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It is now generally accepted that the legal proceedings connected with the confinement of a serious offender will not inevitably terminate with sentencing upon the jury's verdict. Even in Mr. Dooley's time the appellate stages might extend so long that if a new trial should be ordered, (T]h' witnesses ar-re all dead an' burrid, an' th' onforchin't crim'nal is turned out on a wurruld that has frgotten him so completely that he can't aven get a job as an actor on th' vowdyville stage.1

Today the appellate proceedings may be supplemented by post-conviction proceedings which often consume more time and judicial effort than the original trial and appeal.

For the greater part of recent American legal history, the procedural form for collateral post-conviction relief has been the writ of habeas corpus.2 That writ was seen to be of such fundamental importance that its availability was guaranteed by the United States Constitution,3 the First Judiciary Act,4 and the early law of many states.5

That writ, however, was not designed primarily as a post-appellate writ,6 and was procedurally unsuited to its new office. Its greatest drawback was the requirement that suit for the writ be brought in the district where the applicant was confined.7 The result became a sadly disproportionate allocation of the case load among the federal courts.8

The time was therefore set for a reevaluation of the procedural and substantive law of post-conviction review in the federal courts. The Judicial Conference of the United States made an admirable beginning, the Congress agreed, but the courts, alas led by the Supreme Court of the

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1. MR. DOOLEY ON THE CHOICE OF LAW 7 (Bander ed. 1963).
2. The writ of coram nobis is also occasionally used with success. See Lyons v. Goldstein, 290 N.Y. 19, 47 N.E.2d 425 (1943); see generally, Orfield, Writ of Error Coram Nobis, 20 VA. L. REV. 423 (1934).
6. See text accompanying note 62 infra.
7. This procedural result followed from the fact that the writ was not, in theory, adapted to post-conviction review. The writ lay, traditionally, only to test detention, not to review a case, and the material fact, in theory, was therefore restraint, not trial.
8. Similar problems, beyond the scope of this paper, have arisen in the states, producing, e.g. KAN. STAT. ANN. § 60-1607 (1964).
United States, have failed to make use of the opportunity for constructive rethinking.

The legislative response was to divide the problem of post-conviction relief into two parts: one, cases in which state prisoners contend that they are entitled to federal relief, and two, those in which federal prisoners seek to attack their federal trial. The state habeas corpus problem has been the source of much controversy, undoubtedly due to the touchy problems of federalism involved. The result of this controversy has been to slight the problems of review of federal sentences, and to ignore the necessity for developing two substantially independent bodies of law.

Much has been written on section 2255 generally, and two massive compendia collecting the countless cases are available. This article is therefore only peripherally concerned with a statement of what courts now recognize as grounds under 2255; the central problem is to determine the rule by which the grounds are discovered, and particularly to evaluate that rule. The language of the statute will be shown to offer no clear guide: the Supreme Court has pronounced the rule that 2255 is equivalent to habeas corpus, but better rules are possible.

**SECTION 2255**

The statute governing review of federal sentences, adopted by Congress in 1948, upon recommendation of the Judicial Conference, provides that,

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the court was without jurisdiction to impose such sentence, or that the sen-

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11. Habeas corpus may still be an appropriate remedy in some purely intrafederal criminal contexts, such as confinement in a federal medical center pursuant to a pretrial order. Tyler v. Harris, 226 F. Supp. 852 (W.D. Mo. 1964).

12. The present situation has been characterized as “unwise” and “critical” in a resolution passed by the Conference of Chief Justices on August 10, 1963.

13. The most obvious difference is that a federal defendant has already had an opportunity to present his claim before a presumably pro-federal forum. The state defendant, however, may have been forced to proffer his constitutional claim in a hostile forum. There are also differences in the general quality of many state proceedings which may, as a matter of policy, call for a different legal approach.


sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence . . . .16

Although the statute appears to define the terms of its availability, not too detailed an analysis is required to demonstrate the practical uselessness of the statute's unelaborated terms. The statute purports to provide four grounds.

