equal Protection Clauses. In this way, federal constitutional law operated in state criminal cases much as it does today in most other areas: it provided a vaguely defined "floor" of constitutional protection below which the states could not fall, but otherwise was not a significant presence in the day-to-day work of state officials and state judges.

When the Court incorporated most of the specific criminal procedure guarantees of the Fourth, Fifth, and Sixth Amendments into the Fourteenth Amendment's Due Process Clause, thus making those guarantees applicable to the states, it radically transformed the role of federal constitutional law in state criminal cases. Through such landmark decisions as *Mapp v Ohio* (extending the Fourth Amendment's exclusionary rule to the states), *Gideon v Wainwright* (incorporating the Sixth Amendment's right to coun-

37 The Court also, during the same period, expanded the range of rules based directly on the Due Process and Equal Protection Clauses of the Fourteenth Amendment.


sel), *Malloy v Hogan* (incorporating the Fifth Amendment’s self-incrimination privilege), and *Miranda v Arizona* (requiring the states to give warnings, based on the Fifth Amendment, before interrogating suspects in custody), the Court converted federal criminal procedure law from a rarely invoked “background” limit on the states into a detailed set of rules that defined, on a day-to-day basis, the scope of state powers to investigate and prosecute crimes.

It is hard to overstate the effect of these cases. Thirty-five years ago, a police officer who wanted to search the glove compartment of a suspect’s car for evidence would have looked primarily to state law for any regulation of his conduct, as would a state judge reviewing that conduct to determine the admissibility of the evidence; federal law was (for the most part) a concern only for a few extremely intrusive kinds of searches. Prior to 1961, only state searches and seizures that shocked the judicial conscience led to any federal sanction. *Rochin v California*, 342 US 165 (1952). *Rochin* itself was an extreme case—the government had ordered the defendant’s stomach pumped in order to retrieve a pair of capsules containing morphine—and the Court made it clear that only extreme cases would be sufficiently “shocking.” See *Irvine v California*, 347 US 128 (1954) (repeated illegal entries into defendant’s home combined with eavesdropping of private conversations did not violate the *Rochin* standard).

Both of these major interrogation cases have spawned many additional Court rulings. See, for example, *Edwards v Arizona*, 451 US 477 (1981) (invocation of *Miranda* “right to counsel” precludes further interrogation); *Maine v Moulton*, 474 US 159 (1985) (Massiah prohibits use of statements made by defendant charged with one crime to undercover police agents conducting investigation of other crimes).

See *Batson v Kentucky*, 476 US 79 (1986), and its progeny.


exculpatory evidence—all these matters, and many more, were once governed entirely (or almost entirely) by state and local law; all now are governed, with rare exceptions, entirely by federal law.

In short, wherever federal criminal procedure law exists today, that law dominates the landscape. Federal constitutional criminal procedure law no longer serves as a vaguely defined “floor,” above which the states are free to develop and administer their criminal justice systems with relative independence. Rather, federal law today serves as a floor and a ceiling and everything in between: federal law dictates, often in minute detail, the course of state criminal proceedings.

One might say that, in the criminal procedure context, the Nationalist view of federal-state relations triumphed, and the Federalists were routed. Today no one, not even the most ardent states’ rights advocate, seriously contests the preeminence of federal constitutional law in determining how state criminal investigations and trials should proceed. Of course, this acquiescence was not immediate; in the 1960s, the Court was harshly criticized for usurping powers that had previously belonged to the states. But the efforts to undo the Warren Court’s work—to overrule cases like Mapp, Malloy, and Miranda (and even to impeach Earl Warren)—failed. Justice Harlan’s suggestion that incorporated rights might have a different, less intrusive meaning in state cases than in federal cases (a suggestion that might have allowed federal criminal procedure law to continue to play a “background” role similar to that of federal constitutional law in other settings) was given short shrift.49

By the mid-1970s, Court opinions no longer mentioned the possibility that federal constitutional law might not constitute the law of criminal procedure, or that it might not mean the same thing in state and federal cases.

This enormous shift in perspective on the role of federal criminal

48 See Brady v Maryland, 373 US 83 (1963), and its progeny.

49 See Williams v Florida, 399 US 78, 117 (1970) (Harlan concurring in the result and dissenting in Baldwin v New York, 399 US 66 (1970)) (arguing that Sixth Amendment right to jury trial could be interpreted differently in state and federal cases).

By 1972, only one member of the Court, Justice Powell, was willing to adhere to Justice Harlan’s view in Williams. See Apodaca v Oregon, 406 US 404 (1972), Johnson v Louisiana, 406 US 356 (1972). The last opinions explicitly opposing “jot for jot” incorporation of federal constitutional rights in state cases were those of Justice Powell, joined by Chief Justice Burger and Justice Rehnquist, in Crist v Bretz, 437 US 28 (1978), and Ballew v Georgia, 435 US 223 (1978).
procedure law in state criminal cases occurred so gradually that we have tended to overlook its implications for the law of federal remedies. Among the foundational premises for the law of federal courts, and for habeas law in particular, is the assumption that federal law is in some sense foreign to state courts—that it exerts its presence only rarely, and that it operates by trumping an existing body of state law that otherwise governs the relevant state action. This premise no longer holds true in criminal cases: there is no clear, institutional line of demarcation between federal and state law in criminal procedure. In those areas covered by federal constitutional criminal procedure, there are not two sources of relevant law that must be interpreted and applied by state courts in criminal cases, but only one body of law that applies to such cases: the law of the Fourth, Fifth, and Sixth Amendments, as defined by the Supreme Court, and as refined and applied by state and lower federal courts alike.

Indeed, in an important sense, the law of the Fourth, Fifth, and Sixth Amendments—our detailed, national Code of Criminal Procedure—today “belongs” to state courts as much as it does to their federal counterparts. Whether or not they agree with it, state judges no longer experience this body of federal law as alien or foreign. Instead, state courts deal with federal criminal procedure law the same way federal courts do—as the sole source of detailed rules that govern their criminal dockets.

This is not to say, of course, that state and federal courts always see eye-to-eye concerning the proper interpretation of the relevant constitutional provisions. Nor is it to say that state judges are necessarily as competent or conscientious as federal judges, or that the tasks of defining and applying these criminal procedure rules should be left to state courts without federal court supervision and review. Our point is only that, in the regular, day-to-day business of applying law to the facts of cases, federal criminal procedure law is virtually unique in the realm of federal constitutional law: it genuinely occupies the field, and thus is of immediate and primary, rather than remote and secondary, concern to state courts handling criminal cases.

C. FEDERALISM, NATIONALISM, AND HABEAS: THREE PROBLEMS

We are now in a position to see what is wrong with the current habeas debate. There are three main problems. The first has to do
with the role federal constitutional law plays in criminal procedure. The Federalism-Nationalism debate presupposes disputes between federal and state law. Such disputes are, today, all but absent from criminal procedure; federal law is the only game in town. The second problem is that Federalists and Nationalists alike tend to ignore the special role of innocence and guilt in criminal justice. The third problem concerns the deterrent function of many criminal procedure rights. All constitutional rights serve a deterrent function, but that function substantially differs, and is implemented differently, in criminal procedure. We take up each of these problems in turn.

1. Federal law and the need for a federal forum. Both sides in the traditional habeas debate tend to view federal constitutional law as a means of policing the day-to-day administration of state law. Nationalists argue that criminal defendants have a powerful interest in adjudicating their federal rights in a federal forum: that forum is one in which federal law is natural, whereas in state court, state law is natural and federal law is foreign. Federalists, in rebuttal, raise the argument of parity: litigants' federal interests will be protected because state judges are just as good at applying federal law as are federal judges.

As far as criminal procedure is concerned, however, federal constitutional law is no more foreign or less natural in state court than in federal court. The Fourth, Fifth, and Sixth Amendments completely dominate the field in both; state actors, including state courts, look almost exclusively to these federal sources of criminal procedure law to govern the day-to-day administration of state criminal cases. 50

Even the exceptions to this federal law occupation of the criminal procedure field are, in a sense, not exceptions at all. Some states have their own constitutional rules that go beyond federal law on some issues; in these states, state law still plays an important, though peripheral, role. 51 But these rules are "state law" only in

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50 This makes the traditional federal courts notion of entitlement to a federal forum lead, in one sense, to a reductio ad absurdum: if the day-to-day administration of state criminal cases is largely governed by federal constitutional law, and if litigants raising federal claims have a right to an adjudication of those federal claims in a federal forum, then (as a matter of simple efficiency) shouldn't all state criminal prosecutions be conducted in the first instance in a federal court? Or at least be removable to federal court?

an odd sense. State courts that adopt criminal procedure rules more protective than the relevant federal constitutional doctrines commonly cite not state cases but Supreme Court dissents. That is, state law criminal procedure decisions tend either to adopt federal constitutional rules mechanically (making the state law meaningless) or to adopt a minority position from the relevant Court cases. Either way, it is federal law that frames the debate and federal decision makers who craft the relevant rules.

Moreover, whenever state constitutional law provides more protection for a defendant than would the analogous federal constitutional provision, there is no genuine conflict between state and federal law. The relevant federal law—at least as applied to state actors in state criminal cases—does not “trump” state law, because the criminal defendant simply gets the benefit of the more protective state rule. Thus, such situations provide no support at all for the traditional approach to habeas, which assumes the existence of a true conflict between state and federal law.

What has changed since the Revolution is that, for the most part, state courts no longer look primarily to state law for the rules

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Justice Brennan, one of the most outspoken advocates of the use of state constitutions to protect the rights of criminal defendants, has also been relatively forthright in his call for state courts to base their state constitutional decisions on Supreme Court dissenting opinions (many of those opinions, of course, written by him). For example, in a recent article, he applauded the fact that “the state courts have responded with marvelous enthusiasm to many not-so-subtle invitations to fill the constitutional gaps left by decisions of the Supreme Court majority.” William J. Brennan, The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights, 61 NYU L Rev 535, 549 (1986).

53 There may be a problem with applying such state constitutional protections against federal actors, such as FBI or DEA agents, who routinely engage in criminal investigations jointly with state and local law enforcement officers. For example, if federal agents conduct a search that violates a state constitutional provision, but conforms with prevailing federal law (e.g., relevant Supreme Court Fourth Amendment decisions, or a federal statute authorizing the particular kind of search at issue), it is not clear whether the federal agent is bound by the state provision when acting in furtherance of federal law enforcement interests. This problem is a variation on the old "silver platter" problem that existed before the states were held subject to the exclusionary rule in Mapp v. Ohio, 367 US 643 (1961). See Elkins v United States, 364 US 206 (1960).
that govern the day-to-day administration of criminal cases. This means that even state supreme courts are, for the most part, no longer in the business of defining their own state criminal procedure rules. They act, in criminal cases, not as common law courts with plenary law-making authority, but as subordinate entities articulating and applying federal law within the confines of a large, multilayered, combined federal-state criminal justice system. As far as criminal procedure is concerned, state supreme courts operate as lower courts applying a common Nationalist code.

Today, federal criminal procedure law is as routine a part of state criminal litigation as it is of federal litigation. For purposes of applying the Fourth, Fifth, and Sixth Amendments, state courts, like lower federal courts sitting in habeas, are in the business of trying to follow (or distinguish) the relevant Supreme Court decisions.

Even more significant than this total federal occupation of the field of criminal procedure law is the fact that state courts—and everyone else, for that matter—have come to accept the dominance of federal law. There are several likely explanations. First, the idea of a national Code of Criminal Procedure seems to have worked out pretty well in practice. Second, the Burger and Rehnquist Courts have largely eliminated the perception, widespread during the Warren Court era, that the federal law was much too pro-defendant (or, at least, that the federal law was uniformly more pro-defendant than the state law it supplanted). Finally, we’ve simply gotten used to the idea of Nationalism in criminal procedure law—so much so that almost no one even thinks seriously, today, about the alternative.

In short, the criminal procedure arena has changed completely since the Revolution. Then, the battle involved competing sets of laws—state and federal. In the midst of that battle, habeas served as the Supreme Court’s most powerful weapon, allowing it ultimately to prevail in reshaping the criminal justice systems of the states. During that difficult and painful period of transition, when federal law was seen by most state courts as a foreign invader.