One: "sentence was imposed in violation of the Constitution or laws of the United States." This language is subject to two possible interpretations, neither one very helpful. On the one hand, this provision might be read to mean that where sentence is imposed in violation of the law of sentencing, the sentence is subject to attack. Thus read, the first ground would not serve to void a sentence because of trial errors. This interpretation, in effect, would make this ground of the statute roughly equivalent to Fed. Rule Crim. Proc. 35, which authorizes correction of illegal sentences. The one case decided by the Supreme Court17 on the problem of what constitute grounds under 2255 involved a technical problem of sentencing law, but relief was denied. Perhaps this section applies only to "really significant" sentencing defects, such as a sentence in excess of the statutory maximum18 or in violation of the prohibition against cruel and unusual punishments.19

The other linguistically possible construction of the first ground is legally untenable. It might be argued that this language meant that a sentence imposed after a trial error of any kind was subject to attack, since a sentence following an improper trial could arguably be described as "illegal." But if any one principle in this area is absolutely clear, it is that the number of trial errors which can be challenged by section 2255 is strictly limited.20

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18. Which, of course, is specifically mentioned later in the statute. See text accompanying notes 39-43 infra.
19. U.S. CONST. amend. 8. And, in the light of cases like Robinson v. California, 370 U.S. 660 (1962), and Driver v. Hinnant, 356 F.2d 761 (4th Cir., 1966) it may well be that this guarantee is of some substantial value to the defendant. In Robinson, the Supreme Court declared that drug addiction was not a crime, and therefore any punishment was cruel and unusual. That reasoning has been extended to alcoholism in the Driver case. The author is not aware of any case in which this line of argument has been applied under section 2255. In any case, in the present state of the law the courts are apparently not interested in construing this statute technically.
20. See, e.g., the twenty-four cases cited in 4 BARBON & HOLTZOFF § 2306 at 346 n. 85 (cum. supp. 1964). See also, Hill v. United States, 368 U.S. 424, 432 n.2 (dissent). Nor will the sentence be vacated merely because the rule not followed finds its source in the Constitution. E.g., United States v. Robinson, 143 F. Supp. 286 (D. Ky. 1956) (Speedy trial).
Two: "the court was without jurisdiction to impose such sentence."
This ground, again, could be read either narrowly or broadly. One reading this statute without a background of knowledge of the tortuous past of the writ of habeas corpus might conclude that this ground dealt only with that kind of problem ordinarily associated with the law of jurisdiction—surely a not unreasonable assumption. One would look to such factors as the geographical location of the defendant\textsuperscript{21} or of the legal authorities,\textsuperscript{22} or to the giving of notice.\textsuperscript{23}

Unfortunately, however, a straightforward reading of this language is not possible in view of the history of the writ of habeas corpus. Perhaps the most striking feature of the early history of the Great Writ is that it was "originally intended not to get people out of prison, but to put them in it."\textsuperscript{24} The term, "habeas corpus," was, in form, a directive to the Sheriff to "have the body" of a certain person in court.\textsuperscript{25} Such instructions to the Sheriff were regularly given in the writ of capias ad respondendum, which in effect amounted to the established form of civil procedure for securing the presence of the defendant by, if need be, dragging him kicking and screaming into court (a primitive but effective procedure devised, one assumes, to obviate default judgments). Early in the fifteenth century, the writ of habeas corpus began to be fairly regularly used as a form of arrest in criminal procedure, directing the Sheriff not merely to have the defendant \textit{in court} but "in our prison and under your custody."

At this stage in the development of the writ, habeas corpus came to be used as a tool in the jurisdictional struggle between the royal courts and the baronial and other local courts.\textsuperscript{26} One may therefore suspect that when the King's judges felt that some person might receive too easy a sentence in the inferior courts, habeas corpus, far from being the protector of sacred liberties, was a means of assuring punishment. There is also, of course, evidence that habeas corpus was used to protect subjects from pun-

\textsuperscript{21} See United States v. Provoo, 215 F.2d 531 (2d Cir. 1954), where the defendant, a member of the armed services, had been apprehended in one district and transported forcibly to another district by the military (for a dishonorable discharge). His subsequent civil indictment for treason was improper in the second district, and was subject to attack under section 2255.

\textsuperscript{22} See Wallace v. United States, 174 F.2d 112, \textit{cert. denied}, 337 U.S. 947 (1949), which holds that a grand jury's indictment for an offense occurring in another district may not be challenged in a proceeding under section 2255, but only by appeal.

\textsuperscript{23} See Ray v. United States, 192 F.2d 658 (5th Cir. 1951), holding that failure to deliver copy of indictment, \textit{although error}, \textit{could not} be raised under section 2255.

\textsuperscript{24} Jenks, \textit{The Story of the Habeas Corpus}, 18 \textit{Law Quart. Rev.} 64 (1902).

\textsuperscript{25} The words "habeas corpus" were, by 1275, "making their way into divers writs." Pollock & Maitland, \textit{History of English Law} 586 (2d ed. repr. 1923).

\textsuperscript{26} Holdsworth, \textit{History of English Law} 109 (1926) gives an example of a
ishment by the inferior courts. The final chapter in this phase of the history of the writ was its use, during the sixteenth century, in the great jurisdictional rivalry between common law and equity. Up to this point it may be said that the writ was not a stalwart defense of Englishmen's liberties.

But in the time of the Stewarts, the common lawyers were men of great ingenuity who sought, with more success than candor, to insist that the law of England has always been superior to the royal prerogative. But their attitude demanded a reinterpretation of English law. Thus, in this period of the law, habeas corpus began to be issued to free persons from the executive authority, rather than as an aid to assuring the jurisdiction of the tribunal to imprison, or, at least, to try them.

This historical excursion was undertaken to establish two points: one will be discussed below. The point here relevant is that the jurisdictional test for habeas corpus evolved from a historical concept not relevant to current problems of criminal law enforcement in the United States. Yet American law still faces the problem posed in the seventeenth century that "when a remedy which was originally devised for one purpose, has come to be used for a different purpose, it will generally be found that difficult questions will arise as to its application. Its new use will raise all sorts of problems as to its competence, to which no certain answer can be given."

Nonetheless, the jurisdictional language was carried through the nineteenth century and into the twentieth by the Supreme Court. Indeed, some federal courts continue to use "jurisdictional" language, coupled with the fictitious approach that some errors may be of such magnitude that they, in effect, divest the court of jurisdiction. One eminent scholar

struggle for jurisdiction between the King's court and the Staple Court of Chichester, resulting in victory for the royal court by habeas corpus. Y.B. Mich. 13 Hen. 4, pl. 4.
27. See generally HOLDSWORTH, op. cit. supra note 26, at 111, esp. nn.3-5.
28. See, e.g., the dictum in Y.B. Mich. 22 Edw. 4, pl. 21.
29. Coke's commentary on a statute regarding bail is described as "an audacious piece of political controversy, thinly disguised under cover of legal exegesis. It is kindest to remember, that the Second Institute was not published until some time after its author's death." Jenks, supra note 24, at 65.
30. E.g., Searche's Case, 1 Leo. 70 (1588).
31. See text accompanying note 62 infra.
32. Although the use of federal habeas corpus for state prisoners still has some aspects of a judicial "jurisdictional" struggle, see note 11 supra, any serious historical parallel is not worth the candle. There is, perhaps, a very limited analogy in the case of a federal officer indicted by a state and a Chancery clerk indicted in the law courts. Compare Ohio v. Thomas, 173 U.S. 276 (1899), with Y.B. Hill. 14 Hen. 4, pl. 72.
33. HOLDSWORTH, op. cit. supra note 26, at 114.
34. See, e.g., In re Lennon, 166 U.S. 548 (1897); Knewel v. Egan, 268 U.S. 442 (1925).
35. See, e.g., Pulliam v. United States, 178 F.2d 777 (10th Cir. 1949).
has suggested that the Supreme Court's frequent use of jurisdictional language was attributable to its reluctance to assume a function of reviewing federal criminal cases in view of the fact that the statute authorizing direct review clearly excluded federal criminal cases. The same writer goes on to conclude that "the 'jurisdictional' concept has lost all useful meaning as a measure of intrafederal (section 2255) review." We may then conclude, based on this historical digression, that the jurisdictional language in section 2255 is not a touchstone to that section's meaning, although a too casual reading of the precedents might lead to a contrary impression.