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54 The obvious exception is substantive criminal law, or the law of crimes and punishments, which is still mostly a matter of state law. But this exception is far less important than it may seem: a glance through any set of state appellate reports reveals that most disputed legal issues in criminal litigation, outside the special context of capital cases, have to do with criminal procedure and not substantive criminal law.
displacing entrenched state law, it made sense to think about habeas issues in terms of the Federalism-Nationalism debate.

Today, there is no debate over whether most criminal procedure law should be state or federal. Instead, the debate is all about the content of the federal law. State courts may still resist federal criminal procedure law—but whenever they do, it is not because the law is federal, but because they think the law is too pro-defendant. Today's criminal procedure debate, in other words, is the same debate that is inherent in any system of criminal justice, whether or not that system is unitary.

It is pointless to worry about the traditional federal courts values in such a setting. If the relevant governing law is totally federal, and everyone accepts it as such, why should anyone defer to a decision of a state court qua state court? And if federal law is as natural to state courts as to their federal counterparts, why should anyone have a right to a decision by a federal court qua federal court? In criminal procedure law, the concept of institutional allegiance—the foundation for the traditional federal courts approach—is a relic.

This view of the institutional relationship between state courts and federal criminal procedure law is quite separate from the question whether all, or most, state courts make decisions on criminal procedure issues that are just as good as those made by their federal counterparts. (For what it's worth, we think that they often do not.) It does, however, bear on the parity debate. In the criminal procedure context, the relevant question is not whether all, or most, state judges are as good as federal judges at applying federal law—it is pointless to ask that question, since no matter what the answer, applying federal law will continue to be the bulk of their job in state criminal cases. The important question is, instead, whether habeas review of state court decision making on issues of federal law, under certain kinds of habeas rules and procedures, will significantly increase the protection of the values that federal criminal procedure law is designed to protect.

The relevant question, in other words, involves the proper role of habeas within the overall system by which federal criminal procedure rights are enforced in state criminal cases. In the criminal procedure context, we should stop thinking about state courts and habeas courts as if they belonged to two separate legal systems. There is only one criminal justice system, enforcing one set of
criminal procedure rights, and that system includes both state and federal courts.55

2. Drawing distinctions among rights—the primacy of innocence. The most important concern of the criminal justice system is the protection of innocent defendants. Innocent defendants who are imprisoned suffer a horrible injustice that cries out for correction. All constitutional violations are important, but nowhere is the remedial role of habeas so important as in the case of an innocent person.56

There is little dispute about this point. Yet the conventional approach to habeas does not easily accommodate such a consideration. Within federal courts law, the content of the particular federal right to be enforced is mostly beside the point. All federal rights are supreme, and so warrant federal enforcement to the same extent—though the extent will vary depending on one's own views about federalism, comity, and parity. Thus, under the prevailing approach, the innocence of a habeas petitioner usually is "irrelevant," because it is unrelated to the primary questions of federal courts law: Should access to a federal forum be provided in order to vindicate federal rights, or can state courts be trusted to enforce those rights?

Of course, it is hardly novel to suggest that innocence ought to matter in habeas, or that some rights should be treated differently from others. Judge Friendly long ago suggested as much,57 and Stone v Powell58 (which essentially barred relitigation of Fourth Amendment claims on habeas) implemented his idea by differentiating one particular kind of non-innocence-related right from other rights. Since Stone, some individual Justices have espoused, in one form or another, the idea that distinctions should be drawn between different constitutional claims based on whether they go to

55 This same basic observation led another commentator, over ten years ago, to propose replacing the present system of federal habeas review of state criminal cases with federal appellate review (either in the present federal courts of appeal or in a new U.S. Court of Appeals for the State Circuit). See Daniel J. Meador, Straightening Out Federal Review of State Criminal Cases, 44 Ohio State L J 273 (1983).

56 This proposition is arguably anchored in the habeas statute. The statute directs courts to dispose of petitions "as law and justice require." 28 USC § 2243. To the extent that the injustice of punishing innocents is especially acute, this language would seem to require that innocence receive some weight in habeas doctrine.


the basic justice of the defendant’s conviction. Yet most habeas opinions—written by “conservatives” and “liberals” alike—have minimized the significance of innocence in habeas law. Stone itself is now an orphan; this past Term, the Court once again refused to extend it beyond Fourth Amendment claims. The law of procedural default has been framed without regard to the nature of the defendant’s claim, the sole exception being the “fundamental miscarriage of justice” exception, an exception drawn so narrowly it seems never to apply. So too with retroactivity, exhaustion, and abuse of the writ. In all these areas the judicial debate is between those who argue for comity and federalism (and believe that state judges are the equal of their federal counterparts), and those who attach great weight to vindicating federal rights in a federal forum (and believe that state judges are not to be trusted). The accuracy of particular guilty verdicts seems little more than a detail.

This pattern of treating all constitutional rights alike might make sense in other enforcement settings, because elsewhere in constitu-

59 Justices Powell, O’Connor, and Stevens have expressed this view. See Kuhlmann v Wilson, 477 US 436, 448 & n 8 (1986) (Powell for a plurality); Withrow v Williams, 113 S Ct 1745, 1758 (1993) (O’Connor concurring in part and dissenting in part); Rose v Lundy, 455 US 509, 543 (1982) (Stevens dissenting); Brecht v Abrahamson, 113 S Ct 1710, 1723 (1993) (Stevens concurring). See also Reed v Farley, 62 USLW 3356 (US S Ct No 93-5418, argued Mar 28, 1994) (involving whether Stone v Powell should extend to violations of Interstate Agreement on Detainers).

60 Withrow v Williams, 113 S Ct 1745 (1993). But see Reed v Farley (cited in note 59).

61 See note 84.

62 Under Teague v Lane, 489 US 288 (1989), “new rules” may be declared or applied on habeas only if they fit one of two exceptions: (1) new rules placing certain conduct beyond the power of the criminal law to proscribe, such as the flag-burning case, Texas v Johnson, 491 US 397 (1989); or (2) “watershed” new rules of criminal procedure “without which the likelihood of an accurate conviction is seriously diminished.” See Teague, 489 US at 313. This second exception, although related to “innocence,” is defined categorically; the Court has not yet recognized a case-specific “innocence” exception to Teague’s general non-retroactivity principle, although such an exception has been suggested by at least a few commentators. See, e.g., Ellen Boshkoff, Resolving Retroactivity after Teague v. Lane, 65 Ind L J 651 (1990); Joseph L. Hoffmann, Retroactivity and the Great Writ: How Congress Should Respond to Teague v. Lane, 1990 BYU L Rev 183, 208 n 111.

63 The test for whether a petitioner must go back to state court has no “innocence” component; rather, the law looks to whether the claim has been properly raised in state court. See Rose v Lundy, 455 US 509 (1982).

64 “Abuse of the writ” doctrine covers cases in which a defendant raises a claim on a second federal habeas petition that might have been raised in his first petition. The law in such cases is essentially the same as in procedural default doctrine: the defendant must show “cause” for failing to raise the claim earlier, and “prejudice” from the failure. See McCleskey v Zant, 111 S Ct 1454 (1991). The only sense in which this test has anything to do with “innocence” is that, like the test for procedural default in state court, it includes a “fundamental miscarriage of justice” exception.
tional litigation the remedy awarded often reflects differences in the value of the constitutional claim. In a Section 1983 damages action, the degree of the plaintiff's injury determines the amount of damages; in actions for injunctive relief, the scope of the injunction is designed to remedy (or prevent) the relevant wrong. Different liability rules for different constitutional claims are unnecessary, because differences in plaintiffs' injuries are already taken into account at the remedy stage. And differences in levels of damages or breadth of injunctive relief (not to mention levels of attorneys' fees) may also correspond, albeit only roughly, to differences in the social value of the claims. Constitutional claims that generate million-dollar damage awards usually have greater value to society—meaning that it is worth more to society to have the claims brought, the victims compensated, and the violators punished—than constitutional claims that generate thousand-dollar awards. The penalty for the violation is thus likely to be at least roughly proportionate to the wrong done by the violator. (And where that is not so, punitive damages and attorneys' fees are available to correct the imbalance.) Remedies are the device for separating constitutional violations that are more harmful, or more socially important, from violations that are less so. This sorting process is far from perfect, but it probably functions well enough that Friendly-style lines are unnecessary in most settings.

Habeas is different. The remedy for all successful habeas petitioners (except those challenging only their sentences—a group of petitioners who are almost never successful, outside of capital cases) is the same, regardless of the constitutional violation. Petitioners with winning claims have their convictions vacated (usually with the allowance of another trial, although if evidence has gone stale or the case is not important enough to the prosecutor, habeas relief may mean release). There is no grading of relief. The petitioner who may well be innocent is treated no differently from the petitioner who is very likely guilty. This means that if claims are not separated at the liability stage—that is, when the habeas court

65 Professor Jeffries has pointed out that there are some important categories of Section 1983 litigation where the harm caused by the constitutional violation is not a good proxy for social interest in seeing the violation punished. John C. Jeffries, Jr., Damages for Constitutional Violations: The Relation of Risk to Injury in Constitutional Torts, 75 Va L Rev 1461, 1470–84 (1989). Our point is only that those categories are the exception rather than the rule; ordinarily, damages can be expected to track social injury fairly well.
determines whether to grant any relief—they will not be separated at all. To put it differently, elsewhere in constitutional litigation the kind and severity of the victim's harm is reflected in the choice (money, declaratory or injunctive relief) and extent of the remedy. In habeas that is impossible. Guilt and innocence must either be taken into account when deciding whether to grant relief, or ignored altogether. And if guilt and innocence really are central to criminal justice, that centrality ought to be reflected in habeas law.

Prior to the constitutionalization of the day-to-day rules of criminal procedure, this was a minor problem. Before 1961, few federal constitutional claims were available to state criminal defendants; the only realistic avenue for habeas relief was a due process claim. But due process claims were granted only in extreme cases of fundamental injustice, meaning that most successful claims probably involved a likely-to-be-erroneous verdict. In other words, refusing to treat innocence-related claims differently on habeas at the time of Brown v. Allen may have made sense, because successful habeas claims so often were innocence-related. The creation of detailed rules governing police and prosecutorial behavior ensures that this is no longer so. Today, constructing the law of habeas without reference to innocence and guilt means ignoring the central point of the criminal justice system.

3. Deterrence and criminal procedure. A major concern with any remedy for constitutional violations is its ability to deter future

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66 Harmless error rules of the sort at issue in Brecht v. Abrahamsen, 113 S Ct 1710 (1993), do not alter the point. Harmless error review ensures that the defendant's claim is plausibly related to the outcome of the proceeding. (The test under Brecht is "whether the error 'had substantial and injurious effect or influence in determining the jury's verdict.'" Id at 1722, quoting Kotteakos v United States, 328 US 750, 776 (1946).) But this relation to the outcome can be fairly tenuous or quite strong; relief is the same in either event. More important, this relation to the outcome need not have anything to do with the fundamental justice of the outcome. For example, improper police interrogation may affect the outcome of the defendant's trial by inducing the defendant to confess. But if the confession is credible (that is, if it is corroborated by other reliable evidence), then a conviction may nevertheless be "just." At the very least, conviction in such a case must be far more "just," as a relative matter, than conviction of a factually innocent defendant.

67 Consider two examples. The first is police interrogation law, where defendants could obtain relief only if their confession was "involuntary," and findings of involuntariness tended to occur in cases of serious physical abuse of suspects. Such cases are, of course, precisely where it is most likely that the confession is false. The second is right-to-counsel doctrine, where the law did not require state-appointed counsel absent a showing of some special need by the defendant. See Betts v Brady, 316 US 455 (1942). This meant, in practice, that a defendant had to show a substantial likelihood that he was innocent in order to make out a viable right-to-counsel claim.

68 344 US 443 (1953).
violations. Habeas is, in this sense, no different from Section 1983 or the law of constitutional injunctions: one of the primary goals of habeas law should be to deter violations of the Fourth, Fifth, and Sixth Amendments. But deterrence works differently in habeas. The federal rights enforced through habeas arise primarily (although not exclusively) in criminal cases. This fact has two implications that distinguish habeas from other remedies for constitutional violations.