Three: the least problematical of the statutory grounds is that which provides for vacation of a sentence "in excess of the maximum authorized by law." Thus where a defendant was convicted of theft from the mails, but there was no allegation that the value of the stolen material exceeded a set figure prerequisite to longer imprisonment, a sentence for longer imprisonment was properly vacated. And similarly where a defendant is accused of a Dyer Act violation, for which the maximum sentence would be five years, waives indictment and pleads guilty, the imposition of an indeterminate juvenile sentence, which might amount to six years, is error correctible under section 2255. Nor is the right to vacate an excessive sentence in such circumstances lost by the fact that the defendant violated his parole.

The tenacity of the jurisdictional origin of the writ of habeas corpus is illustrated by the fact that distinguished courts still sometimes speak of an excessive sentence as being one whose defect is "jurisdictional."

It should be noted that the ground of "excessive" sentence is not avail-

37. Id. at 383. It nonetheless remains true, as Professor Amsterdam points out, that the jurisdictional "rubric" may have use for the advocate. Id. at 383 n.28; see also United States v. Lovely, 319 F.2d 673 (4th Cir. 1963).
38. The reader may be somewhat ired at having taken a Coke's tour of the Staple Court of Chichester, only to find that the precedents of that ancient and honorable court have a limited contemporary vitality. He may be consoled by the fact that continued use of jurisdictional language by the courts, see e.g., Pulliam v. United States, 178 F.2d 777 (10th Cir. 1949); Brown v. United States, 268 F.2d 118 (9th Cir. 1959), has made it necessary to examine the origin of that language. One suspects that were the courts likewise aware of that history, they also might prefer more modern language.
40. Chapin v. United States, 341 F.2d 900 (10th Cir. 1965). Accord, King v. United States, 346 F.2d 159 (10th Cir. 1965). But where defendant consents understandingly to the indeterminate Youth Corrections Act sentence, the fact that his sentence is longer than the original would have been is not grounds for vacation. Young Hee Choy v. United States, 344 F.2d 126 (9th Cir. 1965).
41. Workman v. United States, 337 F.2d 226 (1st Cir. 1964).
42. E.g., Brown v. United States, 268 F.2d 118 (9th Cir. 1959).
able when the defect in the sentencing procedure has to do with the manner of imposition.43

Four: "otherwise subject to collateral attack." The fourth ground rather obviously does not define precisely its limits. The only reasonable construction to put upon this clause is that it is merely an invitation to the courts to develop, on a case-by-case basis, the grounds for relief. It seems clear that the use of such broad language is expressive of an intent not to freeze the scope of post-conviction relief—an intent which has not been given force through judicial development.

There are two final observations to make about the wording of section 2255. One, that despite the uncertainty concerning what conditions entitle criminals to release, it would appear that the Judicial Conference has decided that the mere fact that a defendant can prove his innocence does not entitle him to relief: the Conference specifically rejected a proposed ground of vacation that the defendant "was not the person that committed the crime."44 Two, it should be noted that the problem of drafting a provision defining the scope of collateral relief with some specificity is not insurmountable. The Judicial Conference has undertaken, with some success,45 to redraft the provisions relating to federal review of state decisions: but since section 2255 is not a source of political controversy, its ambiguities appear less likely to be a popular subject for legislation (for that matter, the passage of the habeas corpus bill is not imminent.)46

THE SUPREME COURT'S CONTRIBUTION

United States v. Hayman47

The Hayman case, although not directly concerned with the problem of what constitute grounds under section 2255, is the most important

43. Cf. Hill v. United States, 368 U.S. 424 (1962), discussed below. But an error in the manner of imposing sentence may still entitle defendant to vacation where the error is severe—e.g., his absence at the final determination of sentence. See United States v. Behrens, 375 U.S. 162 (1963), also discussed below.
45. Report of the Committee on Habeas Corpus, United States Judicial Conference, 33 F.R.D. 363 (1964). The proposed section, id. appendix I at 389, is too long to be set out here, but two features of its draftsmanship are worth noting:
(1) The difficulties associated with the use of the word "jurisdiction" have perhaps been eased by the more explicit phrase "jurisdiction of the subject matter or over the person of the applicant," which evokes more directly problems like those discussed in notes 20–23 and accompanying text, supra.
(2) It was still felt necessary to include, in the last clause, an expression of convenient ambiguity: "that the applicant was otherwise denied due process of law..."
46. See Report, supra note 45, at 376–77.
47. 342 U.S. 205 (1952).
Supreme Court case dealing generally with that section. Hayman filed an application under section 2255, alleging that his attorney had, without Hayman's consent, also represented a co-defendant, to the detriment of Hayman's sixth amendment rights. The district court held extensive but ex parte hearings, concluding that Hayman had consented to his lawyer's double duty. The court of appeals, on its own motion, ruled that section 2255 was unconstitutional since section 2255 was made prerequisite to the writ of habeas corpus, thereby infringing on the Constitution. The court of appeals took the view that section 2255 did not require the presence of the petitioner at the hearing, and was therefore an inadequate remedy.