First, alleged violations of criminal procedure rights are much more likely to be litigated than other alleged constitutional violations. A would-be plaintiff with a possible Section 1983 claim must initiate the proceedings herself if she wants relief; this means finding a lawyer and proceeding through the process to trial if the defendants choose not to settle. The only tangible incentive for doing so is a possible damages award, and such awards are usually quite small. A criminal defendant, on the other hand, is forced to defend himself against charges the state has initiated, and if, as is often the case, he cannot afford a lawyer, one is given to him free of charge. Moreover, the tangible incentive for pressing the claim is avoiding criminal punishment—a far bigger incentive than most damages awards—and the same incentive applies to any claim that may obtain the defendant's release.

This point has important deterrence consequences. Elsewhere in constitutional law, much official misconduct goes unnoticed (or at least unlitigated) and hence unpunished. Preserving access to federal court, and providing a system of remedies that includes potentially generous attorneys' fees, is thus critically important: if most violations are swept under the rug, the system must take very seriously the few claims that come to light through litigation. But in the criminal justice system, violations are constantly litigated in state courts, because the litigants (criminal defendants) both have

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69 In a study of constitutional tort litigation in three federal districts in a one-year period in the early 1980s, Professors Schwab and Eisenberg found that the average total recovery (including attorneys' fees) in successfully litigated cases was $30,480. The median recovery was only $8,000. These figures include only cases taken to trial; the figures for settled cases are presumably a good deal lower. By comparison, in the same districts, the average recovery in non-constitutional tort cases against the United States was $77,300, and the median recovery was $20,000. Stewart J. Schwab & Theodore Eisenberg, Explaining Constitutional Tort Litigation: The Influence of the Attorney Fees Statute and the Government as Defendant, 73 Cornell L Rev 719, 736-38 (1988).

70 For example, suppression motions are filed in approximately one-tenth of all state-court criminal cases. See Peter F. Nardulli, The Societal Cost of the Exclusionary Rule: An Empirical Assessment, 1983 Am Bar Found Res J 385, 594. This makes constitutional litigation in the course of state criminal proceedings vastly more frequent than constitutional tort litigation:
strong incentives to raise claims and bear minimal costs. It follows that the proportion of, say, *Miranda* violations that spawn suppression motions in state court must be far higher than the proportion of First Amendment violations that lead to Section 1983 litigation. (It also follows that there will be many more bogus *Miranda* claims, since criminal defendants have such strong incentives to raise claims, and they bear few costs when the claims are denied.) In short, habeas review supplements a state criminal justice system in which most constitutional violations are likely to be raised, while Section 1983 litigation is, in most settings, the sole (and infrequently used) path to adjudication of constitutional claims.

Second, habeas litigation of federal criminal procedure issues is invariably one-sided. Habeas courts review claims that the constitutional rights of defendants were not adequately protected in the state courts, but they cannot review claims by prosecutors that federal rights were erroneously overprotected by the state courts, thus leading to the defendant's acquittal.

The habeas literature has ignored this point, but its deterrent impact may be quite substantial. As Professor Kate Stith has explained, one-sided appellate review of many issues in criminal litigation skews the resolution of those issues at trial: trial courts tend to give defendants the benefit of the doubt on, say, contested jury instructions, because a pro-government error can mean reversal, while a pro-defendant error is usually unreviewable. Habeas litigation is even more likely to produce this skewing effect. Prosecutors may sometimes appeal pro-defendant errors committed by state courts within the state court system: in some states, for example, the suppression of evidence can be appealed by the government before trial. And erroneous legal rulings that overturn a guilty verdict at trial or in an intermediate appeals court (if based on any ground other than insufficiency of the evidence) are generally appealable by the government. On habeas, however, the government cannot seek to overturn any adverse state court decision. Thus, to a greater extent than with any other federal remedy for constitutional violations, the threat of habeas relief must, at the

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one study concluded that, nationwide, only about 2,000 constitutional tort actions are filed in federal court each year against police officers. Schwab & Eisenberg, 73 Cornell L Rev at 735 (cited in note 69).

margin, tend to push state courts toward greater protection of federal rights.\footnote{Indeed, the one-sided nature of habeas suggests (independent of our arguments about the problems with the traditional federal courts approach to habeas) that Professor James Liebman's recently asserted analogy between habeas and direct appeal is inapt. See Liebman, 92 Colum L Rev 1997 (cited in note 2). The Court has regularly reviewed on appeal claims by the government that state courts erroneously over-protected criminal defendants under federal law; no such federal court review, on the other hand, is available at the request of the government via a habeas petition.}

These two observations suggest that, in the context of criminal procedure, a little deterrence goes a long way. Whatever opportunities may exist for habeas relitigation of federal constitutional claims, those opportunities will likely be used by state prisoners to a much greater extent than corresponding opportunities will be used by ordinary civil litigants. Moreover, habeas follows a state criminal process in which federal constitutional violations are more likely to come to light than elsewhere in constitutional litigation. And the one-sided nature of habeas review will tend to maximize the effect of pushing state courts in the direction of protecting the relevant federal rights.

II. HABEAS AND THE CRIMINAL PROCEDURE SYSTEM

What would the law of habeas corpus look like if one were to reconstruct it in light of the nature of contemporary criminal procedure doctrine? As with any other procedural device, the answer depends on one's views concerning the costs and benefits of the procedure. In the current system, the principal cost of habeas—leaving aside, for reasons we have explained, the supposed intrusion on state sovereignty—is the suspension of finality. Habeas occupies the time and energy of courts and prosecutors (and, in some instances, state-paid counsel for petitioners), and hence delays the conclusion of the proceedings.\footnote{We do not count privately paid defense counsel, because the defendant can make for himself the judgment whether that cost is worth the possible benefit. But, even if he has private counsel, the defendant still does not internalize most of the costs he imposes on the prosecutor and court.} These costs are not massive, but they are real, and should not be incurred unnecessarily.

The benefits must be assessed in light of the goals of constitutional criminal procedure, for that is the law that habeas enforces.
We posit three goals: (1) that only the guilty be punished; (2) that police, prosecutors, and judges treat suspects and defendants fairly; and (3) that federal courts have adequate opportunities to make federal law. The key to any sensible reform of habeas law is to recognize that these goals need not all be achieved in the same way. Different kinds of constitutional claims may require different habeas rules.

A. PREVENTING UN Just PUNISHMENT—THE PROTECTION OF INNOCENCE

As we have said, the possibility that a criminal defendant might be innocent of the crime for which he is being punished currently plays only a small role in the adjudication of his habeas petition. There are two ways to fix this: habeas courts can focus on the nature of the defendant's constitutional claim, or they can focus on prejudice to the individual defendant. We think the second approach is better than the first. The reasons are anchored in the nature of the rights established by the law of constitutional criminal procedure.

*Stone v Powell*\(^7\) represents an example of the first approach. *Stone* effectively removed Fourth Amendment claims from habeas, partly on the ground that such claims were unconnected with the guilt/innocence determination.\(^7\) When *Stone* was decided, it was widely viewed as the first step toward a broad restructuring of habeas, with the Court categorizing all constitutional criminal procedure claims as either innocence-related or not, and treating the former category more favorably on habeas than the latter. Instead, *Stone* has been limited to Fourth Amendment claims. Just this past year, in *Withrow v Williams*,\(^7\) the Court declined to apply *Stone* to *Miranda* claims; Justice Souter's majority opinion in *Withrow* suggested that *Stone* is not subject to further expansion.\(^7\)

Though *Withrow* may have come as a surprise to some observers, we think the Court got it exactly right: the categorical—"innocence"

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\(^7\) 428 US 465 (1976).

\(^7\) Indeed, the point is stronger: criminal defendants with valid Fourth Amendment claims are more likely to be guilty than defendants as a whole, because the evidence they are seeking to suppress is by definition incriminating.

\(^7\) 113 S Ct 1745 (1993).

\(^7\) Id at 1750–55. But see *Reed v Farley* (cited in note 59).
approach of _Stone_ does not work (at least not beyond the special
category of Fourth Amendment claims) because it does not fit the
general nature of criminal procedure law. In an across-the-board _Stone_
regime in which innocence-related claims could be raised on
habeas but other claims could not, _Miranda_ claims, for example,
would presumably be “out” and ineffective assistance of counsel
claims, to take another example, would be “in.” After all, _Miranda_
aims primarily at deterring police misbehavior even if such misbe-
havior might turn up reliable evidence of crime, but if the defendant
had an incompetent lawyer the guilt/innocence determination
seems inherently untrustworthy.

This conclusion is, however, quite problematic. Improper police
interrogation tactics can lead to false confessions. And ineffective
assistance claims need not have anything to do with the guilt/
innocence determination: in _Kimmelman v Morrison_,
the Court held
that defense counsel was constitutionally ineffective for not seeking
to suppress highly probative incriminating evidence that appar-
ently was illegally seized.

These examples illustrate a general point: most criminal proce-
dure rights protect multiple values, and they protect different val-
ues in different cases. Ineffective assistance claims are usually about
ensuring reliable verdicts, but that is not always so. _Miranda_ claims
may primarily serve to deter police misbehavior of a kind that is
unlikely to convict innocent defendants, yet they sometimes bear
strongly on the reliability of a confession (and hence of any subse-
quent conviction). The _Stone_ approach tries to categorize rights
as innocence-related or not. But most criminal procedure rights do
not fit neatly into either of _Stone’s_ boxes.

The alternative is to look not to the kind of claim the defendant

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78 For one recent example, see Roger Parloff, _False Confessions_, in _American Lawyer_ 58, 59–60 (May 1993).
80 Id at 383–91.
81 There are many other examples. The set of constitutional rules surrounding peremptory
challenges in jury selection seems designed, in large part, to protect the interests of potential
jurors in avoiding discrimination—an interest that has no necessary relation to the reliability
of guilty verdicts. Yet in part, those rules also aim to prevent the government from “stacking”
the jury in its favor by excluding groups that might be favorable to the defense, a goal that
obviously has a great deal to do with the guilt-innocence determination. See Nancy J. King,
raises, but to whether the defendant can show in his case that the reliability of the guilt/innocence determination is seriously at issue. This was the original idea behind the "fundamental miscarriage of justice" exception to the procedural default rule of *Wainwright v Sykes*. Sykes held that a defendant may not raise a defaulted claim on habeas unless he can show both cause for the default and prejudice resulting from it. The exception for fundamental miscarriage of justice permits habeas review of a defaulted claim, even without the required showing of cause and prejudice, if the defendant can show that he is probably innocent.

The miscarriage of justice exception has the great virtue of not requiring the categorization of criminal procedure claims: in effect, a claim is "innocence-related" if a defendant can link it to a strong enough showing of innocence in his case, but not otherwise. This avoids the categorical over- and underinclusiveness of *Stone*. On the other hand, the exception seriously underprotects innocence. In practice, the burden of showing probable (more likely than not) innocence turns out to be too much to bear; the exception has become a virtual nullity, cited as evidence of the Court's concern with protecting innocence but almost never applied.

The idea behind the miscarriage of justice exception is sound. But the Court's reluctance to distinguish among different habeas cases has led it to cabin the exception too severely. A defendant who can demonstrate a "reasonable probability" of innocence—not that he is "probably" (more likely than not) innocent, but that he "may well be" innocent, or can raise "substantial doubt" about his guilt—has made the kind of showing that should seriously undermine one's faith in the justice of the verdict in his case. Whenever

84 In the wake of *Carrier*, a few cases actually found the miscarriage of justice exception applicable, though on grounds that went well beyond probable innocence. See *Power v Johnson*, 678 F Supp 1195, 1196–97 (EDNC 1988) (finding miscarriage of justice based on defense attorney incompetence); *Williams v Lane*, 645 F Supp 740, 748 (ND Ill 1986) (finding miscarriage of justice based on a showing of egregious prosecutorial misbehavior). The Supreme Court has since emphasized that only more-likely-than-not innocence will suffice to bring a petitioner's claim within the exception. *Dugger v Adams*, 489 US 401, 412 n 6 (1989). Accordingly, the exception as it stands today is very narrow indeed.
85 This standard—essentially something midway between beyond a reasonable doubt and preponderance of the evidence—already exists in several areas of criminal procedure doctrine. See, for example, *Strickland v Washington*, 466 US 668, 693–96 (1984) (prejudice
such a showing of potential innocence is coupled with a claim of constitutional violation, it seems unacceptable to withhold habeas review of the constitutionality of the defendant's conviction.

We therefore propose that one branch of habeas law be premised directly on the recognition that habeas can provide a valuable layer of protection against the unjust punishment of innocent defendants. Under this first track of habeas review, a "reasonable probability of innocence" standard would apply to all constitutional claims (not simply defaulted or otherwise procedurally deficient claims), so that any defendant could obtain habeas review of the constitutionality of his conviction by (1) demonstrating a "reasonable probability" that he is innocent of the crime for which he was convicted, and (2) alleging a constitutional violation that resulted in his erroneous conviction. If the habeas court finds that a constitutional violation occurred, and that as a result the defendant was convicted even though he may well be innocent, habeas relief should be granted. If the defendant fails either to make the required showing of innocence or to prevail on the merits of his constitutional claim, habeas relief under this first track of habeas review should be denied.

Our approach would lead to habeas review on the merits of all claims that the government failed to disclose material exculpatory evidence, since our proposed "reasonable probability of innocence" standard is the same as that for showing "materiality" under existing Brady doctrine. It would also mean habeas review of all innocence-related ineffective assistance of counsel claims: once again, the standard is the same. And it would mean habeas review

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86 See Bagley, 473 US at 682 (plurality opinion) ("The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different").

87 See Strickland v Washington, 466 US 668 (1984) ("The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different").
of all *Jackson v Virginia* claims, which go directly to the sufficiency of the evidence of the defendant's guilt.\(^8\)

With respect to most other constitutional claims, the “innocence” standard we propose would, under this first branch of habeas law, create an additional prerequisite to obtaining habeas review and possible relief. But the standard would actually benefit some defendants, since such a showing would justify habeas review of the merits of the defendant’s federal claims without regard to any possible procedural deficiencies in state court. The contrary rule in existence today\(^8\) rests on the notion that the state’s interests in finality and the enforcement of procedural rules outweigh the interest of a potentially innocent defendant in avoiding punishment. This balance (with which we disagree in any event) reflects the current law’s preoccupation with federalism concerns, a preoccupation that is out of place with the wholly nationalized body of law that state courts apply to resolve criminal procedure disputes.

Two other aspects of our proposed “innocence” habeas track deserve mention. First, habeas review under this “innocence” track would be de novo, with respect to both legal and mixed law-and-fact issues. We would not restrict habeas petitioners to case law that existed at the time of their state court trials and direct appeals, nor would we require habeas courts to defer to the prior rulings of state courts on legal or mixed issues. A defendant who can demonstrate a “reasonable probability of innocence,” coupled with whatever the habeas court finds to be a constitutional violation under prevailing federal law at the time of the habeas adjudication, should get relief. The reasonableness of the state court’s rulings under the federal law as it then existed is irrelevant, because the goal of habeas relief on this “innocence” track is not to send signals to the state courts but to prevent injustice to the defendant. Whatever impact *Teague v Lane*\(^0\) should have on “non-innocence” habeas

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\(^8\) See *Jackson v Virginia*, 443 US 307 (1979) (“[T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt”). This standard, of course, is much more restrictive than our proposed “reasonable probability of innocence” standard. Thus, habeas review of any credible *Jackson* claim would undoubtedly be de novo under our proposal—a *Jackson* claim could not possibly be credible unless the defendant was able to make a strong showing of innocence.

\(^0\) Today, in cases involving defaulted claims, habeas petitioners must also show “cause” for the default. See *Wainwright v Sykes*, 433 US 72 (1977).

\(^0\) 489 US 288 (1989).
claims (a question we will address in the next section), where a
"reasonable probability of innocence" exists the Teague rule should
not apply.

Second, we would not preclude habeas relief even for a "naked"
innocence claim of the kind that was presented to the Court last
Term in Herrera v Collins.91 The petitioner in Herrera sought habeas
relief simply on the ground that he was innocent. He alleged no
constitutional violation. Herrera's claim was factually implausible,92
so the Court did not need to rule out the possibility of such
claims in order to deny Herrera habeas review and potential re-

Of course, there is much room for disagreement about what the

91 113 S Ct 853 (1993).
92 Herrera was arrested on suspicion of killing two police officers, David Rucker and
Enrique Carrisalez, in two separate shootings that occurred minutes apart along a highway
in south Texas in late 1981. Carrisalez, before his death, identified Herrera as the person
who had shot him. Another witness to the Carrisalez shooting also identified Herrera as
the shooter, and identified the shooter's car as one that was registered to Herrera's live-in
girlfriend. The witness testified that there was only one person in the car at the time of the
Carrisalez shooting.

When Herrera was arrested, he was carrying a handwritten letter strongly implying his
guilt in the Rucker killing. He was also carrying the keys to his girlfriend's car. His Social
Security card was found alongside Rucker's patrol car. Blood and hair evidence tended to

corroborate Herrera's presence at the scene of the Rucker murder. After being convicted
of Carrisalez's murder and sentenced to death, Herrera pled guilty to the murder of Rucker.

Herrera's "newly discovered evidence" consisted of the affidavits of four persons. In 1990
and 1991, three of the four persons claimed for the first time that Herrera's brother, who
had died in 1984, had told them before his death that he and not Herrera was the true killer
of the two police officers. The fourth person, Herrera's brother's son, claimed that he was
present at the time and place of the shootings and that Herrera's brother was the true killer.

All of these facts were detailed in the Court's opinion, and relied upon for the conclusion
that "this showing of innocence falls far short of that which would have to be made in order
to trigger the sort of constitutional claim which we have assumed, arguendo, to exist." 113
S Ct at 870.

93 Indeed, a majority of the Justices indicated, in separate concurring and dissenting
opinions, that a strong enough showing of even "naked" innocence might warrant habeas
review and relief. Nevertheless, Chief Justice Rehnquist's majority opinion suggests that the
Courts might bar such claims altogether: "Federal habeas review of state convictions has
traditionally been limited to claims of constitutional violations occurring in the course of
the underlying state criminal proceedings. . . . History shows that the traditional remedy
for claims of innocence based on new evidence, discovered too late in the day to file a new
trial motion, has been executive clemency." 113 S Ct at 869.
proper standard for such "naked" innocence claims ought to be. Presumably it should be harder for a defendant to obtain habeas review by claiming innocence alone than by coupling an innocence claim with a claim of a constitutional violation of a kind that might have affected the reliability of the evidence or the accuracy of the verdict. Absent such a violation, there is far less reason for the habeas court to distrust the trial process that convicted the defendant. It follows that the showing necessary to obtain habeas review, and potential relief, in such a case should be far stronger—perhaps "more likely than not" innocence, or "clear and convincing evidence" of innocence. Both of these standards are fully consistent with our proposed approach to habeas, for the *Herrera* issue involves not the proper scope of habeas, but the meaning of substantive due process. Whatever one defines as the nature of substantive due process in cases involving claims of "naked" innocence, our "innocence" track of habeas law would implement that definition.

This leads to an important general caveat. Neither our proposal nor any other change in habeas law can sufficiently protect innocent defendants if the underlying criminal procedure doctrine is badly flawed. Some say, for example, that current ineffective assistance law is too restrictive, and that it is too hard for defendants to make the needed showing of attorney incompetence, which means that some innocent defendants cannot get relief because their lawyers, though inept, were not inept enough. If this claim is correct, then Sixth Amendment doctrine should be changed. But either way, our proposal does a better job of protecting innocent defendants by means of habeas review than does the existing system.

In short, adopting the approach Judge Friendly proposed many years ago—not as the exclusive route to habeas relief, but as one option available to habeas petitioners—would make habeas a more useful tool for preventing the most fundamental injustice the criminal justice system can produce. Currently, the unreliability of a defendant's conviction can be remedied on habeas only if the state court's decision was unreasonable under then-existing federal law, and then only if the defendant's claims are not defaulted (or otherwise procedurally deficient) or if he can show "more-likely-than-not" innocence. Our proposed approach would add significantly to the protection of innocent defendants, without adding to the
complexity of habeas law (indeed, as we will show in Part III, our approach would greatly simplify habeas doctrine). And our approach would fit in well with the nature of criminal procedure rights, which protect many values, of which innocence is the most important.

B. DETERRING CONSTITUTIONAL VIOLATIONS

Current habeas doctrine does a somewhat better job of fulfilling the second major goal of criminal procedure law: deterring misconduct by relevant state actors. In particular, the line of habeas retroactivity decisions beginning with *Teague v Lane* shows promise of developing into a sensible deterrence-based habeas doctrine. But the doctrine has not reached fruition yet, and the recent decision in *Wright v West*, declining to adopt a "reasonableness" standard of habeas review for state court decisions on mixed questions of law and fact, indicates that the Court is not yet thinking clearly about habeas's deterrence function.

That function is necessarily different from the deterrence role played by other constitutional remedies. Section 1983 or *Bivens* litigation can occur immediately after the alleged constitutional violation. Plaintiffs need not exhaust other possible remedies, so there is no procedural filter through which the claim must pass before it gets to federal court. Federal habeas litigation, by contrast, always occurs after a trial (or guilty plea) and direct appeal, and also after any state collateral proceedings. And there are many, many more state court criminal procedure decisions (including rulings on suppression motions) than there are habeas decisions.95

Given this unique procedural setting, it is unrealistic to think of habeas as a significant direct deterrent of misconduct by state or


95 Of course, changes in habeas doctrine could alter this ratio, but not as much as one might think: the number of habeas claims has not fluctuated substantially with changes in habeas doctrine over the past twenty years or so. In 1970, the number of habeas petitions filed by state prisoners was 9,063; this figure declined relatively steadily until 1977, when it reached a low of 6,866; then it began to climb again, topping out at 10,545 in 1989. In no single year between 1970 and 1989 did the number of petitions vary by more than 1,000, in either direction, from the preceding year; and in only five of the nineteen years did the number of petitions vary by more than 500, in either direction, from the preceding year. See United States Department of Justice, *Sourcebook of Criminal Justice Statistics*, Table 5.25 (1980); United States Department of Justice, *Sourcebook of Criminal Justice Statistics*, Table 5.55 (1990).
local police and prosecutors. Those officials face a much greater threat of lost convictions in state court than they will ever face in habeas, and when habeas review does occur, it occurs later (sometimes much later) than sanctions applied by state courts. Police officers, for example, are unlikely to change their behavior because of what a federal habeas court might say about that behavior years after they question a suspect.

There is an appropriate deterrence role for habeas to play, but it is a role aimed more at state courts than at other state officials. For state judges, particularly trial judges, the grant of habeas relief resembles a reversal on appeal: the judge's decision is overturned in a way that (at least in some cases) suggests error on the judge's part, and if there are further proceedings the case usually returns to the same judge's docket. To whatever extent appellate review in general deters lower court judges from misapplying law, habeas review should exert a similar deterrent effect on state judges.96

Of course, state judges' rulings in turn deter state and local police officers and prosecutors from misapplying federal law; that is the theory on which the exclusionary rule and many other aspects of criminal procedure rest. But this indirect deterrent impact on primary actors, like police officers and prosecutors, is not the same as the direct deterrent impact of other federal remedies, such as Section 1983 litigation. In the habeas context, the goal is to create incentives for state courts carefully to scrutinize the conduct of primary actors, and thereby to transmit the deterrent effects of habeas review to those primary actors.