The Supreme Court granted certiorari limited to the constitutional question. The ultimate holding of the Court was that the constitutional issue was not presented, and that the court below therefore erred in holding the statute unconstitutional. What is relevant for our purpose is that the Supreme Court announced quite emphatically that the grounds for relief under section 2255 are identical with those available under the writ of habeas corpus: "... the sole purpose was to minimize the difficulties encountered in habeas corpus hearings by affording the same rights in another and more convenient forum." The Supreme Court's decision that the grounds of habeas corpus and section 2255 are identical avoids any constitutional difficulties. For although the Supreme Court theoretically decided that the constitutional issue was not presented, the basis of its holding that the issue was not presented was that it must be shown that some right which would have been available under habeas corpus was not available under section 2255—but at the same time, the Court indicates that section 2255 rights are identical with habeas corpus rights. Thus, the Supreme Court has held the statute constitutional by the indirect means of holding it to be impossible ever to present the issue of its unconstitutionality.

48. One suspects that the thoroughness of the opinion is largely due to petitioner's assigned counsel, Professor Paul Freund, and perhaps also to the fact that the author of the opinion, Chief Justice Vinson, was chairman of the Judicial Conference when section 2255 was proposed.
49. Art. I, sec. 9(2): "The Privilege of Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."
50. Basing its view on the statutory language that "A court may entertain and determine such motion without requiring the production of the prisoner at the hearing."
52. The Supreme Court determined that the court of appeals improperly held that petitioner's presence was not required in this case. Although the statute does not invariably require the presence of the prisoner, he should be produced "where ... there are substantial issues of fact as to events in which [he] participated." 342 U.S. at 223.
53. Id. at 219 (Emphasis supplied.)
The Hill case deals directly with the problem of what constitutes grounds under section 2255. Hill was convicted in federal court, without being given an opportunity under Fed. Rule Crim. Proc. 32(a) to speak on his own behalf in mitigation of sentence. Denial of that opportunity was clearly error, and would have required reversal on direct appeal. The stage was set for a detailed examination of the grounds of a section 2255 motion, and the Supreme Court, in granting certiorari, limited its consideration to that problem. Unfortunately, however, the Supreme Court failed to resolve the problem. Its opinion has merely two phases, neither one of which can be said to constitute thorough analysis and reasoning.

The first phase is to repeat most of the standard normative-ambiguous verbalizations which have been used in various habeas corpus cases:

[The defect] is not of itself an error of the character or magnitude cognizable under a writ of habeas corpus. It is an error which is neither jurisdictional nor constitutional. It is not a fundamental defect which inherently results in a complete miscarriage of justice, nor an omission inconsistent with the rudimentary demands of fair procedure. It does not present exceptional circumstances where the need for the remedy afforded by the writ of habeas corpus is apparent . . . .

The second phase of the Supreme Court's opinion is to set out the facts of Sunal v. Large, admittedly an appealing case for its petitioner, and then to determine that the petitioner in Hill is in even less "compelling" circumstances than Sunal: since Sunal was not allowed relief by habeas corpus, ergo Hill should go back to prison. It seems, then, that one determines what constitutes grounds for 2255 relief by calling together nine judges and deciding whether the petitioner strikes them as more, or less, appealing than Sunal.