How can habeas law create those incentives? The temptation is to play out the analogy to appellate review. On legal and mixed law-and-fact questions, appellate courts reverse whenever they find error. This plenary standard of review not only ensures correct

96 The empirical evidence on this point is sketchy, but there seems to be little disagreement among the members of the Supreme Court—regardless of their respective views about the proper role of habeas—that habeas review, and the threat of reversal, can exert at least some influence on the decisions of state judges. Perhaps the best available evidence in support of this proposition is the simple observation that state courts rarely refuse to abide by the legal rulings of the particular lower federal habeas courts that review their state criminal cases, even though the state courts are not obligated to do so. See Robert Cover and T. Alexander Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 Yale L.J. 1035 (1977) (suggesting that state courts and lower federal habeas courts can engage in a "dialogue" about the nature of federal rights, because state courts are not obligated to abide by legal rulings of lower federal habeas courts).
outcomes in particular cases;\(^9\) it also encourages lower court judges
to take "super-care" to avoid errors, by imposing a kind of strict
liability. Habeas law, some might argue, should do the same: pro-
vide for de novo review of legal or mixed law-and-fact decisions of
state courts with respect to federal constitutional claims.

But the incentive effects of de novo review on habeas are differ-
ent from the incentive effects of de novo review in ordinary ap-
peals. Recall that habeas review, to an even greater extent than
ordinary criminal appeals, is one-directional. Only state court er-
rors that benefit the government can be the basis of habeas claims.
Apart from the Supreme Court's rare use of its certiorari jurisdic-
tion, state court errors that benefit defendants are not subject to
any federal review at all.

State judges in criminal cases thus face asymmetric risks of rever-
sal by federal courts. In this respect, they resemble individual de-
defendants in Section 1983 actions. Most government officials get no
direct reward for acting properly, but risk damages liability if they
violate constitutional standards. The fear is that, as a consequence,
such officials will be overdeterred and will avoid close-to-the-line
behavior—officials will, for example, avoid making some good de-
cisions in order to reduce the risk of liability for bad
\(^8\)

The response of Section 1983 law to this problem is the qualified immu-
nity defense, which generally protects state actors from damages
liability unless their conduct was clearly illegal.\(^9\) By shifting the
liability standard from "violation" (strict liability) to "clear viola-
tion" (a form of negligence), qualified immunity doctrine reduces
overdeterrence.

State judges are in a similar position. Because of double jeopardy
doctrine, they face a much lower risk of reversal on direct appeal
for pro-defendant errors than for mistakes that favor the govern-
ment. And they face no risk whatsoever of reversal on habeas for
pro-defendant errors. If state judges care whether their decisions

\(^9\) Though this is obviously a little artificial, since "correct" in this context means only
that which the appellate court holds.

\(^8\) For the standard discussions of this point, see Jerry L. Mashaw, *Civil Liability of Govern-
ment Officers: Property Rights and Official Accountability*, 42 L & Contemp Probs 8, 29–33
(Winter 1978); Peter H. Schuck, *Suing Government: Citizen Remedies for Official Wrongs* 59–81
(Yale, 1983).

\(^9\) See Anderson v Creighton, 483 US 635, 640 (1987) (in order to defeat qualified immunity
defense, "in the light of pre-existing law the unlawfulness [of the defendant's conduct] must
be apparent").
are reversed, this asymmetry should push their decisions marginally in favor of defendants.

This effect would not matter if the goal of criminal procedure law were to minimize errors favoring the government. But there is no deterrence-based reason to pursue such a goal. It is one thing to let ten guilty people go free to avoid sending one innocent person to prison. Basic principles of justice support tilting the risk of error heavily in the defendant's favor. It is quite another thing to prefer the mistaken suppression of ten (lawfully obtained) confessions by guilty defendants to the mistaken admission of one reliable (yet unconstitutionally obtained) confession into evidence. Assuming that the confession is reliable, the demands of justice do not dictate any particular allocation of errors with regard to *Miranda* questions. That is why the burden of persuasion for *Miranda* claims is not beyond-a-reasonable-doubt or clear-and-convincing evidence, but the preponderance standard.  

The logical solution for habeas doctrine is an analogue to qualified immunity doctrine: a rule requiring reversal on habeas only when a state court ruling was not just wrong, but unreasonably so—that is, when the decision was something other than a close call. Indeed, the case for such a negligence-type rule is stronger in the habeas context than in Section 1983 cases. Qualified immunity in Section 1983 cases may produce substantial underdeterrence: not only do Section 1983 defendants receive a favorable liability standard, but the small number of Section 1983 cases suggests they are unlikely to become defendants in the first place. This last point is not true in the criminal procedure setting. The procedural setting in which the claims are raised—criminal litigation brought by the state, where the defendant receives appointed counsel, and where valid constitutional claims may lead to immunity from punishment—suggests that police officers and prosecutors cannot blithely flout criminal procedure rules in the belief that their violations will be overlooked. Violations of those rules are litigated in state court, with great regularity. Giving "close-call" state court decisions the benefit of the doubt on habeas would not change that.

In short, there is a strong argument for a general "reasonableness" standard of review on habeas—that is, for not granting ha-

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101 See note 70 supra.
beas relief unless the state court decision was unreasonable under federal law at the time it was made. As we have explained, this standard should not apply where the defendant can show a reasonable probability of innocence, for in such a case the potential for an unjust outcome warrants habeas relief apart from any deterrence concerns. But where deterrence alone is at stake, "reasonableness" review on habeas should suffice.

This conclusion holds true even if state judges generally are not the equal of federal judges, and even if some state judges sometimes engage in bad faith efforts to evade federal law. If particular state courts are either sloppy or inept, and if their incompetence manifests itself in plainly erroneous rulings in the government's favor, then habeas relief will follow, even under a "reasonableness" standard. The same is true if particular state courts are sometimes hostile to federal rights.

If, on the other hand, a particular state court makes a substantial number of errors on both sides of the line in "close call" cases, we can see no deterrence-based argument justifying habeas relief. A pattern of evenly distributed mistakes in marginal cases is perfectly consistent with properly functioning constitutional deterrence. The only scenario that would undermine our proposed "reasonableness" standard would be if a state court systematically erred in the government's favor in close cases. This scenario seems unlikely. The incentives to avoid reversal should, if anything, tend to push state courts in the opposite direction. And hostility to federal rights would likely manifest itself in plainly wrong rulings—the kind of rulings that habeas courts would, under our proposal, overturn.

We therefore propose a second "track" of habeas law that would use a "reasonableness" standard of review to achieve maximum constitutional deterrence of state courts at minimum cost. Implementing this second track of habeas review would be easy; the Court need only follow Teague v Lane\textsuperscript{102} to its logical conclusion. Teague held that habeas review is ordinarily unavailable when granting the habeas petitioner's claim would require the adoption or application of a "new rule" of law.\textsuperscript{103} The definition of "new

\textsuperscript{102} 489 US 288 (1989).

\textsuperscript{103} Id at 310, 315–16. Although the lead opinion of Justice O'Connor in Teague was only a plurality opinion, a majority of the Court has since adopted the views expressed in that opinion. See, for example, Penry v Lynaugh, 492 US 302 (1989). We will henceforth, therefore, refer to Justice O'Connor's Teague opinion as if it were a majority opinion.
rule" remains unclear, but recent decisions suggest that it encompasses any claim that a reasonable state judge could have rejected, based on the federal law at the time. Teague thus adopts a "benefit of the doubt" or "reasonableness" habeas standard of review for purely legal issues.

In Wright v West, however, the Court failed to extend this standard to mixed questions of law and fact (such as whether defense counsel was ineffective, or whether a confession was involuntary). The Court has not definitively resolved the issue, but several Justices and many commentators have expressed alarm at the idea of across-the-board "deference" to state court decisions on mixed issues in habeas. This alarm is unwarranted. Habeas courts should not defer to state court decisions on mixed issues; such a notion of "deference" would be based on the same archaic Federalist arguments that we contend ought to be rejected. Rather, the real issue in cases like Wright v West is: what habeas standard of review is necessary to deter state courts from misconstruing or misapplying federal law? Given the frequency with which federal claims arise in state court and the one-sidedness of habeas review (and for the same reasons that support a qualified immunity defense in Section 1983 cases), an across-the-board "reasonableness" habeas standard of review, applicable to all issues, should ensure that state judges apply federal constitutional standards, on average, just about right.

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105 112 S Ct 2482 (1992).

106 Id at 2493–98 (O'Connor, joined by Blackmun and Stevens, concurring in the judgment); id at 2498–2500 (Kennedy concurring in the judgment); Liebman, 92 Colum L Rev at 2012–33 (cited in note 2).

107 There is a category of cases that this approach does not catch: cases in which the defendant never raises a valid constitutional claim because the government conceals the evidence on which the claim rests. One might argue that habeas review is necessary in such cases, notwithstanding the absence of any unreasonable state court decision, in order to deter fraudulent behavior by the government. We think such an argument is mistaken. At the outset, we note that many (perhaps most) claims of concealment would be viable on habeas under our approach, because they involve claims of innocence. To take the most common example, a claim that the prosecution failed to disclose exculpatory evidence would receive de novo review on habeas as long as "exculpatory" is defined in the ordinary sense. So the question reduces to whether habeas review is necessary for deterrence reasons alone in "concealment" cases.

That question can only be answered by considering the contexts in which the claims are likely to arise. There are three major categories. The first is search and seizure cases where the claim is that the officer lied in the suppression hearing. It is impossible to allow litigation
C. FEDERAL COURTS AND FEDERAL LAW

One final aspect of the criminal justice system needs to be taken into account. In a system based on Nationalist criminal procedure rules, someone must make those rules. That "someone" is, ultimately, the Supreme Court. If a particular body of rules, such as those governing criminal procedure, is to be truly Nationalist, then the ultimate lawmaking authority properly must reside within the federal system. (This is so even if parity between state and federal courts exists; it is all the more so if federal courts are generally superior decision makers on federal issues.) There is a big difference between saying (as we do) that state and federal courts both apply federal criminal procedure law as their own, and saying (as we do not) that state courts should be given the authority to define, in the end, the content of federal law.

The Supreme Court has a limited decisional capacity. The Court may sometimes find itself incapable of ensuring, on its own, that federal criminal procedure law will develop in a sufficiently Nationalist manner. When such a situation arises, the Court needs to be able, in effect, to deputize an alternative federal lawmaker—namely, the lower federal courts sitting in habeas—who can perform a supporting role in creating and implementing a Nationalist body of law. That is essentially what happened in the 1960s: the Court dramatically expanded the scope of habeas just as the Criminal Procedure Revolution picked up steam. For the purpose of federal lawmaking, this expansion of habeas was appropriate, indeed probably necessary. Expansive habeas review of state criminal cases allowed the lower federal courts to help the Court craft,

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of these claims without in effect allowing litigation of all Fourth Amendment claims: litigation of "concealment" would turn out to be indistinguishable from relitigation of the merits, since a decision that the officer lied is likely to be the same as a decision that the search was illegal. And reasonableness review is sufficient as a deterrent of bad merits decisions. The second category is police interrogation cases where, again, the claim is that the officer lied at the suppression hearing. Here, the defendant has the relevant information at the time of the state court proceeding—he is the one who was being interrogated. Thus, if the government makes false claims, the defendant is in a position to challenge those claims in the state court proceeding. The third category consists of grand jury discrimination claims in which the evidence of discrimination may have been concealed by the relevant actors. (Concealment is much less likely for petit jury selection, because defense counsel will ordinarily have the information needed to raise any available claims.) Here, the presence of multiple concerned parties means both that successful concealment is unlikely and that there is a reasonable prospect of non-criminal litigation raising the relevant claim. De novo habeas review does not seem to us necessary in any of these cases.
essentially from scratch, the detailed Nationalist code of criminal procedure that we know today.\textsuperscript{108}

The need for federal lawmaking has been the basis of much criticism of \textit{Teague} doctrine. \textit{Teague} bars habeas relief anytime a petitioner's claim would require the adoption or application of a "new rule"; commentators have noted (correctly) that this means habeas courts are generally precluded from crafting such rules.\textsuperscript{109} One can similarly object to the across-the-board "reasonableness" standard of review (which is really just an extension of \textit{Teague}) that we advocate for our second track of habeas law. Does this standard of review too severely limit federal lawmaking?

The answer is no. What must be remembered is that habeas, as an alternative means of federal lawmaking, provides an opportunity for the Supreme Court to obtain the help of the lower federal courts \textit{when needed} in performing a constitutional lawmaking role that belongs, first and foremost, to the Court itself. If the Court believes that it does not need the help, because it is confident in the lawmaking abilities of the state courts as constrained and guided by its own direct review, then that is the end of the argument. The Court is the ultimate federal constitutional lawmaker; it is entitled to decide whether or not to delegate its lawmaking authority. And, through the \textit{Teague} line of cases, the Court has made plain that it does not currently need or want the help of habeas courts in shaping federal criminal procedure law.

Nor, for what it's worth, does the Court's judgment seem unreasonable. In the end, the need is for adequate opportunities for federal lawmaking, not limitless opportunities. And adequacy depends on context, especially on the scope and stability of the law already in place. In the 1960s and 1970s, much of federal criminal procedure law was a blank slate. Expansive habeas review, across the board, allowed the creation of the detailed federal criminal procedure rules that exist today. But those rules do exist today; the need for constitutional lawmaking has declined substantially. The Fourth Amendment, \textit{Miranda}, grand jury discrimination, burden-of-proof instructions—all these areas, and many more, consist of relatively mature lines of doctrine. Today, in each of

\textsuperscript{108} See Cover and Aleinikoff, 86 Yale L J 1035 (cited in note 96).

these areas, the Court either takes cases involving marginal issues, or almost never takes any cases at all. This suggests no great, continuing need for expansive habeas review as a means of federal lawmaking.

To be sure, this picture of doctrinal stability does not hold true throughout criminal procedure. Ineffective assistance law is still in flux, as courts try to give content to *Strickland v Washington*'s vague "performance" and "prejudice" prongs. *Brady* doctrine, which requires prosecutors to turn over material exculpatory evidence, is also relatively undeveloped. *Batson v Kentucky* continues to spawn important new issues, so that the federal law of jury selection seems to change fundamentally on an annual basis. And double jeopardy law seems to shift gears with surprising regularity. Some of these areas (*Strickland* and *Brady*) involve the need to create interstitial law to give content to vague constitutional standards. Others (*Batson* and double jeopardy) involve important new rulings by the Court that require substantial lower court refinement. In such areas, the Criminal Procedure Revolution is ongoing, and the need to create federal law remains strong.

But this need is easily served within the two-track system of habeas review we have already proposed. De novo review of constitutional claims in all cases where the petitioner demonstrates a "reasonable probability of innocence" means substantial lawmaking authority for habeas courts in connection with almost all *Brady* claims and many *Strickland* claims. Meanwhile, *Batson* issues regularly arise in federal criminal prosecutions (and now in civil cases as well), so that the lower federal courts have plenty of non-habeas

113 See, for example, *Powers v Ohio*, 111 S Ct 1364 (1991) (permitting *Batson* claims by defendants of different race than excluded jurors); *Georgia v MacCollum*, 112 S Ct 2348 (1992) (extending *Batson* to peremptory challenges by criminal defendants).
114 See, for example, *Grady v Corbin*, 495 US 508 (1990) (adopting prosecution's-theory-of-the-case approach to defining double jeopardy implications of prosecution for complex crime); *United States v Felix*, 112 S Ct 1377 (1992) (suggesting traditional double jeopardy doctrines may not apply to complex crimes); *United States v Dixon*, 113 S Ct 2849 (1993) (overruling *Grady*, although no opinion declaring new double jeopardy rule to replace *Grady* garnered majority support).
115 *Edmondson v Leesville Concrete Co*, 111 S Ct 2077 (1991). In addition, under *Georgia v MacCollum*, 112 S Ct 2348 (1992), *Batson* also applies to peremptories used by defense counsel in criminal cases.
opportunities for crafting new federal rules. The same is even more true of double jeopardy issues, many of which are triggered primarily by such complex federal crimes as RICO and CCE. There is thus little need for federal lawmaking on habeas in areas where a "reasonableness" standard of review would restrict it, while in areas where the need is great, there are many opportunities to satisfy it.

D. CONCLUSION: A TWO-TRACK SYSTEM OF HABEAS

We have tried to describe and justify the broad outlines of a habeas jurisprudence that aims at directly fulfilling the goals of criminal procedure, something habeas law does not currently do. The core of this jurisprudence is our proposal of two independent tracks of habeas review. We would grant habeas relief whenever a petitioner could show either (1) a constitutional violation (including substantive due process) coupled with a reasonable probability of an unjust outcome, that is, factual innocence, or (2) an unreasonable denial of a constitutional claim on the merits by the state courts. The first track protects against the imprisonment of innocent persons, which Judge Friendly rightly argued should be central to habeas.\footnote{Friendly, 38 U Chi L Rev 142 (cited in note 57).} The second track ensures that state judges "toe the constitutional mark"—that they adequately enforce the constitutional rules that govern police, prosecutors, and judges alike—which Justice Harlan viewed as habeas's core mission.\footnote{See Desist v United States, 394 US 244, 256 (1969) (Harlan dissenting); Mackey v United States, 401 US 667, 675 (1971) (Harlan dissenting and concurring in the judgment).} By creating a two-track system of habeas review, based on the values of innocence and deterrence, the criminal justice system can accommodate both Friendly's and Harlan's views about habeas in a way that also leaves more than adequate opportunities for federal lawmaking.

We also believe that these are the only justifications for federal habeas review of state criminal cases. Ensuring justice for potentially innocent petitioners, deterring unreasonable decisionmaking by state courts, and providing adequate opportunities for federal lawmaking are all that a habeas regime can realistically hope to accomplish. What remains is to discuss how habeas law might best play these roles.
III. SOME APPLICATIONS

Our proposed two-track system of habeas would do a much better job of handling claims of individual injustice than the existing system; it would also do at least as good a job of deterring unconstitutional conduct. These advantages flow, we believe, from the proposal’s anchor in criminal procedure.

Our proposal has another advantage: it would dramatically simplify the law of habeas corpus. Current habeas doctrine is plagued by its complexity. This may well be an indirect consequence of the Federalism-Nationalism debate that has dominated habeas discourse. The battle between comity and federalism on the one hand, and federal court vindication of federal rights on the other, boils down to a battle between less habeas review (across the board) and more (again, across the board). Neither Federalism nor Nationalism is self-limiting: comity and federalism always offer an argument for further restricting habeas, just as the importance of a federal forum and the lack of parity always argue in favor of expanding it. Predictably, the Supreme Court has been unwilling to follow either argument to its logical end point. The result is a system of seemingly arbitrary compromises, limitations that go thus far and no further—Federalist rules boxed in by Nationalist exceptions, or vice versa. This describes the law of substantive scope (including Stone v Powell and its progeny, if that is the right word), the law of procedural default, and especially the ongoing debate about habeas retroactivity. In all these areas, habeas doctrine has achieved a Rube Goldberg quality that frustrates all efforts to give it logical coherence.

A two-track habeas system of the sort we have proposed would largely solve this problem. By abandoning the search for rules to govern “innocence” and “deterrence” claims alike, it is possible to avoid many of the doctrinal swamps in which habeas law is now mired. To illustrate, we explain below how our proposal might apply to several contentious areas of habeas doctrine.

A. SUBSTANTIVE SCOPE AND THE RULE OF STONE V POWELL

Stone v Powell118 held that if a criminal defendant received a full and fair opportunity to litigate his Fourth Amendment claim in

state court, that claim would not be available to him on federal habeas. Full and fair opportunity is defined broadly, so Stone amounts to an almost total exclusion of Fourth Amendment claims from habeas. The decision once seemed likely to spawn a whole category of constitutional claims that would fall outside the scope of habeas, but that has not happened. Stone is today, as it was seventeen years ago, the sole exception to the rule that federal habeas review extends to all constitutional claims. We believe that the exception is probably a bad idea.

Two justifications seem to support the holding in Stone. The first is not terribly problematic: Fourth Amendment claims are unrelated to innocence and guilt, so habeas review is not necessary to prevent unjust outcomes. We argued in Part II that the categorical approach to innocence and guilt does not work, that most rules of constitutional criminal procedure protect a mix of values that sometimes includes the reliability of the guilt determination. It follows that the categories of innocence-related rights and other rights do not exist; the relevant law does not usually fit neatly into either category. Fourth Amendment claims, however, are an exception (and a very large exception at that), since (1) they arise only when the defendant seeks to suppress incriminating evidence, and (2) unlike police misconduct in interrogation, police misconduct in search and seizure cases has no tendency to undermine the reliability of any evidence that is improperly discovered. If protecting innocent defendants were habeas's only role, in other words, Stone might well make good sense.

Yet even in terms of protecting innocents, a Friendly-style prejudice standard would accomplish the same thing as Stone, without the need for a special rule for search and seizure cases. If Fourth Amendment claimants are all guilty, because their claims arise in cases in which the police found the drugs or stolen goods on the suspect, then the claimants will never be able to show a reasonable probability of an unjust outcome. In innocence terms, Stone may be harmless, but if the system were to adopt an across-the-board prejudice standard tied to innocence, Stone would also be redundant.

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The real problem with Stone, though, flows from its second justification. Stone also rests on the assumption that habeas review is not necessary to get state courts to follow the governing Fourth Amendment law—that habeas deterrence has no role to play in this area. But there is no deterrence-based argument for treating Fourth Amendment claims any differently from anything else in constitutional criminal procedure. If state courts are good enough to “toe the constitutional mark” in search and seizure cases, they should be good enough to adhere to Miranda doctrine, the rules governing peremptory challenges, double jeopardy law, and so forth. Thus, Stone really implies that habeas review should be limited to claims of factual innocence. If Stone is right, then the second “track” of our proposal is wrong: no deterrence-based habeas review is justified.

This could be the right bottom line. Anyone familiar with state court criminal procedure decisions of the 1960s and the 1990s would have to conclude that a dramatic shift has taken place. The notion that state courts as a whole are strongly pro-government in criminal procedure disputes seemed plausible thirty years ago, but it is a hard sell today, at least based on our own reading of scattered state cases. There is no good evidence (and it is hard to see how one would go about really testing the point), but it seems more plausible to believe that state court criminal procedure errors are distributed about equally on both sides of the constitutional line.

Even if these happy conclusions are correct, however, the case for habeas deterrence remains fairly powerful. Habeas need not deter only pro-government decision making in state courts as a whole; it is enough if even some state court systems regularly tend to favor prosecutors and the police in deciding criminal cases. Again, we are unaware of any evidence that might support a confident judgment in either direction. But it seems like quite a leap to conclude that just because state courts in general have improved,

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112 Id at 492–94. In making this assumption, Justice Powell necessarily relied on his belief in the parity of state and federal courts. See id at 493 and n 35.

113 Note that this argument is quite different from Justice Powell’s argument for parity: state courts may well err more than federal courts, yet those errors may not be systematically biased in the government’s favor.

122 Perhaps the most noteworthy recent effort to study this question is Craig M. Bradley, Are the State Courts Enforcing the Fourth Amendment? 77 Georgetown L J 251 (1988). Serious methodological problems, however, inherently plague such efforts; almost inevitably, such studies wind up relying on largely subjective judgments.
no particular state court system requires the policing of federal habeas courts. And because "toeing the constitutional mark" is so important, the burden of persuasion on this issue should be on Stone—that is, it should be up to those who wish to do away with habeas deterrence to show (not simply assert) that such deterrence is no longer needed anywhere. Until the showing is made, we think skepticism is justified.

And skepticism is not, in the end, especially costly. Deterrence-based habeas review does not mean de novo review; our argument suggests that across-the-board "reasonableness" review, akin to qualified immunity doctrine (or to a broad reading of Teague v Lane), would be enough to keep state courts in line. And if state courts in fact do a good job of following the relevant constitutional rules, "reasonableness" review will mean little in practice; most state court decisions will be reasonable, and most defendants will lose on habeas, absent plausible innocence claims. In short, if Stone's assumptions about both innocence and deterrence are right, then—under the two-track system we propose—it is redundant. If the assumptions are wrong, it is destructive. The system would work at least as well, and more simply, if Stone were abandoned.