Nor does Hill even succeed in defining the scope of section 2255 relief in cases where the trial court neglects to afford the defendant an opportunity to speak before sentencing. The Supreme Court does not decide whether a 32(a) violation would justify relief in a "context of other

57. 368 U.S. at 428.
58. 332 U.S. 174 (1947). Sunal had been convicted of failure to submit for induction: the district court did not allow him to raise the defense of his improper classification. Sunal did not appeal, since the district court's decision was in conformity with the generally accepted rule. The Supreme Court in another case then reversed the rule and allowed the defense of improper classification. Sunal sought habeas corpus.
aggravating circumstances." The circumstances in Hill were almost at the extreme of non-aggravation: (1) the judge knew the defendant, had sentenced him before, and had heard all he might have to say on his own behalf and (2) the defendant apparently agreed that he would have had nothing to say even if he had been asked.

The author's low opinion of the technical competence of the Hill opinion is perhaps shared by the Supreme Court. United States v. Behrens, decided after Hill, involved a related problem likewise turning on the construction of Rule 32(a). The petitioner in Behrens had likewise applied for relief under section 2255; Behrens was finally successful in his application. Nowhere in the opinion is the Hill case even cited, although Hill is the only Supreme Court case explicitly determining the scope of section 2255 relief—and, by coincidence, the Hill case involved the same criminal rule as Behrens.

CRITICISM AND SUGGESTIONS

The Hill case is not really clear enough to justify substantive criticism. The Hayman case, however, is a good piece of technical workmanship. It is, nonetheless, respectfully submitted that the Hayman case is not imaginative enough to resolve the difficulties in administration of section 2255.

At the outset it should be noted that there are no constitutional limits on the power to diminish the scope of section 2255 relief. Although the Constitution guarantees the availability of the writ of habeas corpus, it is settled that such constitutional phrases are to be construed in light of the common law. At common law habeas corpus was not available for post-conviction review; judgment of a court of competent jurisdiction showing a sentence of imprisonment defeated the writ of habeas corpus.

60. Although the problem in Behrens was different; the petitioner was absent when his final sentence was pronounced.
61. I do not mean to suggest that important constitutional issues should be resolved by setting a recent Act of Congress beside the common law of England and seeing if the two square with each other. Certainly, as Professor Freund says, "The Supreme Court has a tendency throughout to regard habeas corpus as that form of remedy which was known in 1787 on the basis of a congeries of English statutes, practices, and traditions. My point is that there is involved in such institutions or practices a dynamic element which itself was adopted by the framers." Freund, Discussion of Address by William Hurst, in SUPREME COURT AND SUPREME LAW 55, 61 (Cahn ed. 1954). But as far as section 2255 is concerned it must be recognized that the "dynamic element" was committed as much to the Congress as to the Court. "If you can have the expansions, then why can't you likewise have contractions in order to meet current situations." Frank, id. at 64.
62. The basic common-law rule was established in 1414 by a statute of 2 Hen. 5, ch. 2. The rule was recognized in the United States in Ex parte Watkins, 28 U.S. (3 Pet.) 193 (1830).
The power to review sentences was conferred only by Congress, and even then not until after the Civil War.\(^6\)

So the question is purely one of policy. As a matter of the good of society, what conclusive effect should be given criminal judgments? We have come to accept extensive res judicata for civil judgments.\(^{64}\) we recognize important public interests in terminating lawsuits and in protecting the reliability of completed judicial action as well as in promoting popular respect for the administration of law through refusing easily to acknowledge that courts make mistakes.

Then post-appellate relief should be seen as an exception to the application of res judicata.\(^{65}\) The scope of the remedy should therefore be determined by the reason for the exception. There seems to be only one reason, albeit a good one, for the exception in criminal cases—in a free society, the liberty of innocent persons is a public interest paramount to economy of judicial effort and implicit in popular respect for the administration of law.

The applicable test for the scope of section 2255 then becomes simply the demonstrable innocence of the defendant\(^{66}\) or the presence of some defect in the fact-determinative process which leaves a greater degree of doubt about the defendant's guilt than would be currently tolerated in a trial. This test may appear almost simple-minded but on an analysis it would provide a guide which is not now explicitly formulated. The proposed test has two parts:

One: the error must be one respecting the determination of essential facts,\(^ {67} \) as where the defendant was not competent at the time of trial\(^ {68} \) or not represented by counsel,\(^ {69} \) where procured perjured testimony was

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\(^{63}\) 14 Stat. 385 (1867).