B. PROCEDURAL DEFAULT

Habeas doctrine has no messier thicket than the law of defaulted claims. Thirty years ago, Fay v Noia held that a defendant who fails to raise a claim in his state trial could still raise the same claim on federal habeas, as long as the defendant (or his attorney—it was never quite clear which) did not "deliberately bypass" the state courts.124 Sixteen years ago, Wainwright v Sykes125 virtually did away with Fay, holding that a procedurally defaulted claim—that is, a claim not timely raised in state court—cannot be raised on federal court unless there was "cause" for the default and "prejudice" from failing to raise the claim. After a decade and a half of extensive litigation, "cause" has come to mean, roughly, ineffective assistance of counsel (defined as gross incompetence) or some serious misconduct by the state (such as active concealment of informa-

tion that would have given rise to the claim). There may or may not be other things that count as "cause." The definition of "prejudice" is also unclear, though it appears to mean something akin to a reasonable probability that, had the claim been timely raised, the outcome of the state proceeding would have been different. Both "cause" and "prejudice" have been, and continue to be, the subject of enormous amounts of litigation. On top of this cumbersome structure, the Court has now placed the fundamental miscarriage of justice exception, which permits one who is probably innocent to avoid the cause and prejudice requirements.

This set of rules has two major problems. First, it permits potentially grave injustices. Almost all procedural defaults are the result of defense attorney mistakes. The narrow definition of "cause," however, means that most such mistakes will not excuse the default; anything short of truly awful attorney behavior will not suffice. Thus, defendants are routinely penalized for their lawyers' errors. And this includes defendants who may well be, but cannot show that they probably are, innocent. Second, procedural default doctrine is a morass; it requires lawyers and judges to work through the equivalent of a law school exam every time a defendant seeks to raise a defaulted claim.

Both problems are easily solved, simply by separating out cases where the petitioner has a plausible claim of innocence from cases where he does not. If a habeas petitioner can show a reasonable probability that his conviction was unjust—that he is innocent of the crime charged—we believe it is wrong to deny him relief solely because his lawyer mistakenly failed to raise a claim. In the balance between justice for the defendant and the state's interest in enforcing...

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126 See Murray v Carrier, 477 US 478, 488 (1986) ("[W]e think that the existence of cause for a procedural default must ordinarily turn on whether the prisoner can show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule"). On the difficulty of showing ineffective assistance, see, for example, Burger v Kemp, 483 US 776 (1987) (refusing to find ineffective assistance of counsel based on conflict of interest when two members of same law firm represented co-defendants in capital murder case). 

127 See John C. Jeffries, Jr. and William J. Stuntz, Ineffective Assistance and Procedural Default in Federal Habeas Corpus, 57 U Chi L Rev 679, 684—85 and n 25 (1990) (arguing that this is in fact the standard). The Court has never defined "prejudice" in procedural default cases, so the process of giving content to that standard involves a good deal of inference—drawing. See id.

128 See Murray v Carrier, 477 US at 495—96.

129 Jeffries and Stuntz, 57 U Chi L Rev at 690 (cited in note 127).
ing rules against defense lawyers, the state's interest is surely the weaker. Current law acknowledges this point in principle, with the fundamental miscarriage of justice exception, but that exception is too narrow to do any good. We would accordingly broaden it a notch. Once that is done, procedural defaults should be ignored in cases involving potential innocence. The "reasonable probability" standard takes care of prejudice, and "cause" should be irrelevant.\(^\text{130}\)

On the other hand, if the defendant is not raising a potential innocence claim, there is no reason to exempt him from the default. In cases where innocence and guilt are not at stake, habeas's proper role is to ensure that state judges are doing a reasonably good job of deciding constitutional criminal procedure claims. But if the relevant constitutional claim was defaulted, the state court system did not decide it. (Under current law, if the claim has been decided on the merits, it is no longer treated as "defaulted."\(^\text{131}\)) There is no state court mistake to deter. Both "cause" and "prejudice" can safely be ignored.

In other words, our proposed two-track habeas system would permit the virtual abolition of procedural default doctrine. "Cause" would always be irrelevant—in potential innocence cases, because the defendant would get relief without it; in all other cases, because relief would be denied regardless of it. "Prejudice" would continue to matter in cases involving innocence claims; in all other cases that inquiry too would go by the boards. The only remaining rule would be that state courts would have to fairly apply their procedural rules, something they must do under present law anyway.\(^\text{132}\) The resulting regime would treat claims of real injustice more fairly, and would preserve deterrence of state court misbehavior. It would also get rid of the Sykes thicket.

C. RETROACTIVITY AND THE HABEAS STANDARD OF REVIEW

With the nationalization of criminal procedure law in the 1960s came a flood of new constitutional rules. Almost immediately, the Supreme Court began to wrestle with the question whether (and

\(^{130}\) For a more extended version of the argument made in this paragraph, see id at 691–93.

\(^{131}\) See *County Court of Ulster v Allen*, 442 US 140 (1979).

if so, to what extent) those rules should be applied retroactively
on habeas—that is, applied to cases originally decided in state court
before the new rules existed.\textsuperscript{133} The Court has not stopped wrest-
ing with the issue since.

The latest and most controversial installment in the Court's ret-
roactivity saga is the line of cases spawned by \textit{Teague v Lane}.\textsuperscript{134}
The plurality in \textit{Teague} (since adopted by several Court opinions)
went a step beyond prior retroactivity analyses: \textit{Teague} concluded
not only that habeas courts generally may not \textit{apply} new rules
retroactively, but that habeas courts generally may not \textit{create} new
rules either.\textsuperscript{135} This makes the definition of "new rules" enormously
important. On that score, the Court has not spoken clearly. Two
years ago a pair of majority opinions described a new rule as any-
thing not "compelled" by existing precedent.\textsuperscript{136} As one of us has
pointed out, this definition would turn retroactivity doctrine into
a relaxed habeas standard of review for purely legal issues: as long
as the state court decision was reasonable given the then-existing
federal law—that is, the contrary position was not compelled by
precedent—it cannot be overturned on federal habeas.\textsuperscript{137} Yet in
\textit{Wright v West}, several Justices heatedly denied that \textit{Teague}
estab-
lished a habeas standard of review for questions of law;\textsuperscript{138}
more-
over, the Court in \textit{Wright} declined to adopt a rule of "deference"
to reasonable state court decisions concerning mixed questions of law
and fact.\textsuperscript{139} So it remains unclear how "new rule" is to be defined.

Of all the Court's recent habeas initiatives, we think—unlike

\textsuperscript{133} See, for example, \textit{Linkletter v Walker}, 381 US 618 (1965) (retroactive application to
habeas cases of \textit{Mapp v Ohio}, 367 US 643 (1961)); \textit{Tehan v United States ex rel Shott}, 382 US
406 (1966) (retroactive application to habeas cases of \textit{Griffin v California}, 380 US 609 (1965));
\textit{Johnson v New Jersey}, 384 US 719 (1966) (retroactive application to habeas cases of \textit{Escobedo
v Illinois}, 378 US 478 (1964), and \textit{Miranda v Arizona}, 384 US 436 (1966)).

\textsuperscript{134} 489 US 288 (1989).

\textsuperscript{135} Id at 315–16. \textit{Teague} has two exceptions—one for claims of substantive unconstitu-
tionality, and the other for "watershed" rules of criminal procedure seriously implicating inno-
cence. Id at 311–14. The second exception is unlikely ever to apply; the real "watershed"
rules are already in place. And the first exception will only very rarely apply outside
the death penalty context, the one context where substantive constitutional restraints are
common.


\textsuperscript{137} Hoffmann, 1989 Supreme Court Review at 180–84 (cited in note 104).

\textsuperscript{138} 112 S Ct at 2496–97 (O'Connor, joined by Blackmun and Stevens, concurring in the
judgment); id at 2498–99 (Kennedy concurring in the judgment).

\textsuperscript{139} The Court left this issue open, though four of the seven Justices who expressed a view
about it were critical of the idea of "reasonableness" review for mixed questions.
almost everyone else who has written about it—that *Teague* is potentially the most useful. Its chief problem is that, as in the rest of habeas law, the Court does not distinguish in *Teague* between innocence-related and non-innocence-related claims. For innocence-related claims, we see no reason to apply *Teague*’s general rule of non-retroactivity at all. But for non-innocence-related claims, there is every reason to extend *Teague* to its logical conclusion and require habeas courts to look generally, not at whether the challenged state court decision was right, but at whether that decision was reasonable. Once the distinction is drawn between innocence- and non-innocence-related claims, in other words, *Teague* can be seen for what it really is: not a retroactivity decision, but rather a decision about the appropriate standard of review in habeas cases.\(^{140}\)

We have already explained why *Teague* should not apply to the proposed first track of habeas. If a defendant can show a reasonable probability of innocence, plus a constitutional violation—under the law in effect at the time of the federal habeas decision—that should suffice to justify habeas relief. The “reasonableness” of the state court’s decision is not particularly relevant, since the point of habeas relief in such a case would not be to deter state court mistakes but to rectify injustice. The point is the same as in the procedural default context: it seems wrong to uphold a conviction in the face of both unconstitutional conduct (under today’s law) and a substantial likelihood of an unjust outcome, solely because the state court is not blameworthy.

Under the proposed second track of habeas, however, where the defendant’s claim is not that his conviction is unjust, but that habeas relief is needed for deterrence, an across-the-board “reasonableness” standard of review is appropriate. If the entire point of the second track of habeas is deterrence, and if the deterrence message is aimed at state courts, then the “reasonableness” of the

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\(^{140}\) This is why *Teague* seems to be so out of step with the rest of the Court’s recent retroactivity caselaw. Outside the habeas context, in both criminal and civil cases, the Court has made clear that its decisions must generally be applied fully retroactively. See, for example, *Griffith v Kentucky*, 479 US 314 (1987) (criminal case); *James B. Beam Distilling Co. v Georgia*, 111 S Ct 2439 (1991) (civil case); *Harper v Virginia Department of Taxation*, 113 S Ct 2510 (1993) (civil case).

One of us previously has expressed some concerns about *Teague*’s deferential standard of review. See Joseph L. Hoffmann, *Starting from Scratch: Rethinking Federal Habeas Review of Death Penalty Cases*, 20 Fla St U L Rev 133 (1992); Hoffmann, 1990 BYU L Rev 183 (cited in note 62); Hoffmann, 1989 Supreme Court Review 165 (cited in note 104). These concerns
state court decision is precisely what should matter to the habeas court. It makes no difference, for deterrence purposes, whether the relevant constitutional issue is characterized as purely legal, purely factual, or a mixed issue of law and fact. The "reasonableness" standard (which, by the way, is surely sufficiently malleable to ensure that habeas courts can establish whatever standard of care they deem appropriate with respect to state court adjudication of federal issues) works just as well for all three kinds of issues.

A "reasonableness" standard of review for all non-innocence-related claims would greatly simplify habeas law while expanding the ability of defendants to raise claims of individual injustice. Under current habeas doctrine, habeas courts must first categorize an issue as legal, factual, or mixed. Review is then highly deferential on factual issues (under the federal habeas statute, state court findings of fact are generally presumed correct if the court's procedures were fair); 141 de novo on mixed questions of law and fact; 142 and on legal issues, under Teague, apparently available only for unreasonable errors of law by state judges, although Wright v West suggests this standard may not always apply. 143 This convoluted construct is indefensible. A "reasonableness" standard of review for all non-innocence-related claims is both logically defensible and much simpler.

A system such as the one we propose would mean that some constitutional violations would go unremedied on habeas. State court decisions that are erroneous, but not unreasonably so, and that do not lead to the conviction of a potentially innocent defendant, would not be subject to reversal by a habeas court. This supposed problem has prompted much of the criticism of Teague.

seem, in retrospect, to relate primarily to the application of a Teague-like rule of deference to prior adjudication of innocence-related claims.