\(^{65}\) Note, of course, that the "jurisdictional" test of habeas corpus or section 2255, if seriously applied, would create no special exception to res judicata, since civil judgments without jurisdiction are likewise void.

\(^{66}\) It appears so fundamental that provably innocent defendants should go at least as free as Escobedo that it requires, I hope, strong effort to remember that our law is theoretically otherwise. "The denial of a fair hearing is not established by proving merely that the decision was wrong." United States v. Tod, 264 U.S. 131, 133 (1924). This statement is as unassailable logically and historically as it is reprehensible socially; it may be "good law" but it is one hell of a way to run a system of criminal justice. Fortunately the Supreme Court has also told us that the "language of the statute does not strip the district courts of all discretion to exercise their common sense." Andrews v. United States, 373 U.S. 334, 339 (1963).

\(^{67}\) There may also, of course, be special problems in sentencing which call, not for a vacation of the sentence, but simply for its correction. Cf. notes 39–42 supra.


\(^{69}\) Cf. United States v. Capsopa, 260 F.2d 566 (2d Cir. 1958).
used, where defendant's coerced confession was used, etc. In con- 
distinction, the trial court's violation of a rule whose purpose is to pol- 
cice the incidents of the trial or of police investigation should not afford re- 
lief. The clearest example is unlawful search and seizure. The principal 
 purpose of excluding unlawfully obtained evidence is to "police the po- 
lite." It would seem that the police are adequately discouraged from 
seizing evidence by the practice of excluding what evidence they now 
gather from future trials: society has little compelling interest in the free- 
dom of additional proven guilty persons.

Two: the second problem resolved by the proposed test is that of the 
retroactive application of laws. Retroactivity may involve both pro- 
cedural and substantive rules. On the substantive side, e.g., one may 
have been convicted of speeding on a road where the speed limit was 
subsequently increased. Clearly the necessity for promoting obedience to 
the law through sanctions requires that the new limit not be applied 
retroactively.

Criminal procedure, on the other hand, necessitates a balancing 
between the interest in freeing innocent persons and the interest of pun- 
ishing the guilty. As the progress of tolerance and reason (not to men- 
tion scientific crime detection) in society allows the difficulties of proof 
to be increased, it follows that old sentences should likewise be reviewed. 
Reducing the moral calculation to cruder terms for purposes of demon-
stration, if society is now determined that only \( x \) per cent risk is toler-
able in a trial, we should be offended at the incarceration of somebody 
who is innocent with a probability of \( x + y \) per cent, regardless of the 
standard prevailing at the time of his trial. It is the confinement of in-
ocent persons we must end, not their trial. Of course these considera-

70. See Enzor v. United States, 296 F.2d 62 (5th Cir. 1961). Why should a possibly innocent man stay in prison merely because the prosecutor was also innocent? This case can be distinguished from the illegal search and seizure case, discussed below, for illegally obtained evidence is equally probative of guilt with legally gathered evidence. But perjured testimony is not on a par with the truth as evidence of guilt.


72. The Supreme Court has characterized the exclusionary rule as having "no bearing on guilt," Linkletter v. Walker, 381 U.S. 618, 638 (1965), but as one intended only as a "deterrent to lawless police," id. at 636.


74. See generally the masterful treatment in Mishkin, Foreword: The High Court, the Great Writ, and The Due Process of Time and Law—The Supreme Court, 1964 Term, 79 HARV. L. REV. 56 (1965).

75. By which I mean nothing metaphysical, but simply those rules bearing on the con- 
duct of those who administer our criminal law.

76. By which, conversely, I mean all other rules.
tions must to some extent be offset by the increased difficulty of trial at a later date.\footnote{77}

Conclusion. It is submitted that there is no reason to continue to equate section 2255 with habeas corpus. The Constitution does not require it, the statute itself does not require it, and the public welfare is not served. It is time to employ post-conviction procedures for the more important purpose of freeing the innocent and continuing to confine the guilty.

\footnote{77. See generally a more sophisticated approach in Amsterdam, supra note 73, at 383–86. Cf. quotation accompanying note 1 supra.}