141 28 USC § 2254(d); Sumner v Mata, 449 US 539 (1981).
143 Compare Butler v McKellar, 494 US 407, 414 (1990) ("The 'new rule' principle ... validates reasonable, good faith interpretations of existing precedents made by state courts even though they are shown to be contrary to later decisions") with Wright v West, 112 S Ct 2482, 2497 (1992) (O'Connor concurring in the judgment) ("Teague requires courts to ask whether the rule a habeas petitioner seeks can be meaningfully distinguished from that established by binding precedent at the time his state court conviction became final. ... Even though we have characterized the new rule inquiry as whether 'reasonable jurists' could disagree as to whether a result is dictated by precedent, ... the standard for determining when a case establishes a new rule is 'objective,' and the mere existence of conflicting authority does not necessarily mean a rule is new").
But the criticism misperceives the nature of the constitutional violations—that is, it misperceives the nature of modern criminal procedure. Violations of constitutional criminal procedure rules can inflict serious injury or slight harm on criminal defendants; they can be case-specific or structural; they can bear directly on whether the right person was convicted or have nothing to do with the accuracy of the guilty verdict. Criminal litigation is used to enforce rules in all these categories. It is used to protect both individual defendants and other constituencies, like potential jurors or innocent citizens who might be targets of police searches. What it means to “remedy” a given violation should depend on such factors, and on the procedural setting in which the issue arises.

To put it another way, every right deserves a remedy, but it is not true that every violation deserves every possible remedy. Where the interest in avoiding the conviction of innocents is directly at stake, habeas relief is necessary to avoid injustice. Where that interest is not directly at stake, habeas has no real compensatory role to play. And a “reasonableness” standard of review fully satisfies the habeas deterrence interest. Finally, Section 1983 actions are still available to compensate injuries other than wrongful conviction.

For the past twenty years, the Supreme Court has been seeking some doctrinal device for separating habeas claims worth hearing from those not worth hearing. *Stone v Powell*, procedural default doctrine, and *Teague* are all products of that search. *Teague* is far preferable to the other two: unlike *Stone* it does not require categorization of rights in the abstract, and unlike procedural default doctrine it responds directly to the reasonableness of state court decision making. Moreover, given a separate track of de novo habeas review for potential innocence claims, *Teague’s* “reasonableness” standard of review renders the other two doctrines completely unnecessary. The real problem with *Teague* is that it does not go far enough: because of the Court’s unfortunate decision in *Wright v West*, we have been left with a hodge-podge habeas standard of review. *Teague* needs not to be abandoned (as the critics have urged), but to be expanded.

IV. HABEAS AND THE DEATH PENALTY

Since the revival of capital punishment in the mid-1970s, habeas has been the primary battleground for death penalty litigation. One commentator has estimated that habeas relief is granted
in almost half of all death penalty cases,\textsuperscript{144} as compared to a minuscule success rate on habeas in non-capital cases.\textsuperscript{145} In these circumstances, it would be unthinkable to propose a new way of thinking about habeas law without considering its impact on the administration of the death penalty.

Under our general approach, habeas law should apply to capital cases in a manner that reflects the nature of the underlying federal constitutional rights that are enforced in those cases. Because the federal constitutional rights that are unique to death penalty litigation (namely, most of the intricate substantive and procedural rights that the Court has derived from the Eighth Amendment) may substantially differ from the rights that exist in non-capital cases, habeas law should perhaps differ as well.

The difference does not come into play in cases involving habeas's deterrence role. In cases where the primary purpose of granting habeas relief is to deter state court mistakes, there is no reason to treat the Eighth Amendment any differently from the Fourth, Fifth, or Sixth Amendments. If a state court acts unreasonably in construing or applying the Eighth Amendment in a capital case, habeas relief should be available. If the state court acts reasonably in interpreting and applying the relevant federal law, habeas relief should (to the extent deterrence alone is at stake) be denied.

The problem with death penalty cases is the difficulty of applying the concept of "innocence" to capital sentencing. The Court's modern Eighth Amendment law, and the fundamental values and concerns on which that law is based, clearly contemplate a notion of substantive justice in capital sentencing that extends well beyond the protection of defendants who are innocent of capital murder.\textsuperscript{146} But how much further does this concept of substantive justice in capital sentencing extend? What is the analogue, in

\textsuperscript{144} Professor James Liebman has determined that, between 1976 and 1985, the overall success rate for death penalty petitioners in habeas was 49 percent. See Liebman, \textit{Federal Habeas Corpus} at 23--24 n 97 (cited in note 5).

\textsuperscript{145} Professor Liebman notes that, in fiscal year 1985, only 1.2% of all habeas petitions decided by the federal district courts even received a hearing before final disposition, and only 15% of appealed habeas cases resulted in reversals or remands of the district court's disposition. Id.

\textsuperscript{146} See, for example, \textit{Lockett v Ohio}, 438 US 586 (1978) (recognizing constitutional right to present mitigating evidence, based on need for individualized sentencing to consider, inter alia, personal moral culpability of defendant); \textit{Enmund v Florida}, 458 US 782 (1982), and \textit{Tison v Arizona}, 481 US 137 (1987) (establishing minimum constitutional requirements of personal moral culpability for imposition of death penalty on non-triggerman felony murderer).
capital sentencing, of a defendant's claim that he is innocent of the crime?

The Supreme Court faced this problem in Sawyer v Whitley.\textsuperscript{147} Whitley involved the scope of the "fundamental miscarriage of justice" exception to the procedural default/successive petition/abuse of the writ bars to habeas relief.\textsuperscript{148} The specific question was, what kinds of capital defendants should be able to use this exception when challenging errors in capital sentencing proceedings? Only those defendants who claim to be innocent of their capital crime? Those who claim to be "innocent" of the aggravating circumstances that made them death-eligible? Those who contend that their death sentences are undeserved, despite their factual guilt? Or those who complain that, though they may deserve to die for their crimes in the abstract, other defendants of equal or greater culpability have not been sentenced to death?

In Whitley, the Court held that "fundamental miscarriage of justice," in the context of capital sentencing, requires a showing by clear and convincing evidence that no reasonable juror would find the existence of an aggravating circumstance that would render the defendant death-eligible. The Court concluded that any less stringent standard would be too subjective and would seriously undermine the cause-and-prejudice standard for procedural default by allowing capital defendants to obtain habeas relief upon a showing of "prejudice," whether or not they could show "cause" for the default.\textsuperscript{149}

Whether one agrees with the Court's particular resolution of the "innocence" issue in Whitley will depend on one's own views about the administration of the death penalty. Some would argue that there is nothing seriously wrong with executing any defendant who commits a capital crime and also meets basic statutory requirements of aggravation that justify, in general, the imposition of the death penalty.\textsuperscript{150} According to this position, the overriding concern

\textsuperscript{147} 112 S Ct 2514 (1992).


\textsuperscript{149} Whitley, 112 S Ct at 2521–25 and n 13.

\textsuperscript{150} See, for example, Ernest van den Haag, The Collapse of the Case Against Capital Punishment, National Review (March 31, 1978), at 397 ("The Constitution, though it enjoins us to minimize capriciousness, does not enjoin a standard of unattainable perfection or exclude penalties because that standard has not been attained").
in administering a death penalty system is preventing the execution of a defendant who is ineligible to receive a death sentence. Beyond such eligibility concerns, some imprecision in actually meting out capital punishment to defendants is probably inevitable and generally morally acceptable.

Others would contend, however, that capital punishment must be reserved for those defendants who are truly the most deserving of death—and that even defendants who have committed aggravated capital crimes may properly claim injustice if they are given death sentences when others of equal or greater culpability receive prison terms. On this argument, the death penalty cannot be imposed in a morally acceptable fashion unless a precise "fit" is achieved between those defendants who most deserve it and those who actually receive it.

Without trying to resolve this moral debate, we believe that our approach to habeas offers the best route to a solution. Whatever ultimately emerges as the most appropriate definition of "injustice" in capital sentencing—whatever turns out to be the most appropriate analogue in capital sentencing to a defendant's claim of innocence of a crime—should become an additional avenue for obtaining de novo review on federal habeas. If a capital defendant can combine an asserted federal constitutional violation with a sufficiently substantial allegation of "injustice" in capital sentencing (however that term may ultimately be defined), the habeas court should provide de novo review of the defendant's federal claim.

In other words, habeas doctrine for capital cases should depend on the substantive goals of the constitutional criminal procedure rules that govern those cases. The goals themselves, and their proper relationship to just outcomes, are in dispute. But that dis-

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151 See, for example, Nathanson, An Eye for an Eye?: The Morality of Punishing by Death 62 (1987) ("If death is arbitrarily imposed on only some who deserve it, while others equally deserving are treated more leniently, then those who are executed are treated unjustly, even if they deserved to die").

152 By analogy to non-capital cases, a capital defendant should be entitled to de novo habeas review of his constitutional claims upon a showing of a "reasonable probability" that an "injustice" (however that term may be defined) has occurred in his capital sentencing.

In addition, we reiterate here our view that a "naked" innocence claim of the sort presented to the Court in Herrera v Collins, 113 S Ct 853 (1993), if supported by a sufficiently strong showing of potential innocence (even stronger than a "reasonable probability of innocence"), warrants habeas relief in a non-capital case under substantive due process. By analogy, a capital defendant should be entitled to habeas relief upon a similarly strong showing of a potential "injustice" (however that term may be defined) in his capital sentencing. This result could be based on either the Due Process Clause or the Eighth Amendment.
pute ought to be addressed directly, not fought out through the proxy of habeas doctrine.

On the other side of the coin, habeas doctrine for non-capital cases should not be held hostage to disputes about the death penalty. As one of us recently argued, \(^{153}\) battles over capital punishment have for too long distorted habeas doctrine ostensibly designed for all criminal cases. Unlike the Court, we see no reason to assume that the same habeas rules should govern both capital and non-capital cases. Just as innocence claims should, in our view, be treated differently under habeas law than non-innocence claims, so too should the special nature of substantive justice in capital sentencing give rise to a special way of obtaining de novo habeas review, and potential habeas relief.

V. Conclusion

The current debate about habeas is sterile. Judicial opinions and law review articles expound on the importance of federalism and federal rights, and debate the meaning of decades-old Supreme Court habeas decisions. But habeas is part of a criminal justice system in which federalism died a generation ago, when the Court nationalized the law of criminal procedure. In this system, as a practical matter, all criminal procedure rights are federal rights, and those federal rights are enforced routinely in state courts. In this system, there is no need to allocate power between state and federal spheres of sovereignty, because state law's sphere of sovereignty no longer exists. And the federal law that governs this system has changed so dramatically that forty-year-old Supreme Court habeas decisions might as well have come from another planet.

It is time to change the terms of the discussion. Habeas review can play several useful roles in the criminal justice system, but we can identify and implement those roles only if we start seeing habeas as a part of criminal procedure, rather than as simply a weapon in a battle between federal and state law. Seen as a part of criminal procedure, habeas can advance individual justice by giving special

status to constitutional rights coupled with substantial claims of innocence. Habeas review can also help ensure that the law of criminal procedure is obeyed by state and local actors, by overturning unreasonable interpretations and applications of that law by state judges. And habeas can do these things while still giving federal courts sufficient opportunities for federal lawmaking, at least in the context of a system where, in many areas, well-developed bodies of law already exist.

We propose two critical changes. The first is the realization that habeas need not operate on the principle that “one size fits all.” Habeas is a remedy, and most remedies properly take account of the nature and magnitude of the wrong. In this context, that means treating innocence-related claims differently from other claims, a result that follows naturally from the fact that habeas is part of a system whose chief goal is to separate the innocent from the guilty. Habeas can provide a significant layer of protection for innocent defendants, but only if innocence-related claims are freed from the restrictions of the procedural default and habeas retroactivity doctrines.

The second is the recognition of the great opportunity presented by Teague. Though no recent habeas decision has received more criticism than Teague, it actually offers a way out of the habeas swamp: if followed to its logical conclusion, Teague could quickly lead to the establishment of a general habeas standard of review—for non-innocence-related claims—that would eliminate the need for Stone v Powell, procedural default doctrine, and even a separate habeas retroactivity doctrine. Teague offers the potential to untie all of these knots because, unlike Stone v Powell, Wainwright v Sykes, and all previous attempts to separate new rules from old ones, Teague focuses directly on the reasonableness of state court decision making. This is precisely the right focus for habeas in its deterrence role.

Protecting innocence, deterring unreasonable state court decision making, and providing sufficient opportunities for federal lawmaking—these are the goals that modern habeas law should strive to achieve. If we cast aside the debate about federalism, comity, the right to a federal forum, and the parity of state and federal courts, we can do a much better job of reaching these goals.